

Debating love, human rights and identity politics in East Africa: The case of Uganda and Kenya

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Summary

In the wake of the furore surrounding the passing of the Anti-Homosexuality Act and the declaration of its unconstitutionality by the Constitutional Court in Uganda, the issue of sexual orientation and gender identity has assumed heightened prominence in East Africa. As is the case in many countries around the world, courts of law have become particularly prominent arenas within which the struggles over these issues are being fought. That development raises fundamental questions not only about the suitability of judicial arenas for such encounters, but also about the efficacy of a legal strategy in addressing an issue linked to deeply-held social, cultural and religious structures and beliefs. This article reviews recent developments concerning the situation of lesbian, gay, bisexual, transgender and intersex individuals through legislation and in the courts of law of Uganda and Kenya, exploring the implications for the wider struggles by sexual minorities for enduring legal recognition and accommodation.

Key words: *sexual minorities; right to love; LGBTI community; courts; homophobia*

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1 Introduction

'Who says everybody has a right to love?' is the question put to me at one particularly heated public lecture held a few days after the passing of Uganda's Anti-Homosexuality Act (AHA) of 2014.¹ As the lead petitioner in the case which successfully challenged the law, I was placed at the frontline of the debate about sexual minorities and the issue of whether or not they could be accommodated within the country's constitutional and legal regime. Even though asked somewhat sardonically, the question cut to the core of an issue that has provided the most serious recent test to the international human rights movement and to the foundational principles on which it is based.

While the 'right' to love appears in no known legal document – national, regional or global – there is no doubt that it is a universal human sentiment.² If one was to perform a dissection of the right to love, it would be found implicit in several human rights principles – freedom of association and expression, the right to health, the right to privacy and especially in the right to human dignity.³ Despite the absence of the right in normative form, it is a central feature of human existence, especially within the context of sexual expression. To deny its existence is to deny the very essence of our humanity.

And yet, in countries around the world, from Kyrgyzstan to Russia and from Nigeria to The Gambia, new laws are being passed that attack sexual orientation as an expression of the sexual self, as well as gender identity, which is an individual's innate and deeply-felt psychological identification as a man, woman or other gender and which may or may not correspond to the sex assigned at birth. Needless to say, both sexual orientation and gender identity are critical components of the right to love.⁴ In such a context, courts of law have oscillated between enlightened engagement to all manners of legal excuse to retain the *status quo* or to take us even further back.

1 See J Oloka-Onyango 'Of mice and farmers' wives: Unveiling the broader picture behind recent legislation in Uganda' Human Rights and Peace Centre (HURIPeC) Public Dialogue at Makerere University, 25 March 2014, <http://law.mak.ac.ug/article/mice-and-farmers-wives> (accessed 30 April 2015).

2 Of course, this issue has been extensively debated in other disciplines such as literature and philosophy. The 'right of desire' was hinted at in JM Coetzee's Booker prize-winning novel, *Disgrace*, and further developed in André P Brink's novel *The right to desire*.

3 See R Wintemute 'From "sex rights" to "love rights": Partnership rights as human rights' in N Bamforth (ed) *Sex rights: The Oxford Amnesty Lectures 2002* (2005) 186.

4 In the words of Nyanzi, 'Uganda's re-criminalisation of homosexuality is not an isolated case, but rather part of a larger contemporary trend of homophobic legal reversals. Uganda, Nigeria and India are the three ugly sisters who recently ushered into place repressive laws that re-criminalise specific forms of expressing same-sex desire, love, sexualities and eroticism.' S Nyanzi 'The paradoxical geopolitics of recriminalising homosexuality in Uganda: One of three ugly sisters' in Institute of Development Studies *Putting the law in its place: Analyses of recent*

Some courts have simply avoided taking a position. Thus, for example, a two-judge bench of the High Court of Delhi in *Naz Foundation v Government of NCT of Delhi*⁵ declared that the notorious section 377 – on the offence of carnal knowledge against the order of nature – violated the Indian Constitution. In a dramatic twist of events and even before the celebrations over the landmark ruling in the case had ended, the Indian Supreme Court overturned the lower court's decision, stating that it should be parliament that repeals the law, not the judiciary.⁶ In the United States, the Supreme Court's decision in *Lawrence v Texas*,⁷ which declared laws criminalising same-sex conduct unconstitutional, and the more recent *Obergefell v Hodges*,⁸ which upheld the right of same-sex couples to marry under the 14th Amendment to the US Constitution, met with resistance. All these actions are in essence attacking the right to love in its most obvious manifestation: the right to choose who one can love.

The article examines the current situation of the legal struggles surrounding the situation of sexual minorities in the East African countries of Uganda and Kenya. Aside from a common geo-political history, the two share the legacy of the British Victorian era's criminalisation of same-sex conduct and behaviour. Both countries are largely homophobic, strongly influenced by new religious movements and egged on by opportunistic politics. And yet, the direction in Kenya is decidedly more liberal than that taken in Uganda.

The main question explored here is whether, given the varied forces ranged against sexual minority expression, the use of law and legal interventions to address discrimination on the basis of sexual orientation have a future. The exploration begins with an examination of some of the conceptual dimensions that influence the legal frameworks – such as the AHA – that govern same-sex erotics. It then moves on to an examination of the situation in Uganda which, on account of the prominence the issue has assumed over the years, provides a useful starting point for comparison. The article proceeds to look at court developments in Kenya, exploring how the judiciary has responded to the assertion of the rights of sexual minorities. Because transsexual and intersexed individuals are often forgotten in this discussion, the article concludes with a consideration of how the issue has manifested itself in each country. The analysis ends by

developments in law relating to same-sex desire in India and Uganda (2014) 14, <http://mobile.opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/42035/PW%20Newsletter%20July%202014%20Final.pdf?sequence=1> (accessed 30 April 2015).

5 160 *Delhi Law Times* 277 (Delhi High Court 2009).

6 See *Suresh Kumar Koushal & Another v Naz Foundation & Others* Civil Appeal 10972 of 2013, <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070> (accessed 30 April 2015).

7 539 US 558 (2003), <http://www.law.cornell.edu/supct/html/02-102.ZS.html> (accessed 30 April 2015).

8 *Obergefell & Others v Hodges & Others* 576 US ___ 2015, http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf (accessed 1 July 2015).

offering some indication of the hurdles that still remain in the way of sexual minorities gaining full acceptance as equal and dignified members of the community of peoples in Uganda and Kenya.

2 Some conceptual issues

To say that we live in an age of sexuality politics is no exaggeration, although we should be careful not to fall into the trap of painting a broad brush of homophobia raging around the African continent. As pointed out by Thoreson, the issue is much more complex:⁹

Although they were ubiquitous, tropes of 'winds' and 'waves' of homophobia are not merely descriptive. Homophobia is difficult to define, much less instrumentalise, and it is far from clear that it can simply 'rise' or 'fall' in any regional, national, or intranational setting. By lumping disparate incidents together, these framings homogenise complex responses to sexual acts, identities, and politics. Decrying a wave of homophobia in 'Africa' also elides local specificity, and bolsters racist dismissals of the Global South as inherently hostile to queers. By glossing both 'homophobia' and 'Africa', these tropes leave little room for the nuance and specificity of sexual politics in post-colonial settings.

The complexity extends to the issue of naming. Thus, the term lesbian, gay, bisexual, transgender and intersex (LGBTI) is used in this article to cover the range of same-sex erotics practised in Uganda and Kenya, as it is the dominant method of description employed worldwide. However, the terms used in the LGBTI alphabet are rooted in culturally-specific norms and values that are not necessarily shared by African people. Hence, it is important to both remember the foreign origins of such terms as well as to take note of the different and varied ways in which individuals and groups in Uganda and Kenya identify themselves. As Nyanzi has observed in an article on Uganda, there are many 'localised variants to being either lesbian or gay'.¹⁰ Indeed, the localised label *kuchu* is generally used as a means of self-identification among many in the same-sex community in the region.¹¹

It is trite to point out that the politics of sexuality are intricately linked to the politics of gender. Gender dynamics are implicated in the discussion by the perceived subversion that same-sex erotics present to the dominant norms of sexuality that govern society. Heteronormativity – the assumption of the existence of only two sexes/genders and the belief that human sexual relations between a man and a woman are natural and normal, with no other possibilities – is especially threatened by gay and lesbian relationships.¹² These

9 RR Thoreson 'Troubling the waters of a "wave of homophobia": Political economies of anti-queer *animus* in sub-Saharan Africa' (2014) 17 *Sexualities* 24.

10 S Nyanzi 'Dismantling reified African culture through localised homosexualities in Uganda' (2013) 15 *Culture, Health and Sexuality* 958.

11 Nyanzi (n 10 above) 959.

12 See S Tamale *African sexualities* (2011) 641.

gender non-conforming practices and identities threaten the dominance of masculinity which places a premium on the control of women's bodies. Sex between women is viewed as a rejection of that ownership, while that between men marks a serious disconnect between sex and reproduction, raising the ire particularly of organised religion. Also, homosexual men are considered effeminate and not 'real' men.

Many countries in Africa today find themselves in the midst of these sexuality/gender battles. The grounds of engagement are numerous: homes, communities, workplaces, parliaments, courts as well as religious and educational institutions. Looking only at the courts, the question is: How have the courts of law in Uganda and Kenya treated the vexed issue of sexuality? In particular, what have the courts said about the intimate relationships between consenting adults that have been outlawed as part of sexuality politics and social control? What about questions of sexual identity and expression? In sum, are the two countries ready to incorporate sexual citizenship into the core of jurisprudential thought in their courts of law?

The question above presupposes a legal framework against which developments in Uganda and Kenya need to be gauged. Indeed, it is necessary to review those developments against changes on the international scene. Individual countries have addressed the matter in different ways, with South Africa going so far as to incorporate a right to non-discrimination on the basis of sexual orientation into its transformative Constitution, thereby becoming the first country in the world to do so.¹³ This was followed soon after with the decision by the Constitutional Court in the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*.¹⁴

On its part, the United States has oscillated between upholding the rights of states to regulate sexual behaviour and its landmark decision in the 2013 case of *US v Windsor*,¹⁵ which declared the Defense of Marriage Act (DOMA) unconstitutional for denying rights of matrimony to same-sex couples.¹⁶ Although the European Court of

13 J Cook 'Engendering gay and lesbian rights: The equality clause in the South African Constitution' in NW Hoad *et al* (eds) *Sex and politics in South Africa: The equality clause/gay and lesbian movement/The anti-apartheid struggle* (2005) 188-209.

14 [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC).

15 133 S Ct 2675 (2013), http://scholar.google.com/scholar_case?case=6241888197107641609&hl=en&as_sdt=6&as_vis=1&oi=scholarr (accessed 30 April 2015).

16 The Supreme Court held that sec 3 of the Defense of Marriage Act (DOMA), which restricted the federal interpretation of 'marriage' and 'spouse' to apply only to heterosexual unions, was unconstitutional because it violated the due process clause of the Fifth Amendment. According to Justice Kennedy: 'The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the state, by its marriage laws, sought to protect in personhood and dignity.'

Human Rights in *Dudgeon v Ireland*¹⁷ decriminalised same-sex relations in 1982, European countries were similarly inconsistent with varied decisions being made right up to the beginning of the twenty-first century.¹⁸ At the international level, the Human Rights Committee blazed the trail with the decision in *Toonen v Australia*.¹⁹ The Committee held that a statute criminalising various forms of sexual contact between men, including all forms of sexual contact between consenting adult homosexual men in private, was a violation of the International Covenant on Civil and Political Rights (ICCPR). In the 2010 case of *Irina Fedotova v Russian Federation*,²⁰ the Committee found that the applicant's conviction under the Ryazan Law on Administrative Offences (Ryazan Region Law) which prohibited 'public actions aimed at propaganda of homosexuality among minors' violated her right to freedom of expression, read in conjunction with her right to freedom from discrimination, under the ICCPR.

Developments on the international scene since *Toonen* have been the focus of considerable struggle. In 2004, Brazil's attempt at introducing a resolution on the issue of sexual orientation and gender identity was blocked at the United Nations (UN). However, on 17 June 2011, the UN Human Rights Council (HRC) voted in favour of a resolution calling for a study of the laws and practices of violence against LGBTI persons and how international human rights law could be used to end such violence. It also called for the convening of a panel to discuss the issue at the 19th session of the HRC. The vote was historic because it was the very first time that the question of sexual orientation and gender identity was adopted in a formal UN resolution.²¹ It was particularly important because as recently as November 2010, the General Assembly had successfully voted out the words 'sexual orientation and gender identity' from a report by the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions.

There is no international instrument that has yet been agreed upon. Nevertheless, in March 2007, a group of international law experts came together and formulated the ground-breaking *Yogyakarta Principles on Sexual Orientation and Gender Identity*.²² Billed as a coherent and comprehensive identification of the obligation of states

17 Application 7525/76, decided on 21 October 1981, [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{%22dmdocnumber%22:\[%22695350%22\],%22ite mid%22:\[%22001-57473%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{%22dmdocnumber%22:[%22695350%22],%22ite mid%22:[%22001-57473%22]}) (accessed 30 April 2015).

18 K Walker 'Evolving human rights norms around sexuality' (2000) 6 *International Law Students Association Journal of International and Comparative Law* 343-353.

19 Communication 488/1992, <http://www1.umn.edu/humanrts/undocs/html/vws488.htm> (accessed 30 April 2015).

20 Communication CCPR/C/106/D/1932/2010.

21 The voting reflected the contentious nature of the issue, with 23 states in favour, 19 against, and three abstentions (Burkina Faso, China and Zambia).

22 Adopted, the Yogyakarta Principles are regarded as the most comprehensive set of international principles relating to sexual orientation and gender identity, <http://www.yogyakartaprinciples.org/> (accessed 30 April 2015).

to respect, protect and fulfil the human rights of all persons regardless of their sexual orientation or gender identity, the Principles represent the first comprehensive and pan-regional attempt to construct a legal framework to guide interventions on the issue.²³ Although described as 'soft law', the Yogyakarta Principles are important because they are simply a restatement of existing law and not an attempt to formulate a new doctrine or, to put it another way, they are a combination of 'modest demands', 'stable foundations' and 'strategic deployment'.²⁴ The Principles provided a useful guide for assessing or measuring whether there is progress or regression in individual countries, although it needs to be noted that both Uganda and Kenya have been persistent objectors whenever the issue has come up for discussion.²⁵

The cases of Uganda and Kenya offer an important insight into the issue of sexual orientation and gender identity, not only on account of Uganda's recent experience with the AHA, but also because of other kinds of struggles taking place alongside the battle over sexual expression. Kiragu and Nyong'o provide a useful summary of the different forms of discrimination that sexual minorities (particularly LGBTI people) face in East Africa in general:²⁶

Discrimination of sexual minorities can be in the form of criminalisation of homosexuality, institutionalised homophobia, abuse in state institutions, pathologising, forced medication and cruel treatments, neglect of the existence and needs of LGBTI people with disabilities, young and elderly LGBTI persons, diminished access to health care, work place discrimination and violence and harassment from official state representatives including execution. Social repression with or without state tolerance can be manifested in the form of verbal abuse, silence, ridicule, hate crimes, 'corrective rape' of lesbians, honour-related violence and forced marriage.

The above quote summarises the extensive range of legal barriers that confront sexual minorities in the region. To these we can add issues relating to freedom of association concerning the right to form non-governmental organisations (NGOs) and even to meet in public places. Also of concern are questions around the right to privacy and on the right to human dignity as basic civil and political rights. With respect to the observation and protection of economic, social and cultural rights, there are the rights to health, to shelter and to housing. There are the rights to an adequate standard of living, involving the discriminatory treatment of sexual minorities and their

23 M O'Flaherty & J Fisher 'Sexual orientation, gender identity and international human rights law: Contextualising the Yogyakarta Principles' (2008) 8 *Human Rights Law Review* 207-248.

24 RR Thoreson 'Queering human rights: The Yogyakarta Principles and the norm that dare not speak its name' (2009) 8 *Journal of Human Rights* 323-339.

25 A recent exception was registered at the African Commission on Human and Peoples' Rights concerning whether or not to grant observer status to the Coalition of African Lesbians (CAL). Rather than voting against the decision, as would have been expected, the delegate from Uganda abstained.

26 J Kiragu & Z Nyong'o *LGBTI organising in East Africa: The true test for human rights defenders* (2005) 12.

right to work, among other things. The rights to privacy, basic human dignity, equality and non-discrimination are cross-cutting rights. In short, the battle against legalised homophobia is an extensive and multi-faceted one.

There is an additional problem, which is what may be described as the *extra*-legal utilisation of the law in order to achieve goals which are very difficult to realise. Thus, while the Penal Codes of both Kenya and Uganda have provisions criminalising sex against the order of nature, because of the very character of the offence, it is in fact very difficult to secure a conviction.²⁷ As opposed to other offences created by the law, the core of the problem in this instance is that the conduct which has been criminalised is engaged in by consenting adults. One would have thought that, given the rather obvious tension between what the law aspires to achieve and the impracticality of its realisation on the ground, the case for their repeal would have been obvious.

The poor record of conviction in relation to these offences, however, does not prevent the police and other authorities from deploying them as tools of harassment, intimidation and bribery, especially through the mechanisms of arbitrary arrest and pre-trial detention. According to HRAPF and the Civil Society Coalition surveying the situation relating to convictions on such offences in Uganda, these laws hang over the heads of sexual minorities like the sword of Damocles.²⁸

[O]ver the period 2007-2011, there is neither a single conviction nor an acquittal for consensual same-sex conduct on file in any magistrate's court in Kampala. In an egregious example of a waste of both police and judicial resources, all cases that were filed in court during the period 2007-2011 in Kampala district ended in dismissal for want of prosecution. Though not conclusive since cases before magistrate's courts largely go unreported, attempts to look for other acquittals or convictions in the Law Reports revealed no single conviction or acquittal since the laws were introduced (with the exception of those for non-consensual same-sexual relations with minors before 2007).

In light of these and other developments, it is clear that, while the courts of both countries will be crucial arenas for the struggle and fascinating sites of critical appraisal, are they up to the task? Assessing cases which have been decided as well as the emerging jurisprudence

27 In the case of *Mamoon v Canada* [2009] FC 578, the Federal Court of Canada held that criminal laws punishing homosexuality are rarely applied in Tanzania (para 12), <http://www.refugeelaidinformation.org/tanzania-lgbti-resources#sthash.uYRq9YJZ.dpuf> (accessed 30 April 2015).

28 Human Rights Awareness and Promotion Forum (HRAPF) and Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL) *Protecting "morals" by dehumanising suspected LGBTI persons? A critique of the enforcement of the laws criminalising same-sex conduct in Uganda* (October 2013) 13, http://www.hrapf.org/sites/default/files/publications/section_145_research_report_full_version.pdf (accessed 30 April 2015). See also Chapter Four *Where do we go for justice?: The abuse of the rights of sexual minorities in Uganda's criminal justice system* (2015).

and seeking explanations as to the different directions which courts have taken constitutes an important and timely contribution to a debate that is set to get even more intense in future. Consequently, the following sections of this article look at the cases of Uganda and Kenya before making broad conclusions on the implications of these developments on the situation of sexual minorities in the two countries.

3 Addressing homophobia through legal means in Uganda

The situation in Uganda provides a useful point of departure for a consideration of these issues on account of the numerous (and peculiar) developments that have recently taken place there in relation to the situation of sexual minorities. Uganda has witnessed a considerable number of public interest cases in this area, starting with the 2008 case of *Mukasa & Another v Attorney-General*,²⁹ and culminating most recently with the 2014 case of *Oloka-Onyango & 9 Others v Attorney-General*.³⁰ The *Mukasa* case is important, not simply because it was the first involving LGBTI individuals decided after the adoption of the relatively progressive 1995 Constitution, but also because of what it both said and omitted to say about this kind of discrimination.

Victor Mukasa was a well-known activist for the rights of LGBTI individuals.³¹ One evening, Local Council (LC) officials and local defence unit (LDU) operatives led by the LC1 Chairperson of her village raided her home and found her roommate, the second applicant (Oyo), in the house. They forcibly entered the house, removed several personal items from it and held Oyo in forced detention for several hours, subjecting her to sexual harassment, intimidation and inhuman treatment. Justice Arach-Amoko found that Oyo had been arrested by the LC1 Chairperson while she was in Mukasa's house resting. Following the arrest, Oyo was forcibly taken to the police post and denied the use of the toilet. She was also forcibly undressed and 'examined', and fondled by the Police Officer-in-Charge to establish her sex.³² The court thus observed:³³

The acts of the police, LDU's and the Chairman were high-handed, illegal, humiliating and did not only cause them grief, injury and apprehension, but above all, these acts were a breach of several constitutional rights which are guaranteed by the Uganda Constitution which the Police, LC1

29 (2008) AHRLR 248 (UgHC 2008).

30 Constitutional Case 8 of 2014, <http://www.ulii.org/ug/judgment/constitutional-court/2014/14> (accessed 30 April 2015).

31 Originally, Victor self-identified as a lesbian, hence my use of the word 'her' in this account of the case. She subsequently changed her identity to a transgender man.

32 *Mukasa* (n 29 above) 16, para 41.

33 *Mukasa* 6, para 18.

Chairman and LDU's are enjoined to protect and defend. They were acting in the usual course of their employment and the Attorney-General is therefore vicariously liable.

The court concluded by finding that a variety of rights had been violated, including the right to privacy of person and property, protection from inhuman treatment and the sanctity of the right to one's dignity. The court emphasised that the case was a human rights case: 'This case, as Mr Rwakafuzi rightly pointed out in his submission is, however, about abuse of the applicants' human rights and not abuse of office.'³⁴ The court went on to state: 'It is also not about homosexuality. This judgment is therefore strictly on human rights.'³⁵

Despite the irony of the decision in divorcing the right of sexual expression from broader human rights, the case was an important one for the related questions of sexual orientation and gender identity. Heralded as Uganda's first case to make a decision in favour of a sexual minority, Victor Mukasa's case nevertheless needs to be treated with some caution. On the one hand, the fact of the applicant's sexual orientation did not cloud the opinion of the court and stop it from rendering a judgment which affirmed the rights of two individuals who had been grossly mistreated by the authorities. It would have been quite easy for the court to have found that the two were engaged in an 'illegal act' (the state alleged that they were caught 'kissing' in public), and either dismiss the case or issue a sanction against them because of their sexual orientation and conduct.

On the other hand, it is quite clear from the facts of the case that the kind of harassment and violence to which co-applicant, Oyo, was subjected was done primarily on account of her presumed sexual orientation and her relationship to Mukasa, despite the assertion by the judge that the case was 'not about homosexuality'. According to Kabumba, the issue of sexual orientation was the 'large elephant in the room'.³⁶ This is evident not only from the several allusions to the practice in the proceedings, but also from the stature of the applicants, at least one of whom was a well-known activist for the rights of LGBTI individuals in Uganda.

The *Mukasa* case was successfully prosecuted and won in the Ugandan courts. Although it received considerable coverage internationally, the reaction within Uganda was rather lukewarm. Outside the community of activists, the case did not draw much attention even within local media. However, it underscored the structural nature of the violence that LGBTI individuals routinely faced, as well as the general position of the state and the public at large as one of passive acceptance (if not active encouragement) of such

34 *Mukasa* 16, para 41.

35 As above.

36 B Kabumba 'The *Mukasa* judgment and gay rights in Uganda' (2009).15 *East African Journal of Peace and Human Rights* 221.

violence. This point surfaced in bold relief in the later case of *Kasha Jacqueline, David Kato Kisuule & Onziema Patience v Rolling Stone Ltd & Giles Muhame (Kasha-1)*.³⁷ The case involved a cover story in the inaugural issue of the *Rolling Stone* newspaper which printed the pictures of several individuals who were gay or alleged to be so, with the caption 'Hang them: They are after our kids!'³⁸ It was quite obvious that the tabloid capitalised on the populist and sensational headline to attract sales, targeting profits at the expense of a marginalised sexual minority.

The three applicants were among those named in the article, and thus sought a declaration that the newspaper report had violated their rights to privacy of person and property. Repeating the same mantra as in the *Mukasa* judgment, that the case was 'not about homosexuality *per se*', Justice Kibuuka Musoke held that the report was an assault against the dignity of the applicants. The judge was also firm in asserting that the call to violence against sexual minorities, particularly LGBTI persons, was unacceptable.³⁹

Clearly the call to hang gays in dozens tends to tremendously threaten their right to human dignity. Death is the ultimate end of all that is known worldly to be good. If a person is only worthy of death, and arbitrarily (*sic*), then that person's human dignity is placed at the lowest ebb. It is threatened to be abused or infringed.

Although the court stated that the case was not about 'homosexuality', it nevertheless went on to make the crucial point that section 145 of the Penal Code, which criminalises sex 'against the order of nature', could not be used 'to punish persons who themselves acknowledge being, or who are perceived by others to be homosexual'. In order to be regarded as a criminal, stated the court, one has to commit an act prohibited under the section.

The *Rolling Stone's* gay-outing edition may have been extreme. However, the Ugandan media had long been involved in a campaign of vilification of same-sex relations and of sexual minorities.⁴⁰ This demonstrated that the social context within which the stories were released was quite accommodating of this kind of negative targeting. Indeed, the outrage expressed over the *Rolling Stone* article was not widespread and the editor of the publication expressed no remorse for his dastardly actions.

Further legal developments relating to sexual minorities came with a 2005 amendment of the 1995 Constitution to prohibit same-sex marriage, marking out Uganda as the first African country to adopt

37 Miscellaneous Cause 163 of 2010, unreported, <http://iglhrc.org/sites/default/files/2010%20Kasha%20Jacqueline%20v%20Rolling%20Stone.pdf> (accessed 30 April 2015).

38 The article was sub-titled 'Pictures of Uganda's 100 homos leak'.

39 As above.

40 Tamale catalogues 664 articles in the Ugandan mainstream media on sexual minorities and gender issues dating back to 10 April 1997. See S Tamale *Homosexuality: Perspectives from Uganda* (2007) 183-217.

such a position.⁴¹ Then came a last-minute amendment to the 2007 Equal Opportunities Commission Act to prevent the EOC from investigating matters involving behaviour regarded as 'immoral or socially unacceptable' by the majority of cultural groups in Uganda.⁴²

By far the most dramatic development in relation to the situation of sexual minorities was the emergence in 2009 of the Anti-Homosexuality Bill (AHB) by Member of Parliament David Bahati.⁴³ Drawing condemnation from around the world, the AHB sought to recriminalise and expand the range of same-sex relationships subjected to penal sanction, extending the bar to lesbian sex,⁴⁴ and even proposing the death penalty for what was described as 'aggravated homosexuality'.⁴⁵ The AHB was particularly dangerous because it projected existing homophobia in Uganda to an 'entirely different level',⁴⁶ a level that seriously threatened the security, well-being and health of sexual minorities:⁴⁷

The Bill led to a heightened situation of homophobia, not simply by attempting to translate the existing fear into legally-sanctioned forms of targeting the LGBTI community, but by increasing the penalties against same-sex behaviour, extending the sanctions for the alleged 'promotion' of such conduct to counsellors, lawyers and even academics, and providing for the Ugandan government to opt out of any international treaties that went against the spirit of the Bill. If section 145 could be accused of some ambiguity, the Anti-Homosexuality Bill leaves no doubt; it indiscriminately and explicitly targets *all* LGBTI persons and even goes beyond them.

Hence, when President Museveni dramatically signed the Bill into law in early 2014, there was really no choice in the matter but to

41 JD Mujuzi 'The absolute prohibition of same-sex marriages in Uganda' (2009) 23 *International Journal of Law, Policy and the Family* 277-288.

42 This provision of the law was challenged in the case of *Jjuuko Adrian v Attorney-General* Constitutional Petition 1 of 2009. The case was filed on 5 January 2009, and heard on 3 October 2012. As at the time of writing, no judgment had yet been delivered in the case. See HRAPF 'Judgment in *Jjuuko Adrian vs Attorney-General* awaited' <http://www.hrpf.org/news-events/judgment-juuko-adrian-vs-attorney-general-awaited> (accessed 30 April 2015).

43 D Englander 'Protecting the human rights of LGBT people in Uganda in the wake of Uganda's 'Anti-Homosexuality Bill, 2009' (2011) 25 *Emory International Law Review* 3. Although presented as a private member's Bill, there is strong evidence to suggest that the government was the silent, behind-the-scenes actor who actually designed and pushed for its adoption. See James Nsaba Buturo, Minister of Ethics and Integrity, 'Tough anti-gay law due' *Sunday Vision* 26 August 2007 in Tamale (n 40 above) 35-38.

44 It is the general view that the offence of sex against the order of nature refers to male-to-male intercourse and is rooted in the British common law offence of buggery or sodomy, first set down in the Buggery Act of 1533. Over the years, it has been defined to mean anal or oral intercourse by a man with a man or woman or vaginal intercourse by either a man or a woman with an animal.

45 See S Tamale 'A human rights impact assessment of the Anti-Homosexuality Bill' (2009) 15 *East African Journal of Peace and Human Rights* 509-519.

46 J Oloka-Onyango 'We are more than just our bodies: HIV/AIDS and the human rights complexities affecting young women who have sex with women in Uganda' HURIPEC Working Paper 36 (February 2012).

47 Oloka-Onyango (n 46 above) 31.

challenge the Act in the courts of law, particularly since the different attempts to stop the enactment of the Bill had failed.

Unlike the previous cases already reviewed which gingerly skirted around the issue of sexual orientation and instead preferred to focus on the broader rights involved, the *Oloka-Onyango* petition had no choice but to bring the issue directly to the surface; the elephant could no longer be hidden. The petition was thus built around the strategy of compelling the court to directly confront a law that was clearly targeted at gay people. Hence, the petition sought to challenge the broad, arbitrary, imprecise and vague definitions used by the Act. For example, the term 'homosexual' was defined to mean a person who engages or attempts to engage in same-gender sexual activity, while 'homosexuality' was defined as same-gender or same-sex sexual acts. The definition of 'sexual act' was stipulated to include –

- (a) physical sexual activity that does not necessarily culminate in intercourse and may include the touching of another's breast, vagina, penis or anus;
- (b) stimulation or penetration of a vagina or mouth or anus or any part of the body of any person, however slight, by a sexual organ; and
- (c) the unlawful use of any object or organ by a person on another person's sexual organ or anus or mouth.

The law was also problematic for the disproportionate penalties that it prescribed (including life imprisonment), and the introduction of the new offences of 'promotion' and 'recruitment', which were accompanied by extensive discretionary powers conferred on state officials – particularly the Minister and the police – to determine what these offences meant. Finally, the Act had wide implications for Ugandan society at large, including parents, counsellors, the friends of LGBTI individuals, employers, health practitioners, academics, journalists, as well as civil society activists/human rights defenders. All in all, the Act was an unmitigated disaster for the protection of the rights of sexual minorities, but it also greatly impinged on the democratic freedoms and rights of those outside the gay community.

At the same time, the petition was also dictated by pragmatism. The AHB was voted on and passed into law by parliament on 20 December 2013, ostensibly as the promised 'Christmas gift' from the Speaker of the House, Rebecca Kadaga, to the people of Uganda.⁴⁸ It was a lazy Friday afternoon, the last day of the parliamentary session before the Christmas recess. The Bill had been smuggled onto the day's Order of Business on parliament's agenda, demonstrated by the fact that the gallery was filled with proponents of the Bill, including several religious leaders and conservative former politicians, while the human rights and LGBTI activists opposed to it

⁴⁸ See 'Uganda to pass anti-gay law as Christmas gift' 13 November 2012, <http://www.bbc.com/news/world-africa-20318436> (accessed 30 April 2015).

and who had been tracking its development were nowhere near parliament on that day and knew nothing of the impending debate.⁴⁹

The process of passing legislation in Uganda has often been one fraught with problems. Among the most serious of them is the question of quorum. The 1967 Constitution was largely silent on the issue, leaving the matter to the rules of procedure of parliament which could be the subject of manipulation and distortion. More importantly, the application of those rules could not be challenged in a court of law. As a result, many laws were passed in circumstances that left a lot to be desired, especially in relation to the numbers of parliamentarians who were actually in the House chamber when a Bill was debated and passed. In a bid to ensure that there was at least minimal representation of legislators when laws were passed and to ensure an above-board process, for the first time, the 1995 Constitution incorporated the issue of quorum into the premier law. Article 88 stipulated that '[t]he quorum of parliament shall be one-third of all members of parliament'. For a time, there was no controversy over the matter, although it is doubtful whether the numbers were strictly adhered to when passing legislation. However, in the heated debate over the Referendum Bill in mid-1999, the issue was raised by a member of the opposition in a bid to stop the passing of a law considered manifestly unfair to opposition political parties. The matter ended up in court, producing one of the most tense and dramatic stand-offs between the judiciary and the executive since the enactment of the new Constitution.

The details of the case of *Paul K Ssemwogerere and Zackary Olum v Attorney-General*⁵⁰ need not detain us here, save to note that the court declared that there was no quorum when the Referendum Bill was passed rendering it unconstitutional. However, the response to the case was for the government to amend article 88, to state as follows:

- (1) The quorum of parliament shall be one-third of all members of parliament entitled to vote.
- (2) The quorum prescribed by clause (1) of this article shall only be required at a time when parliament is voting on any question.
- (3) Rules of procedure of parliament shall prescribe the quorum of parliament for the conduct of business of parliament other than for voting.

Initially, the government wanted to completely eliminate the question of quorum from constitutional protection, but settled for a compromise. The above reformulation of the quorum provision sought to give parliament greater discretion when dealing with the

49 P Johnson 'Making unjust law: The Parliament of Uganda and the Anti-Homosexuality Act 2014' (2014) 67 *Parliamentary Affairs* 11-14, <http://pa.oxfordjournals.org/content/early/2014/10/05/pa.gsu021.full.pdf+html?sid=3ec86421f433-4a21-a0a4-dc317d7fb3c0> (accessed 30 April 2015).

50 Constitutional Appeal 1 of 2002 (SC). See also *PK Ssemwogerere & Others v Attorney-General* Constitutional Petition 7 of 2000.

issue of voting in the House. Despite the clear attempt to water down the law and subvert the holding of the court in the *Ssemwogerere* case, the provision nevertheless retained its status as a constitutional provision, even though it gave parliament greater discretion over the matter. Quorum remained a mandatory provision of the Constitution.

Given this history, the back-up position for the petitioners in the *Oloka-Onyango* petition was to revert to the issue of quorum.⁵¹ Indeed, this is what won the case, with the court deciding to hear argument only on the question of quorum, and declaring:⁵²

It is our decision that the respondent having been presumed to have admitted the allegations of the petitioners in the petition that there was no *coram*, we find that on the balance of probabilities, the petitioners have proved that at the time the Prime Minister (twice) and Hon Betty Awol raised the objection that there was no *coram* and *coram* was never established, and that was in contravention of the Constitution and the Rules.

Although the decision was thus considered to have been won on a technicality,⁵³ it is clear from the judgment of the Constitutional Court that the issue of quorum in Uganda as a matter of fact and law is a constitutional issue. According to the Court:⁵⁴

Parliament as a law-making body should set standards for compliance with the constitutional provisions and with its own Rules. The Speaker ignored the law and proceeded with the passing of the Act. We agree with counsel Opiyo that the enactment of the law is a process, and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it. We have therefore no hesitation in holding that there was no *coram* in parliament when the Act was passed, that the Speaker acted illegally in neglecting to address the issue of lack of *coram*.

The Court found that resolution of the issue of quorum determined the whole case, and thus declared the AHA unconstitutional.

Nullification of the law allowed for a collective sigh of relief among the LGBTI community and their allies. Conversely, the decision was met by expressions of outrage from members of the anti-gay lobby who immediately began a drive aimed at the re-introduction of the law.⁵⁵ On the positive side, Amnesty International pointed out that the nullification of the AHA helped restore some confidence amongst

51 There were other procedural defects such as the failure to advertise the debate on the Order Paper, as well as 'giving appropriate consideration to the CLPA minority report, and robustly consider pertinent legal concerns raised by the CLPA majority report as well as by other MPs'. See Johnson (n 49 above) 27. However, these could not be considered as constitutional issues.

52 Judgment of the Constitutional Court in *Oloka-Onyango* (n 46 above) 25-26.

53 See N Byekwaso 'Technicality has defeated the people on homosexuality' *New Vision* 5 August 2014.

54 Byekwaso (n 53 above) 20.

55 One Peter Naloda was so outraged by the decision, but turned his wrath instead onto the members who had absented themselves from the parliamentary vote, suing for a declaration that those who stayed away on voting day had contravened their oaths of allegiance and the Anti-Corruption Act. See H Nsambu 'MPs sued over anti-gay Bill' *New Vision* 30 September 2014 6.

healthcare providers to treat LGBTI individuals.⁵⁶ However, the report went on to note that section 145 of the Penal Code, which prohibits sexual intercourse against the order of nature, remains a threat hanging over the rights of LGBTI persons. The report also noted lingering fears over the arrest of LGBTI individuals for visiting groups which offer health and counselling services to the community:⁵⁷

A member of the LGBTI National Security Committee told Amnesty International that 'people still fear going to Walter Reed. They fear arrest.' At Icebreakers, 'the number of clients is growing slowly' but 'it is not increasing at the speed at which it dropped'. The petition by MPs to introduce a new anti-homosexuality Bill in parliament has forced LGBTI people to adopt a 'wait-and-see' approach.

In sum, nullification of the AHA did not mean that the homophobia it had stirred up dissipated or, indeed, that the courts of law would treat the issue of sexual orientation more liberally if confronted with it again. Indeed, the spike in homophobia was evident over the course of the debate of the Bill well before its enactment and continued even after its nullification.⁵⁸ As noted by Khanna:⁵⁹

The most peculiar aspect of the Ugandan story, perhaps, is that in the period of more than four years that the law was a Bill, the state, the media, and sections of society had already begun to behave as though it was, in fact, a law, routinely targeting NGOs and activists working in opposition to the Bill. The Bill, in other words, already had a social and political life even while it did not, strictly speaking, have the legal status as law in force. In this period it was impossible to challenge the instrument - it was not a 'law' subject to judicial review and formal litigation. And yet, it was having the effect of law, generating fear and action against LGBT folk, activists, artists and the like.

If the *Oloka-Onyango* decision was cause for celebration, the case of *Jacqueline Kasha Nabagesera & 3 Others v Attorney-General & Another (Kasha-2)*⁶⁰ threw a damper on the elation. Decided after the AHA was enacted into law but before its nullification by the Constitutional Court, *Kasha-2* underscores the forwards and backwards movement

56 Amnesty International *Rule by law: Discriminatory legislation and legitimised abuses in Uganda* (2014) 65.

57 As above.

58 Civil Society Coalition on Human Rights and Constitutional Law (CSCRCL), Human Rights Awareness and Promotion Forum (HRAPF), Rainbow Health Foundation (RHF), Sexual Minorities Uganda (SMUG) and Support Initiative for Persons with Congenital Disorders (SIPD) *Uganda Report of Violations Based on Sex Determination, Gender Identity, and Sexual Orientation* Kampala, Uganda, October 2014.

59 A Khanna 'The queer body between the judicial and the political – Reflections on the anti-homosexuality laws in India and Uganda' in Institute of Development Studies *Putting the law in its place: Analyses of recent developments in law relating to same-sex desire in India and Uganda* (2014) 11, <http://mobile.opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/4203/SPW%20Newsletter%20July%202014%20Final.pdf?sequence=1> (accessed 30 April 2015).

60 Judgment of Justice Stephen Musota in *Jacqueline Kasha Nabagesera & 3 Others v Attorney-General & Another* Misc Cause 33 of 2012, [2014] UGHC 49, <http://www.ulii.org/ug/judgment/high-court/2014/49> (accessed 2 September 2014).

on the rights of sexual minorities alluded to in the introduction to this article.

The *Kasha-2* case related to the action of the Minister of Ethics and Integrity, the Hon Simon Lokodo, in breaking up a seminar that had been organised by the group Sexual Minorities-Uganda (SMUG) in the town of Entebbe, a few miles outside the capital city Kampala. It must be noted that the Minister's forcible closure of the seminar took place before the passing of the AHA.

The applicants were the organisers of the meeting and sued the Attorney-General (in his official capacity) and Minister Lokodo in his personal capacity for violations, among others, of the freedoms of assembly and association. In responding to the claim, the judge concluded that the Minister was indeed justified in forcibly closing down the workshop. Turning the reading of the notion of 'public interest' on its head, the court stated:⁶¹

My reading of the above provisions – ie article 43 of the Constitution defining the term 'public interest' – persuades me that it recognises that the exercise of individual rights can be validly restricted in the interest of the wider public as long as the restriction does not amount to political persecution and is justifiable, [and] acceptable in a free democratic society. Whereas the applicants were exercising their rights of expression, assembly, etc, in so doing, they were promoting prohibited acts [homosexuality] which amounted to action prejudicial to public interest. Promotion of morals is widely recognised as a legitimate aspect of public interest which can justify restrictions.

What is quite clear from the judgment is that the court was reading much more into a case that was essentially concerned with freedom of expression and assembly and the arbitrary exercise of state power by an errant government official. Indeed, the judgment in this case was all about homosexuality, moreover approached with a thinly-disguised homophobia, a fact which is evident from the following passage taken from the judgment:⁶²

In my ruling I have endeavoured to come to conclusions that while the applicants enjoyed the rights they cited, they had an obligation to exercise them in accordance *with the law*. I have also concluded that in exercising their rights they participated in promoting homosexual practices *which are offences against morality*. This perpetuation of illegality was *unlawful and prejudicial to public interest*. *The limitation on the applicants' rights was thus effected in the public interest specifically to protect moral values*. The limitation fitted well within the scope of valid restrictions under article 43 of the Constitution. Since the applicants did not on a balance of probabilities prove any unlawful infringement of their rights, they are not entitled to any compensation. *They cannot benefit from an illegality*.

The *Kasha-2* case represented a serious setback from the string of cases which had witnessed consecutive successes for sexual minorities in Uganda in terms of their broad protection under the law. While

61 As above.

62 As above.

studiously avoiding making the connection to sexual orientation or questions of identity, the courts in the earlier cases of *Mukasa* and *Kasha-1* were able to protect LGBTI individuals by simply treating them like other human beings. Even though the *Oloka-Onyango* case brought to the surface the issue of same-sex erotics much more directly, the court was nevertheless able to deliver a judgment that got rid of the law without engaging with the more controversial aspects of sexual orientation and gender identity involved. Needless to say, the *Oloka-Onyango* case must be applauded because the Court could have easily made a different conclusion regarding the question of quorum.

In contrast, the *Kasha-2* case took the struggle back to the sexual apartheid encapsulated in section 145, which outlaws sex against the order of nature, and related laws, such as being idle and disorderly or causing a public nuisance – laws that are often deployed to harass and disenfranchise members of the LGBTI community. Furthermore, the judge in the *Kasha-2* case also added into his judgment considerations – such as the ‘promotion’ of homosexuality – that could only have been derived from the Anti-Homosexuality Bill, even though the events relating to the case occurred before the AHB became law.

However, the decision in *Kasha-2* dramatically illustrated how far-reaching the anti-homosexuality law would have been. By inordinately conferring excessive powers to a government agent to act in an arbitrary and draconian manner simply on account of the sexual orientation of the individuals involved, the Court extended the issue well beyond the matter of same-sex erotics. In effect, the decision basically gave government officials *carte blanche* not only to arbitrarily decide that a certain action is illegal, but also on the most appropriate action to take in the circumstances. The *Kasha-2* case is especially dangerous because it reversed basic principles of the law, such as the burden of proof and the presumption of innocence, underscoring a threat that should alarm and concern even those who are not gay. It was a classic case of two steps forward, one step back.

Even though the AHA has ceased to be law in Uganda, activists decided to pursue the matter at the East African Court of Justice. Hence, the case of *HRAPF v AG of Uganda* argues that, despite the declaration of the AHA’s unconstitutionality, it is important that a court of law addresses the insidious implications of the law for the situation of sexual minorities.⁶³ It was also felt important to transmit a message to other governments in the East African Community (EAC) that such legislative intervention violated the treaty of co-operation which established the body.

63 For a summary of the case, see HRAPF ‘Challenging the Anti-Homosexuality Act in international courts: The case of *Human Rights Awareness and Promotion Forum v Attorney-General of Uganda*, Reference No 6 of 2014’ in *The Human Rights Advocate Beyond quorum: Why the Anti-Homosexuality Act 2014 was Illegal* http://www.hrapf.org/sites/default/files/publications/15_04_30_hrapf_second_issue_of_the_human_rights_advocate.pdf (accessed 30 April 2015).

Aside from section 145, there are other laws which are largely overlooked in the discussion about the rights of sexual minorities which pose a serious threat to members of this community. Thus, the Global Commission on HIV and the Law pointed out that there are laws which could be described as much more 'subtle' which⁶⁴

may be laws of general application, on adultery for example, that are applicable to people engaged in same-sex sexual conduct while married to a person of the opposite sex. Laws may be selectively applied to same-sex couples, such as laws on age of consent. Public order laws addressing lewd public behaviour or disorderly conduct have been regularly enforced in gay venues, even where same-sex sexual behaviour is not *per se* illegal. Laws and police may target people who are dressed in a way that is perceived to be inconsistent with their physical gender.

The case of Uganda represents the extreme. How have sexual minorities been treated by legislation and the courts of law in Kenya?

4 The situation of sexual minorities in Kenya

In the immediate aftermath of the enactment of the AHA in Uganda, calls were made in Kenya for similar legislation to be passed.⁶⁵ The same was done in Tanzania, with opposition MP Ezekiel Wenje claiming that he had submitted a draft entitled 'the Bill to Prohibit and Control Any Form of Sexual Relations between Persons of the Same Sex, 2014' as a private member's Bill.⁶⁶ Not much more was heard about the issue in either country and, despite the occasional rhetorical flourishes, neither of the two has taken the debate over sexual minorities to the level it reached in Uganda with the saga of the AHA. This does not mean that these two countries are more liberal; maybe only that they are not quite as extreme. Issues of same-sex orientation and the situation of sexual minorities have been of some concern in Kenya for some years.

Like Uganda, Kenya inherited the same laws from the British, having been enacted as far back as 1897.⁶⁷ Although uncommon, there have also been criminal convictions on the basis of those laws. Thus, in 2006 one Francis Odingi was sentenced to six years in prison for having 'carnal knowledge of MO against the order of nature'.⁶⁸

64 S Burris *et al* 'Laws and practices that effectively criminalise people living with and vulnerable to HIV' paper presented at the first meeting of the Global Commission on HIV and the Law, Working Paper GCHL/MTG1/WP/11 (2010).

65 A Byrd 'Kenyan adventist politician proposes extreme anti-gay Bill' *The Spectrum*, <http://spectrummagazine.org/article/alita-byrd/2014/08/14/kenyan-adventist-politician-proposes-extreme-anti-gay-bill> (accessed 30 April 2015).

66 E Muga 'Dar plans to introduce tougher anti-gay Bill' *The East African* 29 March 2014, <http://www.theeastafrican.co.ke/news/Dar-plans-to-introduce-tougher-anti-gay-Bill--/2558/2262374/-/iq7xix/-/index.html> (accessed 30 April 2015).

67 CE Finerty 'Being gay in Kenya: The implications of Kenya's new Constitution for its anti-sodomy laws' (2012) 45 *Cornell International Law Journal* 436-438.

68 (2006) 2011 eKLR (CA Nakuru). He was not given a higher sentence because he was a student at the time of the offence.

Serious concern about issues of same-sex sexualities first surfaced in bold relief in a constitutional debate over whether to include a reference to the right to sexual orientation in the provisions on the new 2010 Constitution, a recommendation which was ultimately rejected after extensive public debate. It happened soon after the adoption of the new Constitution in the public hearings over the appointment of a new chief justice.⁶⁹

Among the candidates contesting for the position of chief justice was Willy Mutunga, a scholar-activist who had strong public backing for the position but who, as director of the Ford Foundation in Nairobi, had supported several gay rights organisations to set up and operate in the country.⁷⁰ On meeting the parliamentary Committee on Implementation of the Constitution (CIOC), Mutunga was forced to address the issue of his own sexual orientation because some church leaders had objected to the ear stud that he wore, which ostensibly put into question 'his morality and probably even [his] sexual orientation'.⁷¹ Mutunga retorted that he wore the stud as part of his religion, and that it was an act protected in the same way as the right of a Catholic to wear a rosary. Following a direct question from Runyenjes MP Cecily Mbarire, Mutunga responded:⁷²

Let me say it straight out, I am not gay. And having said that, let me say also I do not discriminate against gay people. That will be my straight answer.

The response closed the debate on the issue and, given his strength as a candidate, the Committee had no choice but to recommend his appointment, which was enthusiastically welcomed by civil society activists throughout the East African region.

In comparison to Uganda, Kenya has a more vibrant and active LGBTI community which persists in advocacy despite hostility from the general public and government-led outbursts.⁷³ LGBTI activism in Kenya dates back to the late 1990s and is both more apparent and more tolerated.⁷⁴ For example, openly-gay activist David Kuria ran for

69 As one commentator sarcastically stated, 'Kenyan justice is a sex thing, and orientation is at the centre of it.' See K Makokha 'Elephant in the room during approval hearings for judicial jobs nominees' *Saturday Nation* 11 June 2011 12.

70 See FIDA Uganda 'Gay rights are human rights!' – Dr Willy Mutunga, YouTube 31 January 2012, <http://www.youtube.com/watch?v=PPffiwXNuOg> (accessed 30 April 2015).

71 R Njioka "'I am not gay", CJ nominee Mutunga says' *Standard Digital* 7 June 2011, <http://www.standardmedia.co.ke/business/article/2000036698/i-am-not-gay-cj-nominee-mutunga-says> (accessed 30 April 2015).

72 As above.

73 Equal Rights Trust and Kenya Human Rights Commission *In the spirit of Harambee: Addressing discrimination and inequality in Kenya* ERT Country Report Series 1, London, February 2012 114-130.

74 Kenya Human Rights Commission (KHRC) *The outlawed among us: A study of the LGBTI community's search for equality and non-discrimination in Kenya* (2011) 2, http://www.goethe.de/resources/files/pdf31/THE_OUTLAWED_AMONGST_US_1.pdf (accessed 30 April 2015).

election to the Kenya Senate in 2013, although he withdrew from the race before the ballot largely on account of financial reasons.⁷⁵ Such an act would be hard to duplicate in either Uganda or Tanzania. Groups such as the Gay and Lesbian Coalition of Kenya (GALCK) have a fairly prominent profile in the wider human rights community, while local groups, such as Me and You in Meru and the Kisumu Initiative for Positive Empowerment (KIPE), are organisations that operate outside Nairobi manifesting a much wider outreach than their counterparts in Uganda and Tanzania. A common problem is faced in that LGBTI activists were initially denied registration of their organisations, and thus remained marginal to the mainstream. As observed by the Kenya Commission on Human Rights (KHRC):⁷⁶

[H]uman rights advocacy and responses by [mainstream] Civil Society Organisations (CSOs) to human rights abuses against LGBTI persons have been few, reactionary and lacking in strategic focus. Moreover the interventions rarely address the real source of the problem [criminalization], nor do they build on past responses. Further to this is an absence of mainstreamed LGBTI programmes in most organisations especially those that deal with women and gender issues.

That situation has now changed with a decision recently delivered by the High Court. In the case of *Eric Gitari v NGO Co-Ordination Board & The Attorney-General*,⁷⁷ the Court found that the grounds on which the Board sought to deny the group registration were a violation of the Bill of Rights. In a decision that was erudite in its exposition of what the transformation heralded by the 2010 Constitution actually means, the Court roundly condemned the Board, holding:⁷⁸

The upshot of our findings above is that the Board infringed the petitioner's freedom of association in refusing to accept the names he had proposed for registration of his NGO, thereby in effect refusing to contemplate registration of the proposed NGO. There is a whiff of sophistry in the recommendation by the respondent that the petitioner registers his organisation, but by another name. What this recommendation suggests is that the petitioner can register an organisation and call it, say, the Cattle Dip Promotion Society, but carry out the objects of promoting the interests of the LGBTIQ community, which suggests that what the Board wants to avoid is a recognition of the existence of the LGBTIQ groups.

75 Although there were some reports of threats, Kuria himself reported a rather positive experience before he was forced to withdraw from the campaign: 'I had seen changes in the way our people in the villages view gay people. For many people, gay people and gay rights are perceived through mediated interpretation of politicians and religious leaders. For the first time it was possible to talk with the people, answer their questions as well as point out the nexus areas of different forms of marginalisation, including poverty and other challenges that affect them, too.' See D Smith 'Kenya's first gay political candidate reveals why he quit the race' *The Guardian* 25 December 2012 <http://www.theguardian.com/world/2012/dec/25/kenya-gay-candidate-ends-campaign> (accessed 30 April 2015).

76 KHRC (n 74 above) 3.

77 Petition 440 of 2013 [2015] eKLR.

78 *Gitari* (n 77 above) para 145 46.

While this decision represents a major boost for sexual minority groups in Kenya, and the general context for the operation of such groups is bound to get more tolerant, the community still faces a whole range of violations familiar in both Uganda and Tanzania, including harassment by state officials, stigma and exclusion by family and society, physical violence and threats of death, expulsion from learning institutions, blackmail and extortion, poor access to health care and a lack of comprehensive services, as well as medical research abuse.⁷⁹ The KHRC clearly points to the root cause of the problem:⁸⁰

The criminalisation of homosexuality is a legacy which has now passed its use by date. The colonial laws from which the criminalisation of homosexuality emanates, have no place in a world where central to the stability of a society is the need to respect cultural variety. For such reasons, convicting those who have been found to engage in homosexuality activity has no place in a modern society.

Although the issue of decriminalisation and using the courts of law has been a matter under discussion within the LGBTI community, as at the time of writing, no case has yet been filed in the Kenyan courts to take the matter further. The situation is a little different with respect to transgender and intersex individuals.

5 A note on the 'T' and the 'I' in the LGBTI alphabet

Most analyses of sexual minorities concentrate on the first two letters of the LGBTI alphabet with much less attention given to the 'B' (bisexual), 'T' (Transgender) and the 'I' (Intersex). Issues of gender identity and expression, in particular, are usually overshadowed in African analyses of LGBTI rights. Such non-conformity is a factor that facilitates stigma and ostracism.⁸¹ Indeed, the threats of persecution of this kind⁸²

confine[s] individuals to strict gender and sexual norms for fear of being labelled LGBTI; as a result, it maintains power inequalities between men and women. Lesbians and women who have sex with women are particularly vulnerable to the effects of strict gender norms which are perpetuated by anti-homosexuality laws.

Needless to say, East Africa has recently had to come to grips with the complexities presented by the phenomenon of transgenderism and intersexuality.

79 KHRC (n 74 above) 20-41.

80 KHRC 48.

81 Amnesty International *Making love a crime: Criminalisation of same-sex conduct in sub-Saharan Africa* (2013) 47-57, http://www.amnestyusa.org/sites/default/files/making_love_a_crime_-_africa_lgbti_report_emb_6.24.13_0.pdf (accessed 30 April 2015).

82 Amnesty International (n 81 above) 47.

Major issues of voice, image and security affect this category of individuals. As the KHRC points out with respect to the situation in Kenya, which is also applicable to the case of Uganda:⁸³

There is no legal framework that allows or facilitates transgender and intersex individuals to choose their gender and have it recognised by law; most intersex individuals are taken through unnecessary corrective surgeries when they are born or simply assigned a gender role and raised as such without being given a chance to choose their gender or undergo a sex correction surgery when they are of age. The transgender persons suffer lack of legal recognition and are legally bound to a gender they do not want to identify with.

The legal and policy responses in relation to transgender and intersex individuals have been mixed. Once again, Uganda leads the way in the most extreme legal reaction to the issue. Transgender and intersex individuals have been subjected to all forms of harassment, including hate crimes, especially on account of the charge against transgender women that they are masquerading in order to dupe and extort money from the public, or the alternative claim that they are homosexual, confusing the issue of gender identity and sexual orientation. Others have faced lynch mobs and have been beaten, aside from being ostracised, barred from housing and suffering all manners of discrimination in their places of employment, as well as with immigration officers who accuse them of impersonation. The HRAPF/CSCHCRL report on the enforcement of laws criminalising same-sex conduct in Uganda summarises the situation well, pointing out that just being transgender or intersex is apparently sufficient to satisfy the police that one is a homosexual engaged in 'carnal knowledge against the order of nature'.⁸⁴ To compound matters:⁸⁵

The persons arrested are not informed of their rights and the whole circumstances are so humiliating that the suspect cannot reasonably be said to be having a fair trial. When a suspect cannot pay a bribe and charges are placed, and where suspects have no lawyer, persons such as Brian Mpande and Fred Wesukira are not availed of the right to a hearing on bail. Demands for bribes, coupled with ongoing harassment, ensure that suspects cannot have a fair trial. Suspects are also kept in police cells for more than the 48 hours required by the Constitution. Brenda Kizza and George Oundo spent a week in police detention without access to lawyers or to a magistrate. They were then released without being brought before a magistrate but were required to keep on reporting to the police.

The most recent manifestation of the phobia against transgender and intersex individuals was transparent in the debate in the Ugandan Parliament over the Registration of Persons Bill, 2014. Clause 39 of the Report of the Committee that studied the Bill suggested the adoption

83 KHRC (n 74 above) 42.

84 HRAPF/CSCHCRL (n 58 above) 61.

85 HRAPF/CSCHCRL 61-62.

of the following provision from the earlier Births and Deaths Registration Act:⁸⁶

If a child, after being registered, either through an operation or otherwise, changes from a female to a male or from a male to a female and the change is certified by a medical doctor, the registrar of the births and deaths registration district in which the birth is registered shall, with the approval of the Executive Director and on the application of the parent or guardian of that child, alter the particulars of the child which appear on the births register.

An immediate interjection was raised. What followed exemplifies the knee-jerk reaction of Ugandan politicians to anything even remotely connected to sexual minorities. It is thus in order to extensively quote from the *Hansard* of the day:

Chairperson: Honourable members, order!

Mr Ekanya: Madam Chair, is it in order for the Chairperson of the committee to read a statement that is derogative to the Constitution of the Republic of Uganda?

Chairperson: Honourable members, my understanding is that she is reading the provisions of the law which exists.

Ms Namugwanya: Madam Chair, what I am reading here was imported from the Registration of Birth and Death Act, of 1973 of the Republic of Uganda.⁸⁷

Despite the clarification, the response of members of parliament reflected an affixation with an issue that was in fact not the subject under consideration, homosexuality:

Ms Betty Amongi: Thank you, Madam Chairperson. I have no problem with the importation of the law except when it comes to the provision related to a man changing to a woman – (*Laughter*) – or a woman changing to a man. It is good that the Chairperson indicated that those Acts were of 1973 and under our new law, the 1995 Constitution Article 31(2)(a), it states that marriage between persons of the same sex is prohibited. And the provision which talks about any law that contradicts the Constitution is null and void. So in other words, when we come to delete that particular one, it will be in tandem with it; in fact a law, which contradicts the 1995 Constitution would be in tandem with that particular one.⁸⁸

The Chairperson sought to bring some clarity to the matter:

Chairperson: Honourable members, I think we should be a bit careful. There are people who are hermaphrodites; who are born with two sexual organs and at some stage you must decide whether you are going to be a man or a woman – (*Laughter*). Honourable members, this is serious, it is not a joke. There are hermaphrodites in this country. These are born with two sexual organs. There are people who have both a male and female organ and it is the same person.

86 See sec 14 'Change of sex of child', the Births and Deaths Registration Act (Cap 309, Vol XII, 2000 Laws of Uganda).

87 *Hansards* of the Parliament of Uganda, Bills committee stage, the Registration of Persons Bill 2014, 19 February 2015 242.

88 *Hansards* (n 87 above) 248.

Needless to say, the House had already fixed its mind on the matter:

Ms Alaso: Thank you, Madam Chairperson. *I think that God has accorded us an opportunity in this Bill that we are considering to correct something which is now very explosive.* I would like to take cognisance of the fact that there are Ugandans that are born hermaphrodites and there will be need for corrective surgery. But, for us to carry forward these 1973 anomalies in the law which talked of 'otherwise'; what does 'otherwise' mean in our time? We need to boldly contextualise this and read into the possible interpretation in our day and era.

My heart goes out for the children of this country that are being adopted by homosexuals. We read just a month ago, a little boy who was called Jack being told to change into a girl to be called Jacqueline and they took the little fellow who cannot consent, or understand the times, they cut out what they wanted to remove and turned the fellow into a Jacqueline. *This is the time for us to protect the children of this country (Applause) who are going to help the people who are abused?* For tonight, let us be very specific. If we want to say we want our brothers and sisters, who have a disability and anomaly at birth to have a corrective surgery, let us be very specific. But we can no longer leave it to chance.

Madam Chairperson, if you are born and your leg has a problem, and they correct it, it does not change you to something else. You just get facilitated to be better. That is the corrective surgery Dr Bitekyerezo has been telling us about. I think it would be very dangerous in this day and era to leave this provision which is even like hon.⁸⁹ Betty has said – against the provisions of our Constitution! Let us amend it.

Quite clearly, the ghosts of the AHA were once again at play in the House. It was quite clear that members of parliament were discussing an issue on which they had either no knowledge, or not enough of it. The Speaker was forced to adjourn proceedings to the next session on the following day on account of the ruckus. Given the general atmosphere prevailing in Uganda, no attempt has yet been made to institute a public interest action on the behalf of transgender or intersex individuals.

In Kenya, the initial knee-jerk reaction of the courts to the issue of intersexuality was evident in the case of *Richard Muasya v Attorney-General*⁹⁰ that came to the court as early as 2004, even though the decision was not delivered until 2010. In that case, the petitioner sought the recognition of a third gender and damages for poor treatment at the hands of government health authorities. While accepting that the petitioner had indeed been inhumanely treated by state officials, warranting an award of KShs.500,000/=, the court noted that the law recognised only two sexes. Thus, protecting intersex people from discrimination using the category of 'other status' would result in the recognition of a third category of gender. In making the argument that Kenyan society was not ready for such a development, the court stated:⁹¹

⁸⁹ *Hansards* 249 (my emphasis).

⁹⁰ [2010] eKLR (HCK) (Kenya) Miscellaneous Civil Application 890 of 2004.

⁹¹ *Muasya* (n 90 above) para 148.

Kenyan society is predominantly a traditional African society in terms of social, moral and religious values. We have not reached a stage where such values involving matters of sexuality can be rationalised or compromised through science.

A somewhat different conclusion was made by the court in the application by the organisation Transgender Education and Advocacy (TEA)⁹² for judicial review, a case filed in 2013 and decided soon thereafter. In that case, the NGO Co-Ordination Board refused to register the organisation, citing a string of flimsy reasons, but ultimately on account of their trepidation over the issues that such a group would address. The case thus brought to the fore the question of whether it was appropriate for an organisation established to advocate for the rights of transsexuals to be refused registration. The facts of the case indicated that the Board had refused to register TEA despite submission of all the necessary documentation as per the regulations governing NGO registration in the country. The ostensible reasons given were that the names and passport size photographs of two of the officers who had applied on behalf of the organisation were different from those in their national identification cards.⁹³

The Board also claimed that the applicant's change of gender had put a halt to the registration process since there was an ongoing court case where the TEA Chairperson, Audrey Mbugua (previously Andrew Mbugua), had 'sued the national examinations council seeking the removal of the male gender mark from his academic certificate to reflect her female status'.⁹⁴ The Board also claimed that it had not refused registration of TEA, but that it was 'awaiting the outcome of a pending case in which some (TEA) officials had sought to officially change their names and gender'.⁹⁵ The court found that the grounds of the refusal were wrong, given that the Act did not make it a requirement for the officials of an applicant for registration to state their gender. The court very clearly stated:⁹⁶

The introduction of the issue of gender by the first respondent as a ground for refusing registration, however, is not one of the considerations in deciding whether or not to decline registration. By introducing that issue the first respondent has obviously introduced and considered an irrelevant factor.

Having reviewed the law relating to the exercise of discretion and finding that the NGO Board had not correctly applied itself with respect to the first respondent's request for registration, the court concluded:⁹⁷

92 Miscellaneous Application 308A of 2013.

93 TEA (n 92 above) paras 11 & 12, 5.

94 TEA para 13, 6.

95 TEA para 28, 12.

96 TEA para 31, 13.

97 TEA para 36, 18.

Apart from the foregoing, it is my view that to discriminate persons and deny them freedom of association on the basis of sex or gender is clearly unconstitutional.

Why was the decision in the TEA application important? In the first place, it marked a significant departure from the *Muasya* case that adopted an ostrich-in-the-sand position on the question of sexual diversity. Secondly, by allowing the TEA application to succeed, the court affirmed the importance of giving oppressed and marginal sexual minorities the right to secure a voice as a recognised component of civil society. Often the ability to organise and express oneself is the elemental foundation in the process of asserting one's rights. Indeed, as Tenga and Peter assert, the right of association is the 'mother of all rights'.⁹⁸ It is for this reason that the recent case decided in favour of the LGBTI organisation LeGaBiBo in Botswana, challenging the government's rejection of its application for registration, was so important.⁹⁹ The TEA case is also significant because it gave voice to a constituency (alongside the intersexed) that is often described as a 'forgotten' one.¹⁰⁰ Lastly, the TEA case confirmed the essential viability of the constitutional bar against discrimination enshrined in the 2010 Constitution. While numerous issues remain of concern with regard to the rights of intersex and transgender people in Kenya, at least a start has been made with the TEA case.

Action on intersex identity was given a boost with the *Baby A* case, which sought the legal recognition and protection of intersexual children; a declaration that intersexual children are entitled to and or guaranteed equal rights; a declaration that all surgery on intersex infants that is not therapeutic be approved by a court; directions in relation to guidelines, rules and regulations on the treatment of intersex children; and an order directing the government to investigate, monitor and collate data and/or statistics on all intersexual children in Kenya.¹⁰¹

While refraining from ruling on whether or not there should be a third gender, which issue the court said should be left to parliament, the court said that article 27(4) of the 2010 Constitution on non-discrimination needed to be read 'in its own context and language'. According to the court, the article¹⁰²

98 N Tenga & C Peter 'The right to organise as mother of all rights: The experience of women in Tanzania' (1996) 34 *Journal of Modern African Studies* 143-162.

99 See the judgment in the case of *Thuto Rammoge & 19 Others v The Attorney-General* Case [2014] MAHGB-000175-13; and BBC 'Botswana gay rights group wins landmark case' 14 November 2014, <http://www.bbc.com/news/world-africa-30054459> (accessed 30 April 2015).

100 See J Kaggwa 'Intersex: The forgotten constituency' in Tamale (n 12 above) 231-234. On transgenderism, see A Mbugua 'Gender dynamics: A transsexual overview' in Tamale (n 12 above) 238-246.

101 *Baby A & The Cradle v The Attorney-General & 2 Others* Constitutional Petition 266 of 2013 para 61, 16.

102 As above.

categorically states that there shall be no discrimination 'on any ground' from that provision. An inclusive provision is not exhaustive of all the grounds specifically mentioned therein, including sex. That finding will therefore have to mean that intersexuals ought not to be discriminated against in anyway including in the issuance of registration documents such as a birth certificate.

The court also extended its ruling to intersexuals in general 'as opposed to the narrower and specific interests of Baby A who is only one such person in our society'. The court directed that the government develop guidelines to govern, among other things, the registration of intersex children, medical examinations and corrective surgeries, as well as to collect data on them.¹⁰³ These positive jurisprudential developments are doubtlessly of significant importance in the struggle for the improved recognition of an historically-marginalised community.

6 Conclusion

It is quite clear that courts have become an important context within which the struggle over sexual rights and sexual expression in East Africa is being fought, as the examples from Uganda and Kenya illustrate. There is no doubt that it will remain hot-button for a considerable period of time and there is no indication of which direction they will progress in if subjected to judicial intervention. The timing and framing of strategic litigation on such issues will thus have to be carefully thought out before initiation.

The recent decisions in Kenya on transgender and intersex people also point to some hope over the horizon if the lesson of balance and sobriety over these issues can be taken across the border into Uganda. That is not to say that progress in this regard will be easy, given the time it has taken for societies around the world to fully come to grips with the varied dimensions of sexual orientation and gender identity.¹⁰⁴ For lesbian and gay people, while there has been considerable discussion over the issue of decriminalisation, numerous factors would have to be taken into account before court action can be initiated on this front. Ironically, of the two countries, the Ugandan judiciary has had most engagement with the issue and yet an action in those courts would be ill-advised.

¹⁰³ *Baby A* (n 101 above) paras 67 & 68, 17-18.

¹⁰⁴ As the *New York Times* points out: 'For years, writers and academics have argued that gender identity is not a male/female binary but a continuum along which any individual may fall, depending on a variety of factors, including anatomy, chromosomes, hormones and feelings. But the dichotomy is so deeply embedded in our culture that even the most radical activists have been focused mainly on expanding the definitions of the two pre-existing categories.' See J Scelfo 'A university recognises a third gender: neutral' *New York Times* 3 February 2015, http://www.nytimes.com/2015/02/08/education/edlife/a-university-recognizes-a-third-gender-neutral.html?_r=0 (accessed 30 April 2015).

The experiences recounted lead us to ask how appropriate courts of law are for the kinds of battle encapsulated in the cases reviewed in this article. In many respects, the victory over the AHA in Uganda represented by the *Oloka-Onyango* case was a bittersweet one. The fact that the case turned on the issue of quorum meant that the more substantive rights issues involved in the case were not tackled. In other words, the court found an easy way out of nullifying the law without having to address the very controversial substantive rights issues that the AHA raised. What this means is that there has still not been a comprehensive judicial engagement with the issue of discrimination on the basis of sexual orientation. It remains to be seen whether the EACJ will declare that it has jurisdiction to consider the matter. Secondly, at a more practical level, fresh legislation can be introduced and directed towards the same goal of attempting to legally obliterate same-sex orientation from Ugandan society.¹⁰⁵ In such a situation, there is no telling in which direction the courts would move in response.

In contrast, the Kenyan courts have adopted a much more enlightened and forthright posture in dealing with the twin issues of sexual orientation and gender identity. While the two intersex cases (*TEA* and *Baby A*) demonstrate a movement away from the conservative knee-jerk reaction of the *Muasya* case and a deep appraisal of the fairly complex nature of the issue, the *Eric Gitari* case, concerned with the issue of registration of an LGBTI organisation, reflects a bench that is confident in the exercise of a judicial oversight power that is both progressive and transformative. No doubt, the 2010 Constitution takes a good deal of responsibility for this.

At the same time, it is necessary to remain sensitive to the possible negative consequences of heightened judicial intervention in Kenya. Thus, in the aftermath of the *Gitari* decision, the *Weekly Citizen* newspaper published the names and photographs of 12 LGBTI activists, including some who were previously still in the closet.¹⁰⁶ Dennis Nzoika, who was one of the activists named in the paper, responded with the following reflection:¹⁰⁷

105 Recent press reports indicate that this is precisely what has happened. The new Bill is called the Prohibition of Unnatural Sexual Offences Bill, 2014. For a report, see M Danielsen & I Imaka 'New anti-gay Bill in advanced stages' *Daily Monitor* 20 November 2014, <http://www.monitor.co.ug/News/National/New-anti-gay-Bill-in-advanced-stages/-/688334/2528396/-/14e5eauz/-/index.html> (accessed 30 April 2015).

106 J Morgan 'Kenya newspaper prints list of "top homos"' *Gay Star News* 11 May 2015, <http://www.gaystarnews.com/article/kenya-newspaper-prints-list-top-homos110515> (accessed 30 April 2015).

107 F Nzwili 'Kenya's LGBT community gains the right to organise, but religious opposition looms' *HuffPost* (Gay Voices) 29 April 2014, http://www.huffingtonpost.com/2015/04/29/kenya-lgbt-community-ruling-_n_7173726.html (accessed 30 April 2015).

If homophobes were looking to target people, if the police were looking to arrest people, if anti-gay youths were looking to attack some teen they assume is gay, they now have a face and a name.

The religious community also expressed their opposition.

Also implicated in the intervention of the courts in East Africa thus far (and as was amply demonstrated in the Indian *Naz* case in the Supreme Court) are the age-old battles over separation of powers and the claims about the over-judicialisation of social issues. At the regional and international level, there is the question of cultural relativism and the charge of 'sexual imperialism' levelled against those who speak out in support of these issues.¹⁰⁸ Activists in this area of human rights will thus have to shape their interventions in a manner that seeks to address these concerns.¹⁰⁹

At the end of the day, there is no doubt that the basic rights of those who are marginalised and persecuted will eventually triumph, even if the battle will be lonely, long and rough. Although made in relation to the situation of women, the comments of Amissah JP in the famous case of *Unity Dow v Attorney-General of Botswana* are apposite in relation to the existing discrimination against sexual minorities in Uganda and Kenya.¹¹⁰

Today, it is universally accepted that discrimination on the ground of race is an evil. It is within the memory of men still living today in some countries that women were without a vote and could not acquire degrees from institutions of higher learning, and were otherwise discriminated against in a number of ways. Yet today the comity of nations speaks clearly against discrimination against women. Changes occur. The only general criterion which could be put forward to identify the classes or groups is what to the right thinking man is outrageous treatment only or mainly because of membership of that class or group and what the comity of nations has come to adopt as unacceptable behaviour.

In sum, there is no doubt that discrimination against sexual minorities shall also end. However, the demise of such discrimination will in part be contingent on the extent to which courts of law become more sensitised to the intricacies of sexual orientation and gender identity. Only then will our East African countries be set on the right path to giving full recognition to the right to love in all its varied shapes and sizes.

¹⁰⁸ See Nyanzi (n 4 above).

¹⁰⁹ As Andrew Mwenda (one of the co-petitioners in the *Oloka-Onyango* case) points out: 'Law is (and must be) a reflection of the values, belief and traditions of the society that it governs. No state, democratic or authoritarian, can force a lifestyle on a society, which 90 per cent of the population sees as an abomination.' See A Mwenda 'After court annulled AHA, what next?' *The Independent* 8-14 August 2014 9.

¹¹⁰ (2001) AHRLR 99 (BwCA 1992) para.90.