

UBUNTU AND AFRICAN RESTORATIVE JUSTICE MECHANISMS AS BUILDING BLOCKS FOR AN LGBTQI+ INCLUSIVE LEGAL SYSTEM: A FOCUS ON THE RIGHT TO HOUSING, LEGAL RECOGNITION AND CORPORATE ACCOUNTABILITY FOR LGBTQI+ INCLUSION

PEPE JULIAN ONZIEMA*
DAPHINE ARINDA**

Abstract:

This Article reviews recent developments in national legislation and international law related to housing, legal recognition of LGBTQI+ individuals, and corporate responsibility of businesses towards LGBTQI+ people. It makes strategic recommendations that can lead to the building of LGBTQI+ inclusive legal frameworks leaning against international human rights standards and uniquely African standards like the Ubuntu philosophy and African restorative justice mechanisms.

Introduction:

The legal framework of any community is reflective of how advanced the civilization of that community is. In the year 2023, you would expect that basic rights and freedoms for LGBTQI+ people would be guaranteed, especially because the International Law framework is steadfast in protecting their rights and freedoms. It is absurd and embarrassing to the human race that 60 countries still have laws that criminalize homosexuality. There were 350 murders of transgender people in 2020 and 83% of LGBTQI+ people felt the need to hide their sexual orientation.¹ Ubuntu is an African word for the universal concept of

* Pepe Julian Onziema, is a transman living and working in Uganda where the Anti-Homosexuality Act was passed in May 2023. He is the Director of Programs at Sexual Minorities Uganda (SMUG) whose operations were halted by the NGO Bureau in August 2022 for reasons including having its main objective as “to fight against discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) persons in Uganda.” See Press Release, Uganda Nat’l Bureau for Non-Governmental Orgs., Statement on Halting the Operations of Sexual Minorities Uganda (Aug. 5, 2022), <https://ngobureau.go.ug/en/news-and-notice/statement-on-halting-the-operations-of-sexual-minorities-uganda> [<https://perma.cc/2BPJ-ESA6>]. Mr. Onziema is an award winner and has been interviewed on the renowned “Last Week Tonight” with John Oliver, an interview that won the GLAAD Media Award for Outstanding Interview in 2015.

** Ms. Daphine Arinda is a lawyer experienced in Research, Policy Analysis and Advocacy, LGBTQ+ and Feminist strategic advocacy, sexual reproductive health and rights (SRHR), Women’s Rights, Leadership, and performing arts, among others. She is currently serving as a member of the Legal Committee of The Convening for Equality (CFE); a consortium of civil society actors challenging the Anti Homosexuality Act 2023. She also serves as a board member of Rella Women’s Foundation, an LBQ Shelter for homeless queer and trans women.

1. *LGBTQ+ Rights*, THE FUND FOR GLOB. HUM. RTS. (Sept. 1, 2023, 9:52 PM),

the 'golden rule' of 'love thy neighbor'.² Love is essential to human life and survival, and thus African values of Ubuntu (which means "I am because you are") should guide us to love one another without heed to difference. Oloka-Onyango postulates that despite the absence of the right to love in normative form, such as in national or international laws, it is a central feature of human existence.³ Our legal ecosystems as civilized nations should be inclusive of all people in their diversity because that is one way to love LGBTQI+ persons.

In a quest to contribute theoretical context on how to build LGBTQI+ inclusive legal systems, this article analyzes three strategic areas for intervention that stakeholders, particularly States, can pursue to build LGBTQI+ inclusive legal systems. Love, as represented by Ubuntu philosophy, is proposed as a catalyst for the repeal or amendment of laws that discriminate against LGBTQI+ individuals, and emphasis is placed on laws regarding unhoused LGBTQI+ persons. Secondly, the article considers the necessity for legal recognition and Gender Affirming Treatment as essential components of the right to the highest attainable standard of health. Lastly, the article makes a case for holding businesses accountable to international standards on corporate responsibility to LGBTQI+ individuals.

1. Inclusive legal framework on the right to housing for LGBTQI+ people premised on Ubuntu.

Even without laws to criminalize LGBTQI+ status specifically, as was the case in Uganda between 2015 when the first Anti Homosexuality Act was declared a nullity and 2023 when a new law was passed by parliament, LGBTQI+ individuals remain at risk of homelessness, arrest, and incarceration based expressly on their sexual orientation or gender identity. When they are housed in shelters, they suffer police and community harassment because of homophobia in their countries. Raids of shelters for LGBTQI+ people are executed amidst grave human rights abuses. An instance of inhumane treatment occurred during the Let's Walk Uganda shelter raid in 2019, which resulted in sixteen people being arrested and subjected to painful, abusively intrusive anal examinations and nonconsensual photography of private parts.⁴ Without safe shelters and stable financial independence, LGBTQI+ people are denied the right to housing, a problem compounded by the strict laws in most countries that prohibit living on the streets.

The right to housing should be absolute and non-derogable because everyone

<https://globalhumanrights.org/what-we-do/lgbtq-rights/> [<https://perma.cc/DDN7-9RRF>].

2. Angelo Nicolaides, *Utilizing Ubuntu to Inform Chief Executive Officer (CEO) Thinking on Corporate Social Responsibility (CSR) and Codes of Ethics in Business*, 41 J. SOC. SCIS. 17, 19 (2014).

3. J. Oloka-Onyango, *Debating love, human rights and identity politics in East Africa: The case of Uganda and Kenya*, 15 AFR. HUM. RTS. L.J. 28, 29 (2015).

4. E. Griffin, *16 Let's Walk Members arrested over homosexuality*, LET'S WALK UGANDA (Oct. 26, 2019), <https://letswalkuganda.wordpress.com/> [<https://perma.cc/YHQ2-35VG>].

deserves shelter, even in times of emergency. LGBTQI+ individuals are caught up in a cycle of intersecting forms of discrimination, like employment discrimination and illegal evictions based on their identity and/or sexuality; subsequently, many of them need spaces to feel safe and to call home. Mr. Victor Madrigal-Borloz, the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, and Ms. Leilani Farha, the Special Rapporteur on adequate housing as a component on the right to an adequate standard of living, and on the right to non-discrimination in this context, said in a joint statement, “[W]hen it comes to LGBT young persons, measures to prevent and ultimately eradicate homelessness must include addressing the phenomena of negation, criminalization and stigma based on sexual orientation and gender identity.”⁵

States must address the structural causes of LGBTQI+ homelessness. As a priority step towards protecting the right to safe and decent housing for the community, laws which make it a crime for land and house owners to transact with LGBTQI+ persons⁶ have to be repealed. This can then be followed with continuous monitoring and data collection on access to adequate, safe and affordable housing for LGBTQI+ populations as guided by Strategic Development Goal 11.1.⁷

We must make allowance for those defeated by economic status to stand on their own, starting with dismantling some misdemeanor laws and by-laws that criminalize things like loitering, begging, idling, and archaic laws which still criminalize being a vagabond. Such laws criminalize basic human activities of people living on the streets, like eating and sleeping. However, because of their unsheltered status, they are forced by necessity to do these activities in public.

Through the African philosophy of Ubuntu, states can override the pressures of gentrification that often culminate into the social exclusion of homeless LGBTQI+ individuals, especially in the Global North. Ubuntu teaches us to treat others with dignity because our existence depends on one another. It is an African philosophy that encapsulates “virtues of sympathy, compassion, benevolence, solidarity, hospitality, generosity, sharing, openness, affirming, available, kindness, caring, harmony, interdependence, obedience, collectivity and consensus.”⁸ Using the humanist lens of Ubuntu, law enforcers should be hesitant to enforce laws that render a victim of multiple discrimination homeless. Instead,

5. The right to housing of LGBT youth: an urgent task in the SDG agenda setting, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS. (Aug. 9, 2019), <https://www.ohchr.org/en/statements/2019/08/right-housing-lgbt-youth-urgent-task-sdg-agenda-setting> [https://perma.cc/AL7J-QGX4].

6. The Anti-Homosexuality Act 2023, § 9 (Uganda), <https://www.parliament.go.ug/sites/default/files/The%20Anti-Homosexuality%20Act%2C%202023.pdf> [https://perma.cc/7UAR-LTUZ].

7. *Sustainable Development Goals, Targets and Indicators*, U.N. DEP’T ECON. AND SOCIAL AFFS., https://sdgs.un.org/goals/goal11#targets_and_indicators

8. Elia Shabani Mligo, *African Ubuntu, the See-Reflect-Act Model, and Christian Social Practice: Reading Luke 10:38–42 in Light of African Hospitality*, 12 *DIACONIA* 5, 6-7 (2021).

alternative housing in the form of safe and secure shelters should be supported and given legal recognition to operate and protect the right to adequate housing for LGBTQI+ individuals.

On January 1, 2022, Nazish Dholakia, senior writer from the Vera Institute of Justice explicated how the US criminalizes homelessness.⁹ He offered vivid examples from Austin, Texas and California of how unhoused people are fined and arrested for sitting, lying, camping, or existing in any way that makes one appear plainly homeless. In addition, people experiencing homelessness are also subjected to invisibilization and other forms of inhumane treatment that derogates their dignity. LGBTQI+ persons experiencing homelessness get a double serving of discrimination; first due to their sexual orientation, gender identity and expression, and sex characteristics (SOGIESC), and second due to their housing status.

Status of housing should be a respected status in anti-discrimination law. A 2021 report by the American Civil Liberties Union (ACLU) of California made a recommendation to lawmakers to amend anti-discrimination laws to protect people from discrimination on the basis of housing status as a way to mitigate human rights violations against unhoused people.¹⁰ That recommendation should be adopted and merged with two other recommendations: (1) explicitly prohibiting discrimination on the basis of sexual orientation and/or gender identity in all national laws; and (2) the recognition of the right to adequate housing as a non-derogable right.

2. More light on the ‘T’s and ‘I’s in LGBTQI+: A case for seamless legal recognition processes and Gender Affirming Treatment for Trans and Intersex people.

2.1 Legal Recognition

Oloka-Onyango identifies that much less attention is given to the ‘B’ (bisexual), ‘T’ (transsexual), and the ‘I’ (intersex) in the LGBTQI+ alphabet and calls for their inclusion in analyses of sexuality in planning and envisioning them while passing laws.¹¹

There is no legal framework in Uganda and Kenya that allows for or facilitates transgender and intersex people to choose their gender and have it be recognized by law.¹² The case of the Ugandan trans woman who succeeded at

9. Nazish Dholakia, *How The U.S. Criminalizes Homelessness*, FORBES (Jan. 1, 2022), <https://www.forbes.com/sites/forbeseq/2022/01/01/how-the-us-criminalizes-homelessness/?sh=5b3a29924869> [<https://perma.cc/N4L3-6XC4>].

10. AM. C.L. UNION OF CAL., *OUTSIDE THE LAW: THE LEGAL WAR AGAINST UNHOUSED PEOPLE* (2021), <https://www.aclusocal.org/en/publications/outside-law> [<https://perma.cc/3XT5-V929>].

11. Oloka-Onyango, *supra* note 3.

12. KENYA HUM. RTS. COMM’N, *THE OUTLAWED AMONGST US: A STUDY OF THE LGBTI COMMUNITY’S SEARCH FOR EQUALITY AND NON-DISCRIMINATION IN KENYA* 42 (2011).

getting official gender change¹³ highlighted the challenges that transgender and intersex persons face in pursuing an official gender change. Some of the challenges include lack of access to medical professionals for surgical transformations, limited resources to afford the expensive medical and subsequent legal procedures and, above all, a restrictive law, the *Registration of Persons Act 2015*, which regulates registration of individuals and issuance of national identity cards.

Section 38 of the *Registration of Persons Act* concerns intersex children. It mandates that an application for gender change of an intersex child can only be made by a guardian or parent of the child after complete sex change certified by a doctor.¹⁴ The language of the law is derogatory where it refers to an intersex child as a hermaphrodite and the law is restrictive where it requires an affidavit by a medical doctor as proof of a complete surgical sex change before an official gender change.

International standards mandate States to guarantee legal recognition of everyone without such difficult conditionalities. Principle 31 of the *Yogyakarta plus 10 Principles* provides:

Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them.¹⁵

The solution to overcoming the fundamental challenge of denied or restrictive official gender change lies in removing technical legal barriers to official gender recognition, such as a requirement for doctor's evidence proving complete sex change. This would enable a comprehensive legal system that is inclusive of LGBTQI+ individuals.

13. Khatondi Soita Wepukhulu, *'This is not just my win': trans Ugandan wins official gender change*, OPENDEMOCRACY (Oct. 25, 2021, 9:35 AM), <https://www.opendemocracy.net/en/5050/trans-uganda-gender-change/> [<https://perma.cc/UC7S-YXV6>].

14. Registration of Persons Act, 2015 (Uganda), <https://commons.laws.africa/akn/ug/act/2015/4/media/publication/ug-act-2015-4-publication-document.pdf> [<https://perma.cc/85SF-63X6>].

15. SONIA ONUFER CORRÊA ET AL., *THE YOGYAKARTA PRINCIPLES* (2007) (addressing a broad range of international human rights standards and their application to SOGI issues); MAURO CABRAL GRINSPAN ET AL., *THE YOGYAKARTA PRINCIPLES PLUS 10* (2017) (adding 111 "additional state obligations" related to areas such as torture, asylum, privacy, health and protection of human rights defenders).

2.2 The right to health: A case for Gender Affirming Treatment against Conversion Therapy

Gender Affirming Treatment is pertinent to the right to health, including mental and emotional health, of LGBTQI+ individuals because it can steer the wheel towards ending conversion therapy. Gender Affirming Treatment refers to any of a number of gender affirming interventions, including hormone replacement therapy, surgery, hair removal, interventions for the modification of speech and communication, and behavioral adaptations such as genital tucking or packing, or chest binding. Conversion therapy, on the other hand, seeks to forcefully change gender identity and sexual orientation of a person. It is detrimental to mental health and amounts to an infringement of the highest attainable standard of health of “T” and “I” people. Early forms of conversion therapy methodologies included aversive conditioning which entailed administering beatings, whippings, burnings, electric shocks, and nausea-inducing medication while images of same-sex activities were displayed.¹⁶ Conversion therapy is enabled by the inadequate legal structure on legal recognition for Intersex and Trans people. An LGBTQI+ inclusive legal system would provide for an enabling legal framework for Gender Affirmative Treatment and identity self-determination so that less individuals fall victim of hate crimes since even their official identification would reflect their true gender.

During the 2022 FIFA Men’s World Cup, the Qatar government, through its security operatives, arbitrarily arrested LGBTQI+ persons, subjecting them to ill treatment such as solitary confinement, forceful conformity to the ascribed gender at birth (for instance cutting off hair), wiping feminine makeup off faces of trans persons, and denial of access to counsel for two months in one case. Qatar came under much scrutiny from the international community when it made conversion therapy a prerequisite for release from custody for trans women.¹⁷

Conversion therapy is condoned by a lack of legislation and policy framework ingrained with principles of bodily autonomy, specifically regarding gender change/recognition and Gender Affirming Treatment. Instead of condoning conversion therapy, states should adopt policies and laws that create an enabling and legal environment for Gender Affirming Treatment, as defined as medically necessary by the World Professional Association for Transgender Health.¹⁸

For the case of Qatar, the individuals arrested had not violated the specific

16. Laura A. Gans, *Inverts, Perverts, and Converts: Sexual Orientation Conversion Therapy and Liability*, 8 B.U. PUB. INT’L L.J. 219, 219 (1999).

17. *Qatar: Security Forces Arrest, Abuse LGBT People*, H.R. WATCH (Oct. 24, 2022), <https://www.hrw.org/news/2022/10/24/qatar-security-forces-arrest-abuse-lgbt-people> [<https://perma.cc/U7WB-7BFJ>].

18. *Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.*, WORLD PRO. ASS’N FOR TRANSGENDER HEALTH (Dec. 21, 2016), <https://www.wpath.org/media/cms/Documents/Insurance%20Training/WPATH%20Position%20on%20Medical%20Necessity%2012-2016.pdf> [<https://perma.cc/SP24-NVfV>].

law against same sex relations but rather the Public Morality Laws, like Law No. 17 of 2002 on Protection of Community. Trans people are sometimes arrested under charges of false personation or for offenses against public morality for the audacity to present themselves in a way that contradicts their sex characteristics.¹⁹ By advocating for the amendment of discriminatory laws and adoption of laws that allow for seamless legal recognition and gender affirming treatment, we can reduce and subsequently eliminate cases of conversion therapy and guarantee the highest attainable standard of health for Trans and Intersex people.

We should push for secular laws that respect universality above cultural relativism when dealing with human rights of LGBTQI+ persons. Public morality laws and registration laws that disproportionately affect LGBTQI+ persons need revision and repeal. Additionally, laws should be passed that make conversion therapy illegal. In 2023, only a few states such as Brazil, Ecuador, and Malta expressly ban conversion therapy while many more do not have any laws explicitly prohibiting conversion therapy.²⁰

3. Corporate Responsibility towards LGBTQI+ people using the UN Business and Human Rights framework and the African restorative justice mechanisms.

Businesses play a huge role in addressing and preventing human rights violations of LGBTQI+ people at the workplace, in their communities and in their fields of operation. Some businesses amend human resource policies to provide parental leave to same sex couples and make available health benefits to cover specific needs of transgender employees.²¹

The *United Nations Guiding Principles on Business and Human Rights* compel states to promote respect for human rights by business enterprises. The United Nations has established other mechanisms to ensure corporate responsibility of businesses towards LGBTQI+ individuals such as the *UN Working Group on Business and Human Rights* and the *United Nations 'Standards of Conduct for Business on Tackling Discrimination against LGBTI People' (2017)*, which deals with how to support the rights of LGBTQI+ people in the market, workplace and community. Unfortunately, compliance to these UN mechanisms is on a voluntary basis through corporate social responsibility

19. Gabriel Arkles & Bobby Hodgson, *A Trans Woman Was Charged With 'False Personation' for Giving the NYPD Her Real Name*, AM. C.L. UNION (Jan. 24, 2019), <https://www.aclu.org/news/lgbtq-rights/trans-woman-was-charged-false-personation-giving-nypd-her-real> [<https://perma.cc/UG2W-9YHY>].

20. Thiruna Naidoo & Ayodele Sogunro, *Conversion therapy: Current practices, emerging technology, and the protection of LGBTQ+ Rights in Africa*, AFR. HUM. RTS. POL'Y PAPERS, (2021).

21. Daniel Berezowsky, *Beyond Pride: The Rights of LGBTI People and the Corporate Responsibility to Respect*, SHIFT, (Aug. 2021), <https://shiftproject.org/resource/beyond-pride-series/beyond-pride/> [<https://perma.cc/B6RH-N9GB>].

programs, which are created for purposes other than reverence for human rights.²²

In the *U.N. Human Rights Council Resolution 32/2*, which stipulates protection against violence and discrimination based on sexual orientation and gender identity, the Human Rights Council resolved to appoint an Independent Expert to conduct, facilitate, and support the provision of advisory services, technical assistance, capacity-building and international cooperation in support of national efforts to combat violence and discrimination against persons on the basis of their sexual orientation or gender identity.²³ This strong legal backbone under the UN system, if adopted and implemented, offers a wonderful framework against which to hold states and businesses accountable where human rights violations have been committed against LGBTQI+ individuals especially by business entities.

Some exceptional examples already exist where business entities are engaged as allies in the advocacy for LGBTQI+ inclusion and non-discrimination. For instance, corporate actors mobilized in opposition to the North Carolina (US) “Bathroom Bill” targeting transgender people;²⁴ a French retailer withdrew advertising from a Polish state news website in response to Poland’s anti-LGBTI policies,²⁵ and an alliance of multinational and Brazilian corporations spoke out against anti-LGBTI rhetoric in the lead-up to the election of Jair Bolsonaro.²⁶ In particular, multinational corporations are strategic allies for equality rights and non-discrimination based on identity or sexuality.

It is not enough for the businesses to adopt the UN Guiding Principles because just as was in the case of Qatar above, FIFA had adopted the UN Guiding Principles and yet still held the World Cup amidst enforcement of discriminatory homophobic laws and regulation.²⁷ States globally should adopt the African restorative justice mechanism to hold business entities accountable for LGBTQI+ rights. A quasi-judicial proceeding should be recognized as a legitimate and conclusive way for holding homophobic perpetrators accountable. Adopting Afro-centric strategies like the philosophy of Ubuntu and African Restorative Justice mechanisms is part of a radical move to decolonize Africa. Evangelicals

22. Amanda Lyons & Cooper Christiancy, *Reclaiming the Human Rights Foundations of the UN Standards of Conduct for Business on Tackling Discrimination against LGBTI People*, 7 *BUS. & HUM. RTS. J.* 134 (2022).

23. Human Rights Council Res. 32/2, U.N. Doc. A/HRC/RES/32/2 (July 15, 2016).

24. ‘Bathroom bill’ to cost North Carolina \$3.76 Billion, CNBC (Mar. 27, 2017), <https://www.cnn.com/2017/03/27/bathroom-bill-to-cost-north-carolina-376-billion.html> [<https://perma.cc/2THG-PCZD>].

25. Matthew Holroyd, *Carrefour withdraws advertising campaign from Polish news website over LGBT rights*, EURONEWS (Nov. 27, 2020, 8:57 PM), <https://www.euronews.com/2020/11/27/carrefour-withdraws-advertising-campaign-from-polish-news-website-over-lgbt-rights> [<https://perma.cc/VW39-GL9C>].

26. *Carta de Apoio à Diversidade, ao Respeito e à Inclusão de Pessoas LGBT+ nos Locais de Trabalho no Brasil*, OUT & EQUAL, <https://outandequal.org/lgbtqbrazil/> [<https://perma.cc/B8GB-45PK>] (last visited June 7, 2023).

27. U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS., *supra* note 5.

from the Global North representing the unholy alliance between religious fundamentalism and political dogma are influencing legislation of countries and societal perspectives. They are using colonial religions that disregard equality, a critical feature of the philosophy of Ubuntu.²⁸

African Restorative Justice mechanisms are conflict resolution systems that engage the victim, offender, and the community together to resolve a dispute or pursue justice. Restorative Justice mechanisms have been operational in Ghana, Nigeria, South Africa, Kenya, and Uganda where they were known to encourage community participation in handling crime, reparation, and integration of the perpetrator into the community.²⁹ African Restorative Justice mechanisms allow businesses failing to uphold adopted UN guidelines space to own up, seek forgiveness, and be accountable to victims of their abuse of power or for the consequences of their inaction. Restorative Justice allows for transformation of the capitalist economy into a more refined, equitable one. It reflects a recognition of the dignity of LGBTQI+ individuals because it requires accountability from the faulting business entity. The act of seeking forgiveness in itself builds community between the business entities and LGBTQI+ communities rather than tearing them apart into an anti-LGBTQI+ wing and a pro-LGBTQI+ rights camp.

Conclusion

It has been intentional to keep the spotlight off Uganda although I do refer to it several times because it is a notorious case of states out for blood against LGBTQI+ rights. The article is written from an international law perspective, and while Africa is often portrayed as regressive on upholding Human Rights, the article shows that even countries in the Global North are battling oppressive legal and justice systems against LGBTQI+ individuals. A mélange of alternatives that incorporate the African philosophy of Ubuntu and African restorative justice strategies and intentionally benchmarking progressive national and international laws and policies is key to building an LGBTQI+ inclusive legal mechanisms.

28. Emma Sanderson, *The Unholy Relationship Between Uganda Anti LGBTQ+ Law and US Evangelicalism*, THE CHI. COUNCIL ON GLOBAL AFFS. (June 8, 2023), <https://globalaffairs.org/commentary-and-analysis/blogs/unholy-relationship-between-ugandas-anti-lgbtq-law-and-us> [<https://perma.cc/L739-6QLP>].

29. Julena Jumbe Gabagambi, *A Comparative Analysis of Restorative Justice Practices in Africa*, HAUSER GLOBAL L. SCH. PROGRAM (Oct. 2018), https://www.nyulawglobal.org/globalex/Restorative_Justice_Africa.html [<https://perma.cc/W2KE-H5JD>].