

“Un-African” African Sexualities: Post-Colonial Nation Building and the Conditioning of
Citizenship in sub-Saharan Africa with Analysis of Uganda and Kenya

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Abstract

This thesis explores the phenomenon of the labeling of same-sex sexual behavior as “un-African”. It begins by exposing the myth that same-sex sexual behaviors were non-existent in pre-colonial sub-Africa. Following this, it moves into the colonial-era regulation of sexuality in sub-Saharan Africa and reveals the racialized basis for the first iterations of the “un-Africanness” of same-sex sexual behavior. This first iteration was based on the idea that same-sex sexual behavior was a result of the descendance of more “advanced” cultures. Black Africans did not exhibit this behavior because they were perceived to be more “primitive” and “closer to nature”. This background informs the rest of the thesis which examines the modern “un-African” framing as a post-colonial nation building project which defines the idealized sub-Saharan African citizen as sexually productive and homophobic. The deviance of those who practice or are perceived to practice “un-African” same-sex sexual behavior from this idealized citizen allows homophobic leaders in sub-Saharan Africa to depict them as allied with Western forces. This justifies the exemption of these individuals from having human rights as their citizenship and sometimes personhood is removed. This is accomplished in less formally as states in sub-Saharan Africa deny the protection of these individuals which leads to a culture of impunity and more formally as states enact laws and courts uphold and laws persecuting those who practice or are perceived to practice same-sex sexual behavior. The degree to which the human rights of these individuals are limited is specifically examined in Uganda and Kenya. This is followed by a critique of current Western advocacy strategies attempting to address these issues which often try to directly copy strategies that have worked in Western counties without accounting for differences in political circumstances. This often results in strategies that are easily portrayed by nationalist, populist, homophobic leaders in sub-Saharan Africa as Western imperialism. The final section demonstrates the global nature of the struggle for sexual rights which is in constant interaction with national politics. The purpose of this thesis is to expose the complexity of the struggle for sexual rights in sub-Saharan Africa to better inform advocacy strategies.

Introduction

Same-sex sexual behavior has been termed “un-African” by many political and religious leaders in the region. In 1999 Zimbabwean President Robert Mugabe referred to the British government as a “gay government” that pushes the acceptance of this foreign “practice” on Africa. Also in 1999, Kenyan President Arup Moi said that this behavior was against “African traditions” and portrayed the behavior “the scourge” that Kenya needed to battle against. Namibian Secretary for Information and Publicity for the South West Africa People’s Organization alleged, “[i]t should be noted that most of the ardent supporters of these perverts are Europeans who imagine themselves to be the bulwark of civilization and enlightenment. They are not only appropriating foreign ideas in our society but also destroying the local culture by hiding behind the façade of the very democracy and human right [sic] we have created”. In New York Times piece in 2004, Nigerian President Olusegun Obasanjo deemed these acts, “unbiblical, unnatural, and definitely unAfrican [sic]”. Also in 2004, Senegal’s President, Macky Sall, suggested acceptance of this behavior was being imposed, “We don’t ask the Europeans to be polygamists [...] we like polygamy in our country, but we can’t impose it in yours. Because the people won’t understand it. They won’t accept it”.¹

This thesis explores the framing of same-sex sexual behavior (SSSB)² as “un-African” within a political strategy of nation building through nationalist, regionalist, and populist rhetoric to better inform advocacy strategies. The first section will cover sexuality in pre-colonial sub-Saharan Africa and the colonial affect on perceptions of sexuality. This analysis is critical as it demonstrates the inaccuracy of the framing of SSSB as “un-African” and allows Western

¹ Quotes taken from: Nicholas Kahn-Fogel, “African Law and the Rights of Sexual Minorities: Western Universalism and African Resistance,” ed. M. Ndulo and C. Emeziem, *In Handbook on African Law*, 2018, 1–28.

² This thesis avoids the terms LGBT or LGBTQIA and attempts to focus more on the behavior than on identity. Courts in sub-Saharan Africa and Political Leaders proport to be limiting same-sex sexual behavior not the rights of a recognized minority group. Furthermore, many sub-Saharan Africans who practice same-sex sexual behavior do not themselves associate with the LGBT identifiers. As this thesis demonstrates, however, there is a thin line between identity and behavior and people are often persecuted without evidence that they participated in same-sex sexual activity. This thesis does not explicitly address issues faced by gender identity minorities although it is sometimes impossible to separate gender identity from the analysis as the persecution of those who practice or are assumed to practice same-sex sexual behavior is often based on their deviance from masculine or feminine ideals.

advocates to avoid repeating the mistakes of the colonial past. This past is omnipresent as its memory is precisely what is called upon by homophobic sub-Saharan African leaders. This thesis then moves on to reveal the demonization of sexual minorities as a political strategy specifically in Uganda and Kenya and asks the question: to what extent is national advocacy available within their political and legal systems? Next it investigates the divergence between sub-Saharan African sexual identities and those in the West as well as the differing legal systems to demonstrate the danger in using identical strategies within these systems while advocating for the right to practice same-sex sexual behavior. The final section explores the globalization of the sexual rights debate through the influence of the U.S. Christian Right as well as the global attack on liberal democracy. The complexities surrounding sexual minority rights in sub-Saharan Africa must be taken as a whole to inform advocacy strategies.

Sexualities in Pre-Colonial sub-Saharan Africa

Pre-colonial sub-Saharan Africa was made up of many diverse groups of people with extremely varied cultures and backgrounds. Studies on pre-colonial African sexuality require compiling recordings of several practices and attempting to draw parallels. These records themselves may be faulty, as we often only have firsthand accounts from missionaries, colonizers, and early anthropologists who openly opposed, and did not understand any sexual behaviors that deviated from what they knew: Victorian era ideas of sexuality.³

Despite the challenges, many scholars have compiled records about these diverse communities and there is a general consensus that same-sex sexual relations existed widely within this region.⁴ Because of the diversity in these communities, however, it may have been embraced or

³ For an overview of the problematic colonial recordings of African sexualities see: Sylvia Tamale, ed., "Introduction," in *African Sexualities: A Reader* (Cape Town: Pambazuka Press, 2011), 10–20.

⁴ See, generally, Stephen O. Murray and Will Roscoe, eds., *Boy-Wives and Female Husbands: Studies of African Homosexualities*, 1. paperback ed (New York, NY: Palgrave, 2001); Sylvia Tamale, ed., *African Sexualities: A Reader* (Cape Town: Pambazuka Press, 2011); Bill Stanford Pincheon, "An Ethnography of Silences: Race, (Homo)Sexualities, and a Discourse of Africa," *African Studies Review* 43, no. 3 (December 2000): 39, <https://doi.org/10.2307/525068>; Rudi C. Bleys, *The Geography of Perversion: Male-to-Male Sexual Behaviour Outside the West and the Ethnographic Imagination, 1750 - 1918* (Washington Square, NY: New York University Press, 1995); Delroy Constantine-Simms and Henry Louis Gates, eds., *The Greatest Taboo: Homosexuality in Black Communities*, 1. ed (Los Angeles, Calif.: Alyson Books, 2001); Neville Wallace Hoad, *African Intimacies: Race, Homosexuality, and Globalization* (Minneapolis London: University of Minnesota Press, 2007).

ignored. The practices themselves may not reflect the current practices of same-sex sexual behavior that are becoming more accepted and protected to varying degrees in many parts of the world today. Although there are outliers, these studies reveal a pre-colonial Africa that had a diverse understanding of sex and gender minorities with “tolerance and openness”⁵, where homophobia was uncommon and had minor repercussions.⁶

In “Christianity, Globalization and Protective Homophobia: Democratic Contestation of sexuality in Sub-Saharan Africa,” author Dr. Rev. Kapya Kaoma, who has written extensively on the sexual behavior of many precolonial African groups, gives examples varying from the Zulu people of Zimbabwe to Sangomas (traditional healers) in South Africa, suggesting that they were communities in which these minorities were associated with spiritual beings and same-sex marriages were allowed.⁷ In these examples, Kaoma, demonstrates that these minorities may have been embraced, or in many cases societies “turned a blind eye to them.”⁸ In “LGBT Rights in Africa and the Discursive Role of International Human Rights Law,” Abadir Ibrahim cites precolonial groups, such as the Azande in Sudan (who legally recognized same-sex marriage), the Meru of Kenya and the Bantu of Angola (who both tolerated transgender men and allowed them to marry other men), the Langi of Uganda (who allowed “effeminate males” to marry other men), and the Amhara in Ethiopia (who tolerated sexual SSSB but still referred to those who practiced it as “God’s mistakes”), as examples of groups that tolerated SSSB. As Ibrahim explained, there was a “diverse understanding of sex, gender and family” within the region.⁹

Broad statements about pre-colonial Sub-Saharan African sexual practices are dangerous as they run the risk of describing pre-colonial Sub-Saharan Africa as a timeless monolith, when in actuality, colonization created many of the states that we recognize today. This was done by splitting and combining groups of people who may not have shared cultural practices and

⁵ Dr. Sasile Ndjio as quoted in Johana Bond, “Gender and Non-Normative Sex in Sub-Saharan Africa” 23, no. 1 (2016): 65–145.

⁶ Abadir M Ibrahim, “LGBT Rights in Africa and the Discursive Role of International Human Rights Law,” *African Human Rights Law Journal* 15, no. 2 (2015): 268, <https://doi.org/10.17159/1996-2096/2015/v15n2a2>.

⁷ Kapya J. Kaoma, *Christianity, Globalization, and Protective Homophobia: Democratic Contestation of Sexuality in Sub-Saharan Africa* (Cham: Palgrave Macmillan, 2017), 22–24.

⁸ Kaoma, 25.

⁹ Ibrahim, “LGBT Rights in Africa and the Discursive Role of International Human Rights Law,” 268–69.

would not have had strong connections to their “Africanness” as such. While it can be useful to point out commonalities among pre-colonial African communities, the concept of “African citizenship”, to some extent, may be defined by the common past of being colonial subjects.¹⁰ Because sexualities and their expression, both historically and currently, are influenced by multiple factors and take complex forms, books and essays on the topic may have several contributions that focus on fleshing out the actual practices and ideas of specific groups of people and the social and political elements that influence behavior, thoroughly explaining their complexities.¹¹ Shorter explanations, even when they contain specific examples like the ones given above, run the risk of being misinterpreted, making them inaccurate, but also offensive at times. For example, the ideas that marriage provokes in the readers of the current thesis may not be the same as those in the cultures that allowed same-sex marriage before colonization in sub-Saharan Africa.

To illustrate the danger in this, Kahn-Fogle (in his work titled “African Law and the Rights of Sexual Minorities”) utilizes the example of classifying same-sex marriages between the women in Nnobi, Nigeria as offensive as these close relationships are not sexual in nature at all.¹² Outsiders have a long history of interpreting African sexuality and relationships through their own lenses to long-lasting, dangerous ends.¹³ Kaoma analyzes and criticizes many scholars’ characterizations of promiscuity as a lack of regulation on sex in pre-colonial marriages in sub-Saharan Africa and agrees with scholars that recognize marriage and sex as sacred in many pre-colonial sub-Saharan African communities. They often take place around the time of women’s puberty, when she is capable of bearing a child. The marriage was often thought to bring together the community and fulfills the duty of the couple to reproduce. In many communities

¹⁰ Kaoma, *Christianity, Globalization, and Protective Homophobia*, 6–7.

¹¹ For an explanation of the dangers of a more simplified approach see: Tamale, “Introduction.” Examples that specifically include homosexuality: Murray and Roscoe, *Boy-Wives and Female Husbands*; Constantine-Simms and Gates, *The Greatest Taboo*; Hoad, *African Intimacies*; Sylvia Tamale, ed., *African Sexualities: A Reader* (Cape Town: Pambazuka Press, 2011).

¹² Kahn-Fogel, “African Law and the Rights of Sexual Minorities: Western Universalism and African Resistance,” 19–20.

¹³ For an in depth analysis of the historic and current divergence between the concepts of marriage and family in Africa and changes from pre-colonial to post-colonial times see: Monicah Kareithi, “A Historical-Legal Analysis of Women to Woman Marriage in Kenya” (University of Pretoria, 2018), chap. 2: Institution of Marriage in Africa and the Foundations of Women-to-Woman Marriage.

reproduction was believed to connect deceased ancestors to the living and reproductive duties were essential for preservation. This made sex and marriage something regarded as a public benefit that was more open to critique than these entities are in the contemporary West. Kaoma then goes on to give examples of communities that regulated sex and marriage to a high degree as a result of these beliefs.¹⁴

In an effort to avoid the mistakes of the past, for the purposes of the current thesis we need only to accept that same-sex sexual relationships existed in many cultures in sub-Saharan Africa, that these practices were diverse, that marriage within many of these cultures was inconsistent with current Western notions of marriage, and that they were accepted to varying degrees which is well-established in the referenced scholarship. To reject the framing of same-sex sexual practices as “un-African,” we need not misrepresent same-sex sexual practices as accepted in every community, that they consistently fit within the definitions consensual of same-sex sexual practices that are acceptable in many parts of the world today, nor that the all the same-sex sexual practices that took place in pre-colonial sub-Saharan Africa should be accepted today.

History never repeats itself in the exact same way and to some extent any connections between historic accounts and any current phenomena that we juxtapose are flawed in this way. It is still helpful however to call on the past especially when it so clearly conflicts with the current framing of same-sex sexual activity as the antithesis to sub-Saharan African tradition and culture. In his essay, “Re-Membering Mwanga: Same-Sex Intimacy, Memory and Belonging in Post-colonial Uganda” author Rahul Rao quotes David Halpern:

Just because earlier historical cultures may differ from modern ones in their organization of sex and gender, and just because Greek pederasty differs in a number of crucial respects from contemporary metropolitan gay male identity, it doesn't follow that metropolitan gay men today cannot or should not identify with ancient Greeks. We don't only identify with those who are the same as us, after all; if other people weren't different from us, what would be the point of identifying with them? Identification gets at something, something important: it picks out resemblances, connections, echo effects. Identification is a form of cognition.¹⁵

¹⁴ Kaoma, *Christianity, Globalization, and Protective Homophobia*, 33–37.

¹⁵ Rahul Rao, “Re-Membering Mwanga: Same-Sex Intimacy, Memory and Belonging in Postcolonial Uganda,” *Journal of Eastern African Studies* 9, no. 1 (January 2, 2015): 13.

Promulgating a more accurate history of the diverse sexual practices in pre-colonial Africa that were generally more accepted can be one key within a variety of strategies to advocate for these rights as it directly conflicts with the idea that same-sex sexual activities are “un-African.” Although the acceptance of these behaviors varied, there is enough evidence to break down claims of a monolithic, heterosexual and homophobic pre-colonial past in the region.

Colonial Perceptions and Control of Sub-Saharan African Sexualities Generally and their influence on Same-Sex Sexual Behavior

To understand colonial perceptions and justifications for the limitation of same-sex sexual practices in colonial sub-Saharan Africa, it is useful to understand the broader context of colonial control of sub-Saharan sexualities. This control was justified by ideas of the primitive African race which needed to be controlled in order to elevate to a more “civilized” status as measured against the colonizers’ Victorian ideals of sex. This section demonstrates how the regulation of same-sex activities within the colonies in sub-Saharan Africa fits into broader ideas about white superiority, Christianity, colonial capitalism, colonial nation building and colonial citizenship.

In his work, “Trans-Saharan Trade: The Routes of ‘African Sexuality,’” author Rudolf Gaudio claims that some of the first mis-constructed outside ideas about sexuality in sub-Saharan Africa were pre-colonial, but paralleled colonial tropes. Gaudio references Ibn Battuta’s recordings as he traveled throughout sub-Saharan Africa that he suggests contain racial and sexual tropes that were very damaging to “black” Africans. Ibn Battuta was himself from Morocco and did not consider himself “black” as he separated race into blacks, Berbers, and whites, the latter being Arabic-speakers from North Africa or the Middle East.¹⁶

Gaudio quotes Battuta’s records of “bad practices” as he traveled through Mali, “women servants, slave girls and young daughters appear naked before people, exposing their genitals. Women who come before the Sultan are naked and unveiled, and so are his daughters”.¹⁷

¹⁶ Rudolf P. Gaudio, “TRANS-SAHARAN TRADE: THE ROUTES OF ‘AFRICAN SEXUALITY,’” *The Journal of African History* 55, no. 3 (November 2014): 325.

¹⁷ The quote “bad practices” and the longer sentence were of Battuta in Gaudio, 324.

Gaudio argues that it is plausible that Battuta's depictions of "black" African women contributed to ideas about African sexuality that we are still battling today.¹⁸

According to Gaudio, historians and anthropologists point to the fact that some quotes from Battuta approve of Malian prayer practices, support the ideas that there were relationships between the different races identified by Battuta and that slaves were not only "black" in order to suggest that there was much less emphasis on race within the pre-colonial slave trade. Doing so is a flawed analysis because Gaudio cites the fact that Arab- "black" relationships were between Arab men and "black" women and were often more a concubinage where the children, should they exist, would be accepted as Arab. "Black" male slaves were more often, when compared to other slaves, castrated and kept away from elite Arab women as they were seen as dangerous.¹⁹

These recordings and practices suggest a possible origin of the tropes of the "alluring black female and the threatening black male"²⁰ which are carried on through stories that are still popular in many Arabic societies. For example, more than one popular story depicts a married Arab man is tempted by a "black" African woman because of her alluring sexuality. In one story, a "black" African man is so uncontrollably infatuated with his lover that he eats her.²¹ These tropes helped justify the enslavement of "black" people and, Gaudio argues, have led to some of the differential treatment of black people by Northern African leaders today.²²

These same tropes were used by colonizing forces to justify their takeover of the African continent within their "civilizing" mission, as well as black slavery in the Americas. As mentioned, the sexual practices of Africans as recorded by missionaries, colonizers, and early anthropologists are of questionable accuracy because of their tendency to favor ethnocentrism.²³ These outsider's accounts were heavily influenced by Victorian ideas on sexuality, which, according to Foucault, relies on the "triple edict of taboo, non-existence and

¹⁸ Gaudio, 352, 327–29.

¹⁹ Gaudio, 323–25.

²⁰ Gaudio, 325.

²¹ Gaudio, 325–28.

²² Gaudio, 352, 327–29.

²³ Tamale, "Introduction," 19–23.

silence”.²⁴ Women Victorian societies showed their “civilized” status by muting their sexuality, which was contrasted with African women who, to them, appeared to be unrestrained.²⁵

In “Colonial Tropes and HIV/Aids in Africa: Sex, Disease and Race”, authors Adrian Flint and Vernon Hewitt claim that “the focus on sex did more to define racist stereotypes than almost any aspect of colonial discourse”.²⁶ Colonializers set their own Victorian ideas as superior by characterizing the sub-Saharan Africa as “savage” and suggesting that Europeans had progressed past this stage of development into “civilization”. The tropes that African men were “bestial” and African women were “insatiable” in their sexual appetites were central to these claims.²⁷

Flint and Hewitt trace colonizer’s quotes through the beginning of colonization to demonstrate the development of the racialized characterization of African sexualities. Africans were portrayed as racially prone to “uncontrolled” sexual behavior as these habits developed without “true religious guidance.” Colonizers became fixated on African sexuality which they thought needed to be controlled. Social Darwinism provided a theory suggesting that European advancement was related to their own “racial improvements.” An influential eugenicist suggested that this evolution should be controlled. The “primitiveness” of Africans and the indigenous populations in the Americas was related to climate, their pastoral cultures, and their skin color.²⁸

The tropes of the African male as dangerous were especially important in settler colonies where they feared race mixing and rape by African men. The need for control of the “uninhibited” and “immoral” African sexual practices was furthered by the spread of STDs on the continent. This justified the colonizers obsession with African sexualities as they were now also protecting Africans from themselves by controlling their sexuality. A colonizer panic arose that “native

²⁴ Michel Foucault, *The History of Sexuality*, Vintage Books ed (New York: Vintage Books, 1990), 4–5.

²⁵ Tamale, *African Sexualities*, 2011, 15.

²⁶ Adrian Flint and Vernon Hewitt, “Colonial Tropes and HIV/AIDS in Africa: Sex, Disease and Race,” *Commonwealth & Comparative Politics* 53, no. 3 (July 3, 2015): 301.

²⁷ Flint and Hewitt, 297–98.

²⁸ Flint and Hewitt, 298.

promiscuity” was going to lead to the extinction of the African population.²⁹ Flint and Hewitt flesh out many other tropes characterizing Africans as “ungovernable [...] irrational”³⁰, “lawless”³¹ “corrupt, violent, amoral, sexually depraved”³² and “noble savage[s]”³³, which lead to the depiction of sub-Saharan Africans being “agents of their own disease”³⁴ or having a “disease of choice”.³⁵

Sylvia Tamale in, “The Right to Culture and the Culture of Rights: A Critical Perspective on Women’s Sexual rights in Africa”, also places controlling sexuality and the sexual othering of African subjects as central to the justification of colonization. According to Tamale, “African sexuality was depicted as primitive, exotic, and bordering on Nymphomania. Perceived as immoral, bestial and lascivious [...] their sexuality was read directly into their physical attributes; and the attributes were believed to reflect the culture and morality of Africans.”³⁶ To demonstrate the extent of this sexual othering Tamale utilizes the example of the parading of an African woman, Sarah Baartman, around several European cities in the early 1900s in a fashion that Tamale likens to a zoo animal. Baartman was naked and the focus was on her buttocks and genitalia which could be assaulted physically by the audience for an extra charge.³⁷ This othering allowed colonizers to portray themselves as “civilizing” the “savage natives” on this “dark Continent”³⁸

The “civilizing” of these people was a duty in the eyes of colonizers as they viewed their actions as “the Whiteman’s Burden” (this was the British version, but variations were found in French and Portuguese rhetoric). In “LGBT Rights Movement in African and the Myth of the Whiteman’s Superiority”, Floribert Endong explains that any practice that countered that of

²⁹ Flint and Hewitt, 299–302.

³⁰ Flint and Hewitt, 296.

³¹ Flint and Hewitt, 297.

³² Flint and Hewitt, 301.

³³ Flint and Hewitt, 299.

³⁴ Flint and Hewitt, 294.

³⁵ Flint and Hewitt, 295.

³⁶ Sylvia Tamale, “The Right to Culture and the Culture of Rights: A Critical Perspective on Women’s Sexual Rights in Africa,” *Feminist Legal Studies* 16, no. 1 (April 2008): 53.

³⁷ Tamale, 52.

³⁸ Tamale, 53.

Europe and America could not remain as it was automatically inferior as all culture was measured as compared to the “Whiteman’s civilization” and this was uncontested. These “backward” people needed to be educated by colonizers.³⁹

Other authors reiterate this theme of colonizing forces defining and solidifying their own morals through comparison and conversion of their colonies. These colonies were a reflection of their colonizers and the behavior of Africans within sub-Saharan Africa was highly regulated to maintain their own moral code. The amount of control and the success of these efforts varied between colonies and colonizing forces, with Britain attempting to highly regulate sexual behaviors, while France and Belgium were more permissive of enduring indigenous sexualities.⁴⁰

In “Governing Morality: placing Gender and Sexuality in Migration,” Ingrid Palmary explains that groups in Britain found it imperative that their colonies followed the health and moral code of Britain. This was essential to creating the nation, which at that point was an Empire.⁴¹ Palmary explains that regulation of the family may be seen as outside of the purview of nation building, but it is actually essential to it. Agreeing on the definition of the “family, home, reproduction and the masculine protection of the ‘womenandchildren’” allows people to define themselves as part of the nation.⁴²

The acceptance of the idealized home as defined by the nation builders allows for the constraint of “practices around sex, childbirth and identity that make the national identity appear timeless and natural”.⁴³ Every home can therefore be compared to the ideal home to determine who is inside and outside of the nation defined not by its physical borders, but by

³⁹ Floribert Patrick Endong, “LGBT Rights Movements in Africa and the Myth of the Whiteman’s Superiority,” *Journal of Globalization Studies* 7, no. 1 (May 2016): 141–43.

⁴⁰ Kahn-Fogel, “African Law and the Rights of Sexual Minorities: Western Universalism and African Resistance,” 2–3.

⁴¹ Ingrid Palmary, “Governing Morality: Placing Gender and Sexuality in Migration,” in *Gender, Sexuality and Migration in South Africa*, by Ingrid Palmary (Cham: Springer International Publishing, 2016), 9–10, https://doi.org/10.1007/978-3-319-40733-3_1.

⁴² Palmary, 3; S. M. Rodriguez, “Homophobic Nationalism: The Development of Sodomy Legislation in Uganda,” *Comparative Sociology* 16, no. 3 (June 2, 2017): 396–97.

⁴³ Palmary, “Governing Morality,” 5.

how well you fit into the constraints of the idealized family. This allows us to further define and critique what it means to be a man, woman, or child and ultimately citizen.⁴⁴ Palmary argues that these constraints were part of what made South Africa a settler colony as British citizens feared the sexual practices that were taking place (although likely to an exaggerated extent) when families were split between the colony and Britain (mainly prostitution, trafficking of white women, and white women having sex with black men). Part of the colonizing mission in South Africa was a mission to depart from promiscuity and to “return to family values.”⁴⁵

Capitalism, religion, and white superiority are all woven together within the “civilizing” mission as each aid in the legitimacy and execution of the other. As Rodriguez demonstrates in “Homophobic Nationalism: the Development of Sodomy Legislation in Uganda,” “[t]he Victorian project focused on ruling bodies and minds: actions and ideology.”⁴⁶ The colonizers’ Christian beliefs called for their control of African sexuality and gender through the policing of marriage and family while the colonizer formed a capitalist colony in its image that elevated only men who contributed to the public economy. The state is then reconstructed, as the legitimacy of citizenship is determined by one’s ability to obtain financial resources, which is available exclusively to men and mainly to white men, with the exception of the few black Africans who were able to ascend the economic ladder.⁴⁷

The extent of the duplication of British colonial values and control, is exemplified in “Gender, Gays and Gains: the Sexualized Politics of Donor Aid in Malawi”, as the authors of this article claim that the “colonial-era gender agenda” extended to “agriculture”, “community development”, “education”, “home economics”, “needlecraft”, “home care skills”, “cooking and nutrition”.⁴⁸ Haley McEwen in “Transatlantic Knowledge Politics of Sexuality” further elaborates on the colonial-era education explaining that Christian missionaries ran schools throughout sub-Saharan Africa. The curricula in these schools established and entrenched the

⁴⁴ Palmary, 6–8.

⁴⁵ Palmary, 10–11.

⁴⁶ Rodriguez, “Homophobic Nationalism,” 401.

⁴⁷ Rodriguez, 401.

⁴⁸ Emmie Chanika, John Lwanda, and Adamson Muula, “Gender, Gays and Gain: The Sexualised Politics of Donor Aid in Malawi,” *GIGA German Institute of Global and Area Studies* 48, no. 1 (2013): 94.

idea of the gender binary and hierarchy. Within these schools, women were taught caregiving and housekeeping, while men were taught civics and law, and were encouraged to be assertive and aggressive sexually.⁴⁹

Same-sex sexual activity not only did not fit into the constrained sexual citizens of the colonized nations so they were explained away in the first iteration of the “un-Africanness” of this activity. This was done with the help of pseudoscientific explanations similar to those explaining the tropes of African sexualities more generally. Because African sexuality was perceived by colonizers as “primitive,” they often did not believe that Africans were capable of having same-sex sexual desires. This meant that even when same-sex sexual activity was observed by anthropologists, missionaries, and other colonial authorities, it was disregarded, misinterpreted, or explained away so that it would fit within these narratives.⁵⁰

Rao references two colonial-era pseudoscientists of the time to make the connection between the racial ideas of colonizers and same-sex sexual activities. The first is Richard Burton who came up with the idea of the “Sotadic Zone” which promulgated same-sex sexual activity as common in certain geographic zones, but not present in the “negro and negroid” races. The second is Edward Gibbons who describes same-sex sexual activity as decadent and sophisticated. Because African sexualities were “less advanced” and “simple” they would have been incapable of exhibiting these desires. These accounts encourage colonial-era recorders of African activities to attribute SSSB to Arabs who imported this sexual prevision from their societies, which were perceived as more advanced than African societies, but less advanced than European societies.⁵¹

Kahn-Fogel surveys the work of colonial-era anthropologists who record same-sex sexual activity, but explain that it is a temporary phenomenon often based on circumstance. Some describe the behavior as a way to earn money before returning to heterosexual sexual activities unless the practice was carried on at length, at which point they could only find pleasure in

⁴⁹ Haley McEwen, “Transatlantic Knowledge Politics of Sexuality,” *Penn State University Press* 4, no. 2 (2016): 242–43.

⁵⁰ Bond, “Gender and Non-Normative Sex in Sub-Saharan Africa,” 95–96; Tamale, “Introduction.”

⁵¹ Rao, “Re-Membering Mwanga,” 9.

same-sex sexual activities. Others noted that these activities ended when heterosexual marriage was accomplished which was inevitable for any man who was worthwhile. Still others portrayed the practices as means to avoid undesired heterosexual sex and marriage with those of other tribes or as a way to fulfill sexual desires when an opposite-sex partner was unavailable due to cultural practices or during war.⁵² These accounts counter the idea that there was not same-sex sexual desire among black Africans and demonstrate the contradictions within the colonizers' portrayal of African sexualities. Even as same-sex sexual desires were considered deplorable by the colonizers, the denial of its existence in sub-Saharan Africa set Europe apart from the African other in that these desires existed only in modern states where it needed to be repressed.

Both Rao and Kahn-Fogel suggest that the prominent idea among Europeans regarding the “un-African” portrayal of SSSB was advanced by the economics of slave trade. The possibility of purchasing an effeminate slave (who would have been believed to have same-sex sexual desires and would not produce children) was less desirable than purchasing a product, such as a hypermasculine slave, because of the physical capacity of a masculine man, both in terms of physical labor and sexual productivity. Kahn-Fogel also submits that this dovetails into the idealized “noble savage” that was prominent at the time.⁵³ This “noble savage” was pure and innocent, but susceptible to outside influence. As Gaudio explains, this vulnerability to “moral contamination” further justified the colonizing mission as colonizers were protecting Africans.⁵⁴ Johanna Bond in “Gender and Non-Normative Sex in Sub-Saharan Africa”, adds that colonial authorities could not imagine same-sex sexual desires being exhibited in these cultures where African women were always sexually available to African men.⁵⁵

Even if foreign and unnatural to sub-Saharan Africans, Bond explains how these ideas of the immoral sexualities and the reproduction of the idealized British citizen, lead to a “moral panic”

⁵² Kahn-Fogel, “African Law and the Rights of Sexual Minorities: Western Universalism and African Resistance,” 17–19.

⁵³ Rao, “Re-Membering Mwanga,” 9; Kahn-Fogel, “African Law and the Rights of Sexual Minorities: Western Universalism and African Resistance,” 17.

⁵⁴ Gaudio, “TRANS-SAHARAN TRADE,” 320–320.

⁵⁵ Bond, “Gender and Non-Normative Sex in Sub-Saharan Africa,” 96.

that brought about the creation of laws criminalizing same-sex sexual activities within the colonies. These fit into a broader category of “civilizing” laws that were left intentionally vague so that colonial forces were able to arrest anyone who fell outside of what they deemed a fit citizen, relying on stereotypes of what a person would look and act like who broke these laws rather than focusing on proving that the crime actually occurred.⁵⁶

The first instance of such laws in the colonies⁵⁷ was the Indian Penal Code section 377, which read:

377. Unnatural offences - Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation -Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.⁵⁸

The offense clearly prohibits penetration but doesn’t limit what can be interpreted as “carnal intercourse against the order of nature”. As Rodriguez explains, these laws were meant to move particular behaviors from the realm of inappropriate to illegal without specifying what exactly those behaviors were.⁵⁹ They were not specifically targeting male to male penetrative sex nor the sexual acts of women. No distinction is made between consensual or nonconsensual intercourse, nor was it limited to sexual activities between humans. It is a broad law that fits into the general control of the colonies’ sexual practices.

These laws made their way to many sub-Saharan African colonies including Uganda and Kenya. Both colonies later adopted a variation of these prohibitions from Queensland, at the time an Australian colony, which specifically defined the passive partner as also being culpable in said

⁵⁶ Bond, 119–22; Rodriguez, “Homophobic Nationalism,” sec. “Early Sodomy Legislation and the Making of Degenerate Sexualities (1533-1860), 398-401.

⁵⁷ Laws regulating these “immoral” Same-sex sexual behaviors were first found in Britain in 1533 which were based on King Henry the VIII’s interpretation of Leviticus in the Hebrew bible. (Kaoma, *Christianity, Globalization, and Protective Homophobia*, 21.)

⁵⁸ “Central Government Act,” Pub. L. No. 45, 377 India Penal Code (1860).

⁵⁹ Rodriguez, “Homophobic Nationalism,” 298–402.

criminal activity and included “attempted” unnatural offences.⁶⁰ The applicable sections of their Penal codes are below:

Uganda Penal Code Act of 1950:

Section 145. Unnatural offences.

Any person who—

- (a) has carnal knowledge of any person against the order of nature;
- (b) has carnal knowledge of an animal; or
- (c) permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence and is liable to imprisonment for life.

Section 146. Attempt to commit unnatural offences.

Any person who attempts to commit any of the offences specified in Section 145 commits a felony and is liable to imprisonment for seven years.

Section 148. Indecent practices.

Any person who, whether in public or in private, commits any act of gross indecency with another person who procures another person to commit any act of gross indecency with him or her or attempts to procure the commission of any such act by any person with himself or herself or with another person, whether in public or in private, commits an offence and is liable to imprisonment for seven years.⁶¹

Kenyan Penal Code of 2012:

162. Unnatural offences

Any person who—

- (a) has carnal knowledge of any person against the order of nature; or
- (b) has carnal knowledge of an animal; or
- (c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years: Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if—
 - (i) the offence was committed without the consent of the person who was carnally known; or
 - (ii) the offence was committed with that person’s consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act.

163. Attempt to commit unnatural offences Any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for seven years. [Act No. 5 of 2003, s. 31.]

165. Indecent practices between males Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any

⁶⁰ Bond, “Gender and Non-Normative Sex in Sub-Saharan Africa,” 119–22.

⁶¹ “The Penal Code Act of 1950,” 166 Penal Code § Chapter 120 (1950).

such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.⁶²

This thesis will later discuss amendments to these codes, other acts that were passed or proposed that attempt to regulate perceived or real same-sex sexual behavior (PRSSSB), and how the respective courts have enhanced or limited the language in these codes. At this point, the reader should note the similarities between the colonial era laws that were intended to generally control the “primitive” sexual behavior of the “uncivilized” dark continent and the laws still in place. Although these laws have been amended, enhanced, or altogether abandoned by sub-Saharan African States, the origins of these laws and the language within, where they persist, are clearly colonial even if they have been internalized to varying extents.

In the preface to “Boy Wives and Female Husbands”, a compilation of essays exploring African PRSSSB in over 50 communities in each region of Africa, editors Stephen Murray and Will Roscoe claim:

What began with denial has ended in a near taboo on the subject of African homosexualities— a taboo nonetheless based on European, not African, morality. The colonialists did not introduce homosexuality to Africa but rather intolerance of it— and systems of surveillance and regulation for suppressing it. [...] [T]hese systems were not successful as long as the reaction of the colonized was simply to hide or deny such practices. Only when native people began to forget that same-sex patterns were ever a part of their culture did homosexuality become truly stigmatized.

The history outlined above is important to understand as Western governments and Western non-governmental organizations attempt to bring about and enhance the rights of sexual minorities in sub-Saharan Africa. Rodriguez suggest that the current “homophobic nationalism” is a continuation not only of the colonizing laws, but also of the colonial nation building mission as the leaders of young, postcolonial nations utilize the “nationalist policing” model bestowed on them by their colonizers.⁶³ According to Bond, this colonialism is “omnipresent” and is what provides salience to African leaders’ claims that sexual rights advocacy from the West is a neocolonial “civilizing” mission.⁶⁴ McEwen suggest that Western advocates frequently ignore

⁶² “Laws of Kenya,” Penal Code § Chapter 63 (2012).

⁶³ Rodriguez, “Homophobic Nationalism,” 415–16.

⁶⁴ Bond, “Gender and Non-Normative Sex in Sub-Saharan Africa,” 91–92.

this past to the demise of their own mission as it allows nationalist, homophobic sub-Saharan African leaders to highlight this history and control the narrative.⁶⁵

Exposing the “un-African” claim as racially based on colonial ideas may provide one key strategy, among others, in advocating for the sexual rights of sub-Saharan Africans. The claims made by nationalist leaders within this region often rely on the idea that these are imports from Arab or European influencers. The fact that these claims find their origins so firmly in the idea that African sexuality is “primitive” and “closer to nature” may aid in their dismissal. Furthermore, the connection between the colonizing laws that were aimed at controlling this “primitive” sexuality and the current laws may demonstrate the extent to which this control is illegitimate.

Understanding this past can also help us recognize remnants of old colonial-era tropes that are still present today. As the “un-African” claim regarding SSSB demonstrates, these tropes can be surprisingly resilient. Flint and Hewitt also explain this in the way that African HIV/AIDS issues are discussed by Westerners today, as it still parallels colonial-era language regarding African sexuality. This history and the extent of Western control over colonial sub-Saharan African sexual behavior provides us with a better understanding of how the portrayal of current advocacy for same-sex sexual practices as neo-colonial finds so much saliency within sub-Saharan Africa today.

Advocates attempting to find parallels to Western same-sex sexual practices may fall into the old trap of oversimplifying and mischaracterizing the sexual practices of African communities. This history should serve as a warning against that practice. SSSB in sub-Saharan Africa need not be the same as that in the West to be protected. Acknowledging the diversity in past and present same-sex sexual activity in sub-Saharan Africa may make advocacy more complicated, but the alternative repeats the idealizations of our colonial and African slave owning past.

⁶⁵ McEwen, “Transatlantic Knowledge Politics of Sexuality,” 240–42.

Human Rights, Populist Nation Building and Citizenship

Many states in post-colonial sub-Saharan Africa still have a Penal Code that criminalizes same-sex sexual activity because sections creating this criminalization have not been changed since colonial laws were in place. Some states have dropped such sections in post-independent revisions of their laws. Still other states have introduced laws where no colonial era prohibitions existed or enhanced or broadened existing prohibitions and their penalties.⁶⁶ Currently, 31 sub-Saharan African states criminalize what the International Lesbian, Gay, Bisexual, Trans and Intersex Association term “homosexual acts”.⁶⁷

The wording within these penal codes often carries on the colonial legacy of being unclear or broad. They sometimes criminalize “homosexual acts”, “carnal knowledge of any person against the order of nature” or “buggery”, leaving it unclear if same-sex sexual acts between two women are prohibited. Other codes criminalize “acts against nature”, “improper or unnatural act[s] with a person of the same sex”, “gross indecency”, “intercourse that would be regarded by a reasonable person to be an indecent act” or extramarital sex where same-sex marriage is not allowed. In some states these terms have been defined to limit prohibited acts in courts and through amendments while others have been expanded to explicitly include acts where certain prohibitions were unclear (for example explicitly including same-sex sexual acts between women, a passive partner or even the “promotion” of same-sex sexual acts though sexual rights activism). These laws often include prohibitions of “attempts” to commit same-sex sexual acts. The punishment for these crimes varies greatly, the most severe including life imprisonment or the death penalty (usually for repeated offense).⁶⁸

According to Bond, while governments in sub-Saharan Africa purport to be limiting behavior, the nature of these laws has been to limit peoples’ participation in society as a continuation of their original colonial intent to imprison any undesired persons “whose mere presence colonial

⁶⁶ Lucas Mendos, “State-Sponsored Homophobia 2019” (Geneva: International Lesbian, Gay, Bisexual, Trans and Intersex Association, March 2019), 33–62.

⁶⁷ Mendos, 22.

⁶⁸ Mendos, 33–62.

authorities found undesirable”.⁶⁹ Like in those colonial societies, the laws today do not need to be based on evidence that a law was actually broken. Instead, people within sub-Saharan Africa are arrested based on whether their broader behavior fits well into their societies definition of masculinity and that is used to surmise their PRSSSB. People may be arrested in large swaths for “attempting homosexuality” and held without any evidence that the illegal activity took place. Citizens are arrested based solely on crimes that they were “likely to have committed” based entirely on their behavior and/or appearance which conflicts with the people who arrest them or those who authorize their arrests’ ideas of what someone who commits those crimes are like.⁷⁰

The 2017 UN Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity reverberates Bond’s concerns about the expansive results of criminalization. While it may be the behavior that is criminalized rather than the identity of the person, convictions have been made “solely for their presumed sexual orientation”.⁷¹ Furthermore criminalization “exposes individuals to the risk of arrest, blackmail and extortion, and feeds stigma, discrimination and violence”.⁷²

According to the report of the Joint Thematic Dialogue on Sexual Orientation and Gender Identity between the African Commission on Human and Peoples’ Rights, Inter-American Commission on Human Rights and the United Nations the rights of those who practice same-sex sexual acts or those who are perceived to face many other human rights violations including:

[K]illings, torture, violence including sexual violence, arbitrary detention, criminalization, discriminatory laws and practices, arbitrary restrictions on freedoms of assembly, association and expression and multiple forms of discrimination based on other factors such as sex, race and age. Participants also discussed the serious health impact of human rights violations against LGBT and intersex persons, including the impact of legal and structural barriers on their vulnerability and access to HIV and other health services.⁷³

⁶⁹ Bond, “Gender and Non-Normative Sex in Sub-Saharan Africa,” 121.

⁷⁰ Bond, 119–28.

⁷¹ Vitit Muntarbhorn, “Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity” (Geneva: UN Human Rights Council, June 23, 2017), sec. 53.

⁷² Muntarbhorn, sec. 15.

⁷³ “Ending Violence and Other Human Rights Violations Based on Sexual Orientation and Gender Identity: A Joint Dialogue of the African Commission on Human and Peoples’ Rights, Inter-American Commission on Human Rights and United Nations” (Pretoria, South Africa: Pretoria University Law Press, 2016), 8.

The aforementioned 2017 report of the Independent Expert asserts governments are not fulfilling their duties to protect citizens from these violations:

In many countries, the response to these violations is inadequate, they are underreported and often not properly investigated and prosecuted, leading to widespread impunity, and lack of justice, remedies and support for victims. Human rights defenders combating these violations are frequently persecuted and face discriminatory restrictions on their activities. [which sometimes results in] physical and psychological violence against LGBTI persons [...] including murder, assault, kidnapping, rape, sexual violence, as well as torture and ill-treatment in institutional and other settings.⁷⁴

This impunity is exacerbated by religious and political leaders throughout the region who degrade those who practice PRSSSB as “worse than pigs and dogs”,⁷⁵ not recognizing them as having rights. It is worse when they are portrayed as things that spread disease and therefore need to be controlled, such as “vermin” or “mosquitoes”.⁷⁶ Worse still when they are the disease that needs to be irradiated like “leprosy, gonorrhoea, bacteria and tuberculosis”⁷⁷ or a “festering fingers” that needs to be “cut off”.⁷⁸

While it is important not to allow this rhetoric to depict sub-Saharan Africa as a homophobic monolith,⁷⁹ it informs public opinion as much as it reflects it. According to Ibrahim:

⁷⁴ Muntarhorn, “Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity,” sec. 14.

⁷⁵ Aislinn Laing, “Mugabe Calls David Cameron ‘satanic’ for Backing Gay Rights,” November 24, 2011, sec. News, <https://www.telegraph.co.uk/news/politics/david-cameron/8912132/Mugabe-calls-David-Cameron-satanic-for-backing-gay-rights.html>; “Mugabe - Homosexuals Are Worse Than Pigs And Dogs,” *Zambian Watchdog* (blog), November 27, 2011, <https://www.zambiawatchdog.com/mugabe-homosexuals-are-worse-than-pigs-and-dogs/>.

⁷⁶ Jon Stone, “The 7 Worst Things Gambia’s Awful President Has Ever Said About Gay People,” *The Independent*, January 14, 2015, sec. World, Africa, <http://www.independent.co.uk/news/world/africa/the-7-worst-things-gambias-president-yahya-jammeh-has-ever-said-about-gay-people-9977170.html>; David Lewis, “Gambia’s Jammeh Calls Gays ‘Vermin’, Says to Fight like Mosquitoes,” *Reuters*, February 18, 2014, <https://www.reuters.com/article/us-gambia-homosexuality-idUSBREA1H1S820140218>.

⁷⁷ Josh Scheinert, “How America Should Respond When the President of Gambia Calls Gay People Ungodly Vermin,” *Slate Magazine*, February 24, 2014, <https://slate.com/human-interest/2014/02/gambian-president-calls-gays-ungodly-vermin-how-america-should-respond.html>; Stone, “The 7 Worst Things Gambia’s Awful President Has Ever Said About Gay People.”

⁷⁸ *More than a Name: State-Sponsored Homophobia and Its Consequences in Southern Africa* (San Francisco, Calif.: Human Rights Watch and The International Gay and Lesbian Human Rights Commission, 2003), chap. A. Zimbabwe: From Book Fair to Book Burning; “Zimbabwe Parliamentary Debate: Adjourned Debate on Motion of the Evil and Iniquitous Practice of Homosexuality and Lesbianism” (Zimbabwe Parliament, September 28, 1995), <http://www.qrd.org/qrd/world/africa/zimbabwe/parliamentary.debate-09.28.95>.

⁷⁹ Ryan Thoreson, *Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex (LGBTQI) Rights and Sub-Saharan Africa*, vol. 1 (Oxford University Press, 2018), 5.

[R]epeated enough times, underlined with religious zeal and the threat of supernatural damnation, this narrative slowly has resulted in widespread hatred. In Uganda, Nigeria, Kenya, and Tanzania such narratives have resulted in a vigilante-type violence and the persecution of homosexual individuals and human rights defenders.⁸⁰

South Africa provides us with a unique case study in regard to this impunity as it has been at the forefront of the protection of same-sex sexual acts, yet this rhetoric persists and the state remains a violent place for those who practice PRSSSB.⁸¹ In their 1995 constitution, South Africa was the first state in the world⁸² to prohibit discrimination on the basis of sexual orientation⁸³ and in 2005 the Constitutional Court of South Africa ruled the prohibition of same-sex marriage unconstitutional.⁸⁴ Yet in 2006 President Jacob Zuma proclaimed “When I was growing up an unqingili [a homosexual] would not have stood in front of me. I would knock him out”, although he later apologized.⁸⁵

In “Making the Invisible Visible: a Systematic review of Sexual Minority Women’s Health in Southern Africa” Alexandra Muller and Tonda Hughes examine rape in South Africa that is targeted at RPSSSB with the idea that the rape will “cure” the victim of their sexual affinity toward members of the same sex, often termed corrective rape⁸⁶. Muller and Tonda point out that civil society organizations in South Africa have reported high rates of this form of “homophobic sexual assault”.⁸⁷ They suggest this is a result of the perpetuation of “heterosexuality and homophobia as the bedrock of masculinity” which results in the ignoring

⁸⁰ Ibrahim, “LGBT Rights in Africa and the Discursive Role of International Human Rights Law,” 267.

⁸¹ Mendos, “State-Sponsored Homophobia 2019,” 93–94.

⁸² Kahn-Fogel, “African Law and the Rights of Sexual Minorities: Western Universalism and African Resistance,” 3.

⁸³ Parliament of South Africa, “Constitution of South Africa” (1995), chap. Chapter 2, Section 9.

⁸⁴ Albie Sachs, Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others, No. CCT60/04 (Constitutional Court of South Africa December 1, 2005); National Assembly, “Parliament of South Africa Civil Union Act, 2006,” Act No. 17 of 2006 § (2006).

⁸⁵ “Zuma Provokes Ire of Homosexuals,” IOL News, September 26, 2006,

<https://www.iol.co.za/news/politics/zuma-provokes-ire-of-homosexuals-295239>; John Reed, “Zuma Apologises for Comments Against Gays,” Financial Times, September 28, 2006, <https://www.ft.com/content/fc630030-4e44-11db-bcbc-0000779e2340>.

⁸⁶ The use of the term “corrective rape” is controversial as it could be interpreted to imply that correcting someone’s sexual orientation or gender expression is possible or desirable, but many scholars and activist still use the term as it illustrates the homophobic motives of the perpetrator within the class of rape.

⁸⁷ Alexandra Muller and Tonda L. Hughes, “Making the Invisible Visible: A Systematic Review of Sexual Minority Women’s Health in Southern Africa,” *BMC Public Health* 16, no. 1 (December 2016): 2, <https://doi.org/10.1186/s12889-016-2980-6>.

this violence.⁸⁸ The perpetrators of the rape often justify the act to the victim for example suggesting the “rape was the best way to change [...] satanic behavior”.⁸⁹ The overall result is that those who participate in PRSSSB are more likely to be a victim of these crimes, less likely to approach authorities and healthcare professionals about these crimes, and less likely to receive justice if they do.⁹⁰

Jacqueline Wilson in “Unfolding Knowledge on Sexual Violence Experience by Black Lesbian Survivors in the Townships of Cape Town, South Africa” describes the impunity for corrective rape as “societal rape culture” which “derives from a particular set of ideas or beliefs that are justified within a given society, solely based on certain attitudes, beliefs, customs, rituals and ideologies its members securitized and sanctioned as acceptable and normal”.⁹¹ The rape is culturally motivated as a way to ensure that the members of society remain inside of their gender and sexual norms. It is often not viewed as harmful or even as a criminal offence by the police or courts.⁹² This represents a breakdown between what the South African constitution proports to protect and the social reality that these individuals face due to public opinion.⁹³

In many societies in sub-Saharan Africa the effect on those who practice PRSSSB is compounded as this creates a society in which they experience what Kopano Ratele in “Hegemonic African Masculinities and Men’s Heterosexual Lives: Some Uses for Homophobia”, calls “horizontal homophobia” and “vertical homophobia”.⁹⁴ The latter exist as governments crate constitutions, penal codes, and policies that regulate SSSB, while “horizontal homophobia” penetrates everyday life through homophobic discourse.⁹⁵ In “horizontal homophobia”, citizens

⁸⁸ Muller and Hughes, 2.

⁸⁹ Muller and Hughes, 5.

⁹⁰ Muller and Hughes, 5–6.

⁹¹ Jacqueline Wilson, “Unfolding Knowledge on Sexual Violence Experienced by Black Lesbian Survivors in the Townships of Cape Town, South Africa,” *European Journal of Social Sciences Education and Research* 4, no. 3 (August 2017): 7.

⁹² Wilson, 8–9.

⁹³ Wilson, 10.

⁹⁴ Kopano Ratele, “Hegemonic African Masculinities and Men’s Heterosexual Lives: Some Uses for Homophobia,” *African Studies Review* 57, no. 2 (September 2014): 119.

⁹⁵ Ratele, 119.

take it upon themselves to police the behavior of these “sexual others” as they protect heterosexual Africa.⁹⁶

The Global Philanthropy Project’s publication “The Perfect Storm: the Closing space for LGBT Civil Society in Kyrgyzstan, Indonesia, Kenya, and Hungary” puts the blame for violence against those who practice PRSSSB more squarely on “nationalist politicians” who “[create] an environment in which violence against LGBT individuals is tolerated and sometimes actively encouraged”.⁹⁷ Endong echoes this concern suggesting that the rhetoric “encourages their stigmatization, victimization and their being ostracized” within their communities.⁹⁸ The contempt expressed in this rhetoric and through these laws, even when unenforced, allows citizens to take advantage of the weakness of those who have allegedly practiced SSSB, leading to higher levels of harassment, blackmail, and extortion.⁹⁹ This extends to human rights defenders even if they are not directly involved in advocating for the sexual rights of these minorities.¹⁰⁰

It is hard to ascertain the motivations of the political and religious leaders who use this rhetoric as it is possible that they believe that same-sex sexual activity does threaten the nation. McEwen points out that many of these leaders are the second or third generation of students to be educated under the Christianizing curricula that was introduced during colonialism. As such, they may have internalized the definitions of modernity and progress as espoused by the hegemonic patriarchy within this curricula.¹⁰¹ Still, many authors suggest that this rhetoric is a political strategy that is often used to distract from bad economies,¹⁰² and other social issues,¹⁰³

⁹⁶ Ratele, 122–24.

⁹⁷ “The Perfect Storm: Closing Space for LGBT Civil Society in Kenya, Indonesia, Hungary and Kyrgyzstan” (Global Philanthropy Project, April 2016), 23.

⁹⁸ Endong, “LGBT Rights Movements in Africa and the Myth of the Whiteman’s Superiority,” 140.

⁹⁹ Bond, “Gender and Non-Normative Sex in Sub-Saharan Africa,” 116–19.

¹⁰⁰ Bond, 116–19.

¹⁰¹ McEwen, “Transatlantic Knowledge Politics of Sexuality,” 242–43.

¹⁰² Bond, “Gender and Non-Normative Sex in Sub-Saharan Africa,” 91.

¹⁰³ Bond, 91; Palmay, “Governing Morality,” 13–14; Rao, “Re-Membering Mwanga,” 8; Ratele, “Hegemonic African Masculinities and Men’s Heterosexual Lives,” 119.

to avoid political criticism,¹⁰⁴ to promote constitutional reform¹⁰⁵, or to differentiate one's self from a political opponent,¹⁰⁶ and to generally raise one's public profile.¹⁰⁷

Populist Unreasonability and its Impact on the Human Rights of those who Practice or are Perceived to Practice Same-Sex Sexual Behavior

The rhetoric of homophobic, nationalist leaders reflects what author Alessandro Ferrara calls “populist unreasonability” in his essay “Can Political Liberalism Help us Rescue ‘the People’ from Populism?”. This unreasonability is a political resentment that challenges liberal democracy from within. Ferrara argues that populism has many iterations and is not simply the ideology of a social class, a resentment of elites, a specific set of policies, something preserving an opposition movement, or an acceptance of direct democracy over representative democracy.¹⁰⁸ “Populist unreasonability” always has three aspects. First, the people and the nation are confused with the electorate. Second, the electorate is perceived as having constituent power. Finally, the rejection of challenges to the one perceived “common good”.¹⁰⁹

The Simplification of “the People”

The first aspect is characterized by the simplification of “the people” in which the people is reduced to a homogenous group with one perceived common good. Because populism is not based on a specific theology or complex policy goals, “the people” is often defined and united by their shared opposition to others. This strategically excludes the people who made the constitution and the liberties contained within, those who are mobilized in social movements (if they are not in the leader's base electorate), and respondents to poles and public opinions which often conflict with the popularity of their perceived “common good”.¹¹⁰

¹⁰⁴ Barbara Bompani and Caroline Valois, “Sexualizing Politics: The Anti-Homosexuality Bill, Party-Politics and the New Political Dispensation in Uganda,” *Critical African Studies* 9, no. 1 (January 2, 2017): 55.

¹⁰⁵ Mattia Fumanti, “The Politics of Homosexuality in Africa,” *Critical African Studies* 9, no. 1 (January 2, 2017): 3.

¹⁰⁶ Chanika, Lwanda, and Muula, “Gender, Gays and Gain: The Sexualised Politics of Donor Aid in Malawi,” 94.

¹⁰⁷ Bompani and Valois, “Sexualizing Politics,” 60; *More than a Name: State-Sponsored Homophobia and Its Consequences in Southern Africa*, sec. B. Namibia: Obsession and Opportunism; Kaoma, *Christianity, Globalization, and Protective Homophobia*, 6–8; Rodriguez, “Homophobic Nationalism,” 404.

¹⁰⁸ Alessandro Ferrara, “Can Political Liberalism Help Us Rescue ‘the People’ from Populism?,” *Philosophy & Social Criticism* 44, no. 4 (May 2018): 466.

¹⁰⁹ Ferrara, 467.

¹¹⁰ Ferrara, 467–68.

Homophobia has a remarkable ability to bring together a region with diverse religions, various traditional practices, and competing state interests. As revealed in the previous sections of the current thesis, the idea of Africa having a monolithic, homophobic tradition that would warrant same-sex sexual practices to be labeled “un-African” is inaccurate. Even so, the fact that so many prominent African leaders are able to promulgate this “un-African” labeling demonstrates the remarkably unifying power of homophobia.

One aspect of this is homophobia’s ability to bring together leaders from multiple faiths within sub-Saharan Africa. A 2014 Pew Research Center survey found that sub-Saharan Africa has a high level of religious diversity¹¹¹ and five of the most religiously diverse countries in the world are in this region.¹¹² As Kaoma points out, different religions within the region are often contesting for power. Evangelicals hold negative views of Roman Catholic church and both usually consider Islam a threat to sub-Saharan Africa, all seem to find common ground in homophobia however. The strong view points of religious leaders may not seem so consequential to societies that strongly embrace secularism, but Africans tend to value secularism less, Kaoma suggest, due to high levels of religiosity and, in part, to the active role that many African religious leaders played in challenging African dictatorships in the 1990’s.¹¹³

A 2013 Pew Research Center Survey found that states with higher levels of religiosity corresponded to more “no” answers to the question, “Should Society Accept Homosexuality?”. Religiosity was assessed in 39 countries “measured by whether they [the respondents] consider religion to be very important, whether they believe it is necessary to believe in God in order to be moral, and whether they pray at least once a day”.¹¹⁴ The survey included six states in sub-Saharan Africa which, all having strong religiosity and strong negative response to the question

¹¹¹ “Global Religious Diversity,” Demographic Study, Religion & Public Life (Pew Research Center, April 4, 2014), sec. Religious Diversity by Region.

¹¹² “Global Religious Diversity,” sec. How Countries Ranked.

¹¹³ Kaoma, *Christianity, Globalization, and Protective Homophobia*, 3.

¹¹⁴ “The Global Divide on Homosexuality: Greater Acceptance in More Secular and Affluent Countries,” Pew Global Attitudes Project (Pew Research Center, June 4, 2013), sec. Religiosity and Views of Homosexuality.

regarding homosexuality (Nigeria: 98 percent, Senegal: 96 percent, Ghana: 96 percent, Uganda: 96 percent, South Africa: 61 percent, and Kenya: 90 percent).¹¹⁵

A 2016 Afrobarometer Dispatch survey of 54,000 people in 36 countries found more variation within the region, however. This survey asked “whether you would like having people from this group as neighbors” and listed several groups one being homosexuals. The answer could be selected from the options: “strongly dislike”, “somewhat dislike”, “would not care”, “somewhat like”, “strongly like” and “don’t know”. The sub-Saharan African countries surveyed in the Pew Research Survey answered more favorably toward homosexuality overall, with the number of people who answered “strongly dislike” or “somewhat dislike” ranging from 83 to 95 percent, with the exception of South Africa which was much more favorable at 32 percent (Nigeria: 83 percent, Ghana: 89 percent, Uganda: 95 percent, Senegal was not surveyed). These results were on the high end, however, with over 50 percent of respondents in Cape Verde, Mozambique, and Namibia answering that they “would not care”, “somewhat like”, or “strongly like”. Mauritius, Sao Tome and Principe, and Botswana were also near 50 percent. The average of the 31 sub-Saharan African states surveyed is just under twenty percent for the three more tolerant responses.¹¹⁶ These numbers are not ideal, but they do demonstrate that sub-Saharan Africa itself is somewhat conflicted about sexual minorities and cannot be painted with a broad homophobic brush.

Also in 2016, the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) published a report of an online survey that they conducted with the survey group RIWI titled “The ILGA-RIWI 2016 Global Attitudes Survey on LGBTI people in Partnership with LOGO”. This report covered 53 states, six in sub-Saharan Africa where they received at least 700 completed surveys in each state (the number of people who completed a survey in each state is not specifically given). One question that the survey asked was, “How would you feel if your

¹¹⁵ “The Global Divide on Homosexuality: Greater Acceptance in More Secular and Affluent Countries,” sec. Where Homosexuality Is Rejected.

¹¹⁶ “Afrobarometer Round 6: Good Neighbours? Africans Express High Levels of Tolerance for Many, but Not for All,” Survey, Afrobarometer Dispatch (UK’s Department for International Development, The Mo Ibrahim Foundation, the Swedish International Development Cooperation Agency, The United States Agency for International Development, and The World Bank., March 2016), fig. Table A.6: Tolerance for homosexuals, www.afrobarometer.org.

neighbor were gay or lesbian”? With the possible responses of “no concerns”, “somewhat uncomfortable”, or “very uncomfortable”, the average of the six sub-Saharan African states is under 35 percent of respondents saying that they would be “very uncomfortable” (Ghana: 36, Kenya: 37, Nigeria: 43, South Africa: 15, Uganda: 45, and Zimbabwe: 31). The average is just under 50 percent that said they would have “no concerns” (Ghana: 46, Kenya: 46, Nigeria: 41, South Africa: 77, Uganda: 40 and Zimbabwe: 49).¹¹⁷

A more recent survey conducted by RIWI and ILGA titled “Minorities Report 2017: Attitudes to Sexual and Gender Minorities Around the World,” surveyed twelve states in sub-Saharan Africa which included the six states in the 2013 Pew Research Center’s, “The Global Divide on Homosexuality” survey (the twelve states are Nigeria, Senegal, Ghana, Uganda, South Africa, Kenya, Angola, Cameroon, Democratic Republic of the Congo, Ethiopia, Mozambique, and Tanzania, breakdowns by individual state were not given). The survey asked, “How comfortable are you socializing with people who are openly romantically or sexually attracted to people of the same sex?”. Given the options of “comfortable”, “neither” or “uncomfortable” the average of the sub-Saharan African states was 48 percent saying that they were “comfortable” and 35 percent saying they were “uncomfortable”.¹¹⁸

This survey also included responses to the statement, “It is possible to respect my culture and be accepting of people who are romantically or sexually attracted to people of the same sex.” With the possible responses “agree”, “neither agree nor disagree” and “disagree” only 36 percent of the respondents in the twelve sub-Saharan African states responded that they “agreed”, and 47 percent “disagreed”. These percentages are not overwhelming, there are substantial amounts of respondents who have internalized the idea that their culture is homophobic.¹¹⁹

¹¹⁷ “The ILGA-RIWI 2016 Global Attitudes Survey on LGBTI People in Partnership with LOGO” (International Lesbian, Gay, Bisexual, Trans and Intersex Association, RIWI Corp. Logo, May 2016), sec. 3. How would you feel if your neighbour were gay or lesbian?

¹¹⁸ Aengus Carroll and George Robotham, “Minorities Report 2017: Attitudes to Sexual and Gender Minorities Around the World” ((Geneva: International Lesbian, Gay, Bisexual, Trans and Intersex Association, October 2017), sec. Regional and Sub-Regional Attitudes to Socialization (SO/GIE).

¹¹⁹ Carroll and Robotham, sec. Regional and Sub-Regional: Respect for Culture and Acceptance of Diversity (SO / GIE).

While there have not been sweeping surveys of the level of homophobia among religious leaders, a 2011 Pew Research Center survey of Evangelical leaders who attended the Evangelical Lausanne Conference in Cape Town showed that 96 percent of these leaders from sub-Saharan Africa believed that “homosexuality is a way of life that should be discouraged by society”.¹²⁰ As mentioned above, sub-Saharan Africa is religiously diverse, but if religious leaders are coalescing around homophobia, as Kaoma suggest¹²¹, what we may be seeing is an agreement on the “common good” among various outspoken religious leaders that isn’t borne out in the overall public. The surveys analyzed in the current thesis sometimes seem to conflict, the surveys that include the most states suggest that there is not consensus in the region. It may be a popular political strategy with a remarkable power to bring together diverse religious leaders, but the claim that homophobia is universally “un-African” conflicts with the respondents to these poles which are conflicted regarding the extent to which homophobia is a “common good”.

Majoritarian Post-Liberalism

The second aspect of “populist unreasonability” involves the “true” people having constituent power which needs to be removed from the “elites”. Ferrara explains that this strategy is not un-democratic, it worships majorities and proports to be directly democratic. This form of democracy, however, is what Ferrara calls “majoritarian post-liberalism” because of its disregard for the protection of liberties from the majority. In this system the removal of checks on the majority rule are viewed as legitimate, as the “true” people have the direct power to change the constitution and should be consulted by constitutional courts when making judgements. This removes the idea of public reason and constitutional court oversight as it suggests that the courts legitimacy lies in their ability to reflect public opinion and the “true” people. The constitution itself should then be constantly adapted at the majorities whim until

¹²⁰ “Global Survey of Evangelical Protestant Leaders,” Forum on Religion & Public Life (Cape Town: Pew Research Center, 2011), 78.

¹²¹ Kaoma, *Christianity, Globalization, and Protective Homophobia*, 3.

there is a possibility of the ruling party becoming the minority in which case these changes are locked in.¹²²

As previously addressed, same-sex sexual acts are criminalized in many countries and, even where they are not, strong rhetoric by political leaders creates a culture of impunity which allows and sometimes encourages the removal of the rights of those who practice or are presumed to practice same-sex sexual acts. Victims of the removal of these rights are less likely to report these crimes and are less likely to receive justice if they do and this creates an overall chilling effect on advocacy which often means that cases don't end up in courts. This allows political leaders to limit the rights of these groups, especially the rights to freedom of association, assembly and expression without amendments to the constitution.

Freedom of assembly and expression limitations are often executed through raids of assemblies, the limiting of media and the arrest of those who are advocating for the rights of those who practice SSSB.¹²³ For example, in 2017 in Tanzania police arrested twenty people for attending a meeting educating people on the spread of HIV/AIDS. In an explanation via state media Regional police commander Hassan Ali Nasri said, "They are implicated in homosexuality. We arrested them and are busy interrogating them. The police cannot turn a blind eye to this practice."¹²⁴ This came after a 2016 announcement by Paul Makonda, the regional commissioner for Dar es Salaam, saying that he would utilize social media platforms to seek out and arrest those who practice SSSB. He was quoted "If there's a homosexual who has a Facebook account, or with an Instagram account, all those who 'follow' him, it is very clear that they are just as guilty as the homosexual".¹²⁵ Here, even virtual association is evidence that you have participated in SSSB.

¹²² Ferrara, "Can Political Liberalism Help Us Rescue 'the People' from Populism?," 467–69.

¹²³ Mendos, "State-Sponsored Homophobia 2019," sec. Legal Barriers to Freedom of Expression on SOGIESC Issues, Legal Barriers to the Registration or Operation of Sexual Orientation-Related CSOs.

¹²⁴ "Zanzibar Mass Arrest over Homosexuality," *BBC News*, September 16, 2017, sec. Africa, <https://www.bbc.com/news/world-africa-41292920>.

¹²⁵ Sophie Tremblay, "'Seeds of Hate' Sown as Tanzania Starts LGBT Crackdown," *The Guardian*, August 8, 2016, sec. World news, <https://www.theguardian.com/world/2016/aug/08/seeds-of-hate-sown-as-tanzania-starts-lgbt-crackdown>.

In a June 2017 rally Tanzania's Home Affairs Minister, Mwigulu Nchemba, was quoted:

Those who want to campaign for gay rights should find another country that allows those things [...] If we establish that any organization registered in our country is campaigning for gay rights [...] I will deregister that organization. If a Tanzanian national is doing that campaign, we will arrest him and take him to court [...] and if it is a foreigner, we will immediately order him to leave the country.¹²⁶

An Outright International 2018 report of 140 civil society organizations working directly or indirectly with "LGBTIQ" rights in 37 sub-Saharan African countries found that only 22 percent of these organizations are legally registered to address LGBTIQ issues. 39 percent of organizations working for these rights are not registered and 39 percent are registered without explicitly declaring their advocacy for these rights. Many countries in this region do not have any identifiable LGBTIQ civil society organizations.¹²⁷

The removal of the right to be a recognized association is not without consequence. The Outright case study concluded that registration improves standing with other organizations and the general public, provides legitimacy that is important when working with the government and for fundraising purposes, and creates a legal identity which is needed for a variety of task such as leasing a space and opening a bank account. These benefits are at the core of effectiveness for many civil society organizations which rely on networking and fundraising. Furthermore, organizations even when registered reported state surveillance, indiscriminate arrest and threats of deregistration which can also render them ineffective.¹²⁸

The limitations on these rights are often left to police, ministers, and registration boards, but parliaments have also been passing acts that explicitly limit these rights such as the Uganda Anti-Homosexuality Act, 2014 (discussed further later in this thesis), and the Nigerian Same-Sex Marriage (Prohibition) Act, 2013. Both acts go beyond the criminalization of SSSB to explicitly limit advocacy for the sexual rights of those who practice SSSB. For example, section 4(1) of the

¹²⁶ "Tanzania Threatens Crackdown on LGBT Advocates," *Reuters*, June 26, 2017, <https://www.reuters.com/article/tanzania-lgbt-idUSL8N1JN373>.

¹²⁷ Felicity Daly, "The Global State of LGBTIQ Organizing: The Right to Register" (New York: OutRight Action International, 2018), 20–21.

¹²⁸ Daly, 9.

Nigerian act reads, “[t]he Registration of gay clubs, societies and organizations, their sustenance, processions and meetings is prohibited”.¹²⁹

The justification for these limitations sometimes highlights the sub-human categorization that those who practice PRSSSB receive. For example, when the Attorney General in Botswana appealed a court’s decision to allow for the registration of a group advocating for the sexual rights of those who practice SSSB one basis for the appeal was that:

The lower court erred in holding that homosexual persons were included in the definition of the word ‘person’ in section 3 of the fundamental rights in the Constitution of the Republic of Botswana [...] and were thus entitled to enjoy such fundamental rights.¹³⁰

While SSSB continues to be illegal in Botswana, the court made a distinction between the criminal act and one’s sexual orientation, suggesting that being the latter is not a criminal offence and those who are not heterosexual still enjoy the liberties promised in the constitution. The court found that the decision not to register the group was made on the assumption that they would commit illegal acts, but the organization’s charter did not state any illegal motives and, therefore, this assumption was unwarranted and would result in the petitioners being found guilty without any proof of the actual wrongdoing. The organization’s charter did explicitly state that its purpose was to lobby and advocate for the sexual rights of those who practice SSSB, but the court made it clear that this was in no way illegal.¹³¹

Similar decisions were made Kenya¹³² and Zambia¹³³ which both criminalize SSSB, but now allow some space for advocacy and make it clear that there is a limit to how far criminalization can be extended to limit other rights. The case in Kenya (discussed in further detail below) specifically addresses the courts responsibility to protect that space for unpopular ideas. A particularly poignant resistance to “majoritarian post-liberalism” of those who practice same-sex sexual behavior can be found in the South African same-sex marriage decision which stated,

¹²⁹ “Nigeria Same Sex Marriage (Prohibition) Act, 2013” (2014).

¹³⁰ Attorney General of Botswana v. Thuto Rammoge & 19 Others, No. CACGB-128-14 (Botswana, Court of Appeal March 16, 2016).

¹³¹ Attorney General of Botswana v. Thuto Rammoge & 19 Others.

¹³² Isaac Lenaola, Eric Gitari v Non-Governmental Organizations Co-Ordination Board & 4 Others, No. 440 of 2013 (High Court of Kenya at Nairobi April 24, 2015).

¹³³ The People v. Paul Kasonkomona, No. HPA/53/2014 (Zambia, High Court May 15, 2015).

“the fact that the law today embodies conventional majoritarian views in no way mitigates its discriminatory impact. It is precisely those groups that cannot count on popular support and strong representation in the legislature that have a claim to vindicate their fundamental rights through application of the Bill of Rights”.¹³⁴

Supreme court decisions still stand in both Zimbabwe and Botswana that explicitly cite the courts hesitations to counter conventional majoritarian views for example in the Supreme Court of Zimbabwe, in the case of *Banana v State* the court stated:

As to Gubbay CJ’s views on public opinion I am of the view that while courts can perhaps not be dictated to by public opinion, the courts would be loath to fly in the face of public opinion, especially if expressed through legislation passed by those elected by the public to represent them in the legislature... The public interest must therefore always be a factor in the court’s consideration of legislation particularly where such legislation reflects a public concern¹³⁵

The case Botswanan case of *Kanane v State* specifically cites the Zimbabwean court’s decision and reiterates “No evidence was put before the court a quo nor before this court that public opinion in Botswana has so changed and developed that society in this country demands such decriminalization”.¹³⁶

There may be many limitations on the rights of those who practice RPSSSB sub-Saharan Africa is not in agreement on the extent of those limitations even in countries where SSSB is criminalized. While many political actors are pushing for further limitations, the courts are not always willing to allow this even if their decisions are unpopular. The checks that the courts practice may be incremental as we see in Kenya, Zimbabwe, and Botswana where they are unwilling to overturn criminalization, but willing to defend other rights. At the very least, this is evidence that sub-Saharan Africa is not a monolith of “majoritarian post-liberalism”.

Justified Intolerance

The third aspect of “populist unreasonability” aspect is a rejection of pluralism. The “true” people have been taken advantage of by the “disloyal elites and equally disloyal outsiders,

¹³⁴ Sachs, Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others.

¹³⁵ *Banana v State*, No. 4 LRC 621 (Supreme Court of Zimbabwe May 29, 2000).

¹³⁶ *Kanane v the State*, No. BLR 64 (CA) (Court of Appeal, Lobatse July 30, 2003).

immigrants, minorities, and so on.”¹³⁷ They are represented by the populist leader and anyone who challenges this leader as aligned with the elite enemy. This “justified intolerance” eventually leads to a democracy in which political opponents are not challenged based on their reasonable opposition to another politician’s ideas, but one where politicians simply attack one another’s legitimacy as representatives of the “true” people.¹³⁸

According to Fareed Zakaria, in “The Rise of Illiberal Democracy”, democracy expanded wildly in Africa in the 1990s as many countries quickly allowed multiparty systems to take hold, but these democracies did not emphasize freedoms. The overemphasis on political party competition negated the liberal tenants of democracy.¹³⁹ Zakaria suggests that democracies without a strong constitutional liberal base often cannot accommodate pluralism, leading to violence or terror.¹⁴⁰ Democracies themselves can often lead to hyper-nationalism at the expense of peace as political leaders create alliances between groups often at the expense of minorities.¹⁴¹ It is easiest to create these alliances based on racial, ethnic, or religious lines that is exclusionary.¹⁴² From this, Zakaria concludes, democracy does not force compromise, liberalism does.¹⁴³

This sentiment is echoed in Carlos de la Torre, in “Populism in Latin America” where he defines populism in a similar way to Ferrara’s definition in that it is not an ideological alliance and that it emphasizes not seeking agreement, but defeating the contesting side.¹⁴⁴ Torre focuses on Central and South American countries where populist politicians have run on an anti-globalization and anti-United States stance, promising to bring back the interest of the nation state.¹⁴⁵ Populism may bring about advantages such as unification and sometimes more universal suffrage,¹⁴⁶ but populist leaders often do not want to be constrained by the promise

¹³⁷ Ferrara, “Can Political Liberalism Help Us Rescue ‘the People’ from Populism?,” 470.

¹³⁸ Ferrara, 470–72.

¹³⁹ Fareed Zakaria, “The Rise of Illiberal Democracy,” *Foreign Affairs* 77, no. 6 (December 1997): 28.

¹⁴⁰ Zakaria, 35.

¹⁴¹ Zakaria, 38.

¹⁴² Zakaria, 35.

¹⁴³ Zakaria, 36.

¹⁴⁴ Carlos de la Torre, *Populism in Latin America*, ed. Cristóbal Rovira Kaltwasser et al., vol. 1 (Oxford University Press, 2017), 4.

¹⁴⁵ de la Torre, 1:6–7.

¹⁴⁶ de la Torre, 1:2–3.

of liberties which limit their power. Torre suggest that the autonomy of civil society and the liberties that ensure pluralism are particularly targeted.¹⁴⁷

Civil society organizations that are advocating for the sexual rights of those who practice SSSB are often portrayed by homophobic political and religious leaders as “disloyal elites” allied with “disloyal outsiders” from the West. In 1999 a Ugandan official in President Museveni’s governing Movement published an article claiming that Uganda’s “elite and intellectuals” were abandoning Ugandan society and favoring the West. The official elaborated:

Just because they have heard that homosexuality exists even amongst the most powerful institutions of the developed societies such as governments, IMF, and World Bank, they believe that these can be some of the virtues which can be packaged to develop the Third World. The starting point is that homosexuality has, hitherto, not been known or practiced in our communities.¹⁴⁸

The portrayal of interference by the West goes beyond funding civil society organization in an effort to implant foreign ideas in sub-Saharan Africa as some homophobic religious and political leaders suggest the West is strategically recruiting sub-Saharan Africans for SSSB, especially children. According to President Museveni, the limitation of the rights of those who practice RPSSB is necessary to defend against “arrogant and careless Western groups that are fond of coming into our schools and recruiting young children into homosexuality and lesbianism”.¹⁴⁹ This sentiment was shared by MP David Bahati who suggested that the Western participants in SSSB were recruiting poor African children by promising them money.¹⁵⁰

The colonial-era interference by Western countries in sub-Saharan Africa lends credence to an impression that may seem very unlikely to those outside the region. It also allows the maintenance of the idea that SSSB is “un-African” and is something within the purview of governmental control. It becomes easier to understand the poles that suggest these minorities

¹⁴⁷ de la Torre, 1:4.

¹⁴⁸ “The Spread of Homophobic Rhetoric in Southern Africa” (Human Rights Watch), sec. D. Botswana, accessed November 26, 2019, <https://www.hrw.org/reports/2003/safrica/safriglrc0303-02.htm>.

¹⁴⁹ “Uganda’s New Anti-Gay Law: Part of a Broader Trend in Africa,” National Geographic News, March 1, 2014, <https://www.nationalgeographic.com/news/2014/3/140228-uganda-anti-gay-law-smug-homophobia-africa-world/>.

¹⁵⁰ “Uganda to Pass Anti-Gay Law as ‘Christmas Gift’?,” *USA Today*, November 12, 2012, <https://www.usatoday.com/story/news/world/2012/11/12/uganda-gay/1699065/>.

are very unpopular in Africa if we think of them as allied with outside forces and not just any forces, but forces that sub-Saharan Africa is very weary of given its past. It also further justifies the claims against the legitimacy of their citizenship in their African country as they selfishly participate in treasonous activity.

According to Bond, the colonial past is constantly influencing the construction of the identity of African states. These states resist outside pressure to accept SSSB as they portray it as a neocolonial attempt to “civilize” laws governing SSSB in sovereign sub-Saharan African nations. This is depicted as a continuation of colonial efforts to control African sexualities justified by the inferior African race, cultures, and traditions which once again needs to be controlled because of its deviation from Western ideals.¹⁵¹ African authenticity, citizenship, and one’s access to rights is defined by their protection of “traditional African values” which are inaccurately described as homophobic.¹⁵²

The idea of recruitment and the import of foreign ideals provides for “moral panic” that McEwen suggest “recast the nation as a masculine project of protection”.¹⁵³ As previously cited, Palmary suggest that the regulation of the family and home are the base of the nation building project as they allow us to define who belongs within the nation by comparing them to the idealized definition of a man, woman and child.¹⁵⁴ The idealized sub-Saharan African citizen is fighting against the foreign, Western threat where blackness, heterosexuality and Africanness are combined against the West and homosexuality.¹⁵⁵

What Ferrara refers to as the “imaginary ‘we’” or the “true” people then is extracted to create a citizen to be measured against.¹⁵⁶ As Ibrahim explains, “African culture, essentialized and stripped of its diversity, is presented as homogenously heterosexual and inherently homophobic”.¹⁵⁷ The result is an imaginary, idealized citizen which McEwen suggest is

¹⁵¹ Bond, “Gender and Non-Normative Sex in Sub-Saharan Africa,” 92.

¹⁵² Bond, 93.

¹⁵³ McEwen, “Transatlantic Knowledge Politics of Sexuality,” 243.

¹⁵⁴ Palmary, “Governing Morality,” 6–8.

¹⁵⁵ Palmary, 14.

¹⁵⁶ Ferrara, “Can Political Liberalism Help Us Rescue ‘the People’ from Populism?,” 470.

¹⁵⁷ Ibrahim, “LGBT Rights in Africa and the Discursive Role of International Human Rights Law,” 267.

“heterosexual, monogamous, and homophobic¹⁵⁸ and, emphasizing the paradox, Rodrigues adds “yet untarnished by contemporary Western ideals”.¹⁵⁹

This is being used as a political strategy against the “Western social cancer”¹⁶⁰ or “Westoxifacation”¹⁶¹, but the basis of this rhetoric is preexistent within sub-Saharan Africa having anxieties over the dominant influence of the West in modernization,¹⁶² NGO-ization,¹⁶³ the global economy,¹⁶⁴ global culture,¹⁶⁵ and political influence on non-western sovereign nations.¹⁶⁶ The political leaders use this preexisting anxiety to present themselves as strong leaders who are finally heard on the world stage as they resist Western cultural imperialism.¹⁶⁷ Mattia Fumanti in “The Politics of Homosexuality in Africa” suggest:

[o]ften-cited draconian legislations, the state-sponsored homophobic violence, and the heated public debates on homosexuality, should be seen not simply as the product of political chicanery and Pentecostal religious fervour, but as part of the (re)-emergence and (re)-articulation in postcolonial Africa of old and novel discourses on African independence and nation-building, of citizenship and human rights, and of morality and the place and recognition of Africa, and Africans, in the world.¹⁶⁸

This permits Africa to redefine themselves from their colonial past as inheritors of “civilization” and morals from the West to those who set their own moral codes.¹⁶⁹

Homophobic, nationalist/regionalist sub-Saharan African leaders make claims about protections of the traditional family, society, culture, and reproduction, which they portray as timeless, from Western and local Elites. The “un-African” frame is worked into populist rhetoric that allows for these governments to remove the rights of sexual minorities as their national and regional alliances as well as their citizenship and humanity are removed. Strong homophobic

¹⁵⁸ McEwen, “Transatlantic Knowledge Politics of Sexuality,” 245.

¹⁵⁹ Rodrigues 393

¹⁶⁰ Endong, “LGBT Rights Movements in Africa and the Myth of the Whiteman’s Superiority,” 140.

¹⁶¹ Endong, 140.

¹⁶² Bond, “Gender and Non-Normative Sex in Sub-Saharan Africa,” 93.

¹⁶³ Rodriguez, “Homophobic Nationalism,” 393–96.

¹⁶⁴ Bompani and Valois, “Sexualizing Politics,” 55–56.

¹⁶⁵ Kaoma, *Christianity, Globalization, and Protective Homophobia*, 147.

¹⁶⁶ Bompani and Valois, “Sexualizing Politics,” 55–56.

¹⁶⁷ Endong, “LGBT Rights Movements in Africa and the Myth of the Whiteman’s Superiority,” 149.

¹⁶⁸ Fumanti, “The Politics of Homosexuality in Africa,” 1.

¹⁶⁹ Bompani and Valois, “Sexualizing Politics,” 65.

rhetoric becomes politically strategic as it allows leaders to define themselves as representatives of the “true” with their own version of the true “common good” while they portray those who practice RPSSSB as allied with Western elites.

When this populist, nationalist strategy is utilized to its full extent, it is a sign that there are larger problems within the overall governmental system. Even if this system remains democratic, it will use homophobic rhetoric to create a tyranny over minorities whose ability to participate in the political discussion will be removed. While the prominence of this rhetoric suggest that sub-Saharan Africa is already far into “populist unreasonability” poles suggest that the messages of these leaders may be less universal.

The 2016 ILGA-RIWI Global Attitudes Survey asked respondents in six African states if they believe that same-sex sexual desire was a Western phenomenon. With the possible responses on “strongly agree,” “somewhat agree,” “neither,” “somewhat disagree,” and “strongly disagree,” the average of the six states was 47.5 percent of respondents answering that they either “strongly agree” or “somewhat agree” (Ghana: 49, Kenya: 48, Nigeria: 51, South Africa: 36, Uganda: 54, and Zimbabwe: 47).¹⁷⁰ The same survey asked if being “LGBT” should be a crime. The average of the six states was 44.7 percent of respondents answering that they either “strongly agree” or “somewhat agree” (Ghana: 54, Kenya: 46, Nigeria: 59, South Africa: 22, Uganda: 53, and Zimbabwe: 34).¹⁷¹

Populist Unreasonability in Uganda

Ugandan Rhetoric Among Political and Religious Leaders and the Culture of Impunity

In the area that is now Uganda, the rejection of SSSB has been used politically since before it was a British colony. This is well demonstrated in Rao’s work which seeks to explore the way

¹⁷⁰ “The ILGA-RIWI 2016 Global Attitudes Survey on LGBTI People in Partnership with LOGO,” sec. 2. Same Sex Desire is a Western World Phenomenon.

¹⁷¹ “The ILGA-RIWI 2016 Global Attitudes Survey on LGBTI People in Partnership with LOGO,” sec. 1. Being LGBTI Should be a Crime.

that people from in and around Uganda today remember the “Ugandan Martyrs” and the last king (or Kabaka) of Buganda, the largest kingdom of the area that is now Uganda. Rao explores the way that the story of this king has been utilized and contested through history and currently to the political gain of different groups.

It is difficult to ascertain exactly what happened to the pages that are now called the “Ugandan Martyrs” as most of the recordings of the actual events were collected by a Catholic theologian who emphasized the same-sex sexual activities of the Kabaka in a way that clearly showed his judgement on the topic. The Kabaka was described to have been addicted to “the vice of sodomy” and “the practice of homosexuality”.¹⁷² This king killed 40 of his pages, who are now called the “Ugandan Martyrs” and, according to the recording of the Catholic theologian, the denial of the Kabaka’s same-sex sexual advances towards the pages was a “decisive factor” in the killings.¹⁷³ The centrality and nature of these advances has been is being possibly exaggerated, silenced, displaced, denied, or deployed depending on who is or was recounting the history and what their political motivations were or are.¹⁷⁴

At the time when the killings took place, Buganda was politically split. The final Kabaka, Mwanga, inherited the throne after his father had allowed for many contesting religious factions to come into the kingdom during the time of the scramble for Africa, who were to varying degrees, aligned with different colonizing forces. Mwanga, at the age of seventeen, likely had trouble managing these divisions and this may be another reason for the killings. It was not uncommon for Kabakas to kill large numbers of people to demonstrate their dominance and the sexual advances themselves may have, to some degree, to test the loyalty of these pages who aligned with Christian outsiders.¹⁷⁵

While Rao explains these contestations on the facts surrounding the killings and their motivations, his essay’s drive is to explore how and why these contestations are remembered

¹⁷² Rao, “Re-Membering Mwanga,” 2.

¹⁷³ Mie Roesdahl, “Universal Periodic Review and Its Limited Change Potential: Tracking the Complexity of Multiple Actors and Approaches to Human Rights Change through the Lens of the UPR Process of Nepal,” *Journal of Human Rights Practice* 9, no. 3 (November 1, 2017): 2, <https://doi.org/10.1093/jhuman/hux033>.

¹⁷⁴ Rao, “Re-Membering Mwanga,” 5–14.

¹⁷⁵ Rao, 2–4.

differently, not to analyze their accuracy.¹⁷⁶ Every year hundreds of thousands of thousands of Christians Uganda and some surrounding states gather to remember these “martyrs”. If the Catholic theologian was correct about these same-sex sexual tendencies of Mwanga, it would seem to discount the idea that same-sex sexual activity is foreign to Africa and Rao wants to understand how people contend with these contentions.¹⁷⁷

Rao first covers silence around the of sexuality. Some accounts do not address the issue at all and attribute the killings to the Kabaka’s misunderstand or distain for the newfound religion of these pages. This seems to completely disagree with the idea that it was a “decisive factor” in the Catholic Theologian’s account, but Rao explains that this may have been a product of Catholic influence surrounding the way that the event was and is remembered. In 1887, after the mass killing of 30 pages, but while the killings were still taking place sporadically, there were tribunal hearings on the topic where witness depositions were recorded. While the same-sex sexual advances were included in the introductory statements, which were written by missionaries, they were not mentioned in any statements from indigenous peoples. There was then a second tribunal taking place from 1913 to 1914 in which all the witnesses named these advances as the cause for these killings.¹⁷⁸

Rao suggest that this could be due to the indigenous people’s perceptions that these advances were not outside of their social norms at the time. It is possible that they were coaxed by missionaries by the time of the second tribunal in a way that made this aspect of the history more central. This history is again manipulated around the time of Uganda’s independence from colonial rule in 1962. During this time, the Kabaka was commonly remembered as an “African patriot” while the pages were regarded as “imperial collaborators”. This shifted again during periods of authoritarian rule when the martyrs would become symbols of “resistance to tyranny”, but during these remembrances of this history, the sexual advances were once again not addressed.¹⁷⁹

¹⁷⁶ Rao, 4–5.

¹⁷⁷ Rao, 4.

¹⁷⁸ Rao, 6.

¹⁷⁹ Bond, “Gender and Non-Normative Sex in Sub-Saharan Africa,” 6–7.

This silence ended dramatically in 2004 when an Anglican bishop was quoted in the *New Vision* newspaper in an article titled “Fight Homos” stating, “we will never be shaken by any immoral teachings infiltrating our country. They [the martyrs] never compromised their faith, we will not compromise ourselves”. In 2005, Martin Ssempe, a Pentecostal preacher well known for his homophobic rhetoric, references the Kabaka as a “deviant homosexual” then describes the modern push for sexual minority rights as “gradual global Mwanga who daily increases his legal machinery over the whole world”. He concludes, “I will not stop advocacy for more young men and women who will refuse to bend over one more time to the Mwangas of this generation”.¹⁸⁰

President Museveni, who has been instrumental in the framing of sexual minorities in Uganda delivered a speech at the Anglican shrine on Martyrs’ day in 1986 which suggested that the martyrs were heroes who resisted tyranny and represent self-sacrifice in the fight for human rights. Notably absent from this speech was any mention of same-sex sexual practices. In 2010, however, Museveni utilized his Martyrs’ day speech to warn against the dangers of sodomy.¹⁸¹

The uses of this contested history have even been utilized by a Western homophobic activist outside of Uganda. Scott Lively, a US anti-homosexuality activist, has been criticized for his role in the creation of the “Kill the Gays Bill” in Uganda (Discussed further later). Lively explained that Uganda did not need activist like him to influence their disapproval of same-sex sexual activity as this history demonstrates Uganda’s long-standing disapproval of these practices.¹⁸²

In addition to the sexual nature of this history being centralized or ignored, Rao explains that it is also displaced. This is well demonstrated in a quote taken from a Promoter of the Uganda Martyrs Devotion at the Catholic Shrine:

At that time there used to be ... between three hundred and four hundred young boys in the palace. And some of them had copied some elements from the Arabs ... imagine a big number of boys, a big number of young people without anybody to guide them. Everything would have been very unfortunate ... So Joseph Mukasa Balikuddembe [the leader of the catholic pages]

¹⁸⁰ Rao, “Re-Membering Mwanga,” 7.

¹⁸¹ Rao, 7.

¹⁸² Rao, 7–8.

advised courageously, 'If you are called to such and such a place, by so and so, at such and such awkward hours, please do not go. Because that will lead to the violation of your chastity.'¹⁸³

This reference to same-sex sexual practices being an imported Arab practice finds its origins in the racist tropes and pseudoscientific analysis of colonizing Europeans (as described in the second section of the current thesis).

Rao then explains that some remembrances of this history utilize denial. To demonstrate this, Rao uses the work of the historian Samwiri Lwanga Lunyiigo which portrays Mwanga as a "anti-colonial patriot". During an interview on the topic, Lunyiigo said:

They say 'You're not giving human rights to these [LGBTI] people. They must have their rights!' But to me, if you practice that orientation, you have opted out of humanity, you are no longer human. So human rights should not apply to you. And that's the attitude [of] many of my generation.¹⁸⁴

According to this historian there is no evidence to support the claims of same-sex sexual advances by the Kabaka, suggesting that these accusations were created by Christians to justify the overthrow of Buganda. Rao suggest that these strong feelings on the subject of same-sex sexual practices may have interfered with the historian's ability to acknowledge the possibility of these advances.¹⁸⁵

The final category of reemerging that Rao identifies is Deployment. Sexual rights advocates have been using the contested history of the Kabaka and the pages to place same-sex sexual activity more firmly into Ugandan traditional culture. They claim the Kabaka as a gay indigenous father who represents "a clash of western homophobia and African traditions". There may be some danger in this depiction as the pages may have been younger than the Kabaka, although he took the thrown at seventeen. Rao suggest that because the actual events surrounding these stories has been remembered in so many ways that no one remembrance has a claim to the history anymore.¹⁸⁶

¹⁸³ Quote taken with ellipses Rao, 9.

¹⁸⁴ Rao, 11.

¹⁸⁵ Rao, 12.

¹⁸⁶ Rao, 12–14.

Rodrigues claims that the homophobic rhetoric in Uganda began as a result of the government's strong response to the HIV/AIDS crisis in 1990. This was the first time that the relevant section of the penal code were strengthened to include life imprisonment. Rodrigues blames this on the US and their connection between SSSB and the spread of HIV/AIDS. By increasing the penalty, Uganda maintained its reputation as a country that was leading Africa in the fight against HIV/AIDS the debate around SSSB was mostly muted¹⁸⁷ and no one was prosecuted under this law.¹⁸⁸

In Barbara Bompani and Caroline Valois's work, "Sexualizing Politics: the Anti-Homosexuality Bill, Party-Politics and the New Political Dispensation in Uganda", the authors make the case that sexual politics are being used by Museveni and the National Resistance Movement (NRM) party to distract from corruption, maintain power and gain unity within the party. The article traces events, discourses, public statements, newspaper articles and academic literature to examine when the homophobic rhetoric is used and its intent.

In the late 1990s Museveni began to make many public statements that condemned SSSB as this rhetoric entered a more political arena. This rhetoric became more common as the Museveni administration removed presidential term limits, removed the ability of parliament to assign ministers, extended the presidential power to dissolve parliament, and abolished the Ugandan Human Rights Commission.¹⁸⁹

At a time when Museveni was under criticism for Uganda's involvement in the Congo war, he was quoted, "When I was in America some time ago, I saw a rally of 300,000 homosexuals. If you have a rally of 30 homosexuals here, I would disperse it".¹⁹⁰ At that same time, an alleged homosexual was arrested and striped in front of police to allegedly determine the person's sex and a minister of the administration spoke out about the West advocating for sexual rights and advised Ugandans against defending same-sex sexual practices. In 1999, Museveni stated, "I

¹⁸⁷ Rodrigues, "Homophobic Nationalism," 403.

¹⁸⁸ Rodrigues, 406.

¹⁸⁹ Bompani and Valois, "Sexualizing Politics," 55.

¹⁹⁰ Bompani and Valois, 55.

have told the Criminal Investigations Department [CID] to look for homosexuals, lock them up, and charge them” .¹⁹¹

In 2000 at a time when the US was strongly pushing abstinence education in Africa, Museveni and US president Bush had a close relationship. In that year, Museveni was quoted discussing the benefits of AIDS claiming:

AIDS is a ‘good’ disease. We know the few ways it is transmitted and it is in our control. You have a choice! You can decide not to get it. How can you stop it? You can abstain from sex. Or you can stay with one partner. Be faithful to survive. You can decide not to get it.¹⁹²

According to Rodriguez and his review of parliamentary debates, in 2003 policy makers began to realize that if they continued to be harsh on SSSB, they could appear to be active on HIV/AIDS prevention even if these efforts weren’t effective in stopping the spread of HIV.¹⁹³ Also in 2003, discussions were had about presidential term limits, and the possible use of taxpayer dollars to fund party activities. During these discussions, a statement was released that said that the police were directed by the government to investigate gay organizations as well as accusations of same-sex sexual activities.¹⁹⁴

In 2004, the activist group Sexual Minorities Uganda (SMUG) was established as an umbrella group for those advocating for sexual rights throughout Uganda, although it acted mostly underground.¹⁹⁵ In 2005 SMUG reported and Ugandan political leaders confirmed that they were withholding treatment for HIV/AIDS from those who practiced RPSSB.¹⁹⁶ The Minister of Ethics and Integrity, Nsaba Buturo, ordered the police to investigate alleged SSSB rights advocate groups at a major university and “take appropriate action.”¹⁹⁷ Activism for sexual

¹⁹¹ Bompani and Valois, 55.

¹⁹² Flint and Hewitt, “Colonial Tropes and HIV/AIDS in Africa,” 308.

¹⁹³ Rodriguez, “Homophobic Nationalism,” 404.

¹⁹⁴ Bompani and Valois, “Sexualizing Politics,” 56.

¹⁹⁵ K.A. Guma, *Resisting Or Reinforcing the Neoliberal Present?: The LGBT Struggle for Democratic Space in Uganda*, Southern Papers Series. Working Papers No. 24 (CLACSO, n.d.), 23–24.

¹⁹⁶ Rodriguez, “Homophobic Nationalism,” 404.

¹⁹⁷ Guma, *Resisting Or Reinforcing the Neoliberal Present?: The LGBT Struggle for Democratic Space in Uganda*, 24.

rights was not public at this point, but online organization was facilitating bonds and strategies between activist.¹⁹⁸

In August of 2007, aforementioned Ugandan Pastor, Martin Ssempe organized an event that demonstrates the uniting force of homophobia in Uganda. Ssempe and his group, the Interfaith Rainbow Coalition Against Homosexuality, unites people of different faiths for the specific purpose of fighting same-sex sexual practices and their acceptance. They are known for holding what is called “the first protest against homosexuality in Uganda” in which hundreds of people from various faiths came together to protest a week after the first press conference of Ugandans advocating for sexual minority rights.¹⁹⁹

SMUG, a group that author Chris Dolan in his book chapter “Militarized, Religious and Neo-Colonial The Triple Bond Confronting Men in Contemporary Uganda”, at that time calls “fledgling”, organized seven sexual and/or gender identification/expression minorities to speak in this press conference. These Ugandans spoke about their experiences under a banner stating, “God created us like this, Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI), Let us live in peace”. A notable message from one presenter was “We have big problems in Africa, but two consenting adults choosing to have a relationship is not one of the big issues”.²⁰⁰ They wore mask to protect their identity as they feared that they would be arrested.²⁰¹

Based on the presented evidence, it may be clear the people who are mobilizing in this press conference are excluded from the definition of the “true” people, but these people hardly seem to be what Ferrara calls elite.²⁰² Those depicted as elite people in this fight are revealed in the banners held by the protesters in the rally against homosexuality the following week that

¹⁹⁸ Guma, 25.

¹⁹⁹ Chris Dolan, “Militarized, Religious and Neo-Colonial The Triple Bond Confronting Men in Contemporary Uganda,” in *Men and Development Politicising Masculinities*, ed. Andrea Cornwall, Jerker Edstrom, and Alan Greig (New York: Zed Books, 2011), 129.

²⁰⁰ Dolan, 130.

²⁰¹ Guma, *Resisting Or Reinforcing the Neoliberal Present?: The LGBT Struggle for Democratic Space in Uganda*, 25.

²⁰² Ferrara, “Can Political Liberalism Help Us Rescue ‘the People’ from Populism?,” 470.

read, “Do not accept their money”.²⁰³ The elite here being a very legitimate past and many would argue current adversary of Africa, the West.

Dolan explains that it is commonly believed that Ugandans who claim to be a sexual minority are simply pretending to have same-sex sexual desires to attract funding from the West. This is encouraged by politicians such as Nsaba Buturo, Minister for Ethics and Integrity who portrayed the SMUG press conference as a conspiracy.²⁰⁴ As cited earlier, The 2016 ILGA-RIWI Global Attitudes Survey asked Ugandan respondents if they believe that same-sex sexual desire was a Western phenomenon and 54 percent said that they either “strongly agree” or “somewhat agree”.²⁰⁵

Also in 2007, the former Minister of Justice and Constitutional affairs published an editorial stating:

Uganda is experiencing an internationally orchestrated Crescendo of demands for ‘rights’ by the homosexual fraternity ... what is implicit here is a claim to the ‘right to sex’ ... Uganda must not recognise, sanction, protect or promote sodomy or lesbianism by legislation or otherwise.²⁰⁶

In 2008, the NRM reinstated local kingdoms that were abolished shortly after independence to, according to Museveni, protect culture. He further explained that “anybody who has dealt with NRM knows that we mean what we say ... the recent assault on our culture is that homosexuality is not a deviation but an alternative. That you can be a musiyaji (gay) or a normal person”²⁰⁷ In that same year, the minister of Education started an investigation of reports of same-sex sexual activities in schools to find the source of the practice and a “solution to the vice”.

NRM MP Beatrice Rwakimari supported the investigation stating, “poverty has also led to the spread of gay activities. Some organizations claim to be sponsoring poor students yet their

²⁰³ Dolan, “Militarized, Religious and Neo-Colonial The Triple Bond Confronting Men in Contemporary Uganda,” 129.

²⁰⁴ Dolan, 130.

²⁰⁵ “The ILGA-RIWI 2016 Global Attitudes Survey on LGBTI People in Partnership with LOGO,” sec. 1. Being LGBTI Should be a Crime.

²⁰⁶ Quote taken with ellipses from: Bompani and Valois, “Sexualizing Politics,” 57.

²⁰⁷ Quote taken with ellipses from: Bompani and Valois, 57.

motives are different”.²⁰⁸ Rodriguez articulates, from 2003 to 2009 there are several instances in parliament where frustrations are expressed at the increased visibility of those advocating for the rights of those who practice SSSB. These discussions especially expressed discontent with these organizations ability to build relationships with Western funders and international NGOs.²⁰⁹

After this point, there seems to be a bit of division within the NRM as Museveni appears to be trying to balance international alliances with the rhetoric of members of his own party as they attempt to pass the Anti Homosexuality Bill. In October 2009 a then relatively unknown NRM MP, David Bahanti, presented the Bill before the parliament. The Bill was widely supported inside and outside of the party within the parliament, but most vocally by the NRM members, one claiming, “I would not forgive my government if it dares to mind about foreign aid and forget our cultural values”.²¹⁰ The threats to withhold aid from Western countries at that time provided more motivation for the idea that this was a foreign import, fueled more claims that this was an issue of state sovereignty, and provided more evidence that this was an attempt at neocolonialism. These threats seemed to influence Museveni as he said privately that he would veto the Bill if it passed.²¹¹

In January of 2010 a state minister publicly said that they Bill did not have the full support of the executive branch. Following that comment, in the same month, Museveni made several comments that seem to attempt to downplay his own party’s strong rhetoric while not condemning the Bill outright. In a newspaper article Museveni called to “handle it in a way that does not compromise our principles but also takes into account our foreign policy interests”.²¹²

He later addressed the NRM advising that they “go slow”:²¹³

²⁰⁸ Bompani and Valois, 57.

²⁰⁹ Rodriguez, “Homophobic Nationalism,” 407.

²¹⁰ Bompani and Valois, “Sexualizing Politics,” 58.

²¹¹ Bompani and Valois, 58.

²¹² Kayvan Farzaneh, “Uganda Backs down on Anti-Gay Legislation,” *Foreign Policy* (blog), accessed December 2, 2019, <https://foreignpolicy.com/2010/01/21/uganda-backs-down-on-anti-gay-legislation/>.

²¹³ Bompani and Valois, “Sexualizing Politics,” 58.

foreign policy ... [must not be] managed just by some individuals. We have our values and our stand, historically and socially, but we need to know also that our partners we have been working with have their systems.²¹⁴

Museveni then reiterates “the cultural threat” of same-sex sexual activity in an address at the celebration for the Ugandan Martyrs:

If we follow ... [the Europeans] we shall end up in Sodom and Gomorrah ... I hear there was homosexuality in Mwanga’s palace. This was not part of our culture. I hear he learnt it from the Arabs. But the martyrs reused these falsehoods and went for the truth, which is why we are honouring them today ... When they hear us fighting homosexuality, they think we do so because of religion. No Even before religion came, we were against it and many other vices.²¹⁵

Notably, he distances this from an issue of secularism and places the issue firmly in tradition and culture and suggest that it was a imported practice while utilizing a version of history that is founded in the ideas of racist colonizing forces.

Tensions within the NRM party were furthered when over 70 MPs lost in their primary elections and then tried to run as independents or with other parties. The Ugandan Constitutional Court ruled that these MPs could not keep their seats as they needed to first resign before running outside of the party. One of the MP who was effected by this, James Buturo, called this “robbery from within” the NRM, but used his final remarks as Minister not to elaborate on this, but to speak about the Anti-Homosexuality Bill stating, “I urge you to put pressure on Parliament to debate, amend the Anti-Homosexuality Bill and pass a law that will serve the interests of Ugandans and not our friends”.²¹⁶

The Bill was not introduced then in what may be a broader strategy of the Museveni administration to strategically time discussions about contentious Bills to maintain power where the actual passage of the Bill is secondary. In April of 2011 the sub-committee whose job it was to amend the Bill called for the dropping of the Legislation and it was shelved by August. The bill was retabled in February 2012 after MPs said that the executive branch had been morally corrupted. Sexual minorities remained a heavy subject of discourse and a new minister of ethics broke up a sexual rights activist meeting for its purported illegality and investigated more accusations of SSSB in four secondary schools.²¹⁷

The fracturing within the NRM continued after this as the Speaker of Parliament, Rebecca Kadaga, who was frequently cited as a replacement for Museveni suggest that the NRM was criticizing her for being outspoken for the passing of the Bill. Kadaga has been accused of appealing to the public on the bill to increase her public profile. This strategy was very effective

²¹⁴ Quote taken with ellipsis from: Bompani and Valois, 58.

²¹⁵ Quote taken with ellipsis from: Bompani and Valois, 59.

²¹⁶ Bompani and Valois, 59.

²¹⁷ Bompani and Valois, 60.

when, in October of 2012, she was met at the airport by countless supporters after resisting Canadian Foreign Minister's warning that Uganda should respect human rights. Her response to the Foreign Minister was, "if homosexuality is a value for the people of Canada they should not seek to force Uganda to embrace it. We are not a colony or a protectorate of Canada".²¹⁸

Kadaga then vowed to work toward getting the Anti-Homosexuality Bill passed and she issued statements asking those in control to allow the Bill to be debated, but this was not done. She then overturned a decision by the NRM to expel four MPs who were accused of going against the party, but that decision was overturned by a court who upheld the expulsions.²¹⁹ In December of 2012, the aforementioned author of the bill, David Bahati, had an interview where he discussed Western pressure to put the bill to rest in which he said:

If we suppose that homosexuality is a universal human right, then why do you think American people don't allow the practice of same sex marriage? If it is a universal human right, why don't they allow it? They have enough work to do in their countries. Let them sort that out [...] don't remind me that you took me as a slave. Don't remind me that you took our resources to enrich your countries. Don't tell me you're more superior than I am. You have funded us for over 50 years—have you changed anything? These activists are agents of imperialism and we're not going to take it easily. They are agents of colonialism. How can you continue to act like slave masters? The suggestion that Africa can only exist with America's help is wrong. Africa was here before you.²²⁰

In December of 2013 the Anti-Homosexuality Bill was passed by the parliament unanimously. Museveni suggested that the passing was rushed and said that he was not properly consulted beforehand. He did ultimately sign the bill on February 24, 2014²²¹, an act that one newspaper said, "united the country"²²², after a panel of Ugandan scientist produced a report that said, "there is no definitive gene responsible for homosexuality". The president used this to justify his signing of the bill, but the report also said that homosexuality exists in every society and is not a disease. Museveni agreed to sign the bill after an NRM party retreat in which he was also named the sole nominee for the party in the 2016 presidential election.²²³

In response to the signing of the bill, US president Obama made the following statement:

²¹⁸ Bompani and Valois, 60.

²¹⁹ Bompani and Valois, 60.

²²⁰ Rachel Adams, "I Spoke to the Author of Uganda's Anti-Homosexuality Bill," *Vice* (blog), December 13, 2012, https://www.vice.com/en_us/article/qbwak7/an-interview-with-the-author-of-ugandas-anti-homosexuality-bill.

²²¹ Bompani and Valois, "Sexualizing Politics," 62.

²²² Bompani and Valois, 61.

²²³ Bompani and Valois, 61.

The United States has consistently stood for the protection of fundamental freedoms and universal human rights. We believe that people everywhere should be treated equally, with dignity and respect, and that they should have the opportunity to reach their fullest potential no matter who they are or whom they love. That is why I am so deeply disappointed that Uganda will shortly enact legislation that would criminalize homosexuality. The Anti-Homosexuality Bill in Uganda, once law, will be more than an affront and a danger to the gay community in Uganda. It will be a step backward for all Ugandans and reflect poorly on Uganda's commitment to protecting the human rights of its people.²²⁴

The language used by Obama made opposition easier as McEwen notes. The use of the word "disappointed" alludes to Uganda as a childlike nation that needs guidance from the West. This is reflected in the rhetoric of Obama's interaction with Kenya's president Kenyatta in

McEwen points out that the idea that the US has been consistent on its human rights policy is easily portrayed as erroneous to people in Africa who are well aware of the US and other countries in the West's history of colonization and slavery of African people, as Bahanti pointed out in the above interview. McEwen also points out that the US has not been consistent on this issue as protections for sexual minorities are relatively new.²²⁵ Indeed, the administration that immediately preceded Obama's in the US, the Bush administration, did not support a non-binding United Nations General Assembly Declaration to end the criminalization of same-sex sexual practices.²²⁶ She also contends that groups from the US in particular are very influential in homophobic policies globally (covered later in the current piece).²²⁷

McEwen parallels the "agenda of saving gays" with the "saving women" campaign within the "war on terror". In this comparison, the West is portraying itself as protecting minorities from the "backwards" societies that they live within as a way to justify interference in sovereign nations. This depiction of the societies that these minorities live within reflects the "civilizing" of colonial societies in a way that is easily called upon by homophobic leaders as neocolonial.²²⁸

²²⁴ McEwen, "Transatlantic Knowledge Politics of Sexuality," 251–52.

²²⁵ McEwen, 252.

²²⁶ Audrey Comstock, "Gay Rights and U.S. Foreign Aid: A Look at Nigeria and Uganda," *International Relations, Peace and Development Studies* 2, no. 1 (2016): 6.

²²⁷ McEwen, "Transatlantic Knowledge Politics of Sexuality," 252.

²²⁸ McEwen, 252–53.

When ratifying the legislation, Museveni stated that these sexual minorities had “lost the argument in Uganda ... the outsiders cannot dictate to us. It’s our future and let them take their aid”.²²⁹ While many NRM members united in calling for an end to President Obama’s “bullying mentality”, a previously favorable view of Museveni by the West seems to have been waning, but this did not deter Museveni as he suggested that he could get support elsewhere:

Russia has worked in Africa since 1917, meaning they have been here for more than 100 years. I want to work with Russia because they don’t mix up their politics with other country’s politics ... I would like to discourage the USA government from taking the line that passing this law will ‘complicate our valued relationship’ with the USA.²³⁰

This statement fits Museveni into a larger pattern of leaders that seems to be disconnecting the idea of a liberal democracy from a strong economy, which will be discussed more in the following section of the current thesis.

Also in 2014, an editorial was published in the state owned newspaper that spoke to economic disconnection from the West, but also what McEwen warned about involving the West’s, here specifically the US’s, inconsistency in its human rights stance:

For many years, the media, civil society groups and opposition parties [in Uganda] have tried to draw the West’s attention to the excesses of the NRM ... It was insulting that the West that turned a blind eye to these grave concerns could become so vocal ... because the rights of a strange sexual minority were threatened ... The face of the economy today has been transformed from one of Western influence to a mainly Eastern character. Qatar Airways and Emirates Airlines are the main cargo freighters ... Well over 90% of vehicles in Uganda are Japanese. Most of the merchandise in shops are made in China. All the major road works now underway, like the modified Entebbe-Kampala highway and the forthcoming Kampala-Jinja highway are by Chinese construction firms ... Apart from US military aid ... the heavy side of the economy is now in the hands of the East Asians.²³¹

In August of 2014, the Anti-homosexuality Bill was overturned by a constitutional court. The decision was not made on substance, but because the quart found that there was a lack of quorum for the debate. Bahanti, Kadaga and other prominent members of the NRM heavily supported re-tabling the bill, but president Museveni recommended slow movement to the

²²⁹Quote taken with ellipsis from: Bompani and Valois, “Sexualizing Politics,” 62.

²³⁰ Quote taken with ellipsis from: Bompani and Valois, 62.

²³¹ Bompani and Valois, 63.

NRM again. Bompani and Valois use this analysis of the party-based politics around the NRM to demonstrate that the language used regarding same-sex sexual practices presents them as a threat to the nation and suggest that they require recruitment. This frames the debate as one of nationalism and sovereignty and reveals economic anxieties about postcolonial Uganda and the perception of Western intervention.²³²

Ugandan Political Actors and Limitations on Human Rights

Although the Ugandan penal code clearly prohibits SSSB, in 2005, the Constituent Assembly in Uganda amended the 1995 constitution to limit any discussion about same-sex marriage by stating “Marriage between persons of the same sex is prohibited.”²³³ Despite a mandate of the commission calling for a review from the people on its amendments, there was no consultation in regard to this change.²³⁴ In the same year, the state-owned newspaper encouraged authorities to “outlaw or restrict websites, magazine, newspapers and television channels promoting immorality – including homosexuality and lesbianism”.²³⁵ In 2007, the motivation for a change to the Equal Opportunities Commission which prevented it “from investigating matters which are regarded as immoral or unacceptable by the majority of the social and cultural groupings in Uganda” was revealed in the transcripts of the Parliamentary debate. The transcript said that the prevention was added to stop “the homosexuals and the like [who] have managed to forge their way through in other countries by identifying with minorities.”²³⁶

Although the Anti-Homosexuality Act was struck down in the courts on technical matters, the bill contained multiple limitations on the ability of those advocating for sexual rights for those who practice SSSB. The Acts objectives included: “to establish a comprehensive consolidated legislation to protect the traditional family by prohibiting (i) any form of sexual relations between persons of the same sex; and (ii) the promotion or recognition of such sexual

²³² Bompani and Valois, 63.

²³³ “Constitution of the Republic of Uganda” (1995), sec. Art. 31, 2(a).

²³⁴ Kareithi, “A Historical-Legal Analysis of Women to Woman Marriage in Kenya,” 248–51.

²³⁵ “Uganda: Treatment of Homosexuals by Society and Government Authorities; Legal Recourse and Protection Available to Homosexuals Who Have Been Subject to Ill-Treatment (2005-2006)” (Immigration and Refugee Board of Canada, February 23, 2007).

²³⁶ Bompani and Valois, “Sexualizing Politics,” 56.

relations.”²³⁷ Some of these objectives are met by the expansion of the relevant penal code by courts discussed further in the following section, but this act also extended the penalty for “aggravated homosexuality” to life imprisonment which is no longer present.²³⁸

Despite the chilling effect of prevalent homophobic rhetoric and the frequent raids of advocacy events, Ugandan sexual rights advocates continue to put themselves at risk by publicly speaking out. In 2012 Uganda held its first pride parade. Although it was held outside of the city of Kampala and it was broken up by the police, the event drew almost 100 people.²³⁹ The determination of these activist was tested after a 2016 police raid of a pre-pride party. Activist alleged that they were detained and many said that they were tortured and the pride event was canceled, but activist continue to openly push for these rights.²⁴⁰ The government continues to push back as SMUG alleges that police prohibited guest from the venue of celebration planed in 2019 for the International Day Against Homophobia, Biphobia, Intersexism and Transphobia.²⁴¹

Ugandan Courts and Limitations on Human Rights

Vigilante violence in Uganda’s culture of impunity is exemplified in private citizens’ response to the 2010 publication of a Ugandan tabloid, Rolling Stone, titled “Hang Them” which listed the photos, names, and addresses of 100 suspected sexual minorities. According to Human Rights First, following this publication, at least four of these individuals were attacked and many went into hiding.²⁴² This resulted in the case *Kasha Jacqueline, David Kato Kisule and Onziema Patience v Rolling Stone Ltd and Giles Muhame* (Rolling Stones case) in which the High Court of Uganda at Kampala ruled in the favor of those named in publication. The High Court said that

²³⁷ “Uganda Anti-Homosexuality Act 2014” (2014).

²³⁸ Uganda Anti-Homosexuality Act 2014.

²³⁹ Guma, *Resisting Or Reinforcing the Neoliberal Present?: The LGBT Struggle for Democratic Space in Uganda*, 28–29.

²⁴⁰ Tim Teeman, “The Brave Activists Fighting for LGBT Rights in Uganda,” *The Daily Beast*, August 18, 2016, sec. world, <https://www.thedailybeast.com/articles/2016/08/18/the-brave-activists-fighting-for-lgbt-rights-in-uganda>.

²⁴¹ “LGBTIQ Community In Uganda Pulls of Commemoration of IDAHOBIT 2019 Despite Uganda Police Intimidation Tactics – Sexual Minorities Uganda,” accessed December 2, 2019, <https://sexualminoritiesuganda.com/lgbtiq-community-in-uganda-pulls-of-commemoration-of-idahobit-2019-despite-uganda-police-intimidation-tactics/>.

²⁴² “Court Affirms Rights of Ugandan Gays,” Human Rights First, accessed November 10, 2019, <https://www.humanrightsfirst.org/2011/01/04/court-affirms-rights-of-ugandan-gays>.

the publication violated the applicants' rights to freedom from inhuman and degrading treatment and to privacy.²⁴³

This, taken with the early decision in *Victor Juliet Mukasa & Yvonne Oyoo v Attorney General*²⁴⁴ (Victor Mukasa case) in 2008 verified that even those who were alleged to have engaged in sexual acts with someone of the same sex retained their rights in Uganda. The Victor Mukasa case involved allegations of violations of the right to privacy, unlawful arrest and detention, unlawful search of the applicant's home, cruel, inhuman and degrading treatment, and the right to property. The applicants alleged that Ugandan police had forced themselves into the home of Mukasa while Oyoo was the sole occupant. The police looked through the home owners' files and CDs and took some of these items. They then took Oyoo, who they referred to as "this creature" into custody, forced her to remove her clothes and touched her claiming to be assessing her sex. In the groundbreaking decision, the Justice ruled in the applicants' favor citing both the Ugandan constitution as well as article one of Universal Declaration of Human Rights and article three of the Convention on the Elimination of all Forms of Violence Against Women, the first judgement of a Ugandan Court to refer to international law.²⁴⁵

Although the Justices in both cases rejected the portrayal of the cases as having to do with sexual rights, both were widely recognized as protecting the rights of sexual minorities.²⁴⁶ Both Victor Mukasa and David Kato (applicants in these cases) founded SMUG, the aforementioned Ugandan civil society organization. This organization began its work in 2004, the police forced themselves into Mukasa's house in 2005, and the press conference was in 2007, so the organization was well known by the time that the decision was given. Although the details of

²⁴³ Vincent Musoke, Kasha Jacqueline, David Kato Kisuule & Pepe Julian Onziema v The Rolling stone Newspaper & Giles Muhame (High Court of Uganda at Kampala December 30, 2010).

²⁴⁴ M.S. Arach-Amoko, *Victor Juliet Mukasa & Yvonne Oyoo v Attorney General*, No. 247/06 (High Court of Uganda at Kampala November 22, 2008).

²⁴⁵ Arach-Amoko.

²⁴⁶ Adrain Jjuuko, "Beyond Court Victories: Using Strategic Litigation to Stimulate Social Change in Favour of Lesbian, Gay and Bisexual Persons in Common Law Africa" (University of Pretoria, 2018), 38–39.

his death are unknown, in the same month that the Rolling Stones case was decided, David Kato was killed and many attribute his death to the publication and his activism.²⁴⁷

Despite these early successes, the freedom of those advocating for the rights of sexual minorities in Uganda has consistently been challenged by governing officials. This has included the refusal to register organizations, the shutdown of advocate skill training workshops, the shutdown of pride events, and the fining of media organizations who host advocates.²⁴⁸ The Anti-Homosexuality Bill contained a specific prohibition on promotion of same-sex sexual activities, but without that legislation, they are acting only on the Uganda Penal Code Act of 1950 (included above).²⁴⁹

Ugandan courts have held that the criminal code can be expanded to limit sexual rights advocacy. In 2014, the Ugandan High Court ruled that the shutdown of the training workshops by a minister was legitimate as these workshops were “promoting” and “inciting” same-sex sexual activity, so the penal code alone justified their shutdown. The decision acknowledged that this was limiting the applicants’ freedom of assembly, but said that this was within the limitations allowed stating:

In relation to the complaints by the applicants herein, their promotion of prohibited acts by the workshop organizers was unlawful, since such promotion in itself is prohibited by law as amounting to incitement and conspiracy to effect unlawful purposes. Since the applicants in the exercise of their rights acted in a manner prohibited by law, it was not a valid exercise of these rights. It was also prejudicial to public interest.²⁵⁰

In *Frank Mugisha, Dennis Wamala & Ssenfuka Warry Joanita v Uganda Registration Services Bureau*²⁵¹ (SMUG Registration case), SMUG brought a lawsuit against the Registration Services Bureau who refused to register the group because of their sexual rights advocacy. In this case,

²⁴⁷ Human Rights Watch | 350 Fifth Avenue, 34th Floor | New York, and NY 10118-3299 USA | t 1.212.290.4700, “Universal Periodic Review of Uganda,” Human Rights Watch, March 29, 2011, <https://www.hrw.org/news/2011/03/29/universal-periodic-review-uganda>.

²⁴⁸ Jjuuko, “Beyond Court Victories: Using Strategic Litigation to Stimulate Social Change in Favour of Lesbian, Gay and Bisexual Persons in Common Law Africa,” 189–92.

²⁴⁹ The Penal Code Act of 1950.

²⁵⁰ Stephen Musota, Kasha Jacqueline Nabagesera & 3 Others v The Attorney General and Hon. Rev. Fr. Simon Lokodo, No. 033 (High Court June 24, 2014).

²⁵¹ P. Basaza-Wasswa, Frank Mugisha, Dennis Wamala & Ssenfuka Warry Joanita v Uganda Registration Services Bureau, No. Misc. Cause No. 96 of 2016 (High Court of Uganda at Kampala June 27, 2018).

the Justice ruled that the denial of registration was justified. The judgement again acknowledged that this was an interference, but that the limitation was justified based on morals. Importantly, the Justice said that he disagreed with the statement that, “the scope of sec. 145 of the PCA [Penal Code Act] is narrower than ‘gayism’ and that one has to commit an act prohibited under that section in order to be regarded as criminal” as found in the Rolling Stone case.²⁵²

This indicates that Uganda has entered the later stages of what Ferrara considers “indigenous unreasonability”.²⁵³ The judiciary, not being subject to elections, should be the last institutions to be affected by populism.²⁵⁴ Ugandan courts seem to be willing to limit the rights of sexual minorities to participate in the public debate. They are no longer able to advocate for themselves as the law is now being interpreted to limit, not only same-sex sexual acts, but the assembly, association, and expression necessary to advocate for changes in these laws as these groups are contrary to the one true “common good”.

Populist Unreasonability in Kenya

Kenyan Rhetoric Among Political and Religious Leaders and the Culture of Impunity

The contestation over the remembering of pre-colonial same-sex practices in Kenya is exemplified in the battle over indigenous same-sex marriage practices. These same-sex marriages continue to be practiced today. Although these marriages in many areas are not sexual in nature²⁵⁵ and are not based on romantic ties, they are protested by religious leaders in a paradox that exposes the cracks in those leaders belief in a homophobic traditional Kenyan culture.

²⁵² Basaza-Wasswa.

²⁵³ Ferrara, “Can Political Liberalism Help Us Rescue ‘the People’ from Populism?,” 467.

²⁵⁴ Ferrara, 471.

²⁵⁵ As cited previously, romantic marriages between trans women and men have been found to exist in pre-colonial Kenyan culture (Ibrahim, “LGBT Rights in Africa and the Discursive Role of International Human Rights Law,” 268–69.)

Monicah Kareithi's legal analysis of women-to-women marriage in Kenya demonstrates a contestation between cultural marriages and colonial forces citing colonial-era judges' decisions to show their disdain for customary practices, which sometimes included women-to-women marriages.²⁵⁶ This was based in the colonizers general distain for African culture and its deviation from their own. African marriages often contained elements that were not present in Western culture such as, polygamy and child marriages, and were sometimes based on enhancement of kinship ties with the clan, the legitimacy of children and their kinship, retention of wealth and economic empowerment, and fostering freedom and independence.²⁵⁷

Women-to-women marriages are named, in the at least five communities that have the practice in Kenya, in pre-colonial languages as marriages. They do not simply imply a formalized union, but a customary marriage as such. Kareithi cites examples of these forms of marriage:

[A]mong the Nandi, woman-to-woman marriage is referred to as Kitum Chi tolah. [...] The term is used when a woman, who has no sons and is past child-bearing age, marries another woman for the purpose of bearing male children. Amongst the Luo, woman-to-woman marriage is referred to as Chi Mwandu, where Chi translates to the word 'wife' and mwandu translates to mean 'property' of the clan. Chi mwandu, thus, translates to 'the wife of our property', symbolising a recognition that that the widow belongs to the clan of her husband but the wife of the widow belongs to the widow and her clan.²⁵⁸

While this is a marriage, it may have nothing to do with romance or companionship as is prominent in the definition of marriage in the West.²⁵⁹

Kenya has recognized these customary marriages as their constitution allows room for customary laws but has also explicitly clarified that "every adult has the right to marry a person of the opposite sex" in their 2010 constitution²⁶⁰ as well as in the Marriage Act 2014.²⁶¹ The Marriage Act makes it clear that not all customary marriages will be recognized, but does not explicitly name same-sex customary marriages.²⁶² The recognition of customary law took a big

²⁵⁶ Kareithi, "A Historical-Legal Analysis of Women to Woman Marriage in Kenya," 86–87.

²⁵⁷ Kareithi, 2–4.

²⁵⁸ Kareithi, 2–3.

²⁵⁹ Kareithi, 2–3.

²⁶⁰ "Constitution of Kenya, 2010" (n.d.), Art. 45 (2).

²⁶¹ "Kenya Marriage Act 2014" (2014), Art. 29 (2).

²⁶² Kareithi, "A Historical-Legal Analysis of Women to Woman Marriage in Kenya," 227–30.

hit from colonial era regulation²⁶³ and is under attack again as Kenya participates in the global discussion on same-sex sexual activity.

The contestation between the colonizing forces and their differentiation on the definition of marriage is reset on a global stage as the current conflict is informed by the global battle over the meaning of marriage. In this battle, the West increasingly defines marriage as a romantic bond for the purposes of companionship, while many African cultures define marriage as a passage of kinship and lineage.²⁶⁴ Despite Kareithi's claim that these marriages should be protected as they are part of customary law and are not romantic in nature, the legitimacy of these marriages is contested as they have been mischaracterized by the West and by religious leaders within Kenya, praising them or condemning them for their relation to Western same-sex marriage.²⁶⁵

This demonstrates that, much like the history of Mwanga, Kenyan's framing of culture and historical practices is heavily influenced by political portrayals of same-sex sexual activity, even when it does not necessarily exist. The attack on these practices from religious leaders within Kenya, although they are not all in agreement, creates a conflict with the idea that same-sex sexual relations are "un-African". Even if these marriages are in no way romantic or sexual in nature, Kenyan leaders who advise that they be prohibited suggest that they believe otherwise meaning that they themselves do not seem to agree that SSSB doesn't fit into pre-colonial traditions.

Kenya has its share of religious and political leaders who identify SSSB as "un-African" and are more than willing to vilify it. A famous example of this occurred in 2017 when a photographer captured two male lions seeming to be engaged in sexual acts with each other. In response Ezekial Mutua, the chief executive of the Kenya Film Classification Board suggested:

²⁶³ Kareithi, 10.

²⁶⁴ Kareithi, 28–30.

²⁶⁵ Kareithi, 270–72.

These animals need counselling, because probably they have been influenced by gays who have gone to the national parks and behaved badly. I don't know, they must have copied it somewhere or it is demonic. Because these animals do not watch movies.²⁶⁶

Kenyan Presidents, in contrast, seem less eager to vilify the practice, even as they do not protect the rights of those who practice RPSSSB. In July 2015, US President Obama held a joint press conference with Kenyan President Uhuru Kenyatta. President Obama was asked by a correspondent to address Kenya's criminalization of SSSB. Obama made the point that the law was discriminatory and made some people unequal under the law. President Kenyatta responded:

Just like President Obama, I think we also need to be able to speak frankly about some of these things. And the fact of the matter is that Kenya and the United States, we share so many values—our common love for democracy, entrepreneurship, value for families. These are things that we share. But there are some things that we must admit we don't share—our culture, our societies don't accept. It is very difficult for us to be able to impose on people that which they themselves do not accept. ---- This is why I repeatedly say that, for Kenyans today, the issue of gay rights is really a non-issue.²⁶⁷

Although President Kenyatta's remarks seem to erase SSSB from Kenya's political sphere these comments are more dismissive than condemning. Kaoma surveys the headlines of African newspaper responses to the encounter demonstrating that it was portrayed by some as an act of courage. For example, one read "Uhuru Kenyatta dismisses gays rights as a non-issue in Kenya," and another, "Kenyatta dares Obama: Homosexuality is not part of our Culture." Kaoma suggest that these statements are presented "within the postcolonial predisposition [in an] attempt to represent, limit and legitimate a political identity"²⁶⁸

Despite the claim that SSSB is a "non-issue" Kenya has a culture of impunity as exemplified in early 2010 after religious leaders from the Council of Imams and the National Council of Churches of Kenya demanded investigations into the Kenya Medical Research Institute (KEMRI). These religious leaders suggested that this institute was providing counselling to people who were engaged in SSSB. The day after the news conference in which the demands were made,

²⁶⁶ Jeff Farrell, "Kenyan Official Says Male Lions Who Had Sex 'Must Have Seen Gay Men Behaving Badly' and Should Be Separated," *The Independent*, November 3, 2017, <https://www.independent.co.uk/news/world/africa/gay-lions-sex-kenya-photos-men-inspired-need-therapy-says-official-a8036016.html>.

²⁶⁷ Kaoma, *Christianity, Globalization, and Protective Homophobia*, 129–30.

²⁶⁸ Kaoma, 130–31.

200 to 300 people, some of whom were armed, gathered outside the KEMRI health center. The people who gathered beat one man as he approached the health center. This individual was arrested to prevent further attack.²⁶⁹

Arrest were also made of individuals who worked at the center after a leader of the people who gathered accused them of homosexuality. Police also forcibly entered the home of and arrested another man who the same leader accused of SSSB. Over the following few days, groups beat at least three more men who they accused of the same behavior and one of these victims was arrested. The official reason for the arrest, was to protect the victims, but some local news reports suggested that the men were asked to complete anal examinations²⁷⁰ to determine if they had allowed another man to have “carnal knowledge” of them. None of the individuals who instigated these attacks were arrested.²⁷¹

Kenyan Political Actors and Limitations on Human Rights

We can see the global pressure on Kenya to include protections for sexual minorities in its 2010 constitution in a quote from Otiende Amollo, a member of the Committee of Experts in Kenya:

On several occasions, some British MPs have approached us on the gay matter. They wanted us to include homosexuals and lesbian rights in the draft. But we have told them that such a thing cannot happen because if we did so, a majority of Kenyans will reject the draft during the forthcoming referendum.²⁷²

²⁶⁹ Human Rights Watch | 350 Fifth Avenue, 34th Floor | New York, and NY 10118-3299 USA | t 1.212.290.4700, “Kenya: Halt Anti-Gay Campaign,” Human Rights Watch, February 17, 2010, <https://www.hrw.org/news/2010/02/17/kenya-halt-anti-gay-campaign>.

²⁷⁰ The accuracy of these examinations as well as the human rights implications are heavily criticized in the international community, see generally: Cody Cichowitz, Leonard Rubenstein, and Chris Beyrer, “Forced Anal Examinations to Ascertain Sexual Orientation and Sexual Behavior: An Abusive and Medically Unsound Practice,” *PLOS Medicine* 15, no. 3 (March 16, 2018): e1002536; International Forensic Expert Group, “Statement on Anal Examinations in Cases of Alleged Homosexuality,” *Torture: Quarterly Journal on Rehabilitation of Torture Victims and Prevention of Torture* 26, no. 2 (2016): 85–91; Human Rights Watch | 350 Fifth Avenue, 34th Floor | New York, and NY 10118-3299 USA | t 1.212.290.4700, “Dignity Debased | Forced Anal Examinations in Homosexuality Prosecutions,” Human Rights Watch, July 12, 2016, <https://www.hrw.org/report/2016/07/12/dignity-debased/forced-anal-examinations-homosexuality-prosecutions>.

²⁷¹ Avenue, York, and t 1.212.290.4700, “Kenya.”

²⁷² Kareithi, “A Historical-Legal Analysis of Women to Woman Marriage in Kenya,” 252.

Amollo, said that the committee received a memorandum containing 5,000 signatures from various religious groups who said that they would turn down any proposed constitution if it included rights for those who practice same-sex sexual practices.²⁷³

The Kenyan constitution was passed through popular referendum, but the majority of citizens didn't seem to have a say on this matter as the committee trusted the voice of these religious groups as the "true" people. The aforementioned 2017 ILGA survey found that when asked if being LGBT should be a crime only 46 percent of respondents in Kenya said they strongly or somewhat agreed. This may have been different when the constitution passed the referendum, but it may also be the case that the instance on the exclusion of rights for those who practice SSSB was felt strongly by a particularly vocal portion of the Kenyan population who had the final say.

The Kenyan Film Classification Board under Mutua is a major threat to the Freedom of Expression for those who promote the rights of people who practice SSSB. Mutua has banned television programs and the movie "Rafiki" (discussed further below) based on their distribution of "content glorifying homosexual behavior." Some of the television programs were children's cartoons that originally aired in the US which Mutua contended "target vulnerable children with subtle messages that are deliberately designed to corrupt their moral judgement regarding the institution of family"²⁷⁴

Kenyan Courts and Limitations on Human Rights

While some Kenyan politicians seem to be using a similar political strategy to those in Uganda, their courts are much more likely to find that sexual minorities retain rights even as the prohibition of same-sex sexual activity is upheld. In May 2019 the court decided the case of *EG & 7 others v Attorney General*²⁷⁵ in which is stated that the penal code "the language of section

²⁷³ Kareithi, 253.

²⁷⁴ Ezekiel Mutua, "Statement on Children Television Programs Promoting Homosexuality in Kenya" (Kenya Film Classification Board, June 15, 2017).

²⁷⁵ Roselyne Aburili, *EG & 7 others v Attorney General; DKM & 9 others* (High Court of Kenya at Nairobi May 24, 2019).

162 is clear. It uses the words ‘Any person.’ A natural and literal construction of these words leaves us with no doubt that the section does not target any particular group of persons.”²⁷⁶

Although the applicants made it clear that they were not seeking to affect marriage laws, the court found that decriminalization would “open the door” to same-sex marriage which is explicitly limited to opposite sex couples in the constitution.²⁷⁷ The case defines their responsibility to respond to public opinion:

where the will of the people is expressed in the Constitution, it represents societal values, which must always be a factor in considering constitutional validity of a particular enactment where such legislation seeks to regulate conduct, private or public. In our case, those views were clearly expressed in Article 45(2).²⁷⁸

With regard to freedom of association however, the court in *Eric Gatari v Non-Governmental Organizations Coordination Board and 4 others*, recognized that the penal code criminalizes the act not the person. In a decision that well demonstrates the spirit of freedom of association, the court held:

The constitution and the right to associate are not selective. The right to associate is a right that is guaranteed to and applies to everyone [...] if only people with views that are popular are allowed to associate with others, the room within which to have a rich dialogue and disagree with government and other in society would be thereby limited”.²⁷⁹

In a somewhat hopeful demonstration of the court’s protection of freedom of expression, the High Court of Kenya at Nairobi temporarily overturned a Kenyan Film Classification Board ban on the film “Rafiki” which depicted a romantic relationship between two Kenyan women. The films had received praise in countries where it was available for viewing and the creators hoped to submit the film to the for an US film award (the Oscars in the category of Best Foreign Language Film). To be eligible for submission, however, the film had to have been available for viewing in its country of origin for seven days.²⁸⁰

²⁷⁶ Aburili.

²⁷⁷ Constitution of Kenya, 2010, sec. Art. 45 (2).

²⁷⁸ Aburili, EG & 7 others v Attorney General; DKM & 9 others.

²⁷⁹ Lenaola, Eric Gitari v Non-Governmental Organizations Co-Ordination Board & 4 Others.

²⁸⁰ Kahiu v Mutua, No. Petition No. 313 of 2018 (High Court of Kenya at Nairobi September 21, 2018).

In the decision of *Kahiu v Mutua* the court decided to lift the ban for the time necessary for the film to be considered for the award. The decision stated, “the importance of the rights and freedom of expression in a democratic state such as ours cannot be gainsaid or taken for granted”. Even as the justice seemed to disagree with the banning of the film stating that he was “not convinced that Kenya is such a weak society whose moral foundation will be shaken by simply watching a film depicting gay theme” the ban was not permanently removed.²⁸¹ The decisions in Kenya demonstrate that the issue is still debatable, and the court is willing to make the space for that debate even if governmental officials want to close it.

Comparison

At first glance, these systems don’t seem all that different. Both inherited a penal code that from the same colonial power which criminalize in the exact same way. The constitutions in both states include an explicit prohibition of same-sex marriage, which were added in the after colonial control. While Uganda enacted the Anti-homosexuality bill which would have severely impeded on the human rights of those who practice or are perceived to practice SSSB, but it was very short lived and has not been active for five years.

It is difficult to assess the level of “indigenous unreasonability”²⁸² because we have to try to discern a few political actors who are willing use populist, homophobic rhetoric at the expense of a minority from a system that is now relying only on political adversaries questioning each others legitimacy the represent the true people. Both Kenya and Uganda have political actors who are using this rhetoric to attack RPSSSB, but, based on the political sentiment assessed here, there seems to be more willing ness on the part of Ugandan officials to question political adversaries and their alliances (for example suggesting that members have become morally corrupt when they did not table the Anti-Homosexuality Bill).²⁸³ The lived experiences of those who practice RPSSSB is also difficult to assess, but Kenya does host many Ugandan self-identifying LGBT refugees suggesting that the situation is better although the treatment of

²⁸¹ *Kahiu v Mutua*.

²⁸² Ferrara, “Can Political Liberalism Help Us Rescue ‘the People’ from Populism?,” 471.

²⁸³ Bompani and Valois, “Sexualizing Politics,” 60.

these refugees is often questionable.²⁸⁴ There is hope in both countries, however, as advocates continue to fight even as their rights are removed.

Another possible measurement of “indigenous unreasonability”²⁸⁵ is to try to assess if it has spread to the courts. According to Ferrara, the is most often the last branch that is effected because they are the least answerable to the people and stand the least to gain by exploiting unpopular groups.²⁸⁶ In both states, the courts have ruled to protect the rights of those who practice or are perceived to practice SSSB and have also produce judgements that remove these rights. The biggest difference is that Kenyan courts seem more determined to protect the speech, association, and assembly of those advocating for sexual rights than those in Uganda who have expanded the criminalization of those who practice SSSB to include infringement on these other rights.

Flaws in Western Rights Advocacy

Western organizations and governments who advocate for the rights of people who participate in same-sex sexual activity within sub-Saharan Africa, even when they are well intentioned, sometimes echo the same colonial-era ideas that Africans need saving from themselves. Advocates attempt to bring attention to these groups by presenting the most violent cases of rights abuse against these sexual minorities. This mischaracterizing of the African experience oversimplifies this struggle for rights and portrays Africa as a violent, dangerous, lawless and irrational continent where sexual minorities as communities are incapable of advocating for themselves without being saved by the West.

Ryan Thoreson in “Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex (LGBTQI) Rights in Sub-Saharan Africa” explains that the portrayal of sub-Saharan Africa as a particularly hostile place for sexual minorities, is a monolith that does not reflect the various experiences in the region, public opinion of these minorities, or acknowledge the successes of regional and

²⁸⁴ “U.N. Urges Calm after Protests by LGBT+ Refugees in Kenya Turn Violent,” *Reuters*, May 16, 2019, <https://www.reuters.com/article/us-kenya-lgbt-refugees-idUSKCN1SM1CC>.

²⁸⁵ Ferrara, “Can Political Liberalism Help Us Rescue ‘the People’ from Populism?,” 471.

²⁸⁶ Ferrara, 471.

national advocates for these rights.²⁸⁷ Thoreson cites the aforementioned 2016 RIWI ILGA Report²⁸⁸ and the Afrobarometer Dispatch Report²⁸⁹ to demonstrate that sub-Saharan Africa itself is somewhat conflicted about sexual minorities and cannot be painted with a broad homophobic brush.

Thoreson suggests that Western advocacy tends to focus exclusively on the criminalization of same-sex sexual activities while there are several victories won by regional and national groups that get overlooked. He utilizes examples such as Uganda where courts have found practicing same-sex sexual activity does not remove your rights to liberty, dignity, and privacy under domestic and international law. It also shows that decisions of High Courts in both Botswana and Kenya that allowed sexual rights advocacy groups to be registered as an association, among others, to demonstrate that national advocates are making headway in states even where same-sex sexual activity is criminalized.²⁹⁰

Hakan Seckinelgin in “Same-Sex Lives Between the Language of International LGBT Rights, International Aid, and Anti-Homosexuality” also suggests that the West simplifies, homogenizes, and essentializes sub-Saharan African same-sex sexual practices in a way that portrays these minorities as “passive communities of need, whose rights need to be delivered while negating the agency of the local actors”.²⁹¹ Seckinelgin argues that the Western strategy is dangerous because it does not differentiate enough between the experiences of sexual minorities in the West, and those in sub-Saharan Africa.²⁹² The “LGBT” framework of the West creates its own definition of what it is to be within these sexual minority groups and this definition is not always embraced by sexual minorities within sub-Saharan Africa.²⁹³

²⁸⁷ Thoreson, *Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex (LGBTQI) Rights and Sub-Saharan Africa*, 1:5.

²⁸⁸ “The ILGA-RIWI 2016 Global Attitudes Survey on LGBTI People in Partnership with LOGO.”

²⁸⁹ “Afrobarometer Round 6: Good Neighbours? Africans Express High Levels of Tolerance for Many, but Not for All.”

²⁹⁰ Thoreson, *Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex (LGBTQI) Rights and Sub-Saharan Africa*, 1:5–6.

²⁹¹ Hakan Seckinelgin, “Same-Sex Lives between the Language of International LGBT Rights, International Aid, and Anti-Homosexuality,” *Global Social Policy* 18, no. 3 (December 2018): 286.

²⁹² Seckinelgin, 285–87.

²⁹³ Seckinelgin, 297.

To demonstrate the exclusion of sub-Saharan African sexual minority voices, Seckinelgin utilizes the response of 52 African sexual rights organizations and 85 individual activists to the UK government's threats to condition foreign aid on sexual rights. These organizations and activist signed the "The Statement on British Aid Cut' Threats to African Countries that Violate LGBTI Rights" which condemned the cuts. The statement said that the cuts:

"[disregard] the role of the LGBTI and broader social justice movement [...] and [create] the real risk of a serious backlash against LGBTI people [...] are] coercive and reinforce the disproportionate power dynamics between donor communities and recipients [...] emphasize] the idea that LGBTI rights are special rights and hierarchically more important than other rights [...] [support] the commonly held notion that homosexuality is "unAfrican" and a Western-sponsored idea [...] LGBTI people are part of the social fabric, and thus part of the population that benefit from the funding."²⁹⁴

This statement highlights that the Western framework forces the "LBGT" identity to be central to these minorities in an impossible way as it would force out their identities as Africans in need of aid.²⁹⁵

Bond also calls for a more inclusive framing within the fight for sexual rights for those who practice same-sex sexual activities in sub-Saharan Africa. Bond explains that the rigid categories of "LBGT" that have been successful in the West, fail to represent these minorities in this region as many do not claim these identities. The centrality of heterosexual marriage in many communities within the region, and its contribution to procreation and the perpetuation of kinship ties mean that people are more likely to practice same-sex sexual activities while in a heterosexual marriage. This extramarital activity does not challenge the structure of heterosexual marriage and citizens are still able to fulfill their duties to be fathers and mothers within their communities.²⁹⁶

As Barbra Bompani and Caroline Valois point out in their work titled "Sexualizing Politics: The Anti-Homosexuality Bill, Party-Politics and the New Political Dispensation in Uganda", sexual identity may be constructed in relation to reproduction, so while same-sex sexual practices may

²⁹⁴ Seckinelgin, 295–96.

²⁹⁵ Seckinelgin, 297.

²⁹⁶ Bond, "Gender and Non-Normative Sex in Sub-Saharan Africa," 69, 108–10.

be taking place, they exist “more as a private act, rather than a public identity”.²⁹⁷ This could result in more acceptance of same-sex sexual activities than it may appear from the outside as Marc Epprecht explains:

Many countries in Africa appear to have a de facto culture of tolerance (or indifference) to same-sex sexuality that amounts to freedom from discrimination, notwithstanding sometimes harsh laws and elite homophobic rhetoric [. ...] [T]he key proviso is that non-normative sexuality not be named as such, but take place under the umbrella of hetero-patriarchal constructions of family, faith, and African identity – don’t ask, don’t tell, in other words.²⁹⁸

A more intersectional approach that does not force the “LGBT” identity which sub-Saharan Africans may see as conflicting with their identities as wives/husbands/mothers/fathers in heterosexual marriages may be more appropriate for advocacy in this region.²⁹⁹

Kahn-Fogel suggest that queer theory has already critiqued the “essentialist basis for the homosexual identity”.³⁰⁰ Michel Foucault, whose work is central to queer theory, suggest that one’s sexual practices were not always a fundamental marker of their identity. One could practice same-sex sexual activity as “isolated transgressions” that anyone could take part in without changing their identity.³⁰¹ Over time, Western culture transformed these acts into an identity and the homosexual into a “species”. Returning to a view that detaches sexual practices from fundamental identities may better reflect the way that sexual minorities in sub-Saharan Africa view themselves.³⁰²

The issue here is that the model the West used to enhance rights for these minorities relies on homosexuality as an immutable characteristic. Western success in the courtroom often involves claims of personal autonomy, non-discrimination, privacy, and equality which are much more

²⁹⁷ Bompani and Valois, “Sexualizing Politics,” 54–55.

²⁹⁸ Quote taken with ellipses from: Chanika, Lwanda, and Muula, “Gender, Gays and Gain: The Sexualised Politics of Donor Aid in Malawi,” 91–92.

²⁹⁹ Bond, “Gender and Non-Normative Sex in Sub-Saharan Africa,” 88–89.

³⁰⁰ Seckinelgin, “Same-Sex Lives between the Language of International LGBT Rights, International Aid, and Anti-Homosexuality,” 15–16.

³⁰¹ Foucault, *The History of Sexuality*.

³⁰² Seckinelgin, “Same-Sex Lives between the Language of International LGBT Rights, International Aid, and Anti-Homosexuality,” 15–16.

persuasive when the court sees a trait as immutable.³⁰³ If we view SSSB as a product of society that is not essential to one's identity it falls much more easily into a behavior that is within the preview of governmental regulation.³⁰⁴

This may further the lack of success in African courts as African constitutions tend to give more credence to community rights. These constitutions are more likely to allow for limitations on individual rights as reflect more communitarian view overall in Africa. The African Charter on Human and Peoples' Rights reflects the constrictions of the ratifying states in that it contains many of the rights that we see in liberal constitutions around the world, but does not include a right protecting the privacy of the home or family and is accompanied by a statement of duties which include to:

“preserve the harmonious development of the family”; “[t]o serve [the] national community by placing both physical and intellectual abilities at its service”; “... [t]o preserve and strengthen social and national solidarity”; “[t]o preserve and strengthen positive African cultural values ... and, in general, to contribute to the promotion of the moral wellbeing of society”; to “contribute to the best of [one's] abilities ... to the promotion and achievement of African unity;” and to exercise all rights with due regard for “morality and common interest”³⁰⁵

The Charter also declares that “[t]he promotion and protection of traditional values recognized by the community shall be the duty of the State”.³⁰⁶

The centrality of reproduction, perpetuation of kinship ties, and, in many African cultures, the fact that adulthood is gained through fatherhood or motherhood³⁰⁷, moves sexual rights into a place more open to critique. Furthermore, Africans are more likely to expand their notions of “family” to include people outside of their immediate family than people in the West.³⁰⁸ Reproduction is how you gain worth within one's self, one's broader family, and one's

³⁰³ Kahn-Fogel, “African Law and the Rights of Sexual Minorities: Western Universalism and African Resistance,” 5–9.

³⁰⁴ Kahn-Fogel, 9.

³⁰⁵ “African Charter on Human and Peoples Rights,” June 27, 1981.

³⁰⁶ Kahn-Fogel, “African Law and the Rights of Sexual Minorities: Western Universalism and African Resistance,” 10.

³⁰⁷ Kaoma, *Christianity, Globalization, and Protective Homophobia*, Preface vii.

³⁰⁸ Kaoma, 88.

community. As Kaoma explains, “[i]n this worldview, the sexual transcends individual rights – it is planted in community rights and obligations”.³⁰⁹

The disjunction between the Western and international focus on individual rights as compared to the African state constitutions and African Charter’s primacy of group rights provides more salience to the idea that the fight for sexual rights for these minorities is foreign. According to Seckinelgin, coming out as a sexual minority, as is necessary in this individual rights framework, in Africa can be the equivalent of becoming part of the international “LGBT” community at the expense of being part of the local community. As politicians portray these minorities as threats to the national community that is “un-African” coming out becomes an impossible choice between being “LGBT” or being African.³¹⁰

The divergence between the Western and sub-Saharan African ideas of family, community, marriage, reproduction, and nation mean that a simple copying and pasting of Western sexual rights advocacy strategies into the sub-Saharan African system is problematic. Western advocates working within the region should, therefore, work with national and regional advocates. Sub-Saharan African advocates best understand their own experiences and the systems within which they operate. Forcing identities and frameworks on sexual minorities within this region may be more damaging than good for the minorities involved who must be seen as people with complex identities working within complex systems.

Furthermore, sensationalizing the violence of the sub-Saharan African sexual minority experience may be useful to gain international attention, but it also plays into an overarching theme of Africa as a lawless place of violence that is reminiscent of colonial tropes. In this framing, aggressive action from the West is justified, but it risks moving the fight exclusively to an international arena that often does not allow for participation from local advocates and reeks of the “noble savage” frame where the West must save Africans from themselves. There are places where international advocacy can be applied, but it must be strategic and

³⁰⁹ Kaoma, Preface viii.

³¹⁰ Seckinelgin, “Same-Sex Lives between the Language of International LGBT Rights, International Aid, and Anti-Homosexuality,” 297.

acknowledge the progress being made by regional and national advocates who are often well established. Although homophobia is well established in many of these communities, it doesn't have as much of a hold as nationalistic, homophobic political actors portray and this allows for some space for local advocates to change hearts and minds that may not be hindered by strong Western intervention.

Globalizing the Battle³¹¹

Much of the language that the nationalist and regionalist African leaders use is heavily influenced by their own participation in global politics. A study of civil society organizations that are advocating for sexual orientation and gender identity minorities in Kyrgyzstan, Indonesia, Kenya, and Hungary found that, despite the divergence in cultural history in all four countries, nationalistic rhetoric that scapegoats SSSB as foreign aided in closing the space for these civil society organizations. This "resurgent nationalism" is anti-globalism as all of these nations seek to "preserve national identity and culture" by returning to "traditional values", denouncing any portrayal of gender as non-binary and holding up "heterosexuality as emblems of national pride".³¹² This rhetoric is influenced by US Christian Right groups which ally with African religious leaders and politicians as they work together to influence public opinion and policy in Africa and throughout the world.³¹³

According to McEwen, the fight over the population growth of undesirable minority groups and equality for women and sexual minorities in the US has been controversial for over a century. Powerful people in the US split on this issue and fight to influence the rest of the globe. This expanded globally in opposition of a redefinition of the heterosexual nuclear family in the 1994 Cairo International Conference on Population and Development and the 1995 Beijing World

³¹¹ Jesse Brimmer, "Will the Real African Please Stand Up, Will the Real Neocolonial Force Please Shut up: Activism, Race and Western Influence on African SOGI Minority Rights" (Final Paper, Critical Race Theory, Central European University, 2019).

³¹² "The Perfect Storm: Closing Space for LGBT Civil Society in Kenya, Indonesia, Hungary and Kyrgyzstan," 9.

³¹³ McEwen, "Transatlantic Knowledge Politics of Sexuality," 240.

Conference on Women. The US Christian Right has now supported and influenced dozens of “pro-family” homophobic legislative moves throughout Africa.³¹⁴

Gaudio also identifies a 1990 split in the US Anglican church as particularly influential in African bishops’ strong stance on homosexuality. Conservative factions within the US opposed the more progressive factions’ proposal to recognize same-sex marriages and ordain gay and lesbian Bishops. Most African bishops sided with the conservative factions of the US and made strong proclamations against same-sex practices following the split which has expanded vastly into the current time.³¹⁵

Kaoma explains how US Christian Right leader Schott Lively heavily influenced the Ugandan Anti-Homosexuality Bill 2009 as he spread the idea of the gays’ global “agenda” to destroy the family. Lively claimed that legalizing homosexuality is the same as legalizing the “molestation of children or having sex with animals”.³¹⁶ A week after Lively made these claims in a conference which was attended by many high-profile religious and political leaders, the “strategic meeting on combating homosexuality” was held and the idea for the bill was produced. According to one participant:

The man of God [Scott Lively] told us about [...] a movement behind the promotion of homosexuality and it is called gay movement. Me, I had never heard of that. But I got to know that there is a force behind homosexuality which we need to tackle with force. He also told us that these people who are behind this [...] evil, they have all resources that they need [...] to spread this evil. [In] Africa, Uganda in particular [...] it is [...] easy for the young generation to get attracted into this evil.³¹⁷

In addition to a global ideological fight involving gender and the “traditional family” the global fight over sexual rights fits into a broader fight over the value of liberal democracy and a disconnection between the liberal system and a strong economy. In “The end of the Democratic Century”, authors Yascha Mounk and Roberto Stefan Foa show that the success of the West in the world’s economy and in the war in the twentieth century brought about the spread of liberal idealism in former autocratic countries. Important to this spread was the idea that

³¹⁴ McEwen, 240–44.

³¹⁵ Gaudio, “TRANS-SAHARAN TRADE,” 320.

³¹⁶ Kaoma, *Christianity, Globalization, and Protective Homophobia*, 60.

³¹⁷ Kaoma, 61.

accepting a liberal system would enhance a state's economy.³¹⁸ As liberal democracies decrease the pace of their advancement in living standards and the separation in GDP between these countries and those who are not liberal decreases, citizens may be coming to the conclusion that economic success is not tied to liberalism and this may lead to them being more acceptable of authoritarian populist leaders.³¹⁹

Furthermore, the soft powers to influence through "academia, popular culture, foreign investment, and development aid" are becoming more controlled by wealthy authoritarian regimes.³²⁰ This sentiment is echoed in Marc Plattner's "liberal Democracy's Fading Allure" who suggest that authoritarian regimes have long wanted to separate the ideas of economic success and democracy and the economic crisis of 2008 provided the platform on which they could do so.³²¹ The relative success of authoritarian regimes such as China, Russia, and Saudi Arabia made authoritarianism attractive to The Global South as well as some established democracies such as Hungary where Prime Minister Orbán openly criticizes liberal democracies suggesting, "liberal democrac[ies] will probably be incapable of maintaining their global competitiveness". According to Orbán, This is a race for the best "method of community organization" that is capable of "making a nation and a community internationally competitive".³²²

The Western G-7 countries were willing to push for liberal democracy on a global scale and they experienced the largest downfall in the 2008 crisis. The rising economic importance of countries outside of the G-7 brought about the increased importance of the G-20, which includes several democracies, but also increases the influence of Russia, China, and Saudi Arabia. Newer democracies are less likely to denounce these authoritarian forms of government, even if they enjoy a democratic system.³²³ The citizens of many countries do not separate liberal democracy

³¹⁸ Yascha Mounk and Roberto Foa, "The End of the Democratic Century Auocracy's Global Ascendance," *Foreign Affairs*, June 2018, 29.

³¹⁹ Mounk and Foa, 30.

³²⁰ Mounk and Foa, 33–34.

³²¹ Marc F. Plattner, "Liberal Democracy's Fading Allure," *Journal of Democracy* 28, no. 4 (2017): 9.

³²² Plattner, 10.

³²³ Plattner, 11–12.

from the West, which is problematic in countries where the West has exercised illegitimate control in the past or committed human rights violations.³²⁴

We can see the waning influence of the West in the aforementioned statement from Ugandan President Museveni in which he suggests that he would rather receive aid from Russia as they do not interfere with national policy. Bompani and Valois connect the prevalence of the homosexuality debate to the increase in alternative non-Western donors. When options for funding present themselves that are not conditioned on human rights, the debate is openly hashed out in the Global South who has always had a weariness about interference from the West.³²⁵

In “Gender as ‘Ebola from Brussels’: the Anticolonial Frame and the Rise of Illiberal Populism”, authors Elzbieta Korolczuk and Agnieszka Graff demonstrate the unifying message of anti-Westernism. These authors also describe the global movement away from human rights, toward conservatism, and an open disdain of neoliberalism and globalization as a result of the 2008 financial crisis.³²⁶ They describe this movement as a transnational right-wing movement that combines many working parts such as same-sex marriage opposition, anti-feminism, an attack on gender studies, reproductive health and justice ext. The right-wing has been critical of the UN’s population policies and portrays itself as the populist defender against the threat of gender in this “culture war.” This war includes economic defense as the elites are the rich outsiders who have an undue influence on policy.³²⁷ These movements start out as grassroots, but merge into this global umbrella that idealizes the “family values” and illiberal democracy such as that in Russia. They utilize the “safety of children”, “global elite” arguments while harkening back to a time that was more “natural”.³²⁸ This is a nation building message as it as

³²⁴ Plattner, 12.

³²⁵ Bompani and Valois, “Sexualizing Politics,” 62.

³²⁶ Elzbieta Korolczuk and Agnieszka Graff, “Gender as ‘Ebola from Brussels’: The Anticolonial Frame and the Rise of Illiberal Populism,” *Signs: Journal of Women in Culture and Society* 43, no. 4 (June 2018): 797–98.

³²⁷ Korolczuk and Graff, 800–802.

³²⁸ Korolczuk and Graff, 804.

these nations become “the last frontier of [...] undamaged Christianity and true moral values”.³²⁹

Rodriguez parallels this populist agenda with the rise in populism from in Western countries such as the United States, France, Brittan, Portugal, Spain, Belgium and the Netherlands as leaders there call for a shutdown of their borders from immigrants who threaten their national identities. In former colonies (and other nations who have been heavily influenced by the West, as Korolczuk and Graff explain) the nation is threatened, not by people physically crossing its borders, but by foreign ideas as technology and the presence of foreign NGOs allow for “foreign ideologies” to cross national borders. The former illegitimate influence from the West allows for heightened panic around cultural imperialism which allows for the continuation of the “homophobic nationalism” that began during colonization.³³⁰

As Western sexual minority advocates acknowledge the Western and global influence on these homophobic movements and recognize the possibility to expose them, they must remind themselves not to fall into the colonial trope of the Africa that is overly vulnerable to moral corruption. This view reinforces the idea that Africa cannot bring about its own positive changes and downplays the effect of national efforts to bring about sexual minority rights. This movement may have started in the US, but it has been used strategically toward nationalistic goals in many countries inside and outside of Africa.

The recognition of homophobic rhetoric as a populist, nationalist strategy in sub-Saharan Africa is helpful as the West works toward enhancing sexual rights. As we engage in these countries, we must recognize that any interference is going to be recognized as illegitimate imperialism and will be utilized in political further political rhetoric. In these cases, it may be best to focus on the rights of sexual minorities to association, assembly, and expression within the broader framework of rights rather than a more exclusive focus on the criminalization of SSSB.

³²⁹ Korolczuk and Graff, 808.

³³⁰ Rodriguez, “Homophobic Nationalism,” 415.

Recognizing sexual rights as a broader battle for liberal democracy as the West becomes less economically dominant should inform our advocacy. As non-Western countries, even some with formally strong liberal democracies, unite against universal human rights the West must unite with newer democracies to reaffirm the global system. Advocacy for sexual minorities one part of a broader system of rights that must be maintained and respected.

It is important for the West to acknowledge its past human rights abuses and to sure up their own human rights records to regain legitimacy within the global community. When Western countries human rights records are sub-standard and they attempt to influence foreign rights, especially in former colonies, it appears that they are simply picking and choosing which rights they value and then forcing those rights on others. Without the human rights framework, this interference is easily portrayed as a moral assessment as the West once again forces its views on the rest of the world.

As this thesis highlights, the issue of sexual minority rights in sub-Saharan Africa is incredibly complex. An acknowledgement of the various global political and religious as well as national efforts to enhance and restrict these rights is necessary to any effective advocacy campaign. While global efforts to enhance these rights are important and justified, if Western advocates fail to acknowledge this complexity, their efforts are likely to be used against the very individuals that they aim to protect.

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