

Forging Paths for the African Queer: Is There an “African” Mechanism for Realizing LGBTIQ Rights?

Zahrah Z Devji*

New York University

Zahrah.devji@law.nyu.edu

Abstract

The African continent has struggled to accept its LGBTIQ population and queer individuals continue to struggle in pursuit of their rights. Similar refrains justifying widespread homophobia reverberate throughout the continent. This article analyses two case studies in Africa: Uganda and South Africa. Although each country treats the question of queer rights differently, arguably the treatment of the queer on a day to day basis is not dissimilar in each country. The article considers whether there is a mechanism for realizing queer rights in Africa, by appealing to the values and cultures that exist on the continent.

Keywords

Queer, gay, lesbian, bisexual, transgender, intersex, LGBT, Africa, Uganda, South Africa

INTRODUCTION

Two distinct narratives dominate the discourse relating to African sexualities. The narrative of “sexual colonialism” describes queer sexuality as an un-African colonial legacy. Advocates of sexual colonialism deny the existence of queerness on the African continent and further pathologize it as a perversion imposed upon and adopted by the African population during the era of imperial control.¹ Conversely, the “sexually-deviant African” narrative views pre-colonial Africa as a hypersexual society that was remedied by the imposition of “white Euro-American sexual norms and gender expressions”.² Although contradictory, where the sexual colonialism narrative views queer identity itself as un-African, while the sexually-deviant African narrative sees diverse sexualities as inherently African, both narratives manifest themselves to varying degrees in the laws and practices relating to queer identities in Africa.

* JD, New York University School of Law. This article was written under the supervision of Prof Fareda Banda (SOAS / NYU).

1 L Ossome “Postcolonial discourses of queer activism and class in Africa” in S Ekine and H Abbas (eds) *Queer African Reader* (2013, Pambazuka Press) 32 at 35.

2 S Ekine “Contesting narratives of queer Africa” in Ekine and Abbas (eds), id 77 at 78.

Resistance to queerness in African is at least partially rooted in the language used to describe non-heteronormative sexualities. Many of the most familiar terms, such as the acronym LGBTIQ (lesbian, gay, bisexual, transgender, intersex and queer), are sourced in western studies of non-heteronormativity and are therefore assumed to express western conceptions of sexuality. Some academics argue that western frameworks are not useful in the African context, urging researchers to express ideas in an “African” manner, when exploring the anthropology of the African continent.³ According to Sylvia Tamale, a prominent Ugandan academic, although there is a tendency to “uncritically apply standard western research indicators and assumptions”⁴ to the African context (which often renders skewed results, since “the identity politics that underpin these western notions do not necessarily apply in African contexts”) there is still “a lot of sense in using existing theoretical bases as a starting point and then correcting / revising them in light of the contextual evidence collected in current studies”.⁵ To do otherwise would involve the unnecessary enterprise of reinventing the wheel.⁶ This article uses the term “queer” to describe non-heteronormative sexualities in Africa. The term is admittedly influenced in many ways by western queer theory, but has also been useful in evoking a sense of sexuality as a spectrum, rather than an umbrella acronym that encompasses several independent identities (ie LGBTI). It should also be noted that, while the African continent incorporates a diversity of populations, languages and ideas, the geographic term “Africa” is used in this article to refer to some of the dominant ideas about queer sexualities that exist on the continent. There are no doubt many differing viewpoints around the continent and the elucidation of queer rights and discourses in Africa in this article is in no way intended to be universalist.

This article explores whether there is an “African” way of realizing queer rights. The first part analyses the status quo regarding queer rights in Africa, focusing on South Africa and Uganda, two countries where the laws surrounding queer rights are vastly different. It then looks to the continent as a whole to analyse some of the rhetoric commonly used to reject queer identities. The last part looks to other models of pursuing queer rights in Africa, in an attempt to establish a menu of options for advocacy, which can be manipulated for and adapted to the context to which they are applied.

3 See generally, M Matua *Human Rights: A Political and Cultural Critique* (1st ed, 2002, University of Pennsylvania Press).

4 S Tamale “Researching and theorizing sexualities in Africa” in S Tamale (ed) *African Sexualities: A Reader* (2011, Pambazuka Press) 11 at 20.

5 Id at 25.

6 Ibid.

MODELS FOR ADDRESSING QUEERNESS IN AFRICA

South Africa

The recognition of queer rights in the law of South Africa is perhaps one of the most advanced in the world. The language of the country's 1996 constitution, which included the sexual orientation of individuals as a class towards whom discrimination was prohibited, drove the recognition of queer rights.⁷ In 2006, South Africa was the first country in Africa to extend full marriage rights to same sex couples.⁸ Prior to ruling that the state's refusal to recognize marriage for same sex couples was unconstitutional,⁹ South African courts also overturned the prohibitions against sodomy,¹⁰ held that permanent same sex partners of South Africans should receive the same benefits as heterosexual spouses,¹¹ legalized same sex adoptions,¹² recognized the right to change one's sex,¹³ and invalidated a provision of the Children's Status Act that classified children born to same sex couples, through the aid of artificial insemination, as illegitimate.¹⁴ All these fundamental victories for the South African queer population were achieved under the constitution's equality provision. In addition to establishing concrete rights, the Constitutional Court has interpreted the term "sexual orientation" broadly, by defining it as erotic attraction: "in the case of heterosexuals, [sexual orientation means erotic attraction] to members of the opposite sex; in the case of gays and lesbians to members of the same sex. Potentially, a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex".¹⁵

By defining sexual orientation by reference to erotic attraction, rather than by reference to particular acts, the court broadly reads the proscription of discrimination based on sexual orientation to outlaw discrimination based on conduct, as well as discrimination based on sexual identification.¹⁶

-
- 7 South African Constitution, 1996, chap 2, art 9: "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" (emphasis added).
 - 8 P de Voss "A judicial revolution?: The court-led achievement of same-sex marriage in South Africa" (2008) 4 *Utrecht Law Review* 162.
 - 9 *Minister of Home Affairs and Another v Fourie; Lesbian and Gay Equality Project and Others v Minister of Home Affairs* [2005] ZACC 19 (2005).
 - 10 *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15 (1998).
 - 11 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17 (1999).
 - 12 *Du Toit v Minister of Welfare* [2002] ZACC 20 (2002).
 - 13 *Alteration of Sex Description and Sex Status Act* (Act No 49 of 2003).
 - 14 *J v Director General of Home Affairs* [2003] ZACC 3 (2003).
 - 15 *National Coalition for Gay and Lesbian Equality*, above at note 10.
 - 16 P de Vos "Sexual orientation and the right to equality in the South African Constitution" (2000) 117 *South African Law Journal* 17 at 23.

However, despite progressive policies and interpretations of the South African Constitution, public opinion and majoritarian sentiments are largely contrary to the liberal nature of the law.¹⁷ “The vast majority of South Africans condemn [the queer].”¹⁸ One South African constitutional law scholar offers three explanations for why the law was able to progress in South Africa, despite public opinion: the rise of queer visibility during key moments of transitional justice; the dominant ideology of the liberation movements, which was grounded in prohibiting discrimination and promoting equality; and the actual process of drafting the constitution, which allowed for its approval despite a lack of public support.¹⁹

The “rise in queer visibility” and “shift in ideology” manifest themselves in the fact that it was the fractures in the movement against apartheid, combined with the subsequent pushback against apartheid’s intense control over sexuality, that provided a space for the mobilization of queer rights.²⁰ Many of the queer rights activists who participated in the anti-apartheid movement saw national liberation as an opportunity for initiating social and political change that would benefit groups that were marginalized because of their race or sexuality.²¹ According to one academic, “the nascent [queer] movement in South Africa could not have succeeded had the anti-apartheid struggle not profoundly destabilized and daringly realigned the country’s political and social order.”²² In 2006, *Independent Online*, a news and information website based in South Africa, ran a poll on the question of same sex marriage and, of the 816 people who voted, 47 per cent were opposed to same sex marriage,²³ an already low number that is probably under-representative, since by its very nature an online survey only includes those with access to online media. Furthermore, the survey probably only targeted those who read *Independent Online*, which is a liberal newspaper in the country. Thus, although the

17 E Goodsell “Constitution, custom, and creed: Balancing human rights concerns with cultural and religious freedom in today’s South Africa” (2007) 21 *Brigham Young University Journal of Public Law* 109 at 110; J van der Vyver “State-sponsored proselytization: A South African experience” (2000) 14 *Emory International Law Review* 779 at 815.

18 Goodsell, *ibid.*

19 E Christiansen “Ending the apartheid of the closet: Sexual orientation in the South African Constitution” (2000) 32 *New York University Journal of International Law & Policy* 997.

20 *Ibid.*

21 A Currier “Decolonizing the law: LGBT organizing in Namibia and South Africa” in A Sarat (ed) *Special Issue Social Movements / Legal Possibilities* (2011, Emerald Group Publishing Limited) 17 at 24.

22 R Thoreson “Somewhere over the rainbow nation: Gay, lesbian and bisexual activism in South Africa” (2008) 34 *Journal of South African Studies* 679 at 684; S Croucher “South Africa’s democratisation and the politics of gay liberation” (2002) 28 *Journal of South African Studies* 315.

23 I Kuppan, R Naidu and A Quintal “Civil Union Bill a ‘slap in the face’” (14 November 2006) *The Independent Online*, available at: <<http://www.iol.co.za/news/politics/civil-union-bill-a-slap-in-the-face-1.303121>> (last accessed 12 November 2014).

constitution gives a strong legal basis for queer rights, South Africa remains a deeply conservative country that highly values heteronormativity.²⁴

The drafting process explanation is supported by many of the commentaries accompanying the draft constitutional documents, which demonstrate that even those involved in the drafting process struggled with the inclusion of a prohibition on discrimination based on “sexual orientation”. According to the explanatory memoranda on the draft bill of rights, as late as October 1995 the inclusion of sexual orientation as a protected class was still a “contentious and outstanding issue” and in November 1995 the editorial commentary accompanying the draft constitution “seemed to identify sexual orientation protections as the sole controversial and undecided aspect of the Equality Clause”.²⁵ The tight time constraints and strong political pressure affecting the drafting process, however, meant that public opinion would have little influence on the outcome. Therefore, the inclusion of sexual orientation protections in the South African Constitution represents the elitist approach to the document’s drafting. Although queer rights have continued to expand since the constitution was drafted, all queer rights have been realized by challenging laws under the Equality Clause of the constitution. Some academics have referred to these victories as “through the back door”,²⁶ where rights have been accomplished through stylized legal arguments in court, which bypass popular opinion and do not require the support of the masses. In essence, the South African case study serves to demonstrate that good policies and progressive constitutions are not enough to shape a society’s values and sustain the clear rule of law.²⁷

The biggest threat to the South African queer is the countermovement consisting of civil society groups that endorse homophobic views. Professor Neville Hoad at the University of Texas identifies three main politics that recur around the queer and anti-queer rights movements in South Africa: the corruption framework that sees the queer as un-African; the preservation framework that criticizes colonial taboos and celebrates sexual diversity as inherently African; and the universalist framework, which identifies sexual orientation as a human right that is not intrinsic to any particular time or place.²⁸ The corruption framework is the dominant strategy for the queer movement in South Africa, in addition to in many other places on the

24 Thoreson “Somewhere over the rainbow”, above at note 22 at 682.

25 Christensen “Ending the apartheid”, above at note 19 at 1032–33.

26 L Vincent and S Howell “‘Unnatural’, ‘un-African’ and ‘ungodly’: Homophobic discourse in democratic South Africa” (2014) in 17 *Sexualities* 472 at 473; D Weyers “What has happened to South Africa’s pink agenda? From queer victories to queer bashing” (2007, Rhodes University, Grahamstown, unpublished MA thesis).

27 I Waldman and C Overs “Sexuality and the law: Case studies from Cambodia, Egypt, Nepal and South Africa” (2014) *Institute of Development Studies* at 11, available at: <<http://www.ids.ac.uk/publication/sexuality-and-the-law-case-studies-from-cambodia-egypt-nepal-and-south-africa>> (last accessed 11 November 2014).

28 Thoreson “Somewhere over the rainbow”, above at note 22 at 688–89.

continent. This framework rebukes western decadence and control, which are often viewed as the source of queer sexualities. The dominant refrain within the corruption framework claims that homosexuality is “unnatural, unAfrican and ungodly”.²⁹ The anti-queer movement is especially concerning since it is unclear whether the same fervour and numbers exist on the side rallying for queer rights. While a number of NGOs undoubtedly actively continue to voice concern over queer rights, NGOs face the same problem of lack of public support faced by the drafters of the constitution. Further, sustaining spaces for political negotiation in civil society presents its own set of challenges: in the South African context, some of the main constraints include both a sense that the key goals have already been achieved and therefore it is time to adopt new agendas, and also the universal funding limitations that any civil society movement faces. As such, there appears to be a dangerous disparity between support for the queer movement, versus that for the anti-queer movement.

While anti-queer rights factions have struggled to enshrine their ideologies in the law, in fact the law directly contravenes their views and many of them have pursued their goals extra-legally, through violence. Corrective rape and homophobic violence are common occurrences in South Africa and many instances of these heinous acts go unnoticed, unregulated and unreported. In a 2003 study, one researcher cited that “one in twenty rapes are reported to the police and of those cases only 48% went to court, of which 45% were thrown out”.³⁰ Funeka Soldaat, who runs Free Gender in South Africa, an LGBT rights organization that specializes in helping victims of corrective rape, said in an interview:

“Even if you know how the constitution works, you don’t know how to use it to protect yourself. If you don’t have money, you don’t have access to the justice system. Violence in the townships is normal. Homosexuality is [seen as] un-African. Patriarchy is everywhere. The way religious leaders read scripture is painful. Children start raping at 14, 15 and take pictures. We’re sitting on a time bomb.”³¹

Corrective rape, frequently the chosen form for homophobic hate crimes in South Africa, serves to perpetuate the patriarchy through gender power dynamics. Some men who admitted performing corrective rapes shamelessly commented in an on-camera interview, “if we want to finish lesbians and

29 Vincent and Howell “Unnatural”, above at note 26 at 475.

30 Cited in S Bocshart “Misogyny and violence against black lesbians: Discursive constructions of corrective rape in South Africa” (unpublished MA thesis, American University, Washington, DC, 2014) at 10.

31 P Strudwick “Crisis in South Africa: The shocking practice of ‘corrective rape’ – aimed at ‘curing’ lesbians” (4 January 2014) *Independent UK*, available at: <<http://www.independent.co.uk/news/world/africa/crisis-in-south-africa-the-shocking-practice-of-corrective-rape-aimed-at-curing-lesbians-9033224.html>> (last accessed 12 February 2015).

gays they must be forcefully raped ... a man must go back to his manhood. Women must be women. She must be ready and willing to have sex".³² Another commented, "[queer people] must be raped so that their gay and lesbian behaviour can come out".³³

In the context of queer rights, South Africa is perhaps the poster child of the severing of de facto and de jure law. The law strongly favours the promotion of queer rights; nevertheless public opinion is vehemently opposed to rights, but was virtually silenced as a result of the rapid drafting of the constitution and the political climate of transitional justice.

Uganda

Although anti-queer laws existed in pre-colonial Uganda,³⁴ the main anti-queer law in Uganda today was introduced during the British Imperial era. Colonial laws have since been enshrined in the Ugandan Penal Code Act of 1950 (Penal Code). The key provisions are section 145, which makes "carnal knowledge of any person against the order of nature" an offence, punishable by imprisonment for life; section 146, which imposes a seven year prison sentence on an "attempt to commit unnatural offences"; and section 148, which prohibits "acts of gross indecency", also punishable by seven years' imprisonment. While these laws contain no explicit reference to being queer, these provisions are commonly used to prohibit queer identity and queer conduct.³⁵ Although the gravest punishment is prescribed for violations of section 145, section 148 is potentially more problematic because of its expansive scope. While the "unnatural acts" language from section 145 is "generally understood to require penetration, ... [section 148] does not generally require penetration, and thus mandates a lower standard of proof".³⁶ The lower standard of proof required of acts of gross indecency "allows authorities to harass [queers] or suspected [queers], based on 'prejudice or stereotype of attire, manner, or association'".³⁷ Moreover, section 148 also applies to lesbians, who had been excluded from punishment under section 145 because they were unable

32 Ibid.

33 Ibid.

34 M Hollander "Gay rights in Uganda: Seeking to overturn Uganda's anti-sodomy laws" (2009) 50 *Virginia Journal of International Law* 219 at 226. This position is somewhat controversial but accords with Hollander's interview with the president of the Ugandan Law Society, Oscar Kahike, who said that anti-homosexuality laws existed in pre-colonial times and "homosexuality was punished by brutal penalties in many tribes, including death by stoning or walking off a cliff".

35 Human Rights Watch (HRW) "This alien legacy: The origins of 'sodomy' laws in British colonialism" (2008), available at: <<https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism>> (last accessed 11 November 2014).

36 D Englander "Protecting the human rights of LGBT people in Uganda in the wake of Uganda's 'Anti Homosexuality Bill, 2009'" (2009) 25 *Emory International Law Review* 1263 at 1267.

37 HRW "This alien legacy", above at note 35 at 49; Englander "Protecting the human rights", above at note 36 at 1267.

to satisfy the penetration requirement.³⁸ Finally, since the “gross indecency” requirement does not apply to specified conduct, it can extend to criminalize the basic identity of queer people.³⁹

Despite their potentially broad reach, the anti-queer laws in the Penal Code are rarely enforced. Victor Mukasa, a queer rights advocate from Uganda, commented that overturning the laws in the Penal Code is “not even on the radar right now; we just want to live in peace”.⁴⁰ However, although the laws are rarely enforced, their effects can still be deleterious to the queer rights agenda. The “very existence of the statute expresses society’s condemnation of homosexuality”,⁴¹ which in turn serves as a justification for private law enforcement and violence.⁴² Further, the Penal Code laws serve as a barrier to the passing of positive laws protecting queer rights.⁴³ Therefore, despite their rare enforcement, overturning these laws will help the Ugandan queer community “overcome a major legal and psychological hurdle toward achieving true equality”.⁴⁴

Laws against queer people in Uganda were reinforced in 2005 when the government amended the 1995 constitution to provide an absolute prohibition against same sex marriages. A constitutional amendment was passed explicitly stating that “[m]arriage between persons of the same sex is prohibited”.⁴⁵

In addition to the Penal Code Act and the 2005 constitutional amendment, more recently the Ugandan Parliament passed the Anti-Homosexuality Act. The bill was first proposed in 2009 with a stated purpose of addressing the “defects in existing law” and “fill[ing] the gaps in the provisions of other laws”, namely those in the Penal Code Act.⁴⁶ The bill was intended to “strengthen the nation’s capacity to deal with emerging internal and external threats to the traditional heterosexual family” and “protect the cherished culture of the people of Uganda ... against attempts of sexual rights activists seeking to impose their values of sexual promiscuity on the people of Uganda”.⁴⁷ Despite the fact that the bill was popular among the Ugandan public and had the strong support of the Ugandan Parliament, due to intense international pressure, the bill was temporarily tabled and revised. Subsequent to its tabling

38 HRW and Englander, *ibid.*

39 *Ibid.*

40 Hollander “Gay rights in Uganda”, above at note 34 at 221.

41 Englander “Protecting the human rights”, above at note 36 at 1276; see also D Kahan “The secret ambition of deterrence” (1999) 113 *Harvard Law Review* 413 at 420–21.

42 Englander, *ibid.*; Hollander “Gay rights in Uganda”, above at note 34 at 222; see also T Kogan “Legislative violence against lesbians and gay men” (1994) 1994 *Utah Law Review* 209.

43 Hollander, *ibid.*

44 *Id.* at 224.

45 Ugandan Constitution, art 31, sec 2(a).

46 Ugandan Anti-Homosexuality Bill, memorandum, sec 2.1, available at: <<http://www.publiceye.org/publications/globalizing-the-culture-wars/pdf/uganda-bill-september-09.pdf>> (last accessed 11 November 2014).

47 *Ibid.*

and revision, Uganda's minister of ethics and integrity, James Nsabo Buturo, clarified that the change in the government's attitude was not a response to western threats, rather it resulted from "consultation with various groups, including religious leaders", who helped the government conclude that "killing [queer people] might not be helpful".⁴⁸ Buturo affirmed that the country had not changed its view that queerness is a "moral perversion that must not be allowed to spread".⁴⁹ The bill was reintroduced in 2011 and discussed in the Ugandan Cabinet, which concluded, in May 2011, that current laws in the Penal Code Act were sufficient to thwart queer rights.⁵⁰ Debate reopened once again in October 2011 and the bill was placed on the Ugandan Parliament's list of "Business to follow" for 2013.⁵¹ In December 2013, Parliament passed the bill⁵² and on 14 February 2014 Ugandan President Yoweri Museveni signed it into law.⁵³ The Anti-Homosexuality Act was subsequently challenged in the Constitutional Court. Petitioners alleged, inter alia, that the act was passed without a sufficient Parliamentary quorum, violated equality and privacy rights, was overly broad, and prescribed disproportionate punishment. In a decision exactly six months after the act was signed into law, the Constitutional Court ruled the Anti-Homosexuality Act unconstitutional on the ground that it was passed without the necessary quorum of lawmakers⁵⁴ under article 88(1) of the Ugandan Constitution, which provides that the Parliamentary quorum "shall be one-third of all members of Parliament entitled to vote". Although overturning the law was a victory for the queer rights movement, some activists expressed their disappointment that the court did not actually deal with the substantive issues that violated queer rights,⁵⁵ thus leaving open the possibility that Parliament will revive the Anti-Homosexuality Act if appropriately passed in Parliament. Even before the bill had become law, it received much attention and functioned to

48 E Biryabarema "Uganda government softens proposed [sic] anti-gay law" (23 December 2009) *Reuters Africa*, available at: <<http://af.reuters.com/article/topNews/idAFJ0E5BM0EQ20091223?pageNumber=2&virtualBrandChannel=0>> (last accessed 11 November 2014).

49 Ibid.

50 "Uganda strikes down bid to revive anti-gay bill" (23 August 2011) *Reuters Africa*, available at: <<http://af.reuters.com/article/ugandaNews/idAFL5E7JN1YS20110823>> (last accessed 11 November 2014).

51 See A Grace *Lifelong Learning as Critical Action: International Perspectives on People, Politics, Policy, and Practice* (2013, Canadian Scholars' Press) at 217.

52 "Ugandan MPs pass life in jail anti-homosexual law" (20 December 2013) *BBC Online*, available at: <<http://www.bbc.com/news/world-africa-25463942>> (last accessed 11 November 2014).

53 R Muhumuza "Officials: Uganda's leader to sign anti-gay bill" (14 February 2014) *AP Online*, available at: <<http://bigstory.ap.org/article/official-ugandan-leader-sign-anti-gay-bill>> (last accessed 11 November 2014).

54 *Oloka-Onyango v Attorney General* [2014] UGCC 14 (2014).

55 J Gettleman "Americans' role seen in Uganda anti-gay push" (3 January 2010) *New York Times*, available at: <<http://www.nytimes.com/2010/01/04/world/africa/04uganda.html>> (last accessed 11 November 2014).

“[escalate] homophobic rhetoric and violence in Uganda”.⁵⁶ It can thus be assumed that the overturning of the act will not impact existing widespread homophobia in the country.⁵⁷

Uganda’s rejection of queer identities and queer rights is deeply rooted in family, religious and moral values. The need to protect the family is an essential driver behind the anti-queer rights movement, as was explicit in the stated purposes of the Anti-Homosexuality Act: the government sought to protect the “traditional heterosexual family” and to protect children from being raised by parents in queer relationships.⁵⁸ Religion is another pillar of the anti-queer movement: as Uganda is a predominantly Christian nation,⁵⁹ much of the backdrop to the Anti-Homosexuality Act and other related discussions draws its authority from religious values.⁶⁰ The religious fervour comes from both within and outside the country. One example of external anti-queer support is when Scott Lively, Caleb Lee Brundidge and Don Schmierer, three American evangelicals, spoke at a conference in Kampala, Uganda, which focused on the “threat homosexuals posed to Bible-based values and the traditional African family”.⁶¹ “Often encouraged by foreign religious leaders, many Ugandan pastors have [subsequently used homophobic rhetoric] on their own to rally their congregations.”⁶²

Politicians also take advantage of anti-queer discourses to further their political agendas, understanding how the country’s deeply rooted values contradict allowing queer rights. The affirmation of anti-queer views by those in high positions serves to perpetuate a vicious circle of homophobia: “politicians have come to see that taking [anti-queer] stances is politically beneficial and perhaps expected”,⁶³ which fans the flames of the already widespread homophobia in Ugandan society. The manipulation of themes and values demonstrates how elite actors in the country are able to advance certain goals “by manipulating social anxieties about the destabilization” of familiar relations and subjects.⁶⁴

56 I Carasik “Retrospective anti-gay law in Uganda has ties to the US” (13 January 2014) *Al Jazeera*, available at: <<http://america.aljazeera.com/opinions/2014/1/retrospective-antigaylawinugandahastiestotheus.html>> (last accessed 11 November 2014).

57 Englander “Protecting the human rights”, above at note 36 at 1277.

58 Anti-Homosexuality Bill, memorandum, sec 1.1.

59 Gettleman “Americans’ role”, above at note 55.

60 Englander “Protecting the human rights”, above at note 36 at 1270.

61 Gettleman “Americans’ role”, above at note 55.

62 J Jacobson “‘Anti-gay’ pastors in Uganda charged with conspiracy to slander religious leader” (23 December 2010) *Rewire*, available at: <<http://www.rhrealitycheck.org/node/15161>> (last accessed 11 November 2014); Englander “Protecting the human rights”, above at note 36 at 1273.

63 Englander, id at 1270. See also J Sharlet “Finding the root of anti-gay sentiment in Uganda” (25 August 2010) *NPR*, available at: <<http://www.npr.org/templates/story/story.php?storyId=129422524>> (last accessed 11 November 2014).

64 J Sadgrove “Morality plays and money matters: Towards a situated understanding of the politics of homosexuality in Uganda” (2012) 50 *Journal of Modern African Studies* 102 at 106.

The media also help to further anti-queer efforts, with newspaper debates elucidating the profound social anxieties over the changing nature of sexual norms and discourses.⁶⁵ *New Vision*, a government owned newspaper, published a quote by the Ugandan minister on ethics, who commented, “Uganda is besieged by pornography, prostitution, human sacrifice, drug abuse and witchcraft to the extent that it is dangerously becoming a permissive society”.⁶⁶ Though not expressly mentioning queerness, many Ugandans see that allowing queer rights would be another act representing Uganda’s ultimate moral decline stemming from its excessive permissiveness. Another issue of *New Vision* decried greed as a source of evil in Ugandan society and attributed “homosexuality, defilement, human sacrifice, corruption and theft”⁶⁷ to increasing greed in the country. Perhaps the most extreme involvement of the media in the anti-queer movement was when the Ugandan magazine *Rolling Stone* published a list of Uganda’s “Top homos”, identifying a list of individuals who were thought to be queer, alongside their pictures and addresses. The headline of the article read “Hang them”.⁶⁸ The publication led to the internationally high profile murder of queer rights activist David Kato, one of the individuals listed on the *Rolling Stone* list, who was bludgeoned to death in his home after the article was published.⁶⁹

Although the law and many of the country’s social institutions oppose queer rights, Uganda will perhaps, with enough international pressure and grassroots organizing, take steps toward striking down its anti-queer laws.

THE TRAJECTORY FORWARD: COMING OUT OF THE CLOSET

A general overview of queerness in Africa

Understanding queerness in Africa requires an understanding of the intersecting causes of political persecution that are unique to individuals and communities in the region, including gender, class, religion, ethnicity and sexuality.⁷⁰ It is further important to note that queer populations in Africa are not unified; for example, there exists a prominent sentiment of transphobia among queer groups. Many queers “isolate transsexuals, [for example,] because they regard them as security risks”.⁷¹ The issue of fragmentation among African queers is not unique to Africa or the queer movement; in fact such fragmentation has been the impetus behind the works of many scholars who spiritedly

65 Id at 111.

66 Id at 112.

67 Id at 116.

68 Englander “Protecting the human rights”, above at note 36 at 1273.

69 J Gettleman “Ugandan who spoke up for gays is beaten to death” (27 January 2011) *New York Times*, available at <<http://www.nytimes.com/2011/01/28/world/africa/28uganda.html>> (last accessed 11 November 2014).

70 Ossome “Postcolonial discourses”, above at note 1 at 43.

71 A Mbugua “Transsexuals’ nightmare: Activism or subjugation” in Ekine and Abbas (eds) *Queer African Reader*, above at note 1, 123 at 126.

argue for solidarity in civil rights movements.⁷² Still, it is important to realize the lack of homogeneity that exists in the region, to overlay and assess queerness in Africa.

An important prerequisite to understanding the mechanisms through which queer rights can be realized is an acknowledgement of some of the key rhetoric against queers in Africa in general. One common line of discourse rejects the queer, seeing it as the abject “other”, a dangerous class, which includes immigrants, perverts, criminals, prostitutes and HIV / AIDS positives.⁷³ During times of vulnerability and economic tension, the peripheral groups of citizens, the “other”, often become scapegoats in the name of patriotism⁷⁴ and it becomes easy to organize the masses in a unified manner, against a group that is painted as responsible for threatening inner peace.⁷⁵ A large portion of the backlash against queerness comes from anti-western sentiment, as being queer is seen as a western and imperialist import.

Realising that unifying against the “other” is a powerful form of persuasion, when political leaders feel their support dwindling, they conveniently evoke anti-queer rhetoric, making sweeping statements of disgust with regard to queer populations in an endeavour to regain the support of their constituents. As Binyavanga Wainaina puts it, “homophobia is seasonal, particularly with regard to election season”.⁷⁶ A prominent example of this kind of organization of the masses is Zimbabwean Prime Minister Robert Mugabe’s 2012 birthday speech in which he harshly criticized David Cameron’s and Britain’s strong push for Zimbabwe to recognize non-heteronormative sexual orientations.⁷⁷ In his speech, Mugabe was quoted as saying that gays are “worse than dogs”.⁷⁸ Legitimizing “new” identities and subverting traditional notions of gender, family and sexuality is frequently viewed as analogous to subverting the structure underlying political power. In a prominent Kenyan case, the High Court of Kenya refused to shake the traditional gender binary in rejecting the recognition of “intersex” as a gender identity, saying:

72 See for example C Mohanty “Under western eyes: Feminist scholarship and colonial discourses” in C Mohanty (ed) *Feminism Without Borders* (2003, Duke University Press) 221.

73 Ossome “Postcolonial discourses”, above at note 1 at 34–35.

74 *Id* at 34.

75 *Ibid*.

76 T Adams “Binyavanga Wainaina interview: Coming out in Kenya” (16 February 2014) *The Guardian*, available at: <<http://www.theguardian.com/books/2014/feb/16/binyavanga-wainaina-gay-rights-kenya-africa>> (last accessed 11 November 2014).

77 S MacLean “‘To hell with you’: Robert Mugabe in rambling anti-homosexual rant at David Cameron’s call for global gay rights” (26 February 2012) *New York Times*, available at: <<http://www.dailymail.co.uk/news/article-2106720/Robert-Mugabe-rambling-anti-homosexual-rant-David-Camerons-global-gay-rights.html>> (last accessed 11 November 2014).

78 *Ibid*.

"[T]he term sex ... encompasses the two categories of male and female gender only. To interpret the term sex as including intersex would be akin to introducing intersex as a third category of gender in addition to male and female. As we have endeavored to demonstrate above, an intersex person falls within one of the two categories of male and female gender included in the term sex. To introduce intersex as a third category of gender would be a fallacy."⁷⁹

Politicians and other officials fear letting go of traditions because they are the very principles upon which their power is based. Other examples of the endeavour to maintain traditional sexual and gender identity lie in the revised constitutions of many African countries, where there is an emphasis on marriage as an institution that only exists between a man and a woman.⁸⁰

In the post-colonial era, academics, leaders and citizens are thrown into a conflict between accepting the western, colonial norms that were forced upon them or forging an African identity. The latter option is considerably more difficult since many pre-colonial African practices and customs are no longer relevant to post-industrialized societies.⁸¹ Still, certain values that are considered near and dear to the African psyche are strongly pursued. One such value is the importance of family and community, which is utilized to promote the anti-queer sentiment in Uganda. There is no better testament to the importance that the family is given in African society than that provided in the constitutions of various African countries; family is described as the basic,⁸² natural⁸³ or fundamental⁸⁴ unit or element of society: the moral basis of the human community.⁸⁵ The queer is painted as a force that derails the essential and familiar family unit and as such it is seen as a danger to Africa and its people. The queer as a threat to African culture is a refrain that reverberates through almost every discussion that takes place around the African queer.

Queer identity and / or behaviours are illegal in 34 countries across Africa and an additional six countries have banned male homosexual activity while allowing same sex activities between two women.⁸⁶ Of the countries that have outlawed queerness, the actual codification of the law takes many

79 *RM v Attorney General and 4 Others* [2010] eKLR.

80 See, for example Kenya's Marriage Act, 2014, sec 3(1), limiting marriage to unions between a man and a woman.

81 See M Chanock "Neither customary nor legal: African customary law in an era of family law reform" (1989) 3 *International Journal of Law & Family* 72, pointing out tensions between pre-colonial customs and western ideals in the context of the family.

82 See constitutions of Côte d'Ivoire, Gabon, Mauritania, Mozambique and Uganda.

83 See constitutions of Burundi, Eritrea, Ethiopia, Malawi and Namibia.

84 See constitutions of Cape Verde, Madagascar, São Tomé and Príncipe, and Seychelles.

85 See constitutions of Central African Republic and Senegal.

86 A Kretz "From 'kill the gays' to 'kill the gay rights movement': The future of homosexuality legislation in Africa" (2013) 11 *Northwestern Journal of International Human Rights* 207 at 210.

forms.⁸⁷ Prohibitions of homosexual activity date back to colonial times and as such many countries have retained the colonial laws on their books, while other countries have created their own adaptations of anti-queer laws.⁸⁸ The 2013 Pew study on global attitudes confirms that the opinions of African people are filled with the same animosity toward queer people that the law espouses:

“In sub-Saharan Africa, at least nine-in-ten in Nigeria (98%), Senegal (96%), Ghana (96%), Uganda (96%) and Kenya (90%) believe homosexuality should not be accepted by society. Even in South Africa where, unlike in many other African countries, homosexual acts are legal and discrimination based on sexual orientation is unconstitutional, 61% say homosexuality should not be accepted by society, while just 32% say it should be accepted.”⁸⁹

The road towards achieving queer rights appears steep. Even where certain political opinions do support queer rights, immense pressure on the continent subverts the attempts of the few to take steps towards realizing rights. In Malawi, for example, President Joyce Banda called for a repeal of the country’s ban on homosexuality during her first public speech in May 2012, less than one month after taking office.⁹⁰ After facing substantial pushback, President Banda later reversed her previous statement, saying, “anyone who has listened to the debate in Malawi realizes that Malawians are not ready to deal with [overturning anti-queer laws] right now”.⁹¹ Homophobic sentiments are continuously perpetuated even in the face of the few who attempt to speak out in support of queer rights, since the louder and more widespread denigration of the African queer still aligns with majority social opinion. The refrain “there is no homosexuality in Africa” continues to reverberate throughout the continent, as political leaders chide the West for bringing queerness to Africa. In reality, of course, there is a long history of diverse African peoples engaging in same sex relations. Although modern terms were not necessarily used to explain historical queerness, history reveals how African societies dealt with people who did not fit heterosexual ideals.⁹² In some cases, “queer” people were even honoured; for example “many African cultures explained homosexual attraction as a spirit possession of a female person by a male ancestor and

87 Ibid.

88 Id at 210; HRW “This alien legacy”, above at note 35.

89 “The global divide on homosexuality: Greater acceptance in more secular and affluent countries” (4 June 2013) PEW Research Center, available at: <<http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/>> (last accessed 11 November 2014).

90 Kretz “From ‘kill the gays’”, above at note 86 at 224.

91 Id at 225.

92 M Lukow “Opportunity and repression: LGBT activism in an African context” (unpublished thesis) at 11, available at: <<http://aladinrc.wrlc.org/bitstream/handle/1961/10637/Lukow,%20Meredith%20-%20Spring%2012.pdf?sequence=1>> (last accessed 11 November 2014).

vice versa".⁹³ Moreover, there are additional reports of homosexuality between Hutu and Tutsi youth in pre-colonial Rwanda and a homosexual king named Mwanga in pre-colonial Uganda.⁹⁴

Realizing queer rights: The path forward

One scholar identifies a spectrum of recognizing queer rights, where there are seven key touchstones in the path to complete social and legal equality between queers and non-queers.

The first stage (the stage furthest away from realizing queer rights) is the "total marginalization" of queer communities.⁹⁵ This stage is often even accompanied by bans on advocacy on behalf of queer persons, as the Ugandan Anti-Homosexuality Bill attempted to do. Complete marginalization limits the visibility and establishment of social and political organizations.⁹⁶

The second stage is the "criminalization of [queer] status and [queer] behavior, which entails making queer activity or an individual's open-identification as queer a criminal act".⁹⁷

The third stage is "decriminalization", which the UN and the International Lesbian, Gay, Bisexual, Trans and Intersex Association describes as the first true step towards establishing equal treatment at both legal and social levels.⁹⁸

The fourth stage is the "codification of Anti-Discrimination laws", which was the key step in South Africa's move towards implementing queer rights.⁹⁹ While South Africa is the only African country that has explicitly banned all forms of discrimination based on sexual orientation and gender, Mauritius, Seychelles, Botswana and Mozambique ban some forms of anti-gay discrimination.¹⁰⁰

The fifth stage is the "establishment of positive rights" for queer people, which often includes granting queer people rights or benefits that are given to similarly situated non-queer people.¹⁰¹

93 Ibid.

94 Id at 11–12 (internal citations omitted). See also R Rao "Re-membering Mwanga: Same-sex intimacy, memory and belonging in postcolonial Uganda" (2015) 9 *Journal of Eastern African Studies* 1.

95 Kretz "From 'kill the gays'", above at note 86 at 211.

96 Ibid.

97 Ibid.

98 Id at 213. "Decriminalizing homosexuality step to genuine legal equality" (11 October 2011) *International Lesbian, Gay, Bisexual, Trans & Intersex Association*, available at: <<http://ilga.org/ilga/en/article/nd1dGmP1dX>> (last accessed 11 November 2014).

99 Kretz "From 'kill the gays'", above at note 86 at 214–15.

100 Ibid. LP Itaborahy "State-sponsored homophobia: A world survey of laws criminalising same-sex sexual acts between consenting adults" (May 2012) *The International Lesbian, Gay, Bisexual, Trans and Intersex Association*, available at: <<http://www.aidsfreeworld.org/planetaid/~/-/media/796515f2d74a4158ac599504e042f4a8.pdf>> (last accessed 24 August 2015).

101 Kretz "From 'kill the gays'", above at note 86 at 215.

The sixth stage is “full legal equality”, where there is no longer a distinction between queer and non-queer people. South Africa finds itself at stage six.¹⁰²

The seventh stage is “cultural integration”, which entails widespread social acceptance of queer people.¹⁰³

The majority of Africa finds itself within the first two stages towards realizing queer rights. The move forward requires simultaneous support by civil society and legislative changes. Queer populations need to increase their visibility, as the secrecy with which many queer people feel compelled to live their lives impedes the creation of vibrant queer-controlled and queer-friendly spaces.¹⁰⁴ Laws impeding civil society and further developments in the context of queer rights and equality also need to be repealed to allow for a legal space for these populations to exist.

Promoting visibility of queer populations in society

Visibility is a fundamental step towards acceptance. The benefits of increasing the visibility of the African queer are manifold. For example, increased visibility will help the queer community have a voice that is heard by a broader portion of the population. One reason for the increasing animosity towards queer Africans is the sweeping statements made by people in power, blaming queers for social, political and economic ills in the region. Leaders invent mythologies around the African queer, and the queer community has neither the space nor the voice to refute the outrageous commentary that is frequently made in their regard. Moreover, increased visibility will help demonstrate that queerness is not simply a western identity, but that it is also African. According to one Nigerian writer and social critic, “the first step toward addressing the issue of homophobia is preventing the West from controlling the narratives of African life in this age where neocolonialism seems to persist; the next step is facilitating a culture of coming out and a culture of protest”.¹⁰⁵

Establishing the *African* queer is critical to the movement. Finding an African notion of queerness is fundamental since, as Dr Hakan Seckinelgin cautions, using international human rights frameworks can silence the voices of local queer activists by infusing the local movement with western conceptions of queer identity.¹⁰⁶

Ashley Currier, who has written extensively about the queer movement and specifically about enhancing queer visibility in South Africa and Namibia, argues that visibility and power are intertwined, with invisibility often

102 Ibid.

103 Ibid.

104 Id at 218.

105 U Okafor “How to approach the issue of LGBT rights in Africa” (16 October 2013) *Huffington Post*, available at: <http://www.huffingtonpost.com/udoka-okafor/lgbt-rights-in-africa_b_4098958.html> (last accessed 11 November 2014).

106 Lukow “Opportunity and repression”, above at note 92 at 5.

resulting in relegation to powerlessness.¹⁰⁷ An increase in public visibility will serve to create political relevance and enable activists to attract new recruits.¹⁰⁸ The path towards visibility has thus far been paved with the blood of queer rights activists such as David Kato, who was brutally murdered in response to his involuntary “out-ing” in the Ugandan media,¹⁰⁹ and Eudy Simelane, who was allegedly raped and murdered on account of her sexual orientation.¹¹⁰ Nevertheless, without widespread visibility, the road ahead for the African queer is bleak. As the movement gains strength, individuals and groups will feel more at ease coming out, disclosing their non-normative sexualities, and overcoming the isolation of the closet and the “ideological, social and political mechanisms of heteronormative shame that force sexual minorities to remain silent about their sexual desires”.¹¹¹

Legal strategies for institutionalizing legal rights for the African queer

Although the South African model has ultimately not proved to be successful with its emphasis on legal change, legal change can still provide a useful mechanism if executed appropriately. Legal change coupled with increased visibility would better promote cohesion between de jure law, de facto law and public opinion. The first legal step is to repeal any laws that place a country in stage one marginalization or stage two criminalization, on the spectrum towards achieving queer rights. Moving past these two highly anti-queer stages would initially require a repeal of the laws that ban advocacy or explicitly make queerness a criminal act; most notable among these laws are anti-sodomy laws, which must be overturned in the initial steps towards realizing queer rights. Although some activists, such as Victor Mukasa in Uganda, do not see overturning anti-sodomy laws as a top priority because of their rare enforcement, “[anti]-sodomy laws, which ostensibly proscribe conduct, are also a powerful weapon for persecuting individuals based on actual or perceived sexual identity. The law serves as a justification for action against sexual minorities, both within and without the law”.¹¹² Further, anti-sodomy laws and other laws that proscribe conduct based on public morality are frequently written in broad, vague language, which provides an opportunity for the selective prosecution of such crimes. In many African countries, the brunt of these laws falls almost exclusively on queer populations. The presence of

107 A Currier *Out in Africa: LGBT Organizing in Namibia and South Africa* (1st ed, 2012, Minneapolis University Press) at 1; see also M Epprecht *Hungochani: A History of a Dissident Sexuality in Southern Africa* (2013, McGill-Queens University Press).

108 Ibid.

109 J Gettleman “Ugandan who spoke up”, above at note 69.

110 A Kelly “Raped and killed for being lesbian: South Africa ignores ‘corrective’ attacks” (12 March 2009) *The Guardian*, available at: <<http://www.theguardian.com/world/2009/mar/12/eudy-simelane-corrective-rape-south-africa>> (last accessed 11 November 2014).

111 Currier *Out in Africa*, above at note 107 at 6.

112 S Maguire “The human rights of sexual minorities in Africa” (2004) 35 *California Western International Law Journal* 1 at 5.

these laws gives legitimacy to the anti-homosexual campaigns African leaders have launched in the past decade, thus encouraging violence perpetrated by both state and private actors.¹¹³

Another key legal argument that could help in making considerable leeway for queer rights is an argument for equality, specifically sex equality. This position can use existing equality laws in support. One possible shortcoming of this argument, however, is that, while some African constitutions prohibit discrimination based on sex, many of them undermine equality laws by carving out exceptions for family, personal or religious purposes, which can ultimately suppress queer rights. For example, Uganda's Constitution states: "[a]ll persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law".¹¹⁴ However it also provides that "[c]ultural and customary values which are consistent with fundamental rights and freedoms, human dignity, democracy and with the Constitution may be developed and incorporated in aspects of Ugandan life."¹¹⁵ The lack of rules around what constitutes a conflict between fundamental rights and customary law leaves the decision of whether certain unequal laws or rulings are permitted to the discretion of the administrator, judge or magistrate.¹¹⁶ Moreover, while formal equality in the law is a step forward in achieving queer rights, the social framework may nevertheless violate the equality framework if people independently decide to act in a way that perpetuates inequality, tempered through long-standing histories and traditions of inequality and anti-queer sentiment.¹¹⁷

Seizing opportunities and other lessons from social movement theory

Social movement theory has sought to explain how and why social mobilization occurs. Alex de Toqueville's conception of social movement theory, which was inspired by the French Revolution but maintains a certain degree of relevance to any modern social mobilization, stipulates that social movements occur at the overlap of the state's vulnerability to political pressures (structural opportunity) and the public's awareness of the opportunities for meaningful

113 Ibid.

114 Ugandan Constitution, 1995 National Objectives and Directive Principles of State Policy XXIV, chap 4, sec 21.

115 Ibid. See also the South African Constitution, 1996 chap 2, sec 9 and chap 12, sec 211, stating respectively "[e]veryone is equal before the law and has the right to equal protection and benefit of the law", but also that "[t]he courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

116 G Gopal and M Salim "Overview" in G Gopal and M Salim (eds) *Gender and Law in Eastern Africa Speaks* (1996, The World Bank) 1 at 6.

117 T Higgins, J Fenrich and Z Tanzer "Gender equality and customary marriage: Bargaining in the shadow of post-apartheid legal pluralism" (2006) 30 *Fordham International Law Journal* 1653 at 1664.

protest (perceived opportunity).¹¹⁸ Although making calculated steps forward through civil society and the law can be advantageous because the queer community will be able to maintain a certain degree of control over their visibility, by focusing so intently on identity and framing, the existing queer movement could neglect to seize “an important aspect of mainstream social movement theory: political opportunity structures, or changes in a national political system’s institutional structure or informal power relations that facilitate or constrain the emergence of social movements”.¹¹⁹ Frequently, larger national or transnational movements do not function differently from smaller, domestic social movements.¹²⁰ As was the case in the South African context, political structure and turmoil opened a space for queer advocacy, which advocates seized, notwithstanding the less than perfect circumstances.

One situational factor that can be taken advantage of in many African countries is the repression that the queer community currently faces. While repression is costly and often has a deterrent effect on protest, if used strategically repression can also imbue protest with a new fire. Repression launches micro mobilization as a process that “rais[es] the rewards and diminish[es] the costs of participation”.¹²¹

Another situational factor that has already served as a powerful tool in certain countries is the fear that surrounds HIV/AIDS.

“Queer communities have emerged, or are emerging, in the context of Africa’s HIV epidemics, with all of the social stigmas and fears that have come with HIV, but also in the context of the community mobilization and HIV/AIDS activism and social engagement. Indeed, in several countries, the first real recognition that MSM [men who have sex with men] populations have been present at all has been through HIV prevalence studies among these men.”¹²²

When the barriers to realizing queer rights are so strongly upheld, the queer community and their allies must find the cracks and use them advantageously, eventually to break down the barrier.

CONCLUSION

From the perspective of de jure law, South Africa’s approach to queer rights is much more accepting and open than Uganda’s approach. However, in analysing the day to day lives of South African and Ugandan queers, the danger and

118 C Kurzman “Structural opportunity and perceived opportunity in social-movement theory: The Iranian Revolution of 1979” (1996) 61 *American Sociological Review* 153.

119 Lukow “Opportunity and repression”, above at note 92 at 7.

120 M Keck and K Sikkink “Transnational advocacy networks in international and regional politics” (1999) 51 *International Journal of Social Sciences* 89 at 91.

121 Lukow “Opportunity and repression”, above at note 92 at 10.

122 C Beyrer “LGBT Africa: A social justice movement emerges in the era of HIV” (2012) 9 *SAHARA-J: Journal of Social Aspects of HIV / AIDS* 177 at 177.

ridicule that they face are not dissimilar. In looking at the two models in the context of designing a path for realizing queer rights, the question of whether legal changes can incite social and attitudinal change lies at the core of the issue. Despite current resistance, will the law set the stage for public opinion to follow suit? The South African model is not dissimilar to the path towards realizing women's rights in Africa. Although women's rights have been recognized at a formal level for some time, women's rights were historically and continue to be halted by public opinion and widespread practice. The path to realizing women's rights in Africa is longer than that to realizing queer rights and, through time, attitudinal change has allowed for women's increased visibility in society and in positions of power, thus aligning with the written law recognizing women's rights.¹²³ Especially in urban centres, women's rights are increasingly more accepted, a product of public opinion taking time to align views with changing laws. South Africans also need to work on settling public opinion and aligning the country's views with the language of their inclusive constitution.

Conversely, in the Ugandan context, while anti-queer laws still exist, mobilizing the masses to overturn those laws will perhaps provide for a more symbiotic change between the law and society. Although the constitutional challenge to the Anti-Homosexuality Act did not address any of the key issues, perhaps it brought some of the issues to the forefront of society and served to raise awareness among Ugandan society. Perhaps the fact that Ugandan politicians reduced the death penalty in the initial draft of the Anti-Homosexuality Bill to one of life imprisonment was truly as a result of their own views, rather than international pressure, which could indicate changing attitudes in the country. Furthermore, there does also appear to be some fleeting support in the courts, despite their political entanglements. For example, after *Rolling Stone* published its "Top homos" article, the court issued an injunction to the magazine.¹²⁴ Of course the most recent constitutional challenge to the Anti-Homosexuality Act leaves open the possibility that Uganda will pass another law perpetuating anti-queer rhetoric. In Uganda, anti-queer law is a sleeping giant and, with the fairly recent changes, there is no saying what will happen to the Ugandan queer in the future.

Although in 2014 the African Commission of Human and People's Rights passed resolution 275, which seeks to protect against violence based on sexual orientation and gender identity, the Commission has no enforcement power

123 UN Department of Public Information "African renewal: Women in African assert their rights" (2012), available at: <<http://www.un.org/en/africarenewal/special-edition-women/Africa-Renewal-Womens-Issue-2012-en.pdf>> (last accessed 29 June 2016).

124 "Uganda newspaper outs 'gay' men" (1 November 2010) *Mail & Guardian Africa* (quoting High Court Judge Vincent Musoke-Kibuuka), available at: <<http://mg.co.za/article/2010-11-01-uganda-newspaper-outs-gay-men>> (last accessed 29 June 2016); *Jacqueline v Rolling Stone*, misc cause no 163 (30 December 2010) (Uganda High Court), available at: <<http://www.iglhrc.org/sites/default/files/2010%20Kasha%20Jacqueline%20v%20Rolling%20Stone.pdf>> (last accessed 12 August 2016).

should a state fail to comply with a resolution or recommendation.¹²⁵ As such, the path forward for South Africa, Uganda and other countries in Africa is unpaved. No country has created an example that other countries are necessarily compelled to follow; furthermore, the fact that their neighbours have laws and practices just as homophobic, provides little incentive for countries to make the first move, especially given the examples of strong resistance faced by the few politicians who have spoken out against anti-queer laws. Fundamental to the path forward will be increasing the visibility of queer groups across the continent, in both urban centres and smaller communities, which should be achieved alongside eradicating explicit legal barriers that would interfere with further movements in pursuit of queer rights. Without visibility, queer communities will continue to fade into the forgotten periphery of society and legal barriers will never be torn down.

125 International Justice Resource Center “African human rights system,” available at: <http://www.ijrcenter.org/regional/african/> (last accessed 6 August 2016).