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Sex, Love and Moral Control

Exploring the effectiveness and limitations of international and regional human rights law relevant to SOGIESC diverse groups in the quest to invalidate Zimbabwe's "sodomy" law

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ABSTRACT

"Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level it is about the status, moral citizenship and sense of self-worth of a significant section of the community."

Justice Albie Sachs, *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6, para. 107

More than 70 years after the adoption of the UDHR, which heralded the advent of the modern human rights movement, same-sex attracted persons in over 70 States are under constant threat of harassment, arrest and imprisonment due to the operation of "sodomy" laws effectively criminalising consensual same-sex sexual activity. S 73(1) of the Zimbabwean Criminal Law (Codification and Reform) Act is one such "sodomy" law, and has been used both socially and politically to facilitate stigma and discrimination against same-sex attracted persons in particular and SOGIESC diverse groups in general. Due to the absence of international or regional human rights instruments explicitly extending legal protections to such groups, the realisation of their human rights has occurred by slow degrees on international, regional and domestic *fora*. On a regional level, "sodomy" laws were first undermined by the ECtHR in 1981, when the Court held that their very existence is a human rights violation. This human rights norm was established internationally by the UNHRC in 1994. International and regional human rights standards on "sodomy" laws then triggered a global wave of domestic legal challenges to those laws, and greatly influenced arguments adopted by litigants and lines of reasoning taken by Courts, namely, to focus on privacy rights and the right to equality/principle of non-discrimination. However, there were significant flaws in the approaches taken by the international and regional (quasi)judicial bodies that weakened the foundations of human rights law on SOGIESC issues. Some of these flaws have been addressed by regional Courts in later years or by domestic Courts through comprehensive, *pro homine* interpretations of human rights. There is therefore a strong culture amongst domestic Courts of referring not only to international and regional human rights norms and principles, but also to those norms and principles developed by other domestic Courts. Comparative law analyses have thus strengthened the *corpus* of human rights law relevant to same-sex attracted persons beyond the standards initially set by international and regional human rights law. Nevertheless, in the context of Zimbabwe, considerations of the importance of culture and traditional values, compounded with deeply entrenched social and political stigma, are brought to bear on the question of whether s 73(1) complies with human rights norms. These issues significantly complicate prospects for the invalidation of "sodomy" laws through judicial intervention, especially when the simultaneously occurring trends of human rights promotion and restriction on the wider African continent are taken into account.

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ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
ACHR	American Convention on Human Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ACtHPR	African Court on Human and People's Rights
African Commission	African Commission on Human and People's Rights
CAL	Coalition of African Lesbians
CEDAW	Convention on the Elimination of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CoE	Council of Europe
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
European Commission	European Commission of Human Rights
GALZ	Gays and Lesbians of Zimbabwe
HCP	High Contracting Party
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IBA	International Bar Association
ICJ	International Commission of Jurists
ICCPR	International Covenant for Civil and Political Rights
ICESCR	International Covenant for Economic, Social and Cultural Rights
ILGA	International Lesbian, Gay, Bisexual, Trans and Intersex Association
IPC	Indian Penal Code
LEGABIBO	Lesbians, Gays and Bisexuals of Botswana
LGBT(IQ)	Lesbian, Gay, Bisexual, Transgender, (Intersex, Queer/Questioning)
MSM	Men who have sex with men
NGO	Non-Governmental Organisation
OAS	Organisation of American States
OHCHR	United Nations Office of the High Commissioner of Human Rights
SIDA	Swedish International Development Cooperation Agency
SOGIESC	Sexual Orientation, Gender Identity and Expression, and Sex Characteristics
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly

UNHRC	United Nations Human Rights Committee
UPR	Universal Periodic Review
USSC	United States Supreme Court
ZACC	South African Constitutional Court
ZWCC	Zimbabwean Constitutional Court
ZWSC	Zimbabwean Supreme Court

Chapter I: Introduction

Chapter I.A: State-sponsored homophobia in Zimbabwe - A Factual Background

Zimbabwe's "sodomy" law pre-dates its independence. The offence began as common law inherited from a centuries-old confluence of British and Roman-Dutch legal sources. Roman-Dutch law spread from Dutch settlements in the Cape through Cecil John Rhodes' British South Africa Company, and was heavily influenced by English legal tradition during judicial interpretive exercises.[1] Courts were free to consult both English and Roman-Dutch traditions in defining the scope of "sodomy".[2] By 1979, the pre-independence judiciary had concluded that the offence could not be committed by heterosexual couples.[3] When the constitutionality of the common law was legally challenged by former Zimbabwean President, Bishop Canaan Banana,[4] the definition of the offence was derived by the Supreme Court from Roman-Dutch sources *via* South African jurisprudence. "Sodomy" was taken to mean "intentional sexual relations *per anum* between two human males".[5]

Nevertheless, any certainty in the scope of the common law crime was undone in 2006, when Parliament promulgated the Criminal Law (Codification & Reform) Act, legislation intended to set out substantive criminal law concisely.[6] S 73(1) of the Act states:

> **"Any male person who, with the consent of another male person, knowingly performs with that other person anal sexual intercourse, or any act involving physical contact other than anal sexual intercourse that would be regarded by a reasonable person to be an indecent act, shall be guilty of sodomy and liable to a fine up to or exceeding level 14 or imprisonment for a period not exceeding one year or both."**

The inclusion of the phrase "any act involving physical contact other than anal sexual intercourse that would be regarded by a reasonable person to be an indecent act" undermines more than one hundred years' worth of juridical efforts towards constriction of the scope of "sodomy". What exactly constitutes an "indecent act"? To what standards of morality does this "reasonable person" ascribe? Who has the authority to act as such a reasonable person in the criminal justice system? Can it even be said that a reasonable person is one who holds homophobic views? Illaudable as it was that the criminalisation of consensual sexual contact between men was retained, in one fell swoop, Zimbabwe's "sodomy" law

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[1] Scott Long "Before the law: Criminalising sexual conduct in colonial and post-colonial southern African societies", 2003. Available at https://www.hrw.org/reports/2003/safrica/safriglhrc0303-07.htm [Accessed 19 June 2019].
[2] Ibid.
[3] Ibid, citing *S v Macheka*, Rhodesian Law Reports, p 51.
[4] *S v Banana* 1998 (2) ZLR 533 (HC) and *Banana v S* 2000 (1) ZLR 607 (S), respectively.
[5] *Banana v S* (supra) at 619C. Chief Justice Anthony Gubbay adopted the definition provided by Hunt's *South African Criminal Law and Procedure Volume III* (3ed) and Snyman's *Criminal Law* (3ed).
[6] Criminal Law (Codification & Reform) Act [Chapter 9:23].

returned to a state of uncertainty which arguably contravenes the rule of law because of its vagueness and potential for arbitrary application. It could very well be argued that at its worst, s 73(1) may be enforced against two men who have done no more than hold each other's hands within view of an especially intolerant individual.

It is worth noting at this juncture that the enforcement of s 73(1) appears minimal, implying an unspoken doctrine of desuetude. However, it is difficult to ascertain the exact number of arrests. For example, while the United States State Department reported in a 2015 country report that there had been no prosecutions under s 73(1),[7] a joint submission from the Sexual Rights Centre, GALZ and COC Nederland reported multiple arrests of same-sex attracted persons under the provision since Zimbabwe's last UPR in 2011.[8] The difficulty lies in the fact that such cases are normally brought before Magistrate's Courts, which have neither online databases nor law reports. There is also the unignorable possibility that people charged under the "sodomy" law elect to pay admission-of-guilt fines in order to keep matters out of Court. Although the limitation presented by this lack of statistical information is not detrimental to the current study, it is worth noting as a challenge to be overcome in the information-gathering stage of any strategic litigation challenging the constitutionality of s 73(1).

Under the new Constitution, there have been very few opportunities to ascertain the judiciary's attitude towards SOGIESC diverse groups, or, more particularly, same-sex attracted persons. S 56 of the Constitution is the equality provision.[9] According to reports of the drafting process, despite the efforts of SOGIESC activist groups, drafters took pains to diminish relevant protections.[10] Prohibited grounds of discrimination such as "natural difference or condition" and "circumstances of birth", and the concluding phrase "any other status", were excluded from s 56(3) because of their potential as loopholes

[7] Bureau of Democracy, Human Rights and Labor, United States State Department "Country Reports on Human Rights Practices for 2015: Zimbabwe". Available at https://2009-2017.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2015&dlid=252745#wrapper [Accessed 20 June 2019].

[8] UN Human Rights Council, Joint submission by Sexual Rights Centre, GALZ and COC Nederland, Universal Periodic Review of Zimbabwe, 26th Session, October 2016, page 4.

[9] S 56 of the Constitution states: "**Equality and non-discrimination** - (1) All persons are equal before the law and have the right to equal protection and benefit of the law; (2) …; (3) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock; 4) A person is treated in a discriminatory manner for the purpose of subsection (3) if-(a) they are subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected; or (b) other people are accorded directly or indirectly a privilege or advantage which they are not accorded; (5) Discrimination on any of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom…"

[10] Violet Gonda, Voice of America (VOA) "Zimbabwe's Draft Constitution - the Key Changes", 24 July 2012. Available at https://www.voazimbabwe.com/a/zimbabwes-draft-constitution--the-key-changes-163575986/1477031.html [Accessed 20 June 2019].

through which SOGIESC human rights protections could be claimed.[11] Moreover, s 78 of the Constitution, which enshrines the right to marriage, prohibits same-sex marriage.

Nevertheless, in 2015, the Labour Court of Zimbabwe ruled that a civil servant's employment could not be terminated because of his sexual orientation as that would constitute unfair discrimination.[12] Of course, it has been stated that it is not the condition of same-sex attraction that is criminalised, but the commission of "homosexual acts".[13] As such, any tolerance towards SOGIESC diverse groups expressed by the judiciary short of a specific determination on the constitutionality of "sodomy" laws may belie an intransigence in judicial sentiment on the specific issue of consensual sex between same-sex attracted persons.

Chapter I.B: Research objectives and questions

The ever-present threat of arrest and prosecution under "sodomy" laws like s 73(1) of the Criminal Law (Codification and Reform) Act not only hinders same-sex attracted persons from freely engaging in consensual relations and relationships, but also facilitates social, economic, cultural and political stigma and discrimination against them and other SOGIESC diverse groups. The purpose of thesis is to develop an understanding of the human rights implications of "sodomy" laws, and how legal protections have been developed on international, regional and domestic levels to safeguard the rights of same-sex attracted persons. The ultimate goal of this thesis is to determine the nature of human rights norms that may be brought to bear in a potential constitutional challenge of s 73(1).

In pursuit of this purpose, the following research question will be addressed: *How and to what extent do international and regional human rights law establish human rights protections that lend themselves to the invalidation of "sodomy" laws?* Attendant to this are the following questions:

1. Are there are shortcomings in the *corpus* of international and regional human rights law?
2. By reference to judicial decisions, how have domestic human rights standards expanded or refined the norms established by international and regional human rights institutions?

[11] Esau Mandipa "The suppression of sexual minority rights: A case study of Zimbabwe" in Sylvie Namwase and Adrian Jjuuke (eds) *Protecting the Human Rights of Sexual Minorities in Contemporary Africa* (2017), 152-153; Marc Epprecht, Solidarity Peace Trust "The Constitution Process and Sexual Minority Rights in Zimbabwe", 21 June 2012. Available at http://solidaritypeacetrust.org/1226/the-constitution-process-and-sexual-minority-rights-in-zimbabwe/ [Accessed 20 June 2019].

[12] Taurai Shava, Voice of America (VOA) "Court Rules in Favour of Dismissed Zimbabwe Worker Linked to Gay Party", 27 October 2015. Available at https://www.voazimbabwe.com/a/zimbabwe-sexual-orientation-sex-marriage-unconstitutional/3024732.html [Accessed 20 June 2019].

[13] GALZ "GALZ and the law". Available at https://galz.org/legal-issues-1/ [Accessed 20 June 2019]. Research Directorate, Immigration and Refugee Board of Canada, Ottawa "Zimbabwe: Situation of sexual minorities, including legislation treatment by society and authorities; state protection and support services available to victims of violence (May-May 2017) [ZWE105806.E]", 27 May 2017. Available at https://www.ecoi.net/en/document/1403659.html [Accessed 20 June 2019].

Chapter I.C.: Thesis structure

In **Chapter I**, I establish the factual background of the Zimbabwean "sodomy" law. I shall discuss the nature of "sodomy" laws and why they constitute human rights violations. Chapter I also includes an explanation of the methodology used in this thesis to establish how far international, regional and domestic human rights laws have developed legal protections relevant to same-sex attracted persons. In **Chapter II**, I shall explore and critically analyse the international law aspect through reference to norms established by UN treaty bodies and the European, Inter-American and African human rights systems. **Chapter III** will be a discussion and analysis of domestic human rights law relevant to "sodomy" laws, as developed judicially in 8 jurisdictions: South Africa, Zimbabwe, the United States, Fiji, Belize, India, Kenya and Botswana. The analysis portion of the Chapter will involve ascertaining the extent to which domestic Courts have utilised existing international and regional human rights law relevant to "sodomy" laws and the human rights of same-sex attracted persons, as well as the text to which they have relied on comparative law. The lessons learned from Chapters II and III will be applied to the Zimbabwean context in **Chapter IV**, albeit in a manner that produces more questions than answers, given the uncertainty that prevails in the subject matter. Chapter IV will also include other considerations that may prove pertinent to the question of invalidating s 73(1) through human rights law, such as cultural relativism and consensus-based decision making. The thesis will conclude with **Chapter V**.

Chapter I.D: Justification, methodology, limitations and terminology

Chapter I.D.1: What are "sodomy" laws and why do I address them in this thesis?

"Sodomy" laws are derived from Judeo-Christian tradition and regulate sexual morality. They take a variety of forms and penalise a broad range of conduct that falls under the umbrella of non-procreative sex, regardless of consent or whether any harm befalls participants or third parties. The offences have had different names: "buggery"; "sodomy"; "gross indecency"; and "carnal intercourse against the order of nature". Some States have specifically worded criminal provisions, e.g. § 21 of the Texas Penal Code which criminalises "deviate sexual intercourse with another individual of the same sex" and defines "deviate sexual intercourse" as:

> **"(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or**
>
> **(B) the penetration of the genitals or the anus of another person with an object."**

More often than not, the wording of "sodomy" laws is vague and consequently affects the nature of sexual conduct criminalised.[14] For example, s 377 IPC states:

[14] A possible explanation for this may be found in Lord Macaulay's commentary in the British Law Commission's 1837 draft of the Penal Code: the offences were regarded with such disgust that even descriptions of the conduct

> **"377. Unnatural offences – Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.**
>
> **Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in the section."**

Even after an analysis of past decisions dealing with s 377, the Indian Supreme Court in *Suresh Kumar Koushal and another v NAZ Foundation and others* Civil Appeal No. 10972 of 2013 was unable to define conclusively what "carnal intercourse against the order of nature" means or draw up a conclusive list of the acts which constitute it. Rather, it held that what conduct fell within the scope of s 377 would have to be determined on a case by case basis.[15] The vagueness of "sodomy" laws is exacerbated by the tendency of some to be worded in a way that is gender-neutral, implying that no specific SOGIESC group is targeted. However, these laws are still disproportionately enforced against same-sex attracted persons. If anything, constitutional challenges of such laws are stymied by arguments emphasising that they do not, in fact, pursue specific SOGIESC groups. For example, s 177 of the Fijian Penal Code:

> **"Indecent practices between males - Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony, and is liable to imprisonment for five years, with or without corporal punishment."**

may be contrasted with s 167 of the Botswana Penal Code, which was amended in 1994 to remove references to "males":

> **"Any person who, whether in public or private, commits any act of gross indecency with another person, or procures another person to commit any act of gross indecency with him or her, or attempts to procure the commission of any such act by any person with himself or herself or with another person, whether in public or private, is guilty of an offence."**

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criminalised were considered threats to the moral fabric of society. See Enze Han and Joseph O'Mahoney *British Colonialism and the Criminalization of Homosexuality: Queens, Crime and Empire* (2018) as cited in *Navtej Singh Johar*, Dr. Dahnanjaya and Chandrachud JJ, para. 21.

[15] *Suresh Kumar Koushal*, paras. 36-38. In *Govindarajula In re* (1886) 1 Weir 382, for example, it was established that penetration of the mouth with the penis does not contravene s 377. Conversely, in *Khanu v Emperor* AIR 1925 Sind 286, it was established that anal sex contravened s 377 because permissible intercourse involves the "possibility of conception". Until the 1990s, Courts were debating whether or not oral sex is a crime under s 377.

The constitutionality of s 167 of the Botswana Penal Code was challenged in *Kanane v State* 2003 (2) BLR 64 (CA), and that of s 177 of the Fijian Penal Code was challenged in *McCoskar v The State* [2005] FJHC 500. However, whereas the High Court of Fiji invalidated s 177 on the basis that it clearly discriminated against gay men on the basis of their gender and sexual orientation, the Court of Appeal in *Kanane* held that since the amended s 167 applied to "any person", there were no grounds on which to argue that the law was discriminatory on the basis of gender or any other prohibited ground of discrimination listed in the Constitution of Botswana.

"Sodomy" laws threaten the liberty of same-sex attracted persons and leave them susceptible to violence and other human rights abuses both State and non-State actors.[16] There is a constant threat of harassment and brutalisation because of the stigma attached to living life as "unapprehended felons".[17] In Zimbabwe, s 73(1) emboldens the police to raid private property on the suspicion that consensual same-sex relations are taking place. Even mere attendance at events hosted by SOGIESC-oriented organisations creates vulnerability to harassment, assault and arrest.[18] The facilitation of discrimination by s 73(1) is not limited to same-sex attracted persons. Due to the fact that their gender identity is not legally recognised, transgender women are vulnerable to arrest and detention in pursuit of s 73(1).[19]

Even when they are not (widely) enforced, "sodomy" laws have far-reaching economic, social and political effects. For example, HIV disproportionately affects MSM and transgender persons. Their vulnerability is exacerbated by the existence of "sodomy" laws, which facilitate institutional stigma and discrimination against them amongst healthcare providers, thus hindering access to effective prevention and treatment programmes.[20] On a psychological level, the criminalisation of consensual same-sex sexual contact and the attendant stigma surrounding specific identities and behaviours is directly linked

[16] OHCHR, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, U.N. Doc. A/HRC/19/41, 17 November 2011. The OHCHR documented reports on the link between "criminalization and homophobic hate crimes, police abuse, torture, and family and community violence" and found that "sodomy" laws facilitate the perpetration of human rights abuses with impunity. Hostility towards SOGIESC diverse groups is so great that even in South Africa, which has one of the strongest legal protections for these groups in the world, black trans men and lesbians are often subjected to the extreme violence of corrective rapes, which are intended to teach them that they are "really women". See Human Rights Watch "'We'll show you you're a woman': Violence and discrimination against black lesbians and transgender men in South Africa" (2011).

[17] Edwin Cameron "Sexual orientation and the Constitution: A Test Case for Human Rights" (1993) 110 *South African Law Journal* 450, 455.

[18] For example, a civil servant was charged with public indecency for simply who attended a party organised by GALZ. See: Taurai Shava (supra). The police also harass women who engage in same-sex consensual activity, despite the fact that same-sex sexual contact between women is not expressly criminal. See: SIDA "The Rights of LGBT People in Zimbabwe", November 2014. Available at https://www.sida.se/globalassets/sida/eng/partners/human-rights-based-approach/lgbti/rights-of-lgbt-persons-zimbabwe.pdf [Accessed 20 June 2019].

[19] UN Human Rights Council, Joint submission by Sexual Rights Centre, GALZ and COC Nederland, Joint submission for the Universal Periodic Review of Zimbabwe, 26th Session, October 2016, 2.

[20] UNDP, HIV/AIDS Group *Global Commission on HIV and the law: Risks, rights & health* (2012), 8. The stigma against them also pushes MSM and transgender persons underground, where they are more likely to engage in or be coerced into unsafe sex.

to high levels of depression, anxiety, suicidal ideation and suicide attempts amongst SOGIESC diverse groups.[21]

Chapter I.D.2: Methodology

Responding to the research question in this thesis will involve the following steps:

1. Discussing the Zimbabwean judiciary's approach to comparative law
    1.1. Comparative law plays a significant role in this thesis. This necessitates a determination of the role that it plays in the Zimbabwean human rights regime.
    1.2. This section of the thesis will be addressed in the methodology sub-chapter as it further details the rationale behind the specific approach adopted to answer the research question.

2. Determining the status of international human rights regarding same-sex attracted persons
    2.1. This will involve reference to the scope and limitations of:
        2.1.1. The approaches taken by the ECtHR, IACHR, IACtHR and African Commission to "sodomy" provisions and/or same-sex attracted persons; and
        2.1.2. Communications, general comments and concluding observations from UN treaty bodies, and other relevant documents adopted by UN organs or influential international human rights law experts.
    2.2. This discussion will, of course, necessitate a differentiation between binding and non-binding international and regional human rights law.

3. Analyses of foreign domestic judgments
    3.1. An essential element of this thesis is the determination of the extent to which international and regional human rights norms and principles have permeated national legal discourse in jurisdictions where the constitutionality of "sodomy" laws has been challenged. The cases chosen for this thesis span 2 decades, and have been selected for analysis on the basis of 6 indicators pertinent to the Zimbabwean situation:
        3.1.1. That the judgments emanate from jurisdictions with constitutional supremacy;
        3.1.2. That the Constitutions are considered "living instruments", i.e. that constitutional standards are taken to evolve in response to contemporary human rights issues;
        3.1.3. That the Constitutions or jurisprudence refer to international obligations as interpretive guides in human rights law cases;

[21] Navtej Singh Johar, Dr. Dahnanjaya and Chandrachud JJ, paras. 93-96.

3.1.4. That the Constitutions or jurisprudence permit human rights limitations on grounds of public interest, public health and/or public morality;

3.1.5. That "sodomy" in the States laws began as British colonial imports, thus establishing a common source; and/or

3.1.6. That significant proportions of the public in those States view consensual same-sex relations unfavourably.

3.2. The supplement to this thesis sets out the 10 judgments selected for analysis on the basis of the above criteria, including which of those criteria are satisfied.

Chapter I.D.3: Why comparative law?

One cannot expect domestic Courts to give the same responses to issues involving similar laws and similar human rights. Every nation, no matter its similarities in language, culture or colonial origin with other nations, is unique in the specific pattern of its history, politics and social norms.[22] Nevertheless, the wide ratification of international and regional human rights instruments presents "a shared international frame of reference even where individual jurisdictions do not automatically incorporate international law".[23] This wide ratification has created a "common core" of human rights between States, which has facilitated an increased propensity on the part of domestic Courts to engage in comparative law analyses on the application of specific human rights norms.

In comparative law lies a wealth of reasoning delimiting the scope of specific human rights.[24] Analysis thereof allows for an identification of underlying values, both in converging and diverging decisions.[25] I submit that the manner in which foreign domestic Courts address international law is useful in subjects such as this. It is a matter of elucidating the content of specific human rights and how their interpretations under international law have been accepted, rejected or developed by domestic Courts, especially in response to evolving principles of humanity. We can easily separate States by highlighting what sets each apart from the rest, but we cannot argue that States exist in separate epochs or that their common experiences and values have no influence on each other. The case selection criteria in this thesis serve to improve the efficacy of comparative law analysis by limiting the jurisdictional discrepancies that may compromise their usefulness as comparators.[26] The reasoning is that a shared legal heritage for "sodomy" laws, analogous approaches to constitutional interpretations of human rights and comparable attitudes towards SOGIESC diverse groups (obviously with variegated degrees of hostility) provide a sound foundation upon which to construct an effective comparative law analysis.

[22] Sandra Fredman *Comparative Human Rights Law* (2018), page 3.
[23] Ibid, 4.
[24] Ibid, 11-12.
[25] Ibid, 16.
[26] Ibid, 3-4. Sandra Fredman uses the term "appropriate comparators" to describe jurisdictions with sufficient similarities to engage in a comparative law analysis.

Constitutionally, the Zimbabwean judiciary is entitled to refer to foreign judgments.[27] Following the adoption of 2013 Constitution, comparative law analysis as a tool for the interpretation of human rights has gained considerable traction in Zimbabwean jurisprudence. In recent human rights cases, the judiciary has referred to judgments from, *inter alia*, Canada, South Africa, England, Australia, India and the United States. Courts have also analysed human rights instruments from the CoE and OAS, as well as the jurisprudence of the IACtHR, the IACHR, the ECtHR and the European Commission.[28]

Chapter I.D.4: Limitations

This thesis primarily focuses on the scope and limitations of international and regional human rights law as they apply to "sodomy" laws. It therefore does not assess how international and regional human rights law affects members of SOGIESC diverse groups who do not fall under the umbrella of same-sex attraction.

Additionally, while this thesis will analyse extant international and regional human rights law on "sodomy" laws, including their strengths and shortcomings, this approach will not be taken in the analysis of domestic case law. Detailed assessments of specific constitutional provisions and determinations of whether or not the judicial reasoning in the domestic judgments was "correct" or "incorrect" fall outside of the scope of my research. Rather, this thesis concerns itself only with whether and how domestic Courts have utilised international and regional human rights norms and principles, whether and how they have further developed human rights law relevant to "sodomy" laws, and what lessons may be learned from this.

As a final point, not all domestic judgments meeting some of the criteria set out in Chapter I.D.2 have been discussed in this thesis. Indeed, there are decisions from Nepal, Hong Kong and Trinidad & Tobago which have invalidated "sodomy" laws on the basis of their unconstitutionality. However, as

[27] S 39(2) Constitution of Zimbabwe, 2013.

[28] For example: (a) In *S v Chokuramba* CCZ 10/19, which concerned the constitutionality of legislation permitting corporal punishment of juvenile offenders, the ZWCC's opinion establishing the invalidity of the law included reference to decisions from the ECtHR, the IACHR, South Africa, the USA and Namibia. Moreover, the Court relied on Jamaican constitutional law to ascertain the meaning of "inhuman or degrading punishment" and cited the global trend towards the invalidation of corporal punishment because of its violation of inherent dignity; (b) In *Makani & Ors v Arundel School & Ors* CCZ 17/15, students attending a secondary school in Harare challenged the school's policy of mandatory daily attendance at Anglican prayer sessions by students who identified as Jehovah's Witnesses on the basis of the right to education, freedom of conscience and religion, and freedom from discrimination. The ZWCC concluded that the school was entitled to enforce this policy, and the students could be expelled for not adhering to the policy, but only if the school deemed it necessary to do so and if they were given a reasonable time within which to change schools. In doing so, the Court relied on cases from the ECtHR and South Africa; and (c) In *Mudzuru & Anor v Ministry of Justice, Legal & Parliamentary Affairs N.O. & Ors* CCZ/15, applicants sought a declaration that marriage rights and children's rights in the new Constitution rendered the practice of child marriage unlawful. In confirming the unlawfulness of the practice, the ZWCC relied on cases from Canada, South Africa, England, India, and the USA.

these decisions meet only some, rather than all of the abovementioned criteria, cover ground that is too broad or do not adequately address international law, they have been excluded in the interests of time and space.

Chapter I.D.5: Choice of terminology

Taking cues from organisations like ILGA and the IBA, "SOGIESC" has been used in this thesis in an attempt to encompass the various forms of sexuality that humanity may and does manifest. Every person is accommodated by this term. Where reference is made to persons who occupy spaces outside of the confines of strictly construed cisgender, heterosexual identity and behaviour, the term "SOGIESC diverse groups" has been used alongside the more specific "same-sex attracted persons". Preference has been given to the word "diverse" over the word "minority" in an attempt to negate, at least in part, the hegemony implied in dividing people into "majorities" and "minorities". Of course, it cannot be denied that dominance by one group over another is the core of most human rights problems. It is certainly the main reason why "sodomy" laws still exist today. Moreover, it may, indeed, be argued that the use of "diverse" to refer to identities and behaviours that are not strictly cisgender and heterosexual is actually a form of othering that is essentially *Hegemony-Lite*. I am therefore alive to the potential pitfalls of the terminology in this thesis and certainly welcome discourse on which words are advisable or inadvisable. Nevertheless, at least for the purposes of this research, I believe "SOGIESC diverse groups" is apposite for the reason given above.

The foregoing is not to say that "SOGIESC diverse groups" and "same-sex attracted persons" are the only terms used in this thesis. "LGBT", "LGBTIQ", "gay", "MSM" and "homosexual" all appear herein. This is because, for good or ill, I have chosen to replicate the terminology used in international, regional and domestic human rights cases to avoid obfuscation of meaning and intent on the part of decision-makers.

Chapter II: International law on human rights relevant to same-sex attracted persons

Chapter II.A: Introduction

In this chapter, I shall set out current international and regional human rights law applicable to consensual same-sex sexual activity. In the absence of a standalone international instrument enshrining the rights of SOGIESC diverse groups, the invalidation of "sodomy" laws has been accomplished by interpretations of human rights in existing international and regional instruments, primarily under privacy rights and the right equality and principle of non-discrimination.[29] International and regional

[29] Dominic McGoldrick "The Development and Status of Sexual Orientation Discrimination under International Human Rights Law" *Human Rights Law Review*, 2016, 16, 613-668, 616; Michael O'Flaherty "Sexual Orientation and Gender Identity" in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran (eds) *International Human Rights Law* (3ed) (2018), 296-297.

human rights institutions have reasoned that accommodating SOGIESC issues in pre-existing instruments enjoins State Parties to fulfil to their treaty obligations by adhering to these particular human rights interpretations.[30]

Contemporary international law on the subject of "sodomy" laws is built on a chimerical amalgam of binding and non-binding sources, with the "bindingness" depending on jurisdictional factors. The foundations were laid by the ECtHR, in the 1981 case of *Dudgeon v United Kingdom*. This landmark decision was followed by *Norris v Ireland* in 1988 and *Modinos v Cyprus* in 1993, both of which underscored the *ratio* established in the first case: that "sodomy" laws are incompatible with human rights as they unjustifiably interfere with one's private life. Before the UNHRC and the IACHR, "sodomy" provisions have been held to violate both privacy rights and the right to equality and/or freedom from discrimination. The approaches of international (quasi)judicial bodies have influenced the arguments adopted by litigants in domestic Courts when they challenge the validity of "sodomy" laws. Thus, regardless of the State-to-State heterogeneity of the specific human rights invoked to secure decriminalisation of "sodomy" laws, which may include freedom of expression, criminal justice rights, or freedom from cruel, inhuman or degrading treatment, it is apparent that privacy rights and the right to equality/freedom from discrimination are *leitmotifs* in constitutional challenges because of how international bodies have framed the subject.

Chapter II.B: The ECtHR

Chapter II.B.1: *Dudgeon v United Kingdom*, Application No. 7226/76

Jeffrey Dudgeon challenged the validity in Northern Ireland of ss 61 and 62 of the Offences Against the Person Act (1861), which criminalised buggery and attempts to commit it,[31] and s 11 of the Criminal Law Amendment Act (1885), which criminalised "gross indecency" committed between men, in private or in public, regardless of consent.[32] He argued that the laws unjustly interfered with his right to respect

[30] Holning Lau "Sexual Orientation: Testing the Universality of International Human Rights Law" [2004] 71 *University of Chicago Law Review* 1689, 1699.
[31] Dudgeon (supra), para. 14. The Court accepted the following definition of "buggery": "sexual intercourse *per anum* by a woman with a man or a woman, or *per anum* or *per vaginum* by a man or a woman with an animal."
[32] Ibid, para. 14.

for his private life; and constituted discrimination on the basis of sex, sexuality and residence.[33] The ECtHR limited itself to an assessment of Article 8.[34]

Following the promulgation of the Sexual Offences Act in 1967, which decriminalised consensual sexual activity between men of or over the age of 21 in England and Wales, attempts were made to do the same in Northern Ireland. They were opposed by predominantly religious groups.[35] Ultimately, the government opted to abandon the law reform process, and retained the laws to preserve the nation's moral fabric.[36] The ECtHR noted that between January 1972 and October 1980, there were no prosecutions in Northern Ireland for acts of "buggery" or "gross indecency" that would otherwise not have constituted criminal offences in England and Wales. This did not, however, mean that the prosecutorial arm of the Executive had adopted an official policy not to prosecute such offences.[37]

The ECtHR held that the laws continuously interfered with Dudgeon's Article 8 right because the only choices available to him were: (1) obeying the laws and refraining from engaging in consensual sexual activity to which he was predisposed because of his sexual orientation; or (2) committing the criminal acts and living in constant fear of arrest and prosecution.[38] As to whether this interference was compatible with the ECHR, the ultimate determinant was whether they were "necessary in a democratic society" to protect morals and the rights and freedoms of others, as argued by the State.[39]

In conformity with the its jurisprudence, the Court held that "necessary" equates "pressing social need", rather than just useful and desirable.[40] It falls within each State's margin of appreciation to determine

[33] Ibid, paras. 33-34. Article 8 ECHR: "**Right to respect for private and family life** - (1) Every person has the right to respect for his private and family life, his home and his correspondence; (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."
Article 14: "**Prohibition of discrimination** - The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[34] Ibid, paras. 65-70. Dudgeon claimed that he was subjected to discrimination because conduct which was criminal for him was not criminal for gay men in other parts of the United Kingdom, and was not criminal for heterosexual couples or gay women in Northern Ireland. He also challenged the difference between the ages of consent between gay men (21) and heterosexual people (17). Since a violation of Article 8 had been found, the ECtHR found it unnecessary to assess the compliance of the 1861 and 1885 laws with Article 14.

[35] Dudgeon, paras. 17, 24-25.

[36] Dudgeon, paras. 26 and 46.

[37] Dudgeon, para. 30.

[38] Dudgeon, para. 41.

[39] Dudgeon, paras. 42-45 and 48.

[40] Dudgeon, para. 51. This approach may be contrasted with the one put forward by Judge Matsher in his dissenting opinion. The Judge stated that "necessary" should pertain to the means rather than the ends. A measure is therefore necessary "if failure to take the measure would create a risk that the aim would not be achieved". Thus "necessary" cannot relate to the idea of a "pressing social need", which is an end in itself.

what constitutes a pressing social need. The stronger familiarity that national authorities have with prevailing social *mores* allowed for a wider margin of appreciation in "morality" cases.[41] The margin of appreciation in the case was, however, counterbalanced by the fact that Article 8 protects "the most intimate aspect of private life".[42] As such, the Court took a circumspect approach, requiring the existence of "particularly serious reasons" for the interference.[43] As for what constitutes a "democratic society", the Court held that such societies are founded on "tolerance and broadmindedness", meaning that rights limitations must be "proportionate and legitimate to the aim pursued".[44]

The State relied on Northern Ireland's comparatively more conservative attitudes towards sexuality, primarily because of religion's stronger grip on Northern Ireland than on England and Wales. Dudgeon argued that this representation of Northern Irish religiosity was embellished.[45] Nevertheless, the Court held that it was important to consider national context and social *mores* because it was possible there were circumstances justifying the continuation of the laws in Northern Ireland despite their abrogation in England and Wales.[46] Therefore, the Court determined that both positive and negative social views on homosexuality were relevant to its Article 8(2) enquiry.[47]

The Court took a macrocosmic view of the trend of decriminalisation across the Council of Europe and cited the unofficial policy of non-enforcement in Northern Ireland to conclude that it was no longer necessary to criminalize consensual same-sex relations between men over the age of majority. There was no pressing social need to retain the laws as the State did not adduce evidence to prove that the lack of prosecutions had been injurious to the moral fabric of Northern Irish society, or that society had demanded "stricter enforcement" of the laws.[48] The Court further recognised the disproportionately harsh effect of the laws on gay men like Dudgeon, and held that as disturbed as the public may be by "the commission... of private homosexual acts" personal offence was not enough to justify penalising adults for consensually engaging in sexual acts in which only they are involved.[49] The feeling that decriminalisation of such acts would erode moral standards was, in and of itself, insufficient to warrant

[41] Dudgeon, para. 52.
[42] Dudgeon, para. 52. The Court when on to describe consensual sex in para. 60 as "essentially private manifestation of the human personality".
[43] Dudgeon, para. 52.
[44] Dudgeon, para. 53.
[45] Dudgeon, para. 56.
[46] Dudgeon, para. 56-57.
[47] Dudgeon, para. 57. Because of the direct rule principle, the United Kingdom felt that it was especially important to take full cognisance of the wishes of the people of Northern Ireland before legislating on social issues. The ECtHR held that it had done so through the referendum.
[48] Dudgeon, para. 60.
[49] Dudgeon, para. 60.

interfering with human rights. The laws were too broad and too absolute to be anything but disproportionate to the aim sought.[50]

Chapter II.B.2: *Norris v Ireland*, Application No. 10581/83

David Norris took issue with the same laws challenged by Jeffrey Dudgeon. Like his predecessor, Norris maintained that the laws violated his rights under Article 8 ECHR. Although he had not been arrested in pursuit of the laws, Norris argued that they were the reason why he had received threats and abuse from the public after a television appearance during which he discussed is sexual orientation.[51] The Irish Supreme Court had dismissed his claiming. It found the impugned laws consistent with the Irish Constitution, reasoning that consensual homosexual activity was not encompassed by the right to privacy in a State with such a strong Christian foundation. Furthermore, the Supreme Court characterised homosexuality as an affliction which could lead to depression and suicide, and which had resulted in the spread of venereal disease and the creation of a public health issue in England.[52]

The ECtHR held that the laws interfered with Norris' Article 8 rights, regardless of his apparent ability to live his life openly and conduct his sexual affairs in private without any actual police intervention.[53] The mere possibility of prosecution was enough of an interference.[54] As in *Dudgeon*, it was held that for the laws to meet the standard for rights limitations set in Article 8(2) ECHR, they had to meet a "pressing social need" and be "proportionate to the legitimate aim pursued".[55] Notwithstanding the State's wide margin of appreciation, it was for the ECtHR ultimately to decide the compatibility of the interference with the ECHR.[56] In the absence of evidence supporting retention of the laws, the ECtHR held that there was no pressing social need present. In any event, the Court opined that any reasons provided for retention were subordinate to the injustice suffered by men who had to live life under constant threat of criminal sanction.[57]

[50] Dudgeon, para. 61. The decision was problematic in the Court's refusal to consider Dudgeon's contention that the age of consent for sexual conduct between same-sex attracted men should be lowered to match that set for different-sex attracted persons. Instead, the ECtHR held that it was within the authority of State governments to establish the age at which young people should cease to enjoy the protection of criminal law as part of the State duty to safeguard public morals.
[51] Norris, para. 10.
[52] Norris, para. 24.
[53] Norris, paras. 36-38.
[54] Norris, para. 38.
[55] Norris, para. 41.
[56] Norris, para. 45.
[57] Norris, para. 46.

Chapter II.B.3: *Modinos v Cyprus*, Application No. 15070/89

Alecos Modinos challenged the validity of ss 171, 172 and 173 of the Criminal Code of Cyprus, which criminalised acts of carnal knowledge, in light of Article 8 ECHR.[58] The Attorney-General of Cyprus instructed the police to cease arrests under s 171 pending the decision in *Dudgeon*, but the laws remined intact.[59] The State argued that Modinos' rights had not been infringed because he could not be prosecuted under ss 171, 172 and 173. Modinos countered by arguing that the Attorney-General's policy could be reversed at any moment.[60] The ECtHR agreed with Modinos that the Attorney-General's policy was not a guarantee of non-prosecution in the future. Moreover, the policy did not preclude police investigations or private prosecutions.[61] Through direct application of its decisions in *Dudgeon* and *Norris*, the Court held that there was an interference with Modinos' Article 8 right to respect for his private life. Since the State did not argue that the interference was justified, the Court concluded that the interference amounted to a violation of the ECHR.[62]

Chapter II.C: The UN

Chapter II.C.1: UNHRC - *Toonen v Australia*, Communication No. 488/1992

Nicholas Toonen challenged the compliance of ss 122 and 123 of the Tasmanian Criminal Code, respectively outlawing "unnatural sexual intercourse/intercourse against nature" and "indecent practice between male persons", with Articles 2(1), 17 and 26 ICCPR.[63] Although "sodomy" laws had been repealed in all other Australian states, federal laws prohibited amendments to Tasmanian law by the Australian government.[64] Toonen argued that by empowering the police to invade his home and arrest him on suspicion of violating the Criminal Code, ss 122 and 123 arbitrarily and unlawfully interfered

[58] S 171 criminalised having carnal knowledge of someone, or permitting another person to have carnal knowledge of oneself, against the order of nature. S 172 criminalised violent commissions of these offences, and s 173 criminalised attempts to perpetrate the offences, with or without violence.

[59] The Attorney-General also made a point of refraining from launching prosecutions contrary to human rights under the Constitution and the ECHR.

[60] Modinos, para. 18.

[61] Modinos, para. 23.

[62] Modinos, paras. 24-26.

[63] Toonen, paras. 1-2.2. Article 2(1): "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."
Article 17: "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation; 2. Everyone has the right to the protection of the law against such interference or attacks."
Article 26: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[64] Toonen, paras. 4.2 and 6.6. As at the date of the communication, discrimination on the basis of sexual orientation was unlawful in half of Australia's territories, claims could be submitted to the Australian Human Rights and Equal Opportunity Commission for sexual orientation discrimination in employment under ILO Convention No. 111.

with his privacy. He also argued that the laws discriminated against homosexual men as they were not permitted to exercise their privacy rights in the same manner as homosexual women, who were not targeted by the provisions, or heterosexual couples, against whom the provisions were not enforced.[65] He linked the continued criminalisation of consensual homosexual activity between men to larger-scale harassment and discrimination against homosexual men and women in Tasmania and the adverse "social and psychological impacts" they suffered as a result of their actual or perceived sexual orientation.[66] Furthermore, notwithstanding the trend of non-enforcement of the laws, the absence of a formal policy to refrain from prosecuting persons under the laws left Toonen at constant risk of arrest.[67]

Through its submissions to the UNHRC, the Australian government made clear its support for the invalidation of the laws. Conversely, the Tasmanian government disputed the infringement of Toonen's rights,[68] and maintained that the laws were necessary to curb the spread of HIV/AIDS. Australia countered these arguments by maintaining that the laws actually encumbered comprehensive safe sex education under the national HIV/AIDS strategy.[69] While Australia did accept social *mores* as an element in determining the reasonableness of interfering with a person's privacy,[70] it argued that the rest of the country generally agreed that no one should suffer discrimination on the basis of their sexual orientation.[71] Since Tasmania was the only state with "sodomy" laws, which were largely unenforced in any event, their existence was not essential to the "moral fabric of Australian society".[72]

Privacy

The UNHRC determined that it was undisputed that Article 17 ICCPR encompasses "adult consensual sexual activity in private", and that Toonen's rights had been interfered with by ss 122 and 123 of the Tasmanian Criminal Code, regardless of their non-enforcement.[73] As for whether the interference was arbitrary, the UNHRC referred to its General Comment No. 16, in which it stated that non-arbitrary interferences are reasonable and accord with the aims and objectives of the ICCPR. Reasonableness

[65] Toonen, para. 3.1.
[66] Toonen, paras. 3.1(a) and 7.8.
[67] Toonen, para. 6.3.
[68] Toonen, para. 6.1.
[69] Toonen, para. 6.5.
[70] As appears in para. 6.4 of the communication, the Australian government, through reference to the ICCPR's *travaux preparatoires* and the HRC's statements in paragraph 4 of General Comment 16, interpreted the text of Article 17(1) as imposing a reasonableness standard in determinations on the arbitrariness of interferences with a person's privacy. Reasonableness requires the presence of "reasonable and objective criteria… proportional to the purpose for which they are adopted".
Toonen challenged the Australian government's position that social *mores* should be taken into account in relation to privacy rights, arguing that criminal law in a "pluralistic and multicultural society" ought to refrain from entrenching codes of morality as much as possible, and, instead, uphold the values of human dignity and diversity.
[71] Toonen, para. 6.7.
[72] Toonen, paras. 6.7 and 6.8.
[73] Toonen, para. 8.2.

was taken to mean "proportional to the end sought and… necessary in the circumstances of any given case".[74] The Committee held that criminalising consensual homosexual activity between men was neither reasonable nor proportionate to the aim of preventing the spread of HIV/AIDS. If anything, criminalisation was a hindrance to public health because at-risk persons would be forced "underground" and would not benefit from prophylactic measures or educational programmes. Finally, the UNHRC held that there was no documented link between criminalisation and control over the spread of HIV/AIDS.[75]

The UNHRC determined that issues of morality are not the exclusive purview of States. Moreover, notwithstanding the State's interest in upholding public morality, this was not enough to interfere with Toonen's rights.[76] In concluding that the laws did not meet the reasonableness test, the UNHRC referred to the fact that all other Australian territories had decriminalised similar conduct, that there was no uniform consensus on the continued validity of the laws even in Tasmania. The fact that the laws went unenforced also indicated that they were not essential to preserving morality in Tasmania.[77]

Equality and non-discrimination

Toonen averred that ss 122 was indirectly discriminatory against gay men because, despite its facial neutrality, it was only enforced against homosexual men and criminalised conduct that is performed more often by homosexual men than by heterosexual couples.[78] The Australian government agreed that there was discrimination, but was uncertain of the form it took. It sought the UNHRC's guidance on whether the provisions of the Tasmanian Criminal Code discriminated against Toonen on the ground of "sex" or whether there was another ground which could be included in "any other status". Toonen favoured the latter through reference to the Australian government's position on sexual orientation discrimination and the ECtHR decisions in *Dudgeon*, *Norris* and *Modinos*.[79]

Rather than addressing these arguments, the UNHRC confined itself to declaring that sexual orientation falls under "sex" under Articles 2(1) and 26 ICCPR.[80] Since a violation of Articles 2(1) and 17(1) ICCPR had been identified, it was deemed unnecessary to engage in an analysis of possible violations

[74] Toonen, para. 8.3.
[75] Toonen, para. 8.5.
[76] At para. 8.6, the HRC rejected Tasmania's contention that moral issues fell within the exclusive purview of ICCPR State Parties, as this would potentially create a *lacuna* in the UNHRC's jurisdiction if different States argued that their interferences with the right to privacy were based on moral grounds; Ryan Thoreson "The Limits of Moral Limitations: Reconceptualising 'Morals' in Human Rights Law" *Harvard International Law Journal*, Vol. 59, No. 1 (2018), 197-244 at 206-207.
[77] Toonen, para. 8.6.
[78] Toonen, para. 7.6. Toonen relied on General Comment No. 26 to argue his position on indirect discrimination.
[79] Toonen, paras. 7.3-7.5.
[80] Toonen, para. 8.7.

of Article 26 ICCPR.[81] In a concurring individual opinion, Bertil Wennergren stated that the Committee's inclusion of sexual orientation in "sex" was apt as the grounds of "race, colour and sex" were all "biological or genetic factors", implying reference to sexual orientation as an immutable characteristic.

Chapter II.C.2: Other UN documents and mechanisms

In its Concluding Observations, the UNHRC has maintained that "sodomy" laws violate the principle of non-discrimination and privacy rights under the ICCPR even when they are not enforced.[82] The UNHRC is not the only human rights treaty body to incorporate SOGIESC issues into the instrument over which it has oversight. As international human rights theory and practice have evolved, so too have UN treaty bodies extended their awareness of the wide-reaching effects of discrimination on the capacity of rights-holders to enjoy their human rights because of their actual or perceived sexual orientation, gender identity or expression, or sexual characteristics. For example, in its General Comment No. 14, the CESCR stated that the ICESCR prohibits discrimination on the basis of, *inter alia*, sexual orientation, in access to healthcare services and information.[83] 16 years later, in General Comment No. 22, the Committee stated that State Parties should ensure access to and dissemination of information on sexual and reproductive health that takes into account needs based on, *inter alia*, sexual orientation, gender identity and intersex status.[84] General Comment No. 22 also emphasises that sexual and reproductive health entails respect for sexual orientation, gender identity and intersex status, meaning that criminalisation of consensual same-sex activity, criminalisation of gender identity expression, the pathologising of SOGIESC diversity, and homophobia and transphobia are all violations of human rights.[85] Similarly, the CEDAW Committee and CRPD Committee have acknowledged sexual orientation and gender identity as possible grounds of intersectional discrimination against women and persons with disabilities.[86]

[81] Toonen, para. 11.

[82] For example, Cameroon (CCPR, Concluding observations of the Human Rights Committee on Cameroon, 4 August 2010 (CCPR/C/CMR/CO/4), paras. 11-12; CCPR, Concluding observations of the Human Rights Committee on Cameroon, 30 November 2017 (CCPR/C/CMR/CO/5), paras. 13-14), Namibia (CCPR, Concluding Observations of the Human Rights Committee on Namibia, 22 April 2016 (CCPR/C/NAM/2), paras. 9-10), and Ethiopia (CCPR, Concluding observations of the Human Rights Committee on Ethiopia, 25 July 2011 (CCPR/C/ETH/CO/1), para. 12.

[83] CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), 11 August 2000, E/C.12/2000/4, para. 18.

[84] CESCR General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 2 May 2016, E/C.12/GC/22, paras. 9 and 19.

[85] Ibid, para. 23.

[86] CEDAW General Recommendation No. 27 on older women and protection of their human rights, 19 October 2010 (CEDAW/C/2010/47/GC.1), para. 13; CEDAW General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Woman, 19 October 2010 (CEDAW/C/2010/47/GC.2), para. 18; CRPD General Comment No. 3 (2016) Article 6: Women and girls with disabilities, 2 September 2016 (CRPD/C/GC/3), para. 4; CRPD General Comment No. 6 (2018) on equality and non-discrimination, 26 April 2018 (CRPD/C/GC/6), paras. 21 and 33.

In 2007, a group of human rights experts drafted the Yogyakarta Principles, on the applicability of international human rights law to issues affecting SOGIESC issues, including violence, abuse and discrimination.[87] The Principles include State obligations in relation to persons who may be subjected to discrimination on the basis of their actual or perceived sexual orientation or gender identity. The human rights covered include civil-political rights like freedom of opinion and expression, the right to security of the person, and freedom from arbitrary deprivation of liberty; and socio-economic rights like the right to work, the right to an adequate standard of living, and the right to education. The 2017 YP+10[88] built on these State obligations and added principles like the right to bodily and mental integrity, the right to legal recognition and the right to protection from poverty. Principle 33 directly relates to the decriminalisation of consensual same-sex activity and enjoins States, *inter alia*, to ensure that laws do not criminalise SOGIESC identities, to repeal laws affecting the rights and freedoms of persons on the basis of their SOGIESC identities, and to establish sensitisation training for law enforcement officials, the judiciary and healthcare providers in respect of SOGIESC issues.[89]

In 2011, the UN Human Rights Council adopted Resolution 17/19 on *Human Rights, Sexual Orientation and Gender Identity*,[90] which requested a report from the OHCHR "documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity". The result was the 2011 report entitled *Discriminatory Laws and Practices and Acts of Violence Against Individuals based on their Sexual Orientation and Gender Identity*.[91] The 2012 report from the OHCHR, *Born Free and Equal: Sexual Orientation and Gender identity in International Human Rights Law*,[92] was a follow-up of the 2011 report. *Born Free and Equal* identifies five "core legal obligations" of States in relation to the rights of SOGIESC diverse groups: "protecting them from homophobic and transphobic violence, and ensuring proper investigation and prosecution of hate crimes; preventing torture, cruel, inhuman and degrading treatment of LGBT persons by State and non-State actors; repealing laws criminalising consensual same-sex activity; prohibiting discrimination on the basis of sexual orientation and gender identity; and safeguarding the freedoms of expression,

[87] ICJ, Yogyakarta Principles - Principles on the Application of International Human Rights Law In Relation to Sexual Orientation and Gender Identity, March 2007.
[88] ICJ, The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, 10 November 2017.
[89] Specific mention is made of the decriminalisation of consensual same-sex activity between persons above the age of consent (which must be equal for different-sex and same-sex activity) in Principle 2, on equality and non-discrimination; Principle 4, on the right to life (which includes recommendations against imposition of the death penalty where "sodomy" laws have been contravened); and Principle 6, on privacy.
[90] UN General Assembly, Human Rights Council Resolution 17/19 Human rights, sexual orientation and gender identity, 14 July 2011, A/HRC/RES/17/19, para. 1.
[91] 17 November 2011, A/HRC/19/41.
[92] OHCHR, *Born Free and Equal: Sexual Orientation and Gender identity in International Human Rights Law*, September 2012, HR/PUB/12/06.

assembly and association of LGBT and intersex persons". *Born Free and Equal* identifies "sodomy" laws as infringing Articles 2, 7, 9, 12 UDHR, and Articles 2(1), 6(2), 9, 17 and 26 ICCPR. The ICCPR provisions enshrine the principle of non-discrimination, the right to life (especially the principle that the death penalty should only be imposed for "the most serious crimes", the right to liberty and security of the person, the right to privacy and the right to equality, respectively.

Chapter II.D: The Inter-American System

Neither the IACHR nor IACtHR has issued a decision on the human rights compliance of "sodomy" laws.[93] However, in 2018, the IACHR issued a decision in a petition involving the deprivation of intimate visits from an incarcerated homosexual woman.

The IACHR - *Marta Lucía Álvarez Giraldo v Colombia*, Case 11.656

The Petitioner claimed that she had been deprived of access to intimate visits during 8 years of her incarceration, even though there was no legislative ban to that effect. The State was alleged to have violated her rights to privacy and equal protection, read in conjunction with the principle of non-discrimination in the ACHR.[94] She claimed that the discrimination against her was dual, being based on her sex and her sexual orientation.[95]

In terms of Article 1(1) ACHR, the Petitioner relied on an interpretation of the phrase "any other social condition" to include sexual orientation as a prohibited ground of discrimination. She also relied on *obiter* from ECtHR jurisprudence, including *Dudgeon*, to the effect that tolerance "is one of the hallmarks of a democratic society" and does not permit "restricting the private life of homosexuals for moral reasons",[96] and that consensual sexual activity is one of "the most intimate aspects of a human being's privacy".[97] The Petitioner expanded on the latter point by arguing that, regardless of a person's sexual orientation, the State should not interfere with sexual expression "either by action or omission" unless it is necessary (in a democratic society) to do so.[98]

[93] A petition challenging "sodomy" laws in Jamaica, *Garet Henry v Jamaica*, was filed in 2011 and declared admissible by the IACHR in 2018. It is yet to be addressed on the merits.

[94] Article 1(1) ACHR: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."
Article 11: "**Right to Privacy:** 1. Everyone has the right to have his honor respected and his dignity recognized; 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation; 3. Everyone has the right to the protection of the law against such interference or attacks."
Article 24: "**Right to Equal Protection**: All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."

[95] Giraldo, para. 16.

[96] Giraldo, para. 32.

[97] Ibid. The phrase "the most intimate aspects of a human being's privacy" is from *Dudgeon*, para. 52.

[98] Giraldo, para. 33-34.

Equality and non-discrimination

The IACHR first identified these principles as the "central, basic axis of the inter-American human rights system", and stated that there is "an inseparable connection between the obligation to respect and guarantee human rights and the principle of equality and non-discrimination".[99] The IACHR also cited IACtHR jurisprudence on the principle of equality linking equality with dignity, and emphasising that equality "cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority".[100]

As to whether a distinction amounts to discrimination the IACHR identified a four-step "standard test" used by regional and international courts. It is something of an elaboration on the necessity and proportionality test applied in the ECtHR, and consists of the following: "(i) the existence of a legitimate goal; (ii) the suitability or logical means-to-end relationship between the goal sought and the distinction; (iii) the necessity, in order words, whether other less burdensome and equally suitable alternatives exist; and (iv) proportionality *strictu sensu*, i.e., the balance between the interests at stake and the level of sacrifice required from one party compared to the level of benefit of the other".[101]

Based on its own jurisprudence and those of the IACtHR, the ECtHR and comparative law, the IACHR read sexual orientation into Article 1(1) ACHR under "any other social condition".[102] This entailed the application of a "particularly strict" standard of reasonableness, meaning the distinctions in treatment based on sexual orientation would be presumed to be discriminatory, and it was for the State to prove otherwise.[103] The IACHR highlighted the fact that groups identified by the categories in Article 1(1) "coincide with population groups or sectors that have historically been victims of discrimination and/or of structural inequalities in the exercise and enjoyment of their rights". This fact increases the duty of States to "protect and guarantee" their rights and "condemn 'practices that have the effect of creating or perpetuating in society a subordinate position for certain disadvantaged groups'". Thus the Petitioner being both a woman and homosexual meant that the IACHR's analysis of her treatment would be particularly strict.[104]

[99] Giraldo, para. 154, citing *inter alia*, *Atala Riffo and Daughters v Chile*, para. 74, and IACtHR, *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03, para. 85, respectively

[100] IACtHR, *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica* Advisory Opinion OC-4/84, para. 55

[101] Giraldo, para. 161. The IACHR stated that distinctions are not necessarily always contrary to human rights. They may be reasonable and objective. Rather, it is discrimination which is a violation of human rights.

[102] Giraldo, para. 162.

[103] Giraldo, para. 163.

[104] Giraldo, para. 164.

The State argued that the ban on same-sex intimate visits existed in order to maintain prison security, in order to protect other inmates and their families, given the existing intolerance towards same-sex relationships.[105] The first argument was dismissed as lacking a causal relationship between the means and ends because it would be absurd to suggest that inmates and their visitors were identified solely by their gender.[106] As for the second argument, the IACHR maintained that prejudices and stereotypes could not be used as a justification for the denial of rights. Rather, it is for the State to work against these prejudices.[107] In response to the State's contention that Colombian society was not tolerant of same-sex relations, the IACHR cited IACtHR *obiter* to the effect that while intolerance certainly exists, States cannot use it "as justification to perpetuate discriminatory treatments". Rather, States must "confront intolerant and discriminatory expressions in order to prevent exclusion or the denial of a specific status".[108] As such, the State was held to have violated the Petitioner's rights under Articles 1(1) and 24 ACHR.[109]

The right to privacy

The IACHR stated that Inter-American case law has established that privacy rights encompass "all spheres of the intimate realm and autonomy of an individual, including the development of his or her identity".[110] The IACHR referred to the Universal Declaration of Sexual Rights adopted by the World Association for Sexual Health in 1999, which proclaimed that decisions about one's sexuality are integral to every person's personality, and the full development of that personality "depends upon the satisfaction of basic human needs such as the desire for contact, intimacy, emotional expression, pleasure, tenderness and love".[111] It also cited *Atala Riffo,* in which it was held that there is a clear link between sexual orientation and the notion of freedom and the right to self-determination in one's existence.[112] The expression of a woman's sexuality must therefore not be hindered by stereotypical views, especially in combination with her sexual orientation.[113]

[105] Giraldo, para. 169. The State also argued that the ban existed because intimate visits were governed by rules pertaining to family planning. This argument was immediately dismissed because of its clear disregard of the fact that people exercise their sexuality for reasons other than reproduction; a point which is relevant given the stigmatization of women's sexuality, especially that of lesbians.
[106] Giraldo, para. 175.
[107] Giraldo, para. 176. At para. 178, the IACHR took exception to the language used by the prison authorities in their communications about the case, describing them as demonstrating "an atmosphere of institutional discrimination against lesbian women because of their sexual orientation, especially the expression of that sexual orientation".
[108] Giraldo, para. 179, citing *Atala Riffo* (supra), para. 119.
[109] Giraldo, para 180.
[110] Giraldo, para 185.
[111] Giraldo, para 185, citing Universal Declaration of Sexual Rights. Declaration of the XIII World Congress of Sexology, Valencia (Spain) 1997. Revised and approved by the General Assembly of the World Association for Sexual Health (WAS) on August 26, 1999, at the XIV World Congress of Sexology (Hong Kong)
[112] Atala Riffo, para. 136.
[113] Giraldo, para. 186.

The Commission cited the ECtHR's decisions in *Karner v Austria*, *EB v France*, *Smith and Grady v UK*, and *Lustig-Prean and Beckett v UK*, wherein it was held that States must have "particularly convincing and weighty reasons" to justify interferences with a person's private life because of their sexual orientation.[114] After establishing that intimate visits for incarcerated persons fall within the right to privacy, the IACHR opined that the Petitioner's sexual orientation had been fundamental to the decision made to deny her intimate visits. This decision was not logically connected to the *raison d'être* of the prison system and, given the fact that the decision was discriminatory, it was also determined to be an arbitrary interference with the Petitioner's privacy.[115]

Chapter II.E: The African system

If the trend established by interpretations of the ECHR, ACHR and ICCPR is to be followed, the human rights most relevant to "sodomy" laws are privacy and equality and the principle of non-discrimination. However, while Articles 2, 3(1) and 19 entrench the principle of non-discrimination and the right to equality, no provision in the ACHPR entrenches the right to privacy.[116] As such, a path alternative to that taken by the ECtHR, IACHR and UNHRC would have to be forged if reliance were placed on the ACHPR to secure the human rights of SOGIESC diverse groups.

Neither the ACtHPR nor the African Commission has presided over a communication concerning "sodomy" laws, notwithstanding the fact that the continent has the highest concentration of States criminalising consensual sexual activity, primarily between men. While a challenge to Zimbabwe's "sodomy" laws was lodged with the Commission in 1995, it was withdrawn without consideration on request from GALZ, who feared governmental retaliation in response to the complaint.[117] Nevertheless, the African Commission has demonstrated a vacillating attitude towards SOGIESC diverse groups. This muddies the waters on the subject of whether they really can be accommodated under the ACHPR.

On the one hand, in *Zimbabwe Human Rights NGO Forum v Zimbabwe*, the African Commission opined that Article 2 ACHPR "provides the foundation for the enjoyment of all human rights", and that "the aim of this principle is to ensure equality of treatment for individuals irrespective of nationality,

[114] Giraldo, para. 188.
[115] Giraldo, paras. 203-204.
[116] Article 2: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."
Article 3(1): "Every individual shall be equal before the law; 2. Every individual shall be entitled to equal protection of the law."
Article 19: "All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another."
[117] *William Courson v Zimbabwe*, Communication No. 136/94; Philip Tahmindjis "Sexuality and International Human Rights Law" (2005) *Journal of Homosexuality* 48: 3-4, 9-29, p. 22.

sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation".[118] The last three characteristics are not enumerated in Article 2. Notwithstanding the fact that the particular communication had nothing to do with SOGIESC issues and instead involved election violence, the African Commission made a definitive statement about which groups the ACHPR protects. Additionally, in 2014, the Commission adopted Resolution 275 on *Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity*.[119] The Resolution condemned acts of violence, including corrective rapes, murder and arbitrary arrests, based on the actual or imputed sexual orientation or gender identity of persons.[120] Although the Resolution fell short of urging State Parties to end discrimination in general against SOGIESC diverse groups or defining what constitutes an arbitrary arrest,[121] it did urge States to prohibit and punish acts of violence against them. The Resolution was therefore a significant step in increasing awareness of SOGIESC issues on the continent.[122]

On the other hand, the history of the African Commission's position on the CAL, a pan-African NGO promoting women's gender and sexual rights, ranges from hostility to cautious but divided acceptance, and ends with politically coerced rejection. CAL's first application was rejected in 2010 because the Commission was of the view that its activities did not "promote and protect any of the rights enshrined in the African Charter".[123] Observer status was finally granted in 2015.[124] This prompted an Executive Council directive from the AU, requesting that the Commission "take into account fundamental African values, identity and good traditions, and withdraw the observer status granted to NGOs who may attempt to impose values contrary to African values".[125] An advisory opinion was sought from the ACtHPR on the legality of the directive, but the issue was not resolved on the merits because the ACtHPR determined that CAL lacked *locus standi* in the matter.[126] Subsequent to this, the African Commission stood by its decision to the grant observer status to CAL, maintaining that it was fulfilling

[118] *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Communication 245/02 (2006), para. 169.
[119] African Commission on Human and Peoples' Rights "275: Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity" (2014). Available at http://www.achpr.org/sessions/55th/resolutions/275/ [Accessed 14 July 2019].
[120] In doing so, the African Commission invoked Articles 2 and 3 ACHPR, alongside Articles 4 (right to life) and 5 (right to respect of one's dignity and freedom from torture).
[121] The African Commission instead opted to call on State Parties to end discriminatory practices against human rights defenders working with the rights of SOGIESC diverse groups.
[122] Wendy Issak, Human Rights Watch "African Commission Tackles Sexual Orientation, Gender Identity" (1 June 2017). Available at https://www.hrw.org/news/2017/06/01/african-commission-tackles-sexual-orientation-gender-identity [Accessed 14 July 2019].
[123] Pan Africa ILGA "PAI Statement on CAL's observer status at the African Commission on Human and People's Rights (ACHPR)" (30 April 2015). Available at https://ilga.org/pai-statement-cals-observer-status-african-commission-human-peoples-rights-achpr [Accessed 14 July 2019].
[124] African Commission on Human and Peoples' Rights, 38th Activity Report (2015), para. 14.
[125] African Union Executive Council "Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights Doc.EX.CL/921(XXVII)", EX.CL/Dec.887(XXVII) (June 2015), para. 7.
[126] African Court of Human and Peoples' Rights *Request for Advisory Opinion by the Centre for Human Rights of the University of Pretoria and the Coalition of African Lesbians* No. 002/2015 (2017), para. 57-58.

its mandate to give effect to ACHPR provisions *sans* discrimination, and that it would not encroach on domestic policies and would continue analysing the concept of "African values".[127] The AU Executive Council repeated its request for the withdrawal of observer status in a decision that also threatened the Commission's jurisdictional authority.[128] This decision is what compelled the African Commission to withdraw CAL's observer status in August 2018.[129]

Chapter II.F: Analysis of international human rights law

The exclusion of SOGIESC issues from the foundations of human rights language has created a *lacuna* permitting their continued ostracision by homophobic States and regional blocs. Attempts to address the human rights of SOGIESC diverse groups have been resisted through arguments that these issues fall outside the scope of international human rights law. This makes it difficult to ascertain on which side the African Commission or ACtHPR would land if confronted with a case concerning SOGIESC issues. The problem is exacerbated by the fact that apart from the ICCPR, the ACHPR is the only primary international human rights instrument that imposes civil and political human rights obligations on Zimbabwe. This is not even to say that any decisions from either the African Commission or ACtHPR would be binding on Zimbabwe. The African Commission does not issue binding decisions, and Zimbabwe is not subject to the jurisdiction of the ACtHPR. However, it cannot be ignored that pronouncements from these bodies have persuasive interpretive value. It would therefore have been preferable if there were something of a *corpus* of regional human rights law on SOGIESC issues from them, especially considering the emphasis in both the ACHPR and the Zimbabwean Constitution on the importance of culture and traditional values.

In a similar vein, although the pronouncements of UN treaty bodies are authoritative, these pronouncements are not binding or representative of "formal obligations", even in direct communications.[130] To give an example, *Toonen* did not automatically invalidate Tasmanian "sodomy" laws. Rather, it inspired the enactment of the Human Rights (Sexual Conduct) Act in Australia, which excludes private consensual sex between adults from any "arbitrary interference with privacy" as per

[127] African Commission on Human and Peoples' Rights, 43rd Activity Report (2017), paras. 49-51.
[128] African Union Executive Council "Decision on the African Commission on Human and Peoples' Rights", EX.CL/Dec.995(XXII) (January 2018), para. 8; International Justice Resource Center "African Commission bows to political pressure, withdraws NGO's observer status" (28 August 2018). Available at https://ijrcenter.org/2018/08/28/achpr-strips-the-coalition-of-african-lesbians-of-its-observer-status/ [Accessed 14 July 2019].
[129] African Commission on Human and Peoples' Rights, 45th Activity Report (2018), para. 61; Coalition of African Lesbians "Women and sexual minorities denied a seat at the table by the African Commission on Human and Peoples' Rights" (17 August 2018). Available at 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 14 July 2019].
[130] Daniel Moeckli *et al* (supra), 308.

Article 17 ICCPR.[131] However, before the law was enacted, Tasmania rejected the UNHRC decision as a violation of its sovereignty.[132] The Human Rights (Sexual Conduct) Act ultimately indirectly repealed ss 122 and 123 of the Tasmanian Criminal Code through the Australian government's exercise of its external affairs power.[133] This shortcoming on the part of treaty bodies is a further weakness in international human rights law that may be exploited by regional blocs hostile to SOGIESC diverse groups.

In a dissenting opinion to *Modinos*, Pikis J characterised *Dudgeon* as not so much establishing "the breadth of the right to respect for private life" as determining "the acceptability of limitations to the right" on the basis of public morality or the protection of the rights and freedoms of others. This characterisation may be applied equally to the reasoning in *Norris* and *Toonen*. The cases narrowed, but did not eliminate the divide between consensual same-sex relations and consensual different-sex relations as they only established the very minimum standard of respect to which same-sex attracted men were entitled.[134] In contrast to the ECtHR and UNHRC, which began the process of actualizing the rights of SOGIESC diverse groups with this bare minimum, the first three admissible claims before the Inter-American human rights institutions concerned child custody,[135] discharge from the army for breaking a rule prohibiting same-sex sexual contact,[136] and access to a deceased partner's pension benefits.[137] These cases, deliberated on from 2008 onwards, have their counterparts in decisions rendered by the ECtHR approximately two decades after *Dudgeon*.[138] It is arguable, however, that the IACHR and IACtHR had the benefit of drawing from a more evolved body of international human rights knowledge and theory in rendering their decisions. Indeed, Inter-American decisions usually include reference to cases from the ECtHR and other jurisdictions.[139] In *Homero Flor Freire v Ecuador*, for example, the IACtHR referred to *Dudgeon*, *Norris*, and *Toonen* and the conclusions reached therein that "sodomy" provisions are contrary to human rights norms.

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[131] S 4 of the Human Rights (Sexual Conduct) Act of 1994.

[132] Philip Tahmindjis (supra), 13-14.

[133] Laurence R. Helfer, Alice M. Miller "Sexual orientation and human rights: Toward a United States and transnational jurisprudence" (1996) *Harvard Human Rights Journal*, vol. 9, 61-103, at 69.

[134] Michael McLoughlin "Crystal or Glass?: A Review of *Dudgeon v United Kingdom* on the Fifteenth Anniversary of the Decision" (1996) *Murdoch Electronic Journal of Law*, Vol. 3, No. 4, para. 90. Available at http://classic.austlii.edu.au/au/journals/MurUEJL/1996/36.html [Accessed 6 July 2019].

[135] *Atala Riffo and Daughters v. Chile*, Case 12.502 (2012).

[136] *Homero Flor Freire v Ecuador*, Case 12.743 (2013).

[137] *Ángel Alberto Duque v Colombia*, Case 12.841 (2014).

[138] *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96 (1999), a child custody case; and *Lustig-Prean and Beckett v United Kingdom*, Applications No. 31417/96 and 32377/96 and *Smith and Grady v United Kingdom*, Applications No. 33985/96 and 33986/96 (1999), the cases on discharge from the armed forces because of policies banning homosexuals from serving. *Mata Estevez v Spain*, Application No. 56501/00 (2001), which concerned the right to receive a deceased partner's pension benefits, was declared inadmissible *ratione materiae* because Article 8 ECHR right to family life does not apply to "long-term homosexual relationships between two men", nor does it guarantee the right to pension benefits.

[139] Ryan Thoreson "The Limits of Moral Limitations: Reconceptualising 'Morals' in Human Rights Law" *Harvard International Law Journal*, Vol. 59, No. 1 (2018), 197-244, 219.

Based on the foregoing, the following issues arise:

(1) The conception of "privacy" in *Dudgeon* retained unequal ages of consent by restricting decriminalisation to same-sex sexual activity between two men over the age of 21.[140]

(2) The ECtHR and UNHRC placed consensual sexual contact within the scope of privacy rights without sufficient explanation for why they did so. The ECtHR in *Dudgeon* appeared to draw links between the fact that sex is an intimate act and its position that Article 8 ECHR safeguards the most intimate aspects of people's lives. This is something of a facile argument. Further elaborations on the connection between sex and the right to respect for private life would have been preferable given the fact that the core question in the cases concerned the aspects of humanity which should be free from State interference. In this respect, the IACHR has provided a stronger foundation on the content of the right to privacy, having established that it not only relates to intimate activities, but to autonomy and self-determination, the development of identity, and the development of relationships. The IACHR therefore established a stronger link between sexuality and the right to privacy.

(3) The ECtHR and UNHRC applied only the spatial and decisional aspects of privacy to consensual same-sex activity. They excluded relational privacy, which pertains to the ability to establish committed, monogamous and long-term relationships with each other. While it may be argued that the ECtHR's understanding of the right to respect for private life, at least in respect of SOGIESC diverse groups, was underdeveloped in 1981, it could easily have been developed 12 years later in *Modinos*. The Court in that case could have transcribed its characterisation of private life, namely that it "must comprise to a certain degree the right to establish and develop relationships with other human beings" from *Niemetz v Germany,* a decision involving the unlawful search of a lawyer's offices, which was delivered 5 months

[140] Evert van der Veen, Aart Hendriks, Astrid Mattijssen "Lesbian and Gay Rights in Europe: Homosexuality and the Law" in Aart Hendriks, Rob Tielman, Evert van der Veen (eds) *The Third Pink Book: A Global View of Lesbian and Gay Liberation and Oppression* (1993), 231. The 1967 Sexual Offences Act still criminalised consensual sexual contact between three or more adult men, or such contact between two men where one was younger than 21. It was not until *A.D.T. v. United Kingdom,* Application No. 35765/97 that the ECtHR declared laws criminalising consensual same-sex group sex between men contrary to Article 8 ECHR. As with *Dudgeon*, *Norris* and *Modinos*, the ECtHR found it unnecessary to address the validity of the laws *vis-a-vis* Article 14 once an Article 8 violation had been established.
The ECtHR declared that unequal ages of consent between same-sex and different-sex sexual relations violate Article 14 as read with Article 8 ECHR in *L and V v Austria*, Applications No. 39392/98 and 39829/98. The justifications given in the Wolfenden Report for setting the age of consent for consensual same-sex relations between men at 21 was being questioned by the European Commission as early as *X v United Kingdom* 7215/75. However, even in *Dudgeon*, the ECtHR viewed unequal ages of consent as compliant with the ECHR. See Ryan Thoreson (supra), 218-219.

prior to *Modinos*.[141] However, instead of developing or elaborating on human rights principles applicable to same-sex relations, *Modinos* amounted to a copy-paste of *Dudgeon* and *Norris*. The ECtHR later developed the scope of Article 8 ECHR, but this development occurred in cases which do not involve intimate sexual expression. For example, in *Pajić v Croatia*, which concerned family reunification for a same-sex couple, the Court established that Article 8 relates to the ability to establish relationships, personal development and self-determination.[142] The result is that, as far as cases concerning proscriptions of consensual same-sex relations are concerned, the already merely persuasive international standard gives very limited understanding of how privacy rights fundamentally affect same-sex attracted persons.

(4) Despite the fact that *Dudgeon* emboldened SOGIESC activists to mount legal challenges to "sodomy" laws,[143] what the larger body of ECtHR and UNHRC "jurisprudence" reveals is a shared deference to State conceptions of public morality[144] and consensus-based decision-making. The ECtHR has stated that its approach in relation to same-sex couples is to extend a wide margin of appreciation to States where there is "little common ground" between States on the governance of their relationships.[145] In *Hertzberg v Finland*, the UNHRC held that the Finnish government's censorship of "pro-gay" programmes did not infringe freedom of expression under Article 19(1) ICCPR as the State enjoyed a "margin of discretion" with regards to the concept of public morality.[146] The manner in which the communication was written implied that the margin is non-exhaustive, but it was established to have limits in *Toonen*, when the UNHRC rejected the Tasmanian government's argument for an unlimited margin of discretion on the subject of public morality. This limitation was applied because of the attendant risk of having "margin of discretion" arguments remove many State interferences with privacy from the Committee's scrutiny.[147] However, the shift in approach would have benefited from some explanation and elaboration as to the scope and limitations of the "margin of discretion", given the potential of the decision to further understandings of the interaction between international human rights law and "domestic conceptions of morality".[148]

[141] Application 13710/88, para. 29.
[142] Application 68453/13 (2016), citing *Niemietz v. Germany*, *Bensaid v. the United Kingdom*, Application No. 44599/98 and *Pretty v. the United Kingdom*, Application No. 2346/02.
[143] Angioletta Sperti *Constitutional Courts, Gay Rights and Sexual Orientation* (2017), 46.
[144] Laurence R. Helfer, Alice M. Miller (supra), 72.
[145] *Schalk and Kopf v Austria*, Application No. 30141/04, para. 92.
[146] *Leo Hertzberg et al. v. Finland*, Communication No. 61/1979, U.N. Doc. CCPR/C/OP/1 at 124 (1985); Laurence R. Helfer, Alice M. Miller (supra), 71-72; Philip Tahmindjis (supra), 13.
[147] Toonen, para. 8.6.
[148] Philip Tahmindjis (supra), 19.

(5) The ECtHR and UNHRC restricted their human rights analyses to privacy rights and their application of said rights was limited to the personal spheres of rights-holders instead of exploring the spaces they occupy within the larger, diverse and hierarchical social context.[149] This creates the implication that the accommodation of same-sex attracted persons under human rights law only applies to the extent that they engage in sexual activity away from the public eye.[150]

Chapter II.F.2: Equality and non-discrimination

What is lacking from *Toonen* and totally absent from *Dudgeon*, *Norris* and *Modinos* is an elaboration on the interaction between "sodomy" laws and the principle of non-discrimination. The UNHRC concluded that sexual orientation falls under "sex" as a prohibited ground of discrimination, but did not explain why. The minority opinion gave slightly more detail on the issue by stating that like race, colour and sex, sexual orientation is a "biological or genetic factor". However, the opinion did not explore why attributes like those listed in Article 2(1) and 26 ICCPR require the prohibition of discrimination based on them. This would have been pertinent especially when we consider that religion, political opinions and property are included in Articles 2(1) and 26 but are neither biological nor genetic attributes. In the same way that the UNHRC explored the elements of arbitrary interferences with privacy and their attendant negative effects, it could have explored the elements of discrimination and their deleterious effects, then applied the reasoning to discrimination on the basis of sexual orientation. As an example, the UNHRC could have assessed the effect of discrimination through the lens of dignity, which is identified as a founding value in the Preamble ICCPR and is a factor that connects all of the grounds listed in Articles 2(1) and 26 to each other.[151] The absence of a comprehensive link between sex and sexual orientation is therefore a *lacuna* of international human rights law that could diminish human rights protection.[152]

There is also some inconsistency between the UN treaty bodies in how they characterise sexual orientation and/or gender identity as prohibited grounds of discrimination. Whereas the UNHRC held in *Toonen* that sexual orientation, at least, falls under "sex" as a prohibited ground of discrimination

[149] Edwin Cameron (supra), 464.
[150] Ibid.
[151] Indeed, whereas the UNHRC referred to General Comment No. 16 on Article 17 ICCPR, recourse was not made to General Comment No. 18 on non-discrimination and the Committee's established understanding of discrimination in para. 7, namely: "any distinction, exclusion, restriction or preference which is based on any ground... and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms".
[152] For example, although "gender" appears in the 1980 Zimbabwean Constitution's non-discrimination clause instead of "sex", reliance was still placed by the Appellant in *Banana* on Article 26 and the UNHRC's statements in *Toonen* on the link between sex and sexual orientation. The majority of the ZWSC dismissed the argument, reasoning that "gender" is about "men and women", not at all about sexuality, hence discrimination on the basis of sexual orientation was neither encompassed by the Constitution nor unlawful.

under Articles 2(1) and 26 ICCPR, the CESCR stated in its General Comment No. 20 that sexual orientation and gender identity are included in "other status" under Article 2(2) ICESCR.[153] Conversely, the CRC Committee stated in its General Comment No. 4 on adolescent health and development that sexual orientation falls under the non-discrimination clause in Article 2, but did not specify under which listed ground it falls.[154] As a guide for judicial interpretations of domestic non-discrimination clauses, it would have been preferable for the UN treaty bodies to present a consistent position on the inclusion of sexual orientation in the non-discrimination provisions of international instruments.

It was in 2000 that the ECtHR included sexual orientation as a prohibited ground of discrimination under "any such grounds" in Article 14 ECHR.[155] A similar approach was taken in *Zimbabwe Human Rights NGO Forum*, wherein, without explicitly stating that it was doing so, the African Commission read sexual orientation into "other status" under Article 2 ACHPR. However, as indicated above, the authoritativeness of this position is undermined two-fold by the non-binding nature of African Commission communications and the fact that the actual communication in which sexual orientation was mentioned had nothing to do with SOGIESC issues. Notwithstanding the fact that the *obiter* from *Zimbabwe Human Rights NGO Forum* was actually relied on by litigants challenging Kenyan "sodomy" laws, it is rather a long stretch of the imagination to regard it as precedential, especially when the larger context of the African Commission's attitude towards SOGIESC issues is considered.

The IACtHR read sexual orientation into "any other social condition" in Article 1(1) ACHR in *Atala Riffo and Daughters v Chile* through a *pro homine* interpretation that also relied on OAS Resolutions on discrimination against SOGIESC diverse groups and some ECtHR decisions.[156] This fact must be considered alongside the Court's conclusion in *Homero Flor Freire* that "sodomy" provisions "are directly at odds with the prohibition on discrimination based on sexual orientation",[157] and its statements in *Atala Riffo* and *Advisory Opinion on the Juridical Condition and Rights of the Undocumented Migrants* that the principle of equality and non-discrimination is a *jus cogens* norm "because the whole legal structure of national and international public order rests on it and it is a fundamental principle that

[153] CESCR General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, para. 32. Article 2(2) ICESCR states: "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."
[154] CRC General Comment No. 4 (2003) Adolescent health and development in the context of the Convention on the Rights of the Child, 4 July 2003 (CRC/GC/2003/4).
[155] *Salgueiro da Silva Mouta v Portugal*, Application No. 33290/96, para. 28.
[156] *Atala Riffo and Daughters v. Chile*, Case 12.502 (2012), paras. 83-90. The Court cited *Clift v United Kingdom*, Application No. 7205/07 (2010); *Salgueiro da Silva Mouta* (supra), and the UNHRC and UNCESCR which have read sexual orientation into "gender" and "another social condition", respectively.
[157] *Homero Flor Freire* (supra), para. 114.

permeates all laws".[158] The characterisation of equality and non-discrimination as *jus cogens* norms explains in part the IACHR and IACtHR's insistence on addressing both privacy and equality and non-discrimination in cases involving SOGIESC issues. The Inter-American approach is holistic in addressing the ability of same-sex attracted persons to operate under the same legal regime and on the same terms as different-sex attracted persons.

It is only in the Inter-American System that equality and non-discrimination are considered *jus cogens* norms. While the right to equality and/or principle of non-discrimination are not explicitly stated to be non-derogable in either the ECHR or ICCPR, human rights derogations during states of emergency are strictly regulated.[159] In any event, human rights being non-derogable is not the same as them being *jus cogens* norms, i.e. even if equality and non-discrimination are characterised in human rights instruments as non-derogable rights, this does not mean that they are absolute rights.

What truly distinguishes the Inter-American System from the ECtHR in relation to the rights of same-sex attracted persons is that while the IACtHR and IACHR consider the right to equality and principle of non-discrimination peremptory, the ECtHR has demonstrated in its jurisprudence, especially through its reliance on consensus-based decision-making and the margin of appreciation doctrine, that equality and non-discrimination are not peremptory in the Council of Europe. Indeed, the ECtHR opined in *Fretté v France*, a case involving a gay man's attempt carry out a single parent adoption, that the "scope of the margin of appreciation" in determining the extent to which specific groups may be treated differently "will vary according to the circumstances, the subject matter and the background".[160] The idea that certain groups may be prevented from equal enjoyment and protection of the law depending on "the circumstances" reveals something of the fallacy of human rights. The question is begged: What is the point of human rights principles and institutions if we can agree that some people can be relegated to second class status because "organic" changes in popular sentiment or the law are yet to occur?

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[158] *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03, para. 101; *Atala Riffo*, para. 79.

[159] See ECtHR "Factsheet - Derogation in time of emergency". Available at https://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf [Accessed 24 August 2019]; UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, in which the UNHRC stated in para. 8 that some elements of non-discrimination are not derogable "in any circumstances". Article 4(1) ICCPR states that any derogations must not "involve discrimination solely on the ground of race, colour, sex, language, religion or social origin". Given, the effect of *Toonen*, the assumption is that whatever their cause or purpose they may have, in states of emergency even discrimination on the basis of sexual orientation is impermissible if such discrimination is the be-all-and-end-all of the measure introduced.

[160] *Fretté v France*, Application No. 36515/97 (2002). The ECtHR concluded in para. 41 that since it was "not possible to find in the legal and social orders of Contracting States uniform principles on these social issues on which opinions within a democratic society may reasonably differ widely". Thus, French authorities were given a wide margin of appreciation and the Application was dismissed.

It cannot be ignored that "sodomy" laws represent centuries' worth of discrimination against same-sex attracted persons, their persecution and forced invisibility in the name of survival. They are not the be-all-and-end-all of the subjugation of SOGIESC diverse groups by hegemonic heterosexism, but facilitate "the articulation of homophobia" that has targeted "abnormal" sexual identities for generations.[161] Equality and non-discrimination therefore more closely approach the root of this oppression than privacy rights. As it is, the ECtHR's position on discrimination in SOGIESC issues can only address and undo the legacy of homophobia in a piecemeal and ultimately unpredictable manner that does few favours for litigants in domestic cases who rely on ECtHR jurisprudence.

Chapter III: Comparative law on human rights affecting SOGIESC diverse groups

Chapter III.A: Introductory remarks

International and domestic tribunals have identified 1967 as the incipient point of the domestic movement to recognise and promote the rights of SOGIESC diverse groups throughout the Commonwealth. This was when English and Welsh Parliament enacted the Sexual Offences Act, implementing the recommendations made in the 1957 Report of the Departmental Committee on Homosexual Offences and Prostitution, otherwise known as the Wolfenden Report. The Committee's conclusion that consensual same-sex sexual contact lay in the realm of the private lives of the participants, and therefore outside of the purview of criminal law, extended beyond the United Kingdom. The same can be said of the Wolfenden Report's impact on the ECtHR decisions in *Dudgeon*, *Norris* and *Modinos*. These decisions, and the manner in which specific human rights were interpreted and applied, influenced the judgments rendered by domestic Courts. The influence on domestic Courts then created a snow-ball effect of ever-broadening comparative law analyses elemental to constitutional challenges to "sodomy" laws.

Chapter III.B: Domestic judgments on the constitutionality of "sodomy" laws

Chapter III.B.1: South Africa

The South African Constitution was the first in the world to prohibit sexual orientation on the basis of sexual orientation. Nevertheless, it was four years after the Constitution's adoption that the State's "sodomy" laws were invalidated by the Constitutional Court.

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC)

The National Coalition for Gay and Lesbian Equality and South African Human Rights Commission made an unopposed application to have "sodomy" legislation and common law declared unconstitutional. The Applicants took issue with the "sodomy" provisions in s 20A of the 1957 Sexual

[161] Zaid Al Baset "Section 377 and the Myth of Heterosexuality" (2012) *Jindal Global Law Review*, Vol. 4, Issue 1, 97.

Offences Act, Schedule 1 of the 1977 Criminal Procedure Act, and the schedule of the 1987 Security Officers Act.[162] Ackermann J penned the Court's majority opinion.

Equality and non-discrimination

Because of the inclusion of "sexual orientation" as a prohibited ground of discrimination in the South African Constitution's equality clause, the analysis launched from the perspective of a rebuttable presumption of unfair discrimination against gay men.[163] Ackermann J held that the criminalisation of consensual sexual contact between men reinforced "existing social prejudices" and increased the effects of those prejudices on such men.[164] There was nothing that could counterbalance this unfairness.[165] Apart from the absence of valid reasons for limiting the rights of gay men, the "enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate purpose".[166] As such, the common law crime of sodomy was held to be in contravention of s 9 of the Constitution, as were the legislative "sodomy" provisions.[167]

Right to privacy

Ackermann J stated that the right to privacy entails an understanding that all people are entitled to a sphere of intimacy and personal freedom which permits the fostering of relationships and the expression of one's sexuality free from outside interference. Ackermann J described the impact of the "sodomy"

[162] National Coalition, paras. 1-10. S 20A of the 1957 Sexual Offences Act states: "(1) A male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or to give sexual gratification, shall be guilty of an offence; (2) For the purposes of subsection (1) 'a party' means any occasion where more than two persons are present; (3) The provisions of subsection (1) do not derogate from the common law, any other provision of this Act or a provision of any other law." The inclusion of "sodomy" in the schedules of the 1977 Criminal Procedure Act and the 1987 Security Officers Act had a number of consequences, including disqualifying person convicted of "sodomy" from receiving pensions, permitting the State to erect roadblocks or intercept postal services in investigations of "sodomy", permitting private persons to arrest people on suspicion of committing "sodomy" even when they do not have a warrant, and preventing persons convicted of "sodomy" from registering as security officers or having their registrations withdrawn.

[163] National Coalition, para. 18. The presumption is established by s 9(5) of the Constitution. S 9 in its entirety states: "**Equality -** (1) Everyone is equal before the law and has the right to equal protection and benefit of the law; (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protected or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken; (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination; (5) Discrimination on one or more of the grounds in subsection (3) is unfair unless it is established that the discrimination is fair."

[164] National Coalition, para. 23.

[165] National Coalition, para. 27.

[166] National Coalition, para. 37. Ackermann J went on to state that however nuanced opinions may be about the propriety of certain relationships, those opinions cannot affect how discrimination on the basis of sexual orientation is approached in constitutional analyses.

[167] National Coalition, para. 27.

laws as "flagrant, intense, demeaning and destructive of self-realisation, sexual expression and sexual orientation".[168] Provided the actors involved have the capacity to consent and have given such consent, intrusion into their acts of intimacy constitutes a violation of their right to privacy.[169] Ackermann J did caution that relying on privacy rights must not be construed as deeming consensual sexual contact between men acceptable so long as it is confined to the privacy of the home, away from the public.[170]

Comparative law

Ackermann J took account of global consensus, and held that on a preponderance of probabilities, jurisprudence in "other open and democratic societies based on human dignity, equality and freedom" were establishing a trend towards decriminalisation of consensual sex between men.[171] Account was taken of the decriminalization that occurred in England and Wales in 1967, in Scotland in 1980, in Canada in 1969, in Germany in 1994, in New Zealand in 1986, in 23 Member States of the Council of Europe by 1989, in 9 out of 10 subsequent members of the Council of Europe as at 10 February 1995, and in all Australian territories except Tasmania by 1992.[172] Apart from the United States, which upheld the validity of "sodomy" laws in a 1986 USSC decision, "Western democracies" began changing "legal attitudes towards sexual orientation" in 1967.[173]

Significant to the trend was the decriminalization that took place in Northern Ireland and Ireland following *Dudgeon* and *Norris*, and in Tasmania following *Toonen*.[174] Ackermann J considered the extent to which ECtHR decisions could be relied on in a South African context, bearing in mind the margin of appreciation doctrine that applies in the European regional human rights system.[175] He established that caution is not necessary where the ECtHR has concluded that there has been a rights violation. Such a conclusion is reached after a margin of appreciation enquiry, so any violation identified is likely "a very clear breach".[176] At the very least, *Dudgeon* and *Norris* were useful for their indication of social and judicial attitudes towards the rights of same-sex attracted men.[177]

Ackermann J cited *obiter* in *Dudgeon* in which it was held that at the time of the decision, as compared to the time when the impugned legislation was adopted, there was a better understanding of and greater

[168] National Coalition, para. 76.
[169] National Coalition, para. 32.
[170] National Coalition, para. 29. This cautionary statement was made in reference to the article written by Edwin Cameron (supra) explaining the risk of relying solely on privacy rights to invalidate "sodomy" laws.
[171] National Coalition, para. 40.
[172] National Coalition, paras. 40-51.
[173] National Coalition, 52-53. In 1986, the U.S. Supreme Court upheld the constitutionality of "sodomy" laws in *Bowers, Attorney General v Hardwick* (1986) 478 US 186.
[174] National Coalition, para. 40.
[175] National Coalition, para. 41.
[176] National Coalition, para. 41.
[177] National Coalition, para. 42.

tolerance towards "homosexual behaviour" in the Council of Europe, and that it was no longer considered necessary to regulate consensual sexual activities between men by law.[178] Later in the decision, Ackermann J also affirmed the ECtHR's statement in *Dudgeon* that there was legitimate State interest in maintaining some legal regulation over consensual sex between men, particularly where sexual conduct is non-consensual.[179] However, considering that other common law rules proscribed male rape and the probability that the "sodomy" common law only came into existence because the conduct was deemed socially unacceptable, Ackermann J deemed it appropriate to declare the whole of the "sodomy" common law inconsistent with the Constitution.[180]

Chapter III.B.2: Zimbabwe

As stated above, Zimbabwe's current "sodomy" law is a legislative provision in the Criminal Law (Codification and Reform) Act. However, at the time of Zimbabwe's seminal legal challenge to the criminalisation of consensual homosexual sex, the criminal provision was common law.

Banana v State 2000 (1) ZLR 607 (S)

Zimbabwe's first non-executive President, Bishop Canaan Banana, was convicted by the High Court on two counts of "sodomy", seven counts of indecent assault, and one count of committing an unnatural offence, offences alleged to have been committed between January 1984, and December 1986. Bishop Banana challenged the constitutionality of the common law crime of "sodomy" in light of section 23(2) of the 1980 Constitution, the equality and non-discrimination provision.[181] On appeal to the Supreme Court, there was a 3-2 split in favour of upholding the validity of the common law. McNally JA penned the majority opinion, and Gubbay CJ wrote the dissenting opinion.

The dissenting opinion

Gubbay CJ framed the questions before the Court as: (1) By prohibiting behaviour by men which is not prohibited when committed by women, does the common law crime of "sodomy" discriminate against men?; and (2) If the common law is, indeed, discriminatory, is the discrimination "reasonably justifiable

[178] Dudgeon, para. 60, as cited in National Coalition, para. 42.
[179] National Coalition, 66.
[180] National Coalition, 67-71.
[181] Although the appellant made an argument in terms of the right to privacy, the primary argument was based on equality. Gubbay CJ did not assess the right to privacy, and McNally JA mentioned it only in passing. S 23(2) of the Constitution: "For the purposes of subsection (1), a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour, creed or gender are prejudiced- (a) by being subjected to a condition, restriction or disability to which other persons of another such description are not made subject; or (b) by the according to persons of another such description of a privilege or advantage which is not accorded to persons of the first-mentioned description; and the imposition of that condition, restriction or disability or the according of that privilege or advantage is wholly or mainly attributable to the description by race, tribe, place of origin, political opinions, colour, creed or gender of the persons concerned."

in a democratic society"? The Chief Justice narrowed the constitutionality assessment to the common law's application against consenting adults acting in private.[182]

Gubbay CJ agreed with the accused that there was a disparity between the sexual conduct deemed permissible when committed by heterosexual couples or female homosexual couples on the one hand and that committed by male homosexual couples on the other.[183] The Chief Justice cited Article 26 ICCPR, emphasising the obligation on State Parties to ensure equal protection of the law regardless of sex.[184] He referred to the minority opinion in *Toonen*, which established that the Tasmanian Criminal Code violated Article 26 by unfairly discriminating against male homosexual couples. Gubbay CJ took this minority opinion as a sufficient demarcation of the scope of the common law crime of "sodomy" as it applied in Zimbabwe *vis-à-vis* the constitutional guarantee of equality.[185] However, unlike Article 26 ICCPR, "sex" was absent from s 23(2) of the former Zimbabwean Constitution as a prohibited ground of discrimination. As such, in line with the argument made by the Appellant, Gubbay CJ held that the common law discriminated against consenting adult men on the basis of "gender".[186]

As to whether this discrimination was constitutionally valid, the following required assessment: (1) whether the legislative objective which the limitation is designed to promote is sufficiently important to justify overriding the fundamental right concerned; (2) whether the measures designed or framed to meet the legislative objective are rationally connected to it and are not arbitrary, unfair or based on irrational considerations; and (3) whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective.[187] In the first stage, Gubbay CJ deduced that the common law was designed to "discourage conduct… considered to be immoral, shameful and reprehensible and against the order of nature".[188] As to whether consensual sex between adult men in private was immoral, shameful or reprehensible conduct, the Chief Justice relied on the comparative law analysis carried out in *National Coalition for Gay and Lesbian Equality* and the discussion in *Dudgeon* of evolving social attitudes to demonstrate that consensual sex between men was no longer so negatively characterised in many States.[189]

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[182] Banana, 641A-C.
[183] Banana, 641D-G. In this regard, Gubbay CJ relied on *obiter* from *National Coalition for Gay and Lesbian Equality* in which Ackermann J discussed the extent of the discrimination against male same-sex couples
[184] Banana, 642B.
[185] Banana, 642E. This is an interesting approach given of the difference in the grounds used by the UNHRC as compared to Gubbay CJ. "Sex" and "gender" were prone to conflation in the early days of litigating over the rights of SOGIESC diverse groups but the difference between them have grown more relevant with time
[186] Banana, 644A.
[187] Banana, 644B-C.
[188] Banana, 644F.
[189] Banana, 645C-D, citing *Dudgeon*, para. 60.

Taking cognisance of the probable differences between social attitudes in South Africa and social attitudes in Zimbabwe towards homosexuals, Gubbay CJ resolved that constitutional supremacy overcomes rule by popular standards of morality, which alone are insufficient to criminalise particular activities.[190] Bound as it is to safeguard the sanctity of the rule of law, the judiciary cannot be swayed by popular opinion, especially when such opinion is based on prejudice and the outcome of its enforcement is the curtailment of the fundamental rights of marginalised groups.[191] In the final stage of the limitations analysis, Gubbay CJ concluded that there was no rational nexus between the common law and its intended goal because it was irrational to declare certain conduct immoral or against the order of nature when perpetrated by one gender, but permissible when perpetrated by another gender.[192] Rather, the common law was discriminatory in effect as it heightened social prejudice against homosexual men.[193] Curtailing their right "to choose for themselves how to conduct their relationships" was "a greater threat to the fabric of society… than tolerance and understanding of non-conformity".[194]

The majority opinion

McNally JA began the majority opinion by identifying three ways in which laws against consensual homosexual sex have been repealed across the world: (1) the gradual shift of *boni mores* towards greater tolerance and understanding, as was the case in England and Wales; (2) constitutional provisions specifically outlawing discrimination on the basis of sexual orientation, as occurred in South Africa; and (3) the intervention of a supranational judicial body into the legal affairs of a country whose citizens support the continuation of "sodomy" laws and whose domestic judicial bodies are disinclined to make rulings contrary to popular opinion, as was the case in Northern Ireland and Ireland.[195] After a brief discussion of the historical origins of "sodomy" laws, McNally JA considered some academic authorities in Zimbabwean customary law and concluded that the country has not changed its conservative attitude to sexual behaviour.[196] This sexual conservatism would be a guiding principle for constitutional interpretation,[197] and was the background for the analysis of the right to equality.

[190] Banana, 645F.
[191] Banana, 646B-C.
[192] Banana, 646D-E.
[193] Banana, 646H. Gubbay CJ cited the same article by Edwin Cameron used by the ZACC to point out that criminalisation of consensual sex between adult men rendered them "unapprehended felons", thus enabling discrimination against them in areas like employment, family law matters, etc. Gubbay CJ also cited para. 21 of *Norris*, and included an excerpt of *obiter* from *Vriend v Alberta* [1998] 3 LRC 483, para. 102-103, in which the Canadian Supreme Court discussed the psychological impact of criminalisation on SOGIESC diverse groups.
[194] Banana, 646F-G.
[195] Banana, 669F-670A.
[196] Banana, 670D-671A.
[197] Banana, 671B. Ironically, McNally JA used the Chief Justice's own words against him by citing *obiter* in a previous case where Gubbay CJ had held that "generous and purposive" interpretations of the Constitution required that full account be taken of "changing conditions, social norms and values".

McNally JA was of the view that gender discrimination only operated between men and women, not between heterosexual men and homosexual men. For the latter differentiation to amount to discrimination, sexual orientation would have to be included in s 23(2) of the Constitution. Since it did not, McNally JA concluded that the "sodomy" common law was not technically discrimination in the constitutional sense.[198] In any event, according to McNally JA, it was unrealistic to expect enforcement of "sodomy" laws against heterosexual couples given the infrequency of perpetration and difficulty of enforcing the law against them.[199]

In the event that the law was discriminatory, McNally JA opined that it was still justifiable in a democratic society. He did not do so by engaging in a limitations analysis, however, but by referring to the USSC decision in *Bowers, Attorney General v Hardwick*, which upheld the validity of "sodomy" laws in the United States. McNally JA simply asked: "Are we to say that 25 American states are not democratic societies?"[200] Finally, McNally JA opined that each State is at a different stage of development and it is not for the judiciary, which has not been democratically elected, to decide when or if social *mores* ought to be modernised.[201] It would not be appropriate to interpret the Constitution in a way that would place Zimbabwe among "the front-runners of liberal democracy in sexual matters" when it was not "designed" to do so.[202]

Chapter III.B.3: The United States

The USSC addressed "sodomy" laws in two judgments, *Bowers, Attorney General of Georgia v Hardwick* 478 US 186 (1986) and *Lawrence v Texas* 538 US 558 (2003). In the former case, the USSC upheld the validity of Georgia's "sodomy" laws in a 5-4 decision. Justice White for the majority had narrowed the question to whether the Constitution conferred "a fundamental right upon homosexuals to engage in sodomy".[203] Given the country's long history of enforcing "sodomy" laws, Justice White held that claims that such a right existed were "at best, facetious".[204] While the majority decision refrained from addressing the morality question, in response to Hardwick's argument that the immorality and unacceptability of consensual "sodomy" was not a rational basis for the maintenance of Georgia's "sodomy" law, Justice White held that, generally, the law "is constantly based on notions of

[198] Banana, 673C.
[199] Banana, 672H-673A.
[200] Banana, 673C-D. When *Bowers* appeared before the US Supreme Court, approximately half of the states in the country had enforceable "sodomy" laws on the books
[201] Banana, 673D-E.
[202] Banana, 673G.
[203] Bowers, 190.
[204] Bowers, 192-194.

morality" It was therefore unpersuasive to argue for the invalidation of dozens of state-level "sodomy" laws on this basis.[205]

Conversely, Justice Blackmun's dissenting opinion cited previous USSC jurisprudence to the effect that sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality" and held that it is key to how one defines oneself.[206] His opinion explored the spatial and decisional aspects of privacy. In respect of the former, he held that sexual expression takes various forms, and richness is added to a person's life through the ability to choose which form such expression takes.[207] What the majority decision had rejected was not "the right to engage in homosexual sodomy" but the "fundamental interest all individuals have in controlling the nature of their intimate associations with others".[208]

Lawrence v Texas 538 U.S. 558 (2003)

John Geddes Lawrence and Tyron Garner were convicted of "deviate sexual intercourse with another individual of the same sex".[209] They challenged the compliance of the law with the Due Process Clause of the Fourteenth Amendment. Justice Kennedy penned the majority opinion, exploring concepts under the right to liberty that coincide with principles under the right to privacy.[210]

Justice Kennedy criticised the *Bowers* majority's framing of the decriminalisation question as one concerning the right to engage in "homosexual sodomy", opining that it failed to appreciate the gravity of the claim and demeaned the claimant. Rather, the laws in both cases sought to regulate "the most private human conduct… in the most private of places, the home"; conduct which ought to be at the discretion of persons to choose without threat of imprisonment.[211] Justice Kennedy held that absent harm to third parties, the Constitution protects the liberty of adults to engage in sexual behaviour in their homes and retain their dignity and freedom in doing so.[212] As to the *Bowers* majority's opinion that laws against homosexual "sodomy" have existed for millennia, Justice Kennedy held that this

[205] Bowers, 196. Chief Justice Burger's concurring opinion emphasised the religious underpinnings of "sodomy" laws, from Roman law, to English law and its transfer to the American colonies. Justice Blackmun's dissenting opinion emphasised the importance of secularising justifications behind rights-limiting laws.
[206] Bowers, 205, citing *Paris Adult Theatre I v Slaton*, 413 U.S. 49, 63 (1973).
[207] Ibid.
[208] Bowers, 206.
[209] Lawrence, 563. The law in question was Texas Penal Code Ann. § 21.06(a) (2003). § 21.01 of the Penal Code defined "deviate sexual intercourse" as "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object".
[210] Justice O'Connor filed a concurring opinion, and Justices Scalia and Thomas filed dissenting opinions, but they will not be canvassed herein because they do not consider international or comparative law.
[211] Lawrence, 567.
[212] Lawrence, 567.

history was more complicated than was alluded to by Justice White.[213] Several considerations militated against such a definitive view, namely, the variations in the types of couples against whom the laws were enforced;[214] "sodomy" laws appeared to have been primarily enforced under circumstances where consent was absent;[215] prosecutions were infrequent, which militated against the conclusion that society thought it appropriate to punish male same-sex couples engaging in consensual sex;[216] and where there were prosecutions of consensual sexual conduct, such conduct had taken place in public.[217]

According to Justice Kennedy, regardless of the profundity of voices condemning homosexual sodomy, the mere existence of moral codes could not permit the majority to impose theirs on the minority through State sanction.[218] Rather than focusing on centuries' worth of history, Justice Kennedy saw fit to limit the court's analysis to the preceding 50 years of constitutional jurisprudence to determine the scope of protection available to consenting adults engaging in consensual sexual conduct in private.[219] Between 1961 and *Bowers* appearing before the USSC, the number of states with extant "sodomy" laws had decreased from 50 to 24 plus the District of Columbia. Even then, several of the states did not enforce their "sodomy" laws in respect of consensual and private acts.[220] By the time *Lawrence* made its way to the USSC, 24 had been further reduced to 13, and only 4 of those only applied their sodomy laws against homosexual men exclusively. Even then, there was a pattern of non-enforcement against either heterosexual or homosexual couples, in relation to consensual and private conduct.[221]

Non-discrimination

Justice Kennedy drew links between privacy and non-discrimination by holding that decisions on the former would impact the latter. "Sodomy" laws facilitate discrimination against homosexual men in both the private and public spheres, and thus impugn their dignity and diminish their quality of life

[213] Lawrence, 571.
[214] Lawrence, 568-569. For example, in the 16th century, the laws applied to different-sex couples and same-sex male couples. Justice Kennedy opined that this was possibly due to the fact that gay men as a distinct social category were not identified as such until the late 19th century. In any case, what was revealed by the colonial laws was that "sodomy" in general was considered a social evil, i.e. non-procreative, regardless of the sexes of the couple "perpetrating" it.
[215] Lawrence, 569. In essence, "sodomy" was a catch-all offence under circumstances where acts of sexual violence did not meet the legal definition of rape.
[216] Lawrence 569-570. It must be noted, however, that Justice Kennedy did state that the infrequency of prosecutions was most likely attributable to the fact that convictions on charges of sodomy required witness statements from persons who were not involved in the impugned conduct. Unless there was non-consensual "sodomy" or the other person involved was a minor lacking legal capacity to give consent, co-participants in the acts could not give testimony as witnesses as they were considered accomplices.
[217] Lawrence, 570.
[218] Lawrence, 571.
[219] Lawrence, 571-572.
[220] Lawrence, 572.
[221] Lawrence, 573.

because of the consequences that attend having sexual offence convictions on their records.[222] Justice Kennedy aligned the majority with Justice Stevens' dissenting opinion in *Bowers*, citing favourably the judge's *obiter* to the effect that popular views on morality are not sufficient to uphold rights-infringing laws, and that physical intimacy is a form of liberty that is protected under the Due Process Clause even when it is non-procreative.[223]

Comparative law

Justice Kennedy turned the gaze of the Court outwards in reaching the conclusion that the *Bowers* majority had not considered sources which contradicted the idea of centuries of condemnation. He referred to the Wolfenden Report and its impact on English and Welsh law. Of greater importance was *Dudgeon*, which preceded *Bowers* by five years but resulted in a totally different outcome. Justice Kennedy held that the decision contradicted Chief Justice Burger's position in *Bowers* that Hardwick's rights claim "was insubstantial in Western civilization".[224] Moreover, *Bowers* was undermined by the fact that subsequent judgments from the ECtHR contradicted the idea that the Supreme Court relied on "values we share with a wider civilization", and instead upheld the *ratio* of *Dudgeon*.[225] It was further noted that other national jurisdictions had also opted to issue decisions protecting the rights of homosexual men to engage in consensual sexual conduct.[226] The fact that the decriminalisation of consensual sex between men had been litigated in several countries prior to *Lawrence*, and had been accepted as a fundamental right in those countries, led Justice Kennedy to conclude that there was no greater need to regulate such personal choices in the United States than in the rest of the world.[227]

Chapter III.B.4: Fiji

Fiji acceded to the ICCPR and ICESCR in August 2018.[228] Surprisingly, Article 17 ICCPR and *Toonen* played a greater role in the decriminalisation of the State's "sodomy" laws than they played in the invalidation of similar laws in States that had been party to the ICCPR for years before their judiciaries were confronted with the same question.

[222] Lawrence, 575-576.
[223] Lawrence, 577-578.
[224] Lawrence, 572-573.
[225] Lawrence, 576. Justice Kennedy was referring to *P.G. & J.H*, *Modinos* and *Norris*.
[226] Lawrence, 576-577.
[227] Lawrence, 577.
[228]UNOHCHR, UN Treaty Body Database. Available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=60&Lang=EN [Accessed 20 July 2019].

McCoskar v The State [2005] FJHC 500

Thomas McCoskar was an Australian tourist in Fiji who met and developed an intimate relationship with Dhirendra Nadan during his trip.[229] Both were charged with contravening ss 175(a) and (c) and 177 of the Penal Code.[230] They pled guilty to the offences and were sentenced to imprisonment.[231] On appeal, they challenged the compliance of the provisions with the constitutional rights to privacy, equality and freedom from degrading treatment.[232] The Court's decision focussed on the rights to privacy and equality under Articles 37 and 38 of the Constitution, respectively.[233]

The appellants argued that ss 175(a) and (c) and 177 violated their rights to privacy and equality, rights which they claimed were not subject to limitation,[234] and that they had been subjected to discrimination as gay men through criminalisation of their "primary expression of sexuality". The State argued that the provisions were "gender and sexual orientation neutral" and therefore not discriminatory.[235] It was also argued that the Fijian Constitution's reference to Christianity in its preamble meant that Fiji was a "religious and conservative State" where "homosexuality is abhorrent", thus permitting the limitation of the rights to privacy and equality for public interest and morality reasons.[236]

The Court accepted the State's contention that the ss 175(a) and (c) were gender neutral. However, notwithstanding their apparent neutrality, there was no evidence that the laws had been enforced against heterosexual couples, leaving the Court inclined to agree that they were primarily enforced against

[229] McCoskar, 1.

[230] McCoskar, 2. The provisions state: "175. **Unnatural offences** - Any person who - (a) has carnal knowledge of any person against the order of nature; or; (b) …; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of felony, and is liable to imprisonment for fourteen years with or without corporal punishment.
"177. **Indecent practices between males** - Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony, and is liable to imprisonment for five years, with or without corporal punishment."

[231] McCoskar, 2.

[232] McCoskar, 2.

[233] McCoskar, 14. The Appellants also claimed that their freedom from degrading treatment had been violated, but Winter J determined that there was no apparent violation of that right. Articles 37 and 38 of the Constitution:
"37. **Privacy** - (1) Every person has the right to personal privacy, including the right to privacy of personal communications; (2) The right set out in subsection (1) may be made subject to such limitations prescribed by law as are reasonable and justifiable in a free and democratic society.
"38. **Equality** - (1) Every person has the right to equality before the law; (2) A person must not be unfairly discriminated against, directly or indirectly, on the ground of his or her: (a) actual or supposed personal characteristics or circumstances, including race, ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age or disability; or (b) opinions or beliefs, except to the extent that those opinions or beliefs involve harm to others or the diminution of the rights or freedoms of others; or on any other ground prohibited by this Constitution; (3) Accordingly, neither a law nor an administrative action taken under a law may directly or indirectly impose a disability or restriction on any person on a prohibited ground…"

[234] McCoskar, 3.

[235] McCoskar, 5.

[236] McCoskar, 3.

homosexuals. S 177 only applied to men, regardless of age of consent, actual consent, and whether the conduct occurred in private or in public. It was therefore clearly discriminatory.[237]

The Court rejected the contention that the Fijian Constitution was based on Christianity alone. Rather, Fiji was a secular State inspired by Christianity and a host of other faiths and cultures. Although Christianity was deeply woven into the history of the State, the State was not "predominated" by Christianity alone.[238] The Constitution requires the judiciary to examine human rights provisions in light of the historical background of the Constitution, in the context of the Constitution as a whole, and in light of international instruments to which Fiji is a party.[239] Despite the fact that Fiji was 13 years away from acceding to the ICCPR, the Court took the position that the international instrument had already been ratified, and concluded that it was appropriate for the Appellants to expect constitutional rights to be interpreted according to the provisions of the ICCPR.[240]

Bearing in mind the judiciary's role as the "guardian" of the Constitution, the Court held that its primary duty is to interpret the Constitution widely and purposively so that human rights and freedoms are only subject to limitation under legitimate exercises of governmental power.[241] The Constitution's preamble affirms a commitment to human rights and fundamental freedoms informed by "the rule of law and respect for human dignity".[242] It was noted as a relevant part of the interpretation exercise that both parties had acknowledged the existence of a "genuine and sincere conviction" in Fijian society that decriminalising homosexuality would "seriously damage the moral fabric of society".[243] Nevertheless, the Court held that these moral convictions were not, by themselves, sufficient to justify interference with "the most intimate aspect of private life". Reasons for such interference would have to be "particularly serious".[244]

<u>The right to privacy</u>

The primary approach adopted by the Court was based on "privacy supported by equality".[245] The Court compared the rights to privacy in the Constitution to Article 17 ICCPR.[246] The Court adopted the reasoning in *Toonen* that consensual sexual activity between adults in private falls under the right to

[237] McCoskar, 6.
[238] McCoskar, 6-7.
[239] McCoskar, 7-8.
[240] McCoskar, 8.
[241] McCoskar, 8.
[242] McCoskar, 6.
[243] McCoskar, 8.
[244] McCoskar, 8.
[245] McCoskar, 6.
[246] McCoskar, 9-10.

privacy, declaring that a similar decision would have been reached by the UNHRC were the Fijian situation placed before it.[247]

The Court held that interpreting the constitutional right to privacy in line with international law requires that it extend beyond a negative right against undue State interference and encompass "the positive right to establish and nurture human relationships free of criminal or indeed community sanction".[248] The Court held that sexual expression is a basic way of establishing and nurturing relationships, which are capable of fundamentally altering the people involved, their communities, cultures, places and time. Interfering with consensual sexual expressions constitutes an infringement of the right to privacy and the very foundation of the constitutional compact between society and the State.[249]

The Court established that the right to privacy is subject to reasonable and justifiable limitations prescribed by law in "a free and democratic society".[250] However, despite the existence of a margin of appreciation in upholding public morality, the Court held that the criminalization of consensual same-sex relations in private was an unnecessary and disproportionate, and therefore unjustifiably gross intrusion into the right of persons "to build relationships with dignity and free of State intervention".[251] The much clearer violation of gay men's rights by s 177 was also determined to be unconstitutional on the basis of its arbitrary targeting of male sexuality.[252]

<u>The right to equality/non-discrimination</u>

The Court's position was based on a "premise of acceptance", which would "eliminate the unequal consequences arising from difference".[253] Although s 175 was neutral on its face, its application and enforcement specifically singled out gay men because it criminalised conduct essential to their sexual expression.[254] The Court held that ss 175 and 177 infringe gay men's rights to equality and non-discrimination on the basis of gender and sexual orientation, and were invalid for this reason.[255] The

[247] McCoskar, 10.
[248] McCoskar, 11.
[249] McCoskar, 11.
[250] McCoskar, 12. The Court relied on South African jurisprudence (specifically, *S v Makwanyane and Another* [1995] 6 BCLR 665) to establish the criteria to be met by rights limitations under the Fijian Constitution. The Court also referred to the 1984 panel on the ICCPR, which established non-binding precedent that individual rights may be limited in the interests of group rights where the limitations are imposed as a last resort measure provided for in law when it is deemed strictly necessary, and the limitations is not arbitrary and serves a legitimate public interest.
[251] McCoskar, 12-13.
[252] McCoskar, 12.
[253] McCoskar, 13, citing Christine A. Littleton 'Reconstructing Sexual Equality' *California Law Review*, Vol. 75, Issue 4 (1987) at 1285.
[254] McCoskar, 13.
[255] McCoskar, 13-14.

Court elected not to establish a hierarchy between the rights to privacy and equality. Rather, it held that the two are inseparable as they are simultaneously violated.[256]

Winter J concluded by declaring that the Constitution "acknowledges difference, affirms dignity and allows equal respect for every citizen as they are". Embracing these qualities requires the existence of a State which celebrates tolerance and respect for the rule of law, rather than imposing moral standards on what is good versus what is evil.[257]

Comparative law

The Court noted the global trend of decriminalisation in Europe, the United States, Canada, New Zealand, Australia and South Africa, opining that "nothing in the jurisprudence of other open and democratic societies based on human dignity, equality and freedom" leads to a conclusion that "sodomy" laws do not violate the right to privacy.[258] The Court then had direct recourse to *obiter* in *Dudgeon* on the regulation of male homosexual conduct. It echoed the sentiments of the Court by stating that any necessary regulation would pertain to protecting vulnerable members of society, e.g. the young, those without capacity to consent and those in a state of physical, official or economic dependence.[259]

Chapter III.B.5: Belize

Caleb Orozco et al. v. Attorney-General of Belize Claim No. 668 of 2010

Caleb Orozco sought a declaration of the invalidation of s 53 of the Belize Criminal Code to the extent that it applied to "anal sex between two consenting males in private".[260] He claimed that, as a homosexual man, it violated his rights to dignity, privacy and equality.[261] Chief Justice Benjamin penned the Court's opinion.

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[256] McCoskar, 13-14.
[257] McCoskar, 15.
[258] McCoskar, 11.
[259] Ibid.
[260] Orozco, paras. 1-2 and 17. Section 53 of the Criminal Code states: "Every person who has carnal intercourse against the order of nature with any person or animal shall be liable to imprisonment for ten years".
[261] The constitutional provisions state:
"14.-(1) A person shall not be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. The private and family life, the home and the personal correspondence of every person shall be respected. (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision of the kind specified in subsection (2) of section 9 of this Constitution.
"16.-(1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect. (2) Subject to the provisions of subsection (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person or authority. (3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description..."

The Chief Justice established that the Constitution is a living instrument and stated that it "owes its provenance" to the ECHR, which was "influenced" by the UDHR. The Court held that human rights matters are "informed by developments in international law".[262] The Court made it clear that domestic law is supposed to be on all fours with international law where constitutional rights are concerned.[263]

The right to dignity

The Court held that dignity is central to fundamental rights but is hard to define. Benjamin CJ relied on Canadian and South African jurisprudence to flesh out the contours of the right, citing *obiter* that references the connection of human dignity to feelings of self-respect or self-worth and "physical and psychological integrity and empowerment". This iteration of dignity is undermined by marginalisation and promoted through full recognition of "the place of all individuals" in society.[264] Orozco argued that the "sodomy" law violated his human dignity stigmatising him as a criminal because of his sexual orientation, since homosexual men were the primary targets of law enforcement. The law also undermined his dignity by placing consensual sex between men in the same league as non-consensual sex, sex with children and sex with animals.[265] Benjamin CJ turned to *National Coalition for Gay and Lesbian Equality* and Ackermann J's *obiter* on the right to dignity, which spoke of stigma and the impact of the laws on the self-worth and outwardly perceived worth of gay men in society.[266] The Chief Justice was of the view that this *obiter* from the ZACC was fully applicable to Orozco's situation, and concluded that s 53 of the Criminal Code violated his dignity under section 3(c) of the Constitution.[267]

The right to privacy

The Chief Justice opined that this right was founded on "the concept of human dignity".[268] Although Benjamin CJ held that assessing the right would be a two-stage process beginning with answering the question of whether there had been interference with Orozco's right to privacy, then determining whether this limitation was justified, the Court did not fulfil the first step. Rather, it began with the second stage, discussing the grounds of public morality and public health raised by the State and religious leaders.[269]

The Chief Justice dismissed the public health argument by relying on expert evidence on HIV infections

[262] Orozco, para. 58.
[263] Orozco, para. 59.
[264] Orozco, para. 63, citing *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497.
[265] Orozco, para. 65.
[266] Orozco, para. 66, citing *National Coalition for Gay and Lesbian Equality*, para. 28.
[267] Orozco, paras. 66-67.
[268] Orozco, para. 68.
[269] Orozco, paras. 69, 71.

amongst MSM, which maintained that criminalisation of consensual sex between men hinders curtailment efforts.[270] After this, Benjamin CJ briefly discussed *Dudgeon* and its effect on the "sodomy" laws of Northern Ireland. He also mentioned *Norris* and *Modinos*' replication of the standard set in *Dudgeon*,[271] before moving on to assess the submissions made by religious leaders on the immorality of homosexual acts. These submissions were based on the inclusion of the supremacy of God in the Constitution's Preamble. Benjamin CJ opined that even though the views expressed by the religious leaders condemning homosexual acts were likely reflective of popular views of morality, these views alone could not compel the Court to accept limitations of Orozco's rights.[272] The Chief Justice concluded that despite references to God in the Constitution, Belize is secular. Thus, religious teachings would not influence human rights issues. S 53 was held to violate the right to privacy.[273]

The right to equality

The Chief Justice accepted that although the wording of s 53 is gender neutral, it disproportionately affected Orozco because of his sexual orientation.[274] He cited the UNHRC's inclusion of sexual orientation in the ground of "sex" under Articles 2 and 26 ICCPR in *Toonen*.[275] Benjamin CJ held that a similar interpretation applied to s 16(3) of the Constitution for two reasons: (1) Belize ratified the ICCPR in 1996, two years after *Toonen*, which indicated tacit acceptance of the UNHRC's interpretation of the ICCPR; (2) In terms of the national Interpretation Act, statutory interpretations consistent with international obligations are to be preferred where more than one interpretation is possible.[276] As no evidence was led by the State to justify the discrimination against Orozco, the Court concluded that his right to equality before the law and equal protection of the law *sans* discrimination had been violated.[277] The Supreme Court therefore amended s 53 of the Criminal Code to reflect that it no longer applies to consensual sexual activity between adults in private.[278]

[270] Orozco, paras. 71-73.
[271] Orozco, para. 74.
[272] Orozco, para. 81. The Court cited *Makwanyane* from the ZACC, *McCoskar*, and *Lawrence*, in which the Courts established that constitutionalism supersedes public opinion. The ZACC decision included *obiter* to the effect that the Constitution would be redundant if public morality were applied unquestionably. Constitutional protection regardless of popular morality is something to which everyone, especially the vulnerable and marginalised of society, is entitled. Benjamin CJ indicated at para. 81 of the Belize judgment that claims of public morality are insufficient without supporting evidence on the likelihood of harm that would result from the invalidation of s 53.
[273] Orozco, paras. 85-86. The Chief Justice compared Belize's Constitution to the Canadian Charter of Rights and Freedoms, which also mentions the supremacy of God in its Preamble, and cited *obiter* from two Canadian cases which established that mentioning God does not make the State a theocracy. Rather, it is prevented from being officially atheist without being prevented from being secular.
[274] Orozco, para. 92.
[275] Orozco, para. 93.
[276] Orozco, paras. 94-95.
[277] Orozco, para. 96.
[278] Orozco, para. 99.

Within the same decade, s 377 IPC was invalidated,[279] re-validated and re-invalidated by the judiciary.

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The Naz Foundation, a NGO specialising in the fight against HIV/AIDS, argued that s 377 (insofar as it criminalised private consensual conduct between adults) violated the rights to equality and non-discrimination, freedom of speech and expression, freedom of association/assembly, freedom of movement, privacy and dignity (as elements of the right to life and liberty), and health under Articles 14, 15, 19 and 21 of the Indian Constitution.[280] The State presented conflicting arguments: The Ministry of Home Affairs and Union of India argued for the retention of the law for the sake of public morality, public health and public safety, but the Ministry of Health and the Family argued that s 377 was a hindrance to the prevention and treatment of HIV/AIDS.[281]

The rights to privacy and dignity

There are no self-standing rights to privacy or dignity in the Indian Constitution. Both were read into Articles 19(1)(a), 19(1)(d) and 21 of the Constitution through years' worth of judicial precedent that greatly relied on comparative law.[282] For the right to privacy, the High Court began by referring to Article 8 UDHR, Article 17 ICCPR and Article 8 ECHR, then discussed the scope of the right as informed by US and South African jurisprudence.[283] The right to privacy was held to include a personal sphere in which man may exercise his autonomy, pursue his happiness and explore the content of his soul without undue governmental interference.[284]

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[279] S 377 states: "**Unnatural offences** – Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in the section."

[280] Naz Foundation, paras. 1-10. The constitutional provisions state:

"**14. Equality before law**-The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India;

"**15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth**-(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them...;

"**19. Protection of certain rights regarding freedom of speech etc**-(1) All citizens shall have the right-(a) to freedom of speech and expression; (b) to assemble peaceably and without arms; to form associations or unions; (c) …; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India…; (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence…

"**21. Protection of life and personal liberty**-No person shall be deprived of his life or personal liberty except according to procedure established by law."

[281] Naz Foundation, paras. 11-14.

[282] Naz Foundation, paras. 25-31.

[283] Naz Foundation, paras. 29-34 and 46-47.

[284] Naz Foundation, paras. 36 and 40.

After relying on Justice Blackmun's dissent in *Bowers* and Ackermann J's opinion in *National Coalition for Gay and Lesbian Equality*, the Court referred to the "growing jurisprudence and other law related practice that identifies a significant application of human rights law with regard to people of diverse sexual orientations and gender identities".[285] Under international law, the Court referred to the Yogyakarta Principles and their positive influence on HRC proceedings and the laws and policies of some States. It also discussed *Dudgeon*, *Norris* and *Modinos*, specifically, ECtHR's conclusion that "sodomy" laws constitute "continuing interference" with the right to respect for private life, paragraph 21 of *Norris* in which the ECtHR quoted *obiter* from the Irish High Court on the psychological impact of "sodomy" laws, and the ECtHR's position in *Modinos* that even policies of non-enforcement were insufficient safeguards against rights violations.[286] The Court referred to the UNHRC's statements in *Toonen* which aligned with the ECtHR's statements in *Modinos* on policies of non-enforcement and the fact that the mere existence of "sodomy" laws is what interferes with the rights to privacy of gay men.[287] The Court also cited the 2008 UNGA statement calling for an end to violence and discrimination on the basis of sexual orientation and gender identity.[288] The Court held that sexual orientation and gender identity are constant companions of the self and determine modes of sexual expression which, by their nature, require participation with a consenting partner. The Court concluded that by denying homosexuals their privacy and autonomy to grow, seek happiness and fulfilment on their own terms, s 377 contravened Article 21 of the Constitution.[289]

The right to health

In a previous decision, the right to health was read into the right to life under Article 21 of the Constitution in light of Article 12 ICESCR.[290] The High Court relied on CESCR General Comment No. 14, which established that the right to health includes "the right to control one's health and body, including sexual reproductive freedom" and "equality of opportunity for people to enjoy the highest attainable standard of health" free from discrimination.[291] The Court also discussed efforts at the UN and in India to address the needs of persons most affected by HIV/AIDS, who include MSM as they are disproportionately affected by HIV.[292] The Court held that rather than discouraging the spread of HIV/AIDS, s 377 contributed to its spread by cutting off a vulnerable group of persons form effective

[285] Naz Foundation, para. 42.
[286] Naz Foundation, paras. 43, 53-54 and 58.
[287] Naz Foundation, para. 55.
[288] Naz Foundation, para. 59.
[289] Naz Foundation, paras. 47-49.
[290] Naz Foundation, para. 61, citing *Paschim Banga Khet Mazdoor Samity v State of WB* (1996) 4 SCC 37. Interveners in *Suresh Kumar Koushal* also cited s 2 of the Protection of Human Rights Act (1993), which purportedly domesticates Article 12 ICESCR.
[291] Naz Foundation, para. 63, citing General Comment No. 14 (2000) [E/C.12/2000/4; 11 August 2000].
[292] Naz Foundation, paras. 64-66.

preventative education and healthcare.[293] The UNHRC's discussion of Tasmania's public health argument served to underscore the position that criminalising consensual sex between men is a hindrance, not a boon, to comprehensive public health mechanisms.[294]

Under the morality argument, the Court cited *Lawrence* and the conclusion reached that "moral disapproval" alone is an insufficient limitations mechanism.[295] It referred to the ECtHR's assessment in *Dudgeon* of the purpose of criminal law,[296] and its sentiments in *Norris* that justifications for retaining "sodomy" laws are outweighed by their deleterious effects on persons "of homosexual orientation", and while the public may be shocked or offended by same-sex sexual contact, social disapproval on its own does not warrant the retention of the laws.[297] This led the Court to distinguish between "popular morality" and "constitutional morality". Whereas the former reflects prevailing social *mores* and is not a sufficient rights limiter by itself, the latter is based on constitutional values, including equality, liberty and diversity.[298] The Court held that moral approbation, no matter how strong it is, cannot validly supersede individual dignity and privacy.[299] The fact that the law was not enforced against consensual sexual activity between men meant s 377 was not necessary on public health or morality grounds.[300]

<u>The right to equality / freedom from discrimination</u>

The Court established that according to its jurisprudence, classification is permissible where it is based on "intelligible *differentia*" that are rationally connected to the objective pursued. Reasonableness under Article 14 of the Constitution requires that the objective sought not be illogical, unfair, unjust or arbitrary.[301] The Court was of the view that s 377 was discriminatory it sought only the enforcement of dominant notions of morality and religion to the detriment of homosexuals.[302] The Court referred to the Equal Rights Trust's 2008 *Declaration of Principles of Equality* as the "current understanding of Principles of Equality". The Declaration defines the right to equality (equality in dignity and respect, and participation "on an equal basis with others in any area of economic, social, political, cultural or civil life"), equal treatment (which is not the same as identical treatment) and discrimination (direct or indirect differentiation which undermines dignity, perpetuates disadvantage or "adversely affects the

[293] Naz Foundation, paras 71-72.
[294] Naz Foundation, para. 73, citing *Toonen* para. 8.5.
[295] Naz Foundation, paras. 75-76, citing Justice Kennedy's majority opinion at p. 578 and Justice O'Connor's concurring opinion at p. 582.
[296] Naz Foundation, para. 77, citing *Dudgeon*, para. 60, being the regulation of what may be "offensive or injurious", and the increased social tolerance of "homosexual practices", as evidenced by the non-enforcement of the 1861 and 1885 "sodomy" laws, and the lack of evidence of a consequent decline in moral standards.
[297] Naz Foundation, para. 78, citing *Norris*, para. 46.
[298] Naz Foundation, paras. 77-80.
[299] Naz Foundation, para. 86.
[300] Naz Foundation, para. 74.
[301] Naz Foundation, paras. 88-90.
[302] Naz Foundation, para. 92.

equal enjoyment" of other rights).[303] The Court concluded that although s 377 was facially neutral in its proscription of acts rather than identities, it operated in a way that disproportionately affected homosexuals by criminalising acts "associated more closely" with them. By effectively criminalising all gay men, s 377 effectively guaranteed their continued marginalisation and persecution,[304] and damaged their senses of self-worth.[305] Therefore, s 377 violated the Article 14 rights of same-sex attracted men.

The High Court then addressed whether "sexual orientation" is a ground analogous to "sex" in Article 15 of the Constitution. The Petitioners pinpointed "sex" because in the same way that sex-discrimination is intended to challenge differentiation on the basis of non-conformity to gender roles, sexual orientation-discrimination is "grounded in stereotypical judgments and generalisation about the conduct of either sex".[306] The High Court concurred that sexual orientation is an analogous ground to sex as differentiation on its basis "has the potential to impair personal autonomy".[307] The Court confirmed if a law targets a disadvantaged group on such basis, a strict scrutiny test will apply. The test requires that the differentiation be justified and proportionate.[308] As s 377 targeted gay men because of popular disapproval of them, the Court held that Article 15 had been violated.[309] For these and the foregoing reasons, the High Court invalidated s 377 to the extent that it applied to consensual same-sex relations between men.

Suresh Kumar Koushal and another v NAZ Foundation and others Civil Appeal No. 10972 of 2013

Naz Foundation was challenged by a number of parties, some of whom had intervened in the proceedings before the High Court. They included private citizens assuming the responsibility to protect "the cultural values of Indian society" and organisations promoting religiosity and political parties.[310] These parties argued that there was no evidence that s 377 specifically targeted homosexuals, as it was gender-neutral, or that it hindered programmes combatting HIV/AIDS; that s 377 did not violate the

[303] Naz Foundation, para. 93.
[304] Naz Foundation, para. 94.
[305] Naz Foundation, para. 97, citing *Vriend v Alberta* (1998) 1 SCR 493, para. 102.
[306] Naz Foundation, para. 99.
[307] Naz Foundation, paras. 100-104 and 112. The Court looked at *obiter* from *Toonen* on the application of Articles 2(1) and 26 ICCPR. It also discussed *Vriend*, on the "historical, social, political and economic disadvantage covered by homosexuals" and *Corbiere v Canada* [1999] 2 SCR 203, where the Supreme Court held at para. 13 that in respect to analogous grounds "what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity". There was also *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) and *Harksen v Lane* 1988 (1) SA 300 (CC), where the ZACC held that the characteristics upon which differentiation is based will be impair their "fundamental dignity as human beings" or "affect them adversely in a comparably serious manner".
[308] Naz Foundation, paras. 108 and 110-113.
[309] Naz Foundation, para. 113.
[310] Suresh Kumar Koushal, para. 15.

rights to privacy and dignity, especially because the former does not include the right to same-sex sexual conduct; that s 377 protected "social values and morals"; that the drafters of the Constitution never contemplated the inclusion of sexual orientation under "sex" as a prohibited ground of discrimination in Article 15 of the Constitution; and that there was a presumption of s 377's constitutionality for as long as it remained law.[311] The Ministry of Home Affairs argued that social disapproval of the conduct criminalised by s 377 was strong and remained so decades after India won its independence. It was therefore not for the judiciary to foist "extra-ordinary moral values" on society.[312]

The Supreme Court based its decision on the presumption of constitutionality, which it held was in keeping with the doctrine of separation of powers. Attendant to the presumption are the doctrines of severability and reading down, which partially inform judicial propensity to interpret laws in favour of constitutionality rather than in favour of unconstitutionality.[313] The Court noted the fact that s 377 had not been amended despite dozens of amendments to the body of the Penal Code and that, as of the date of the judgment, Parliament had not amended s 377 in line with the High Court decision. These facts, coupled with the fact that Parliament is an elected body representing the people, necessarily affected the Court's assessment of s 377's constitutionality.[314] The Supreme Court opined that the foregoing meant that a "clear constitutional violation" had to be proved, otherwise it could not invalidate a law simply because it was no longer enforced or because social views as to the necessity of its existence had changed.[315]

The Supreme Court was of the view that *Naz Foundation* had not provided a factual foundation to its invalidation of s 377. It held that the Foundation's submissions before the High Court lacked "particulars of the incidents of discriminatory attitude exhibited by the State agencies towards sexual minorities and the consequential denial of basic human rights to them", "particulars of cases involving harassment and assault from public and public (sic) authorities to sexual minorities".[316]

The Supreme Court held that the High Court was wrong in declaring s 377 invalid in light of Articles 14 and 15 of the Constitution because the differentiated classes the Supreme Court identified were "those who indulge in carnal intercourse in the ordinary course" and "those who indulge in carnal intercourse against the order of nature". The latter group could not justifiably claim that s 377 was irrational or arbitrary because the law merely defines an offence and sets the terms of punishment for

[311] Suresh Kumar Koushal, paras. 16.2-16.14.
[312] Suresh Kumar Koushal, para. 22.
[313] Suresh Kumar Koushal, paras. 28-30.
[314] Suresh Kumar Koushal, paras. 32-33.
[315] Suresh Kumar Koushal, para. 33.
[316] Suresh Kumar Koushal, paras. 39-40.

contravening it.[317] Moreover, the High Court ignored the fact that LGBT persons constitute "a miniscule fraction of the country's population". This and the fact that "only" 200 persons had been prosecuted under s 377 in the past 150 years meant that there was no sound basis to declare it *ultra vires* Articles 14, 15 and 21 of the Constitution.[318]

The Supreme Court then moved on to "the requirement of substantive due process" as read into the Constitution through Articles 14, 19 and 21. It requires that laws restricting the rights to privacy, dignity and autonomy, as subsumed under Article 21, be "just, fair and reasonable". In other words, the laws must pursue a legitimate interest and be proportional to the interest sought.[319] The Court referred to the privacy rights in Article 12 UDHR, Article 17 ICCPR and Article 8 ECHR, and briefly set out how the right was read into Article 21 of the Constitution by the Indian judiciary.[320] In response to the argument made before the High Court that s 377 has been used as a basis for harassment, extortion and violence against LGBT persons, the Supreme Court held that s 377 itself does not mandate or condone such treatment, nor does the perpetration of discriminatory or violent acts by private or public actors lead to the conclusion that s 377 is *ultra vires*.[321]

The Supreme Court criticised the High Court's reliance on comparative law, stating that while foreign decisions may be illuminative on the right to privacy and in their discussion of issues facing LGBT persons, they ought not to be "applied blindfolded" in a constitutional matter because of the cultural, social, educational, moral and political differences that abide from State to State. This and the foregoing led the Court to uphold the constitutionality of s 377.[322]

Navtej Singh Johar & Ors. versus Union of India thr. Secretary Ministry of Law and Justice W. P. (Crl.) No. 76 of 2016 D. No. 14961/2016

A Petition was filed to have s 377 declared unconstitutional on the basis of its purported violation of the right to life, which was alleged to include the "right to sexuality", the "right to sexual autonomy" the "right to a choice of a sexual partner" and the "right to be in a relationship with a consenting adult of the same gender". More specifically, the Petitioners contended that s 377 violates the rights to privacy, dignity, equality, liberty and freedom of expression.[323] The Petitioners also argued for the inclusion of "sexual orientation" as a component of sex-discrimination under Article 15 of the

[317] Suresh Kumar Koushal, para. 42.
[318] Suresh Kumar Koushal, para. 43.
[319] Suresh Kumar Koushal, para. 45.
[320] Suresh Kumar Koushal, para. 46.
[321] Suresh Kumar Koushal, para. 51.
[322] Suresh Kumar Koushal, paras. 52-56.
[323] Navtej Singh Johar, Misra CJI and Khanwilkar J, paras. 10, 20-34; Dr. Dahnanjaya and Chandrachud JJ, para. 12. The Petitioners claimed that the inability to represent their identities to the world and assert same in their relationships with the community and the State violated their freedom of speech and expression.

Constitution.[324] The State did not oppose this challenge, provided the Court restricted itself to the question of the constitutionality of s 377.[325] Four opinions were submitted by Misra CJI and Khanwilkar J, Nariman J, Dr. Dahnanjaya and Chandrachud JJ, and Malhotra J.

The right to dignity

The Supreme Court established that while it is not easy to define, dignity "is a core intrinsic value of every human being".[326] It has played a role in transforming the perception of SOGIESC diverse groups from being "unworthy of some rights" to consensus that they "should no longer be deprived of the benefits of citizenship that are available to heterosexuals".[327] The Supreme Court cited Article 1 UDHR, which it viewed as "uncompromising in its generality of application". The recognition of dignity as a human right is paramount to the full enjoyment of all other human rights and even to the full enjoyment of one's life as it permits people to express themselves without fear.[328] The Court gave more content to the right to dignity through reliance on Canadian jurisprudence to the effect that dignity is harmed when groups are marginalised.[329] Dignity was considered especially important *in casu* because s 377 hindered a "severely deprived" segment of society from expressing their natural and innate sexuality in private on the basis of restrictive social perceptions.[330] This expression of sexuality is also considered an important aspect of liberty, which, together with dignity, is at the core of life and personhood.[331] The Court held that s 377 violated the dignity of LGBT persons as it prevented them from not only engaging in consensual sexual relationships with the partners of their choosing, but also prevented them from entering more fulfilling, stable, nurturing relationships, which, in turn, prevents them from "realising their full potential as human beings".[332]

The right to privacy

The Supreme Court referred to *Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors*, Writ Petition (Civil) No. 494 of 2012, a landmark judgement in which the bench circumvented the absence of the right to privacy in the Indian Constitution by reading it into the document.[333] The Court

[324] Navtej Singh Johar, Dr. Dahnanjaya and Chandrachud JJ, para. 12.
[325] Navtej Singh Johar, Misra CJI and Khanwilkar J, paras. 35-38.
[326] Navtej Singh Johar, Malhotra J, para. 16.1.
[327] Navtej Singh Johar, Misra CJI and Khanwilkar J, paras. 125 and 130, citing Michele Fink "The role of human dignity in gay rights adjudication and legislation: A comparative perspective" (2016) *International Journal of Constitutional Law*, Vol. 14, 26-53.
[328] Navtej Singh Johar, Misra CJI and Khanwilkar J, paras. 126, 128 and 132.
[329] Navtej Singh Johar, Misra CJI and Khanwilkar J, para. 133.
[330] Navtej Singh Johar, Misra CJI and Khanwilkar J, para. 135; Malhotra J, para. 16.1.
[331] Navtej Singh Johar, Misra CJI and Khanwilkar J, para. 138.
[332] Navtej Singh Johar, Malhotra J, para. 16.1.
[333] Navtej Singh Johar, Misra CJI and Khanwilkar J, para. 149; Nariman J at para. 60 included an excerpt from *Puttaswamy*, in which the Supreme Court at para. 521 identified three forms of privacy protected by the Indian Constitution: privacy of the person (which relates to their physical body); informational privacy; and privacy of choice (which has implications on personal autonomy and is inseparable from the sense of self).

first pinpointed autonomy as an aspect of privacy, then opined that sexual orientation and sexual identity are "innate" reflections of autonomy with which there must be no interference unless they violate "decency or morality".[334] The Court criticised the dismissal of LGBT persons as "a miniscule fraction of the country's population" in *Suresh Koushal Kumar*, holding that numbers are inconsequential where constitutional rights are concerned, especially where the State lacks compelling reasons for violating the rights of people who do not violate the rights of others.[335]

Misra CJI and Khanwilkar J sought to capture "the essence of the right to privacy" through reference to the right as it appears in Article 12 UDHR, Article 17 ICCPR and Article 8 ECHR,[336] and *obiter* from Judge Walsh's partially dissenting opinion in *Dudgeon* which cited a USSC characterisation of privacy as "the right to be let alone". These conceptions of privacy were linked to Indian jurisprudence, which has established that the right to privacy encompasses oneself, one's family, intimate relationships, familial relationships and education.[337] Malhotra J held that privacy had moved beyond "the right to be let alone" and now incorporates spatial and decisional elements, requiring that rights-holders be permitted to make decisions relating to "fundamental personal choices, including those relating to intimate sexual conduct, without unwarranted State interference.[338] Dr. Dahnanjaya and Chandrachud JJ held that the right to privacy must be expanded to include sexual privacy, which "entails allowing an individual the right to a self-determined sexual orientation". They also focussed on the decisional aspect of the right to privacy, emphasising that under the right, persons must be able to exercise their autonomy and the State must respect their "moral right" to make choices thereunder.[339] To address criticisms levelled against the inadvertent "re-closeting" of privacy claims, Dr. Dahnanjaya and Chandrachud JJ emphasised that the right to sexual privacy "must capture the right of persons of the community to navigate public places on their own terms, free from state interference".[340]

Toonen was cited to emphasise the permissibility of interferences with the right to privacy so long as

[334] Navtej Singh Johar, Misra CJI and Khanwilkar J, para. 149. Misra CJI and Khanwilkar J emphasised that the morality to which the Court in *Puttaswamy* was constitutional morality.
[335] Navtej Singh Johar, Misra CJI and Khanwilkar J, para. 167; Nariman J, para. 95; Malhotra J, para. 19.
[336] Navtej Singh Johar, Misra CJI and Khanwilkar J, paras. 150-152.
[337] Navtej Singh Johar, Misra CJI and Khanwilkar J, paras. 153-154, citing partially dissenting opinion of Judge Walsh in *Dudgeon*, para. 8. The idea of "the right to be left alone" is derived *Paris Adult Theatre I v Slaton*. Misra CJI and Khanwilkar J also cited Justice Blackmun's dissent in *Bowers*, which developed "the right to be let alone" in the context of sexual expression, holding that "giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices".
[338] Navtej Singh Johar, Malhotra J, para. 16.2.
[339] Navtej Singh Johar, Misra CJI and Khanwilkar J, paras. 58 and 64-65. At para. 157, the Judges further relied on *AR Coeriel and MAR Aurik v The Netherlands*, Communication No. 453/1991, in which the UNHRC opined that privacy "refers to the sphere of a person's life in which he or she can freely express his or her identity". They also cited *National Coalition for Gay and Lesbian Equality* at para. 159, and the ZACC's theory of spatial and decisional privacy.
[340] Navtej Singh Johar, Dr. Dahnanjaya and Chandrachud JJ, para. 62.

they are not arbitrary, i.e. so long as they are provided by law, in accordance with the aims, objectives and provisions of the ICCPR, and are reasonable, with the latter implying proportionality and necessity.[341] S 377 was held to diminish the "decisional autonomy of LGBT persons to make choices consistent with their sexual orientation" which are decisions inherent to "the most intimate spaces of one's existence".[342] In response to Interveners' arguments that s 377 is a legislative reflection of popular *mores*, the Court referred to its own jurisprudence, which has established that "notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy".[343] In other words, s 377 and the notion of natural and unnatural sex were "a denial of the distinctive human capacities for sensual experience outside of the realm of procreative sex", and violations of the rights to dignity and privacy.[344]

Equality and non-discrimination

Across the four opinions comprising the judgment, different approaches were taken in determining whether s 377 was discriminatory. Three of the opinions established that for differentiation in terms of s 377 to pass constitutional muster, it would have to (1) "be founded on intelligible *differentia*" and (2) "the said *differentia* must have a rational nexus with the object sought to be achieved by the decision".[345] A law may be invalidated under Article 14 of the Constitution on the basis that it is "manifestly arbitrary", meaning capricious, irrational or excessive and disproportionate.[346]

Malhotra J held that s 377 effectively criminalised "voluntary consensual relationships between LGBT persons… in totality" and LGBT persons as a group because of its criminalisation of non-procreative sex.[347] Malhotra J underscored the unconstitutionality of discrimination on the basis of sexual orientation by declaring, "Where a legislation discriminates on the basis of an intrinsic and core trait of an individual, it cannot form a reasonable classification based on intelligible *differentia*".[348] In a previous decision, the Supreme Court had concluded that "sex" includes "sexual identity and character".[349] Malhotra J therefore found it pertinent to cite *Toonen*, in which the same conclusion was

[341] Navtej Singh Johar, Misra CJI and Khanwilkar J, para. 158.
[342] Navtej Singh Johar, Malhotra J, para. 16.2.
[343] Navtej Singh Johar, Nariman J, para. 80, citing, inter alia, *S Khushboo v Kanniammal and Another* (2010) 5 SCC 600.
[344] Navtej Singh Johar, Dr. Dahnanjaya and Chandrachud JJ, paras. 58-59; Misra CJI and Khanwilkar J, para. 229.
[345] Navtej Singh Johar, Misra CJI and Khanwilkar J, para. 233; Dr. Dahnanjaya and Chandrachud JJ, para. 26; Malhotra J, para. 14.2.
[346] Navtej Singh Johar, Malhotra, para. 14.9.
[347] Navtej Singh Johar, Malhotra J, para. 14.3 and 19.
[348] Navtej Singh Johar, Malhotra J, paras. 14.3 and 14.5.
[349] Navtej Singh Johar, Malhotra J, para. 15.1, citing *NALSA v Union of India & Others*, in which the Court held at para. 66: "Both gender and biological attributes constitute distinct components of sex. The biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes includes one's self-image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of sex under Article 14 and 15, therefore includes discrimination on the ground of

reached, and emphasised the fact that discrimination on grounds like race, caste, sex and place of birth undermines personal autonomy.[350]

Nariman J addressed the arbitrariness of s 377 through a discussion of a 2013 amendment to s 375 IPC, which decriminalised certain penetrative sexual acts between men and women if they occurred consensually. According to Nariman and Malhotra JJ, it made no sense to decriminalise certain sexual conduct between different-sex couples on the basis that they are consensual, but retain the criminalisation of the same acts under s 377.[351] Both concluded that the arbitrary distinction between different-sex and same-sex consensual sexual contact necessarily fell afoul of Articles 14 of the Constitution as it was not based rational principle.[352]

Dr. Dahnanjaya and Chandrachud JJ adopted a directly feminist approach. They reasoned that LGBT persons are discriminated against because they defy heteronormative standards of what is normal. Direct and indirect discrimination based on "stereotypical understanding of the role of sex" is indistinguishable from sex-discrimination as prohibited by Article 15 of the Constitution. It was therefore held that s 377 indirectly discriminated against LGBT persons because of their non-conformity to heteronormative standards and hierarchical gender roles.[353]

Moreover, due to the law's arbitrary failure to differentiate between consensual and non-consensual sex and its failure to acknowledge that consensual sex between adults in private does not harm society, both the opinions of Misra CJI and Khanwilkar J, and Dr. Dahnanjaya and Chandrachud JJ concluded that s 377 persecuted LGBT persons by fostering a "culture of silence and stigmatisation" by rendering them social pariahs.[354]

The right to health

In previous judgments, a constitutional right to health was read into the rights to life and dignity. The Court referred to Article 25 UDHR and Article 12 ICESCR, which enshrine the right to a standard of living adequate for the health and well-being of oneself and one's family and the right to enjoyment of the highest attainable standard of physical and mental health, respectively.[355] The Court established that

gender identity. The expression sex used in Articles 15 and 16 is not just limited to biological sex of male and female, but intended to include people who consider themselves neither male nor female."

[350] Navtej Singh Johar, Malhotra J, paras. 15.1-15.2. Malhotra J also cited the Canadian Freedom Charter and the Supreme Court's decisions in *Egan* and *Vriend* which held that sexual orientation is a ground of prohibited discrimination analogous to those listed in Article 15(1) of the Charter.

[351] Navtej Singh Johar, Nariman J, para. 94; Malhotra J, para. 14.6.

[352] Navtej Singh Johar, Nariman J, para. 94; Malhotra J, paras. 14.3 and 14.9.

[353] Navtej Singh Johar, Dr. Dahnanjaya and Chandrachud JJ, paras. 41, 44-47.

[354] Navtej Singh Johar, Misra CJI and Khanwilkar J, paras. 237 and 239; Dr. Dahnanjaya and Chandrachud JJ, para. 52.

[355] Navtej Singh Johar, Dr. Dahnanjaya and Chandrachud JJ, paras. 68-69.

India was under an obligation to provide the LGBT community with healthcare services and information in accordance with CESCR General Comments Nos. 14 and 20, which require States to provide health care services, education and information without discrimination and especially to marginalised members of society, and adhere to the provisions of the ICESCR without discrimination based on, *inter alia*, sexual orientation.[356] However, the reality was that LGBT persons were denied these services because of their "intimate sexual choices". Attaining the highest standard of health requires freedom of choice in one's sexual life. Discrimination and stigma curtail this freedom and diminish the standard of health many enjoy.[357] Furthermore, the criminalisation of consensual same-sex contact increases incidents of unsafe or coercive sex, minimises the dispensation of sound medical advice and education,[358] and hinders efforts to prevent the spread of HIV or treat infected persons. The right to health must necessarily be read with the right to equal protection of the law in order to ensure that State functions are carried ought in ways that respect the equality of all.[359]

With regards to HIV specifically, the Court established that MSM and transgender persons are disproportionately more susceptible to HIV than other groups, and that this susceptibility is closely linked to the criminalisation of consensual same-sex sexual contact.[360] The Court referred to the UNHRC's discussion in *Toonen* of how ss 122 and 123 hindered efforts to prevent and treat HIV/AIDS. It is a combination of the secrecy necessitated by s 377 and stigma held by healthcare providers against LGBT groups curtails effective prevention and treatment programmes.[361]

Freedom of expression

Malhotra J held that expression of one's sexual orientation, which is central to personality and identity, may take many forms, including through consensual sexual conduct. S 377 and resulting institutional discrimination prevent LGBT persons from expressing their sexual orientations and gender identities on the basis of popular morality, which does not pass constitutional muster because of its subjectivity.[362]

Comparative law

The various opinions looked at relevant decisions from the United States,[363] Canada,[364] South Africa,

[356] Navtej Singh Johar, Dr. Dahnanjaya and Chandrachud JJ, paras. 69 and 100-101..
[357] Navtej Singh Johar, Dr. Dahnanjaya and Chandrachud JJ, paras. 70-76.
[358] Navtej Singh Johar, Dr. Dahnanjaya and Chandrachud JJ, para. 81.
[359] Navtej Singh Johar, Dr. Dahnanjaya and Chandrachud JJ, para. 83
[360] Navtej Singh Johar, Dr. Dahnanjaya and Chandrachud JJ, para. 86; Malhotra J, para. 16.3.
[361] Navtej Singh Johar, Dr. Dahnanjaya and Chandrachud JJ, paras. 88-89.
[362] Navtej Singh Johar, Malhotra J, paras. 17.1-17.2.
[363] *United States v Windsor* 570 US 744 (2013), *Obergefell v Hodges* 576 US ___ (2015), *Masterpiece Cakeshop v Colorado Civil Rights Commission* 584 US ___ (2018) and *Lawrence*.
[364] *Vriend*.

the United Kingdom,[365] the Philippines, Trinidad & Tobago,[366] Israel,[367] Fiji, Belize, Hong Kong,[368] Nepal,[369] and the Council of Europe.[370] The Court referred to the conclusion reached in *Toonen* that ss 122 and 123 of the Tasmanian Criminal Code violated Article 26 ICCPR,[371] as well as the discussion in *Dudgeon*, *Norris* and *Modinos* on Article 8 ECHR's limitations tests of necessity and proportionality, especially the *obiter* establishing that popular conceptions of morality alone cannot justify criminalisation of consensual activities between adults.[372] In exploring possible reasons for the existence of s 377, the Court referred to the European Commission's decision in *Dudgeon*, which cited a portion of the Wolfenden Report to the effect that rather than imposing personal standards of morality, laws exist to preserve public order and protect people, especially the vulnerable, from "what is offensive or injurious".[373]

Chapter III.B.7: Kenya

EG & 7 Others v Attorney-General; DKM & 9 Others (Interested Parties); *Katiba Institute and Another* (*Amicus Curiae*) Petition 150 of 2016

The case consisted of two petitions, joined because of their shared challenge of the constitutionality of ss 162(a), 162(c) and 165 of the Kenyan Penal Code.[374] The Petitioner in the first petition, EG was the director of a LGBTIQ-oriented NGO, and acted on his own behalf and on behalf of LGBTIQ persons in Kenya.[375] The Petitioners in the second petition, MO *et al*, were anonymous LGBTIQ persons and two civil society organisations.[376] EG averred that ss 162(a) and (c) and 165, although facially neutral, were enforced primarily against same-sex relations and therefore violated the rights to equality and freedom from discrimination, human dignity, freedom and security of the person, privacy and the right

[365] Navtej Singh Johar, Misra CJI and Khanwilkar J, para. 201, cited the European Commission's decision in *Sutherland v United Kingdom* Application No. 25186/94.
[366] *Jason Jones v Attorney-General of Trinidad & Tobago* Claim No. CV 2017-00720.
[367] *El-Al Israel Airlines Ltd v Jonathan Danielwitz* HCJ 721/94
[368] *Leung TC William Roy v Secretary for Justice*, Civil Appeal No. 317 of 2005).
[369] *Sunil Babu Pant v Nepal Government*, Writ Petition No. 917 of 2007.
[370] *Dudgeon*, *Norris* and *Modinos*; Dr. Dahnanjaya and Chandrachud JJ, para. 120, also cited *Oliari v Italy*, Applications Nos. 18766/11 and 36030/11, in which the ECtHR held that since same-sex couples are just as able to enter into stable and committed relationships as different-sex couples, the absence of laws in Italy providing for formal recognition of these relationships was in violation of Articles 8, 12 and 14 ECHR.
[371] Navtej Singh Johar, Misra CJI and Khanwilkar J, para. 203; Nariman J, para. 42.
[372] Navtej Singh Johar, Misra CJI and Khanwilkar J, para. 204; Nariman J, para. 37
[373] Navtej Singh Johar, Misra CJI and Khanwilkar J, para. 222.
[374] S 162(a) and (c) state: "Any person who–(a) has carnal knowledge of any person against the order of nature; or (b) …; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years…"
S 165 states: "Any male person who, whether in public or in private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or in private, is guilty of a felony and is liable to imprisonment for five years."
[375] EG, para. 1.
[376] EG, paras. 4-12. Ten interested parties filed affidavits, including the Kenyan Christian Professional Forum and the Kenyan Legal and Ethical Issues Network on HIV & AIDS. The Katiba Institute and the Kenyan National Commission on Human Rights intervened as Amicus Curiae.

to health.[377] He also argued that the provisions were unconstitutional for their vagueness and uncertainty.[378] The second petition was on the same terms as the first petition, but also invoked freedom of conscience, religion, belief and opinion and the right to a fair hearing.[379]

EG relied on Article 2(5) and (6) of the Constitution, which incorporates international law and international treaty obligations into Kenyan law, in order to use international human rights law as an interpretive mechanism.[380] He argued that the laws violated provisions of the UDHR, the ICCPR, the ICESCR, the ACHPR corresponding to the constitutional rights they raised, as well as Resolution 275 from the African Commission.[381] The Petitioners also relied on *Dudgeon*, *Norris* and *Toonen* in their

[377] EG, paras 58-60. Articles 27, 28, 29, 31 and 43 of the Constitution, respectively. The provisions state:
"27. **Equality and freedom from discrimination**: (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law; (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms; (3) …; (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth; (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4)...
"28. **Human dignity**: Every person has inherent dignity and the right to have that dignity respected and protected.
"29. **Freedom and security of the person**: Every person has the right to freedom and security of the person, which includes the right not to be—(a) deprived of freedom arbitrarily or without just cause; (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58; (c) subjected to any form of violence from either public or private sources; (d) subjected to torture in any manner, whether physical or psychological; (e) subjected to corporal punishment; or (f) treated or punished in a cruel, inhuman or degrading manner.
"31. **Privacy**: Every person has the right to privacy, which includes the right not to have—(a) their person, home or property searched; (b) their possessions seized; (c) information relating to their family or private affairs unnecessarily required or revealed; or (d) the privacy of their communications infringed.
"43. **Economic and social rights**: (1) Every person has the right—(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care…"
[378] Ibid. These arguments were addressed and dismissed in paras. 270-278. The Court referred to Black's Law Dictionary for definitions of "carnal knowledge", "unnatural offence", "buggery" and "sodomy", and to its own case law for an understanding of what makes carnal knowledge "against the order of nature". It concluded that the existence of definitions meant the criminal provisions were not "vague, ambiguous or uncertain" simply because those definitions were not included in the Penal Code itself.
[379] The Court concluded that the Petitioner's fair trial rights had not been infringed because neither of them was on trial and nor had proved that they had been in a trial where evidence was procured by the State illegally. The argument on the freedom of conscience, religion, belief and opinion was dismissed because the Petitioners had not made submissions on it.
[380] EG, para. 126. Articles 2(5) and (6) state: "2. **Supremacy of the Constitution**: (1)-(4)…; (5) The general rules of international law shall form part of the law of Kenya; (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."
[381] EG, paras 64-65. Specifically, Articles 1,2,3,7,9,12 and 28 UDHR; Articles 2(1), 6(1), 7, 9(1), 17(1) and 26 ICCPR; Articles 2(2), and 12(1) ICESCR; Articles 2, 3, 4, 6, 10, 19 and 28 ACHPR. For example, the Petitioners maintained that the right to freedom and security of the person under Article 29 of the Constitution ought to be construed on the same terms as Article 6 ACHPR, which, according to the African Commission only permits arrests when undertaken by security forces acting normally in a democratic society. The Petitioners argued that a democratic society is not one in which State agents interfere in the private, consensual sexual activities of adults. EG linked right to equal protection and principle of non-discrimination under the Constitution with Articles 2 and 26 ICCPR and Articles 2 and 3 ACHPR. Under the right to health, EG invoked Article 12 ICESCR and Article ACHPR, and argued that ss 162(a) and (c) and 165 violate the State obligation to provide minorities with reasonable access to health services by diminishing access to adequate healthcare. MO *et al* also linked the constitutional right to dignity to its iterations in Article 1 UDHR and Article 4 ACHPR. Freedom and security of the person was linked to Articles 3 and 9 UDHR, Article 6 ACHPR and Resolution 275 from the African Commission.

privacy argument.[382] MO *et al.* cited the 2010 report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health to supplement their argument that ss 162(a) and (c) and 165 prevent LGBTIQ persons from seeking medical attention for fear of being stigmatised and discriminated against.[383] To strengthen their non-discrimination argument, MO *et al* cited the UNHRC's General Comment 18 and the African Commission's *obiter* in *Zimbabwe Human Rights NGO Forum.* All of the Petitioners referred to the Yogyakarta Principles.[384]

The Attorney-General argued that the Constitution's mention of the supremacy of God established the constitutionality of ss 162(a) and (c) and 165. Moreover, decriminalisation would fundamentally alter the State on "cultural, religious, social and legislative" levels. The Attorney-General highlighted the neutrality of the provisions, arguing that they criminalised all non-procreative sex between homosexual and heterosexual couples.[385] Despite the fact that no Petitioner had claimed the right to marry, the Attorney-General went on to argue that the intention of the provisions, as read with Article 45 of the Constitution, which prohibits same-sex marriage, was to maintain the moral uprightness of different-sex relations and marriages.[386] The Attorney-General also invoked Articles 17(3), 27 and 29(7) ACHPR to underscore the fact that the State is the guardian of morality, culture and national security.[387]

The right to equality / non-discrimination

The Court invoked the presumption of constitutionality and established that the burden lay on the Petitioners to establish clearly the unconstitutionality of the laws. The Court also stated that the rule of presumption of constitutionality would operate until "it becomes clear and beyond a reasonable doubt that the legislature has crossed its bounds".[388] The Court then identified three guiding principles under freedom from discrimination: (1) whether there is a legal differentiation between two groups; (2) whether the differentiation "amounts to discrimination"; and (3) "whether the discrimination is unfair".[389] The Court held that "unfair discrimination", the only form of discrimination prohibited by

[382] EG, para. paras. 113, 129 and 153. The second *Amicus Curiae* relied on Article 17 ICCPR and the UNHRC's placement of sexual orientation under the umbrella of "sex" in Article 26 ICCPR.
[383] EG, paras. 147 and 155.
[384] EG, paras. 137 and 143. EG also cited statements from former UN Secretary-General Ban Ki Moon on ending discrimination against LGBT persons.
[385] EG, paras. 177-178.
[386] EG, para. 180. The Attorney-General was of the view that although sexual orientations and gender identities were not criminal in and of themselves, the decriminalisation of consensual same-sex activity would create a "legitimate expectation" in LGBTIQ persons that they are entitled to marriage.
[387] EG, para. 183.
[388] EG, para. 286.
[389] EG, para. 287. As for what discrimination means, the Court relied on *obiter* from the ZACC and *Wills v United Kingdom*, Application No. 36042/97. In the latter case, discrimination was defined as "...a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available members of society".

the Constitution, is "when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalisation".[390] The Court concluded that what the sources revealed was that a legitimate reason and a rational connection to that reason are what prevent discrimination from amounting to unfair discrimination.[391]

The Court characterised the Petitioners' equality challenge as an averment that ss 162(a) and (c) and 165 only target LGBTIQ persons to the exclusion of heterosexual persons. Despite the fact that the short title of s 165 is "Indecent practices between males", the Court held that the use of "any person" in s 162 and "any male person" in s 165 makes it clear that no specific group is targeted by the provisions. The Court concluded that Parliament had "appreciated that the offence… can only be committed by a male person" regardless of his orientation.[392] The Court dismissed MO's argument that the provisions were primarily enforced against LGBTIQ persons because, regardless of submissions he had made about the violence and discrimination to which he was subjected because of his sexual orientation, he had not submitted "credible evidence" to prove these violations.[393]

The right to health

The Court identified it as essential to the enjoyment of other rights.[394] However, this part of the claim was dismissed because the Petitioners and Interested Parties had not adduced evidence to support their claims. More specifically, the Court held that the Petitioners had not proved that they had been denied medical care or had been ill-treated when seeking medical care. Rather, what they did was make "generalised statements without proof".[395]

Freedom and security of the person

Despite establishing that the right exists to "protect the physical integrity and dignity of the individual", the claim was dismissed without explanation from the Court. It merely stated, "...the impugned provisions do not apply exclusively to the Petitioners".[396]

The rights to privacy and dignity

The Court maintained that these were the determinative rights in the Petition.[397] In line with Article 2(5)

[390] EG, para. 288.
[391] EG, paras. 291 and 293.
[392] EG, paras. 295-297.
[393] EG, paras. 298-299.
[394] EG, para. 302.
[395] EG, para. 308.
[396] EG, para. 319-321.
[397] EG, para. 323.

of the Constitution, the Court cited Articles 1, 5 and 12 UDHR, which, respectively, set out the principles of equality and dignity, the right to freedom from torture or cruel, inhuman or degrading treatment, and freedom from interference with one's privacy.[398] The Court also referred to the ACHPR preamble, which entitles all persons to enjoyment of the rights set out therein, and the provisions for equality, respect for life and dignity and prohibition of degradation, torture and cruel, inhuman or degrading treatment for punishment.[399] The Court established the importance of dignity as a principle, linking it to the rights to privacy and equality, and establishing that privacy "fosters human dignity insofar as it protects an individual's entitlement to a 'sphere of private intimacy and autonomy'".[400]

Earlier in the judgment, the Court had established that constitutional provisions cannot be interpreted in isolation but must be approached holistically in order to "effectuate the greater purpose of the instrument".[401] The Constitution "is a mirror reflecting the national soul, the identification of the ideals and aspirations of the nation; articulates the values bonding its people and disciplining its government".[402] Bearing the foregoing in mind, the Court posed the question of how an invalidation of "sodomy" laws would "relate to the values, principles and purposes" of the Constitution. The Court discussed how the Constitution reflects Kenya's history and its "economic, social and cultural realities and aspirations" and should be regarded holistically rather than piece-meal.[403]

The Court identified culture "as the foundation of the nation and as the cumulative civilisation of the Kenyan people". It referred to the constitutional drafting process which resulted in same-sex marriage being prohibited in Article 45(2) of the Constitution.[404] Whether or not the views are majoritarian, the views of Kenyans were reflected in the Constitution and could therefore not be ignored.[405] The Court found it difficult to reconcile the invalidity of ss 162(a) and (c) and 165 with "the spirit, purpose and intention" of Article 45(2).[406] The invalidation of the laws would lead to same-sex intimate cohabitation, whether private or public, formal or informal, and this would flout the "tenor and spirit of the Constitution".[407] Thus, the Court concluded that although it and the Court of Appeal had previously concluded that sexual orientation may be included in the Article 27(4) list of prohibited grounds of

[398] EG, para. 332.
[399] EG, para. 334.
[400] EG, para. 341.
[401] EG, para. 250.
[402] EG, para. 379.
[403] EG, paras. 385-386 and 390.
[404] EG, para. 388 and 390.
[405] EG, para. 402.
[406] EG, para. 395.
[407] EG, para. 396. The Court also mentioned the Marriage Act which recognised long-term cohabitation by unmarried couples. After "observing" that the constitutionality of this law had not been challenged, the Court opined that decriminalising consensual same-sex sexual activity "would indirectly open the door for unions among persons of the same sex".

discrimination, this inclusion depended on the circumstances of each case.[408] While sexual orientation was read into the Constitution in a matter involving freedom of association and the registration of a LGBTIQ-oriented NGO, this would not happen with respect to consensual sexual conduct.[409]

Chapter III.B.8: Botswana

In 2003, the Botswana Court of Appeal dismissed a challenge to the constitutionality of the State's "sodomy" laws in *Kanane*. The Appellant had been accused of committing "unnatural offences" and "indecent practices between males" contrary to ss 164 and 167 of the Botswana Penal Code. The Court of Appeal addressed the provisions before and after their amendment in 1998 and whether they violated the Appellant's right to privacy, discriminated against him on the basis of gender, or violated his freedom of conscience, expression, privacy, assembly and association. The 1998 amendment made s 167 gender-neutral by removing all references to "males". This led to the Court of Appeal opining that unlike the pre-1998 version, the amended version of s 167 was not discriminatory on the basis of gender. The Court of Appeal ultimately dismissed the Appellant's claim, concluding that it was not yet time to invalidate "sodomy" laws as gay men and women had not been shown to be groups requiring constitutional protection.

Letsweletse Motshidiemang v Attorney-General MAHGB-000591-16

The Applicant sought an order from the High Court declaring sections 164(a) and (c) and section 165 of Botswana's Penal Code unconstitutional as they prevented him from expressing love through engagement in the only form of sexual intercourse that he knew.[410] The Applicant averred that the laws violated the constitutional guarantees of non-discrimination, liberty and freedom from inhuman or degrading treatment.[411] The Applicant further argued that the provisions were unconstitutional because they were too vague to establish exactly which conduct was prohibited.[412] LEGABIBO submitted

[408] EG, para. 400.

[409] Ibid. At paras. 401-406, the Court concluded that the explicit wording of Article 45(2), from which the rights to privacy and dignity could not be isolated, made it unnecessary to engage in a limitations analysis under Article 24 and the rest of the Petitioners' claim was dismissed.

[410] Motshidiemang, paras. 26-27. Ss 164(a) and (c) and 165 state: "164. Any person who… (a) has carnal knowledge of any person against the order of nature; or (b) …; or (c) permits any other person to have carnal knowledge of him or her against the order of nature, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years

"165. Any person who attempts to commit any of the offences specified in section 164 is guilty of an offence and is liable to imprisonment for a term not exceeding five years."

The Applicant also challenged the inclusion of the word "private" in s 167 of the Penal Code, which states: "Any person who, whether in public or private, commits any act of gross indecency with another person, or procures another person to commit any act of gross indecency with him or her, or attempts to procure the commission of any such act by any person with himself or herself or with another person, whether in public or private, is guilty of an offence". The Court concluded at para. 223 that "private" had to be severed from the provision as it violated the Applicant's right to privacy.

[411] Motshidiemang, paras. 6, 30.

[412] Motshidiemang, para. 29. The Court addressed the vagueness argument in paras. 94-97. Although neither "carnal knowledge" nor "the order of nature" were defined in the Penal Code, Leburu J's brief jurisprudential analysis revealed that "carnal knowledge" meant "intercourse" and "the order of nature" meant "anal sexual

amicus curiae briefs arguing that although that the prohibition of consensual sex between persons of the same sex was contrary to public interests and public health.[413] The Applicant submitted evidence indicating that social views towards homosexuality had improved.[414] LEGABIBO submitted evidence from a medical sociologist attesting to the violence and structural stigma to which LGBTI persons are subjected, including ss 164(a), 164(c) and 165.[415] The State averred that the criminal provisions were not discriminatory as they applied equally "to all sexual preferences", and that there was no vagueness as the provisions clearly prohibited "anal penetration".[416] Contrary to what had been averred by the Applicant, the State submitted that Batswana were "not yet ready to embrace homosexuality".[417] The Court's opinion was submitted by Leburu J.

Leburu J established the background upon which the human rights implications of ss 164(a), 164(b) and 165 would be assessed by stating that the Constitution is "a living and dynamic charter of progressive human rights".[418] It ought to be interpreted generously and not in a manner that unjustifiably restricts human rights, while also adhering to "the imperatives of the prevailing socio and political context".[419] The Court would therefore reject formalism for contextual interpretation and purposivism and be enjoined to consider treaties to which Botswana was a party. Leburu J stated that domestic laws were not to be interpreted in a manner contrary to the State's international obligations.[420] The Court also considered *Kanane*, upon which the State placed great reliance.[421] The Appellant and LEGABIBO argued that a material change to Batswana social *mores* had occurred since *Kanane*. Leburu J opined that the Court of Appeal had left a window for legislative change.

The right to privacy

Leburu J began by establishing first that the right to privacy is context-based and qualified.[422] It was also held to protect "the liberty of people to make certain crucial decisions regarding their well-being, without coercion, intimidation or interference, from any direction, be it governmental or otherwise". Leburu J held that privacy is inviolable and allows people to express themselves without hindrance,

penetration". These were the definitions adopted by the Court in *Kanane*. The High Court was therefore bound by them and the criminal provisions were not actually vague.

[413] Motshidiemang, para. 16.

[414] Motshidiemang, para. 32.

[415] Motshidiemang, paras. 33-34.

[416] Motshidiemang, paras. 37 and 39.

[417] Motshidiemang, para. 40. From para. 61-69, the State also argued that the Applicant and LEGABIBO ought to petition the Legislature, as the elected representative of the people, and that the judiciary should defer to the legislature on matters of morality, but this argument was shot down after Leburu J interpreted the constitutional provisions on the judiciary's jurisdiction.

[418] Motshidiemang, para. 76.

[419] Motshidiemang, para. 77.

[420] Motshidiemang, paras. 78-79.

[421] Motshidiemang, para. 99.

[422] Motshidiemang, paras. 107, 112.

which is essential to autonomy.[423] The right may be limited in the interests of, *inter alia*, public order, public morality, public health or the rights and freedoms of others, provided the limitation is "reasonably justifiable in a democratic society".[424] For referential purposes, Leburu J noted the right to privacy as it appears in Article 12 UDHR and Article 17 ICCPR.[425]

The Court relied on *obiter* from *Navtej Singh Johar*, which characterised sexual orientation as "an essential attribute of privacy", addressed the spatial and decisional aspects of privacy, and stated that the State ought not to interfere with personal matters surrounding love, relationships and intimacy.[426] Leburu J also cited *obiter* from *National Coalition for Gay and Lesbian Equality* on the "sphere of private intimacy and autonomy" in which people are allowed to establish relationships without undue State interference.[427] Given the foregoing, Leburu J concluded that ss 164(a), 164(c) and 165 violated the Applicant's right to "express his sexuality in private" and that he had "a sphere of private intimacy and autonomy, which is not harmful to any person" given its consensual nature.[428]

The right to equality / non-discrimination

Leburu labelled liberty, equality and dignity a "*triumvirate*" at the core of fundamental rights.[429] Once again *obiter* from *Navtej Singh Johar* was cited, to the effect that sexual autonomy is an important element of liberty, and sexual preferences should be respected in a diverse society, and Leburu J characterised sexual orientation as "innate" and "an important attribute of one's personality and identity" over which people should have "complete autonomy" without undue influence.[430] The Court concluded that the Applicant's liberty had been violated because his ability to express himself sexually was curtailed by criminal proscription.[431] This compromise of the Applicant's sexual expression was held to infringe "his dignity and self-worth", of which his sexual orientation was a part.[432] To emphasise this point about the dignity and equal worth of every person, Leburu J cited Articles 1 to 3 UDHR.[433]

On the matter of discrimination, the Applicant argued that sexual orientation was subsumed under "sex"

[423] Motshidiemang, paras. 112-114.
[424] Motshidiemang, paras. 118-119.
[425] Motshidiemang, para. 120. In para. 121, Leburu J also pointed out that the right to privacy is included in Article 14 Convention on Migrant Workers, Article 16 CRC, Article 10 African Charter on the Rights and Welfare of the Child, Article 4 of the African Union Principles on Freedom of Expression, Article 11 ACHR, Article 5 American Declaration of the Rights and Duties of Man, Articles 16 and 21 Arab Charter on Human Rights, Article 21 ASEAN Human Rights Declaration, and Article 8 ECHR.
[426] Motshidiemang, para. 122, citing *Navtey Singh Johar*, para. 16.2.
[427] Motshidiemang, para. 124. The Court also mentioned the USSC invalidation of "sodomy" laws in *Lawrence*.
[428] Motshidiemang, para. 127.
[429] Motshidiemang, para. 129.
[430] Motshidiemang, paras. 140-141 and 142-143.
[431] Motshidiemang, para. 144.
[432] Motshidiemang, paras. 151-153.
[433] Motshidiemang, para. 151.

in s 3 of the Constitution, which sets out prohibited grounds of discrimination. The Court held that "sex" was "generally wide enough" to include sexual orientation.[434] According to Leburu J, both sex-discrimination and sexual orientation-discrimination are "associable signifiers of similar scope and content", with the former being "of wider scope and application" while the latter is narrower.[435] That sexual orientation is a "subset or component" of "sex" was underscored through reference to the UNHRC's similar conclusion in *Toonen*.[436]

Leburu J agreed with the Applicant that the laws disproportionately affected gay men by criminalising what he described as the only means of sexual expression available to them, adding that they rendered him and people like him "unapprehended felons" and increased stigma against them.[437] Leburu J identified plurality, diversity, inclusivity and tolerance as the markers of a "mature and an enlightened democratic society".[438] Oppressing a minority which expressed what is "merely a variety of human sexuality" and is part of a diverse society cannot be seen as reasonable or justifiable.[439] The Court further stated that the State had not even identified a goal which it pursued.[440]

The Court's proportionality test includes a rational connection to the aim pursued, minimum intrusion of the human rights involved, and proportionality between the means and the ends.[441] The State did not justify its infringement of the Applicant's rights, nor did it submit expert evidence or prove that there was no other way to achieve its aims.[442] As such, the Court had to consider public morality and public interest arguments that were not supported by evidence. Leburu J held that public opinion, although relevant to constitutional matters, is overpowered by the *triumvirate* of liberty, equality and dignity.[443] Moreover, criminalisation of consensual same-sex sexual activity is demonstrably detrimental to LGBT persons, subjecting them to stigma and risking their ostracisation by society. Leburu J held public morality in such cases is really prejudice, and that criminalising consensual sexual activity in private

[434] Motshidiemang, paras. 156-157.
[435] Motshidiemang, para. 161. Leburu J did so through reference to *Vriend* (supra), in which sexual orientation was also subsumed under "sex" as a prohibited ground of discrimination, and an analysis of the Employment (Amendment) Act, which outlaws termination on the basis of sexual orientation.
[436] Motshidiemang, para. 161.
[437] Motshidiemang, para. 170. The Court cited *Sutherland v United Kingdom* (supra) and the updated Yogyakarta Principles. However, *Sutherland*, which involved unequal ages of consent for same-sex sexual activity between men and between women, was struck out by the ECtHR because of the equalisation of ages of consent through the Sexual Offences (Amendment) Act.
[438] Motshidiemang, para. 173. Throughout the judgement, the Court repeatedly emphasised the importance of plurality and diversity in democratic societies.
[439] Motshidiemang, para. 191.
[440] Motshidiemang, para. 192.
[441] Motshidiemang, para. 178. The Court relied on *R v Oakes* (1986) 1 SCR 103, a Canadian case, to identify the stages of the proportionality test in a limitations analysis.
[442] Motshidiemang, paras. 179 and 181.
[443] Motshidiemang, para. 185.

between adults cannot meet the proportionality standard.[444]

Chapter III.C: Analysis of domestic decisions on "sodomy" laws

Chapter III.C.1: International law in the Court decisions that upheld "sodomy" laws

All of the Court decisions that ultimately upheld the validity of "sodomy" laws acknowledged the influence of international and comparative law with varying degrees of brevity. The Indian Supreme Court in *Suresh Kumar Koushal* did not actually mention a single international or foreign domestic decision outside of its summary of the High Court's decision in *Naz Foundation*. Rather, while it acknowledged the potential of such judgments to "shed considerable light" on the "so-called rights of LGBT persons",[445] it ultimately ignored such cases, electing to characterise reliance on foreign judgements as potentially ignorant of the idiosyncratic socio-political, historical, cultural and economic realities in India.

McNally JA in *Banana* cited, but did not name, *Dudgeon* and *Norris* as examples of judicial interventions against "sodomy" laws; one of three established ways of invalidating such laws. The cases were not discussed beyond this quick reference, and *Toonen* was not mentioned at all, possibly because of the focus by the ECtHR and UNHRC on privacy rights, which did not form the basis of the Supreme Court's constitutional analysis. However, not even the *obiter* from *Toonen* discussing the right to equality and principle of non-discrimination was mentioned in the majority opinion, notwithstanding the Chief Justice's heavy reliance on the UNHRC minority opinion in his own minority opinion. The absence of reference to *Toonen* in the majority opinion is notable because it was written in direct response to the human rights considerations included in the minority opinion. If anything, reference to Zimbabwe's international obligations was eschewed for a primarily insular assessment of applicable human rights principles. The majority opinion only looked outwards for persuasive authority when it relied on the USSC decision in *Bowers* to justify retention of the Zimbabwean "sodomy" common law on the basis that "sodomy" laws could still exist in democratic societies.

The Kenyan High Court, on the other hand, did address comparative and international law more extensively than the other Courts. However, despite the Petitioners' exhaustive reference to Kenya's international law obligations and the Attorney-General's reliance on Articles 17(3), 27 and 29 ACHPR, the judicial decision did not canvas international instruments beyond non-binding provisions of the UDHR and the Preamble of the ACHPR, which both served as foundation for the privacy and dignity analyses. The Court did readily accept the persuasive value of foreign domestic judgments, cautiously attributing deliberative value to it so long as effect was given to the values and spirit of the Constitution.

[444] Motshidiemang, paras. 189 and 206.
[445] Suresh Kumar Koushal, para. 52.

Aside from considering the domestic decisions that preceded it, from *National Coalition for Gay and Lesbian Equality* to *Navtej Singh Johar*, the Court also considered *Chapin & Charpentier v France*.[446] In the last case, the ECtHR held that there is no right to marriage for same-sex couples guaranteed by the ECHR and that the full extension of the right should be reserved to States. Ultimately, the Court did no more than summarise the cases raised by the litigants in their arguments. It did not assess their relevance to the Kenyan "sodomy" laws; either as a basis for understanding the scope of the rights to privacy, health or equality or how they interact with "sodomy" laws of a specific nature, or as proof of a global trend of decriminalisation through litigation.[447]

Chapter III.C.2: International law in the Court decisions that invalidated "sodomy" laws

There is a broad spectrum describing the role that each Court ascribes to international law in domestic human rights disputes. It ranges from regarding it as an authoritative template to be followed closely to regarding it as a merely corroborative element in the persuasive global trend of decriminalising consensual same-sex relations. On the former end of the spectrum are the High Court of Fiji and the Supreme Court of Belize. In *McCoskar & Nadan,* Winter J concluded that constitutional rights would be interpreted not only according to ICCPR provisions, but also according to the UNHRC's interpretations of these provisions notwithstanding the fact that the case had appeared before the Court 13 years before Fiji acceded to the ICCPR. This position not only cast UNHRC pronouncements in a more authoritative light than they would assume for actual State Parties to the ICCPR, but also apparently undermined a foundational concept of international law: consent-based law-making. Moreover, the High Court's discussion of a margin of appreciation in upholding public morality appears to have been plucked straight out of ECtHR jurisprudence, as it is difficult to reconcile with the notion that judicial authorities are just as capable as legislative authorities of determining what prevailing social *mores* are in their own State.

In a similar manner, the Supreme Court of Belize held that the national Constitution owed its provenance to the ECHR, which led to the Chief Justice relying more on *Dudgeon*, *Norris* and *Modinos* than on *Toonen* in the constitutional analysis of the right to privacy. Although the Chief Justice did not explain what he meant with this statement, a possible reason is that the second sentence in s 14(1) of the Belizean Constitution, which enshrines the right to privacy, essentially rewords Article 8(1) ECHR in that it dictates that the private and family life, home and personal correspondence of individuals shall be respected. Nevertheless, it is rather unusual that the Supreme Court did not refer to decisions from the Inter-American system, given the fact that Belize is an OAS Member.

[446] Application No 40183/07.

[447] The Court did, however, rely on US and Tanzanian cases to derive principles for the interpretation of constitutional provisions and delimit the scope of judicial capacity to invalidate unconstitutional laws.

Additionally, the fact that Belize acceded to the ICCPR in 1996[448] was relied on by the Chief Justice to conclude that not only would ICCPR provisions influence interpretation of constitutional rights, but so too would the UNHRC's interpretations of the instrument.[449] Thus, the Supreme Court of Belize concluded, without further explanation, that sexual orientation is included in "sex" under s 16(3) of the Constitution. In the same way that such an unsubstantiated conclusion was problematic when reached by the UNHRC, this assertion by the Belize Supreme Court, without further elaboration, may complicate future cases on non-discrimination in relation to SOGIESC issues, depending on the nature of the cases involved. Indeed, if ECtHR jurisprudence is any indication, simply because it has been determined that same-sex attracted persons may legally engage in relations and relationships does not mean that, on the first try, it will be determined that they can also adopt children, receive survivor's pension benefits or marry.

On the other end of the spectrum is the United States and South Africa. Justice Kennedy in *Lawrence* held that the USSC in *Bowers* failed to take account of the States that had decriminalised consensual same-sex relations by 1986. The USSC in *Lawrence* was convinced to consider the ECtHR decisions in *Dudgeon*, *Norris* and *Modinos* in part by the *amicus curiae* brief from Mary Robinson, who submitted that the validity of "sodomy" laws ought not to be determined *in vacuo*. She also argued for the consideration of foreign and international decisions which upheld the spatial, decisional and relational aspects of the right to privacy.[450] It can certainly be argued that recourse to international and comparative law bolstered the USSC's assessment of its own jurisprudence. In a similar vein, Ackermann J for the ZACC included *Toonen*, *Dudgeon*, *Norris* and *Modinos* in the pattern of decriminalisation in "other open and democratic societies based on human dignity, equality and freedom". In fact, Ackermann J established that a cautionary approach must be taken when considering ECtHR decisions because the margin of appreciation doctrine may result in rights limitations being declared compliant with human rights in the Council of Europe where the same conclusion would not be reached in the South African context. Nevertheless, *Dudgeon* and *Norris* were considered useful for their demonstration that as compared to the time when the 1861 and 1885 laws were promulgated, it was no longer necessary to regulate the consensual behaviour of same-sex-attracted persons.

[448] UNOHCHR, UN Treaty Body Database. Available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=60&Lang=EN [Accessed 20 July 2019].

[449] It is worth noting that although Belize acceded to the ICCPR 15 years after the adoption of its Constitution, the first sentence of s 14(1) on the right to privacy is a mirror of Article 17(1) ICCPR.

[450] *Lawrence v Texas* 538 US 558 (2003), Brief *Amici Curiae* of Mary Robinson, Amnesty International USA, Human Rights Watch, Interights, The Lawyers Committee for Human Rights, and Minnesota Advocates for Human Rights in Support of Petitioners, 8-10.

Chapter III.C.3: The role of comparative law

What is perhaps more influential than international law in constitutional enquiries into "sodomy" laws is comparative law. Almost every Court presiding over such matters referred to foreign domestic judgments of the same or similar nature. The only exception is *Suresh Kumar Koushal*, which did not consider any foreign decisions. Although reference to foreign judgments in *Lawrence* was minimal, Justice Kennedy did refer to "other nations" which have "taken action consistent with an affirmation of the protected rights of homosexual adults to engage in intimate, consensual conduct". The Supreme Court Justice cited portions of Mary Robinson's *amicus curiae* brief that discussed *National Coalition for Gay and Lesbian Equality*.[451]

If anything, as the years have progressed, decisions on the human rights compliance of "sodomy" may be considered incomplete without extensive comparative law analyses. Even in the early years, *National Coalition for Gay and Lesbian Equality* and *Banana* cited *Bowers*, for the purposes of distinguishing the case from the one before it in the case of the ZACC, and for finding common ground with it in the case of the ZWSC majority. *National Coalition for Gay and Lesbian Equality* may actually be considered the *locus classicus* of these cases, not only because it was the first domestic legal decision in the English-speaking world, but also because of the continued relevance of its framing of the right to privacy in its spatial, decisional and relational aspects and its discussion of the effects of "sodomy" laws on the right to equality, the latter of which is almost totally absent from the decision's international law counterparts. In fact, so influential is *National Coalition for Gay and Lesbian Equality* that the Court in *McCoskar & Nadan* liberally borrowed language from it.[452]

Chapter III.C.4: The legacy of domestic decisions

Domestic decisions have steadily built on human rights law applicable to consensual same-sex relations established by international law. These developments include:

[451] The brief also discussed the Colombian Constitutional Court's decision in *Sentencia No. C-098/96*, which established the principle of decisional privacy and the importance of sexual self-determination to the right to personality.

[452] In *National Coalition for Gay and Lesbian Equality*, para. 32 (when discussing the scope of the right to privacy), Ackermann J stated: "If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy." Contrast with Winter J's statements in *McCoskar & Nadan*, 11: "If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct risks relationships, risks the durability of our compact with the State and will be a breach of our privacy." Similarly, at para. 39 (when discussing the point that conservative/religious opinions about sexual expression cannot constitute constitutionally justifiable limitations of the rights of gay men), Ackermann J opined: "There is nothing in the jurisprudence of other open and democratic societies based on human dignity, equality and freedom which would lead me to a different conclusion. In fact, on balance, they support such a conclusion. In many of these countries there has been a definite trend towards decriminalisation." Contrast with Winter J's sentiments at 11: "There is nothing in the jurisprudence of other open and democratic societies based on human dignity equality [sic] and freedom which would lead me to a different conclusion. In many of these countries there has been a definite trend towards decriminalisation of consensual adult homosexual sodomy."

(1) Expanding the right to privacy to include relational aspects, thus emphasising that the right in relation to "sodomy" laws is about more than being able to choose freely the fellow adult with whom to have consensual sex behind closed doors. It is about realising the personal fulfilment that comes with forgiving intimate connections with others and building committed, stable relationships with them.

(2) Explaining the ways in which discrimination on the basis of sexual orientation qualifies as sex-discrimination, which was not explained by the UNHRC in *Toonen*.
    (a) The Indian Supreme Court opined in *NALSA v Union of India* that "sex" in Article 15 of the Indian Constitution includes sexual orientation and gender identity. Based on this and *obiter* from *Toonen*, Malhotra J in *Navtej Singh Johar* held that discrimination on the basis of sexual orientation is akin to discrimination on the basis of sex, race and colour because of its capacity to undermine personal autonomy.
    (b) Dr. Dahnanjaya and Chandrachud JJ in *Navtej Singh Johar* focussed on the effects of sex-discrimination, which is the enforcement of gender roles that perpetuate the subordination of women. They concluded that since SOGIESC diverse groups are persecuted because of their apparent defiance of gender roles, discrimination against them constitutes sex-discrimination.
    (c) The Botswana High Court in *Motshidiemang* held that "sex" in s 3 of the Constitution of Botswana includes sexual orientation because both are "associable signifiers of similar scope and content" and because its jurisprudence has established that the framers of the Constitution did not intend to limit the types of vulnerable groups deserving constitutional protection at the time of the Constitution's adoption.[453]

(3) Addressing the "recloseting" concerns that arise in relation to the right to privacy. Dr. Dahnanjaya and Chandrachud JJ in Navtej Singh Johar opined that:
    (a) "confronting the closet" requires that the right to privacy encompass the ability of SOGIESC diverse groups to occupy and navigate freely through public spaces, unencumbered by heteronormative "markers" of desire and identity.[454] This is especially important because of what has been described as "ambient heterosexism" public spaces that leaves SOGIESC diverse groups more susceptible to harassment in those spaces.[455]

[453] Motshidiemang, paras. 158-161. The Court also cited a 2010 amendment to the Employment Act, which prohibited discrimination on the basis of sexual orientation, and concluded that this law dove-tailed from the constitutional prohibition of sex-discrimination.
[454] Navtej Singh Johar, Dr. Dahnanjaya and Chandrachud JJ, para. 60, citing Zaid Al Baset "Section 377 and the Myth of Heterosexuality" (2012) Jindal Global Law Review, Vol. 4, Issue 1, 103.
[455] Navtej Singh Johar, Dr. Dahnanjaya and Chandrachud JJ, para. 62, citing Zaid Al Baset (supra), 100.

(b) it is important to remember that many members of SOGIESC diverse groups do not possess "private" spaces, not even at the family home, where heteronormativity will likely force them to hide their orientations or identities.[456]

(4) Elaborating on the public health implications of "sodomy" laws and thereby establishing that the social stigma caused/facilitated/exacerbated by those laws contributes to violations of health rights. In doing so, Dr. Dahnanjaya and Chandrachud JJ in Navtej Singh Johar relied on international law, especially the ICESCR and CESCR General Comment No. 14.

(5) Elaborating on the impact of "sodomy" laws on human dignity, although the capacity of the ECtHR and UNHRC to do so is admittedly limited by the fact that there is no free-standing right to dignity in the ECHR or ICCPR.

(6) Addressing the role of religion, and to a lesser extent, culture, in morality arguments. Of course, the domestic Courts had greater latitude to explore the contours and limitations of such arguments because of their familiarity with national contexts. This is a familiarity which the ECtHR has repeatedly emphasises it does not have, hence the margin of appreciation doctrine.

Chapter IV: Back to the Zimbabwean context - A series of open-ended questions

Chapter IV.A: Introduction

Leburu J opined in *Motshidiemang* that the global trend of decriminalisation of consensual sex between same-sex attracted persons is attributable to ""the inherent recognition of such laws as being discriminatory, invasive of personal dignity, privacy, autonomy, liberty and lastly, the absence of compelling public interest to intrude and regulate private sexual expression and intimacy between consenting adults".[457] From the foregoing analyses of domestic judgments assessing the constitutional validity of "sodomy" laws, the human rights in the Zimbabwean Constitution which may be invoked to challenge the validity of s 73(1) are: human dignity (s 51); equality and non-discrimination (s 56); privacy (s 57); and health care (s 76).[458] As the international and comparative law analyses have shown, neither of these rights is entirely straightforward. Moreover, aside from considering the potential of these individual rights to invalidate s 73(1) of the Criminal Law (Codification and Reform) Act, there is the matter of issues like cultural relativism and continent-wide consensus on SOGIESC matters, which may significantly affect the scope of these rights and how or whether they are applied.

[456] Navtej Singh Johar, Dr. Dahnanjaya and Chandrachud JJ, para. 61.
[457] Motshidiemang, paras. 56-57.
[458] Although human rights freedom of expression, freedom from inhuman or degrading treatment, and freedom and security of the person were discussed in *Navtej Singh Johar* and *EG & Ors*, these rights are currently too underdeveloped in both international and comparative law to constitute viable challenges to "sodomy" laws.

Chapter IV.B: The individual rights

Chapter IV.B.1: The right to dignity

In the Preambles UDHR, ICCPR and ICESCR, dignity is established as foundational to "freedom, justice and peace in the world". Article 1 UDHR proclaims that every person is "born free and equal in dignity" and the Preambles ICCPR and ICESCR go on to identify inherent dignity as the sources of "equal and inalienable rights". Article 5 ACHPR upholds the right to respect for one's dignity in the same clause as proscriptions of, *inter alia*, torture, slavery and exploitative or degrading treatment. Article 5 ACHR enjoins State Parties to respect the inherent dignity of all persons deprived of their liberty, and Article 11 on the right to privacy dictates that every person has the right to have their honour respected and dignity recognised. Notwithstanding affirmations of the importance of the importance of dignity, as both a concept and right, its meaning and scope are difficult to ascertain because of the variety of philosophies underpinning it and how it has been used on various *fora*.[459]

The right to dignity as it appears in the Constitutions of South Africa, Kenya and Zimbabwe acknowledges the inherent dignity of every person and dictates that every person has the right to have their dignity "respected and protected".[460] Ackermann J in *National Coalition for Gay and Lesbian Equality* identified the right to dignity as "a cornerstone" of the South African Constitution.[461] The Nairobi High Court in *EG & Ors* relied on different South African case law establishing dignity as an important founding value which acknowledges "the intrinsic worth of human beings", entitling them "to be treated as worthy of respect and concern".[462] The ZWCC has referred to the principle as a foundational "interpretive value" without which it is impossible to define what it is to be human.[463] Constitutionally, in Zimbabwe, dignity is an absolute right which may not be limited under any circumstances.[464]

The ZWCC's insistence on upholding the inherent dignity of human beings, regardless of their "social, economic or political status",[465] is, at the very least, favourable to SOGIESC diverse groups who may emphasise their being forced to live as "unapprehended felons" by virtue of the existence of the "sodomy" law. However, while hope resides in the inclusion of the right to dignity, which was absent in the 1980 Constitution, it cannot be forgotten that the right to dignity carries arguably the same weight

[459] Roger Brownsword "Human dignity from a legal perspective" in Marcus Düwell, Jens Braarvig, Roger Brownsword, Dietmar Mieth (eds) *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (2014), 2-3; Govert Den Hartogh "Is human dignity the ground of human rights?" in Marcus Düwell *et al* (supra), 201-202.

[460] S 51 Constitution of Zimbabwe, 2013; s 10 Constitution of South Africa, 1996; Article 28, Constitution of Kenya, 1966.

[461] National Coalition, para. 28.

[462] EG, para. 337, citing *Makwanyane*, para. 328.

[463] S v Chokuramba CCZ 10/19.

[464] S 86(3) Constitution of Zimbabwe, 2013.

[465] S v Chokuramba CCZ 10/19.

in Kenyan jurisprudence, but was insufficient to invalidate ss 162(a) and (c) and 165 of the Kenyan Penal Code, either as a standalone right or as an interpretive principle because of the High Court's emphasis on cultural values and the implications of Article 45(2) of the Kenyan Constitution, which proscribes same-sex marriage. In this sense, it is important to remember that the discrepancy between the ways in which the Kenyan and South African Courts interpreted the right to equality through the lens of human dignity was inevitable because of the South African Constitution's prohibition of discrimination based on sexual orientation, which is absent in Kenya. Indeed, Ackermann J pointed out in *National Coalition for Gay and Lesbian Equality* that this specific inclusion of sexual orientation as a prohibited ground of discrimination is what set South Africa apart from other States which also had enforceable "sodomy" laws.[466] Since the Zimbabwean Constitution includes similar emphasis on cultural values and restriction of marriage rights, it is very possible that a Zimbabwean decision would also consider the right to dignity, but align itself with the Kenyan High Court.

Chapter IV.B.2: The right to privacy

The right in the Constitution only explicitly prohibits the entry, search and seizure of possessions and other property, the home and the person without permission, and the disclosure of personal communications and health conditions. Of the seven other States discussed in this thesis, Botswana, Kenya and South Africa have privacy rights provisions that are worded similarly to that in the Zimbabwean Constitution.[467] This is important because the privacy invoked in legal challenges against "sodomy" laws does not pertain to physical possessions, nor does it rely on unlawful searches, seizures or entries into the home or other premises. Indeed, one of the most important aspects of these legal challenges is that it is the very existence of "sodomy" laws, not whether anyone has been questioned, searched, investigated or arrested in terms thereof, which constitutes a human rights violation.

Through domestic development of international human rights law principles, privacy rights in relation to consensual same-sex activities have been established as relating to the spatial, decisional and relational senses of self. It therefore matters how Zimbabwean Courts have interpreted or will interpret this right. Thus far, the right to privacy has been described as entitling every person "not to be subjected to scrutiny of his or her personal life or business",[468] which implies both spatial and decisional aspects of privacy. The right is yet to be interpreted to encompass relational privacy. Although this aspect of

[466] National Coalition for Gay and Lesbian Equality, para. 56.

[467] The right to privacy was read into the Indian Constitution through interpretations of the rights to life and freedom. The right to respect for private life in *Lawrence* was derived from the right to liberty in the Due Process Clause of the United States Constitution's 14th Amendment. The Clause dictates that persons shall not be deprived of their "life, liberty, or property, without due process of law". The right to privacy in the Fijian Constitution applies to the confidentiality of personal communications and information, as well as to respect for private and family life. The right to privacy in the Belizean Constitution mirrors both Article 17(1) ICCPR and Article 8(1) ECHR.

[468] Netone Cellular (Pvt) Ltd & Anor v Econet Wireless (Pvt) Ltd & Anor, SC 47/18.

privacy was absent in the ultimately successful ECtHR and UNHRC decisions, it was also absent from *Bowers* and *EG & Ors*, which stymied the human rights of same-sex attracted persons. It may therefore be advisable to await further development of the right to privacy in constitutional jurisprudence.

Chapter IV.B.3: Equality and non-discrimination

Like dignity, the principle of non-discrimination is pervasive and affects every other human right which could be invoked by litigants challenging the constitutionality of s 73(1). We are equal to each other because we are human beings, not because we abide by social norms delimiting what is "wrong" or "right".[469] The principles of equality and non-discrimination necessarily reject the domination of one group by another. This rejection contributed to the Indian Supreme Court overturning *Suresh Kumar Koushal*, the USSC overturning *Bowers* and the Botswana High Court overturning *Kanane*.

The options open to potential litigants in Zimbabwe are either to argue that sexual orientation falls under "sex" in s 56(3) of the Constitution, or that it is analogous to the grounds included in the provision. As discussed in Chapter III.C, lines of argument in respect of the first option are many but may be rejected by the Zimbabwean judiciary all the same because of the expansive, *pro homine* reasoning required to apply them, which a conservative Court may be reluctant to adopt. In respect of the latter option, it may be argued that the phrase "such grounds as" in s 56(3) is comparable to "other status" in international and regional instruments, and therefore has the capacity to include "sexual orientation". However, judicial reasoning that focuses on Zimbabwe's cultural and social conservatism could result in the judiciary refraining from considering sexual orientation an analogous ground, as was done in Kenya, when the High Court held that the State's culture and social *mores* necessitated the exclusion of sexual orientation from Article 27(4) of the Constitution in sexual matters. Even when some iterations of equality and non-discrimination are considered in "sodomy" law cases, the end result may still be an invalidation of human rights principles rather than the invalidation of "sodomy" laws. Indeed, the ZWSC majority in *Banana* concluded that even if the discrimination complained of by the Appellant were of the type prohibited by the Constitution, such discrimination was permissible because of Zimbabwe's social conservatism in sexual matters.

To draw further similarities between Zimbabwe and Kenya, both have judicial history of extending some legal protection to SOGIESC diverse groups. As indicated in Chapter I of this thesis, the Labour Court of Zimbabwe established that people cannot have their employment terminated on the basis of their sexual orientation. Similarly, in 2013, the High Court of Kenya issued a judgment in *Eric Gitari v Non-Governmental Organisations Coordination Board & 4 Others,* upholding the freedom of association of a Petitioner whose attempts to register a SOGIESC-oriented NGO had been denied by

[469] Martha C Nussbaum *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (2010), 34.

the national NGO Coordination Board. The Court relied on the UDHR, the ICCPR, the ACHPR and on ACtHPR jurisprudence to establish that freedom of association is a universally accepted right the enjoyment of which does not rely on a person's sexual orientation.[470] The Court established that if a State is a representative democracy and has adopted a Constitution, it is precluded from making determinations on which "convictions and moral judgments are tolerable".[471] The Court also held that the rejection of the Petitioner's application was discriminatory because, despite the fact that sexual orientation is not included in the prohibited grounds of discrimination under Article 27(4) of the Constitution, a holistic interpretation predicated on the values of dignity, equality and non-discrimination, which run through the entire Constitution, made it clear that discrimination on the basis of sexual orientation is against constitutional values.[472]

The fact that the High Court completely disregarded these principles of equality, dignity and non-discrimination 6 years later is only surprising at first glance. In *Eric Gitari*, the Court discussed "sodomy" laws, pointing out that they do not criminalise identity or association based on identity. Rather, they only criminalise acts "against the order of nature" and are therefore constitutionally valid. The idea that there are only certain rights to which SOGIESC diverse groups are entitled is not a foreign concept. The African Commission has thus far only expressed the view that actual or imputed members of these groups should not be raped, subjected to torture or degrading, cruel or inhuman treatment, or be murdered extra-judicially; a standard that falls shockingly short of even the minimum standard of respect for same-sex attracted persons established in *Dudgeon*, *Norris*, *Modinos* and *Toonen*.[473]

There is simply something about sex and relationships that compels judicial bodies to change their opinions on human rights principles and how they are to be interpreted and applied. If equality, dignity and non-discrimination inform the entire Constitution, surely they must also inform the rights of same-sex attracted persons as far as their ability to engage in mutually fulfilling intimate relations and

[470] *Eric Gitari v Non-Governmental Organisations Coordination Board & 4 Others* [2015] eKLR (24 April 2015), paras. 77-86.
[471] Ibid, paras. 88-89. The Court also opined at para. 121 that even strong moral and religious views cannot limit human rights because they are not laws.
[472] Ibid, paras. 131-137.
[473] Similarly, ECtHR jurisprudence reveals that the same approach has also been taken in the European human rights system, although it must be noted that human rights protections withheld in early cases are usually extended in later cases, depending on consensus across the Council of Europe and the Court's approach to the margin of appreciation in particular cases. For example, in *Mata Estevez v Spain*, Application No. 56501/00, the ECtHR held that long-term emotional and sexual same-sex relationships constituted private life under Article 8 ECHR, but not family life. This position was reversed 10 years later in *PB and JS v Austria*, Application No. 18984/10, given the fact that States in the Council of Europe had demonstrated a trend of formally recognising same-sex relationships. Similarly, whereas the ECtHR extended a wide margin of appreciation to the State in *Fretté* in determining whether same-sex attracted persons could adopt children as single parents, it held in *EB v France*, Application No. 43546/02 that where there is differential treatment on the basis of sexual orientation, the margin of appreciation is narrow and the State must establish "particularly convincing and weighty reasons" to justify the differentiation.

relationships is concerned. Even if we take provisions like Article 45(2) of the Kenyan Constitution into account, the question is begged: If freedom of association can be separated from consensual same-sex relations and relationships, why can consensual same-sex relations not be separated from marriage? The Petitioners in *EG & Ors* took pains to make this exact point, but their arguments were totally ignored. The Kenyan High Court's decision was an overly cautious "floodgates" argument that refused to give an inch for fear that same-sex attracted persons would take a mile in the form of demanding equal marriage rights with different-sex attracted persons. It is not at all possible to give effect to the living nature of a Constitution if Courts insist on social, political and cultural inertia. As undesirable as it is to have human rights advance at a glacial pace dictated by the evolution of popular sentiment, this slow advance is preferable to no advancement at all. What is most worrying is the parallels between the Kenyan and Zimbabwean legal situations. It is far too uncertain which would win between the combination of tradition, religion and s 78(3) of the Constitution, on the one hand, and equality, dignity, non-discrimination on the other.

Chapter IV.B.4: The right to healthcare

This right is yet to be developed in *fora* other than India and the CESCR, the General Comments of which the Supreme Court heavily relied on to substantiate its reasoning. There is a difference between healthcare rights as they appear in Article 12 ICESCR and Article 16 ACHPR, which, respectively, uphold the right to the highest and best attainable standard of physical and mental health, on the one hand and s 76 of the Constitution, which upholds the right to access to basic health care services. Both the CESCR and African Commission have established that health rights under their respective instruments are to be enjoyed by rights-holders without discrimination, with the African Commission going so far as to say "without discrimination of any kind".[474] At present, there is no jurisprudence indicating whether the same principles would apply in Zimbabwe, especially when viewed through the lens of criminalisation as a form of human rights violation.

Chapter IV.C: Other considerations

Chapter IV.C.1: The dangers of consensus-based decision making

It has been posited that Dudgeon's claim was successful was because there were government documents and a trend of decriminalisation supporting the ECtHR's decision.[475] Indeed, in matters concerning SOGIESC issues, the ECtHR does demonstrate a propensity towards consensus-based decision-making. It has also be suggested that Toonen's claim before the UNHRC was successful because the issue of public morality was addressed in the context of a State Party which had not only repealed the "sodomy" laws in most of its territories, but had also extended other human rights protections to SOGIESC diverse

[474] *Purohit & Another v The Gambia*, Communication No. 241/01, para. 84.
[475] Michael T McLoughlin (supra), para. 105.

groups. In other words, the outcome of the communication may have been different were the UNHRC faced with a State Party in which there was "strong opposition to homosexuality and a homogenous moral and legal code".[476]

While comparative law analyses are an almost inescapable element of domestic judgements on the constitutional validity of "sodomy" laws, the notion of the realisation of the human rights of SOGIESC diverse groups relying on consensus from other States could prove dangerous to potential litigants in Zimbabwe because Zimbabwe is surrounded by other States which not only still have extant "sodomy" laws on the books, but actively target SOGIESC diverse groups under the guise of enforcing those laws for public interest or morality reasons. In fact, Africa has experienced two conflicting waves of decriminalisation and criminalisation and/or the creation of harsher sentences for existing crimes. Within the same ten-year span: Mozambique's Parliament decriminalised consensual same-sex relations;[477] the Gaborone High Court invalidated Botswana's "sodomy" laws;[478] consensual same-sex relations were criminalised in Burundi;[479] the Ugandan Parliament made an unsuccessful attempt to promulgate the Anti-Homosexuality Bill;[480] the Nigerian President signed the draconian Same-Sex Marriage (Prohibition) Act into law;[481] and the Nairobi High Court upheld the constitutional validity of Kenyan "sodomy" laws.[482] Regardless of the positive strides that have been made to repeal "sodomy" laws, regressive political and judicial action in other parts of the continent is a looming spectre potentially encumbering progress in Zimbabwe.

Chapter IV.C.2: Are the rights of SOGIESC diverse groups universal or culturally relative?

An inescapable obstacle to the pursuit of human rights protections for SOGIESC diverse groups is the vehement opposition to such human rights protections on the basis that they are "unAfrican". Social

[476] Frederick Cowell and Angelina Milon "Decriminalisation of Sexual Orientation through the Universal Periodic Review" (2012) *Human Rights Law Review*, Vol. 12, Issue 2, 343-344.

[477] BBC "Mozambique decriminalises gay and lesbian relationships" (1 July 2015). Available at https://www.bbc.com/news/world-africa-33342963 [Accessed 9 August 2019].

[478] Human Dignity Trust "High Court strikes down discriminatory laws in huge win for human rights of LGBT people in Botswana and beyond" (11 June 2019). Available at https://www.humandignitytrust.org/news/high-court-decision-huge-win-for-human-rights-of-lgbt-people-in-botswana-and-beyond/ [Accessed 9 August 2019].

[479] Human Rights Watch "Burundi: Gays and Lesbians Face Increasing Persecution" (29 July 2009). Available at https://www.hrw.org/news/2009/07/29/burundi-gays-and-lesbians-face-increasing-persecution [Accessed 9 August 2019].

[480] Faith Karimi and Nick Thompson, CNN "Uganda's President Museveni signs controversial anti-gay bill into law" (25 February 2014). Available at https://edition.cnn.com/2014/02/24/world/africa/uganda-anti-gay-bill [Accessed 9 August 2019]; BBC "Uganda court annuls anti-homosexuality law" (1 August 2014). Available at https://www.bbc.com/news/world-africa-28605400 [Accessed 9 August 2019].

[481] Human Rights Watch "Nigeria: Harsh law's severe impact on LGBT community" (20 October 2016). Available at https://www.hrw.org/news/2016/10/20/nigeria-harsh-laws-severe-impact-lgbt-community [Accessed 9 August 2019].

[482] Human Rights Watch "Kenya: Court upholds archaic anti-homosexuality laws" (24 May 2019). Available at https://www.hrw.org/news/2019/05/24/kenya-court-upholds-archaic-anti-homosexuality-laws-0 [Accessed 9 August 2019].

values and views on what is right or wrong are predicated on religious ideology, and the general religious and traditional sentiments expressed in Zimbabwe are to the effect sex is intended for procreation, which renders "homosexuality" is immoral.[483] Unfortunately, the irony of upholding "sodomy" laws brought to the State by foreign colonial powers as manifestations of African values, and relying on religion imposed by those same foreign colonial powers as a standard for sexual morality, is lost on far too many. Zimbabwe's apparent social conservatism on the subject of sex is what led the ZWSC to uphold the constitutionality of the "sodomy" common law in 2000. Would Zimbabwe's social conservatism justify the continued existence of s 73(1) of the Criminal Law (Codification and Reform) Act?

The UN upholds the universality, indivisibility, interdependence and interrelatedness of human rights. In the Vienna Declaration and Programme of Action, the UN called on all States to address human rights "on equal footing" and "with the same emphasis". While "national and regional particularities" predicated on culture and religion were acknowledged, the UN advised States of their obligation to promote and protect all human rights "regardless of their political, economic and cultural systems".[484] The ACHPR, in its own right, underscores the importance of cultural and traditional values. Article 17(3) makes it the duty of the State to promote and protect "moral and traditional values protected by the community". Article 27 imposes personal duties on rights-holders to their family, society, the State and the larger community, and to exercise their rights with due regard to the rights of others, "collective security, morality and common interest".[485] Article 29 articulates more duties for the individual, including "to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral wellbeing of society".[486] It must be noted, however, that the capacity for these provisions to limit human rights set out in the ACHPR has been limited by the African Commission, which has held that only Article 27(2) sets ought "legitimate reasons" for rights limitations in the Charter. Such limitations "must be strictly proportionate with and absolutely necessary for the

[483] ICJ, *Sexual Orientation, Gender Identity and International Human Rights Law, Practitioners Guide No. 4* (2009), 5; Tabona Shoko (2010) "Worse than dogs and pigs?" Attitudes Toward Homosexual Practice in Zimbabwe, *Journal of Homosexuality*, Vol. 57, Issue 5, 635, 642 and 645.
[484] UNGA, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, para. 5.
[485] According to Kofi Quashigah "Scope of individual duties under the African Charter" in Manisuli Ssenyonjo (ed) *The African Regional Human Rights System: 30 Years after the African Charter on Human and People's Rights* (2012), 121, what is notable about Article 27(2) is its exclusion of the ending phrase "in a democratic society", which appears in its counterpart in the ACHR, Article 32(2). The absence is relevant because the ending phrase necessitates consideration of applicable standards in democratic societies when setting human rights limitations. However, Quashigah goes on to state that the African Commission has "endeavoured to infuse… those same values inherent in the phrase" into Article 27(2).
[486] Article 29(7) ACHPR.

advantages" that result from the limitations, and they "may not erode a right such that the right itself becomes illusory".[487]

Domestically, alongside the inherent dignity and recognition of the equality of all persons and their fundamental rights and freedoms, s 3 of the Zimbabwean Constitution identifies "the nation's diverse cultural, religious and traditional values" as a founding principle of the State. Moreover, s 86(2)(b) permits limitations of human rights, excluding the right to human dignity, for public morality reasons. Culture and tradition are therefore firmly entrenched in not only political dialogue in Zimbabwe and Africa at large, but also in the human rights language employed by their institutions. Culture and tradition also necessarily inform the content of "public morality". This gives the constitutional limitations mechanism an added layer of danger because it is shored up by concepts which may ultimately prove insurmountable in potential attempts to invalidate Zimbabwe's "sodomy" law through litigation. In the context of this thesis, the following questions are therefore begged: What is our culture? Which of our traditions do we uphold? In other words, what does cultural relativism in Africa mean for SOGIESC diverse groups in the context of "sodomy" laws?

Culture encompasses belief systems, which may include religion, and is essentially a *corpus* of concepts shared by a group of people.[488] Cultural relativism emphasises that cultural differences are widespread and inform all aspects of life including the interpretation and application of human rights norms.[489] Indeed, regional human rights instruments may be perceived as "manifestations" of shared culture.[490] Cultural relativism therefore argues for respect for the global diversity of culture, religion and values.[491] Conversely, universalism claims that all human rights apply equally to everyone intrinsically.[492] Its proponents have taken pains to eschew the primacy of culture and religion in human rights discourse and prefer to present their own ideology as culturally neutral.[493]

While the concept of human rights has existed in various regions of the world over the centuries, contemporary human rights is built on a foundation comprised of primarily Western European

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[487] Communications No. 140/94, 141/94, 145/95, 13th Activity Report, 1999-2000, paras. 41-41, as cited in Kofi Quashigah "Scope of Individual Duties in the African Charter" in Manisuli Ssenyonjo (ed) *The African Regional Human Rights System: 30 Years after the African Charter on Human and People's Rights* (2012), 122-123.

[488] Cyra Akila Choudhury "Beyond Culture: Human Rights Universalisms versus Religious and Cultural Relativism in the Activism for Gender Justice" (2015) *Berkeley Journal of Gender, Law and Justice*, Vol. 30, Issue 2, 230; Hugh Thirlway "Reflections on Multiculturalism and International Law" in Sienho Yee and Jaques-Yvan Morin (eds) *Multiculturalism and International Law: Essays in Honour of Edward McWhinney* (2009), 105.

[489] Ajnesh Prasad "Cultural Relativism in Human Rights Discourse" (2007) *Peace Review: A Journal of Social Justice*, 19, 590.

[490] Hugh Thirlway (supra), 105.

[491] Oonagh Reitman "Cultural Relativist and Feminist Critiques of International Human Rights - Friends of Foe?, 105. Available at https://journals.lub.lu.se/index.php/st/article/view/3048 [Accessed 20 August 2019].

[492] Frederico Lenzerini *The Culturalization of Human Rights Law* (2014), 4.

[493] Cyra Akila Choudhury (supra), 240-241.

principles and concepts established post-WWII.[494] Scholars have even argued that the manner in which universal human rights are implemented involves cultural substructures.[495] Cultural relativists therefore argue that European ideologies and culture, of a sort, are imbued in international human rights law.[496] Moreover, it is argued that the notion of universality presupposes universally shared moral judgments, notwithstanding the fact that value systems may be opposed to each other.[497] Insofar as these ideologies attempt to impose human rights standards on the rest of the world which are "foreign" to specific regions, including "Western" notions of equality that extend to SOGIESC diverse groups, some cultural relativists view international human rights are seen as a form of imperialism.[498]

Relativism is not without its own issues, however. It is much easier to define culture as a noun than to identify what the prevailing culture in any given region or State actually is. There is no easily discernible standard for how culture informs decisions on law and social practices.[499] This issue is especially relevant in post-colonial States whose present-day laws are heavily informed by the legacies of their erstwhile colonisers on the one hand, but also seek to nurture the influence of indigenous tradition on the other. Culture as it has been presented by African leaders like Former President Mugabe, a vociferous critic of SOGIESC diverse groups, is monolithic, intransigent and immutable. It ignores the possibility of progressive reform and the existence of divergent viewpoints or narratives from marginalised groups.[500] Where societies and the people within them may be construed as operating under multiple and overlapping "cultures", it is difficult to attribute specific values to the whole. Indeed, in the same way that "no man is an island", no present-day culture is an island of homogeneity.[501]

Complementary to the UN's brand of universalism, which is sensitive to cultural differences, the African human rights system indicates a commitment to a brand of human rights that promotes cultural values typifying African societies, but is also set on UN standards of universalism.[502] Aside from the fact that the Preamble ACHPR promotes international cooperation that pays regard to the UN and UDHR, other human rights instruments in the African system, like the ACRWC and the Maputo Protocol, demonstrate fidelity towards universalism over cultural practices which are harmful to

[494] Frederico Lenzerini (supra), 33-47; Hugh Thirlway (supra), 107; Cyra Akila Choudhury (supra), 241.
[495] Cyra Akila Choudhury (supra), 242.
[496] Oonagh Reitman (supra), 104.
[497] Frederico Lenzerini (supra), 4.
[498] Oonagh Reitman (supra), 104 and 107. The argument for universalism certainly is not aided by Ackermann J's reliance on trends of decriminalising consensual same-sex relations established by "Western democracies".
[499] Cyra Akila Choudhury (supra), 230.
[500] Oonagh Reitman (supra), 106; Cyra Akila Choudhury (supra), 243.
[501] Christos Galanos, "Universal Human Rights in the Face of Cultural Relativism and Moral Objectivity: Preaching or Teaching," *UCL Jurisprudence Review* 16 (2010), 41-42; Scottish Poetry Library, John Donne "No man is an island". Available at https://www.scottishpoetrylibrary.org.uk/poem/no-man-is-an-island/ [Accessed 20 August 2019].
[502] Frederico Lenzerini, 12 and 58.

children and women and therefore constitute human rights violations.[503] In 2018 the ACtHPR held that Mali was in breach of not only the ACRWC and Maputo Protocol, but also of CEDAW, for attempting to accommodate traditional practices by failing to set the minimum legal age of marriage for women at 18 and maintaining a law which restricted their capacity to consent to marriage.[504] The foregoing may be construed as "moderate cultural relativism" which accommodates regional and domestic differences in human rights norms and practices but retains a core of human rights that cannot be affected by these differences.[505] However, the concept of "moderate cultural relativism" becomes problematic when we ask by whose authority and on what grounds this core of inalienable rights is established.[506] Proposing that the starting point be dominant universalist human rights standards, predicated as they are on Western concepts and ideology, raises the spectre of imperialism.[507] Conversely, if we look at Zimbabwean law as a potential starting point, we could identify dignity as an inalienable right around which a human rights argument is constructed. Indeed, s 86(3) of the Constitution does not permit limitations of the right to dignity under any circumstances, which establishes dignity as peremptory norm under Zimbabwean law. This increases the urgency of establishing firm jurisprudence on the scope of the right to dignity and how it interacts with other human rights relevant to "sodomy" enquiries.

Much has been written about the commonality and acceptance of same-sex relations and relationships in pre-colonial Zimbabwean and African societies.[508] Much has also been said about same-sex attraction being a purely Western phenomenon imposed on African societies that are otherwise morally opposed to it.[509] Cultural relativism in this sense is weaponised against SOGIESC diverse groups to thrust heterosexist beliefs and institutions into the cultural zeitgeist, not only out of a sense of disgust, but also strategically, to avoid political criticism by diverting public censure to already vulnerable groups.[510] If one were to construe the constitutional prohibition of same-sex marriage as a manifestation of Zimbabwean society's hostility towards SOGIESC diverse groups, as was done by the Nairobi High Court, one may wonder whether anything can be gained from debating the existence and/or prevalence of same-sex practices in pre-colonial Zimbabwe and Africa. Those who deny the proposition will deny

[503] Article 21 ACRWC calls on Member States to end harmful practices like child marriage, which impair the dignity and welfare of children, and Article 2(1)(b) of the Maputo Protocol calls on States to adopt legislation prohibiting harmful practices that threaten the wellbeing of women. See Frederico Lenzerini (supra), 52-53.
[504] AfCHPR, *APDF and IHRDA v Republic of Mali*, App. No. 046/2016, Judgment of 11 May 2018.
[505] Frederico Lenzerini (supra), 8.
[506] Ibid, 9.
[507] Abdul G. Koroma "International Law and Multiculturalism" in Sienho Yee and Jaques-Yvan Morin (eds) (supra), 82.
[508] Anjesh Prasad, 593, citing authors like Marc Epprecht and Kahtryn Kendall, who have written on the subject.
[509] Former President Robert Mugabe made many, vitriolic statements about SOGIESC diverse groups during his presidency, including this statement targeting GALZ, made in 1995 at the International Book Fair in Harare: "I find it extremely outrageous and repugnant to my human conscience that such immoral and repulsive organisations, like those of homosexuals who offend both against the law of nature and the morals of religious beliefs espoused by our society, should have advocates in our midst."
[510] Ajnesh Prasad, 592.

it vehemently, and if they occupy positions of power, they will take pains diminish or even eradicate human rights protections for the groups they despise.

Resistance against this requires unpacking and identifying the components of what we believe to be Zimbabwean and African culture in respect of the individual rights to dignity, equality, healthcare and, in the context of Zimbabwe, privacy. We must enquire: Are these rights and the manner in which they have been interpreted with respect to SOGIESC issues universal enough to merit adherence to existing UN standards? What are our national or continental codes of morality and by what cultural values are they informed? The UNHRC rejected the notion of cultural relativism by diminishing the role of morality in *Toonen*.[511] It then established in its General Comment No. 34 that human rights limitations based on morality must be "non-discriminatory in effect and compatible with the universality of human rights" and will not be assessed in accordance with the doctrine of "margin of appreciation".[512] As indicated Chapter II of this thesis, SOGIESC issues have been increasingly incorporated into UN procedures and documents, especially under the principle of non-discrimination. Does this then mean that the characterisation of "sodomy" laws as human rights violations is a standard to which the African human rights system and Zimbabwe ought to adhere?

Chapter IV.C.3: This has always been about more than just sex

The introduction of relational privacy and the development of the rights to equality and health are possibly the most important contributions from domestic Courts to human rights law affecting consensual same-sex relations. These elaborations further the humanisation of same-sex attracted persons beyond the efforts made in *Dudgeon*, *Norris*, *Modinos* and *Toonen*. As absurd as it may appear to argue for the further infusion of humanity in human rights debates, the proposition is based on a notable lapse by the ECtHR and UNHRC in grasping fully the nuanced implications of "sodomy" laws. What lies at the heart of criminalising consensual same-sex relations is not a misguided effort to protect the moral fabric of society from perdition but a Devlinesque disgust at the idea of two people of the same-sex engaging in consensual and mutually fulfilling relations and relationships.[513]

[511] Holning Lau (2004) "Sexual Orientation: Testing the Universality of International Human Rights Law," *University of Chicago Law Review*, Vol. 71, Issue 4, 1700-1701.

[512] Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds) (supra), 300, citing CCPR, General comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, paras. 32 and 36.

[513] Lord Devlin believed that disgust is a useful social tool which protects society from degeneration through corruption by social ills. Devlin was also of the view that personal liberty may be superseded by disgust for the purposes of social solidarity. Devlin's standard for ascertaining the moral standards of society is similar to s 73(1) of the Criminal Law (Codification and Reform) Act in that both require judgment from the "reasonable man" on what conduct garners feelings of reprobation and merits legal regulation for that reason. See Martha C Nussbaum (supra), 9-10.

Disgust and the dehumanisation that both sustains and is sustained by it are not foreign concepts to legal regulation.[514] They were the foundation of such laws as the Immorality Act and Reservation of Amenities Act of Apartheid South Africa, which prohibited consensual sexual relations between white and non-white people and allowed for segregation in public spaces and facilities, respectively. Today, no State authority would argue that the perpetuation of white supremacy is a legitimate objective, let alone that any means to that end are justifiable. However, public order, morality and health are still being raised as valid legal justifications for the politics of disgust against SOGIESC diverse groups, and these arguments have acquired constitutional validity before some Courts.[515] Humanity necessitates respect for a person's inherent dignity and equality with others, and requires that Courts attempt to understand the commonality of the aims and interests we all pursue as human beings. This is not an entirely logical approach, unfortunately, and requires a not insignificant amount of creativity backed by empathy.[516] If there is no inclination to be either creative or empathetic, it is unlikely that positive results will be achieved.

Chapter V: Conclusion

SOGIESC issues occupy an interesting space in international human rights law. Social heterosexism, coupled with the absence of international and regional human rights language specific to these issues, has left human rights relevant to SOGIESC diverse groups progressing at an arguably glacial pace globally. Where morality comes to the fore, built as it is on culture, tradition and/or religion, the people whose rights have been affected must endure being the subject of debates that essentially centre on what it means to be human. The dearth of substantive reasoning and inconsistencies emerging from international and regional jurisprudence on "sodomy" laws in relation to privacy, equality and non-discrimination creates gaps through which homophobic States may strengthen arguments for the retention of "sodomy" laws. The ECtHR and UNHRC ought to have incorporated the relational aspect of privacy rights at earlier dates; the ECtHR ought to have been more willing to explore equality and non-discrimination in "sodomy" law cases; and the UNHRC ought to have explained in *Toonen* just why sexual orientation falls under the umbrella of "sex" in non-discrimination provisions. International human rights law greatly influences litigants who take human rights claims to domestic Courts. These shortcomings are therefore likely to continue to have far reaching effects in domestic cases.

It would obviously be facile to suggest that the manner in which a domestic Court refers to international and comparative law determines whether a law infringing human rights will be upheld or invalidated.

[514] Martha C Nussbaum (supra), 9.
[515] Indeed, the notion that "sodomy" laws are necessary to curb the spread of HIV/AIDS plays directly into the politics of disgust by implying that same-sex attracted men are promiscuous carriers of contaminants and must be restrained from contaminating others through punitive measures.
[516] Martha C Nussbaum (supra), 32.

There are a plethora of elements that factor into any given Court decision, not least of which is a judicial officer's own moral code, which will affect how they view specific groups on the spectrum of disgust to humanity, whether they understand that "sodomy" laws are about far more than who gets to stick their genitals where, and what they ultimately believe justice to require. Nevertheless, shortcomings aside, it is unignorable that both international and comparative law have great potential to influence human rights court cases. Both exist symbiotically; they inevitably intertwine and affect each other. Indeed:

(1) it was developments in English and Welsh domestic law which compelled the ECtHR to invalidate Northern Irish "sodomy" laws. *Dudgeon* then sparked the global movement of human rights activists mounting constitutional challenges against "sodomy" laws;

(2) the invalidation of "sodomy" laws in Australian territories influenced the UNHRC's conclusion in *Toonen* that the moral fabric of Australian society did not require protection through ss 122 and 123 of the Tasmanian Criminal Code. The UNHRC's analysis of privacy rights served as a template for the judgments in *McCoskar & Nadan* and *Orozco*. Its discussion on the right to equality and principle of non-discrimination was also fundamental to the conclusions reached in *Orozco*, in Gubbay CJ's minority opinion in *Banana*, and in the Botswana High Court's conclusion in *Motshidiemang* that discrimination on the basis of sexual orientation amounts to sex-discrimination;

(3) international law on the right to privacy influenced the Indian Supreme Court to read the right into the Indian Constitution in *Puttaswamy*, the case which was considered to have laid the foundation for the successful constitutional challenge against s 377 IPC in *Navtej Singh Johar*; and

(4) the Indian judiciary read the right to health into the Indian Constitution partly on the basis of India's State obligations under the ICESCR. In *Navtej Singh Johar*, CESCR General Comments No. 14 and 20 were held to impose a State obligation to provide accessible and acceptable medical goods and services of quality to SOGIESC diverse groups. This position was supplemented by reference to the UNHRC's discussion in *Toonen* of how "sodomy" laws hinder rather than facilitate HIV/AIDS prevention and treatment programmes.

However, the combined power of international and comparative law is not fallible. It proved unsuccessful in Kenya, and although there are plans to take the decision in *EG & Ors* on appeal, it cannot be denied that the High Court decision will have its own persuasive power in future constitutional challenges in Africa. The case will be one instance on a long list of manifestations of homophobic sentiment across the continent; homophobia which threatens the realisation of human rights relevant to same-sex attracted persons if future Courts elect to engage in consensus-based decision making. One question that is pertinent in the Zimbabwean context is whether culture and/or tradition supplement the universal limitations mechanism of morality in a way that all but guarantees

that SOGIESC diverse groups will not be able to enjoy or exercise human rights beyond those rights which have nothing to do with their capacity to establish intimate relationships with each other. Alternatively, is there a form of cultural relativism that can accommodate these rights as universal, and therefore inalienable, fundamental rights?

There is a great degree of uncertainty surrounding the chances of securing the invalidation of s 73(1) of the Criminal Law (Codification and Reform) Act through reliance on the rights to dignity, privacy, equality and non-discrimination, and access to basic health care. This uncertainty leaves the impression that it may be advisable to await the development of a more comprehensive constitutional human rights jurisprudence or, if litigation is not at all preferred, to await social and political sensitisation programmes through organisations like GALZ. Certainly, the latter has a greater chance to foster tolerance and acceptance of SOGIESC issues.

On the other hand, one may wonder just how long we ought to wait for "organic" change to happen. The principles of equality and dignity reject the notion of heterosexist hegemony and require more than quiet hope or acceptance that times will change eventually. There is an immense indignity in waiting for people to decide when or whether one becomes fully human. As such, one may argue that in the same way that international and regional human rights instruments are global and continental contracts establishing obligations owed by States to rights-holders, national Constitutions are social contracts between States and their citizens, more easily enforced by the latter against the former than international and regional instruments. Where already marginalised and vulnerable groups are deprived of their human rights through no fault of their own besides that of simple existence, these social contracts ought to be approached as such and utilised by said marginalised groups to claim the human rights that they deserve and that the rest of us have always taken for granted.

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S v Chokuramba CCZ 10/19

SUPPLEMENT

Case Name	Jurisdiction	Case selection indicators					
		Constitutional supremacy	**Constitution is a "living instrument"**	**International law was an interpretive guide**	**Rights limitations permitted**	**"Sodomy" laws" began as British colonial laws**	**Same-sex relations regarded unfavourably by society**
National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others 1999 (1) SA 6 (CC)	Constitutional Court of South Africa	X	X	X	X	X	X
Banana v State 2000 (1) ZLR 607 (S)	Supreme Court of Zimbabwe	X	X	X	X	X	X
Lawrence v Texas, 539 U.S. 558 (2003)	United States Supreme Court	X	X	X	X	X	X
McCoskar v The State [2005] FJHC 500 (26 August 2005)	High Court of Fiji at Suva	X	X	X	X	X	X
Naz Foundation v. Govt. of NCT of Delhi 160 Delhi Law Times 277	Delhi High Court	X	X	X	X	X	X
Suresh Kumar Koushal and another v NAZ Foundation and others Civil Appeal No. 10972 of 2013	Supreme Court of India	X	X		X	X	X
Caleb Orozco et al. v. Attorney-General of Belize Claim No. 668 of 2010 (10 August, 2016)	Supreme Court of Belize	X	X	X	X	X	X
Navtej Singh Johar & Ors. versus Union of India thr. Secretary Ministry of Law and Justice W. P. (Crl.) No. 76 of 2016 D. No. 14961/2016	Supreme Court of India	X	X	X	X	X	X
EG & 7 Others v Attorney-General; DKM & 9 Others (Interested Parties)*; Katiba Institute and Another (Amicus Curiae)* Petition 150 of 2016	High Court of Kenya at Nairobi	X	X	X	X	X	X
Letsweletse Motshidiemang v Attorney-General MAHGB-000591-16	High Court of Botswana	X	X	X	X	X	X