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**REPORT ON THE ABOLISHMENT OF THE COMMON
LAW OFFENCES OF SODOMY AND UNNATURAL
SEXUAL OFFENCES**



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LAW REFORM AND DEVELOPMENT COMMISSION

Tell: (061) 228 593

Private Bag 13302

Fax: (061) 240 064

Windhoek

Email: lawreform@moj.gov.na

Enquiries: The Secretary

Honourable Yvonne Dausab, MP

The Minister of Justice

Windhoek

Dear Honourable Minister,

STATUTORY SUBMISSION OF THE REPORT ON THE ABOLISHMENT OF THE COMMON LAW OFFENCES OF SODOMY AND UNNATURAL SEXUAL OFFENCES

According to section 9 (1) of the Law Reform and Development Commission Act, 1991 (No. 29 of 1991), the Law Reform and Development Commission (LRDC) is obliged to report to the Minister of Justice, for consideration, any matter it examines.

It is my privilege, therefore, as Deputy Chairperson of the LRDC to present to you this Report on the Abolishment of the Common Law Offences of Sodomy and Unnatural Sexual Offences. In doing so, I would also like to thank the previous Commissioners of the LRDC as well as all our stakeholders and the staff involved in bringing the report to fruition.

The LRDC will avail itself to assist the Minister in consideration of the contents of the report and the further development of the proposed draft law on the Abolishment of the Common Law Offences of Sodomy and Unnatural Sexual Offences.

Sincerely,

A handwritten signature in black ink, appearing to be 'Jakobus Etuna L. Josua'.

Jakobus Etuna L. Josua
DEPUTY CHAIRPERSON

The Namibian Law Reform and Development Commission (the LRDC) is a creature of statute established by section 2 of the Law Reform and Development Commission Act, 1991 (Act No. 29 of 1991).

The core mandate of the Commission is to review and undertake research in connection with all branches of law and to make recommendations for the reform and development, where necessary. The current Commission members' are—

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The Directorate of Law Reform serves as Secretariat to the Commission, assisting the Commission in the exercise of its powers and the performance of its duties and functions under the Law Reform and Development Commission Act, 1991. The Commission and Secretariat are housed on the 8th Floor, Sanlam Building, Windhoek. The working committee on this project consisted of the project officer Mr. S Niingungo; the consultant Ms. D. Hubbard and Commissioner A. Goagoses

All correspondence to the Commission should be addressed to:

The Chairperson

Law Reform & Development Commission

Private Bag 13302

Windhoek

Republic of Namibia

Tel.: (+264-61) 230486

E-mail: lawreform@moj.gov.na

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1. Introduction

In 2013, the Law Reform and Development Commission initiated a project for the repeal of obsolete laws, as part of its mandate to make recommendations for the repeal of obsolete or unnecessary laws, and the enactment of laws to enhance respect for human rights enshrined in the Namibian Constitution or to ensure compliance with international legal obligations.¹ This resulted in the 2014 Obsolete Laws Report, which identified many laws which were obsolete, archaic, superseded by new laws or for some other reason no longer in use. This process was informed by consultations with various stakeholders. It led to the enactment of the Repeal of Obsolete Laws Act, 2018 (Act No. 21 of 2018).

In 2019, the Commission started phase 2 of the obsolete laws project, which identified another list of possibly obsolete laws. The common law criminal offence of sodomy was amongst the laws on this list. This law was determined to warrant examination under a separate project. The decision to consider the repeal of the law on sodomy was reinforced by a submission from a range of Namibian civil society organisations calling for this step.

As the starting point for the project, the Commission drew from the research of the Office of the Ombudsman² and the Legal Assistance Centre report, *Namibian Law on LGBT Issues*.³ With financial support from the international legal organization, Sisters For Change, the Commission consequently established a working committee comprising the Law Reform Directorate and Ms Dianne Hubbard as the consultant on the project.

What is sodomy? Sodomy was previously considered to comprise a number of “unnatural” sexual acts which included masturbation, sexual intercourse with animals, heterosexual intercourse between Christians and Jews, oral sex and anal intercourse between people of the same or opposite sexes.⁴ The criminalisation of sodomy is found in the common law of Namibia which was

¹ Law Reform and Development Commission Act, 1991 (Act No. 29 of 1991), section 6(a) and (dA).

² Office of the Ombudsman, *2013 Baseline Study Report on Human Rights in Namibia*, 2013 (available at <www.ombudsman.org.na/reports/special-reports/finish/4-special-reports/22-2013-baseline-study-report-on-human-rights-in-namibia>).

³ *Namibian Law on LGBT Issues*, Windhoek: Legal Assistance Centre, 2015 (available at <www.lac.org.na/projects/grap/Pdf/LGBT_mono.pdf>).

⁴ D Hubbard “Why the law on sodomy should be repealed”, Legal Assistance Centre, 2000, page 1 (available at <www.lac.org.na/news/inthenews/pdf/sodomy.pdf>). See also *Namibian Law on LGBT Issues*, Windhoek: Legal Assistance Centre, 2015, page 65.

inherited from South Africa at Namibian independence. Currently, this law, along with the common law crime of “unnatural sexual offences”, criminalises certain sexual acts between men.⁵ There is no corresponding criminalisation of any sexual acts which take place between women.

According to a recent report by the Office of the Ombudsman, the continued criminalization of sodomy in Namibia has the impact of making gay men vulnerable to discrimination. It also has the effect of intruding upon some of their constitutional rights, particularly the right to dignity. This becomes more apparent when one takes into account that an important aspect of the right to dignity includes freedom from inhuman and degrading treatment.⁶ Although there is no statute that directly criminalises a person’s sexual orientation, the criminalisation of sodomy law inevitably causes some to believe mistakenly that homosexuality itself is illegal in Namibia;⁷ but there is no Namibian law that makes any sexual orientation illegal, and no Namibian law that prohibits same-sex relationships – as long as the parties, if they are male, do not engage in the prohibited sexual acts. As will be demonstrated, the continued existence of this law cannot be justified, for a number of reasons, chief among which is the mere fact that the law is seldom enforced and yet it interferes with the constitutional and international law rights of individuals in Namibia.

Namibia’s *National Human Rights Action Plan 2015-2019*, which was approved by Parliament in late 2014, identifies the Lesbian Gay Bisexual Transgender and Intersex population (LGBTIs) as a “vulnerable group” and points to the need to protect members of vulnerable groups against discrimination. It identifies the continued criminalisation of sodomy as one of several key concerns in this regard.⁸ Amongst the key interventions identified by this plan is “research and review of laws and policies to identify and rectify provisions that discriminate against vulnerable groups”.⁹ The ultimate vision of this part of the National Human Rights Plan is that “Namibia becomes a

⁵ The prohibited acts are discussed below in section 3.1.

⁶ See, for example, *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC), 1998 (12 BCLR 1517), paragraph 14.

⁷ Office of the Ombudsman, *2013 Baseline Study Report on Human Rights in Namibia*, 2013, page 97.

⁸ Republic of Namibia, *National Human Rights Action Plan 2015-2019*, pages 37-38 (available at www.ombudsman.org.na/wp-content/uploads/2016/09/NHRAP.pdf): Key concerns included widespread social exclusion and rejection of LGBTIs (but evidence lack[ing] to support), the continued criminalization of sodomy, the omission of sexual orientation as a prohibited ground for discrimination in the work place, the continued criminalization of sex work and how it impacts the right to fair/just and safe work conditions, continued insensitivity by the Namibian police of the plight of LGBTIs, and the lack of extensive research on LGBTIs’ human rights situation. Further concerns include discrimination, violence and punitive acts against homosexuals by the police and the lack of facilities to cater for LGBTI needs, especially in detention facilities or holding cells. Although the time frame covered by this plan has expired, it has not yet been updated or replaced.

⁹ Id, page 41 (Key Intervention 6).

society based on equality and a country that acknowledges, recognises, respects and values individual differences, common humanity, dignity and equality”.¹⁰

In addition, the law on sodomy has been raised in Namibia’s last two Universal Periodic Reviews (UPRs) in 2011 and 2016. The UPR is a United Nations process where a State’s human rights record undergoes peer review. In the recommendations which followed both reviews, there were calls for the Namibian government to de-criminalise consensual homosexual activities.¹¹ In its 2011 response, Namibia stated that these recommendations did not enjoy its support – while at the same time offering assurances that the Namibian Government does not persecute members of the LGBTI community in Namibia and making reference to the Constitutional guarantees of equality and freedom from discrimination.¹² In Namibia’s 2016 response, it again noted that this recommendation did not enjoy the support of the State¹³ - but again offered assurances that LGBTI persons are not victimised or persecuted for practising their preferred sexual orientation.¹⁴ Namibia is sure to be confronted with this issue again in its next UPR, which should take place in 2021.

During Namibia’s presentation at the Universal Periodic Review in 2011, the delegation informed the meeting with regard to homosexuality that the Namibian Constitution outlawed discrimination of any kind. In the same breath, the delegation also stated that since Namibia attained independence in 1990, there have been no cases of discrimination on the basis of sexual preference or orientation that have come before the courts. In addition, the delegation also stated that homosexuals are not prosecuted by the State for practising same-sex activities in private even though such activities are not condoned.¹⁵ The same sentiments were again expressed in

¹⁰ Id, page 39.

¹¹ Report of the Working Group on the Universal Periodic Review: Namibia, Human Rights Council, Seventeenth Session, A/HRC/17/14, 24 March 2011, paragraph 99(available at <www.upr-info.org/IMG/pdf/a_hrc_17_14_namibia_e.pdf>); Report of the Working Group on the Universal Periodic Review: Namibia, Human Rights Council, Thirty-second Session, A/HRC/32/4, 15 April 2016, paragraphs 137.69-137.73 (available at <<https://undocs.org/A/HRC/32/4> >).

¹² “Report of the Working Group on the Universal Periodic Review: Namibia, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review”, Human Rights Council, Seventeenth Session, A/HRC/17/14/Add.1, 31 May 2011, paragraph 99 (available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/137/02/PDF/G1113702.pdf?OpenElement>>).

¹³ “Report of the Working Group on the Universal Periodic Review: Namibia, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review”, Human Rights Council, Thirty-second Session, A/HRC/32/4/Add.1, 14 June 2016, paragraph 30 (available at <www.upr-info.org/sites/default/files/document/namibia/session_24_-_january_2016/a_hrc_32_4_add.1_namibia_e.pdf>).

¹⁴ Report of the Working Group on the Universal Periodic Review: Namibia, Human Rights Council, Thirty-second Session, A/HRC/32/4, 15 April 2016, paragraph 40.

¹⁵ Report of the Working Group on the Universal Periodic Review: Namibia, Human Rights Council, Seventeenth Session, A/HRC/17/14, 24 March 2011, paragraph 21.

2016, to the effect that lesbian, gay, bisexual, transgender and intersex persons were not victimised or persecuted for practising their preferred sexual orientation.¹⁶

Furthermore, the Committee on Economic, Social and Cultural Rights in its 2016 concluding observations on Namibia identified the law that criminalises sexual relations between consenting individuals of the same sex as a discriminatory legal provision that should be abolished.¹⁷

2. Historical context

The law that criminalises sodomy in Namibia was not enacted by democratically-elected representatives of the Namibian people. When Namibia became a mandated territory of South Africa in 1920,¹⁸ South Africa applied its legislative power over Namibia to impose a legal framework that included the Roman-Dutch common law brought to the Cape of Good Hope by Dutch settlers in the 1600s. This Roman-Dutch law introduced a prohibition on sodomy – which, after the British annexation of the Cape of Good Hope, was interpreted in accordance with the concepts underlying the colonial British penal code¹⁹ which was modified and implemented across British colonies in Africa, including South Africa.²⁰ Consequently, the criminal offence of “sodomy” is part of the common law which was inherited by Namibia from South Africa at independence. In terms of the Namibian Constitution, all laws in force at Independence, including the common law, remain in force unless they are repealed by Parliament or declared unconstitutional by a Namibian court.²¹

¹⁶ Report of the Working Group on the Universal Periodic Review: Namibia, Human Rights Council, Thirty-second Session, A/HRC/32/4, 15 April 2016, paragraph 40.

¹⁷ Committee on Economic, Social and Cultural Rights, “Concluding observations on the initial report of Namibia”, E/C.12/NAM/CO/1, 23 March 2016, paragraph 22(c) (available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fNAM%2fCO%2f1&Lang=en).

¹⁸ This was sanctioned by the erstwhile League of Nations.

¹⁹ S Haskins, “The influence of Roman laws regarding same-sex acts on homophobia in Africa”, *African Human Rights Law Journal* 14(2), 2014, pages 407-408 (available at www.saflii.org/za/journals/AHRLJ/2014/21.html); Scott Long, “Before the law: Criminalising sexual conduct in colonial and post-colonial southern African societies” in Human Rights Watch and International Gay and Lesbian Human Rights Commission, *More Than A Name: State-Sponsored Homophobia and its Consequences in Southern Africa*, 2003, pages 261-63 (available at www.hrw.org/report/2003/05/13/more-name/state-sponsored-homophobia-and-its-consequences-southern-africa).

²⁰ Id at 408.

²¹ Art 66(1) of the Namibian Constitution states: “Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.” Art 140(1) states: “Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.”

As noted above, the term sodomy was originally applied to “unnatural” sexual acts which comprised oral sex, masturbation as well as anal sexual penetration between persons of the same or opposite sex, sexual intercourse with animals and sexual intercourse between Christians and Jews.²² As time went by, the list of prohibited acts narrowed and crystallised into three separate criminal offences:

- (1) **sodomy** (which applies only to anal intercourse between males)
- (2) **bestiality** (which criminalises sexual relations by a person of any sex with an animal; and
- (3) **unnatural sexual offences** (which covers various sexual activities between men).²³

This report will focus only on the crimes of sodomy and the related crime of unnatural sexual offences. The common-law crime of bestiality should remain intact.

It should also be noted that the common-law crimes of sodomy and unnatural sexual offences are now relevant only to **consensual** sexual activity between men; coercive sexual activity of this nature, and sexual activity of this nature with children below the age of consent, is now covered by the Combating of Rape Act, 2000 (Act No. 8 of 2000) and the Combating of Immoral Practices Act, 1980 (Act No. 21 of 1980).

As a background to this discussion, as of December 2019, consensual sexual acts between persons of the same sex were legal in 64% of the Member States of the United Nations.²⁴

²² *S v Chikore* 1987 (2) Zimbabwe Law Reports 48 (High Court) at 50.

²³ See, for example, J Milton, *South African Criminal Law and Procedure*, 2nd ed, Cape Town: Juta, 1982, pages 267-ff, 276.

²⁴ International Gay and Lesbian Association (ILGA), State-Sponsored Homophobia: Global Legislation Overview Update, Dec 2019, page 29 (available at https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2019.pdf). This includes 39% of the countries in Africa.

3. The current legal position

3.1 *The common law*

The crime of sodomy as it currently stands covers only anal intercourse between men.²⁵ Both participating men are criminally liable.²⁶ The Criminal Procedure Act, 1977 (Act No. 51 of 1977) provides that where a person is charged with the crime of sodomy and the evidence is insufficient to support all the elements of the crime, indecent assault or assault are competent verdicts.²⁷

Consensual anal intercourse between a man and a woman is not illegal in terms of the law.²⁸ The Namibian Supreme Court has suggested that the reason for this distinction is that law-makers paid much less attention to sexual activities between women in the past.²⁹

With regard to unnatural sexual offences, today the crime covers a number of activities between men, including mutual masturbation,³⁰ masturbation of one man by another,³¹ sexual gratification through friction between the legs of another man as well as oral sex.³²

²⁵ Sodomy is defined in the leading South African criminal law textbook as unlawful and intentional sexual relations per anum between human males. CR Snyman, *Criminal Law*, Durban: Butterworths, 1984 at 332; Milton, *South African Criminal Law and Procedure*, 2nd ed, Cape Town: Juta, 1982, page 271. A historical analysis of the crime can be found in *S v Kampher* 1997 (4) SA 460 (C), paragraphs 11-21.

²⁶ Scott Long, "Before the law: Criminalising sexual conduct in colonial and post-colonial southern African societies" in Human Rights Watch and International Gay and Lesbian Human Rights Commission, *More Than A Name: State-Sponsored Homophobia and its Consequences in Southern Africa*, 2003, page 262.

²⁷ Criminal Procedure Act 51 of 1977, section 269: "If the evidence on a charge of sodomy or attempted sodomy does not prove the offence of sodomy or, as the case may be, attempted sodomy, but the offence of indecent assault or common assault, the accused may be found guilty of the offence so proved."

²⁸ See, for example, the discussion of this issue in *S v M* 1979 (2) SA 406 (RA). Commentators are not in full agreement on this point. Snyman states that "acts of lesbianism" have never been regarded as constituting an unnatural sexual offence. CR Snyman, *Criminal Law*, Durban: Butterworths, 1984, page 334. Milton states: "Whether lesbianism and other unnatural acts between females constitute this crime is an open question. Such conduct seems to have been a crime in Roman-Dutch law, but there are no reported South African cases and the offence may have been abrogated." Milton, *South African Criminal Law and Procedure*, 2nd ed, Cape Town: Juta & Co, 1982, pages 276-277. However, the Namibian Supreme Court has taken the view that "the sexual act between lesbian females has never been criminalised in South African and Namibian common law". *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC), page 154.

²⁹ *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC), page 154.

³⁰ *S v V* 1967 (2) SA 17 (E).

³¹ *R v Curtis* (1926) CPD 385.

³² *R v Gough and Narroway* (1926) CPD 159.

3.2 Related statutory offences

Over the years, new legislation has been enacted to deal with non-consensual sexual offences and sexual offences against children. The most significant is the Combating of Rape Act, 2000 (Act No. 8 of 2000), which deals with a range of intimate sexual contact – including anal sex, oral sex and genital stimulation³³ – where these acts take place under coercive circumstances.

The following are amongst the key features of this post-independence statute:

- a) It makes no distinction as to whether such acts take place between persons of the same or different sexes.
- b) It introduces the concept of coercion (to replace absence of consent) to cover forceful or coercive circumstances, including where the victim is under age 14 and the perpetrator is more than three years older, or where the victim is physically detained, intoxicated or under the influence of drugs, or impaired by a physical disability, helplessness, mental incapacity or sleep to the extent of being unable to understand the nature of the act in question or unable to communicate unwillingness.

This statute is complemented by section 14 of the Combating of Immoral Practices Act, 1980 (Act No. 21 of 1980) which makes it an offence for a person to commit a sexual act with a woman with limited mental capacity, or with a child under age 16 where the perpetrator is more than three years older.

The Child Care and Protection Act, 2015 (Act No. 3 of 2015) provides further protection for children against sexual abuse and sexual exploitation.

Therefore, since there are laws that provide for protection against non-consensual sexual acts between people of the same or different sexes, as well as for the protection of children and vulnerable persons, the common law crimes of sodomy and unnatural sexual offences are now applicable only to sexual acts between consenting adult men. Consequently, this patently

³³ Section 1 of the Act defines “sexual act” as

- (a) the insertion (to even the slightest degree) of the penis of a person into the vagina or anus or mouth of another person; or
- (b) the insertion of any other part of the body of a person or of any part of the body of an animal or of any object into the vagina or anus of another person...; or
- (c) cunnilingus [oral stimulation of the female genitals] or any other form of genital stimulation;

discriminatory law cannot be justified on the grounds that it is needed to protect against non-consensual sexual activity.

3.3 Enforcement

The Namibian Police provided the following statistics on arrests for sodomy for all the years for which this information is available.

SODOMY CASES REPORTED TO NAMPOL 2003-2019						
YEAR	CASES		PERPETRATORS		VICTIMS	
	Reported	Arrests	Adult male	Juvenile male	Adult male	Juvenile male
2003	6	6	4	-	4	2
2004	13	10	11	-	8	3
2005	8	6	6	-	6	2
2006	4	-	-	-	2	2
2007	4	3	4	-	-	1
2008	4	3	3	-	2	2
2009	5	3	3	-	4	1
2010	9	4	3	2	7	2
2011	9	6	6	-	3	6
2012	3	7	7	-	1	2
2013	6	2	2	-	3	3
2014	2	1	1	-	1	1
2015	10	4	2	-	8	2
2016	13	4	4	-	6	7
2017	5	3	3	-	3	2
2018	5	-	-	-	2	3
2019	9	2	-	2	5	4
TOTALS	115	64	59	4	65	45
	115 reported cases		ages of 63 perpetrators known		ages of 110 victims known	

Source: Based on statistics provided on request by Nampol to the Law Reform and Development Commission as at January 2020. Note that the “juvenile” category includes all persons under age 18, while the age of consent is effectively 16.³⁴

³⁴ Combating of Immoral Practices Act, 1980 (Act No. 21 of 1980), section 14, read together with the Combating of Rape Act, 2000 (Act No. 8 of 2000).

The police statistics demonstrate that, despite its continued existence, the common law crime of sodomy is seldom enforced in practice. These figures indicate an average of fewer than seven cases per year – and not all of these involve consensual sodomy. The Office of the Prosecutor - General has explained that most of the cases recorded by the police which are forwarded for prosecution involve non-consensual anal penetration perpetrated by an adult on a minor, which is erroneously recorded as sodomy by the police but is correctly dealt with by the Office of the Prosecutor General as rape in terms of the Combating of Rape Act, 2000 (Act No. 8 of 2000). There is seldom a prosecution for consensual sodomy because the act usually takes place within the privacy of homes, with no innocent victim who is willing to report the crime and testify against the other party.

This explains why there are no reported cases involving the prosecution of criminal charges of sodomy or unnatural sexual offences since Namibian independence.³⁵ In fact, the low number of arrests means that the law is particularly invidious; it is not being used with sufficient frequency to accomplish any social objective, but it is enforced often enough to create realistic fear of possible arrest on the part of the gay community. Furthermore, even though these laws are seldom enforced, their very existence violates the fundamental rights of the individuals who could be affected, as well as creating and reinforcing a culture of homophobia and intolerance against LGBTI people.³⁶ These attributes make the laws in question very likely unconstitutional.

3.4 Implications

The infrequent enforcement of sodomy and unnatural sexual offences does not diminish the negative impact of these offences. Not only do they stigmatise and discriminate against gay men, but they also have cross-cutting impacts on their lives.

³⁵ Although these two crimes are seldom utilised in practice, it is unlikely that either crime would be found to be “abrogated by disuse” – a term which refers to a situation where laws lose their validity if they are not applied in practice over a long period. The bar for applying this legal doctrine is a high one. See *Hoho v The State* [2008] ZASCA 98; 2009 (1) SACR 276 (SCA) (criminal defamation not abrogated by disuse) and *United Greyhound Racing and Breeders Society v Vrystaat Dobbelen Wedren Raad en Andere* 2003 (2) SA 269 (O) at 270H-271B (Prohibition of Dog Race-meetings Ordinance 11 of 1976 of the Orange Free State was not been abrogated by disuse).

³⁶ Navi Pillai, ‘Ending violence and criminal sanctions based on sexual orientation and gender identity: Statement by the High Commissioner [for Human Rights]’ (Speech delivered at the Human Rights Council meeting in Geneva on 17 September 2010) (available at <<https://newsarchive.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10717&LangID=EM>>).

One of these implications can be found in the Criminal Procedure Act, 1977 (Act No. 51 of 1977). Sodomy (although not “unnatural sexual offences”) is listed as a Schedule 1 offence, along with serious offences such as treason, murder, rape, assault where a dangerous injury is inflicted, robbery, theft, fraud and forgery.³⁷

Where a person is reasonably suspected of committing a Schedule 1 offence, a police officer or a private citizen can:

- a) arrest the person without a warrant;³⁸ and
- b) use deadly force against such a suspect in the process of effecting an arrest.³⁹

The Act also provides for the taking of finger-prints, palm-prints or foot-prints of anyone who is served with a summons for a Schedule 1 crime.⁴⁰

These provisions stem from a time before the enactment of the Combating of Rape Act, when the common-law crime of sodomy was the only crime which could be used for non-consensual sodomy or sodomy committed with children. However, now that the common-law crime of sodomy is relevant only to consensual sodomy, these consequences are clearly disproportionate to the crime and therefore almost certainly unconstitutional.⁴¹

³⁷ Bestiality (sexual relations between a person and an animal) is also in this list. In South Africa, this same list of offences was referred to as “a widely divergent rag-bag of some 20 offences ranging from really serious crimes with an element of violence like treason, public violence, murder, rape and robbery at one end of the spectrum to, at the other end, relatively petty offences like pickpocketing or grabbing the mealie from the fruit-stall. What is more, the schedule includes offences that do not constitute any kind of physical threat, let alone violence. It is difficult to imagine why lethal force should be justified in arresting a fugitive who is suspected of having passed a forged cheque or a homemade banknote or, for that matter, having gratified his sexual urges with an animal”. *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* 2002 (4) SA 613, paragraph 41.

³⁸ Criminal Procedure Act 51 of 1977, section 37(1)(a)(iv).

³⁹ *Id*, section 49(2): “Where the person concerned is to be arrested for an offence referred to in Schedule 1 or is to be arrested on the ground that he is reasonably suspected of having committed such an offence, and the person authorised under this Act to arrest or to assist in arresting him cannot arrest him or prevent him from fleeing by other means than by killing him, the killing shall be deemed to be justifiable homicide.”

⁴⁰ *Id*, section 37(1)(a)(iv).

⁴¹ In South Africa, an identical provision has been struck down in its entirety on constitutional grounds, on the basis that the section infringes the rights to bodily integrity, dignity and life and that “the resort to Schedule 1 in subsection (2) in order to draw the line between serious cases warranting the potential use of deadly force and those that do not, comprehensively fails the test of reasonableness and justifiability...”. The Court stated that “...this schedule not only includes relatively trivial offences, but what is more important, it includes offences involving no suggestion of violence and no hint of possible danger to anyone. The list is therefore simply too wide and inappropriately focussed to permit a constitutionally defensible line to be drawn for the permissible use of deadly force”. *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* 2002 (4) SA 613 (CC), paragraphs 44-45. The Court held that deadly force would be constitutionally justifiable only where there was an immediate threat of serious bodily harm to a police officer or a member of the public, or where the accused has committed a crime involving the infliction or threatened infliction of serious bodily harm – and where there are no other reasonable means of carrying out the arrest. *Id*, as summarised at paragraph 54. Since this case was decided, South Africa has amended section 49 of its Criminal Procedure Act 51 of 1977 (which is similar but not identical to the Namibian version inherited at Independence and

Furthermore, in terms of the Immigration Control Act, 1993 (Act No. 7 of 1993) sodomy is listed as a Schedule 1 offence.⁴² The implications of this are that a non-Namibian person convicted of sodomy in Namibia or another country is classified as a prohibited immigrant. Such a person will be refused entry into Namibia⁴³ and can be arrested and deported if found in Namibia.⁴⁴ In addition, a permanent resident can also lose his status and become a prohibited immigrant if convicted of sodomy in some circumstances.⁴⁵

Ironically, the government could also find itself having to fund legal representation for someone accused of consensual sodomy. Sodomy is a specified offence for the purposes of the Legal Aid Act, 1990 (Act No. 29 of 1990), meaning that legal aid will likely be made available to an unrepresented accused who is charged with this crime.⁴⁶

The criminalisation of sodomy has in some cases been used as a basis to make certain detrimental policy decisions. One example is where members of the Namibian Correctional Services have declined to provide inmates with condoms in order to prevent the spread of HIV/AIDS. The reasoning proffered is that correctional services officials do not want to be complicit with the crime of sodomy taking place in correctional facilities, combined with the fact that many inmates fear the stigmatisation that can come from getting condoms in prison, which might lead some to conclude that they engage in homosexual relationships.⁴⁷

amended since then in Namibia), to de-link the use of deadly force from Schedule 1 crimes. See the Judicial Matters Second Amendment Act 122 of 1998 (South Africa), the relevant portion of which was brought into force only on 18 July 2003, with another amendments being made in the Criminal Procedure Amendment Act 9 of 2012 (South Africa). See Legal Assistance Centre, "Use of force by law enforcement officials in Namibia", November 2019, section 5.1 (available at www.lac.org.na/projects/grap/Pdf/use_of_force_by_law_enforcement_officials.pdf).

⁴² In contrast to the list in the Criminal Procedure Act, this list does not include bestiality or unnatural sexual offences.

⁴³ Immigration Control Act 7 of 1993, sections 7-10, Schedule 1. A person who is suspected of being a prohibited immigrant may be given permission to enter Namibia temporarily while the matter is being investigated. Section 11.

⁴⁴ Id, sections 39-50.

⁴⁵ Id, section 26(5). This will be the case if the person in question has not yet acquired a domicile in Namibia in terms of the Act – which for a permanent resident requires two years of continuous residence in Namibia after being granted permanent resident status. Id, section 22.

⁴⁶ Legal Aid Act 29 of 1990, section 9 read with Government Notice 106 of 1990 (Government Gazette 273 of 8 October 1991). The list of specified offences also includes bestiality, but not "unnatural sexual offences" (available at <http://www.lac.org.na/laws/1991/273.pdf>).

⁴⁷ See Aids Law Unit of the Legal Assistance Centre, Namibia and the University of Wyoming. "Struggle to Survive: A Report on HIV/AIDS and Prisoners' Rights In Namibia", 2008, pages 32-ff (available at www.lac.org.na/projects/alu/Pdf/struggletosurvive.pdf). This report calls for the repeal of the sodomy laws. The current policy on condoms in correctional facilities was confirmed with the Namibian Correctional Services.

However, this approach has led to dangerous and absurd consequences. For instance, in 2017 the Namibian Minister of Health at that time admitted that the Ministry had been sneaking condoms into correctional facilities. The Minister identified prisoners as a vulnerable group when it comes to HIV infection, and called for the repeal of the common-law crime of sodomy, saying “We cannot let so many people die because we do not want to change laws.”⁴⁸ In 2019, the deputy director of investigations in the Office of the Ombudsman noted that there are inmates who acquire HIV in correctional facilities, calling for the provision of condoms to allow prisoners to protect themselves.⁴⁹ It has been pointed out in respect of Namibia that a situation where condoms are not distributed through a structured program increases the risk of abuses (such as a black market in condoms, or the use of condoms for other purposes such as moving drugs).⁵⁰

UNAIDS considers prisoners to be one of the five main key population groups who are particularly vulnerable to HIV and advocates for a minimum package of services for people in prison that includes access to condoms.⁵¹

4. Constitutionality of the crime of sodomy in Namibia

The Namibian Constitution is the supreme law of Namibia.⁵² A close reading of the Constitution suggests that the laws against consensual sodomy and other consensual sexual acts may be unconstitutional.

At the outset, it may be helpful to clear up some confusion about the current position in this regard. Many Namibian policy-makers have stated, mistakenly, that the Namibian Supreme Court has

⁴⁸ Denver Kisting, “We sneak condoms into prison – Haufiku”, *The Namibian*, 25 September 2017. (available at <www.namibian.com.na/169707/archive-read/We-sneak-condoms-into-prison-%E2%80%93-Haufiku>); Jana-Mari Smith, “Rubbers coming for inmates”, *Namibian Sun*, 15 August 2018 (available at <www.namibiansun.com/news/rubbers-coming-for-inmates2018-08-14>).

⁴⁹ Ndanki Kahiurika, “More than 500 prisoners living with HIV”, *The Namibian*, 8 November 2019 (available at <www.thenamibian.mobi/195154/archive-read/More-than-500-prisoners-living-with-HIV>).

⁵⁰ Babak Moazen et al, “Availability, Coverage and Barriers Towards Condom Provision in Prisons: A Review of the Evidence”, 2019, section 2.8, (available at <www.researchgate.net/publication/330543762_Availability_Coverage_and_Barriers_Towards_Condom_Provision_in_Prisons_A_Review_of_the_Evidence>).

⁵¹ According to Namibia’s National Strategic Framework for HIV and AIDS Response in Namibia 2010/11 – 2015/16, page 13, the other four main key population groups who are particularly vulnerable to HIV are gay men and other men who have sex with men; sex workers; transgender people; and people who inject drugs (available at <www.unaids.org/sites/default/files/country/documents/NAM_2018_countryreport.pdf>).

⁵² Article 1(6), Namibian Constitution: “This Constitution shall be the Supreme Law of Namibia.”

held that homosexuality is unconstitutional. Such erroneous statements seem to be based on the 2001 *Frank* case. In this case, the Supreme Court held that the existence of a lesbian relationship between a Namibian and a non-Namibian *had no bearing* on an application for permanent residence by the non-Namibian partner. The judgment emphasised that the holding did not justify discrimination against homosexuals as individuals, or deprive them of the protection of other provisions of the Namibian Constitution.⁵³ It also emphasised that the Court had not yet considered the constitutionality of the crime of sodomy because it had not yet been raised before the Court.⁵⁴

4.1 The Right to Equality - Article 10

At first glance, the criminalisation of consensual sodomy violates the right to equality in Article 10 of the Constitution. The law obviously differentiates between heterosexual persons and homosexual persons, as well as between men and women. However, as the Namibian Supreme Court has stated, “not every distinction created by legislation gives rise to discrimination”.⁵⁵

Article 10 provides as follows:

Equality and Freedom from Discrimination

- (1) All persons shall be equal before the law.
- (2) No person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

In considering the right to equality, it is important to remember that Article 10 has two parts which have given rise to two different legal tests.

a) Article 10(1)

The approach to legal analysis under Article 10(1) was set out in the 1995 *Mwellie* case⁵⁶ which held that Article 10(1) permits “reasonable classifications” which are “rationally connected to a

⁵³ *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC), page 156.

⁵⁴ *Id*, page 150.

⁵⁵ *Müller v President of the Republic of Namibia* 1999 NR 190 (SC), page 20, citing the Canadian case of *Egan v Canada* [1995] 2 S.C.R. 513.

⁵⁶ *Mwellie v Minister of Works, Transport and Communication and Another* 1995 (9) BCLR 1118 (NmH).

legitimate object”.⁵⁷ The Namibian Supreme Court has also noted that Article 10(1) has been interpreted “not to mean absolute equality but equality between persons equally placed”.⁵⁸

Article 10(1) has not frequently been the basis for striking down laws on the grounds of equality, and it has generally been applied successfully for this purpose only in conjunction with other constitutional provisions which help to define its meaning. It has more often been referred to as part of the constitutional context for cases decided on other grounds.⁵⁹

Article 10(1) has been invoked in respect of the following distinctions:

- It was used to guide the interpretation of Article 12 (the right to a fair trial) in respect of non-disclosure of certain witness statements to the defence in a criminal trial, to support the principle of “equality between the prosecution and the defence”.⁶⁰
- It was relied upon to invalidate an adoption provision that differentiated (a) between children born in Namibia to Namibian parents and those born in Namibia to non-Namibian parents and (b) between prospective adoptive parents who are Namibian citizens and those who are non-Namibians;⁶¹
- It was the basis for a holding that a corporate “person” can essentially represent itself in court without a legal practitioner, in the same way as a natural person;⁶²
- It was invoked to strike down a provision imposing a minimum sentence for stock theft on the grounds that it was disproportionate to the sentencing regime applicable to other equally serious offences.⁶³

⁵⁷ *Mwellie* at 1132 E-H. The *Müller* case summarised the *Mwellie* test as follows at page 14:

(a) Article 10(1) - The questioned legislation would be unconstitutional if it allows for differentiation between people or categories of people and that differentiation is not based on a rational connection to a legitimate purpose.

See also *Hiskia & Another v Body Corporate of Urban Space & Others* 2018 (4) NR 1067 (HC), paragraph 50, which notes that the approach set out in the *Mwellie* case has been consistently applied by the High Court and the Supreme Court whenever it has considered Article 10(1).

⁵⁸ *Government of the Republic of Namibia & Others v Mwilima & all other accused in the Caprivi treason trial* 2002 NR 235 (SC), page 30, citing *Müller v President of the Republic of Namibia* 1999 NR 190 (SC).

⁵⁹ See Dianne Hubbard, “The paradigm of equality in the Namibian Constitution: Concept, contours and concerns” in Anton Bösl et al, eds, *Constitutional Democracy in Namibia: A Critical Analysis After Two Decades*, Windhoek: Macmillan Education, 2010, page 216.

⁶⁰ *S v Scholtz* 1998 NR 207 (SC), at 218B-E. See also *S v Nassar* 1994 NR 233 (HC), where several cases from other jurisdictions cited in the High Court’s judgment on the defence’s right to access information in the police docket cited the principle of equality for the same purpose, although the Namibian judgment did not otherwise place any weight on Article 10 in deciding this question. Pages 254-56, per Muller AJ.

⁶¹ *Detmold and Another v Minister of Health and Social Services and Others* 2004 NR 174 (HC).

⁶² *Nationwide Detectives CC v Standard Bank of Namibia Ltd* 2008 (1) NR 290 (SC).

⁶³ *Prosecutor-General v Daniel & Others* 2017 (3) NR 837 (SC). Note that the Court gave more emphasis to Article 8 of the Constitution in respect of this finding. See paragraph 40.

- It was applied to invalidate legal provisions which provided fewer safeguards regarding execution against immovable property to satisfy debts to litigants in the Magistrates' Court than to litigants in the High Court.⁶⁴

It could be argued under Article 10(1) that the distinction between heterosexual persons and homosexual persons which is implicit in the crimes of consensual sodomy and unnatural sexual offences bears no rational connection to a legitimate state objective.

b) Article 10(2)

The leading case on the application of Article 10(2) is the 1999 *Müller* case, which set out four steps for considering whether a law violates Article 10(2) of the Constitution:

The steps to be taken in regard to this sub-article are to determine-

- (i) whether there exists a differentiation between people or categories of people;
- (ii) whether such differentiation is based on one of the enumerated grounds set out in the sub-article [i.e., sex, race, colour, ethnic origin, religion, creed or social or economic status];
- (iii) whether such differentiation amounts to discrimination against such people or categories of people; and
- (iv) once it is determined that the differentiation amounts to discrimination, it is unconstitutional unless it is covered by the provisions of art 23 of the Constitution [which authorises affirmative action for persons disadvantaged by past discrimination].⁶⁵

It has been noted that Article 10(2) does not have a “catch-all phrase” for forms of discrimination other than those which are enumerated. The High Court has held that Article 10(2) thus “specifically limits the enumerated proscribed grounds of discrimination to those which are contained in it” – with the general guarantee of equality before the law in Article 10(1) being intended to protect against discrimination on other grounds. However, as the same case pointed out, the protections provided by Article 10(1) and Article 10(2) are not the same; there can be no justification for differentiation which constitutes unfair discrimination under Article 10(2) once

⁶⁴ *Hiskia & Another v Body Corporate of Urban Space & Others* 2018 (4) NR 1067 (HC).

⁶⁵ *Müller* at 200B-D.

unfair discrimination has been found,⁶⁶ but such differentiation can be justified under Article 10(1) if they have a rational connection to a legitimate state objective.⁶⁷

There is interesting jurisprudence on the application of Article 10(2) to sex discrimination. In the 1999 *Müller* case,⁶⁸ the Supreme Court held that the different rules for husbands and wives with regard to the assumption of surnames upon marriage did not amount to unfair discrimination. The easier and less expensive procedure which applied to married women did not unfairly discriminate against married men because -

- the complainant, a white male, was not a member of a previously-disadvantaged group;
- the name change formalities were not intended to impair the dignity of males or to disadvantage them;
- the legislature has a clear interest in the regulation of surnames; and
- the impact on married men was minimal since there was an accessible procedure by which they could adopt their wives' surnames.⁶⁹

In contrast, in the 2000 *Myburgh* case,⁷⁰ the Supreme Court relied on Article 10(2) to hold that a husband's marital power over his wife was unconstitutionally unfair discrimination. The key factors here were that -

- women were a previously-disadvantaged group in Namibia;
- the sex differentiation was based on stereotyping which failed to acknowledge women's "equal worth" with men;
- the distinction impaired women's dignity individually and as a group.⁷¹

The question of whether the term "sex" in Article 10(2) can be understood to encompass "sexual orientation" is a complicated issue – as discussed in detail below in respect of the holding of the *Frank* case.

⁶⁶ The meaning of the word 'discrimination' in Article 10 must involve an element of unjust or unfair treatment stemming from unjustified and illegitimate unequal treatment. *Maletzky v The President of the Republic of Namibia & Others* 2016 (2) NR 420 (HC), paragraph 26, citing *Hamwaama and Others v Attorney-General NAHC A 176/2007 (31 July 2008)*, paragraph 23, relying on *Müller v The President of the Republic of Namibia* 1999 NR 190 (SC).

⁶⁷ *Visser v Minister of Finance and Others* 2017 (2) NR 359 (SC), paragraph 145.

⁶⁸ *Müller v President of the Republic of Namibia* 1999 NR 190 (SC).

⁶⁹ *Id.*, pages 203G-204F.

⁷⁰ *Myburgh v Commercial Bank of Namibia* 2000 NR 255 (SC).

⁷¹ *Id.*, pages 265H-266J.

However, the common-law crimes of consensual sodomy and unnatural sexual offences obviously discriminate against men in comparison to women, since these crimes make certain sexual acts criminal only when they take place between men and not between women. It is possible that the courts would find that this constitutes unfair discrimination since homosexual men, the primary group of men affected by the law, are a vulnerable group – as attested to by Namibia’s *National Human Rights Plan 2015-2019*.⁷²

One other question is whether sexual orientation might fall within the category of “social status” in Article 10(2). This category has been found to apply to a common-law rule differentiating between ‘legitimate’ and ‘illegitimate’ children for the purposes of inheritance,⁷³ but ruled *not* to encompass persons with disabilities.⁷⁴

c) The *Frank* case

As already noted, there was an unsuccessful attempt to apply Article 10 to sexual orientation in 2001 in the *Frank* case.⁷⁵ This case concerned the impact of a lesbian relationship between a non-Namibian and a Namibian citizen in an application for permanent residence by the non-Namibian partner. One argument raised in this case was that the failure to treat the homosexual relationship as a positive factor in favour of the application was discriminatory in terms of Article 10 – because the parties would have been able to marry if their relationship were a heterosexual one, which would have given the non-Namibian partner residency rights.

With respect to Article 10, the Court noted that Article 10(2) does not expressly prohibit discrimination on the grounds of “sexual orientation”⁷⁶, and concluded (without extensive discussion) that the term “sex” in this provision does not encompass “sexual orientation”.⁷⁷ In terms of Article 10(1), the Court purported to apply the standard set out in the *Mwellie* case, and

⁷² Republic of Namibia, *National Human Rights Action Plan 2015-2019*, pages 37-38.

⁷³ *Frans v Paschke and Others* 2007 (2) NR 520 (HC), pages 528-29.

⁷⁴ *Visser v Minister of Finance and Others* 2017 (2) NR 359 (SC). It has also been suggested that persons who are victims of the alleged crimes of violence by their spouses, and their children, might be encompassed within the concept of “social status”. *S v Venaani* (CA 38/2015) [2017] NAHCMD 114 (18 April 2017), paragraph 24.

⁷⁵ *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC).

⁷⁶ *Id*, page 149l.

⁷⁷ The Court made this far-fetched assertion without foundation: “Whereas the word ‘sex’ can be defined as ‘being male or female’, or ‘males or females as a group’, ‘sexual orientation’ could encompass in theory ‘any sexual attraction of anyone towards anyone or anything’. The prohibition against discrimination on the grounds of sexual orientation is so wide, that a case may even be made out for decriminalizing the crime of bestiality, particularly, when done in private”. *Id*, page 149G-H (citation omitted).

concluded in summary fashion that there was no “unfair” discrimination because “[e]quality before the law for each person does not mean equality before the law for each person’s sexual relationships”.⁷⁸

With respect, the Court’s reasoning mixed the approaches to Article 10(1) and 10(2) which had been set out in previous cases. When considering Article 10(1), the Court failed to consider whether the differentiation had a rational connection to a legitimate purpose as the *Mwellie* test requires. In respect of Article 10(2), the Court did not follow the four-step analysis set out in the *Müller* case.⁷⁹

Thus, the *Frank* case is not decisive on the question of whether Article 10(1) or 10(2) might apply to some forms of discrimination based on sexual orientation, for the following reasons:

- (1) The Court did not conduct a clear analysis of Article 10(1) or 10(2) based on the interpretations of these provisions set out in Namibian case law.
- (2) The Court supported its conclusion that “sex” does not include “sexual orientation” by drawing an analogy to the reference to “sex” in the provision on discrimination in the International Covenant on Civil and Political Rights. However, the Court’s statement that this reference to “sex” does not include sexual orientation⁸⁰ was, respectfully, factually incorrect. The Human Rights Committee that monitors compliance with the Covenant had already stated at that stage that the references to “sex” in the provisions on discrimination in the Covenant *do* include “sexual orientation”.⁸¹
- (3) The Court buttressed its findings on discrimination with a view that the constitutional protection given to the “family” in Article 14 “envisages a formal relationship between male and female, where sexual intercourse between them in the family context is the method to procreate offspring and thus ensure the perpetuation and survival of the nation and the human race”.⁸² This is, with respect, an untenable conclusion as it would deny constitutional protection to couples who were infertile or past child-bearing age, to couples

⁷⁸ *Id*, page 155E-F.

⁷⁹ See *Müller*, pages 199J-200D, quoted in *Frank*, pages 154I-155C.

⁸⁰ *Id*, page 145E-F.

⁸¹ *Toonen v Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

⁸² *Frank*, pages 146F-G.

who adopt children and to couples who simply choose not to have children. Furthermore, this stance would deny constitutional protection to the many single-parent families in Namibia and to the extended family which is so important in African culture.⁸³

- (4) The Court placed a strong emphasis on “Namibian values” as a guide to its Constitutional interpretation, but provided virtually no factual evidence of those values. Indeed, despite citing a long list of potential sources of information on national values, the Court actually relied on only two specific sources: statements by the President of Namibia and the Minister of Home Affairs indicating that homosexual relationships were against Namibian traditions and values, coupled with the failure of any other Member of Parliament from the ruling party to make any statement to the contrary when the matter was raised in Parliament.⁸⁴ This is not a fair measure of “Namibian values”. Even if it were, Namibian values are likely to have changed and evolved in the intervening 19 years since the *Frank* case was decided. Furthermore, the Court does not discuss the fact that one of the fundamental roles of a Constitution is to protect vulnerable minorities; any meaningful promise of equality for “all persons” under the law must extend to minorities and to persons with unpopular views or lifestyles.⁸⁵ As the South African Constitutional Court has pointed out:

[t]he impact of discrimination on gays and lesbians is rendered more serious and their vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favourable legislation for themselves. They are accordingly almost exclusively reliant on the Bill of Rights for their protection.⁸⁶

⁸³ See, for example, the South African case of *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC), paragraph 51. See also *Canada (Attorney-General) v Mossop* (1993) 100 DLR (4th) 658, page 710C-E, quoted in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, 2000 (2) SA 1 (CC), paragraph 52:

The argument is that procreation is somehow necessary to the concept of family and that same-sex couples cannot be families as they are incapable of procreation. Though there is undeniable value in procreation, the Tribunal could not have accepted that the capacity to procreate limits the boundaries of family. If this were so, childless couples and single parents would not constitute families. Further, this logic suggests that adoptive families are not as desirable as natural families. The flaws in this position must have been self-evident. Though procreation is an element in many families, placing the ability to procreate as the inalterable basis of family could result in an impoverished rather than an enriched version.

⁸⁴ *Frank*, page 150E-G.

⁸⁵ See Dianne Hubbard, “The paradigm of equality in the Namibian Constitution: Concept, contours and concerns” in Anton Bösl et al, eds, *Constitutional Democracy in Namibia: A Critical Analysis After Two Decades*, Windhoek: Macmillan Education, 2010, page 242.

⁸⁶ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC), paragraph 25.

Thus, the *Frank* case does not deal with how Article 10 might be applied to the criminal law on consensual sodomy or unnatural sexual offences. Also, since these laws discriminate between male and female, as well as between homosexual and heterosexual, their conflict with Article 10(2) is much more straightforward.

d) Would making the laws on consensual sodomy and unnatural sexual offences gender-neutral remedy their inequality?

It is worth asking whether the discriminatory nature of the law criminalising sodomy could be remedied if the law happened to be made applicable to sodomy between two women, between two men and between a man and a woman. As will be seen in the examples in the next section below, in several other jurisdictions (such as Belize, Botswana and India), similar laws that are drafted in gender-neutral terms have been found to violate principles of equality because they still have a disproportionate impact on homosexual persons. Furthermore, gender-neutral wording cannot disguise the fact that laws criminalising consensual sodomy are intended to target homosexual acts rather than sodomy in other contexts. Giving the law the appearance of gender equality would not remedy the remaining indirect discrimination.⁸⁷

It is important to remember the words of the Namibian High Court in the 1994 *Kauesa* case:

Articles 8(1) and 10 go hand in hand. Discrimination in most cases also violates dignity.⁸⁸

In addition, a constitutional provision should not be looked at in isolation. A 2017 Namibian High court case informs us that interpreting the Constitution requires a holistic approach to ensure that the fundamental rights are promoted rather than curtailed. It is important to consider the purpose of the provisions and the values embodied therein, some of which are to promote fundamental human rights and the rule of law.⁸⁹

⁸⁷ In Botswana, it has been pointed out that indirect discrimination takes place where occurs where a rule ostensibly applies neutrally to all; but the application of the rule has a disproportionate negative effect on one group. *Moatswi & Another v Fencing Centre Ltd* [2002] (1) BLR 262 (IC), page 266F-G, cited in *Letsweletse Motshidiemang v Attorney General and Others* MAHGB-000591-16, 11 June 2019, pages 93-94 (available at <<https://africanlii.org/sites/default/files/legabibo.pdf>>).

⁸⁸ *Kauesa v Minister of Home Affairs and Others* 1994 NR 102 (HC), page 136.

⁸⁹ *S v NV* 2017 (3) NR 700 (HC), page 706.

It is for this reason that making the crime of sodomy gender-neutral would only be a cosmetic exercise and would not remedy any constitutional violation.

4.2 The Right to Dignity – Article 8

It may be argued that the criminal offences of sodomy and unnatural sexual offences also violate the right to dignity protected by Article 8. This is because they indirectly categorise homosexual men as criminals and consequently lower their worth and standing in society. Such an implication seems to be a violation of the right to dignity. It can further be argued that this law creates an environment where homosexual men are treated as social pariahs by means of offences that have no actual victim and cause no harm to society. It is, however, important to dissect Article 8 to understand it more fully.

Article 8 provides as follows:

Respect for Human Dignity

- (1) The dignity of all persons shall be inviolable.
- (2) (a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.
- (b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

Dignity is fact part of the very foundation of the Namibian Constitution, which begins with the acknowledgment in its very first words that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace”.⁹⁰

One of Namibia’s earliest constitutional cases stressed the role of human dignity in shaping the new Namibian nation where the late Mohamed AJA (as he then was) said:

⁹⁰ Namibian Constitution, Preamble, first paragraph.

The Namibian Constitution seeks to articulate the aspirations and values of the new Namibian nation following upon independence. It expresses the commitment of the Namibian people to the creation of a democratic society based on respect for human dignity, protection of liberty and the rule of law. Practices and values which are inconsistent with or which might subvert this commitment are vigorously rejected.⁹¹

In the 2006 *Afshani* case, the High Court explained why dignity is a core constitutional value:

Article 8(1) demands respect for human dignity and entrenches that right in peremptory language: The dignity of all persons shall be inviolable. One only has to refer to the articulation of this value in the first paragraph of the Preamble to the Constitution to understand why human dignity is a core value, not only entrenched as a fundamental right and freedom in chapter 3, but also permeating all other values reflected therein.⁹²

In the 2012 *Alexander* case, the Supreme Court emphasised “most, if not all, of the fundamental rights and freedoms” protected by the Namibian Constitution are inspired by and pervaded with “the dignity of the individual as a human being”.⁹³ The Court emphasised here that the concept of dignity must be interpreted against Namibia’s historical background, when the majority of the people of Namibia were stereotyped and discriminated against on the basis of ethnicity and race. During that period, the “criminalization of ordinary day to day activities, which activities we today accept as natural, carried with it the seeds of humiliation and affront to a person’s dignity as it deprived that person of many of his or her personal rights and further carried with it the possibility of arrest and detention”. The Court concluded: “It is very much in the realm of personal rights that a person’s dignity and his worth as human being manifested itself and it is against the background history that the Constitution must be interpreted so as to afford to its subjects the full measure of the protection of the rights set out in Chapter 3 of the Constitution.”⁹⁴

A 2015 High Court case articulated of the three basic elements to consider whenever it is alleged that the right to dignity has been infringed:

- (1) Every human being possesses an intrinsic worth, merely by being human.

⁹¹ *Ex parte Attorney General: In re Corporal Punishment by Organs of State* 1991 NR 178 (SC), page 179F.

⁹² *Afshani and Another v Vaatz* 2006 (1) NR 35 (HC), paragraph 28.

⁹³ *Alexander v Minister of Justice and Others* 2010 (1) NR 328 (SC), paragraph 99 (available at namiblii.org/na/judgment/supreme-court/2010/2).

⁹⁴ *Id.*, paragraphs 99-101.

- (2) This intrinsic worth should be recognised and respected by others, and some forms of treatment by others are inconsistent with, or required by, respect for this intrinsic worth.
- (3) Recognizing the intrinsic worth of the individual requires that the State should be seen to exist for the sake of the individual human being.⁹⁵

There are a few other cases in Namibian jurisprudence that are particularly important in determining whether a law infringes the right to dignity.

Shortly after independence, the Namibian Supreme Court had to determine if the imposition of corporal punishment by organs of State violated the constitutional right to dignity. In analysing this right, the Court first noted that it includes protection from seven different conditions:

- a) torture;
- b) cruel treatment;
- c) cruel punishment;
- d) inhuman treatment;
- e) inhuman punishment;
- d) degrading treatment;
- e) degrading punishment.⁹⁶

It also considered the meaning of the terms “inhuman” and “degrading” – relying on the Oxford English Dictionary to find that “inhuman” means “destitute of natural kindness or pity; brutal, unfeeling, cruel; savage, barbarous, while “to degrade” means “to lower in estimation, to bring into dishonour or contempt; to lower in character or quality; to debase”.⁹⁷

The Court also emphasised that, while Article 24(3) of the Constitution allows for permissible derogation from some of the fundamental rights and freedoms in Chapter 3 of the Constitution, it does *not* allow derogation from the right to dignity in Article 8.⁹⁸ This means that once a court finds

⁹⁵ *Medical Association of Namibia Ltd and Another v Minister of Health and Social Services and Others 2015 (1) NR 1 (HC)*, citing *Khumalo and Others v Holomisa 2002 (5) SA 401 (CC)*, pages 418F– 19A; overruled by *Medical Association of Namibia and Another v Minister of Health and Social Services and Others (SA 80/2013) [2017] NASC 1 (09 February 2017)*, where the Court found it unnecessary to consider whether the legal provisions in question violated the right to dignity (paragraph 102).

⁹⁶ *Ex parte Attorney-General: In Re Corporal Punishment by Organs of State 1991 NR 178 (SC)*, page 3.

⁹⁷ *Id.*, page 19. These definitions were re-iterated in *McNab & Others v Minister of Home Affairs & Others 2007 (2) NR 531 (HC)*, paragraph 46.

⁹⁸ *Id.*, page 187. Article 24 (3) of the Namibian Constitution states: “Nothing contained in this Article shall permit a derogation from or suspension of the fundamental rights or freedoms referred to in Articles 5, 6, 8, 9, 10, 12, 14, 15, 18, 19 and 21(1)(a), (b), (c) and (e) hereof, or the denial of access by any persons to legal practitioners or a Court of law.”

that a particular statute or practice violates any of the seven permutations of Article 8(2)(b), there can be no question of justification. The State's obligation to protect human dignity is "absolute and unqualified".⁹⁹

The Court found the imposition of corporal punishment by a State organ to be inhuman and degrading and therefore a violation of the right to dignity in Article 8.¹⁰⁰

In the 1999 *Tcoeib* case, the Namibian Supreme Court held that a sentence of life imprisonment without any possibility of parole would amount to violation of Article 8, because the right to dignity includes also a "right not to live in despair and helplessness".¹⁰¹ Although the issue before the Court was very different from the question of consensual sodomy, it is not difficult to understand that the criminalisation of the primary form of intimate expression of two consenting adults could also produce profound feelings of despair and helplessness.

In the 2007 *McNab* case, the Namibian High Court considered the concept of dignity. Drawing on the reasoning in the 1991 corporal punishment case, and quoting South African jurisprudence on dignity, the Court found that recognition of a person's right to dignity is an acknowledgment of the intrinsic worth of that person as a human being. Every human being is entitled to be treated as worthy of respect and concern. This right to dignity is therefore is the foundation of many of the other rights that are entrenched in Bill of Rights and a fundamental touchstone of the constitutional order.¹⁰² The Court then found that conditions in the police holding cells where the plaintiffs were detained were inhuman and degrading, and therefore a violation of the constitutional right to human dignity.¹⁰³

⁹⁹ *Ibid.*

¹⁰⁰ *Id.*, page 189.

¹⁰¹ *S v Tcoeib* 1999 NR 24 (SC), paragraph 22. The holding in the *Tcoeib* case was reinforced in 2018 when the Supreme Court found that "informal life sentences" which leave no realistic prospect of release are unconstitutional as cruel, degrading and inhuman or degrading punishment and a violation of the right to human dignity. *Gaingob v The State* [2018] NASC (6 February 2018).

¹⁰² *Id.*, paragraph 46, quoting *S v Makwanyane and Others* 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665), paragraph 144.

¹⁰³ *Id.*, paragraph 52.

4.3 The Right to Privacy – Article 13(1)

It may further be argued that the criminalization of sodomy between consenting adult males violates the constitutional right to privacy. Article 13(1) of the Namibian Constitution protects persons in the privacy of their homes, correspondence and communications:

Privacy

(1) No persons shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.

Considering that the act of consensual sodomy takes place behind closed doors and in private, one wonders how the State would police and investigate this crime without violating an individual's right to privacy.

Privacy also has a deeper meaning. In the 2015 case of *ES v AC*, involving a mother of young children whose life was at risk because she refused a blood transfusion on religious grounds., the Namibian Supreme Court had to consider the balance between her right to privacy (intertwined with her personal liberty, dignity and freedom of religion), weighed against her parental duty to care for her children. In finding that the mother's rights outweighed her parental duty, the Court placed a strong emphasis on patient autonomy. The Court found that "individual free choice and self-determination are themselves fundamental constituents of life"¹⁰⁴ and concluded that "[m]oral autonomy is of central importance to the protection of human dignity and liberty in free and open democracies such as ours."¹⁰⁵

Of course, Article 13(1) embodies exceptions; it contemplates the imposition of limitations on the right to privacy for certain limited purposes.¹⁰⁶ These purposes are for national security, public

¹⁰⁴ *ES v AC* 2015 (4) NR 921 (SC), paragraph 72, quoting the Canadian case of *Malette v Shulman* 67 DLR (4th) 321, page 334 (72 OR (2d) 417).

¹⁰⁵ *Id*, paragraph 73.

¹⁰⁶ See *Attorney-General of Namibia v Minister of Justice and Others* 2013 (3) NR 806 (SC), paragraphs 29-30.

safety, the economic well-being of the country, the protection of health or morals, the prevention of disorder or crime and the protection of the rights or freedoms of others.

Some may argue that the criminalisation of sodomy can be justified for the protection of morals. Such an argument is misguided for a number of reasons:

Firstly, legal commentators have warned against the inclination to equate crime with sin in order to justify the enforcement of morality on religious grounds:

[The function of criminal law] is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of physical, official or economic dependence.

It is not ... the function of law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined.

Unless a deliberate attempt is made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.¹⁰⁷

Secondly, the disapproval of homosexuality by some is based on religious views¹⁰⁸ - but Namibia is a secular state.¹⁰⁹ This constitutes a clear commitment by the State to maintain a separation between law and religion. Furthermore, while Article 19 protects the right to “enjoy, practise, profess, maintain and promote” any religion, this right is expressly subject to the condition that it does not impinge upon the rights of others. In addition, the right to practise religion protected by Article 19 and Article 21(1)(c)¹¹⁰ implicitly includes the right *not* to practice any religion or any

¹⁰⁷ P Devlin, *The Enforcement of Morals*, Oxford: Oxford University Press, 1959, reprinted 1965, pages 987-988, quoting Wolfenden J, et al, *Report of the English Departmental Committee on Homosexual Offences and Prostitution*, 1957.

¹⁰⁸ See *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC), paragraph 26.

¹⁰⁹ Article 1(1) of the Namibian Constitution states: “The Republic of Namibia is hereby established as a sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all.”

¹¹⁰ “All persons shall have the right to... freedom to practise any religion and to manifest such practice”.

aspect of any religion. Consequently, absent any other lawful justification, the criminalization of consensual sodomy actually amounts to imposing certain morals, which are rooted in religious precepts, on people who do not subscribe to those morals.

4.4 "Unnatural sexual offences" and unconstitutional vagueness

It is not entirely clear exactly what is encompassed within the crime of "unnatural sexual offences".

A similarly vague phrase is used in a provision of the Combating of Immoral Practices Act, 1980, which previously made it a criminal offence to manufacture, sell or supply "any article which is intended to be used to perform an unnatural sexual act".¹¹¹ In the 1998 *Fantasy Enterprises* case, several sex shops challenged this provision on the basis that it interfered with their right to carry on any trade or business under Article 21(1)(j) of the Namibian Constitution.¹¹²

The Court noted the uncertain meaning of "an unnatural sexual act" with reference to the common-law crime of unnatural sexual offences:

[I]t is not possible to define with precision what types of sexually deviant acts constitute this crime. Hunt, South African Criminal Law and Procedure, 2nd ed, includes a definition of an 'unnatural offence', but the learned author appreciates the problems of interpretation that arise. As he says (at 276)

'the adjective 'unnatural' involves a value judgment varying from country to country, race to race, and age to age: it has little if any objective content'.¹¹³

The High Court concluded that the offence in the Combating of Immoral Practices Act which refers to "an unnatural sex act" was unconstitutionally vague because it did not indicate precisely what was prohibited – and was thus an unreasonable restriction of the constitutional right in question.¹¹⁴

¹¹¹ Combating of Immoral Practice Act 21 of 1980, section 17(1).

¹¹² *Fantasy Enterprises CC t/a Hustler the Shop v Minister of Home Affairs and Another; Nasilowski & Another v Minister of Justice & Others* 1998 NR 96 (HC).

¹¹³ *Id*, page 18, quoting with approval the Zimbabwean High Court case of *S v C* 1988 (2) SA 398 (ZH).

¹¹⁴ *Fantasy Enterprises CC t/a Hustler the Shop v Minister of Home Affairs and Another; Nasilowski & Another v Minister of Justice & Others* 1998 NR 96 (HC).

In light of this case, it is probable that the common-law crime of “unnatural sexual offences” would be similarly unconstitutional, on the basis that it infringes other constitutional rights which are subject to limitation (such as the right to privacy) and yet is too imprecise to constitute a justifiable limitation on any constitutional right.

Alternatively, it could be argued that the crime is unconstitutionally vague simply because it is insufficiently precise to put people on notice of what behaviour can lead to criminal sanctions and is thus an affront to the rule of law.¹¹⁵

5. Constitutionality of the crime of sodomy in other countries

In any process of law reform, it is always important to look at cases in other jurisdictions to see how other countries’ courts have dealt with similar situations.

5.1 *The Right to Equality and Freedom from Discrimination*

a) South Africa

In the 1999 South African case of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*,¹¹⁶ the Constitutional Court found that the criminalization of consensual sodomy violated a number of constitutional rights, including the rights to dignity, equality and privacy.

The equality analysis is not as relevant to Namibia as that of some other jurisdictions because the South African Constitution, unlike the Namibian Constitution, *expressly* prohibits unfair discrimination based on sexual orientation.¹¹⁷ However, the Court’s finding that the differential

¹¹⁵ See, for example, *Lameck & Another v President of the Republic of Namibia & Others* 2012 (1) NR 255 (HC), paragraphs 84-91.

¹¹⁶ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) (available at <www.saflii.org/za/cases/ZACC/1998/15.pdf>).

¹¹⁷ South African Constitution 1996, section 9, which reads as follows:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

treatment of gay men constitutes unfair discrimination, and its emphasis on the absence of an acceptable motive for the differentiation, could be relevant to an analysis of the applicability of Article 10(1) of Namibia's Constitution:

- (a) ... Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact is severe, affecting the dignity, personhood and identity of gay men at a deep level. It occurs at many levels and in many ways and is often difficult to eradicate.
- (b) The nature of the power and its purpose is to criminalise private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of society.
- (c) The discrimination has, for the reasons already mentioned, gravely affected the rights and interests of gay men and deeply impaired their fundamental dignity.¹¹⁸

The Court noted that the discriminatory prohibitions on sex between men reinforce existing societal prejudices and severely increase the negative effects of such prejudices on their lives.¹¹⁹ The mere existence of the crime of consensual sodomy, even in the absence of enforcement, categorises gay men as 'unapprehended felons' and perpetuates their stigmatization in various areas of their lives.¹²⁰

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- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
 - (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

¹¹⁸ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC), paragraph 26.

¹¹⁹ *Id*, paragraph 23.

¹²⁰ *Ibid*, citing Edwin Cameron, "Sexual Orientation and the Constitution: A Test Case for Human Rights" (1993) 110 *SALJ* 450.

b) Fiji

In the 2005 case of *McCoskar v The State*,¹²¹ the High Court of Fiji struck down two criminal provisions aimed at consensual sexual acts. One, which was worded in a neutral fashion with respect to both sex and sexual orientation, was invalidated on the grounds of “privacy supported by equality”, while the other, which applied only to men, was found to be “overtly discriminatory of homosexuals as it criminalises their sexual expression”.¹²² It must be noted that the Constitution of Fiji (like that of South Africa) explicitly prohibits unfair discrimination on the basis of “sexual orientation”.¹²³

As a starting point, the Court noted that Fiji is “a secular State influenced by Christianity but not predominated by it” since Fiji is a multi-cultural society.¹²⁴

With respect to equality, the Court noted:

Equality based on the premise of acceptance focuses on creating symmetry in the lived out experiences of all members of society by eliminating the unequal consequences arising from difference... It affirms that difference should not be the basis for exclusion, marginalization, stigma and punishment.¹²⁵

In considering the provisions that were technically gender-neutral, the Court found that this does not save them from violating the protections for equality because “they proscribe criminal conduct

¹²¹ *McCoskar v The State* [2005] FJHC 500; HAA00 85 & 86.2005 (available at <www.humandignitytrust.org/wp-content/uploads/resources/Nadan_McCoskar_v_State.pdf>).

¹²² *Id*, unpaginated (see subsections entitled “section 175(a) and (c)” and “section 177”).

¹²³ Fiji Constitution 1997, Article 38(1)-(3):

- (1) Every person has the right to equality before the law.
- (2) A person must not be unfairly discriminated against, directly or indirectly, on the ground of his or her:
 - (a) actual or supposed personal characteristics or circumstances, including race, ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age or disability; or
 - (b) opinions or beliefs, except to the extent that those opinions or beliefs involve harm to others or the diminution of the rights or freedoms of others; or on any other ground prohibited by this Constitution.
- (3) Accordingly, neither a law nor an administrative action taken under a law may directly or indirectly impose a disability or restriction on any person on a prohibited ground.

The Fiji Constitution 1997 was subsequently replaced by the Fiji Constitution 2013 – which protects against discrimination on the basis of “sex, gender, sexual orientation, gender identity and expression” amongst other grounds (Article 26(3)(a)).

¹²⁴ *Id*, unpaginated (see subsection entitled “The Fijian Constitution”): “The preamble emphasises the enduring influence of Christianity and its contribution, along with that of other faiths, to the spiritual life of Fiji.”

¹²⁵ *Id*, unpaginated (see subsection entitled “Equality and Privacy and Freedom from Degrading Treatment”).

essential to the sexual expression of the homosexual relationship and are perceived as such”, as well as being primarily applied for prosecutions against homosexuals. The provisions that punish males but not females for sexual acts conducted consensually in private were found to be overtly unequal and therefore invalid.¹²⁶

As well as being discriminatory, both provisions were held to be a “gross intrusion into the private sexual lives of consenting adults” - and the Court held that this right to privacy is “so important in an open and democratic society that the morals argument cannot be allowed to trump the Constitutional invalidity”. It thus found that the provisions could not be proportionate or necessary limitations on constitutional rights.¹²⁷

The judgment concluded by stating:

What the Constitution requires is that the Law acknowledges difference, affirms dignity and allows equal respect to every citizen as they are. The acceptance of difference celebrates diversity. The affirmation of individual dignity offers respect to the whole of society. The promotion of equality can be a source of interactive vitality. The State that embraces difference, dignity and equality does not encourage citizens without a sense of good or evil but rather creates a strong society built on tolerant relationships with a healthy regard for the rule of law.

A country so founded will put sexual expression in private relationships into its proper perspective and allow citizens to define their own good moral sensibilities leaving the law to its necessary duties of keeping sexual expression in check by protecting the vulnerable and penalizing the predator.¹²⁸

c) Nepal

In the 2008 case of ***Pant v Nepal Government, Office of the Prime Minister and Council of Ministers***,¹²⁹ the Supreme Court of Nepal had to determine whether the constitutional right to

¹²⁶ Id, unpaginated (see subsection entitled “Equality and Privacy and Freedom from Degrading Treatment”).

¹²⁷ Id, unpaginated (see subsection entitled “Limitations”).

¹²⁸ Id, unpaginated (see subsection entitled “Conclusion”).

¹²⁹ *Pant v Nepal Government, Office of the Prime Minister and Council of Ministers* (2008) N.J.A. Law Journal 262 (Nepali Supreme Court).

equality applied in the context of sexual orientation. The relevant Constitutional provision applicable to the case was Article 13 of the Interim Constitution of Nepal 2063, 2007, which protected against discrimination on the basis of sex without expressly mentioning sexual orientation, gender, sexual identity or the like.¹³⁰ However, the Court found that Nepal's constitutional provisions on equality must be understood to cover sexual orientation because of the evolution of the universal norms of human rights in this direction, to which Nepal has shown commitment by ratifying multiple international human rights conventions. The Court also emphasised the State's obligation to protect the right of *all* of its citizens.

Amongst the sources cited by the Court in support of its conclusion was the following excerpt from *Sexual Orientation and Gender Identity in Human Rights Law*, a publication of the International Commission of Jurists:

Discrimination on the grounds of sexual orientation and gender identity may give rise to the most egregious human rights violations, such as extrajudicial killings, torture and ill-treatment and arbitrary detention. Demonstrating that discrimination has consequences in the deprivation of enjoyment of all other guaranteed human rights. These include inter alia the right to life, right to liberty, right to a fair trial by an independent and impartial tribunal, right to privacy, freedom of conscience, freedom of opinion, freedom of assembly and freedom of association, equal access to public services, equality before the law and equal protection of the law, right to work, right to social security including social insurance, right to the enjoyment of the highest attainable level of health, right to education, and right to adequate housing. The social sexual orientation exposes them more to violence and human rights abuses; this stigmatisation also increases the climate of impunity, in which such violations frequently occur.

¹³⁰ The Interim Constitution of Nepal 2063, 2007 , Article 13:

13. Right to Equality:
 - (1) All citizens shall be equal before the law. No person shall be denied the equal protection of the laws.
 - (2) No discrimination shall be made against any citizen in the application of general laws on grounds of religion, race, sex, caste, tribe, origin, language or ideological conviction or any of these.
 - (3) The State shall not discriminate among citizens on grounds of religion, race, caste, tribe, sex, origin, language or ideological conviction or any of these. Provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or advancement of the interests of women, Dalit, indigenous ethnic tribes, Madeshi, or peasants, labourers or those who belong to a class which is economically, socially or culturally backward and children, the aged, disabled and those who are physically or mentally incapacitated.
 - (4) No discrimination in regard to remuneration and social security shall be made between men and women for the same work.

In some countries, sexual relationships between same-sex consenting adults or “unnatural behaviour”, such as the manifestation of transgender behaviours, are criminalised under “sodomy laws” or under the abuse of morality laws, which violate the right to privacy and the equal protection of the law without discrimination. Such criminalization reinforces attitudes of discrimination between persons on the basis of sexual orientation. In some countries such acts are punishable by corporal punishments or the death penalty impairing the right to be free from cruel, inhuman or degrading punishment and the right to life. Treaty bodies, the former Commission on Human Rights and special procedures have expressed concern at such criminalization, called on States to refrain from such criminalization and where such laws exist repeal them, and urged all States that maintains the death penalty not to impose for sexual relations between same-sex consenting adults.

Violence taking place in some countries against lesbian, gay, bisexual or transgender (LGBT) persons, including killing, “social cleansing”, torture and ill-treatment, impairs the right to life, the right to be free from torture and cruel, inhuman or degrading treatment or punishment, and the right to security and is also a matter of concern of treaty bodies and special procedures of the former Commission. Victims of criminal offences suffer. From discrimination because of their sexual orientation and gender identity, as they are often perceived as less credible by law enforcement agencies and police officials frequently show prejudice towards such persons. These particular in cases of abuse, ill treatment, including rape or sexual assault, torture, or sexual harassment, and may be disinclined to investigate promptly and thoroughly extrajudicial executions of LGBT persons. The refusal to bring those responsible for such killings to justice and to ensure that such killings particularly disturbing. The special procedures and the treaty bodies have repeatedly asked the States to take action to protect the right to life of LGBT persons, including proper investigation in cases of violence against LGBT persons. They have also called on states to take initiatives against homophobia and hate crimes, including policies and programmes aimed towards overcoming hatred and prejudice against LGBT persons.¹³¹

¹³¹ *Pant v Nepal Government, Office of the Prime Minister and Council of Ministers* (2008) N.J.A. Law Journal 262 (Nepali Supreme Court), pages 272-273. The publication quoted by the Court is “Sexual Orientation and Gender Identity in Human Rights Law: References to Jurisprudence and Doctrine of the United Nations Human Rights System”, International Commission of Jurists, 2007 (available at <www.refworld.org/pdfid/4ad5b5ab2.pdf>).

d) Botswana

In the 2019 case of *Letsweletse Motshidiemang v Attorney General*¹³² the Botswana High Court considered the constitutionality of provisions of the Penal Code that criminalise sexual intercourse between persons of the same sex, as well as both public and private “gross indecency”. The Court found that these provisions violate constitutional rights to privacy, liberty, dignity and equality, holding that these rights are guaranteed on an equal basis to people in same-sex relationships.

The case was brought by a gay man who asserted that the sodomy law discriminated against homosexuals and interfered with an intimate personal aspect of his life which was not harmful to the public interest. A local NGO submitted additional arguments stressing the negative impact of the challenged laws on access to health care services, and their links to the stigma and violence experienced by the LGBTI community. The State asserted that the criminal laws in question did not criminalise homosexuality but only a specific sexual act.

Like the Namibian Constitution, the equality provision of the Constitution of Botswana prohibits sex discrimination but does not expressly refer to sexual orientation.¹³³ However, the Court

¹³² *Letsweletse Motshidiemang v Attorney General and Others* MAHGB-000591-16, 11 June 2019 (available at <<https://africanlii.org/sites/default/files/legabibo.pdf>>).

¹³³ Constitution of Botswana 1996, sections 3 and 15 (emphasis added):

3. Fundamental rights and freedoms of the individual

Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his **race, place of origin, political opinions, colour, creed or sex**, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely -

- (a) life, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, of expression and of assembly and association; and
- (c) protection for the privacy of his home and other property and from deprivation of property without compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

15. Protection from discrimination on the grounds of race, etc.

(1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(3) In this section, the expression "**discriminatory**" means **affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed** whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision -

applied a purposive interpretation to section 3 of the Constitution, quoting the following opinion from a previous Botswana case with approval:

I do not think that the framers of the Constitution intended to declare in 1966, that all potentially vulnerable groups and classes, who would be affected for all time by discriminatory treatment, have been identified and mentioned... I do not think that they intended to declare that the categories mentioned in that definition were forever closed. In the nature of things, as farsighted people trying to look into the future, they would have contemplated that, with the passage of time, not only groups or classes which had caused concern at the time of writing the Constitution but other groups or classes needing protection would arise. The categories might grow or change.¹³⁴

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- (a) for the appropriation of public revenues or other public funds;
 - (b) with respect to persons who are not citizens of Botswana;
 - (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;
 - (d) for the application in the case of members of a particular race, community or tribe of customary law with respect to any matter whether to the exclusion of any law in respect to that matter which is applicable in the case of other persons or not; or
 - (e) whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.
- (5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that it makes reasonable provision with respect to qualifications for service as a public officer or as a member of a disciplined force or for the service of a local government authority or a body corporate established directly by any law.
- (6) Subsection (2) of this section shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in subsection (4) or (5) of this section.
- (7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any restriction on the rights and freedoms guaranteed by sections 9, 11, 12, 13 and 14 of this Constitution, being such a restriction as is authorised by section 9(2), 11(5), 12(2) 13(2), or 14(3), as the case may be.
- (8) Nothing in subsection (2) of this section shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law.
- (9) Nothing contained in or done under the authority of any law shall be held to be inconsistent with the provisions of this section -
- (a) if that law was in force immediately before the coming into operation of this Constitution and has continued in force at all times since the coming into operation of this Constitution; or
 - (b) to the extent that the law repeals and re-enacts any provision which has been contained in any written law at all times since immediately before the coming into operation of this Constitution.

¹³⁴ *Letsweletse Motshidiemang v Attorney General and Others* MAHGB-000591-16, 11 June 2019, paragraph 158, quoting *Attorney General v Dow* [1992] BLR 119 (CA).

In line with this understanding, the Court concluded that the word “sex” in Section 3 is “generously wide enough to include and capture ‘sexual orientation’”.¹³⁵ It buttressed this conclusion with two arguments. Firstly it noted that the country’s Parliament had made it unlawful to terminate employment on the basis of sexual orientation; since all laws flow from the Constitution, this prohibition on discrimination on the basis of sexual orientation must be a subset of the larger constitutional prohibition on sex discrimination.¹³⁶ Secondly, the Court noted that the reference to “sex” in the International Covenant on Civil and Political Rights which Botswana has joined has been interpreted to encompass “sexual orientation”.¹³⁷

The Court found that the fact that penal provisions were gender-neutral did not save them. Even though Botswana’s law criminalised all anal intercourse, including anal intercourse between persons of the opposite sex, it still discriminated on the basis of sexual orientation. This is because it prevented gay men from expressing their sexuality and love in the manner most natural to them, while not having the same effect on heterosexual men and women.¹³⁸

Having found that the laws in question violated multiple constitutional rights, the Court had to consider whether they could be justified on the grounds that they protected the rights and freedoms of others.¹³⁹ The State argued that the laws were necessary to protect the public interest and public morality. The Court found that no evidence had been presented to support this assertion.¹⁴⁰ The Court considered the role of public opinion, but found that public opinion about homosexuality was far outweighed by the finding that the laws violated the key constitutional rights of liberty, equality and dignity. The Court concluded that the laws in question were not in the public interest because they perpetuated “stigma and shame against homosexuals”. The Court also noted that there is no victim in respect of consensual sexual activity between adults, and that

¹³⁵ Id, paragraph 157.

¹³⁶ Id, paragraphs 159-161. The employment law referred to by the court is section 23(d) of the Employment (Amendment) Act, 2010 (Act No. 10 of 2010).

¹³⁷ Id, paragraph 161, citing the decision of the Human Rights Committee in *Toonen v Australia*, Communication No. 488/1992 (available at <hrlibrary.umn.edu/undocs/html/vws488.htm>).

¹³⁸ Id, paragraphs 164-169. The Court stated at paragraph 169:

An interrogation of the impugned provisions, in my view, reveals that the said provisions, have a substantially greater impact on the applicant as a homosexual, who engages only in anal sexual penetration; than it does on heterosexual men and women. The fact that anal intercourse is the only means available to the applicant, is dispositive. Denying the applicant the right to sexual expression, in the only way natural and available to him, even if that way is denied to all, remains discriminatory in effect, when heterosexuals are permitted the right to sexual expression, in a way that is natural to them. Simply put, it is indirect discrimination founded upon sexual orientation. The impugned provisions render the applicant a criminal, or an “unapprehended felon”, always on tenterhooks, waiting to be arrested.

¹³⁹ Id, paragraph 177.

¹⁴⁰ Id, paragraphs 179-181.

enforcement of the criminal laws at issue would entail invasions of private places and bedrooms.¹⁴¹

According to the Court, “the impugned penal provisions oppress a minority and then target and mark them for an innate attribute that they have no control over and which they are singularly unable to change”.¹⁴² It concluded that there was nothing “reasonable and justifiable” about “discriminating against fellow members of our diversified society”.¹⁴³

In its reasoning, the Court emphasised the universality of human rights:

Any discrimination against a member of the society is discrimination against all. Any discrimination against a minority or class of people is discrimination against the majority. Plurality, diversity, inclusivity and tolerance are quadrants of a mature and an enlightened democratic society.¹⁴⁴

The Court concluded that discrimination against a segment of society “pollutes compassion”, and that a democratic nation is one that “embraces plurality, diversity, tolerance and open-mindedness”.¹⁴⁵ It stated that minorities who are perceived by the majority “as deviants or outcasts” must be “excluded and ostracised”: “Discrimination has no place in this world. All human beings are born equal.”¹⁴⁶

The State is taking the case on appeal, with the outcome expected in 2020.¹⁴⁷

¹⁴¹ Id, paragraphs 184-189.

¹⁴² Id, paragraph 190.

¹⁴³ Id, paragraph 191.

¹⁴⁴ Id, paragraph 173.

¹⁴⁵ Id, paragraph 198.

¹⁴⁶ Id, paragraph 210.

¹⁴⁷ See, for instance, “Botswana to appeal ruling decriminalising homosexuality”, *BBC News*, 6 July 2019 (available at www.bbc.com/news/world-africa-48892517>). The appeal was announced in a press statement issued by the Attorney-General, dated 3 July 2019, (reproduced at www.facebook.com/BotswanaGovernment/posts/2303704606378851?comment_id=2303756296373682&reply_comment_id=2303762199706425&comment_tracking=%7B%22tn%22%3A%22R%22%7D%7D>).

e) Belize

In the 2016 **Orozco** case,¹⁴⁸ the Supreme Court of Belize found a law criminalising “carnal intercourse against the order of nature with any person” to be unconstitutional.¹⁴⁹

Although the key basis for this holding was the violation of the constitutional right to dignity, the Court also found violations of equality, privacy and freedom of expression.

With respect to equality, the court held that the law violated the constitutional prohibition on discrimination on the basis of “sex”¹⁵⁰ – finding that the term “sex” in the Belize Constitution must be interpreted as including “sexual orientation”, following on the interpretation of the term “sex” in the International Covenant on Civil and Political Rights which Belize (like Namibia) has joined.¹⁵¹ Furthermore, the Court found that the law violated the more general constitution promise that “All persons are equal before the law and are entitled without discrimination to the equal protection of the law.”¹⁵²

The Court found that, even though the legal prohibition covered sexual acts involving both males and females, “the impact on the dignity of a homosexual man is disproportionate given the deep stigmatisation caused by them being the primary targets”.¹⁵³ The provision’s gender-neutral language did not save it from being discriminatory in its effect, with homosexual men being rendered criminals under the law by virtue of their homosexuality.¹⁵⁴

Certain aspects of this case were challenged on appeal, including the Supreme Court’s equality analysis. However, the Court of Appeal upheld the decision of the Supreme Court,¹⁵⁵ specifically

¹⁴⁸ *Caleb Orozco v Attorney General of Belize*, Claim No. 668 of 2010 (10 August 2016) (available at <www.humandignitytrust.org/wp-content/uploads/resources/Judgment-Orozco-v-The-Attorney-General-of-Belize.pdf>).

¹⁴⁹ The challenged law was section 53 of the Criminal Code, which provided as follows:

Every person who has carnal intercourse against the order of nature with any person or animal shall be liable to imprisonment for ten years.

¹⁵⁰ Constitution of Belize 1981, section 16.

¹⁵¹ *Caleb Orozco v Attorney General of Belize*, Claim No. 668 of 2010 (10 August 2016), paragraphs 93-94, citing *Toonen v Australia*, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 where the UN Human Rights Committee found that the term “sex” in Articles 2 and 26 of the International Covenant on Civil and Political Rights were to be interpreted as including “sexual orientation”.

¹⁵² Constitution of Belize 1981, section 6(1).

¹⁵³ *Caleb Orozco v Attorney General of Belize*, Claim No. 668 of 2010 (10 August 2016), paragraph 65.

¹⁵⁴ *Id.*, paragraph 92.

¹⁵⁵ *Attorney-General v Caleb Orozco and Others*, Civil Appeal 32 of 2016, Court of Appeal of Belize (30 December 2019) (available for download at <www.u-rap.org/web2/index.php/component/k2/item/79-press-release-belize-court-of-appeal-does-not-disturb-2016-ruling-in-orozco-case-that-section-53-is-unconstitutional>).

finding that the Supreme Court was correct in holding that “sexual orientation” is encompassed in the reference to “sex” in the non-discrimination provisions of the Belize Constitution.

The Court of Appeal relied on the following reasoning:¹⁵⁶

- 1) The term “sex” refers to sexual intercourse, which is the primary element of “carnal intercourse” regardless of whether it takes place between heterosexual or homosexual persons; “sex” includes “sexual intercourse”, which includes “sexual intercourse orientation”.¹⁵⁷
- 2) Including “sexual orientation” in the word “sex” gives the Constitution a “purposive and generous meaning for protecting human rights”.¹⁵⁸
- 3) The principles of statutory interpretation in Belize require that, if more than one construction of a statute is possible, the courts should prefer the meaning that is consistent with the international obligations of Belize, and the meaning which best fits the general legislative purpose – which is what the lower court correctly did.¹⁵⁹

The appellate court concluded on this issue:

It is our view that consensual sexual intercourse between adult gays or between adult lesbians in private does not harm the fundamental rights and freedoms of others, nor does it intolerably harm contemporary public interest, even though it may be repugnant to Christian morality ...and repugnant to some non-Christians. Accordingly, the meaning of the word sex in section 3 and 16 of the Constitution which promotes fundamental rights and freedoms regardless of sex, is that the word sex includes sexual intercourse and sexual intercourse orientation.¹⁶⁰

¹⁵⁶ Although there were concurring opinions, the reasoning of all three justices was similar on this issue.

¹⁵⁷ Id, paragraphs 108-109.

¹⁵⁸ Id, paragraph 110.

¹⁵⁹ Id, paragraphs 111-122.

¹⁶⁰ Id, paragraph 124.

f) India

The Supreme Court of India struck down a statute prohibiting “unnatural offences”¹⁶¹ on constitutional grounds in the 2018 *Johar* case.¹⁶² The main constitutional objections to the provision were based on dignity and privacy – but, as in many other cases of this nature, the Court drew connections between equality and freedom from discrimination, liberty, dignity and privacy.¹⁶³

At the outset, the Supreme Court emphasised the principle of “constitutional morality”, which is premised on inclusiveness.¹⁶⁴ People in society may prefer different things for themselves; they have the freedom to be different as long as they remain within the legal framework and respect the fundamental rights of others.¹⁶⁵

Any attempt to push and shove a homogeneous, uniform, consistent and a standardised philosophy throughout the society would violate the principle of constitutional morality. Devotion and fidelity to constitutional morality must not be equated with the popular sentiment prevalent at a particular point of time.¹⁶⁶

It contrasted constitutional morality with social morality, which is based on the popular sentiment of the majority,¹⁶⁷ noting that the courts must be guided by constitutional morality rather than societal morality.¹⁶⁸

¹⁶¹ The provision at issue was section 377 of the Indian Penal Code:

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.

The portion of this provision relating to bestiality was not affected by the case. Paragraphs 252, 253(xvii).

¹⁶² *Navtej Singh Johar & Ors v Union of India*, Supreme Court, Writ Petition (Criminal) No. 76 of 2016 (6 September 2018) (available at <www.humandignitytrust.org/wp-content/uploads/resources/2018.09.06-Johar-v-India-judgment-Indian-SC.pdf>).

¹⁶³ The case was heard by five justices who issued four separate opinions (all concurring in the same outcome) - with the majority opinion being subscribed to by two justices and three other opinions being issued by individual judges. Unless otherwise indicated, the citations to this case refer to the majority judgement.

¹⁶⁴ *Id.*, paragraphs 115-124; see paragraph 123 in particular. The concurring opinion of Chandrachud J stated (at paragraph 148): “Our Constitution, above all, is an essay in the acceptance of diversity. It is founded on a vision of an inclusive society which accommodates plural ways of life.”

¹⁶⁵ *Id.*, paragraph 115.

¹⁶⁶ *Id.*, paragraph 116.

¹⁶⁷ *Id.*, paragraph 116, for example.

¹⁶⁸ *Id.*, paragraph 119.

The test of popular acceptance, in view of the majority opinion, was not at all a valid basis to disregard rights which have been conferred with the sanctity of constitutional protection. The Court noted that the discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the 'mainstream', but in a democratic Constitution founded on the Rule of Law, it does not mean that their rights are any less sacred than those conferred on other citizens.¹⁶⁹

The statute at issue criminalised voluntary carnal intercourse between homosexuals as well as between heterosexuals, and was equally applicable to women and men.¹⁷⁰ Nevertheless, the Court found that the law in question targeted the LGBT community and thus constituted discrimination and unequal treatment that violated the right to equality.¹⁷¹ In the words of one of the concurring justices, the effect the law “is not merely to criminalize an act, but to criminalize a specific set of identities”.¹⁷²

The Court noted that “equality demands that the sexual orientation of each individual in the society must be protected on an even platform”.¹⁷³

The law was held to be unjustifiable. It serves no legitimate public purpose or interest since non-consensual sexual acts are covered by other Penal Code provisions.¹⁷⁴ Furthermore, “consensual sexual acts between adults in private space are neither harmful nor contagious to the society”.¹⁷⁵

The law in question actually served as “a weapon in the hands of the majority to seclude, exploit and harass the LGBT community”:

¹⁶⁹ Id, paragraph 162. See also paragraph 253(v).

¹⁷⁰ Id, paragraphs 218, 252.

¹⁷¹ Id, paragraph 237. As one of the concurring opinions put it, “facially neutral action by the State may have a disproportionate impact upon a particular class”. Id, concurring opinion of Chandrachud J, paragraph 43. See also the concurring opinion of Malhotra J, paragraph 19(iii):

Even though Section 377 is facially neutral, it has been misused by subjecting members of the LGBT community to hostile discrimination, making them vulnerable and living in fear of the ever-present threat of prosecution on account of their sexual orientation. The criminalisation of “carnal intercourse against the order of nature” has the effect of criminalising the entire class of LGBT persons since any kind of sexual intercourse in the case of such persons would be considered to be against the “order of nature”...

¹⁷² Id, concurring opinion of Chandrachud J, paragraph 51. See also the concurring opinion of J. Malhotra, paragraph 14.3: “In effect, voluntary consensual relationships between LGBT persons are criminalised in totality.”

¹⁷³ Id, paragraph 163.

¹⁷⁴ Id, paragraphs 223, 237.

¹⁷⁵ Id, paragraphs 239, 253(xv)-(xvi).

It shrouds the lives of the LGBT community in criminality and constant fear mars their joy of life. They constantly face social prejudice, disdain and are subjected to the shame of being their very natural selves. Thus, an archaic law which is incompatible with constitutional values cannot be allowed to be preserved.¹⁷⁶

One of the concurring opinions described the negative impact in this way:

The presence of the provision on the statute book has reinforced stereotypes about sexual orientation. It has lent the authority of the state to the suppression of identities. The fear of persecution has led to the closeting of same sex relationships. A penal provision has reinforced societal disdain.

Sexual and gender based minorities cannot live in fear, if the Constitution has to have meaning for them on even terms. In its quest for equality and the equal protection of the law, the Constitution guarantees to them an equal citizenship. In de-criminalising such conduct, the values of the Constitution assure to the LGBT community the ability to lead a life of freedom from fear and to find fulfilment in intimate choices.¹⁷⁷

This opinion concluded that members of the LGBT community “are entitled to the benefit of an equal citizenship, without discrimination, and to the equal protection of law”.¹⁷⁸

5.2 *The right to dignity*

Even though there is no universal definition of dignity, four primary aspects of dignity have been identified, namely:

- a) the prohibition of all types of inhuman treatment, humiliation, or degradation by one person over another;
- b) the assurance of the possibility for individual choice and the conditions for each individual’s self-fulfilment, autonomy, or self-realization;
- c) the recognition that the protection of group identity and culture may be essential for the protection of personal dignity; and

¹⁷⁶ Id, paragraphs 247, 253(xv).

¹⁷⁷ Id, concurring opinion of Chandrachud J, paragraphs 149-150.

¹⁷⁸ Id, concurring opinion of Chandrachud J, paragraph 156(iv).

- d) the creation of the necessary conditions for each individual to have their essential needs satisfied.¹⁷⁹

In Canada, the Supreme Court has provided this description of dignity as it relates to the Canadian Charter of Rights and Freedoms:

What is human dignity?... Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society...¹⁸⁰

These various elements of dignity have been cited by courts in jurisdictions which have found that criminal prohibitions on sodomy violate the right to dignity. These various elements of dignity have been cited by courts in the jurisdictions which have found that criminal prohibitions on sodomy violate the right to dignity.

a) South Africa

Section 10 of the South African Constitution provides: “Everyone has inherent dignity and the right to have their dignity respected and protected.”

The 1999 case of ***National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*** held that criminalising sodomy deeply impairs the fundamental dignity of gay men. The Court noted that “dignity is a difficult concept to capture in precise terms”, but found that it clearly requires acknowledgement of “the value and worth of all individuals as members of

¹⁷⁹ Andrew Clapham, *Human rights obligations of non-state actors*, Oxford: Oxford University Press, 2006, pages 545-546, cited in P Kaufmann et al, *Library of Ethics and Applied Philosophy*, Vol 24, Humiliation, degradation, dehumanization: Human dignity violated, New York; Springer, 2011, page 121.

¹⁸⁰ *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, paragraph 53.

our society”.¹⁸¹ The Court set out the following reasoning on how the criminalisation of sodomy violates the right to dignity:

... As we have emphasized on several occasions, the right to dignity is a cornerstone of our Constitution ... Dignity is a difficult concept to express in precise terms. At its least it is clear that the constitutional protection of dignity requires us to acknowledge the value and work of all individuals as members of society. The common-law prohibition on sodomy criminalises all sexual intercourse per anum between men: regardless of the relationship of the couple who engage therein, of the age of such couple, of the place where it occurs, or indeed of any other circumstances whatsoever. In so doing, it punishes a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.¹⁸²

b) Belize

In the 2016 **Orozco** case discussed above,¹⁸³ the Supreme Court of Belize found the law criminalising carnal intercourse against the order of nature with any person to be a violation of the constitutional protection for dignity.

¹⁸¹ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC), paragraph 28.

¹⁸² *Id*, paragraph 28.

¹⁸³ *Caleb Orozco v Attorney General of Belize*, Claim No. 668 of 2010 (10 August 2016) (available at www.humandignitytrust.org/wp-content/uploads/resources/Judgment-Orozco-v-The-Attorney-General-of-Belize.pdf).

The Court followed the South African judgement in the ***National Coalition for Gay and Lesbian Equality*** case on the issue of dignity – quoting the passage reproduced above and finding that the same reasoning applies to the Belize Constitution’s recognition of the human dignity of all persons.¹⁸⁴ The Court stated further that this breach “operates to inform the other rights from which the concept of human dignity emanates”.¹⁸⁵

As noted above, this case was confirmed on appeal - but the finding of the Supreme Court on dignity was not challenged and so was not discussed by the Court of Appeal.¹⁸⁶

c) United States of America

The American Constitution does not refer specifically to human dignity, but there are some provisions – such as the prohibition on cruel and unusual punishments and the protections of due process which include liberty and privacy -- that have been developed in American constitutional jurisprudence to lean towards the protection of dignity.¹⁸⁷ This is evidenced by the 2003 judgment in ***Lawrence v Texas***, where the Supreme Court found the criminalisation of sodomy to be unconstitutional.¹⁸⁸

Although the Court’s analysis focused on “liberty”,¹⁸⁹ it explained the link between liberty and dignity:

...[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education...
In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:

¹⁸⁴ Constitution of Belize 1981, section 3(c).

¹⁸⁵ Id, paragraphs 66-67, quoting *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), paragraph 28, with approval.

¹⁸⁶ *Attorney-General v Caleb Orozco and Others*, Civil Appeal 32 of 2016, Court of Appeal of Belize (30 December 2019) (available for download at <www.u-rap.org/web2/index.php/component/k2/item/79-press-release-belize-court-of-appeal-does-not-disturb-2016-ruling-in-orozco-case-that-section-53-is-unconstitutional>).

¹⁸⁷ VC Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, *Montana Law Review*, Vol. 65, 2004, page 16. (available at <scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1112&context=facpub>).

¹⁸⁸ *Lawrence v Texas* 539 US 558 (2003), page 575.

¹⁸⁹ The Due Process Clause of the Fourteenth Amendment to the US Constitution reads as follows:

No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment [of the US Constitution]. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."

Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.¹⁹⁰

The Court stated that making homosexual conduct criminal is in itself an invitation to subject homosexual persons to discrimination both in the public and in the private spheres – which demeans the lives of homosexual persons” and thus impacts their dignity.¹⁹¹

The Court concluded that the right of homosexual adults to engage in intimate, consensual conduct has been accepted as an integral part of human freedom in many other countries, and that there had been no showing in the United States that “the governmental interest in circumscribing personal choice is somehow more legitimate or urgent”. It quoted with approval the reasoning that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice”.¹⁹² It found that the statute in question “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual”.¹⁹³

¹⁹⁰ *Lawrence v Texas* 539 US 558 (2003), page 574 (citations omitted); the Court was quoting its own holding in *Planned Parenthood of Southeastern Pa v Casey* 505 U.S. 833 (1992).

¹⁹¹ *Id.*, page 575.

¹⁹² *Id.*, page 577, quoting the dissenting opinion in the previous US Supreme Court case on sodomy, *Bowers v Hardwick* 478 U.S. 186 (1986), saying that this analysis was correct and should have prevailed. The *Lawrence* case overruled the *Bowers* case.

¹⁹³ *Id.*, page 578.

d) Trinidad & Tobago

In the 2018 *Jason Jones* case,¹⁹⁴ the High Court of Justice of Trinidad and Tobago invalidated certain statutory provisions that criminalised consensual same-sex sexual activity between adults on constitutional grounds.

The two offences in question were both, on their faces, gender-neutral and of general application - they criminalised sodomy between two males or between a male and a female, and acts of “serious indecency” (any act other than either “natural or unnatural” sexual intercourse involving the use of the genital organ for the purpose of arousing or gratifying sexual desire) between persons of the same or opposite sexes.¹⁹⁵

The Court noted at the outset that Trinidad and Tobago is a secular state, which means that the Court could not determine the case on the basis of religious belief:¹⁹⁶

This is not a case about religious and moral beliefs but is one about the inalienable rights of a citizen under the Republican Constitution of Trinidad and Tobago; any citizen; all citizens. As discussed below, this is a case about the dignity of the person and not about the will of the majority or any religious debate. History has proven that the two do not always coincide. To my mind, religious debates are best left to be discussed and resolved in other quarters with persons who subscribe to those particular ideals and for the followers of those ideals to be convinced as to the religiousness, sanctity or morality of those ideals.

¹⁹⁴ *Jason Jones v Attorney General of Trinidad & Tobago* (2018) High Court, Claim No. CV2017-00720 (12 April 2018), paragraph 92 (available at <ufdc.ufl.edu/AA00063330/00001>).

¹⁹⁵ Sexual Offences Act of 1986, sections 13 and 16, as described in the Court’s judgment, paragraphs 6-7. The statute used the term “buggery” as a synonym for sodomy. The Court quoted the provisions at paragraph 30:

13. (1) A person who commits the offence of buggery is liable on conviction to imprisonment for twenty-five years.
- (2) In this section ‘buggery’ means sexual intercourse per anum by a male person with a male person or by a male person with a female person.

16. (1) A person who commits an act of serious indecency on or towards another is liable on conviction to imprisonment for five years.
- (2) Subsection (1) does not apply to an act of serious indecency committed in private between—
 - (a) a husband and his wife;
 - (b) a male person and a female person each of whom is sixteen years of age or more, both of whom consent to the commission of the act; or
 - (c) persons to whom section 20(1) and (2) and (3) of the Children Act apply.
- (3) An act of ‘serious indecency’ is an act, other than sexual intercourse (whether natural or unnatural), by a person involving the use of the genital organ for the purpose of arousing or gratifying sexual desire.

¹⁹⁶ *Jason Jones v Attorney General of Trinidad & Tobago* (2018) High Court, Claim No. CV2017-00720 (12 April 2018), paragraph 13.

In this case, the court has had to consider the dignity of the claimant and citizens like him in the Republic of Trinidad and Tobago in the context of whether his, and by extension, their rights under the Constitution are being validly impinged.¹⁹⁷

The Court first considered whether the statutory provisions violated any constitutional rights, and then addressed the question of whether such infringement was justifiable.¹⁹⁸

Although the Court described its focus as being on the right to privacy,¹⁹⁹ its reasoning was actually based primarily on the concept of dignity. In fact, the Court emphasised the interconnections between privacy, dignity and equality. It quoted with approval this passage from an Indian case on the connection between these three constitutional concepts:

Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life. Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture.

Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary state action. It prevents the state from discriminating between individuals. The destruction by the state of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary state action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual.

¹⁹⁷ Id, paragraph 14 (footnotes omitted).

¹⁹⁸ Id, paragraph 80.

¹⁹⁹ Id, paragraph 4.3.

Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation.²⁰⁰

The Court stated that “human dignity is a basic and inalienable right recognised worldwide in all democratic societies”, and that dignity requires autonomy, in the form of an individual’s right to make his or her own decisions with unreasonable interference by the State regarding whom to love, to incorporate into his or her life, to live with and to form a family with. The laws under challenge effectively criminalise “the very lifestyle, life and existence: of persons “whose ultimate expression of love and affection is crystallised in an act which is statutorily unlawful” – whether or not that statute is enforced in practice – because it creates a constant threat of prosecution and justifies other members of society in thinking that such persons are of “lesser value” than others.²⁰¹

The Court also found that the laws in question violated the right to private and family life (because they prevent homosexual persons from lawfully choosing partners and creating families as they wish), the right to equality (because they treat homosexual citizens differently from heterosexual citizens by reason of the manner in which they express love and affection) and freedom of thought and expression (because they support public discrimination, threats, abuse and hatred which affect the ability of homosexual persons to express themselves and their thoughts freely in public).²⁰²

The Court then considered whether or not these infringements on constitutional rights were “reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual”.²⁰³ The State asserted that the purpose of the law was “to maintain traditional family and values that represent society”.²⁰⁴ However, the Court found that, since the law was unenforced, its only purpose was to serve as “a statement by the State against homosexuality”; it was “more vindictive than protective or curative”, designed “to hold a ‘big stick’ over a minority to try to enforce a portion of society’s morality over it”.²⁰⁵ The Court also found that the State’s claimed objective did not counterbalance the infringement of fundamental constitutional rights resulting from the criminal laws.²⁰⁶

²⁰⁰ Id, paragraph 90, quoting *Puttaswamy v Union of India*, Writ Petition (Civil) No 494 of 2012.

²⁰¹ Id, paragraph 92.

²⁰² Id, paragraphs 93-95.

²⁰³ Id, paragraph 102, citing section 13 of the Constitution of Trinidad and Tobago.

²⁰⁴ Id, paragraph 149.

²⁰⁵ Id, paragraph 156.

²⁰⁶ Id, paragraph 168-ff.

The Court, in its conclusion, noted the parallels between devaluing people on the basis of sexual orientation with similar infringements of human dignity on the basis of race:

...[I]t is unfortunate when society in any way values a person or gives a person their identity based on their race, colour, gender, age or sexual orientation. That is not their identity. That is not their soul. That is not the sum total of their value to society or their value to themselves. The experiences of apartheid South Africa and the USA during and after slavery, even into the mid and late 20th century, have shown the depths that human dignity has been plunged as a result of presupposed and predetermined prejudices based on factors that do not accept or recognise humanity. Racial segregation, apartheid, the Holocaust - these are all painful memories of this type of prejudice. To now deny a perceived minority their right to humanity and human dignity would be to continue this type of thinking, this type of perceived superiority based on the genuinely held beliefs of some.

This conclusion is not an assessment or denial of the religious beliefs of anyone. This court is not qualified to do so. However, this conclusion is a recognition that the beliefs of some, by definition, is not the belief of **all** and, in the Republic of Trinidad and Tobago, **all** are protected, and are entitled to be protected, under the Constitution. As a result, this court must and will uphold the Constitution to recognise the dignity of even one citizen whose rights and freedoms have been invalidly taken away.²⁰⁷

The case is being appealed by the State to the Privy Council in the UK.²⁰⁸ As of July 2020, that appeal had not yet been decided.

²⁰⁷ Id, paragraphs 173-74. The Court found that the statutory provisions at issue were unconstitutional and void to the extent that they criminalises consensual sexual conduct between adults. It allowed the parties an opportunity to present arguments on whether the offending sections should be struck down in their entirety. Id, paragraph 176. It subsequently decided to retain the offences in question, with modifications to ensure that they were applicable only to non-consensual sexual activity between persons who had reach the appropriate age of consent. *Jason Jones v Attorney General of Trinidad & Tobago* (2018) High Court, Claim No. CV2017-00720 (20 September 2018) (available at webopac.ttlawcourts.org/LibraryJud/Judgments/HC/rampersad/2017/cv_17_00720DD20sep2018.pdf).

²⁰⁸ The involvement of the UK stems from Trinidad and Tobago's membership in the Commonwealth. The Constitution of Trinidad and Tobago expressly provides that final appeals in certain categories of cases may be decided by the Judicial Committee of the Privy Council in London. The Constitution of the Republic of Trinidad and Tobago of 1976 with reforms through 2000, section 109.

e) India

The Supreme Court of India also relied on dignity in holding that a statute prohibiting “unnatural offences”²⁰⁹ was unconstitutional in the 2018 *Johar* case.²¹⁰ As in many other cases of this nature, the Court drew connections between individual liberty, equality and freedom from discrimination, dignity and privacy.

The Court’s analysis began with dignity. It noted the foundational aspect of the right to dignity, with the first article in the Universal Declaration of Human Rights declaring: “All human beings are born free and equal in dignity and rights.”²¹¹

The Court found that dignity and autonomy are connected in that a personal decision to choose a partner is a feature of the right to dignity. The Court added the realisation of individuals’ right to dignity encompasses the right to express themselves and to make their own choices without any impediments. It also found that sexual orientation is a natural and innate biological phenomenon that goes to the core of a person’s being and identity; heterosexuality, homosexuality and bisexuality are all-natural variants of human sexuality, and persons have little or no choice over their sexual orientation.²¹²

The Court concluded as follows with respect to dignity:

The right to live with dignity has been recognised as a human right on the international front and by [a] number of precedents of this Court and, therefore, the constitutional courts must strive to protect the dignity of every individual, for without the right to dignity, every other right would be rendered meaningless. Dignity is an inseparable facet of every

²⁰⁹ The provision at issue was section 377 of the Indian Penal Code:

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.

²¹⁰ *Navtej Singh Johar & Ors v Union of India*, Supreme Court, Writ Petition (Criminal) No. 76 of 2016 (6 September 2018) (available at <www.humandignitytrust.org/wp-content/uploads/resources/2018.09.06-Johar-v-India-judgment-Indian-SC.pdf>).

²¹¹ *Id.*, paragraph 126.

²¹² *Id.*, paragraphs 143-146, 149, 253(vii). The Court drew an analogy between children who are destined to be right-handed or left-handed and children who are destined to be heterosexual or homosexual (paragraph 146). The concurring opinion of. Malhotra J stated at paragraph 14.5:

A person’s sexual orientation is intrinsic to their being. It is connected with their individuality, and identity. A classification which discriminates between persons based on their innate nature, would be violative of their fundamental rights, and cannot withstand the test of constitutional morality.

individual that invites reciprocative respect from others to every aspect of an individual which he/she perceives as an essential attribute of his/her individuality, be it an orientation or an optional expression of choice.²¹³

f) Botswana

In the 2019 *Motshidiemang* case,²¹⁴ the High Court in Botswana found that laws criminalizing consensual sodomy violate the right to dignity as well as other rights.²¹⁵ The Court stated that such laws essentially deny a gay man the right to sexual expression in the only way available to him and therefore it goes to the core of his worth as a human being.²¹⁶

5.3 Right to privacy

a) South Africa

In the South African *National Coalition for Gay and Lesbian Equality* case,²¹⁷ the Constitutional Court found that the laws criminalizing consensual sodomy violated the right to privacy:

Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.²¹⁸

²¹³ Id, paragraph 253(vi).

²¹⁴ *Letsweletse Motshidiemang v Attorney General and Others* MAHGB-000591-16, 11 June 2019 (available at <africanlii.org/sites/default/files/legabibo.pdf>).

²¹⁵ Id, paragraph 129: "Liberty, equality and dignity are associable friends who hobnob in close proximity, and are thus intricately and harmoniously related."

²¹⁶ Id, paragraphs 151-153.

²¹⁷ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC).

²¹⁸ Id, paragraph 32.

A concurring opinion posited that the right to privacy should be seen not simply as a negative right to occupy a private space free from government intrusion, but as a right to express one's personality and make fundamental decisions about intimate relationships without penalization.²¹⁹

Upon concluding that the sodomy law violated a number of constitutional rights, including the right to privacy, the Court had to determine whether these violations were reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.²²⁰ The Court found that the purpose of the law was to enforce the private moral views of a section of the community which were premised on prejudice. Consequently, there was no legitimate purpose to justify the intrusion on constitutional rights.²²¹

b) Nepal

In the *Pant* case discussed above,²²² the Supreme Court also found that sexual activity falls within the fundamental right to privacy. No one has the right to question how two adults perform sexual intercourse and whether this intercourse is natural or unnatural. Furthermore, the Court concluded that if the right of privacy is ensured in respect of sexual intercourse between heterosexual individuals, this right should be equally assured to persons with different sexual orientations.

c) Belize

The 2016 *Orozco* case discussed above²²³ also found that the law criminalising "carnal intercourse against the order of nature" violated the constitutional protection for privacy, which it found to be associated with and indeed emanating from the concept of human dignity.²²⁴

²¹⁹ Id, concurring opinion of Sachs J, paragraphs 116-117, citing the dissenting opinion of Blackmun J in the US case of *Bowers v Hardwick* 478 U.S. 186 (1985) which was later overruled by *Lawrence v Texas* 539 US 558 (2003).

²²⁰ South Africa Constitution, Article 36(1). Assessing this issue requires a consideration of (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) whether there are any less restrictive means to achieve the purpose.

²²¹ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at 57.

²²² *Pant v Nepal Government*, Office of the Prime Minister and Council of Ministers (2008) N.J.A. Law Journal 262 (Nepali Supreme Court).

²²³ *Caleb Orozco v Attorney General of Belize*, Claim No. 668 of 2010 (10 August 2016).

²²⁴ Id, paragraph 68.

The Belize Constitution states that every person in Belize is entitled to personal privacy.²²⁵ In addition, it states:

A person shall not be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. The private and family life, the home and the personal correspondence of every person shall be respected.²²⁶

This right can be limited by law on various grounds, including public safety, public order, public morality and public health, or the protection of the rights or freedoms of other persons.²²⁷

The Court considered several possible grounds of limitation. The possible transmission of HIV through anal intercourse was raised, but the Court found more persuasive the argument that decriminalization of anal intercourse between consenting males would enhance the fight against HIV/AIDS and encourage testing and treatment amongst men who have sex with men.²²⁸

The more strongly-argued basis for limitation was public morality. The State contended that Belizean society is “deeply religious, founded upon strong Christian values, morals and the family”,²²⁹ and it was asserted that homosexual acts are not condoned by Christian churches.²³⁰ The Court was in no doubt that such religious views were sincere and conscientiously held, as well as being representative of the majority of the Christian community and possibly of the entire population of Belize. However, it found that this still could not justify the law’s invasion of privacy:

...[F]rom the perspective of legal principle, the Court cannot act upon prevailing majority views or what is popularly accepted as moral. The evidence may be supportive but this does not satisfy the justification of public morality. There must be demonstrated that some harm will be caused should the proscribed conduct be rendered unregulated. No evidence has been presented as to the real likelihood of such harm. The duty of the Court is to apply the provisions of the Constitution.²³¹

²²⁵ Constitution of Belize 1981, section 3(c).

²²⁶ *Id.*, section 14(1).

²²⁷ *Id.*, section 14(2) read together with section 9(2).

²²⁸ *Caleb Orozco v Attorney General of Belize*, Claim No. 668 of 2010 (10 August 2016), paragraphs 70-73.

²²⁹ *Id.*, paragraph 69.

²³⁰ *Id.*, paragraphs 75-80.

²³¹ *Id.*, paragraph 81.

The Court quoted South Africa case law in support of the point that public opinion cannot be controlling. If it were, then constitutional adjudication would be unnecessary – since the reason for judicial review based on constitutional principles is to protect the rights of minorities and others who cannot adequately protect their rights by means of the democratic process.²³²

As has already been explained, this case was confirmed on appeal - but the Supreme Court's analysis of privacy was not challenged and so was not discussed by the Court of Appeal.²³³

d) Botswana

In the 2019 *Motshidiemang* case discussed above,²³⁴ the High Court of Botswana explained that privacy is “essential to who we are as human beings”:

It gives a person space to be himself/herself without judgment. It allows persons to think freely without hindrance and is an important element of giving people personal autonomy and control over themselves....²³⁵

This case makes an interesting comparison with Namibia, because the wording of the constitutional right to privacy in Botswana is somewhat similar in scope to that in the Namibian Constitution; the Botswana Constitution refers to protection for the privacy of every person's “home and other property and from deprivation of property without compensation”.²³⁶

Taking this provision at face value, it might be understood to refer only to protection against trespassing and searches of person or property. But the Court found that a broader interpretation is required to comply with the duty to give a constitution a generous and purposive

²³² Id, paragraph 82, quoting the South African case, *State v Makwanvana* 1995 (3) SA 391, paragraph 88 and also citing the Fijian case *McCoskar v The State* [2005] FJHC 500; HAA00 85 & 86.2005 and the US case *Lawrence v Texas* (2003) 539 US 558, page 571.

²³³ *Attorney-General v Caleb Orozco and Others*, Civil Appeal 32 of 2016, Court of Appeal of Belize (30 December 2019) (available for download at <www.u-rap.org/web2/index.php/component/k2/item/79-press-release-belize-court-of-appeal-does-not-disturb-2016-ruling-in-orozco-case-that-section-53-is-unconstitutional>).

²³⁴ *Letsweletse Motshidiemang v Attorney General and Others* MAHGB-000591-16, 11 June 2019 (available at <africanlii.org/sites/default/files/legabibo.pdf>).

²³⁵ Id, paragraph 113.

²³⁶ Constitution of Botswana 1966, section 3(c).

interpretation.²³⁷ It found that the right to privacy is in fact “multifaceted and multipronged”.²³⁸ It protects “the liberty of people to make certain crucial decisions regarding their well-being, without coercion, intimidation or interference”.²³⁹ Thus, the Court found that persons have a constitutional right to “a sphere of private intimacy and autonomy” where this does not involve actions that are harmful to any other person.²⁴⁰

The Court concluded that the laws prohibiting consensual sexual activity between homosexual persons thus unjustifiably interfered with the right to privacy.²⁴¹

e) India

The Supreme Court of India, in the *Johar* case discussed above, also relied on privacy, which had already been found in a previous case to be a fundamental right under the Constitution of India.²⁴² In the words of one of the concurring opinions: “The right to privacy is intrinsic to liberty, central to human dignity and the core of autonomy.”²⁴³ Another concurring opinion emphasised that the right to privacy is more than just the “right to be let alone”; it extends to “the right to make fundamental personal choices, including those relating to intimate sexual conduct, without unwarranted State interference”.²⁴⁴

The Court found that “within the compartment of privacy, individual autonomy has a significant space” – with autonomy including self-determination in respect of sexual orientation and sexual identity, as well as sovereignty over one’s own body,²⁴⁵ thus, “sexual orientation is also a facet of a person's privacy”.²⁴⁶

²³⁷ Id, paragraph 116.

²³⁸ Id, paragraph 117.

²³⁹ Id, paragraph 122.

²⁴⁰ Id, paragraph 127.

²⁴¹ Id, paragraphs 127-127.

²⁴² *K.S. Puttaswamy and Another v Union of India and Others* 4 (2017) 10 SCC 1.

²⁴³ *Navtej Singh Johar & Ors v Union of India*, Supreme Court, Writ Petition (Criminal) No. 76 of 2016 (6 September 2018), concurring opinion of J. Chandrachud, paragraph 54.

²⁴⁴ Id, concurring opinion of Malhotra J, paragraph 16.2.

²⁴⁵ Id, paragraphs 149, 253(x).

²⁴⁶ Id, paragraph 168. See also the concurring opinion of Malhotra J, paragraph 16.1, on the link between privacy and dignity: LGBT persons, like other heterosexual persons, are entitled to their privacy, and the right to lead a dignified existence, without fear of persecution. They are entitled to complete autonomy over the most intimate decisions relating to their personal life, including the choice of their partners.

The Court held that the statute criminalising “carnal intercourse against the order of nature” was unconstitutional because it abridges both human dignity as well as the fundamental right to privacy and choice:

As sexual orientation is an essential and innate facet of privacy, the right to privacy takes within its sweep the right of every individual including that of the LGBT to express their choices in terms of sexual inclination without the fear of persecution or criminal prosecution.²⁴⁷

The Court went on to state that “the organisation of intimate relations is a matter of complete personal choice especially between consenting adults” and “a vital personal right falling within the private protective sphere and realm of individual choice and autonomy”.²⁴⁸

5.4 Failed constitutional challenges to the criminalisation of consensual sodomy

a) Kenya

A Kenyan case decided in 2019²⁴⁹ considered a challenge to the constitutionality of the sections of the Penal Code that criminalise “unnatural offences” and “indecent practices between males”.²⁵⁰ The challenge was based on the vagueness and uncertainty of the provisions, and their

²⁴⁷ Id, paragraph 229.

²⁴⁸ Id, paragraph 240.

²⁴⁹ *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)*, Petition 150 & 234 of 2016 (Consolidated), High Court of Kenya at Nairobi, 24 May 2019 (available at <<http://kenyalaw.org/caselaw/cases/view/173946/>>).

²⁵⁰ Cap 63, Laws of Kenya, sections 162(a) and (c) and 165; the prohibition on bestiality in section 162(b) was not challenged.

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.

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 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.

interference with the rights to equality, human dignity, freedom and security of the person, privacy, economic and social rights – specifically health, freedom of conscience, religion, belief and opinion and the fundamental human rights protected by international law applicable to Kenya. The petition was unsuccessful for a number of reasons, but perhaps the most important defects in the petitioners’ cases were the lack of evidence to substantiate violations of constitutional rights and the averments that the provisions target persons based on their sexual orientation. The Court also found that the provisions in question were not unconstitutionally vague, given that they use phrases that have been clearly defined in law dictionaries and in a multitude of judicial pronouncements.

b) Zimbabwe

In the 2000 case of *Banana v State*,²⁵¹ the Supreme Court of Zimbabwe was tasked with determining whether the common-law offence of sodomy was in conflict with section 23 of the Constitution of Zimbabwe which protects against discrimination on the basis of gender. The question was whether the word “gender” included sexual orientation. The Court held that discrimination on the basis of gender means that women and men must be treated in such a way that neither is prejudiced on the grounds of his or her gender by being subjected to condition, restriction or disability to which persons of the other gender are not subjected to. The Court’s conclusion was that section 23 prohibited discrimination only between men and women, not between heterosexual men and homosexual men.²⁵²

c) Singapore

The 2020 *Ong Ming Johnson* case²⁵³ comprises three separate cases that challenged the constitutionality of section 377A²⁵⁴ of the Penal Code of Singapore which criminalises consensual sex between men. The basis of the challenge was that the penal provision was inconsistent with

²⁵¹ *Banana v State*, Supreme Court of Zimbabwe, [2000] 4 LRC 621. (available at www.humandignitytrust.org/wp-content/uploads/resources/Banana_v_State_Supreme_Court_of_Zimbabwe.pdf and uniteforreporights.org/wp-content/uploads/2017/10/Banana-v-the-State.pdf).

²⁵² *Id*, page 387.

²⁵³ *Ong Ming Johnson v Attorney-General and other matters* [2020] SGHC 63 (available at www.livelaw.in/pdf_upload/pdf_upload-371997.pdf).

²⁵⁴ Outrages on decency - 377A. Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years.

the right to life and personal liberty,²⁵⁵ the right to equality,²⁵⁶ and the right to freedom of expression.²⁵⁷ The Court found that the challenged provision was intended to be of general application and aimed at male homosexual practices generally, to enforce a stricter standard of societal morality.²⁵⁸ Although the crime differentiated between male-male and male-female or female-female sexual conduct, the Court concluded that this did not violate the right to equality because the differentiation was not so unreasonable as to be illogical and or incoherent.²⁵⁹ The Court also found that the criminal provision did not violate freedom of speech and expression and that the latter does not afford a constitutional right to engage in male homosexual acts as a form of expression.²⁶⁰ The Court therefore dismissed all three applications on the basis that they had no merit.²⁶¹

5.5 Pending constitutional challenges

As of July 2020, challenges to laws criminalising consensual sodomy were pending in several domestic and international forums.

Constitutional challenges were underway in national courts in several countries in the Caribbean:

- **Mauritius:** As of late 2019, at least three challenges to the constitutionality of the penal provision criminalising of sodomy had been filed.²⁶²

²⁵⁵ Article 9(1): “No person shall be deprived of his life or personal liberty save in accordance with law ...”.

²⁵⁶ Article 12(1) : “All persons are equal before the law and entitled to the equal protection of the law.”

²⁵⁷ Article 14:

- “(1) Subject to clauses (2) and (3) –
- (a) every citizen of Singapore has the right to freedom of speech and expression;
 - (b) all citizens of Singapore have the right to assemble peaceably and without arms; and
 - (c) all citizens of Singapore have the right to form associations.
- (2) Parliament may by law impose -
- (a) on the rights conferred by clause (1)(a), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence;
 - (b) on the right conferred by clause (1)(b), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof or public order; and
 - (c) on the right conferred by clause (1)(c), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, public order or morality ...

²⁵⁸ Paragraph 96.

²⁵⁹ Paragraph 172.

²⁶⁰ Paragraph 265.

²⁶¹ Paragraph 315.

²⁶² See the Human Dignity Trust profile of Mauritius (available at <www.humandignitytrust.org/country-profile/mauritius/>). Legal challenges Section 250 of the Mauritian Penal Cod were filed in 2019 by (1) Najeeb Ahmad Fokeerbux (founder of the Young Queer Alliance) and three others; (2) Edward Henry Richard Coombes; and (3) Abdool Ridwan Firaas Ah Seek, supported by the

- **Dominica:** In July 2019, an anonymous gay man filed a lawsuit with Dominica's High Court of Justice, challenging provisions of the country's Sexual Offenses Act that criminalise anal sex and "gross indecency".²⁶³
- **St Vincent and the Grenadines:** In July 2019, two men filed a constitutional challenge to the country's legal provisions that criminalise consensual same-sex relations.²⁶⁴

Petitions had also reportedly been filed with the Inter-American Commission on Human Rights (IACHR) challenging laws criminalising consensual sodomy in **Barbados** and **Jamaica**.²⁶⁵

6. International law binding on Namibia

International treaties which Namibia has accepted are automatically part of Namibia law in terms of Article 144 of the Namibian Constitution.²⁶⁶ Thus, Namibia's international commitments are relevant, both in themselves and as guides to interpretation of the Namibian Constitution.

Furthermore, some of the relevant international commitments provide individual complaints procedures which are available after domestic remedies have been exhausted – including the International Covenant on Civil and Political Rights²⁶⁷ and the African Charter on Human and Peoples Rights.²⁶⁸ This means that Namibia's laws on sodomy and unnatural sexual offences might be challenged at the international level in future, if they are not repealed or overturned on

NGO Collectif Arc-en-Ciel. For more information on the Ah Seek case, see the press release issued by Collectif Arc-en-Ciel (available at <https://collectifarcenciel.org/the-first-hearing-in-the-case-challenging-the-constitutionality-of-section-250-press-release/>). For more information on the Fokeerbux case, see Nita Bhalla, "INTERVIEW-Gay Mauritian men seek to overturn anti-gay law on paradise island", *Reuters*, 1 October 2019 (available at www.reuters.com/article/mauritiu-igbt-lawmaking/interview-gay-mauritian-men-seek-to-overturn-anti-gay-law-on-paradise-island-idUSL3N26L3D2).

²⁶³ This case was filed with the support of the Canadian HIV/AIDS Legal Network, the University of Toronto's International Human Rights Program, Minority Rights Dominica (MiRiDom) which is an LGBT advocacy group, and Lawyers Without Borders. The petitioner alleged that he has faced homophobic hostility, discrimination, harassment and assaults exacerbated by this law. See the Canadian HIV/AIDS Legal Network press release about this case, dated 19 July 2019 (available at www.aidslaw.ca/site/news-release-gay-man-files-legal-challenge-against-dominicas-anti-lgbt-laws/?lang=en).

²⁶⁴ The petitioners are Javin Johnson and Sean Macleish. See Michael K Lavers, "Lawsuits in four Caribbean countries challenge colonial-era sodomy laws", *Washington Blade*, 8 August 2019 (available at www.washingtonblade.com/2019/08/08/lawsuits-in-four-caribbean-countries-challenge-colonial-era-sodomy-laws/).

²⁶⁵ See Hugo Greenhalgh, "FACTBOX-Eight legal hotspots for global LGBT+ rights in 2020", *Thomson Reuters Foundation* 7 January 2020 (available at <https://news.trust.org/item/20200107161803-ixon2/>).

²⁶⁶ Article 144 states: "Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia."

²⁶⁷ In terms of Article 2 of the Optional Protocol to the International Covenant on Civil and Political Rights, 1966 which became binding on Namibia on 28 February 1995.

²⁶⁸ In terms of Article 55 of the African Charter.

constitutional grounds by the Supreme Court. Given that several of the monitoring committees have already pointed to these laws as violations of Namibia's international commitments, it is likely that an international challenge to these laws would be successful.

6.1 The right to equality and freedom from discrimination

a) International Covenant on Civil and Political Rights (ICCPR)

In terms of Article 26 of the International Covenant on Civil and Political Rights,²⁶⁹ States Parties are required to ensure equality before the law without discrimination *and* equal and effective protection against discrimination on any ground, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, in terms of Article 3, States Parties undertake to ensure "the equal right of men and women to the enjoyment of all civil and political rights" set forth in the Covenant. Article 2(1) obliges every States Party to ensure that all individuals within its territory enjoy the rights in the Covenant, without distinction of any kind, such as distinctions based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

None of these provisions expressly refer to sexual orientation. However, in the 1994 case of ***Toonen v Australia***²⁷⁰ the Human Rights Committee found that the reference to "sex" in Articles 2(1) and Article 26 is to be taken as including sexual orientation. It is noteworthy that this interpretation preceded Namibia's accession to the Convention. Furthermore, the Human Rights

²⁶⁹ This Convention became binding on Namibia on 28 February 1995.

²⁷⁰ *Toonen v Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) (available at <hrlibrary.umn.edu/undocs/html/vws488.htm>).

Committee has interpreted “other status” as including sexual orientation in two other cases: *Young v Australia* (2003)²⁷¹ and *X v Colombia* (2007).²⁷²

In 2016, in its most recent Concluding Observations on Namibia, the Human Rights Committee expressed concern that Namibia’s protection against discrimination is insufficient; amongst the measures it recommended to remedy this issue was the abolition of the common-law crime which applies to consensual sodomy.²⁷³ The Namibian Government responded by noting that it had adopted its first National Human Rights Action Plan for the period 2015 to 2019, which includes amongst its objectives enhancing affirmation of the rights of the LGBTI community and implementing legal and regulatory reforms that will give effect to non-discriminatory provisions in various international and regional instruments.²⁷⁴

b) International Covenant on Economic, Social and Cultural Rights (ICESCR)

Article 2(2) of the International Covenant on Economic, Social and Cultural Rights²⁷⁵ provides that:

States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

²⁷¹ *Young v Australia*, Merits, Communication No 941/2000, UN Doc CCPR/C/78/D/941/2000, (2003) 5 IHRR 747, IHRL 1921 (UNHRC 2003), 6 August 2003 (available at docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPFPRiCAqhKb7yhsswSVVnSz50wXLYzs7W9cwELJKQR9g%2BvMXhFRfTz9jyvMyeu9OEk1gpXSQCvVRizp1wIXahVDWb4gWSBJpiAQBBXVMVkkVbBV%2FruNVOMBA8QQLTNA0cihOnTrRm%2B%2FJcd7lg%3D%3D).

²⁷² *X v Colombia*, Merits, Communication No 1361/2005, UN Doc CCPR/C/89/D/1361/2005, (2007) 13 IHRR 933, IHRL 2615 (UNHRC 2007), 30 March 2007 (available at www.worldcourts.com/hrc/eng/decisions/2007.03.30_X_v_Colombia.htm)

²⁷³ Human Rights Committee, Concluding observations on the second report of Namibia, CCPR/C/NAM/CO/2, 22 April 2016, paragraph 10(c) (available at docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPFPRiCAqhKb7yhsh7Ph3KVs8zxwYZKnao5FA8MpfDWy%2FQGPY29QoZxc1OtOmGEp%2BDSIHNGsDjRvjLL6S1zO99wgtffaBMjydHo9u27GY%2FQgxb3%2FXOfU8yQm7l)

²⁷⁴ Human Rights Committee, concluding observations on the second periodic report of Namibia, Addendum: Information received from Namibia on follow-up to the concluding observations, CCPR/C/NAM/CO/2/Add.1, Non-discrimination: paragraph 3 (available at tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fNAM%2fCO%2f2%2fAdd.1&Lang=en).

²⁷⁵ This Covenant became binding on Namibia on 28 February 1995.

Although this provision does not expressly refer to sexual orientation, the Committee on Economic, Social and Cultural Rights has interpreted the term “other status” to include “sexual orientation”.²⁷⁶

In its 2016 concluding observations on Namibia, the Committee on Economic, Social and Cultural Rights stated with respect to non-discrimination that Namibia should abrogate all discriminatory legal provisions “and, in that regard, decriminalise sexual relations between consenting individuals of the same sex”.²⁷⁷

c) African Charter on Human and Peoples Rights

Article 2 of the African Charter on Human and Peoples Rights²⁷⁸ provides that every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the Charter without distinction of any kind, such as distinctions on the basis of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. This is supported by Article 3 which provides that (a) every individual shall be equal before the law, and (b) every individual shall be entitled to equal protection of the law.

These provisions do not expressly refer to sexual orientation. However, in the 2006 case of **Zimbabwe Human Rights NGO Forum v Zimbabwe**, the African Commission stated the following:

Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under Article 2 of the Charter provides the foundation for the enjoyment of all human rights... The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.²⁷⁹

²⁷⁶ General Comment No. 20 of the Committee on Economic, Social and Cultural Rights, E/C.12/GC/20, 2 July 2009, para.32.

²⁷⁷ Committee on Economic, Social and Cultural Rights, Concluding observations on the initial report of Namibia E/C.12/NAM/CO/1, 23 March 2016, paragraph 22(c) (available at http://internet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/NAM/CO/1&Lang=En).

²⁷⁸ This Charter became binding on Namibia on 16 December 1992.

²⁷⁹ Communication No. 245/02, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, 15 May 2006, para.169.

In the 2016 concluding observations on Namibia's 6th Periodic Report (which covered the period 2011-2014), the African Commission on Human and Peoples' Rights expressed concern about discrimination and stigmatisation practices that limit health care access for vulnerable groups, including the LGBT community.²⁸⁰

6.2 *The right to privacy*

a) International Covenant on Civil and Political Rights

Article 17 of the International Covenant on Civil and Political Rights provides that (a) no person shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation, and (b) everyone has the right to the protection of the law against such interference or attacks.

As the cases discussed in the preceding section have illustrated, the criminalization of consensual sodomy intrudes into the most intimate parts of a person's private life and therefore violates their right to privacy.

6.3 *Other international commitments*

a) Convention against Torture

Although the current laws on sodomy and unnatural sexual offences might not have an obvious connection with torture, the Committee against Torture in its most recent Concluding Observations on Namibia in 2017 expressed concern about “reports of abuse of gay men by law enforcement personnel and by the stigmatisation they suffer, especially taking into consideration the current criminalisation of sexual acts between consenting adult men”. One of the Committee's

²⁸⁰ African Commission on Human and Peoples' Rights, Concluding Observations and Recommendations - Namibia: 6th Periodic Report, 2011-2014, adopted at 20th Extraordinary Session June 09 to June 18 , 2016 ,Gambia, paragraphs 32(iii) and 50(vi) (available at <www.achpr.org/states/statereport?id=106>).

recommendations was that Namibia “should consider decriminalising sexual acts between consenting adult men”.²⁸¹

7. Conclusion

The law which criminalises sodomy was enacted at a time when the legal climate was drastically different than what it is now. With the enactment of new legislation to deal with non-consensual sexual offences and sexual offences against children, such as the Combating of Rape Act, 2000 (Act No. 8 of 2000) and the Combating of Immoral Practices Act, 1980 (Act No. 21 of 1980), the common-law crimes of sodomy and unnatural sexual offences are now relevant only to **consensual** sexual activity between men. This shift is also reflected by information from the Namibian Police and the Office of the Prosecutor-General that there are virtually no prosecutions for sexual acts between consenting adults. Therefore, from a practical point of view there seems to be no use for the crime of consensual sodomy or the vague crime of unnatural sexual offences.

The Office of the Prosecutor General has cited the intimate and private circumstances under which consensual sodomy takes place as one of the reasons why these laws are rarely enforced. However, it is these very intimate and private circumstances where the acts take place that make their existence and enforcement fundamentally intrusive and a violation of the constitutional rights to privacy and dignity.

This is compounded by the fact that the crime of sodomy targets only males, and particularly gay males, which is a violation of the right to equality. This discrimination cannot be remedied by making the laws gender-neutral on their faces, since their impact would still weigh most heavily on gay men.

Although Namibia as a state has on many occasions reported that it does not criminalize homosexual people, or gay men in this instance, one cannot deny the stigmatization that these laws create for homosexual men. In actual fact, these laws reduce them to criminals.

²⁸¹ Committee against Torture, Concluding observations on the second periodic report of Namibia, CAT/C/NAM/CO/2, 1 February 2017, paragraphs 30-31 (available at tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/NAM/CO/2&Lang=En).

The effect can also be seen in how the existence of the law has influenced policy decisions. The Namibian Correctional Service has cited the existence of the law as the reason for not providing condoms to inmates, notwithstanding the fact that it is common knowledge that consensual sexual intercourse takes place in the prisons. Thus, unenforced laws are unnecessarily putting inmates' health at risk in prisons.

The existence of the crimes of sodomy and unnatural sexual offences amounts to unconstitutional discrimination. Discrimination is the antithesis of equality and recognition of equality in its truest sense will foster the dignity of every individual.

It is unjustifiable to maintain offences which intrude severely on constitutional rights, particularly given that they are essentially enforceable and therefore futile, as both the First Lady of Namibia and the Ombudsman have emphasised.²⁸²

Some will try to argue that the repeal of the crimes of consensual sodomy and unnatural sexual offences will inexorably lead to recognition of same-sex marriages. This argument falsely compares two entirely different legal situations – criminal punishment on the one hand with the criteria for a change in civil status on the other. Furthermore, repeal of these laws is about realising the aspirations edged in the preamble to our constitution, namely that the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace. Also, many countries have repealed criminal provisions on sodomy without recognising same-sex marriages. This research report has not addressed the issue of marriage, but clearly that topic must be considered on its own terms and not lumped together with a victimless crime that serves no practical purpose whatsoever.

The Namibian house encompasses all Namibians and the laws on sodomy and unnatural sexual offences are contrary to fostering a culture of dynamic inclusion for all members of society, including the LGBTI community. These laws should be repealed.

²⁸² The First Lady of Namibia has pointed out that no convictions have been recorded under this law since Independence, and that it would not be feasible to prosecute anyone for consensual sodomy without violating the Constitutional protections for personal privacy. Speech by First Lady Monica Geingos, at the official opening of the "The Journey", an interactive human rights dialogue, on 12 June 2019 in Parliament Gardens., The Ombudsman is quoted in Denver Kisting, "Let gays be – Walters", *The Namibian*, 23 August 2016 (available at www.namibian.com.na/154753/archive-read/Let-gays-be-%E2%80%93-Walters>).

APPENDIX

REPEAL OF SEXUAL OFFENCES BILL

To repeal certain sexual offences and to provide for incidental matters.

(Introduced by the Minister of Justice)

BE IT ENACTED as passed by the Parliament, and assented to by the President, of the Republic of Namibia as follows:

Repeal of the offences of sodomy and unnatural sexual offences

1. From the date of commencement of this Act, the common law offences of sodomy and unnatural sexual offences are repealed.

Repeal of section 269 and amendment of Schedule 1 of Criminal Procedure Act, 1977

2. The Criminal Procedure Act, 1977 (Act No. 51 of 1977) is amended -

- (a) by the repeal of section 269; and
- (b) by the deletion of the reference to "Sodomy." in Schedule 1.

Amendment of Schedule 1 of Immigration Act, 1993

3. The Immigration Control Act, 1993 (Act No. 7 of 1993) is amended -

- (a) by the deletion of the reference to "Sodomy" in Schedule I; and
- (b) by the insertion, in Schedule I, of the following offence after the offence of "Murder" –

“Rape as referred to in section 2 of the Combating of Rape Act, 2000 (Act No. 8 of 2000).”.

Amendment of section 68(4) of Defence Act, 2002

4. The Defence Act, 2002 (Act No. 1 of 2002) is amended by the deletion of the reference to “sodomy” in paragraph (a) of the definition of “offence against the person” in subsection 68(4).

Short title and commencement

5. This Act is called the Repeal of Certain Sexual Offences Act, 2019.