

SEXUAL MINORITIES AND THE RIGHT TO CULTURE IN AFRICAN STATES

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African law makers have used and continue to use culture as a justification for laws that violate the rights of sexual minorities in Africa. This justification is impermissible under international human rights law, regional law, as well as the domestic constitutions of a majority of African nations. The right to culture protects the rights of sexual minorities to engage in sexual activity and express their sexuality and gender.

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In this paper, I use sexual minorities as a broad phrase which includes people who have a minority sexual orientation (i.e. lesbian, gay, bisexual, pansexual, etc.), a minority gender identity or expression (i.e. transgender, gender-queer, two-spirit, etc.), or those persons who have a minority sex expression (i.e. intersex). Although much of this paper will focus on sexual orientation, the constructs of sexual orientation and gender expression are Western and fail to map precisely onto the experiences of all cultures, including those of Africans.

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I. INTRODUCTION

The past fifty years were dynamic for those advocating for the rights of sexual minorities.¹ The rights of sexual minorities have rapidly advanced through much of Europe, Australia, and the Americas. Countries in these regions have decriminalized same-sex sexual acts, legally recognized same-sex partnerships and marriage, created processes for transgender persons to change gender markers on legal documents, protected against discrimination based on sexual orientation and gender identity in the workplace, as well as many other legal advances.²

Africa, a region that has often been characterized as hostile to lesbian, gay, bisexual, transgender, and intersex (LGBTI) people, has also achieved progress.³ Within the last

1. See, e.g., *Frustration at Coverage of Malawi Couple*, GAYNZ.COM (May 31, 2010), <http://www.pridenz.com/gaynz/8869.html> (a couple comprised of a cis-gendered man and a transgender woman is described as a gay male couple by national and international news media).

2. See, e.g., *Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, Rep. of the Office of the U.N. High Comm'r for Human Rights, ¶¶ 71–75, U.N. Doc. A/HRC/29/23 (2015) (reporting on global movements to protect the rights of LGBTI persons); *Legal and Social Mapping – World #1: Transrespect Versus Transphobia Worldwide*, TRANSGENDER EUR. (2014), http://transrespect.org/wp-content/uploads/2015/08/web_tvt_mapping_1_EN1.pdf (compilation of European laws which impact the rights or transgender persons); David Masci, Elizabeth Sciupac & Michael Lipka, *Gay Marriage Around the World*, PEW RESEARCH CTR. (Aug. 8, 2017), <http://www.pewforum.org/2015/06/26/gay-marriage-around-the-world-2013/> (list of countries where same-sex marriage is legalized).

3. In this paper, I address concerns of the African continent. From a geopolitical framework, the fifty-five member states of the African Union (AU), and the legal documents codified under its auspices, make for a tidy

three years both Mozambique and the Seychelles reformed their criminal codes to remove all statutes which criminalized consensual same-sex acts.⁴ LGBTI organizations won cases in Kenya and Botswana that affirmed their right to association.⁵ In its decision, the Court of Appeals in Botswana concluded, “[m]embers of the gay, lesbian and transgender community, although no doubt a small minority, and unacceptable to some on religious or other grounds, form part of the rich diversity of any nation and are fully entitled in Botswana, as in any other progressive state, to the constitutional protection of their dignity.”⁶

These developments are encouraging, but there has also been a countermovement occurring across much of the African continent. There are many legal obstacles that sexual minorities face, such as criminalization of consensual sex between parties of the same-sex,⁷ barriers to changing gender markers on government IDs,⁸ marriage laws that do not allow

legal boundary of what is African and what is not African. This concept of “African,” however, also diminishes the distinct nations and peoples that reside within the geopolitical boundaries which are a remnant of colonial and imperial movements by Europe and the West. To borrow the words of Law Professor Sylvia Tamale, the term Africa, “is used politically to call attention to some of the commonalities and shared historical legacies inscribed in cultures and sexualities within the region by forces such as colonialism, capitalism, imperialism, globalisation and fundamentalism.” *AFRICAN SEXUALITIES: A READER 1* (Sylvia Tamale ed., 2011). It is my hope that the generalities addressed in this paper can be used as a starting point for discussions of specific nations that draw out the unique challenges that face each of the individual fifty-five states of the A.U.

4. AENGUS CARROLL & LUCAS R. MENDOS, *INT’L LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASS’N, STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF SEXUAL ORIENTATION LAWS: CRIMINALISATION, PROTECTION AND RECOGNITION* 146 (12th ed. 2017) [hereinafter *STATE-SPONSORED HOMOPHOBIA*], https://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf.

5. *Id.*

6. *Attorney General of Botswana v. Rammoge & others*, Court of Appeal Civil Appeal No. CACGB-128-14, ¶ 60 (2016) (Bots.), <http://www.womenslinkworldwide.org/en/files/3012/legbibo.pdf>.

7. *STATE-SPONSORED HOMOPHOBIA*, *supra* note 5, at 37-38.

8. ZHAN CHIAM, SANDRA DUFFY & MATILDA GONZÁLEZ GIL, *INT’L LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASS’N, TRANS LEGAL MAPPING REPORT: RECOGNITION BEFORE THE LAW* 17-24 (2d ed. 2017), https://ilga.org/downloads/ILGA_Trans_Legal_Mapping_Report_2017_ENG.pdf.

members of the same sex to marry,⁹ and discriminatory laws that prohibit the registration and operation of LGBT rights organizations.¹⁰ Many African countries have strengthened criminal sanctions for homosexual activity in recent years. Additionally, the majority of African countries have not repealed colonial era laws that criminalize homosexuality.¹¹ In 2011, Malawi criminalized consensual same-sex activity between women. This law was in addition to the section of the penal code that already criminalized consensual sex between men.¹² Two years later, Nigeria passed a law criminalizing those who attempt to enter a same-sex marriage, who operate or participate in a gay organization, or who solemnize or witness a same-sex marriage.¹³ In an even more extreme move, Uganda increased the penalties for certain types of consensual homosexual activity to life imprisonment.¹⁴

These actions and inactions reflect a worrisome trend. This trend has hurt relations between the states of Africa and the West, but more importantly, it has had devastating consequences for local populations of sexual minorities living in these states.¹⁵ This Note will demonstrate how states have an obligation to protect the diverse cultural practices of their citi-

9. South Africa is the only African country that has legalized same sex marriage. STATE-SPONSORED HOMOPHOBIA, *supra* note 5, at 68.

10. *Id.* at 43-44.

11. In a 2017 report by the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), thirty-two African countries had laws that criminalized homosexuality and twenty-two did not. Many of these laws are remnants of Colonial era penal codes. STATE-SPONSORED HOMOPHOBIA, *supra* note 5, at 26-28, 37-38.

12. MALAWI PENAL CODE, ch. 7:01, §§ 137(a), 156 (2011); *see also*, Press Release, Int'l Comm'n of Jurists, Sex Between Women Now a Crime in Malawi: New Law Violates Human Rights Obligations of Malawi (Feb. 8, 2011), <https://globalequality.wordpress.com/tag/section-137a/> (expressing the International Commission of Jurists' disappointment at Malawi's decision to criminalize consensual same-sex activities between women).

13. Same Sex Marriage (Prohibition) Act (2013) (Nigeria), [http://www.placng.org/new/laws/Same%20Sex%20Marriage%20\(Prohibition\)%20Act,%202013.pdf](http://www.placng.org/new/laws/Same%20Sex%20Marriage%20(Prohibition)%20Act,%202013.pdf).

14. Anti-Homosexuality Act (2014), §3(2) (Uganda). This law was later declared invalid on procedural grounds by the High Court of Uganda. David Smith, *Uganda Anti-Gay Law Declared 'Null and Void' by Constitutional Court*, GUARDIAN (Aug. 1, 2014), <https://www.theguardian.com/world/2014/aug/01/uganda-anti-gay-law-null-and-void>.

15. *See, e.g.*, Jacob Kushner, *The Brutal Consequences of Uganda's Infamous Anti-Gay Law*, VICE (Mar. 16, 2016), https://www.vice.com/en_us/article/

zens, including the cultural practices of sexual minorities in Africa. In Part II, this Note explores how lawmakers use culture to justify laws that criminalize actions by LGBTI people in the African region. The Note will then problematize these characterizations by demonstrating the long history and contemporary development of sexual minority cultures in Part III. Part IV will examine the right to culture as protected by international, regional, and national law.¹⁶ This Part will also outline States' obligations under international law, and the way that these obligations apply to cultures developed by sexual minorities. Part V concludes with a case study, applying the right to culture in Uganda. It will demonstrate how the Ugandan government has violated the rights of LGBTI Ugandans and suggest actions that the State could take to stop these violations.

II. AFRICAN LAWMAKERS USE CULTURE TO JUSTIFY LAWS THAT ARE HARMFUL TO THE LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX (LGBTI) COMMUNITY

As African lawmakers pass homophobic bills they continue to make statements about the un-African nature of homosexual relationships. This Part observes the efforts of legislatures, judiciaries, and executive offices across the region to characterize same-sex relationships as a wholly foreign cultural conception developed and advocated by Western countries. It proceeds to introduce the problems with these characterizations, expounded upon in Parts III and IV.

African leaders often respond to Western leaders' calls for acceptance of LGBTI rights by stating cultural differences. In

on-the-run-kenya-lgbt-v23n1 (reporting on the plight of African LGBT refugees).

16. Although homophobic and transphobic laws are counter to many rights that are protected in the international human rights legal framework, this paper will focus on the right to culture, as it is one prominent rationale used by lawmakers when proposing and passing these laws. This analysis should be read as an augmentation of the rich set of human rights which already protect LGBTI persons. For a more comprehensive analysis of international human rights law as applied to sexual minorities, see *THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY* (2007) [hereinafter *YOGYAKARTA PRINCIPLES*], http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf.

2015, when U.S. President Barack Obama called on President Kenyatta of Kenya to address the legal discrimination of LGBTI people, President Kenyatta responded, “there are some things that we must admit we don’t share [with the United States]. Our culture, our societies don’t accept.”¹⁷ A spokesperson for the Deputy President of Kenya, William Ruto, stated it more directly: “[t]he government believes that homosexual relations are unnatural and unAfrican [*sic*].”¹⁸

Lawmakers across the continent often reiterate these sentiments. For example, in the memoranda section of a 2009 Anti-Homosexuality Bill in Uganda, the government justified the bill by stating:

The Bill further aims at providing a comprehensive and enhanced legislation to protect the cherished culture of the people of Uganda, legal, religious, and traditional family values of the people of Uganda against the attempts of sexual rights activists seeking to impose their values of sexual promiscuity on the people of Uganda.¹⁹

This statement distinguishes Ugandan culture and the culture of sexual rights activists. It implies that those who advocate for the rights of sexual minorities cannot be Ugandan. It further assumes that those advocates value sexual promiscuity and attempt to impose it on others. It both misunderstands the broader goals of the movement of those who advocate for the rights of sexual minorities and erases the identity of those advocates who are, in fact, Ugandan.²⁰

17. Bisi Alimi, *If You Say Being Gay is Not African, You Don't Know Your History*, GUARDIAN (Sept. 9, 2015), <https://www.theguardian.com/commentisfree/2015/sep/09/being-gay-african-history-homosexuality-christianity>.

18. “No Room” For Gays in Kenya, Says Deputy President, REUTERS (May 4, 2015), <http://af.reuters.com/article/topNews/idAFKBN0NP11T20150504?pageNumber=1&virtualBrandChannel=0>.

19. Anti Homosexuality Bill, Supp. No. 13, CII Uganda Gazette No. 47, § 1.1 (2009), <https://drive.google.com/file/d/0B7pFotabJnTmYzFiMWJmY2UtYWYxMi00MDY2LWI4NWYtYTViOWU1OTEzMzk0/view?ddrp=1&hl=EN>.

20. Sexual Minorities Uganda (SMUG) is one of the leading organizations that advocates for the rights of sexual minorities in Uganda. An example of their broad goal is “[t]he protection and promotion of human rights of lesbian, gay, bisexual and transgender Ugandans.” “*About Us*” SMUG Website (2016), <http://sexualminoritiesuganda.com/>.

President Mugabe of Zimbabwe articulated the idea that gay advocates are not African more starkly when he rejected calls by member states of the United Nations to protect LGBT rights in Zimbabwe.²¹ He stated, “we reject attempts to prescribe new rights that are contrary to our values, norms, traditions and beliefs. We are not gays.”²² Reuben Abati, a spokesperson for the president of Nigeria, made a similar statement when a 2013 bill passed in Nigeria²³ outlawing same-sex marriage and the organization of LGBT associations: “[t]his is a law that is in line with the people’s cultural and religious inclination. So it is a law that is a reflection of the beliefs and orientation of Nigerian people . . . Nigerians are pleased with it.”²⁴

While it is egregious to justify homophobic laws by citing the apparent separation between homosexual practice and local culture, African lawmakers also make such statements even when acting to allegedly protect gay citizens. For instance, in Malawi, following the pardon of a same-sex couple arrested under the law prohibiting unnatural acts and gross indecency, President Bingu wa Mutharika stated that he released the couple on “humanitarian grounds only” and that they had still “committed a crime against our culture, against our religion, and against our laws.”²⁵

A. *Culture Versus Homosexuality is a Problematic and Illegal Dichotomy*

The recurring theme within these statements by African leaders and other lawmakers across the continent, is that African States need to protect specific national cultures from the threat of homosexuality. These individuals proclaim that homosexuality and gender non-conformity are outside of the na-

21. President Mugabe of Nigeria, Statement to the U.N. G. A. (Sept. 28, 2015), <https://gadebate.un.org/en/70/zimbabwe>.

22. *Id.*

23. Same Sex Marriage (Prohibition) Act (2013) (Nigeria), [http://www.placng.org/new/laws/Same%20Sex%20Marriage%20\(Prohibition\)%20Act,%202013.pdf](http://www.placng.org/new/laws/Same%20Sex%20Marriage%20(Prohibition)%20Act,%202013.pdf).

24. *Nigeria Passes Law Banning Homosexuality*, TELEGRAPH (Jan. 14, 2014), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/nigeria/10570304/Nigeria-passes-law-banning-homosexuality.html>.

25. David Smith & Godfrey Mapondera, *Malawi President Vows to Legalise Homosexuality*, GUARDIAN (May 18, 2012), <https://www.theguardian.com/world/2012/may/18/malawi-president-vows-legalise-homosexuality>.

tional culture and existentially dangerous and should therefore be restricted. This sentiment was documented at the continental level in 2010 when the Coalition of African Lesbians was denied observer status to the African Commission on Human and Peoples' Rights (ACHPR). The ACHPR decided "not to grant Observer Status to the Coalition for African Lesbians (CAL), South Africa, whose application had been pending before it [because] . . . the activities of the said Organisation do not promote and protect any of the rights enshrined in the African Charter."²⁶ Additionally, Senegal and Nigeria cited sexual orientation and gender identity as a threat to culture during an orchestrated walkout by nearly all Arab and African States at the first official U.N. panel on sexual orientation and gender identity.²⁷ The conception that sexual minorities and their sexual orientations or gender identities are outside forces threatening the culture of African nations is problematic for several reasons.

First, this sentiment disregards the existence of sexual minorities in Africa. Cultures and peoples across the African continent have consistently practiced same-sex sexuality from the distant past to the present.²⁸ Additionally, by setting homosexual and gender non-conforming practices in opposition to culture, proponents often ignore the fact that sexuality is an inte-

26. African Union [AU], *28th Activity Report of the African Commission on Human and People's Rights*, Executive Council, Seventeenth Ordinary Session, EX.CL/600(XVII), ¶ 33 (July 23, 2010), http://www.achpr.org/files/activity-reports/28/achpr47eo8_actrep28_20092010_eng.pdf. CAL was later granted observer status in 2015. Press Release, Coal. for Afr. Lesbians, Statement on Decision of the ACHPR to Grant Observer Status to the Coalition of African Lesbians (Apr. 25, 2015), <https://www.cal.org.za/2015/04/25/statement-on-decision-of-the-african-commission-on-human-and-peoples-rights-to-grant-observer-status-to-the-coalition-of-african-lesbians-cal/>.

27. South Africa was the only African state to rebut this contention, stating that the African Charter on Democracy, Elections and Governance requires the elimination of "all forms of discrimination, especially those based on political opinion, gender, ethnic, religious and racial grounds as well as any other form of intolerance." Emily Gray, *'I Am Because You Are' – The First Ever UN Panel on Sexual Orientation and Gender Identity*, AMNESTY INT'L (Mar. 3, 2012), <https://www.amnesty.org/en/latest/campaigns/2012/03/i-am-be-cause-you-are-the-first-ever-un-panel-on-sexual-orientation-and-gender-identity/>. This panel was held pursuant to Human Rights Council Res. 17/19, U.N. Doc. A/17/19 (July 14, 2011).

28. See, STEPHEN O. MURRAY & WILL ROSCOE, *BOY-WIVES AND FEMALE HUSBANDS: STUDIES OF AFRICAN HOMOSEXUALITIES* (1998) 1-18.

gral part of culture. Sexuality is more than a biological or reproductive process, it is a social construct influenced by politics, economics, religion, and beliefs.²⁹ Although some would frame the exclusion of homosexual practices as protecting a specific culture from infringement by another, it is still a limitation on cultural participation for the person excluded.

This leads to a second problem. If the cultural nature of sexuality is recognized, any limits on sexual acts or on the expression of sexuality or gender must be within parameters of international law. International law protects the right to culture.³⁰ If States seek to limit the right to participate in culture, those limitations must be determined by law, compatible with the nature of the right to culture, and solely for the purpose of promoting the general welfare in a democratic society.³¹ Within the right to culture, it is recognized that national culture is not monolithic, and that the rights of minorities to participate in cultural life must also be protected.³²

By framing the existence and experiences of sexual minorities as outside the fold of a unified national culture, African lawmakers create a politically popular narrative in which they are protecting the cultures of their states. This attempt to promote suppression of sexuality as protection of cultural sovereignty masks the fact that these lawmakers are subjugating other legitimate forms of African culture. Consenting adults who participate in various forms of homosexual behavior should have their right to participate in culture protected just as much as people who only participate in heterosexual sexual behaviors.

29. See, e.g., AFRICAN SEXUALITIES, *supra* note 4, at 2 (“Ideas about and experiences of African sexualities are shaped and defined by issues such as colonialism, globalisation, patriarchy, gender, class, religion, age, law and culture.”).

30. See, e.g., G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 27(1) (Dec. 10, 1948) (declaring that everyone has the right to participate in cultural life).

31. International Covenant on Economic, Social and Cultural Rights art. 4, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

32. See, e.g., African Union [AU], Charter for African Cultural Renaissance, Assembly, Sixth Ordinary Session, art. 4 (Jan. 24, 2006) [hereinafter Charter for African Cultural Renaissance] (stating that African states must respect the cultural rights of minorities).

III. AFRICAN SEXUALITIES

Stating that homosexuality and gender non-conforming behavior are *un-African* ignores the large body of work by cultural anthropologists and historians who have documented the presence of both in traditional communities across the African region.³³ These statements also attempt to erase the burgeoning LGBTI communities developing and flourishing across the continent. This Part explores the historical and modern existence of sexual minorities in Africa. It argues that sexual minorities and cultural traditions should be protected by African governments, and that States risk violating the rights of their citizens when they pass laws targeted at sexual minorities.

A. *Homosexuality and Gender-Nonconformity are Well-Documented Aspects of Many Traditional Cultures Within Africa*

History is replete with examples of same-sex sexuality and gender non-conformance in African societies. Some of these traditions survive today. In early twentieth century Uganda, the Nilotic Lango, Iteso, and Karamojan people groups had an alternative gender status called *mudoko daka*. In this tradition, certain men are treated as women and allowed to marry men.³⁴ In Zambia, the Ila people group had transgender “prophets” referred to as *mwaami*.³⁵ In this practice, men dressed as women, went about traditional women’s work, and slept with women without having sex with them.³⁶ Furthermore, in Lesotho, the Basotho people recognized same-sex relationships between women referred to as *motsoalle*.³⁷ These relationships are still found today. They are usually in addition to heterosexual marriages and are often known and blessed by

33. See, e.g., MURRAY & ROSCOE, *supra* note 29, (anthropological research on sexual minorities in traditional African cultures); MARC EPPRECHT, *HETEROSEXUAL AFRICA?: THE HISTORY OF AN IDEA FROM THE AGE OF EXPLORATION TO THE AGE OF AIDS* (2008) (anthropological critique on views that heterosexuality is innately African); MARC EPPRECHT, *HUNGOCHANI: THE HISTORY OF A DISSIDENT SEXUALITY IN SOUTHERN AFRICA* (2004) (historical research on sexual minorities in southern Africa); *AFRICAN SEXUALITIES*, *supra* note 4 (anthology of writings and research of modern sexuality in Africa).

34. MURRAY & ROSCOE, *id* at 35–36.

35. *Id.* at 176.

36. *Id.*

37. *Id.* at 233–35.

the husbands. A large community celebration is held to mark the beginning of a *motsaalle* relationship. Within these relationships, women participate in sexual behavior including rubbing, fondling, cunnilingus, and digital penetration.³⁸ In Nigeria, there are feminine men who have sex with men referred to by the Hausa as, *'yan daudu*.³⁹ These men generally facilitate transactional sex of *karuwai* (female sex workers) with men, and will often use this role as a cover to have sex with *maza masu neman maza* (masculine men who have sex with men). This community tends to be discreet, and generally participants will also have public heterosexual marriages and children.⁴⁰

In addition to the cultural traditions of peoples across the African continent, there are also recorded stories of same-sex sexual practice throughout history. For example, in the late 1800s King Mwangi ruled Baganda, a kingdom in the region of modern day Uganda. King Mwangi would regularly have sex with male pages of his court. When European missionaries came they converted some of the pages to Christianity—and the pages began to refuse the advances of the King. When King Mwangi's favorite page refused him, the King became outraged and killed him. This is one of the earliest documented cases of homosexuality in Africa.⁴¹

It is interesting that in the Cultural Charter of Africa—where African leaders first set out to protect African culture—they recognized “that cultural domination led to the depersonalization of part of the African peoples, falsified their history, systematically disparaged and combated African values”⁴² Modern leaders have adopted the language outlined in the Cultural Charter, but at the same time, seem to have accepted a depersonalizing and falsified version of history of their own. Traditional African values include the *mudoko dako* of Uganda, the *'yan daudu* of Nigeria, *mwaami* of Zambia, and the *motsaalle* of Lesotho. These values and cultures should be recognized. As anthropologist Katherine

38. *Id.*

39. *Id.* at 115–17.

40. *Id.*

41. *Id.* at 277–78.

42. Org. of African Unity [OAU], Cultural Charter for Africa, Heads of State, Thirteenth Ordinary Session, pmb., (July 5, 1976) [hereinafter Cultural Charter for Africa].

Kendall observed, “it would be insulting and essentializing in the extreme to suggest that the bonds of love and loyalty among Basotho women [as characterized in *motsosalle*] are in any way ‘Western’ or that the erotic expression of those bonds is ‘alien’ to the women who enjoy them.”⁴³

The notion that traditional African cultures are necessarily opposed to homosexuality and gender non-conformity is false. Traditional African cultures are diverse, and many include practices of sexual minorities. As discussed further below, the right to culture under international law protects the diverse array of cultural practices, as long as they do not infringe on the rights of others. This should include the traditional practices from cultures across that continent that include consensual same-sex acts and gender non-conforming behavior.

B. *Modern Sexualities in Africa*

While it is helpful to contextualize African culture in historical traditions with deep roots on the continent, it is impossible to discuss gender, sexuality, and culture without reference to the present. Professor Tamale of Makerere University concluded, “[t]he notion of a homogeneous, unchanging sexuality for all Africans is out of touch not only with the realities of lives, experiences, identities and relationships but also with current activism and scholarship.”⁴⁴ In a recent op-ed piece discussing his own personal experience, Professor Eusebius McKaiser sought to reframe the proposition that being gay was *un-African*:

As a gay African, with a background in analytic philosophy, the most annoying opposition to my sexual orientation is the claim that my lifestyle is un-African . . . Colonialists are often accused of bringing homosexuality to Africa. Yet they never get attributed with a likelier anthropological truth: introducing penal codes to the continent that outlaw gay sex Should former colonial masters not rather be ac-

43. MURRAY & ROSCOE, *supra* note 29, at 238-39.

44. AFRICAN SEXUALITIES, *supra* note 4, at 2.

cused of teaching Africa how to codify homophobia?⁴⁵

Contemporary Africans who self-identify as gay strongly demonstrate the fallacy that being gay is *un-African*. Furthermore, Professor McKaiser alludes to a poignant truth—there is more historical evidence pointing to homophobia, rather than homosexuality, as a Western import.⁴⁶

Modern African LGBTI movements draw strength from the sexual minority representations of the past. However, the movements have continued to independently develop. LGBTI Africans and the movements that they are forming across the continent demonstrate the ways in which they are a part of the culture of modern Africa. Significant conversations around the status of modern queer culture took place at the second African Same Sex Sexualities and Gender Diversity Conference in Nairobi, Kenya, in March 2014. In his paper submitted at the conference, John McAllister reflected on the state of the movement:

45. Eusebius McKaiser, *Homosexuality Un-African? The Claim is an Historical Embarrassment*, GUARDIAN (Oct. 2, 2012), <https://www.theguardian.com/world/2012/oct/02/homosexuality-unafrican-claim-historical-embarrassment>. For a modern example of the export of homophobia to Africa by Western actors, see the Center for Constitutional Rights' case against Scott Lively, who is being sued in U.S. courts for his involvement in Uganda's Anti-Homosexuality Law. Press Release, Ctr. for Constitutional Rights, Court Allows Groundbreaking Case Against Anti-Gay Religious Leader to Proceed (Aug. 14, 2013), <https://ccrjustice.org/home/press-center/press-releases/court-allows-groundbreaking-case-against-anti-gay-religious-leader>.

46. The recent court case against Scott Lively in the United States highlights the role the American pastor played in the passage of the Anti-Homosexuality Act of 2014 in Uganda. See *Sexual Minorities Uganda v. Lively*, 254 F. Supp. 3d 262, 271 (D. Mass. 2017) (“[D]iscovery confirmed the nature of Defendant’s, on the one hand, vicious and, on the other hand, ludicrously extreme animus against LGBTI people and his determination to assist in persecuting them wherever they are, including Uganda. The evidence of record demonstrates that Defendant aided and abetted efforts (1) to restrict freedom of expression by members of the LGBTI community in Uganda, (2) to suppress their civil rights, and (3) to make the very existence of LGBTI people in Uganda a crime.”); see also Press Release, Ctr. for Constitutional Rights, In Scathing Ruling, Court Affirms SMUG’s Charges Against U.S. Anti-Gay Extremist Scott Lively While Dismissing on Jurisdictional Ground (June 6, 2017), <https://ccrjustice.org/home/press-center/press-releases/scathing-ruling-court-affirms-smug-s-charges-against-us-anti-gay> (describing a federal court’s rebuke of Scott Lively’s efforts to demonize, intimidate, and injure LGBTI people in Uganda).

[D]espite the criminalisation of same-sex relations in most African countries, many African LGBT, not just in Botswana, live more or less openly, while African LGBT organisations are increasingly vocal and visible . . . Without downplaying the anxiety and suffering caused by oppressive laws and political and religious demagoguery, the reality is that African LGBT cultures and activism are growing, diversifying, and making progress, slow and patchy as the progress may be. The current wave of homophobia is, after all, a reaction against these successes.⁴⁷

Indeed, despite the many legal obstacles mentioned above, modern African queer culture is flourishing, and the leaders of the movements are creating new spaces and networks in nations across the continent.⁴⁸

IV. RIGHT TO CULTURE

Culture plays an important role in how societies organize their laws. This Part explores how the right to culture is protected and codified in international law, expounded upon in regional African law, and domesticated in the constitutions of states across the African continent. It examines the substance of the right to culture, the obligations that States have to protect and not infringe on the right to culture, and the way that the right to culture protects sexuality and gender expression.

A. *Cultural Rights in International Law*

Under international law, all people have the right to culture. This right is codified in international declarations and treaties, such as the Universal Declaration of Human Rights which declares: “[e]veryone has the right freely to participate

47. John McAllister, *LGBT Activism and ‘Traditional Values’: Dialogue Through Indigenous Cultural Values in Botswana*, in *BOLDLY QUEER: AFRICAN PERSPECTIVES ON SAME-SEX SEXUALITY AND GENDER DIVERSITY* 41, 46 (Theo Sandfort et al. eds., 2015).

48. See, e.g., award winning queer anthology *QUEER AFRICA: NEW AND COLLECTED FICTION* (Karen Martin & Makhosazana Xaba eds., 2013) (fiction anthology collecting stories highlighting queer experiences written by African authors); award winning film directed by Jim Chuchu, *STORIES OF OUR LIVES* (Nest Film Collective 2014) (anthology of short films based on the lives of LGBT people in Kenya).

in the cultural life of the community”⁴⁹ This right is reiterated by Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which states: “[t]he States Parties to the present Covenant recognize the right of everyone . . . [t]o take part in cultural life”⁵⁰ This treaty, as well as others, have been signed and ratified by the majority of the member states of the African Union.⁵¹

Many members of the human rights advocacy community claim that cultural rights remain some of the most underdeveloped rights within the modern human rights regime.⁵² However, the Committee on Economic, Social and Cultural Rights has expounded upon them. The foundational statement on these rights can be found in General Comment 21 of that Committee. General Comment 21 begins by stating:

Cultural rights are an integral part of human rights and, like other rights, are universal, indivisible and interdependent. The full promotion of and respect for cultural rights is essential for the maintenance of human dignity and positive social interaction be-

49. G.A. Res. 217 (III) A, *supra* note 31, art. 27(1).

50. ICESCR, *supra* note 32, art. 15(1)(a).

51. The African Union consists of all fifty-five states located on the African continent. For example, fifty-one have ratified the ICESCR. Comoros has signed but not ratified, Botswana, Mozambique and South Sudan have not signed the ICESCR. Fifty-four have ratified the International Covenant on Civil and Political Rights (ICCPR). G.A. Res. 2200A (XXI), art. 41 (Dec. 16, 1966) (entered into force Mar. 23, 1976). South Sudan has not signed the ICCPR. Fifty-three states have ratified the International Convention on the Elimination of All Forms of Racial Discrimination. G.A. Res. 2106 (XX) (Dec. 21, 1965). South Sudan has not signed this convention, and Angola has signed but not ratified. Fifty-three have ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). G.A. Res. 34/180 (Dec. 18, 1979). Sudan and Somalia have not signed CEDAW. All fifty-five have ratified the Convention on the Rights of the Child (UNCRC). G.A. Res. 44/25 (Nov. 20, 1989). Up-to-date signatory status can be found at the United Nations website, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx.

52. See, e.g., Miodrag A. Jovanovic, *Cultural Rights as Collective Rights, in CULTURAL RIGHTS AS COLLECTIVE RIGHTS* 15, 15 (Andrzej Jakubowski ed., 2016) (“[T]he status of cultural. . . rights, in the family of human rights has for a long time been disputed by both political philosophers and legal practitioners”).

tween individuals and communities in a diverse and multicultural world.⁵³

Furthermore, the right to culture is codified in many international treaties and declarations including the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),⁵⁴ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),⁵⁵ Convention on the Rights of the Child (CRC),⁵⁶ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW),⁵⁷ Convention on the Rights of Persons with Disabilities (CRPD),⁵⁸ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,⁵⁹ and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).⁶⁰ Through these instruments, everyone is guaranteed access to, and full and equal participation in, cultural life.

Cultural rights are both a positive and negative obligation for States; States must not infringe on free participation in cultural life and they must also create and ensure the preconditions that are necessary for involvement in and access to cultural life.⁶¹ States cannot impose one monolithic culture upon members of their society. For example, Comment 21 of CESR also says that the “decision by a person whether or not to exercise the right to take part in cultural life individually, or in association with others, is a cultural choice and, as such, should be recognized, respected and protected on the basis of

53. Committee on Economic, Social and Cultural Rights, General Comment 21, ¶ 1, U.N. Doc. E/C.12/GC/21 (2009) [hereinafter CESCR General Comment 21].

54. G.A. Res. 2106 (XX), *supra* note 52, art. 5(e)(vi).

55. G.A. Res. 34/180, *supra* note 52, art. 13(c).

56. G.A. Res. 44/25, *supra* note 52, art. 31.

57. G.A. Res. 45/158, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 43(1)(g) (Dec. 18, 1990).

58. G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities, art. 30(1) (Dec. 13, 2006).

59. G.A. Res. 47/135, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, art. 2 (Dec. 18, 1992).

60. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, arts. 8(1), 11(1), 15(1) (Sept. 13, 2007).

61. CESCR General Comment 21, *supra* note 54, ¶ 6.

equality.”⁶² Individuals and groups have the right to choose their own identity, and to subsequently change that choice.⁶³ Furthermore, no one should be “discriminated against because he or she chooses . . . to practise or not practise a particular cultural activity.”⁶⁴

The ICESCR uses a broad definition of cultural life, as interpreted by the Committee on Economic, Social and Cultural Rights. The concept of culture is “multifaceted”; in addition to art, literature, and language, it includes “lifestyles, ways of living together, value systems,” and the “ways of life through which a person or a group expresses their humanity and meanings that they give to their existence and to their development.”⁶⁵

For cultural rights to be realized in an equal and nondiscriminatory way, the following five conditions must be met: availability, accessibility, acceptability, adaptability, and appropriateness.⁶⁶ Availability refers to the presence of cultural goods—be they tangible or intangible.⁶⁷ Accessibility to culture means that there are actual opportunities to participate without discrimination.⁶⁸ Acceptability means that the opportunities must “be acceptable to the individuals and communities involved.”⁶⁹ Adaptability involves flexibility to the diverse expression of culture in a diverse society.⁷⁰ Appropriateness is measured by the context of the culture within which the rights are being protected.⁷¹ All five are essential for governments to uphold their obligations under the Covenant.

Any limitations to the right to participate in cultural life must be within the parameters of Article 4 of the ICESCR. Arti-

62. *Id.* ¶ 7.

63. *Id.* ¶ 15(a).

64. *Id.* ¶ 22.

65. *Id.* ¶ 10 n.12 (citing United Nations Educational, Scientific and Cultural Organization, UNESCO Doc. 31/C/RES/25, Annex II, Universal Declaration on Cultural Diversity, pmbl. ¶ 5 (Nov. 31 2001) [hereinafter Universal Declaration on Cultural Diversity]; and United Nations Educational, Scientific and Cultural Organization, Fribourg Declaration on Cultural Rights, art. 2 (a)).

66. CESCR General Comment 21, *supra* note 54, ¶ 16.

67. *Id.* ¶ 16(a).

68. *Id.* ¶ 16(b).

69. *Id.* ¶ 16(c).

70. *Id.* ¶ 16(d).

71. *Id.* ¶ 16(e).

cle 4 states: “the State may subject . . . rights [outlined in the Covenant] only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”⁷²

General Comment 21 echoed this sentiment by saying: “limitations must pursue a legitimate aim, be compatible with the nature of this right and be strictly necessary for the promotion of general welfare in a democratic society”⁷³

Limitations must be proportionate—when there is more than one possibility for a limitation, lawmakers must choose the least restrictive limitation.⁷⁴ This, however, does not mean that States can use cultural diversity as a justification for infringing on other rights protected within other international human rights instruments. As is outlined in General Comment 21, “States parties have a duty to implement their obligations [to protect the right to participate in cultural life] together with their obligations under other provisions of the Covenant and international instruments, in order to promote and protect the entire range of human rights guaranteed under international law.”⁷⁵ Human rights are universal and indivisible.⁷⁶ UNESCO further articulates that “[n]o one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.”⁷⁷ This means that in seeking to protect cultures that have negative views of homosexuality or gender non-conformity on the basis of cultural diversity States cannot infringe on the rights of LGBTI persons.

For example, if a cultural practice involves female genital mutilation (FGM)—that cultural practice would not be protected by the right to culture because it infringes on the right to non-discrimination on the basis of sex, freedom from cruel, inhuman, or degrading treatment, and the right to the highest attainable standard of health.⁷⁸ Much in the same way, cultural

72. ICESCR, *supra* note 32, art. 4.

73. CESCR General Comment 21, *supra* note 54, ¶ 19.

74. *Id.*

75. *Id.* ¶ 17.

76. *Id.* ¶ 1.

77. Universal Declaration on Cultural Diversity, *supra* note 66, art. 4.

78. See World Health Organization [WHO], *Eliminating Female Genital Mutilation: An Interagency Statement*, at 9 (2008), <http://www.un.org/women>

practices which infringe on the rights of LGBTI persons are not protected by the right to culture. Cultural practices which involve psychological harm, such as sexual-orientation conversion therapy of children, or physical harm, such as religious traditions condemning those who have homosexual sex to death, are not protected under the right to culture.

General Comment 21 also outlines the connection between cultural rights as found in the ICESCR and the panoply of civil and political rights protected in the International Covenant on Civil and Political Rights (ICCPR).⁷⁹ Specifically, the Comment points to prohibitions in the ICCPR, such as those against “arbitrary or unlawful interference with his privacy, family, home or correspondence,”⁸⁰ the “freedom of thought, conscience and religion,”⁸¹ “the right to hold opinions without interference,”⁸² the “right of peaceful assembly,”⁸³ “the right to freedom of association with others,”⁸⁴ and the right of “persons belonging to . . . minorities [to] not be denied the right, in community with the other members of their group, to enjoy their own culture”⁸⁵ These rights further protect people who wish to participate in cultural life and show the interconnectedness of all rights which protect the dignity of people.

B. *Cultural Rights in African Regional Law*

In addition to the inclusion of the right to culture in many international treaties—African regional treaties and legal instruments include text protecting the right to culture as well. Article 17(2) of the African Charter on Human and Peoples’ Rights (Banjul Charter) states that “[e]very individual may freely take part in the cultural life of his community.”⁸⁶

watch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf (describing how female genital mutilation violates human rights).

79. CESCR General Comment 21, *supra* note 54, at ¶ 3.

80. G.A. Res. 2200A (XXI), *supra* note 52, art. 17.

81. *Id.* art. 18.

82. *Id.* art. 19.

83. *Id.* art. 21.

84. *Id.* art. 22.

85. *Id.* art. 27.

86. African Commission on Human and Peoples’ Rights, Charter on Human and Peoples’ Rights art. 17(2), June 27, 1981, 21 I.L.M. 59.

This article is clearly in conversation with the right to participate in cultural life outlined in the UDHR and ICESCR.

However, the formulation of the right to culture in the Banjul Charter is not a direct reiteration of the right to culture as defined in the UDHR or ICESCR. The rights recognized under international law create a floor which States cannot fall below, but they do not prevent States or collections of States from adding more protection. The text of the Banjul Charter implies that it is meant to be read more expansively than in the UDHR. For example, the UDHR uses “the” community instead of “his” community, as found in the Charter.⁸⁷ Because “his” references the individual, rather than the communal reference of “the”, it allows each individual to assert protections of the right to culture, even if that cultural practice does not conform with the majority cultural practices of his community. This suggests strong protections for a pluralistic society where there are diverse cultures. Furthermore, in the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, the African Commission interpreted the “right to take part in cultural life” as being vested “in the individual and should be protected as such.”⁸⁸ The Commission indicated that this also includes the right to “choose in what culture(s) and cultural life to participate and the freedom to manifest one’s own culture.”⁸⁹

Like the ICESCR, the Banjul Charter links cultural rights to civil and political rights. For example, it explicitly lays out the codependence between the right to culture and the right to freedom of expression.⁹⁰ The Charter was drafted shortly after the 1976 Cultural Charter for Africa.⁹¹ This Charter was a declaration about the way that African leaders intended to approach culture as they led their nations. The Cultural Charter

87. See Jovanovic, *supra* note 53, at 13 (describing the difference between how the Banjul Charter and UDHR drafters define the right to culture).

88. African Comm’n on Human & Peoples’ Rights [ACHPR], *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights*, ¶ 73 (Oct. 24, 2011), http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf.

89. *Id.* ¶ 74.

90. *Id.*

91. Cultural Charter for Africa, *supra* note 43.

was subsequently replaced by the Charter for African Cultural Renaissance in 2006.⁹² The Charter for African Cultural Renaissance establishes the principle of “[a]ccess of all citizens . . . to culture.”⁹³ The Charter recognizes the diversity of culture within Africa and promotes “respect for national and regional identities in the area of culture as well as the cultural rights of minorities”⁹⁴ Furthermore, the signatories recognized “that cultural diversity is a factor for mutual enrichment of peoples and nations.”⁹⁵ Consequently, they committed “to defend minorities, their cultures, their rights and their fundamental freedoms.”⁹⁶ The Charter also establishes how the diversity of cultures within African nations is part of what creates “national and regional identities, and more widely . . . Pan-Africanism.”⁹⁷ These statements highlight the false premise that any country can have a singular, monolithic culture while excluding minority cultures. Although there are aspects of culture that may be traditionally present in certain countries or regions—and it is important to protect and preserve these cultural identities—preservation should not come at the expense of other cultural identities or practices.

The African Commission on Human and Peoples’ Rights (African Commission) recognized that sexual minorities are particularly vulnerable across the continent. In a 2015 Resolution, the African Commission condemned the “increasing incidence of violence and other human rights violations . . . and . . . persecution of persons on the basis of their imputed or real sexual orientation or gender identity” and strongly urged states “to end all acts of violence and abuse”⁹⁸ Prohibition of LGBTI persons from the participation in cultural life is one form of abuse that must be ended in accordance with this Resolution.

92. Charter for African Cultural Renaissance, *supra* note 33, art. 1.

93. *Id.* art. 4(a).

94. *Id.* art. 4(c).

95. *Id.* art. 5(1).

96. *Id.*

97. *Id.* art. 5(2).

98. African Comm’n on Human & Peoples’ Rights [ACHPR], Resolution on Protection Against Violence and Other Human Rights Violations Against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity, Fifty-Fifth Ordinary Session, Res. 275, ¶¶ 1, 4 (May 12, 2014), <http://www.achpr.org/sessions/55th/resolutions/275/>.

C. *Domestication of the Right to Culture in African States*

States have reaffirmed the binding right to culture found in international treaties through the process of domestication into their national laws and constitutions. The right to culture is found in the constitutions of almost every member state of the African Union.⁹⁹ Although language protecting cultural

99. CONSTITUTION OF THE PEOPLE'S DEMOCRATIC REPUBLIC OF ALGERIA 1989, art. 31; CONSTITUTION OF THE REPUBLIC OF ANGOLA Jan. 21, 2010, arts. 21(c), 21(m), 79; CONSTITUTION OF THE REPUBLIC OF BENIN 1994, arts. 8, 10; CONSTITUTION OF BURKINA FASO 1991, art. 18; CONSTITUTION OF THE REPUBLIC OF BURUNDI June 7, 2018, arts. 52, 53; CONSTITUÇÃO DA REPÚBLICA DE CABO VERDE 2010, art. 79; CONSTITUTION OF THE REPUBLIC OF CAMEROON Jan. 18, 1996, art. 27; CONSTITUTION OF THE CENTRAL AFRICAN REPUBLIC Mar. 30, 2016, art. 9; CONSTITUTION OF THE REPUBLIC OF CHAD July 3, 2013, art. 33; CONSTITUTION OF THE REPUBLIC OF THE CONGO 2001, art. 22; CONSTITUTION OF THE REPUBLIC OF CÔTE D'IVOIRE Nov. 8, 2016, art. 24; CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF THE CONGO Jan. 20, 2011, art. 46; CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT 2014, art. 47; FUNDAMENTAL LAW OF EQUATORIAL GUINEA [CONSTITUTION] 2012, art. 6; CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA 1995, art. 39; CONSTITUTION OF THE GABONESE REPUBLIC Jan. 12, 2018, art. 1(18); CONSTITUTION OF THE REPUBLIC OF THE GAMBIA 1997, art. 32; CONSTITUTION OF THE REPUBLIC OF GHANA 1992, art. 26; CONSTITUTION OF 7 MAY 2010, art. 21 (Guinea); CONSTITUTION art. 44(1) (2010) (Kenya); CONSTITUTION OF LESOTHO 1993, art. 35; CONSTITUTION OF THE REPUBLIC OF LIBERIA 1986, art. 5(b); CONSTITUTIONAL DECLARATION 2011, art. 1 (Libya); CONSTITUTION OF THE IVTH REPUBLIC 2010, art. 26 (Madag.); CONSTITUTION OF THE REPUBLIC OF MALAWI 1994, arts. 26, 30(1); CONSTITUTION OF THE REPUBLIC OF MALI 1992, pmb., art. 8; CONSTITUTION OF THE REPUBLIC OF MOZAMBIQUE 1990, art. 53; CONSTITUTION OF THE REPUBLIC OF NAMIBIA 1990, art. 19; CONSTITUTION OF THE REPUBLIC OF NIGER 2010, art. 17; CONSTITUTION OF NIGERIA 1999, § 21; CONSTITUTION OF THE REPUBLIC OF RWANDA 2003, art. 47; REPÚBLICA DEMOCRÁTICA DE SAO TOMÉ E PRÍNCIPE 1975, arts. 10, 55; CONSTITUTION OF THE REPUBLIC OF SENEGAL 2001, arts. 8, 24; CONSTITUTION OF THE REPUBLIC OF SEYCHELLES June 21, 1993, art. 39; CONSTITUTION OF SIERRA LEONE 1991, art. 12; PROVISIONAL CONSTITUTION OF THE FEDERAL REPUBLIC OF SOMALIA Aug. 1, 2012, art. 31; S. AFR. CONSTITUTION 1996, arts. 30, 31; TRANSITIONAL CONSTITUTION OF THE REPUBLIC OF SOUTH SUDAN 2011, arts. 33, 38; INTERIM NATIONAL CONSTITUTION OF THE REPUBLIC OF THE SUDAN 2005, 13, 47; CONSTITUTION OF THE IVTH REPUBLIC Oct. 14, 1992, arts. 12, 40 (Togo); CONSTITUTION OF THE TUNISIAN REPUBLIC 2014, art. 42; CONSTITUTION OF THE REPUBLIC OF UGANDA 1995, art. 37; CONSTITUTION OF ZAMBIA 2016, § 266; CONSTITUTION OF ZIMBABWE 2013, art. 16. Of the fifty-five states within the African Union, only Botswana, Comoros, Djibouti, Eritrea, Guinea Bissau, Kingdom of Eswatini, Mauritania, Mauritius, Sahrawi Republic, and Tanzania do not contain specific textual provisions which protect the right to culture.

rights is nearly universally present—the formulations vary drastically across the continent.

South Africa's constitution has a strong commitment to human rights,¹⁰⁰ and it contains one of the most developed enunciations of the right to culture, as the following sections show:

Language and culture

30. Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

Cultural, religious and linguistic communities

31. (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—

a. to enjoy their culture, practise their religion and use their language; and

b. to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.¹⁰¹

This formulation explicitly protects both individuals and groups. Additionally, the only limitation on the right to free participation is consistency with other protected rights. This is contrasted slightly by the Namibian Constitution which states:

Article 19 Culture

Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the

100. See, e.g., Jeremy Sarkin, *The Drafting of South Africa's Final Constitution from a Human-Rights Perspective*, 47 AM. J. COMP. L. 67, 83, 85–86 (1999) (“The final Constitution further entrenches human rights as a cornerstone of South African democracy. . . . [T]he drafting process has been hailed not only as unique but also as one of the most democratic and inclusive constitution-making exercises in history . . . the final Constitution should provide a basis for developing a human-rights culture in South Africa.”).

101. S. AFR. CONST. 1996, arts. 30, 31.

rights protected by this Article do not impinge upon the rights of others or the national interest.¹⁰²

This formulation includes limitations based both on the rights of others and the national interest. National interest should be interpreted in line with the requirements of international law. Governments should not abuse provisions like this to unjustly limit the right to culture.

Some constitutions state the right without further elaboration. For example, Article 33 of the Chadian Constitution simply states, “[e]very Chadian has the right to culture.”¹⁰³ This should be interpreted to follow regional and international interpretations on the obligations and duties of the State in relation to the right to culture. Furthermore, the limitation to the application of this Article to only citizens of Chad is concerning. All people within a nation should enjoy the protection of their right to culture, not just citizens.

Another formulation of the right to culture can be found in the Rwandan Constitution. Article 47 of this Constitution states:

Article 47: Safeguard and promotion of national culture

The State has the duty to safeguard and promote national values based on cultural traditions and practices so long as they do not conflict with human rights, public order and good morals. The State also has the duty to preserve the national cultural heritage.¹⁰⁴

This text appears to be insufficient to fully comply with the international obligation to protect the right to culture. Article 47, unlike the Banjul Charter, does not enunciate any individual protection to the free participation in culture. Also, in addition to limitations to the right to culture based on conflict with human rights, the Article also includes limitations based on “public order and good morals.” There is the possibility that the government of Rwanda could use these categories to unjustifiably limit their people’s right to free participation in culture. Therefore, “public order” and “good morals” should

102. CONSTITUTION OF THE REPUBLIC OF NAMIBIA 1990, art. 19.

103. CONSTITUTION OF THE REPUBLIC OF CHAD July 3, 2013, art. 33.

104. CONSTITUTION OF THE REPUBLIC OF RWANDA 2003, art. 47.

be interpreted to align with international standards on the limitations allowed to rights in the ICESCR and the Banjul Charter.

The textual presence of the right to culture in constitutions across the African continent provides a useful starting point for protecting the right—but practitioners must develop its application to fully encompass the standards set forth in international and regional law. All states are bound by the Banjul Charter and by customary international law. States should be held accountable when they infringe on this right by improperly limiting cultural participation.

D. *Sexuality and Gender are Integral Aspects of Cultural Life*

Sexuality and gender are important aspects of culture that fall within the broad definition of cultural life as found in the ICESCR and other international treaties. As outlined above, culture includes lifestyles, the way one associates with others, the way one expresses herself, as well as her beliefs about those behaviors.¹⁰⁵ Sexuality and gender are essential parts of these individualized aspects of culture.

Practitioners and scholars recognize the inclusion of sexuality and gender identity within the international legal definition of culture. For example, in 2007, a group of international scholars created the Yogyakarta Principles.¹⁰⁶ These principles set out to “collate and clarify State obligations under existing international human rights law” in relation to sexual orientation and gender identity.¹⁰⁷ Principle 26 affirms that “[e]veryone has the right to participate freely in cultural life, regardless of sexual orientation or gender identity, and to express, through cultural participation, the diversity of sexual orientation and gender identity.” It goes on to clarify that States should foster mutual respect between cultures who may hold different views about gender and sexuality—further highlighting the integration of sexuality, gender, and culture.¹⁰⁸

105. CESCR General Comment 21, *supra* note 54, at ¶ 10 n.12; Universal Declaration on Cultural Diversity, *supra* note 66; and Fribourg Declaration on Cultural Rights, *supra* note 66.

106. YOGYAKARTA PRINCIPLES, *supra* note 17.

107. *Id.* at 7.

108. *Id.* at 29.

Scholars routinely explore sexuality as culture. For example, in her discussion of the ACHPR and its Banjul Charter, Professor Rachel Murray recognized that a “culture will have a particular way of dealing with relations between the sexes”¹⁰⁹ Likewise, Professor Sylvia Tamale points to the mischaracterization of African female sexuality, an arguably sociological phenomenon, as a damaging misinterpretation of culture with negative effects on the equality of women and the protection of their human rights.¹¹⁰

Examining academic conversation from fields outside of the law also clarifies the role that sexuality plays in culture. For example, as Tamale puts it in her seminal anthropology anthology about African sexualities:

Sexualities are often thought of as closely related to one of the most critical of biological processes, namely reproduction. But contemporary scholarship understands sexualities as socially constructed, in profound and troubling engagement with the biological, and therefore as heavily influenced by, and implicated within, social, cultural, political and economic forces.¹¹¹

Similar themes are echoed in the field of public health. In 2015, the World Health Organization defined sexuality as the following:

Sexuality is a central aspect of being human throughout life; it encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction. Sexuality is experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes, values, behaviours, practices, roles and relationships. While sexuality can include all of these dimensions, not all of them are always experienced or expressed. Sexuality is influenced by the interaction of biological, psychological, social, economic,

109. Rachel Murray & Steven Wheatley, *Groups and the African Charter on Human and Peoples' Rights*, 25 *HUM. RTS. Q.* 213, 219 (2003).

110. Sylvia Tamale, *The Right to Culture and the Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa*, 16 *FEMINIST LEGAL STUD.* 47 (2008).

111. *AFRICAN SEXUALITIES*, *supra* note 4, at 2.

political, cultural, legal, historical, religious and spiritual factors.¹¹²

The inclusion of beliefs, values, and relationships in the definition—as well as the social, cultural, religious, and spiritual context—all echo back the definitions of culture in legal instruments. Another example, from Ellen Ross and Rayna Rapp in the field of historical anthropology, simply states, “[s]exuality’s biological base is always experienced culturally”¹¹³

Sexuality is necessarily cultural, and cultures necessarily have an established framework for expression of sexuality. Therefore, the right to culture protects the right for people to express their own formulation of sexuality, including the acts involved and how they choose to express their gender and sexuality.

V. RIGHT TO CULTURE SHOULD PROTECT THE DIVERSE SEXUALITIES IN AFRICA

Contrary to the use of culture by African lawmakers over the past several decades to justify persecution of sexual minorities and criminalization of consensual sex between members of the same sex, the right to culture should protect diverse sexualities within African States. There are many instances of African States’ failure to protect the cultural rights of sexual minorities. Each case inevitably has a multitude of variables that are connected to national and regional specificities, but a concerning trend is discernable across the continent. In order to examine the application of the right to culture in a national setting it is helpful to turn to a specific case.

A. *Uganda: A Case Study*

Uganda is a hostile country for sexual minorities and has been one for many years. Homosexuality was first criminalized in the penal code during colonization by Britain.¹¹⁴ In 2009, a new bill was introduced that increased penalties for certain

112. World Health Organization [WHO], *Sexual Health, Human Rights and the Law*, at 5 (2015), http://apps.who.int/iris/bitstream/10665/175556/1/9789241564984_eng.pdf?ua=1.

113. Ellen Ross & Rayna Rapp, *Sex and Society: A Research Note from Social History and Anthropology*, 23 COMP. STUD. SOC’Y & HIST. 51, 51 (1981).

114. Penal Code Act, c. 120, §§ 145, 148 (1950) (Uganda).

consensual homosexual acts and created new crimes, such as “[p]romotion of homosexuality.”¹¹⁵ The bill garnered international attention, especially because of its inclusion of the death penalty for “[a]ggravated homosexuality,” a crime which included some consensual same-sex acts such as having sex with someone of the same-sex while being HIV positive, or being a “serial offender.”¹¹⁶ As a consequence of the bill, many countries threatened to pull aid from Uganda.¹¹⁷ Eventually, lawmakers replaced the death penalty with life imprisonment, but kept the “aggravated homosexuality” provision.¹¹⁸ The Anti-Homosexuality Act¹¹⁹ was passed by parliament in 2013 and signed into law by President Yoweri Museveni in 2014.¹²⁰ Following the passage of the new law, the United States and

115. Anti Homosexuality Bill, Supp. No. 13, CII Uganda Gazette No. 47 § 13 (2009), <https://drive.google.com/file/d/0B7pFotabJnTmYzFiMWJmY2U4YWYxMi00MDY2LWI4NWYtYTViOWU1OTEzZmZk0/view?ddrp=1&hl=EN>.

116. *Id.* § 3; see also *Finding the Root of Anti-Gay Sentiment in Uganda*, NAT’L PUB. RADIO: FRESH AIR (Aug. 25, 2010), <http://www.npr.org/templates/transcript/transcript.php?storyId=129422524> (interviewing Jeff Sharlet who traveled to Uganda to meet with David Bahati, the MP who introduced the Anti Homosexuality Bill); *Uganda: ‘Anti-Homosexuality’ Bill Threatens Liberties and Human Rights Defenders*, HUMAN RIGHTS WATCH (Oct. 15, 2009, 2:00 PM), <https://www.hrw.org/news/2009/10/15/uganda-anti-homosexuality-bill-threatens-liberties-and-human-rights-defenders> (sharing statements by seventeen local and international human rights organizations who call the Anti Homosexuality bill a violation of human rights); *Uganda: Homosexuality Bill Opposed*, N.Y. TIMES (Dec. 18, 2009), http://www.nytimes.com/2009/12/19/world/africa/19briefs-HOMOSEXUALIT_BRF.html (reporting on statements by the United States’ State Department along with gay and lesbian activists noting their opposition to the Anti Homosexuality bill).

117. See, e.g., *Africa Won’t Sacrifice Values for Donor Aid*, DAILY NATION (Nov. 5, 2011), <http://www.nation.co.ke/oped/Editorial/Africa-wont-sacrifice-values-for-donor-aid/-/440804/1267780/-/pc1w98z/-/index.html> (describing African leaders’ negative reaction to British Prime Minister David Cameron’s decision to withdraw aid from African countries that do not recognize homosexuality in their legal frameworks); European Parliament Resolution of 17 December 2009 on Uganda: Anti-homosexual Draft Legislation, 2009 O.J. (C 286 E) (calling on Ugandan authorities to reject the Anti-Homosexuality Bill).

118. *Uganda Anti-Homosexuality Bill: MPs Drop Death Penalty*, BBC (Nov. 23, 2012), <http://www.bbc.com/news/world-africa-20463887>.

119. Anti-Homosexuality Act (2014) (Uganda).

120. Faith Karimi & Nick Thompson, *Uganda’s President Museveni Signs Controversial Anti-gay Bill into Law*, CNN (Feb. 25, 2014), <http://edition.cnn.com/2014/02/24/world/africa/uganda-anti-gay-bill>.

several EU countries pulled aid funding from the Ugandan government.¹²¹ A lawsuit was quickly brought against the new Act, and the Constitutional Court of Uganda ruled in August of 2014 that the Act was unconstitutional on procedural grounds.¹²² However, because there was no ruling on the merits, activists continue to fear that another anti-homosexuality bill will be passed in the future.¹²³

Since 2009, proponents of greater criminal sanctions for homosexual acts in Uganda have cited cultural reasons as the main justification for their actions. The original bill was proposed to “protect the cherished culture of the people of Uganda”¹²⁴ During the years between the proposal and passage of the Act, the legislation periodically gained momentum from deeply homophobic sentiments. Uganda’s former minister of ethics and integrity, James Nsaba Buturo, once stated, “[h]omosexuals can forget about human rights.”¹²⁵ This comment clearly stated the position the Ugandan government took on the issue. At a press conference announcing the passage of the new Anti-Homosexuality Act, President Museveni attacked what he termed “social imperialism,” stat-

121. *Uganda Hit with Foreign Aid Cuts over Anti-gay Law*, AL JAZEERA (Feb. 27, 2014, 9:45 AM), <http://america.aljazeera.com/articles/2014/2/27/uganda-hit-with-foreignaidcutsoverantigaylaw.html>; *Europe Backs Sanctions over Anti-gay Laws*, AL JAZEERA (Mar. 13, 2014), <http://www.aljazeera.com/news/africa/2014/03/europe-backs-sanctions-over-anti-gay-laws-2014313174349972181.html>; Tricia Escobedo, *U.S. Reduces Money to Uganda over Harsh Anti-gay Laws*, CNN (June 19, 2014), <http://www.cnn.com/2014/06/19/world/africa/uganda-homosexuality-u-s-funds/>.

122. *Uganda Court Annuls Anti-Homosexuality Law*, BBC (Aug. 1, 2014), <http://www.bbc.com/news/world-africa-28605400>.

123. Tierney Sneed, *LGBT Groups Celebrate Uganda Ruling, but Human Rights Concerns Continue*, U.S. NEWS & WORLD REPORT (Aug. 1, 2014, 5:08 PM), <https://www.usnews.com/news/articles/2014/08/01/lgbt-groups-celebrate-uganda-ruling-but-human-rights-concerns-continue>; Justin Ling, *Uganda’s ‘Kill the Gays’ Bill Could Be Back Soon*, VICE (June 3, 2016, 1:20 PM), <https://news.vice.com/article/ugandas-kill-the-gays-bill-could-be-back-soon>.

124. Anti Homosexuality Bill, Supp. No. 13, CII Uganda Gazette No. 47, § 1.1 (2009), <https://drive.google.com/file/d/0B7pFotabJnTmYzFiMWJmY2UyYWYxMi00MDY2LWI4NWYtYTViOWU1OTEzMzk0/view?ddrp=1&hl=EN>.

125. Jeffery Gettleman, *Ugandan Who Spoke Up for Gays Is Beaten to Death*, N.Y. TIMES (Jan. 27, 2011), <http://www.nytimes.com/2011/01/28/world/africa/28uganda.html>.

ing, “[a]rrogant western groups are to blame Leave us aloneWe don’t need your (donor) money.”¹²⁶

Following the signing of the Act, President Museveni further chastised the West, saying they should “[r]espect African societies and their values If you don’t agree, just keep quiet. Let us manage our society, then we will see. If we are wrong, we shall find out by ourselves, just the way we don’t interfere with yours.”¹²⁷ Chief Opposition Whip, Cecilia Ogwal said that the Anti-Homosexuality Act was one of the “fundamental laws for Uganda” and that she had “no apologies” for passing the law.¹²⁸

These sentiments were also echoed by citizens in newspapers in Uganda,¹²⁹ as well as across the continent.¹³⁰ They

126. Zain Verjee, *Anti-west and Anti-gay: How Yoweri Museveni Played to His Audience*, CNN (Feb. 24, 2014), <http://www.cnn.com/2014/02/24/world/africa/verjee-uganda-museveni-anti-gay/>.

127. Elizabeth Landau et al., *Uganda President: Homosexuals are ‘Disgusting’*, CNN (Feb. 25, 2014), <http://www.cnn.com/2014/02/24/world/africa/uganda-homosexuality-interview/index.html>.

128. Ling, *supra* note 124.

129. For example, see comments from the editorial staff of Uganda’s OBSERVER. *Editorial: UK’s Cameron Touched Wrong Button on Gays*, OBSERVER (Nov. 6, 2011), <http://www.observer.ug/viewpoint/editorial/15802-editorial-uks-cameron-touched-wrong-button-on-gays> (“Most avid critics of homosexuality have all along argued that Western countries are trying to impose unAfrican sex practices on Africans, and Cameron just succeeded in playing into the hands of these controversial sentiments. With those insensitive remarks, the British Prime Minister provoked nationalist sentiments in Africa and rallied even those previously tolerant of homosexuality to call his bluff.”).

130. See e.g. *Africa Won’t Sacrifice*, *supra* note 118 (“[S]ome of the donor nations . . . think that since they give aid to Africa they have the right to impose some outrageous demands that have grave implications on our social and cultural values. As [sic] case in point is the declaration by British Prime Minister David Cameron that Britain will withdraw aid from African countries that do not recognise homosexuality within their legal frameworks In social networks and call-ins to international media houses, ordinary people from all over Africa expressed . . . outrage at what is clearly a blatant, short-sighted arrogance on the part of Mr [sic] Cameron. The remarks by the Premier are a reflection of centuries-old disdain by the West for the African culture and values African people have demonstrated that they have the intellectual capacity to decide what cultural practices to adopt and which ones to reject [T]hrough the ages African societies have been held together by acceptable social values and cultural norms handed down many generations. Within this complex system of values, there has existed a strong communal sense of what is right and what is wrong or unacceptable. In a sense, these values have created an unwritten constitution by which every

claimed that nationalism and anti-colonialism demanded condemnation of homosexuality. In this vision of relations between Uganda and the West, Uganda is working hard to maintain its strong national identity against concerted efforts by the West to make it succumb to Western values through neo-colonialist and neo-imperialist strong arming.

This neo-colonialism, neo-imperialism narrative fails to capture the human cost of this homophobic political movement. Shortly after the Anti-Homosexuality Bill was proposed in parliament, a prominent Ugandan gay rights activist, David Kato, started speaking out more vigorously.¹³¹ David Kato was known as one of the forefathers of the gay rights movement in Uganda. He emerged onto the political scene in 1998 as an activist for gay liberation, and by 2010 had become the litigation officer at Sexual Minorities Uganda (SMUG) after leaving his job as a teacher.¹³² On January 3, 2011 Kato was part of a team of activists who won a court case against a Ugandan tabloid, Rolling Stone.¹³³ This ruling helped protect the constitutional rights to privacy and safety for LGBTI persons in Uganda.¹³⁴ However, just a few weeks after the decision in the case, David Kato was murdered in his home.¹³⁵ An in-depth investigation into his death was never conducted. Human rights organizations like Amnesty International and Human Rights Watch have advocated unsuccessfully for an investigation to clarify the circumstances and motivations surrounding his murder.¹³⁶

member of the society lives by. . . . [The] West [should] accept and respect the African way of life, including their abhorrence of certain sexual habits.”).

131. Aaron Ankinoyemi, *‘His Death Made Us Stronger’: Uganda’s LGBT Groups on David Kato’s Murder*, GUARDIAN (Jan. 26, 2016), <https://www.theguardian.com/world/2016/jan/26/uganda-lgbt-groups-david-kato-murder-5-years-on>.

132. *Obituary: Uganda Gay Activist David Kato*, BBC (Jan. 27, 2011), <http://www.bbc.co.uk/news/mobile/world-africa-12299786>.

133. Rolling Stone has no association with the American publication, Rolling Stones.

134. Peter Walker, *Ugandans Win Damages over Anti-gay Newspaper Article*, GUARDIAN (Jan. 3, 2011), <https://www.theguardian.com/world/2011/jan/03/uganda-court-damages-gay>.

135. Gettleman, *supra* note 126.

136. Ankinoyemi, *supra* note 132.

At David Kato's funeral, his friends and colleagues wore black shirts with rainbows on the sleeves; written on the back was *aluta continua* (the struggle continues).¹³⁷ And so it did—SMUG and other LGBTI advocacy organizations in Uganda continued to fight against the Anti-Homosexuality Bill in the Parliament, as well as homophobia and transphobia in society. However, following the passage of the Anti-Homosexuality Act in 2014, there was a sharp spike in persecution of LGBTI people in Uganda. A report by SMUG documented 162 cases of harassment, eviction, assault, and even torture in the four months following the passage of the Act.¹³⁸ This represented an increase of 750% – 1900% over the previous two years.¹³⁹ A subsequent report by SMUG, documenting events that occurred between May 2014 and December 2015, included another 264 verified cases of persecution of LGBTI persons based on their sexual orientation or their gender identity.¹⁴⁰ These cases include instances of State torture, violence, loss of property, and social exclusion.¹⁴¹ Raids and harassment by the police are common—including a raid on a peaceful gay pageant in August of 2016.¹⁴²

The persecution forced many LGBTI Ugandans to flee the country. It is difficult to know the exact number of LGBTI refugees fleeing Uganda because there is free movement within the East Africa community and many would-be refugees have never registered because they fear coming out.¹⁴³ Following the passage of the Anti-Homosexuality Act, SMUG docu-

137. Sarah S. Kilborne, *The Funeral of David Kato: How Uganda's Leading Gay Activist was Laid to Rest*, SLATE (Jan. 26, 2015), http://www.slate.com/blogs/outward/2015/01/26/david_kato_s_funeral_how_uganda_s_leading_gay_activist_was_laid_to_rest.html.

138. SEXUAL MINORITIES UGANDA, FROM TORMENT TO TYRANNY: ENHANCED PERSECUTION IN UGANDA FOLLOWING THE PASSAGE OF THE ANTI-HOMOSEXUALITY ACT 2014 2 (2014), <https://sexualminoritiesuganda.com/wp-content/uploads/2014/11/SMUG-From-Torment-to-Tyranny.pdf>.

139. *Id.*

140. SEXUAL MINORITIES UGANDA, "AND THAT'S HOW I SURVIVED BEING KILLED": TESTIMONIES OF HUMAN RIGHTS ABUSES FROM UGANDA'S SEXUAL AND GENDER MINORITIES 12 (2016), https://www.scribd.com/doc/310116145/And-That-s-How-I-Survived#fullscreen&from_embed.

141. *Id.* at 5.

142. HUMAN RIGHTS WATCH, WORLD REPORT 2017: UGANDA 618 (2017).

143. Thom Senzee, *Activists: Hundreds of LGBT Refugees have Fled Uganda*, ADVOCATE (June 27, 2014), <http://www.advocate.com/world/2014/06/27/activists-hundreds-lgbt-refugees-have-fled-uganda>.

mented twenty-four cases of LGBTI persons fleeing Uganda.¹⁴⁴ Displaced sexual minorities continue to face persecution even after leaving Uganda. Homosexuality is criminalized in most neighboring countries and refugees face eviction, harassment, and violence in Nairobi as well as in refugee camps across the region.¹⁴⁵

The Anti-Homosexuality Act and the accompanying political and social movements in Uganda have had a devastating effect on the community of sexual minorities living there. The question of whether the Ugandan government is justified stands. Even if protecting the so-called traditional culture of Uganda is a permissible goal—it cannot be accomplished through the complete obliteration of another minority culture within Uganda.

B. *Uganda Cannot Infringe on the Cultural Rights of Sexual Minorities in its Pursuit to Promote a Unified Traditional Ugandan Culture*

The international human rights community has decried the actions of the Ugandan government regarding its persecution of the LGBTI community for many years. For example, the former United Nations High Commissioner for Human Rights, Navi Pillay, criticized Uganda over its enactment of the Anti-Homosexuality Act. In denouncing the impact this law would have on sexual minorities in Uganda, Pillay stated, “[t]his law violates a host of fundamental human rights, including the right to freedom from discrimination, to privacy, freedom of association, peaceful assembly, opinion and expression and equality before the law—all of which are enshrined in Uganda’s own constitution and in the international treaties it has ratified”¹⁴⁶

Likewise, the 2016 SMUG Report outlines how the Act infringes on the rights to equality, freedom from discrimination, life, freedom from deprivation of property, education, free-

144. SEXUAL MINORITIES UGANDA, *supra* note 141, at 4. The Act was overturned on procedural grounds, but the substantive rights issues were never addressed by the court. David Smith, *Uganda Anti-Gay Law Declared ‘Null and Void’ by Constitutional Court*, GUARDIAN (Aug. 1, 2014), <https://www.theguardian.com/world/2014/aug/01/uganda-anti-gay-law-null-and-void>.

145. Kushner, *supra* note 16.

146. Landau, *supra* note 128.

dom of conscience, expression, free movement, religious freedom, freedom of assembly, freedom of association, privacy, freedom from inhuman treatment, and dignity of sexual minorities in Uganda.¹⁴⁷ Although these assertions of the broad range of humans rights violations are essential to holding the Ugandan government accountable for its illegal behavior, they fall short of challenging the government on its underlying justifications for its actions. Put another way, the government's justifications fall short on their own terms, and this should be highlighted by the international community.

The Ugandan Constitution contains a section on National Objectives and Directive Principles of State Policy. The objectives and principles "guide all organs and agencies of the State, all citizens, organisations and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society."¹⁴⁸ The Anti-Homosexuality Bill's stated purpose, which was "to establish a comprehensive consolidated legislation to protect the traditional family . . . [and] to protect the cherished culture of the people of Uganda . . .",¹⁴⁹ must comply with those constitutional principles. Several provisions within the National Objective and Directive Principles apply to this section of the Bill, which in a closely related form was signed into law as the Anti-Homosexuality Act of 2014. Under Objective XIV – General Social and Economic Objectives, the Constitution states:

The State shall endeavour to fulfill the fundamental rights of all Ugandans to social justice and economic development and shall, in particular, ensure that –

(a) all developmental efforts are directed at ensuring the maximum social and cultural well-being of the people¹⁵⁰

147. SEXUAL MINORITIES UGANDA, *supra* note 141, at 8–10.

148. CONSTITUTION OF THE REPUBLIC OF UGANDA 1995, § I.

149. Anti Homosexuality Bill, Supp. No. 13, CII Uganda Gazette No. 47, § 1.1 (2009), <https://drive.google.com/file/d/0B7pFotabJnTmYzFiMWJmY2UYWYxMi00MDY2LWI4NWYtYTViOWU1OTEzMzk0/view?ddrp=1&hl=EN>.

150. CONSTITUTION OF THE REPUBLIC OF UGANDA 1995, § XIV.

Furthermore, under Objective III—National Unity and Stability, the Constitution also states:

(i) All organs of State and people of Uganda shall work towards the promotion of national unity, peace and stability.

(ii) Every effort shall be made to integrate all the peoples of Uganda while at the same time recognising the existence of their ethnic, religious, ideological, political and cultural diversity.

(iii) Everything shall be done to promote a culture of cooperation, understanding, appreciation, tolerance and respect for each other's customs, traditions and beliefs.¹⁵¹

Under its own Constitution, the government has a responsibility to ensure the “maximum . . . cultural well-being of the people,” and this is supposed to be done “recognising the existence of . . . cultural diversity” and to “promote a culture of . . . tolerance and respect . . .”¹⁵² This tracks the regional declaration by African heads of State “that cultural diversity is a factor for mutual enrichment of peoples and nations” and that it is important “to defend minorities, their cultures, their rights and their fundamental freedoms.”¹⁵³

The Anti-Homosexuality Act states its purpose as “prohibit[ing] any form of sexual relations between persons of the same-sex; [and] prohibit the promotion or recognition of such relations”¹⁵⁴ This Act specifically prohibited any sort of sexual cultural diversity. Furthermore, rather than promoting cooperation, understanding, appreciation, tolerance, or respect—it acted directly in the contrary by prohibiting even the promotion or recognition of an entire class of relationships. The fundamental goal of the Act went against the Ugandan Constitution and international law.

Beyond the interpretive directives within the Ugandan Constitution, there are also important substantive provisions which interact with the law. Article 37 outlines the Right to Culture: “[e]very person has a right as applicable to belong to,

151. *Id.* § III.

152. *Id.* §§ III, XIV.

153. Charter for African Cultural Renaissance, *supra* note 33, art. 5(1).

154. Anti-Homosexuality Act (2014), pmbl. (Uganda).

enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others.”¹⁵⁵

Perhaps the main contention that a promoter of the Act would put forth is that homosexuality is not a valid culture or cultural tradition—but the premise of this argument is flawed. First, the Constitution does not limit the right to cultures it deems valid, which the State might have difficulty defining objectively. Second, and perhaps most persuasive, both the President and the Ugandan government have admitted that homosexuality is a long-standing cultural practice in Uganda. During a prime-time interview with the BBC show “Hard Talk” in March 2012, while deliberation of the Anti-Homosexuality Bill was ongoing, President Museveni noted, “[h]omosexuals in small numbers have always existed in our part of black Africa . . . They were never prosecuted. They were never discriminated.”¹⁵⁶ Third, in the very report that President Museveni cited when signing the Act into law, scientists found that “[i]n every society, there is a small number of people with homosexuality[sic] tendencies.”¹⁵⁷ This statement is consistent with research by anthropologists about *mudoko dako* in Uganda and with the reports by historians about homosexual practices in the court of King Mwanga.¹⁵⁸

Furthermore, the right to culture outlined in Article 37 of the Constitution must live up to the international obligations of availability, accessibility, acceptability, adaptability, and appropriateness.¹⁵⁹ By prohibiting all forms of sexual relationships between persons of the same sex, the Act completely removed the availability of this cultural expression. Accessibility is hampered not only by the complete prohibition of same-sex sexual relationships, but also by the inclusion of provisions

155. CONSTITUTION OF THE REPUBLIC OF UGANDA 1995, art. 37.

156. Sylvia Tamale, *Homosexuality is not Un-African*, AL JAZEERA (Apr. 26, 2014), <http://america.aljazeera.com/opinions/2014/4/homosexuality-africamuseveniugandanigeriaethiopia.html>.

157. Press Release, NRM Caucus, Presentation by a Team of Scientists from Moh and Makerere University on Homosexuality and Genetics in Humans (Feb. 14, 2014), <https://www.scribd.com/document/207241120/Scientists-on-Uganda-anti-homosexuality-bill>.

158. See Murray & Roscoe, *supra* note 29, at 35–36, 278 (evidencing centuries of homosexual practice and culture in Uganda).

159. CESCR General Comment 21, *supra* note 54, ¶ 16.

against “[a]iding and abetting homosexuality” and “[p]romotion of [h]omosexuality.”¹⁶⁰ These create insurmountable obstacles to accessibility of cultural life. The idea of adaptability is completely absent from the law as there is no flexibility in its application. Furthermore, the questions of acceptability and appropriateness are moot due to the staggering issues presented in discussion of the first three pillars.

The Anti-Homosexuality Act worked as a complete block on the rights of sexual minorities to participate in the cultural life of their choosing. As such, the question that remains is whether the Act is a justifiable limitation on the right to culture. The Constitution covers limitations on rights in Article 43.¹⁶¹ The only justifications for limitations on the right to culture are the rights of others, or the “public interest.” Article 43 further narrows what can be limited under the public interest to nothing beyond what is “acceptable and demonstrably justified”¹⁶² This provision must also be interpreted through the obligations of the ICESCR, which Uganda has ratified. As interpreted in General Comment 21, “limitations must . . . be proportionate, meaning that the least restrictive measures must be taken when several types of limitations may be imposed.”¹⁶³ Even if the government were to say that its purported aim to protect and promote the traditional family and culture of Uganda was demonstrably justified, the limitations of this Act completely fail the proportionality test. There are many less restrictive options that promote traditional family

160. Anti-Homosexuality Act (2014), §§ 7, 13 (Uganda).

161. CONSTITUTION OF THE REPUBLIC OF UGANDA 1995, art. 43.

“General limitation on fundamental and other human rights and freedoms.

(1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.

(2) Public interest under this article shall not permit –

(a) political persecution;

(b) detention without trial;

(c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.”

162. *Id.*

163. CESCR General Comment 21, *supra* note 54, ¶ 19.

and cultural values while still allowing sexual minorities to participate in their cultural life.¹⁶⁴

It is important to note that the Anti-Homosexuality Act was also an unjustifiable limitation on the right to culture because of the many other human rights provisions on which it infringed, as outlined in the SMUG report.¹⁶⁵ No “one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.”¹⁶⁶ This means that even if there is a traditional culture within Uganda that is hostile towards LGBTI persons or actions—that cannot justify violating the human rights of LGBTI persons.

The actions of the Ugandan government when it passed the Anti-Homosexuality Act in 2014 were both unconstitutional and in contravention of Uganda’s obligations under international law. The government impermissibly prioritized one culture over another and attempted to remove all access of sexual minorities to the culture in which they sought to participate. This was unjustifiable and should not be repeated through the passage of any other future laws.

This test case from Uganda is just one example of homophobic or transphobic legislation on the continent which fails to protect the cultural rights of citizens and residents. For too long, many African leaders have justified the brutal oppression of sexual minorities and their cultural participation by calling it *un-African*. Culture cannot be used by lawmakers as defense for laws which infringe on the rights of people—including LGBTI people. Furthermore, lawmakers should live up to the aspirations laid out in the Charter for African Cultural Renaissance, where they set out to “defend minorities, their cultures, their rights and their fundamental freedoms.”¹⁶⁷ Some nations across the continent have already taken up this call and started passing laws that protect sexual minorities. For example, seven countries in Africa have laws which protect people from employment discrimination based

164. For example, the government could create tax subsidies for marriage or children that would promote traditional family structures without infringing on the rights of sexual minorities to participate in the cultural life of their choosing.

165. SEXUAL MINORITIES UGANDA, *supra* note 141, at 8–10.

166. Universal Declaration on Cultural Diversity, *supra* note 66, art. 4.

167. Charter for African Cultural Renaissance, *supra* note 33, art. 5(1).

on their sexual orientation.¹⁶⁸ The continued decriminalization of same-sex sexual acts and proliferation of protections for sexual minorities should be recognized as a movement which helps African people, and which is an integral part of protecting the continent's modern and vibrant cultural diversity.

VI. LAWMAKERS SHOULD RESPECT AND PROTECT LGBTI PERSONS' RIGHT TO PARTICIPATE IN CULTURAL LIFE

In an interview prior to his death, David Kato talked to a reporter about the importance of visibility of the LGBTI community in Uganda. "If we keep on hiding, they will say we are not here," David said, arguing that this would allow the government and society to continue to infringe on the rights of sexual minorities in Uganda.¹⁶⁹ He went on to speak of the activism of SMUG, and the way that members had staked out their existence in response to this: "they kept on saying we are not here, but of late, we are here."¹⁷⁰

As LGBTI people across the continent develop communities, form relationships, and live their lives—it is essential that governments stop persecuting them and prevent and redress the persecution they face from private actors. Under international law, and by the text of their very own constitutions, governments are bound to protect the cultural diversity represented within their citizenry. Sexual minorities are human beings of equal worth and dignity. They have the same rights to form communities, associate with others, express themselves, and form their own beliefs about the lives that they choose to lead. Under both international and domestic laws these are essential human rights which belong to all people. Governments must stop attempting to erase the existence of sexual minorities and must cease characterizing their lives and relationships as myths constructed by foreign adversaries. Erasure will not lead to elimination. African States can do better and

168. As of October 2017, these six countries are Angola, Botswana, Cape Verde, Mauritius, Mozambique, Seychelles and South Africa. STATE-SPONSORED HOMOPHOBIA, *supra* note 5, at 48.

169. Katherine Fairfax Wright & Malika Zouhali-Worrall, *They Will Say We Are Not Here*, N.Y. TIMES (Jan. 25, 2012), <http://www.nytimes.com/2012/01/26/opinion/they-will-say-we-are-not-here.html>.

170. *Id.*

should follow the principles of international law that they helped develop. Furthermore, these nations ought to protect the beautiful diversity represented by the culture of sexual minorities in Africa.