

Fighting the Power: Queer Social Movements and Their Impact on African Laws and Culture

Khalid O. Vrede†

The current approach by Western actors cannot be said to help queer people in Africa achieve sustainable rights. Instead of promoting rights for sexual and gender minorities, Western punitive advocacy has worsened the situation for queer people in Africa. What, then, if anything, can Western actors do to help secure rights for queer folk in Africa?

Relying on the theory of demoprudence, and of precipitating legal and social change through social movements, this Note argues that if Western authorities wish to effectively create sustainable rights for queer people in Africa, they should support queer social movements instead of using tactics of public castigation or imposing monetary sanctions. This is because such movements have been successful in creating sustainable rights for queer folk.

All told, this Note makes at least three contributions. First, descriptively, it demonstrates how current Western approaches fail queer communities in Africa. Second, prescriptively, it shows how the West can use the social movement model to combat queerphobia more effectively. Third, descriptively, it shows how the social movement model has already been efficiently used by queer activists in various African countries.

Introduction	468
I. Queerphobia in Africa and the West's Flawed Approaches to Addressing It	471
A. The Prevalence of Queerphobia in Africa	471
B. The Western Approach	475
1. <i>The United States, U.N., and Europe</i>	476
2. <i>Western Businesses</i>	477

† J.D.-ILA Candidate, 2021, Cornell Law School; B.A. English Rhetoric, 2017, Binghamton University. This Note was conceived in Professor Muna Ndulo's Law and Social Change: Comparative Law in Africa seminar in the Fall of 2019. In addition to Professor Muna Ndulo and Professor Andrea Mooney, I would like to thank Chan Tov McNamarah for his incredible help in forming this Note, as well as Mariette Geldenhuis and Jared Ham for their assistance and insight. I also thank the staff of the *Cornell International Law Journal* for their diligent editing. This Note is dedicated to my parents, Mark and Wanda; sister, Desiree; and grandmother, Constance, whose unwavering support of my academic pursuits made its creation possible.

C. Why the Western Approach Fails	478
D. Social Movements: An Effective Alternative	479
II. How Social Movements Change the Law	479
A. Social Movements	479
B. Demosprudence	480
C. Social Movements, Demosprudence, and Legal Change ..	481
D. Social Movements and Demosprudence in Action	481
III. Colonialism, Queerphobia, and Applying the Social Movement Model to Three African Case Studies	483
A. How Colonialism Laid the Groundwork for Queerphobia	483
B. The Success of Social Movements in Three African Case Studies	485
1. <i>South Africa</i>	486
a. The Demosprudential and Social Movement Strategy	486
b. Demosprudence and the Constitutional Court ..	486
c. The Success of South Africa's Queer Social Movements	488
2. <i>Botswana</i>	492
a. The Successes of the Botswanan Queer Social Movement	492
b. Demosprudence and the High Court of Botswana	494
3. <i>Mozambique</i>	494
Conclusion	496

Introduction

In 2015, during former United States (U.S.) President Barack Obama's first visit to Kenya, his father's home country, Obama delivered a harsh critique of Kenya's treatment of queer¹ people. While speaking to Kenyan President Uhuru Kenyatta in a public forum, President Obama pointed out that he "believe[d] in the principle of treating people equally under the law, and that . . . [people were] deserving of equal protection under the law and that the state should not discriminate against people based on their sexual

1. This Note uses the term "queer" to refer to those who belong to the Lesbian, Gay, Bisexual, Transgender, Queer or Questioning, Intersex, and Asexual (LGBTQIA) community. This note may also use the term queer interchangeably with the terms "LGBTQIA," "sexual minorities," and the like. All of these terms are intended to refer to non-heterosexual or non-cisgender identities. If a specific identity within the LGBTQIA umbrella is being referenced, the identity will be specified. While the term LGBTQIA may be used in this paper, please note that the term is limiting. The predominant use of the term "queer" in this Note is a deliberate acknowledgment of the shortcomings associated with the acronym LGBTQIA, which many queer activists and academics believe does not capture the nuances of queer identity, particularly in non-Western countries. For additional information on this topic, see Judith Butler, *Critically Queer*, 1 J. LESBIAN & GAY STUD. 17, 18 (1993) (discussing the multifaceted use of the term queer, particularly in reference to LGBTQIA identities).

orientation.”²

In the days following Obama’s address, Kenyan newspapers were replete with editorials condemning his remarks as an attempt to interfere with Kenya’s sovereignty and disrespect the traditions of Africa as a whole.³ The backlash continued for some time, leading 700 Kenyan pastors to sign a letter addressed to Obama, demanding that he not push “gay talk” in their country.⁴ Unfortunately, such a response to queer advocacy by a Western actor⁵ is not unheard of. On the contrary, previously in Nigeria, pressures from the United States to adopt more queer-friendly laws heavily influenced the Nigerian government to pass the Same-Sex Marriage Prohibition Act.⁶ Activists have said the same about Uganda’s passing its Anti-Homosexuality Act (AHA).⁷

In many ways, Western influence has undermined indigenous queer rights movements because some Africans perceived it as a form of cultural imperialism. Take the response to Obama’s 2015 visit to Kenya. The aforementioned newspaper editorials and letter signed by Kenyan pastors constituted what many Kenya queer-rights activists thought was a marked setback in their fight for rights.⁸ In the months leading up to Obama’s visit, queer people in Kenya feared a spotlight would be shone on them, leading queerphobic individuals to commit more violent acts against them.⁹ Queer activists in Kenya providing healthcare also noted a marked decline in people showing up for medical appointments to receive vital HIV medication.¹⁰

2. Aryn Baker, *Obama Defends Gay Rights on Kenya Trip*, TIME (July 26, 2015, 10:02 AM), <https://time.com/3972445/obama-kenyatta-gay-rights/> [<https://perma.cc/V3V3-EKA6>].

3. See, e.g., Jacob Kushner, *The British Empire’s Homophobia Lives on in Former Colonies*, ATLANTIC (May 24, 2019), <https://www.theatlantic.com/international/archive/2019/05/kenya-supreme-court-lgbtq/590014/> [<https://perma.cc/AFQ2-YCU5>].

4. Stephanie Mithika, *How Should the U.S. Approach LGBT Rights in Africa?*, ATL. COUNCIL (July 25, 2019), <https://www.atlanticcouncil.org/blogs/africasource/how-should-the-us-approach-lgbt-rights-in-africa/> [<https://perma.cc/HZD4-VN94>].

5. References to “the West,” “Western authorities,” or “Western actor(s),” and the like, refer collectively or individually to the United States; the United Nations; Western European countries, such as the United Kingdom, France, Germany, Spain, and Portugal; as well as businesses based in western countries. Due to common cultural values and a united approach to various political issues, these countries and entities are often referenced as being a part of the monolithic “West.” Such will be the case in this Note.

6. See Norimitsu Onishi, *U.S. Support of Gay Rights in Africa May Have Done More Harm than Good*, N.Y. TIMES (Dec. 20, 2015), <https://www.nytimes.com/2015/12/21/world/africa/us-support-of-gay-rights-in-africa-may-have-done-more-harm-than-good.html> [<https://perma.cc/8CSB-SGMY>].

7. See *infra* Part II; see also *The Anti-Homosexuality Act of 2014 (Uganda)*, <https://www.refworld.org/pdfid/530c4bc64.pdf> [<https://perma.cc/8PH8-QN59>].

8. See Kushner, *supra* note 3.

9. See Gregory Warner, *When the U.S. Backs Gay and Lesbian Rights in Africa, Is There a Backlash?*, NAT’L PUB. RADIO (Aug. 30, 2016, 4:28 PM), <https://www.npr.org/sections/goatsandsoda/2016/08/30/491818892/when-the-u-s-backs-gay-and-lesbian-rights-in-africa-is-there-a-backlash> [<https://perma.cc/3BWE-XEGN>] (noting that incidents of violence against LGBTQI people in Kenya increased leading up to Obama’s visit).

10. See *id.*

Queer rights activists in Africa have often noted that overt advocacy and punitive acts by the West are more likely to cause African governments to rebel, rather than adopt more favorable policies.¹¹ Furthermore, Western rhetoric about queer rights must be employed cautiously. In the case of queer rights activist Pepe Julian Onziema, a transgender man, queer-affirming rhetoric by the United States led to Onziema's arrest and beating at a gay pride event in Uganda.¹² Onziema's arresting officers directly cited their perception that the U.S. government afforded Onziema special privileges due to his queer identity as the reason for their actions.¹³ This perception of queer privilege is not unique to Onziema's unfortunate experience.¹⁴

Even if one sets aside the possibility of backlash, the fact remains that despite the current Western approach, queer rights are still being rolled back in many African countries.¹⁵ This situation begs the question, if pressure from Western actors is so forcefully resisted and ineffective at spurring change, then what would be a more effective method of securing rights for queer people in Africa?

This Note answers that question by arguing first that the primary approaches Western actors have recently employed to improve queer rights in Africa are fundamentally flawed. Then, taking a prescriptive stance, this Note suggests that, to create real, qualitative change for queer folk in Africa, the "Western approach" must be replaced by a new advocacy model. Put more plainly, the theory of demosprudence, and of creating legal and social change through social movements, reveals that if Western authorities wish to create sustainable rights for queer people in Africa, such authorities should support grass-roots social movements, instead of using tactics of public castigation or imposing monetary sanctions. Western authorities should do this because various examples from Africa prove that social movements are very successful in creating such rights.

This theory is advanced in three steps. Part I will explore the prevalence of queerphobia in Africa and affirm the notion that the current Western approach to addressing the issue is flawed. This part will go on to present the social movement model as an effective alternative to the Western approach. Part II will set forth the operative definitions of demos-

11. See Kushner, *supra* note 3; see also Onishi, *supra* note 6 (noting that Nigerian LGBTQIA activists blame the United States intervention in queer rights for increased levels of harassment and violence).

12. See Warner, *supra* note 9.

13. See *id.*

14. See Baker, *supra* note 2 (noting that in response to Obama's pro-LGBTQIA comments in Kenya, former President Uhuru Kenyatta argued that other issues such as "health, education and road development," deserved more attention than that given to queer rights by the U.S.).

15. See *U.S. Cuts Aid to Uganda, Cancels Military Exercise over Anti-Gay Law*, REUTERS (June 19, 2014, 2:22 PM), <https://www.reuters.com/article/us-usa-uganda-gay-announcement/u-s-cuts-aid-to-uganda-cancels-military-exercise-over-anti-gay-law-id-USKBN0EU26N20140619> [<https://perma.cc/CLM6-JF2Z>] [hereinafter *U.S. Cuts Aid*] (noting that the spokesman for Uganda, Ofwono Opondo, said that if the United States imposed sanctions, it would not cause Uganda to repeal its anti-queer laws).

prudence and social movements. This part will then describe how such concepts are successful in creating sustainable cultural and legal change in society. Part III will show how colonialism, not indigenous African culture, led to pervasive queerphobia on the continent. Knowledge of this information makes it clear that queerphobia, not queerness, is a product of Western influence. This means that queer Africans are in the best position to combat queerphobic influences as they cannot be easily labeled “Western actors.” Part III will go on to convey the positive impacts of social movements on queer rights in three African case studies, thus displaying the validity of this Note’s thesis.

I. Queerphobia in Africa and the West’s Flawed Approaches to Addressing It

A. The Prevalence of Queerphobia in Africa

With few exceptions, queer people face a marked stigma throughout Africa. They are subject to violence and, in many instances, lack substantive legal and social protections. Some critics have even gone as far as to dub Africa the most homophobic continent on earth.¹⁶ A 2013 Pew Research Center study revealed that in South Africa, the first nation to include protections for sexual minorities in its constitution, “61% [of South Africans] say homosexuality should not be accepted by society, while just 32% say it should be accepted.”¹⁷ The number of those who disapprove of same-sex relationships is considerably higher in other African countries.¹⁸ In her article, queer rights reporter Stephanie Mithika notes that “[a]cross . . . [Africa], sexual minorities have been forced into displacement by threats of violence, blackmail, unemployment and other forms of social ostracization.”¹⁹ The issues queer people in Africa face are multifaceted, with an ever-increasing number of discriminatory practices²⁰ leading to even more insidious consequences. In Nigeria, for example, it is illegal for LGBTQIA people to “organize” or “patronize” any type of queer-centric

16. See David Smith, *Why Africa Is the Most Homophobic Continent*, *GUARDIAN* (Feb. 22, 2014, 7:06 PM), <https://www.theguardian.com/world/2014/feb/23/africa-homophobia-uganda-anti-gay-law> [<https://perma.cc/NHE8-WK7W>].

17. *The Global Divide on Homosexuality*, PEW RSCH. CTR. (June 4, 2013), <https://www.pewresearch.org/global/2013/06/04/the-global-divide-on-homosexuality/> [<https://perma.cc/6TTF-FXEJ>] [hereinafter PEW RESEARCH CENTER]. These numbers may have changed in recent years, but they are still damning. See *id.*; see also S. AFR. CONST. § 9(3), 1996.

18. In Nigeria, Kenya, Uganda, Senegal, and Ghana the vast majority of people—98% in Nigeria; 90% in Kenya; and 96% in Uganda, Senegal, and Ghana—say homosexuality is unacceptable. PEW RESEARCH CENTER, *supra* note 17.

19. Mithika, *supra* note 4.

20. See *Mapping Anti-Gay Laws in Africa*, AMNESTY INT’L U.K. (May 31, 2018, 2:48 PM), <https://www.amnesty.org.uk/lgbti-lgbt-gay-human-rights-law-africa-uganda-kenya-nigeria-cameroon> [<https://perma.cc/NL5Q-WULD>] [hereinafter *Mapping*] (discussing the Same-Sex Marriage Prohibition Act passed in Nigeria in 2014 that made punishment for same-sex relationships harsher).

organization.²¹ This has the added consequence of making many Nigerian organizations aimed at combating HIV and AIDS illegal.²²

This widespread disdain forced many queer people in Africa to struggle with a litany of issues. In Mauritania, Sudan, Somalia, and parts of Nigeria, same-sex relationships are punishable by death.²³ Queer people in Africa also face social stigma perpetuated by African leaders, with the former Prime Minister of Zimbabwe Robert Mugabe proclaiming that LGBTQIA people behaved “worse than pigs and dogs” and should “have absolutely no rights.”²⁴ Gambian president Yahya Jammeh said that, “LGBT can only stand for Leprosy, Gonorrhoea, Bacteria, and Tuberculosis,” then proceeded to compare gay people to “vermin.”²⁵ Furthermore, queer people in Africa face practices such as conversion therapy²⁶ and corrective rape²⁷ in their countries. While Africa has recently seen progress in the realm of queer rights, the perpetuation of queerphobic laws is by no means at a standstill.²⁸ Though Uganda’s Supreme Court deemed the AHA null and void,²⁹ there is strong evidence that Uganda’s government will introduce a similar piece of legislation in the future.³⁰

21. Rick Gladstone, *Nigerian President Signs Ban on Same-Sex Relationships*, N.Y. TIMES (Jan. 13, 2014), <https://www.nytimes.com/2014/01/14/world/africa/nigerian-president-signs-ban-on-same-sex-relationships.html?module=inline> [https://perma.cc/J4FL-QAR6].

22. *Id.*; see also Abadir M. Ibrahim, *LGBT Rights in Africa and the Discursive Role of International Human Rights Law*, 15 AFR. HUM. RTS. L.J. 263, 276–77 (2015) (noting that the criminalization of same-sex relationships in general is a hindrance to the provision of medical treatment for ailments such as HIV and AIDS).

23. *Botswana’s High Court Rejects Laws Criminalising Homosexuality*, ALJAZEERA (June 11, 2019), <https://www.aljazeera.com/news/2019/06/botswana-high-court-rejects-laws-criminalising-homosexuality-190611100525546.html> [https://perma.cc/U4TR-C6TB] [hereinafter *Criminalising Homosexuality*].

24. Andrew Meldrum, *Gay Rights Are Being Debated in Every Corner of the World*, MINNPOST (Oct. 13, 2009), <https://www.minnpost.com/global-post/2009/10/gay-rights-are-being-debated-every-corner-world/> [https://perma.cc/4N8C-YFVV].

25. Heather Saul, *Gambian President Says Gay People Are ‘Vermin’ and Should Be Tackled Like Malaria-Causing Mosquitoes*, INDEPENDENT (Feb. 19, 2014, 5:31 PM), <https://www.independent.co.uk/news/world/africa/gambian-president-says-gay-people-are-vermin-and-should-be-tackled-malaria-causing-mosquitoes-9139119.html> [https://perma.cc/5V7S-3PFB].

26. Maria Sjödin, *Criminalization and Conversion. Prevalence and Practices of So-Called Conversion Therapy in Africa*, OUTRIGHT ACTION INT’L (Oct. 14, 2019), <https://outrightinternational.org/content/criminalization-and-conversion-prevalence-and-practices-so-called-conversion-therapy-africa> [https://perma.cc/2YYB-FP89].

27. See generally Jacqueline K. Wilson, *Unfolding Knowledge on Sexual Violence Experienced by Black Lesbian Survivors in the Townships of Cape Town*, EUR. J. SOC. SCI. EDUC. & RSCH., May-Aug. 2017, at 7, 10 (discussing the prevalence of corrective rape upon queer women in South Africa).

28. The African country of Chad approved a law in 2017 that punishes same-sex intimacy with three months to two years in jail and a fine of \$85 to \$850. *Anti-Gay Laws Widespread in Africa Despite Gains*, GLOBEPOST (Feb. 20, 2019), <https://theglobe-post.com/2019/02/20/africa-lgbt-rights/> [https://perma.cc/3ZVE-39VW].

29. See Paul Johnson & Silvia Falcetta, *Beyond the Anti-Homosexuality Act: Homosexuality and the Parliament of Uganda*, 74 PARLIAMENTARY AFFS. 27, 27 (2021).

30. A bill, emulating the AHA, that proposes harsh penalties against same-sex intimacy is set to be introduced in Uganda’s national assembly in 2020. See Rodney Muhumuza, *Ugandan Official Says New Bill Will Target Homosexuals*, ABC NEWS (Oct. 11,

One reason so many Africans harbor queerphobic sentiments is the popular notion that queerness is fundamentally un-African.³¹ This notion has been repeated time and again by Africans and Westerners alike.³² In places where narratives such as the un-African nature of queerness, or laws such as the AHA and Same-Sex Marriage Prohibition Act, go unchecked, the perpetuation of these ideas and the enforcement of such laws has increased.³³

The severe conditions queer people in Africa face are evidence of the West's failure to encourage African countries to adopt comprehensive queer rights properly, or at the very least, decriminalize same-sex relationships and gender nonconformity. Despite the West's best efforts, half of all African nations still criminalize same-sex relationships and target transgender individuals.³⁴ Some acts by the West have, in fact, worsened African stances toward the LGBTQIA community.³⁵ Moreover, monetary sanctions, often imposed by Western countries to encourage queer rights in Africa, may harm the most vulnerable in the queer community.³⁶

While some legal scholars have written about the interplay between

2019, 7:44 AM), <https://abcnews.go.com/International/wireStory/ugandan-official-bill-target-homosexuals-66203528> [<https://perma.cc/JH2K-V2CZ>].

31. See Ibrahim, *supra* note 22, at 266-67 (discussing how this notion has led to vigilante hate-crimes in countries like Nigeria, Kenya, and Uganda).

32. In a May 2015 interview, a Kenyan government spokesman called homosexuality "unnatural and un-African." Kayla Ruble, *Kenya Doubles Down on Anti-Gay Stance, Calling Homosexuality 'Unnatural and Un-African'*, VICE (May 4, 2015, 4:20 PM), <https://www.vice.com/en/article/a39w4j/kenya-doubles-down-on-anti-gay-stance-calling-homosexuality-unnatural-and-un-african> [<https://perma.cc/WD98-VJWH>]; see BOY-WIVES AND FEMALE-HUSBANDS: STUDIES OF AFRICAN HOMOSEXUALITIES xvi (Stephen O. Murray & Will Roscoe eds., 2001) [hereinafter BOY-WIVES] (noting that in 1990, a member of the rap group Public Enemy asserted that, "there [was] not a word in any African language [that] describe[d] homosexual[s] . . . [It] didn't exist.").

33. South Sudan, Burundi, Liberia, and Nigeria have implemented increasingly punitive penalties for people who engage in same-sex relationships. Gambia now calls for life in prison as a punishment for same-sex relationships. See Baker, *supra* note 2.

34. Mithika, *supra* note 4.

35. See Norimitsu Onishi, *Obama Kenya Trip Sets Off Gay Rights Debate in Africa*, N.Y. TIMES (July 21, 2015), <https://www.nytimes.com/2015/07/22/world/africa/africans-to-welcome-obama-but-not-a-scolding-on-gay-rights.html> [<https://perma.cc/SZD9-YD7Q>] (noting that after Gambia and Uganda passed their laws criminalizing homosexuality, the United States imposed sanctions on the two countries that merely hardened public opposition to gay rights); Jocelyne Sambira, *Making Waves: Malawi Revives Debate on Gay Rights*, AFR. RENEWAL, <https://www.un.org/africarenewal/web-features/making-waves-malawi-revives-debate-gay-rights> [<https://perma.cc/JX5X-9CCG>] (last visited Jan. 25, 2020) (arguing that "recent decisions by the [U.S.] and [U.K.] to tie [queer] rights to foreign funding," has caused a rise in queerphobia in Africa and resulted in Liberia passing two new bills that hand down harsher sentences for "voluntary sodomy").

36. See Edith Honan, *'No Room' for Gays in Kenya, Says Deputy President*, REUTERS (May 4, 2015, 8:21 AM), <https://www.reuters.com/article/us-kenya-gay/no-room-for-gays-in-kenya-says-deputy-president-idUSKBN0NP10D20150504> [<https://perma.cc/X9VR-D9M2>]; see also MARK GEVISSER, OTHER FOUND., CANARIES IN THE COAL MINES: AN ANALYSIS OF SPACES FOR LGBTI ACTIVISM IN SOUTHERN AFRICA 33 (2017), http://the-otherfoundation.org/wp-content/uploads/2016/10/Canaries_Summary_epub_Draft4_MJ6-2.pdf [<https://perma.cc/S625-7TDA>] (noting that many African countries are largely dependent on donor funds when it comes to addressing health issues such as HIV and AIDS).

queer activism and the legal changes it may yield,³⁷ the writing on this subject is sparse due to the ever-evolving nature of modern queer rights movements in Africa.³⁸ This Note aims to discuss the interplay between queer activism and legal change while highlighting the power of queer activism in the continent. As Mithika notes in her article, queer activists in Africa are the “[b]est-placed actors to challenge their local courts and set precedents for future LGBT wins.”³⁹ This is mainly because Africans are uniquely aware of the different ways fellow Africans perceive queerness as compared to Westerners. In many African countries, homosexuality is traditionally viewed as “a behavioral practice rather than [a] social or political identity assumed by a group of people with the intention of claiming rights.”⁴⁰ This difference in perception creates a tension between the Western approach to achieving queer rights and the African approach.⁴¹ Africans also know that, in many cases, queer people in Africa wish to be integrated into society rather than achieve “gay rights” in the Western sense of the phrase.⁴² LGBTQIA activists in Africa have noted that the West would be more effective working behind the scenes with social movements, “rather than issuing too many public pronouncements that could be seen as finger-wagging.”⁴³

In addition to their primary knowledge about African culture, queer Africans are better able to dispel the notion that queerness is fundamentally un-African. Africa’s history is replete with examples of African indigenous groups not only accepting queer people but integrating them into society.⁴⁴ Nevertheless, the notion that queer modes of behavior are an import from the West is pervasive in Africa. Various writers and African activists have pointed out that Africans must eliminate this notion; for example, Abadir Ibrahim states that “the detachment of homophobia from ‘African-ness’ [is], thus, a necessary first step in the promotion of LGBT rights.”⁴⁵ Africans are uniquely able to foster this detachment. Many Afri-

37. See generally Brian Ray, *Demosprudence in Comparative Perspective*, 47 STAN. J. INT’L L. 111 (2011) (discussing social movements and their success in achieving queer rights in South Africa).

38. The penal code of Botswana, for instance, was only revised to eliminate sanctions against people engaging in same-sex relationships in 2019. See discussion *infra* Part III.

39. Foreign actors wishing to support queer rights in the continent should thus listen closely to local queer activist. See Mithika, *supra* note 4.

40. This practice, even when accepted, is often not discussed openly in many African cultures. See GEVISSER, *supra* note 36, at 19.

41. See Ruth Morgan & Graeme Reid, ‘I’ve Got Two Men and One Woman’: Ancestors, Sexuality and Identity Among Same-Sex Identified Woman Traditional Healers in South Africa, 5 HEALTH & SEXUALITY 375, 376 (2003).

42. This is a proven notion in the Southern Region of Africa. See GEVISSER, *supra* note 36, at 31.

43. Warner, *supra* note 9.

44. See Ibrahim, *supra* note 22, at 268.

45. Kari Mugo, the operations manager at the National Gay and Lesbian Human Rights Commission of Kenya, said that the notion of what African culture is must be undone, as well as “what it means to be African.” Kushner, *supra* note 3; see also Ibrahim, *supra* note 22, at 268.

can activists continually remind their communities that queerphobia, rather than queerness itself, is an import from the West.⁴⁶ Were queer social movements in Africa given more attention and monetary support from the West, such movements would be better able to present themselves as unapologetically African and openly queer.

B. The Western Approach

When encouraging African countries to adopt more comprehensive rights for gender and sexual minorities, Western authorities primarily use (1) public condemnation,⁴⁷ and (2) monetary sanctions.⁴⁸ The practice of public condemnation was mentioned above and is discussed in more detail below. However, the practice of levying monetary sanctions deserves further explanation here.

Monetary sanctions may take many forms. One such form is conditional aid, where financial aid is conditioned on the receiving State taking specific actions, such as adapting its laws to be more queer-friendly.⁴⁹ If preconditions are not met sometimes the aid will be refused entirely, depending on the circumstances.⁵⁰ State actors, however, are not the only Western authorities that levy monetary sanctions upon African countries with ostensibly queerphobic laws. Western businesses may also refuse to invest in, or provide goods and services to, countries with less than favorable queer laws. Although these methods are ineffective, Western actors—namely, the United States, the United Nations (U.N.), European countries, and Western businesses—employ them readily. Further, these are not the only methods used by the West to encourage queer-friendly laws in Africa.⁵¹

46. See Kushner, *supra* note 3.

47. Matt Schiavenza, *Why Obama Pushed for Gay Rights in Kenya*, ATLANTIC (July 26, 2015), <https://www.theatlantic.com/international/archive/2015/07/why-obama-pushed-for-gay-rights-in-kenya/399635/> [<https://perma.cc/Q57B-7G4H>] (noting that during Obama's 2015 visit to Kenya, he linked anti-gay discrimination to "the path whereby freedoms begin to erode and bad things happen").

48. See discussion *infra* Section I.B.1-2; The Trump administration has, at best, a mixed approach to promoting queer rights in the United States. During the 2016 elections, pro-Trump advocate and PayPal founder Peter Thiel became the first openly gay person to speak at a Republican convention. Nevertheless, the Trump administration has prevented transgender people from serving in the military, and his administration has scaled back certain workplace protections for gay people. Despite this, the administration has launched a sanction-oriented campaign to end the criminalization of homosexuality in dozens of nations where it is still illegal to be gay. This may, however, primarily be a way for the administration to levy monetary sanctions upon Iran. See Josh Lederman, *Trump Administration Launches Global Effort to End Criminalization of Homosexuality*, NBC NEWS (Feb. 19, 2019), <https://www.nbcnews.com/politics/national-security/trump-administration-launches-global-effort-end-criminalization-homosexuality-n973081> [<https://perma.cc/X3DH-2QBP>].

49. See Dara P. Brown, *LGBT Rights Are Human Rights: Conditioning Foreign Direct Investments on Domestic Policy Reform*, 50 CORNELL INT'L L.J. 611, 638-39 (2017).

50. See *U.S. Cuts Aid*, *supra* note 15.

51. After Uganda passed its anti-queer laws, the United States responded by canceling their joint military drills and instituting travel bans against the country. Jacob Kushner & Anthony Langat, *Anti-LGBT Groups Are Making Inroads Across East Africa*,

1. *The United States, U.N., and Europe*

The discussion about former President Obama's 2015 visit to Kenya in the introduction of this Note serves as an excellent example of the harsh rhetoric used by the United States to foster queer rights in Africa. Monetary sanctions often accompany such rhetoric, particularly where the United States is concerned. In as early as 2011, then-Secretary of State Hillary Clinton said the United States would "tie [U.S.] foreign aid to a country's record on gay rights."⁵² A Thomson Reuters article points out that even as far back as 2014, the United States has levied financial sanctions against African countries with unfavorable laws, as was the case when the United States refused Uganda \$118 million in aid on account of its recently approved anti-queer laws.⁵³

The U.N. began focusing on queer rights violations more heavily in recent years. South Africa introduced a resolution on sexual orientation and gender identity to the U.N. Human Rights Council in 2011, marking the first U.N. resolution to focus specifically on human rights violations based on sexual orientation and gender identity.⁵⁴ Like the United States, the U.N. has used harsh rhetoric to address unfavorable anti-queer laws in African countries. In 2014, after the Nigerian government signed the Same-Sex Marriage Prohibition Act into law, Navi Pillay, the U.N. High Commissioner for Human Rights, publicly stated that the law "violated 'basic, universal human rights.'"⁵⁵ In January 2019, U.N. Secretary-General Ban Ki-Moon also passionately spoke out against legalized homophobia in Africa.⁵⁶

Leaders of European countries and the European Parliament have likewise adopted this rhetorical trend, with former British Prime Minister Theresa May apologizing in 2018 for Britain's role in introducing regressive anti-queer laws to Africa,⁵⁷ and with Martin Schulz in 2014, then-President

GLOBALPOST (June 15, 2015, 11:15 AM), <https://www.pri.org/stories/2015-06-15/anti-lgbt-groups-are-making-inroads-across-east-africa> [<https://perma.cc/SM38-F4CD>].

52. Susan Haskins, *The Influence of Roman Laws Regarding Same-Sex Acts on Homophobia in Africa*, 14 AFR. HUM. RTS. L.J. 393, 395 n.4 (2014) (citing Naomi Abraham, *Religious Leaders Battle African Homophobia*, SALON (Dec. 22, 2011, 6:00 AM) https://www.salon.com/2011/12/22/religious_leaders_battle_african_homophobia/ [<https://perma.cc/CTM7-6VVM>]).

53. See *U.S. Cuts Aid*, *supra* note 15.

54. Graeme Reid, *Opinion: A Globalized LGBT Rights Fight*, GLOBALPOST (Nov. 2, 2011, 12:00 PM), <https://www.pri.org/stories/2011-11-02/opinion-globalized-lgbt-rights-fight> [<https://perma.cc/9G5B-PY6S>]. In 2016, the Human Rights Council agreed to appoint an expert to investigate discrimination against LGBT people. *African Nations Attempt to Suspend UN's LGBT Rights Monitor*, GUARDIAN (Mar. 4, 2019), <https://www.theguardian.com/global-development/2016/nov/07/african-nations-attempt-suspend-un-united-nations-lgbt-rights-monitor-vitit-muntarbhorn> [<https://perma.cc/2JDF-DN96>].

55. Haskins, *supra* note 52, at 395 n.4.

56. *Id.*

57. See Kushner, *supra* note 3.

of the European Parliament, calling anti-queer laws in Africa a disgrace.⁵⁸ As in the United States, European actors have used monetary sanctions to voice their discontent with certain laws in Africa. After Uganda passed the Anti-Homosexuality Act, banning same-sex relationships, the European Union (EU) withheld an annual €460 million budget payment from Uganda.⁵⁹ Denmark, the Netherlands, Norway, and the United States all followed suit—to the dismay of many Ugandans.⁶⁰ And, after Malawian officials arrested a gay couple attempting to perform a traditional marriage ceremony, western donors withheld \$400 million in financial aid from the country.⁶¹

2. *Western Businesses*

Western businesses mainly employ the same flawed methods as the other Western actors mentioned above. In his article discussing what role businesses should play in promoting queer rights, activist Bisi Alimi presents three different approaches they may use. The first is the “[w]hen in Rome” approach, in which businesses simply maintain status quo and do not attempt to push a progressive, queer-friendly agenda on a country.⁶² The second is the “embassy” approach, in which businesses provide a sanctuary for queer people within the workplace but do not outwardly promote queer rights.⁶³ The third is the “change-makers” approach, where businesses take a more open and active role in advocating for queer rights in a country.⁶⁴

While some may feel that the first approach is unsatisfactory and forces a firm to be an amoral, profit-seeking entity, the second approach presents issues as well. Company directors and officers may assume that using the second approach to encourage queer rights is a politically neutral way to take a stance against queerphobia; but, according to South African activist Graeme Reid, the globalization of culture, even concentrated within

58. Arthur Neslen, *Schulz: Cut Aid to African Countries with Anti-Gay Laws*, EURACTIV (Jan. 8, 2015), <https://www.euractiv.com/section/development-policy/news/schulz-cut-aid-to-african-countries-with-anti-gay-laws/> [https://perma.cc/8P2B-L2CT].

59. *Id.*

60. A Polity article points out the hypocrisy in the U.S.’s response to such laws given then-President Obama’s flip-flopping gay marriage support and the existence of anti-queer laws in the U.S. itself. See IN ON AFRICA, *Hypocrisies and Contradictions: Western Aid and LGBT Rights in Africa*, POLITY (Apr. 15, 2014), <https://www.polity.org.za/article/hypocrisies-and-contradictions-western-aid-and-lgbt-rights-in-africa-2014-04-15> [https://perma.cc/HU8W-GRTM] [hereinafter *Contradictions*]. David Cameron said he would also withhold aid from Uganda. See Haskins, *supra* note 52, at 395 n.4; see also *Uganda Court Annuls Anti-Homosexuality Law*, BRIT. BROAD. CO. (Aug. 1, 2014), <https://www.bbc.com/news/world-africa-28605400> [https://perma.cc/CLL9-P2AV].

61. Western donors relaxed their sanctions a year later after Malawi’s “current president, Joyce Banda, suspended all laws criminalising homosexuality.” *Contradictions*, *supra* note 60.

62. Bisi Alimi, *What Role Should Business Play in Promoting LGBT Rights in Africa?*, WORLD ECON. F. (May 4, 2016), <https://www.weforum.org/agenda/2016/05/lgbt-rights-africa-business/> [https://perma.cc/N788-T5TE].

63. *Id.*

64. *Id.*

the walls of a private corporation, has created a backlash to the LGBTQIA movement.⁶⁵ In this way, the second approach may also be viewed by many Africans as a form of cultural imperialism, thus spurring the dangerous idea that queerness is essentially un-African.

An example of the third approach, the drawbacks of which this Note discusses below in subsection C, was evident after Uganda passed the AHA. In 2014, following the passage of the AHA, Virgin Group's Chief Executive Officer Richard Branson—a billionaire business magnate who oversees 400 companies, including an airline—said that his company would no longer do business in Uganda.⁶⁶ Branson went on to encourage others to follow suit⁶⁷ and some did.⁶⁸

C. Why the Western Approach Fails

The information in subsection B above shows that harsh rhetoric and monetary sanctions do work in a limited sense.⁶⁹ This kind of short-term change, however, is not what this Note—and likely what most queer people in Africa—aim to encourage. Queer people in Africa are unlikely to achieve long-lasting, culture-shifting change around their rights when Western actors use life-saving aid money to coerce African countries to change their laws. Moreover, the fact remains that despite the current Western approach, many African leaders are unperturbed by the consequences of their codified queerphobia.⁷⁰

In addition to potentially spurring a backlash against queer people in Africa, the Western approach may, in fact, harm queer folk. Notably, HIV and AIDS funding from the West directed at Africa has been an important factor in getting local queer movements off the ground in the continent.⁷¹ Ceasing such funding would harm queer social movements by reducing their numbers, and thus reducing the likelihood that a more lasting cultural change will occur. Furthermore, LGBTQIA people are often the most economically disadvantaged in African society,⁷² and thus a reduction in

65. See Reid, *supra* note 54 (noting that religious fundamentalism has spread on account of cultural changes in Africa being pinned on more liberal, Western views of sexuality).

66. Alimi, *supra* note 62.

67. *Id.*

68. In response to Uganda's anti-queer laws, the World Bank stopped sending aid money to the country. Western European countries did the same. See *World Bank Postpones \$90M Uganda Loan over Anti-Gay Law*, BRIT. BROAD. CO. (Feb. 28, 2014), <https://www.bbc.com/news/world-africa-26378230> [<https://perma.cc/NM8L-HJYP>].

69. That is, the World Bank and Western European countries who imposed sanctions on Uganda, forced Uganda to repeal its laws. See Johnson & Falcetta, *supra* note 29, at 27.

70. See *U.S. Cuts Aid*, *supra* note 15 (noting that the former President of Uganda said U.S. imposed sanctions would not cause Uganda to repeal its anti-queer laws).

71. See Reid, *supra* note 54.

72. See generally Kate Hairsine, *Why Is Homosexuality Still Taboo in Many African Countries?*, DEUTSCHE WELLE [GERMAN WAVE] (Apr. 12, 2019), <https://www.dw.com/en/why-is-homosexuality-still-taboo-in-many-african-countries/a-51528737> [<https://perma.cc/R44N-YUU3>] (discussing the plethora of economic issues faced by queer people in Africa).

general government funding will be likely to disproportionately harm, rather than help, them.

D. Social Movements: An Effective Alternative

Instead of its instant approach, the West should use a grass-roots-centric strategy to encourage queer rights in Africa.⁷³ As noted by Danilo da Silva, Executive Director of the premiere queer activist group in Mozambique, the Mozambican Association for the Defense of Sexual Minorities (LAMBDA), “[m]egaphone diplomacy [does not] consider how African governments would deal with the pushing, blaming and shaming.”⁷⁴ Such governments, Silva goes on to say, may not be compelled to improve their laws by such tactics.⁷⁵

Why is an advocacy approach better able to secure greater rights and protections for queer people in Africa? This approach is best because on-the-ground social movements have demonstrated a great ability to create permanent legal change in African countries.⁷⁶ In his article, Muna Ndulo, a renowned African legal scholar and Cornell Law professor, points out that the fight for equal rights by those historically oppressed in the African continent must include mass movements that pressure the courts and society to reform.⁷⁷ In recent years, Africa has experienced an uptake of queer rights, which has coincided with the prevalence of queer social movements in the continent.⁷⁸

In addition, an emphasis on queer social movements improves the lives of average queer people in Africa, who have become increasingly caught in the American culture wars waged in the continent.⁷⁹ As Reverend Kapyia Kaoma, a researcher and Anglican priest from Zambia, points out, “when two elephants fight, the grass will suffer.”⁸⁰

II. How Social Movements Change the Law

A. Social Movements

In order to understand the power of social movements, one must understand the concept itself. In their *Yale Law Journal* article, Harvard

73. See GEVISSER, *supra* note 36, at 33 (noting that alliances are sought between queer activists and the citizens of Mozambique but “a monetised clientism has come to stand in the place of grassroots movement-building and alliance-building in the region”).

74. Marvin Bowser, *Leading the Struggle for LGBT Rights in Mozambique*, WASH. BLADE (June 26, 2017, 8:27 AM), <https://www.washingtonblade.com/2017/06/26/leading-struggle-lgbt-rights-mozambique/> [https://perma.cc/YBH8-CSKW].

75. *See id.*

76. *See discussion infra* Part III.

77. *See* Muna Ndulo, *African Customary Law, Customs, and Women’s Rights*, IND. J. GLOBAL LEGAL STUD., Winter 2011, at 87, 92. Muna Ndulo’s article deals primarily with women’s rights but the ideas therein apply to queer rights. *See generally id.*

78. *See* GEVISSER, *supra* note 36, at 21 (observing that the LGBTQIA organization called MATRIX has been successful in targeting anti-LGBTQI sentiments in Lesotho and that the same has occurred in Namibia).

79. *See* Onishi, *supra* note 6.

80. *Id.*

Law professor Lani Guinier and Cornell Law professor Gerald Torres set forth a working definition for social movements. First and foremost, a core group of actors that tend to be “the nonpowerful, the nonwealthy and the nonfamous,” make up a social movement.⁸¹ Social movements are an essential tool that politically disadvantaged minorities use in majoritarian democracies to protect their rights.⁸² When achieving these rights, social movements are likely to (1) legitimize positive social, legal, and cultural change; and (2) increase citizen participation in democracy by engaging in disruptive tactics that halt or upset ongoing social practices in a given society.⁸³ Such movements, and those that populate them, are often motivated by “radical aspirational visions of a different, better society,”⁸⁴ rather than by any singular leader. Social movements may also succeed in changing public opinion by introducing new sources of authority to society that confer rights upon a minority group.⁸⁵ In their article, Guinier and Torres correctly argue that social movements are as much a source of law as any statute or judicial decision.⁸⁶ This conclusion is further supported when one views social movements through the lens of demosprudence.

B. Demosprudence

Guinier and Torres state that, “[d]emosprudence is the study of the dynamic equilibrium of power between lawmaking and social movements.”⁸⁷ They further explain that “[t]he demos in demosprudence are those people who are collectively mobilized to make change,” and thus constitute “constituencies of accountability” that hold elite authority figures accountable.⁸⁸ Constituencies of accountability are groups of people “who are not committed primarily to any particular person or leader, but rather to a particular vision of change.”⁸⁹ Primarily, the study of demosprudence focuses on how social movements can, through democracy-enhancing acts, create law. In order to achieve its goals, however, a social movement cannot merely rely on strategic litigation, as encouraged by a legal liberalist approach,⁹⁰ but must work alongside lawyers as fellow advocates.⁹¹

81. Lani Guinier & Gerald Torres, *The Meaning of the Civil Rights Revolution: Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2757 (2014) (quoting Michael McCann, *Law and Social Movements*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 506, 509 (Austin Sarat ed., 2004)).

82. See *id.* at 2757-58.

83. See *id.* at 2757.

84. *Id.* (quoting McCann, *supra* note 81, at 509).

85. Social movement actors may cite God—rather than the courts, for instance—as having conferred rights upon a minority group, such as Martin Luther King Jr. did in a speech discussing the United States Supreme Court case *Brown v. Board of Education*. *Id.* at 2760-61.

86. See *id.* at 2760.

87. *Id.* at 2749.

88. *Id.* at 2754.

89. Essentially, constituencies of accountability are composed of people who populate social movements. *Id.* at 2751.

90. See *id.* at 2748.

91. See *id.* at 2749.

Juridical and political leaders may also deploy demosprudence as a rhetorical tool to legitimize legal change. This can occur when a judge or social movement leader, in a judicial opinion or speech, draws a connection between the law and the lived experiences of people affected by such laws. Such leaders may also use a demosprudential approach to legitimize their quest for minority rights by referencing a higher power that transcends law or a narrative about social fairness and justice.

C. Social Movements, Demosprudence, and Legal Change

The study of demosprudence analyzes how many minority groups achieve rights. While legislative changes, and judicial decisions, are very important tools used to cement minority rights, a demosprudential approach would emphasize the fact that such legal changes often gain their power and enduring force from social movements.⁹² Guinier and Torres point out that social movements serve as an important function of the law, namely “translat[ing] lived experience into a series of stories about individual and social fairness and justice.”⁹³

Through democracy-enhancing tactics—such as protests, marches, and public education initiatives—grassroots social movements are highly equipped to shift the traditional rules of their society and provide a stable rhetorical foundation that allows society to accept controversial legal and cultural change. While social movements may work in tandem with influential charismatic leaders, and capable attorneys, they do not rely on these traditional elite actors to foster change. Herein lies their cogency. They, in essence, represent “the people,” specifically underrepresented vulnerable minority groups, finally able to engage in democracy in a way they had not previously been able to.⁹⁴

Even though social movements are not always successful in achieving their goals,⁹⁵ they bring to the fore the idea that people should base law-making on what is fair and reasonable rather than simply what is procedurally sound. Put simply, the success of social movements is evident when these groups “(1) shift the rules that govern social institutions” by increasing minority rights; “(2) transform the culture that controls the meaning of legal changes[;] and (3) affect the interpretation of those legal changes by providing the foundation for naturalizing those changes into the doctrinal structure of law and legal analysis.”⁹⁶

D. Social Movements and Demosprudence in Action

When illuminating the concept of demosprudence, Guinier and Torres reference various movements in U.S. history to serve as case studies that

92. *See id.*

93. *Id.* at 2745.

94. *See* GEVISSER, *supra* note 36, at 10.

95. *See* Guinier & Torres, *supra* note 81, at 2758 (asserting that “it is crucial to recognize that most social movements do not prevail on their own or in conventional terms.”).

96. *Id.* at 2755.

show the power of the concepts they present. One such example concerned the bus boycotts that took place in Montgomery, Alabama, during the American Civil Rights Movement in the 1950s.⁹⁷ After Montgomery police arrested Rosa Parks, a civil rights activist, for refusing to give up her seat on a bus to a white patron, the Montgomery Improvement Association (MIA) undertook the task of staging mass boycotts against the Montgomery Public Transportation System in protest of its segregation.⁹⁸

Leading up to these boycotts, American civil rights leader Martin Luther King Jr. made numerous speeches to large congregations of civil rights activists.⁹⁹ During his speeches, King weaved biblical inspiration into his calls for boycotts.¹⁰⁰ While MIA worked alongside attorneys to achieve desegregation, these legal experts did not control the organization by any means.¹⁰¹ Fred Gray, a civil rights attorney, worked with MIA to help guide its desegregation litigation through the courts.¹⁰² Gray, however, did not institute any lawsuit until MIA leadership instructed him to do so.

The Montgomery bus boycotts grew out of grassroots mobilization and received funds from the National Association for the Advancement of Colored People, Black churches, and northern white organizations.¹⁰³ Through King's strategic use of religious imagery, he was successful in introducing new sources of authority, aside from the courts or legislature, to legitimize the rights of Black Americans.¹⁰⁴ The boycotts, and subsequent media coverage, encouraged Black Americans to think of democracy as an institution in which they could finally participate.¹⁰⁵ While there is still a debate about the exact significance of the bus boycotts, it is clear that their media coverage validated new models of protest; displayed the injustice of racists, which may have encouraged federal judges to keep racial disputes off the street and in the courtroom; and mobilized local Black Americans to ensure that their communities complied with Supreme Court decisions conferring rights upon Blacks.¹⁰⁶

97. See *id.* at 2777-83.

98. During the boycotts, African Americans and their white allies refused to use Montgomery's public transport for months. Instead, protesters arranged carpools or simply walked to their destinations. See *id.* at 2777-78.

99. See *id.* at 2777.

100. See *id.* at 2761, 2777.

101. See *id.* at 2778.

102. See *id.*

103. See *id.*

104. See *id.* at 2760, 2777.

105. See *id.* at 2780.

106. See *id.* at 2783.

III. Colonialism, Queerphobia, and Applying the Social Movement Model to Three African Case Studies

A. How Colonialism Laid the Groundwork for Queerphobia

To understand how queerphobic sentiments became so popular in Africa, one must examine the history of queerness on the continent, and its varied interactions with the law. One way to combat the misconception that queerness is un-African is to highlight a counter-narrative that points out the existence and importance of queer people in Africa before European religious and colonial domination.¹⁰⁷

In their seminal book on historical queer patterns in Africa, Stephen O. Murray and Will Roscoe note that same-sex relationships, roles, and identities in Africa typically fall into three basic patterns: (1) the kind embraced by contemporary gay and lesbian Europeans and North Americans, (2) status-differentiated relationships based on differences in age or gender status, and (3) heteronormative patterns, such as a male same-sex relationships in which one of the partners plays the traditional role of a woman by performing domestic tasks and the like.¹⁰⁸ Given the fact that native, African writing systems were mostly absent before the nineteenth century, there are few sources discussing African societies before European contact, in particular how such societies dealt with queer patterns.¹⁰⁹ Moreover, indigenous people seldom wrote down traditional African law, and instead used unwritten oral law to govern their societies.¹¹⁰ In almost all instances, female same-sex patterns are poorly documented.¹¹¹ But despite the difficulty of obtaining reliable sources discussing traditional African treatment of queer people, research on the topic indicates that pre-colonial societies were often more amenable to queer folk than some scholarship suggests.¹¹²

European colonists did not introduce same-sex patterns to Africa, but instead used systems to surveil and suppress such behaviors among the native populations of various countries.¹¹³ Laws alone, however, were not

107. See GEVISSER, *supra* note 36, at 20.

108. See BOY-WIVES, *supra* note 32, at 6-7.

109. Colonial actors, whose presence “seriously disrupted” African cultures, wrote most of what is known about such cultures. *Id.* at 9.

110. See Chan Tov McNamarah, *Silent, Spoken, Written, and Enforced: The Role of Law in the Construction of the Post-Colonial Queerphobic State*, 51 CORNELL INT’L L.J. 496, 509 (2018) (discussing the significance of orality in African communities).

111. BOY-WIVES, *supra* note 32, at xx.

112. See Desiree Lewis, *Representing African Sexualities*, in *AFRICAN SEXUALITIES: A READER* 199, 209 (2011) (Sylvia Tamale ed., 2011). This, however, was not always the case. In pre-colonial Nigerian Yoruba Communities, for instance, same-sex relationships were found, but not historically approved of. For more information about the pervasiveness of queer relationships in pre-colonial Africa, see BOY-WIVES, *supra* note 32, at xx.

113. A report from the Other Foundation suggests that Victorian missionaries first introduced anti-LGBT sentiments to South Africa in the nineteenth century. GEVISSER, *supra* note 36, at 18. Furthermore, of the seventy-two countries worldwide that still criminalize same-sex intimacy as of 2018, thirty-eight of them were under British rule at some point. ENZE HAN & JOSEPH O’MAHONEY, *BRITISH COLONIALISM AND THE CRIMINALIZATION OF HOMOSEXUALITY: QUEENS, CRIME AND EMPIRE* 2 (2018).

the only instrument used by Europeans to decrease indigenous African tolerance of queer people. Western religion played a central role in promoting homophobia in Africa. Many religions continue to fill this role today.¹¹⁴ In her article, journalist Aryn Baker points out that the American Evangelical Christian Movement has primarily caused increased homophobic sentiments in Africa.¹¹⁵ Uganda's notorious AHA, for instance, was passed at the behest of American evangelical activists who lobbied Uganda's parliament to approve the legislation.¹¹⁶ In 2010, the American Center for Law and Justice, a Christian law firm founded by evangelist Pat Robertson, launched a Zimbabwean office whose lobbying led Zimbabwe's government to approve a new constitution that includes a ban on gay marriage.¹¹⁷

The importance of acknowledging Western homophobia and indigenous, African queer acceptance lies in the insidious power of the opposing narrative. In Murray and Roscoe's book, the authors point out that European systems of homophobia were not as successful in stigmatizing same-sex patterns when natives simply denied or tried to hide the existence of same-sex practices in their culture.¹¹⁸ Only when native people began to forget that same-sex-patterns were ever a part of their culture did queerness truly become stigmatized.¹¹⁹

Europeans tempered much of the information about pre-colonial African culture with the assumption that Africans were primitive and thus heterosexual.¹²⁰ More often than not, European anthropologists reinforced this idea by failing to seriously investigate same-sex patterns; failing to produce detailed reports when they did observe such patterns; or, in the rare instance of proper observation and reporting, discounting their observations in their reports.¹²¹ Despite Europeans' flawed observations and reporting, their documents show widespread same-sex patterns throughout the continent before European countries introduced their laws.¹²² Even after colonial powers imposed their laws in Africa, same-sex patterns continued to exist, but they were severely altered. Aside from physical and technological domination, the law was the central tool used by European

114. See Ibrahim, *supra* note 22, at 270.

115. See Baker, *supra* note 2. Most of the recent organized efforts to limit queer rights in various African countries are directly supported by conservative, Western Christian groups. See Ibrahim, *supra* note 22, at 266, 269.

116. See Ibrahim, *supra* note 22, at 264 (noting that the bill punishes "aggravated homosexuality" with life imprisonment). Uganda's Supreme Court later struck down the law, allegedly due to pressure put on President Yoweri Museveni by Western governments though homophobic sentiments remain powerful in the country. *Id.*

117. Nathalie Baptiste, *It's Not Just Uganda: Behind the Christian Right's Onslaught in Africa*, NATION (Apr. 4, 2014), <https://www.thenation.com/article/archive/its-not-just-uganda-behind-christian-rights-onslaught-africa/> [<https://perma.cc/B6Q3-9K4T>].

118. See BOY-WIVES, *supra* note 32, at xvi.

119. See *id.*

120. See *id.* at xi.

121. See *id.* at xii.

122. See *id.* at 2.

powers to establish colonial control in Africa.¹²³ Even when indigenous laws, rather than European laws, were recognized by colonial powers, such powers applied a special “repugnancy clause.”¹²⁴ In essence, this clause allowed indigenous, African customary laws to stand except when such laws conflicted with the “demands of the colonial administration or [were] thought to be repugnant to European ideas of justice, humanity or morality.”¹²⁵ While repugnancy clauses did not explicitly reference same-sex relationships, they often prohibited these relationships. The existence of repugnancy clauses affirms that much of Africa’s homophobic sentiments originated from European domination.¹²⁶ European colonists eroded not only indigenous African sentiments about queerness, but also historically recognized African group identities.¹²⁷

B. The Success of Social Movements in Three African Case Studies

Monetary and rhetorical support for queer rights can go a long way in Africa if these tools are used to promote queer social movements instead of a nebulous idea of equality for queer folk. While academic spheres have in passing discussed the idea of the West identifying and supporting queer grassroots movements, many real-world examples show the primacy of such a strategy. In South Africa, for instance, Western donor support aimed at queer social movements created impactful change in the country,¹²⁸ which now boasts one of the most progressive queer-inclusive constitutions in the world.

As noted above, this Note focuses on three African countries, namely South Africa, Botswana, and Mozambique, that have seen immense improvements in their laws around queer people as a result of robust social movements. This Note will further reference the idea of demosprudential court decision as an analog to on-the-ground social movements in Africa.

123. See Sally Engle Merry, *Law and Colonialism*, 25 *LAW & SOC’Y REV.* 890, 890–91 (1991) (recalling that Europeans justified their subjugation of African people with the belief that their laws would encourage African society to civilize and develop).

124. T.W. Bennett, *Conflict of Laws: The Application of Customary Law and the Common Law in Zimbabwe*, 30 *INT’L & COMPAR. L.Q.* 59, 82–83 (1981).

125. *Id.* at 59; see also Kamau Muiga, *African Homophobia and the Colonial Roots of African Conservatism*, *AFR. CNTY.* (June 20, 2019), <https://africasacountry.com/2019/06/african-homophobia-and-the-colonial-intervention-of-african-conservatism> [<https://perma.cc/H2DF-3GWK>] (reporting that this authoritarian clause created a European-imposed standard for “proper” African-ness).

126. See Muiga, *supra* note 125.

127. Europeans often imposed a system of artificial tribalization where ethnolinguistic groups would be lumped together and treated as a central body meant to conform to the objectives of colonial domination. See *id.*

128. Lobbying and advocacy by the Joseph Roundtree Charitable Trust, the Dutch Humanistic Institute for Development Co-operation, and the Norwegian Agency for Development Aid helped fund the National Coalition for Gay and Lesbian Equality (NCGLE) in the 1990’s. The NCGLE successfully advocated for the equality clause in the Bill of Rights of the South African Constitution. This provided the basis for many of the pro-queer judicial victories in South Africa generally. See *TO HAVE AND TO HOLD: THE MAKING OF SAME-SEX MARRIAGE IN SOUTH AFRICA* 279 (Melanie Judge et al. eds., 2008) [hereinafter *TO HAVE AND TO HOLD*].

As noted above, demosprudence is essentially the study of how social movements create law. When a court rules through a demosprudential lens, it is essentially calling upon narratives and tactics often used by social movements to legitimize and humanize the court's arguments. Demosprudential rhetoric in legal decisions supports the notion that the powers that be should support queer social movements, who then provide judges with persuasive narratives that legitimize their legal decisions.

1. South Africa

a. The Demosprudential and Social Movement Strategy

As Jonathan Berger notes, the success of queer social movements in acquiring explicit equal protection for queer people via South Africa's Bill of Rights was accomplished not through changing public opinion, but through activism used in tandem with strategic litigation.¹²⁹ In this way, the queer, South African social movement provided a "foundation for naturalizing . . . changes into the [country's] doctrinal structure of law."¹³⁰ In addition, South African courts effectively legitimized their controversial decisions by ruling in a demosprudential manner that drew upon the narratives of queer social movements within the country.

As alluded to above, South African queer rights groups began their quest for legal protection by ensuring that the country's constitution protected queer people. In his article, Brian Ray points out that the express protection for queer people, found in Section 9 of the South African Constitution, only came about as a result of advocacy by queer rights groups within the African National Congress (ANC) during the anti-apartheid struggle.¹³¹ The National Coalition for Gay and Lesbian Equality (NCGLE), formed in 1994, was at the front of this effort, representing over seventy organizations that shared the goal of protecting queer rights in South Africa's constitution.¹³² Through these early efforts, queer social movements in South Africa laid the groundwork for the jurisprudential success that followed.

b. Demosprudence and the Constitutional Court

Demosprudential court opinions can work together with social movements to create lasting change. In South Africa, such opinions enhanced queer movements. Brian Ray identifies examples of opinions from the Constitutional Court of South Africa (CCSA) that reflect a demosprudential approach. Demosprudence, Ray reports, is a crucial feature of the Con-

129. *Id.* at 18.

130. Guinier & Torres, *supra* note 81, at 2755.

131. See Ray, *supra* note 37, at 156.

132. TO HAVE AND TO HOLD, *supra* note 128, at 19; see also Ray, *supra* note 37, at 157 (noting that "the 'battle for principle' was largely won by gay-rights advocates during the constitutional drafting process.").

stitutional Court's approach to adjudication.¹³³ The 2005 case *Minister of Home Affairs v. Fourie*, that essentially legalized same-sex marriage in South Africa, provides a prime example of the Constitutional Court's demosprudential approach.¹³⁴ Before the *Fourie* case, South Africa barred same-sex marriage; but *Fourie* challenged the common law definition of marriage and the Marriage Act under Section 9(3) of the South African Constitution.

Through the majority opinion, written by Justice Albie Sachs, the CCSA issued a suspended order that gave parliament one year to adopt legislation that legalized same-sex marriage.¹³⁵ In his opinion, Sachs used a distinctly demosprudential rhetorical approach, much like that used by King in his speech about the Montgomery bus boycotts.¹³⁶ Sachs begins his opinion by telling a humanizing story, characteristic of demosprudence.¹³⁷ In doing so, he draws a connection between the law and the lived experience of citizens impacted by those laws.¹³⁸ Sachs goes on to use the effective tactic of linking contemporary jurisprudence with the legacy of the "pre-democratic" era of apartheid South Africa, and comparing this with transformative values found in the new South African Constitution.¹³⁹

Justice Sachs also points out in *Fourie* that the purpose of the CCSA is to prevent dehumanizing laws such as the Immorality Act and Prohibition of Mixed Marriages Act, and that the court can fulfill this directive by legalizing same-sex marriage.¹⁴⁰ He continues by painting a hopeful picture of a society in transition, committed to the transformative values of its constitution yet hindered by political realities.¹⁴¹ Here, Sachs' opinion seems to reflect his hope that by publicizing the positive transitional nature of the

133. This approach is, in part, used as a self-conscious effort by the court to develop and enforce constitutional norms through non-judicial mechanisms, similar to the aim of social movements. See TO HAVE AND TO HOLD, *supra* note 128, at 19.

134. *Id.* at 33; see also *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) ¶ 161 (S. Afr.).

135. Ray, *supra* note 37, at 158. The dissenting opinion issued by Justice Kate O'Regan argued that same-sex couples should be allowed to marry without waiting for parliament to pass legislation. O'Regan, however, noted that "social change is brought about not simply by changing the law or [by] landmark judicial decisions . . . justice will only be achieved . . . by the ongoing struggle of all of us." TO HAVE AND TO HOLD, *supra* note 128, at 13.

136. Compare Guinier & Torres, *supra* note 81, at 2777-78 (describing "the mass meetings" that King organized to mobilize a thirteen-month long Montgomery County bus boycott following Rosa Park's arrest as "crucial" and "works of art"), with Ray, *supra* note 37, at 159 (suggesting that Sach's "majority[] decision to suspend the direct changes to the law is an example of the . . . demosprudential mechanism[] for opening up a constitutional dialogue.").

137. The story revolves around the lesbian couple of *Fourie*, who Sachs describes as a devoted couple bared by law from enjoying the rights and freedoms of heterosexual couples. See Ray, *supra* note 37, at 158.

138. See *id.*

139. *Id.*

140. See TO HAVE AND TO HOLD, *supra* note 128, at 34.

141. See *id.* at 159.

Constitution, he would be able to deepen public support for it.¹⁴²

In the end, the *Fourie* case successfully provoked democratic debate over constitutional meaning and commitment to constitutional values.¹⁴³ Through his *Fourie* opinion, Justice Sachs used a demosprudential approach to make way for queer social movement's influence on South Africa's democratic process. Undoubtedly, the "radical aspirational visions of a different, better society" that Sachs presented in his opinion motivated queer movements in the country.¹⁴⁴

c. The Success of South Africa's Queer Social Movements

Admittedly, demosprudential court opinions alone did not spur queer social movements in South Africa. Such movements existed long before Sachs wrote his eloquent *Fourie* opinion and formed as a result of South Africa's oppressive apartheid policies, which in addition to targeting people of color in South Africa, demonized queer people. As Thomas Brown notes in his article, the "[a]partheid government placed high values on heterosexual marriage, reproduction, and family life and established strict social requirements to determine when sexual activity . . . would be considered legitimate in the eyes of the state."¹⁴⁵ Even before the apartheid National Party (NP) came into power, Dutch colonists brought to the continent Roman-Dutch laws that criminalized all non-procreative sex, including same-sex intimacy.¹⁴⁶

Despite the legal realities of the country, writer Mark Gevisser and former CCSA Justice Edwin Cameron, note in their book that queer communities have existed in major South African cities such as Johannesburg, Durban, and Cape Town "relatively unharassed" since the 1940s.¹⁴⁷ In the mid-1960s, however, police raided a queer social gathering, an act that Thomas Brown says "catalyzed the development of the first gay law reform movement . . ." ¹⁴⁸ This gathering has come to be referred to as "The Forest Town Party," or more notably, "South Africa's 'Stonewall.'" ¹⁴⁹

142. Ray, *supra* note 37, at 158.

143. *See id.*

144. Guinier & Torres, *supra* note 81, at 2757 (citing McCann, *supra* note 81, at 509).

145. Thomas Brown, *South Africa's Gay Revolution: The Development of Gay and Lesbian Rights in South Africa's Constitution and the Lingering Societal Stigma Towards the Country's Homosexuals*, 6 ELON L. REV. 455, 456 (2014) (citing William L. Leap, *Language, Belonging, and (Homo)sexual Citizenship in Cape Town, South Africa*, in *SPEAKING IN QUEER TONGUES: GLOBALIZATION AND GAY LANGUAGE* 134, 138 (William L. Leap & Tom Boellstorff eds., 2004)).

146. *See id.* at 457.

147. Mark Gevisser, *A Different Fight for Freedom: A History of South African Lesbian and Gay Organisation from the 1950s to 1990s*, in *DEFIANT DESIRE* 18 (Mark Gevisser & Edwin Cameron eds., 1994); *see also* Deborah P. Amory, "Homosexuality" in *Africa: Issues & Debates*, J. OP., 1997, at 5, 7 (noting that the lack of police enforcement of sodomy laws in South Africa led to flourishing gay communities).

148. Brown, *supra* note 145, at 458.

149. *Id.*; *see also* Garance Franke-Ruta, *An Amazing 1969 Account of the Stonewall Uprising*, ATLANTIC (Jan. 24, 2013), <https://www.theatlantic.com/politics/archive/2013/01/an-amazing-1969-account-of-the-stonewall-uprising/272467/> [https://perma.cc/

Queer activists mobilized in the wake of The Forest Town Party¹⁵⁰ after increased raids on queer gatherings began, and the NP passed a 1968 amendment to the Immorality Act that “sought to make male and female homosexuality an offense punishable by compulsory imprisonment of up to three years.”¹⁵¹

In addition to The Forest Town Party, queer rights groups in South Africa began forming in the wake of the Soweto student uprising of 1979.¹⁵² One such group was the Gay and Lesbian Organization of the Witwatersrand (GLOW), a group comprised of Black South Africans.¹⁵³ When encouraging ANC members to fight for queer rights, GLOW released a demosprudential manifesto that called on “All South Africans who are Committed to a Non-racist, Non-sexist, Non-Discriminatory Democratic Future” to support queer rights.¹⁵⁴ In its manifesto, GLOW purposefully used “words like ‘confront’ and ‘challenge,’ and . . . ‘non-racist,’” to create a parallel between GLOW and the ANC.¹⁵⁵ GLOW’s manifesto was demosprudential in that it set forth a vision of a more democratic society. The manifesto also showed that GLOW represented a social movement in that one can easily construe its manifesto as a disruptive tactic demanding that the ANC support its cause. GLOW, as an organization, was particularly important because it challenged the idea that queerness was un-African through the sheer number of its rural Black participants. GLOW’s nonpowerful members, and the narratives about social fairness and justice found in its manifesto, reveal that the group was an important part of queer social movements’ success in South Africa.

Organizations like NCGLE and GLOW readily used democracy-enhancing acts to legitimize positive legal change and increase the queer minority’s participation in democracy, which, according to Guinier and Torres, social movements tend to do.¹⁵⁶ Social movements were able to exceptionally influence queer rights in South Africa around the issue of same-sex marriage. While much of the rights queer people in South Africa now enjoy resulted from (1) the efforts of queer rights groups to include the Equality Clause in South Africa’s Bill of Rights, and (2) a litigation strategy developed by Edwin Cameron,¹⁵⁷ social movements played an

VCU6-3U9Q] (discussing the 1969 Stonewall Uprising in New York City that many scholars suggest marked the beginning of the queer right movement in the U.S.).

150. Brown, *supra* note 145, at 459.

151. Gevisser, *supra* note 147, at 31.

152. See Morgan & Reid, *supra* note 41, at 376.

153. See Brown, *supra* note 145, at 463.

154. *Id.* at 464 (quoting Gevisser, *supra* note 147, at 74).

155. *Id.* at 475–76.

156. Guinier & Torres, *supra* note 81, at 2756.

157. See generally Edwin Cameron, *Sexual Orientation and the Constitution: A Test Case for Human Rights*, 110 S. AFR. L.J. 450 (1993). Cameron explains that LGBT people will receive adequate constitutional protection when the government: (1) abolishes sodomy laws found in common law and statutes, (2) enforces non-discrimination laws meant to protect LGBT people, (3) safeguards rights to free speech and assembly, and (4) grants domestic partnership benefits to LGBT couples. *Id.* at 470–71; see also TO HAVE AND TO HOLD, *supra* note 128, at 18–19.

active role in the marriage debate from its inception. In her essay, lesbian activist Wendy Isaacks, who worked with the Lesbian and Gay Equality Project (The Equality Project), describes her gay marriage advocacy work in various provinces such as KwaZulu-Natal, Mpumalanga, Western Cape, Eastern Cape, and Gauteng, in as early as 1994.¹⁵⁸ Isaacks undertook public education campaigns that she says created greater queer inclusion rather than legal recognition alone.¹⁵⁹ She did all of this before filing any lawsuits with South Africa's High Court.

The fact that such movements were, through democracy enhancing tactics, able to create a favorable marriage scheme that did not relegate same-sex couples to a separate-but-equal status shows social movements' real success in South Africa. The CCSA's demosprudential opinion, that deferred relief to Marié Fourie and her prospective wife, started the process of cultural transformation that Sachs envisioned. Andries Nel, who was Chief Deputy Whip of the ANC in parliament in 2006, reported that public hearings held in 2006 by the Portfolio Committee of Home Affairs discussing the impending same-sex marriage legislation heavily influenced the Civil Union Bill that eventually became the Civil Union Act.¹⁶⁰ Despite high levels of homophobia, queer activists' mobilized presence in the hearings allowed them to plead their cases to members of the Portfolio Committee successfully.¹⁶¹

In large part due to sustained lobbying and public education campaigns by queer activist groups like The Equality Project, the proposal to create a separate marriage regime for same-sex couples was substantially modified, allowing for more equitable same-sex marriage legislation.¹⁶² This modification occurred after queer rights groups joined together. They reminded the public and parliament that a separate marriage scheme was unacceptably reminiscent of apartheid because it gave same-sex couples a second-class status in society.¹⁶³

In this way, the CCSA's decision to defer a remedy was instrumental in creating the more inclusive marriage scheme that exists in South Africa today. This is further evidenced by the fact that during the legislative process, ANC leadership embraced the court's rhetoric about constitutional transformation and the connection between same-sex rights, as well as the foundational principles of the anti-apartheid struggle.¹⁶⁴ With the help of

158. See generally Wendy Isaack, *LGBTI Mainstreaming: Inculcating a Culture of Human Rights*, in *AGENDA: EMPOWERING WOMEN FOR GENDER EQUITY* 50 (2005).

159. See *TO HAVE AND TO HOLD*, *supra* note 128, at 45.

160. This act legalized same-sex marriage in South Africa. See *id.* at 108.

161. See *id.* at 94.

162. See Ray, *supra* note 37, at 162 (noting that "[t]he final legislation adopted a dual regime that permits same-sex and heterosexual couples to enter into a civil union marriage that may be termed either a 'marriage' or a 'civil partnership' depending on the procedure a couple chooses.").

163. See *TO HAVE AND TO HOLD*, *supra* note 128, at 4.

164. See Ray, *supra* note 37, at 163 (quoting the then-ANC Minister of Defense who said, "in the long and arduous struggle for democracy, very many men and women of homosexual and lesbian orientation joined the ranks of the liberation and democratic forces.").

the CCSA's deferred remedy, queer groups seized upon the national debate that had begun and ultimately succeeded in passing legislation granting equitable marriage rights to same-sex couples, despite strong public dissent.¹⁶⁵

When picking up where the CCSA left off, queer social movements used many democracy-enhancing techniques. Between 2004 and 2006, Fikile Vilakazi, a lesbian activist, lobbied for Out LGBT Well-Being (Out) and served as the Public Education and Advocacy Officer of The Equality Project.¹⁶⁶ Vilakazi's account of the efforts of queer rights groups in South Africa—made during a critical period of the same-sex marriage debate—provide insight into the effectiveness of queer social movements in general. Vilakazi noted that The Equality Project aimed to promote public education and advocacy about same-sex marriage in order to encourage human rights stakeholders to push the issue.¹⁶⁷ Queer activists in the early 2000s knew that queer people were a politically disenfranchised minority. Therefore, they needed to build a robust political strategy, and mobilize the public in order to effectively support the parliamentary same-sex marriage campaign.¹⁶⁸

Vilakazi describes the advocacy strategy of Out, The Equality Project, and the Joint Working Group (JWG), another queer rights organization, as consisting of (1) lobbying parliament, (2) mobilizing LGBTQIA constituencies to join in the campaign, (3) partnering with human rights organizations, and (4) presenting sentiments supporting same-sex marriage in the media.¹⁶⁹ To implement this strategy, The Equality Project held workshops in 2004 and 2005 for queer people, their organizations, and their allies.¹⁷⁰ These workshops engaged with average activists who did not understand the intricacies of South Africa's approach to queer rights, and armed them with a basic, legal understanding of LGBTQIA rights in the country.¹⁷¹ This strategy shows how queer social movements in South Africa successfully increased democratic participation among the disadvantaged queer minority in the country. Such workshops provided queer people with the necessary tools to effectively engage in political discussions about queer rights and influence the narrative. Vilakazi herself interacted with the media, presenting a Black, queer face to the masses. She did this to combat the notion that queerness is un-African.¹⁷² The Equality Project also encouraged same-sex couples to write narratives about their experiences and to appear on television and radio to present a queer-

165. *See id.*

166. Fikile Vilakazi, UNIV. KWAZULU-NATAL, <https://sss.ukzn.ac.za/staff-profile/international-and-public-affairs/fikile-vilakazi/> [<https://perma.cc/APJ4-REJB>] (last visited Jan. 25, 2020).

167. *See TO HAVE AND TO HOLD*, *supra* note 128, at 88.

168. Queer groups recruited the Joint Working Group in order to prevent bigotry from stunting the parliamentary campaign for marriage. *Id.* at 89.

169. *Id.*

170. *Id.*

171. *Id.*

172. *See id.* at 92.

friendly narrative about same-sex marriage to mainstream media.¹⁷³

Queer groups in South Africa, however, did not limit their efforts to public education and media campaigns. These groups also engaged in more combative, democracy-enhancing techniques. Before parliament passed the Civil Union Act in 2006, Out and JWG held various public demonstrations. These demonstrations included a march to the Union Buildings, the official home of the South African government.¹⁷⁴ In addition, Glenn de Swardt, then-manager of the Triangle Project, a queer rights organization, recounted the organization's protests outside public hearings in Cape Town that discussed same-sex marriage.¹⁷⁵

Through their efforts, queer activists established the power of social movements by meeting the criteria of a successful social movement discussed in Section II.C of this Note. Such movements incrementally increased queer rights in South Africa, culminating in the government's passing of an equitable same-sex marriage scheme. The movements also helped transform South African culture by providing a human (and sometimes Black) face to represent queer folk in the country. Finally, with the help of the CCSA, these queer-friendly legal changes were legitimized through references to the apartheid struggle and the transformative power of the South African Constitution.

2. Botswana

a. The Successes of the Botswanan Queer Social Movement

Though queer social movements in Botswana have not existed as long as those in South Africa, they have been no less impactful on the law. Botswana, like many African countries, was traditionally patriarchal and many Botswanans viewed same-sex relationships as a Western phenomenon.¹⁷⁶ In 2013, the High Court of Botswana forced the country to contend with queer rights when it held that homosexuality was not acceptable in society.¹⁷⁷ Arrests for sodomy in the 1990s, and the problematic *Kanane v. State* decision, gave rise to queer rights groups such as Lesbians, Gays, Bisexuals of Botswana (LeGaBiBo), the most popular non-governmental

173. *Id.* at 90.

174. *Id.*

175. *See id.* at 113 (noting that these protests were successful, in part, because they received media attention and alerted people to the existence of the Triangle Project and its views).

176. In recent years, this view has been changing, even among Botswana's religious community. As an example, "[t]he Botswana Council of Churches has participated in family dialogues of transgender and intersex persons as well as dialogues in churches on sexuality and mental health." GLENDA MUZENDA, OTHER FOUND., CANARIES IN THE COAL MINES: AN ANALYSIS OF SPACES FOR LGBTI ACTIVISM IN BOTSWANA 7 (2017), http://the-otherfoundation.org/wp-content/uploads/2017/06/Canaries_Botswana_epub_Draft2_CB2.pdf [<https://perma.cc/GH3N-CLGP>].

177. The court made this decision in the 1995 case *Kanane v. State*, which centered around a Botswanan man who was arrested in 1994 under colonial-era sodomy laws—laws that the court, in 2003, refused to repeal despite years of litigation and advocacy. *See id.* at 5; *Kanane v. State*, [1995] BLR 94 (Bots.).

organization in Botswana advocating for LGBTQIA rights.¹⁷⁸ Three other queer rights groups exist in Botswana: the Rainbow Identity Botswana (RIA),¹⁷⁹ Ditshwanelo,¹⁸⁰ and Bonela.¹⁸¹

In her report, human rights consultant Glenda Muzenda said that “LeGaBiBo used strategies that pushed the LGBTI human rights agenda forward in intelligent and innovative ways.”¹⁸² Muzenda notes that “LeGaBiBo has, for many years, been hosting events such as cabaret shows [and] peaceful marches through the streets” of Botswana.¹⁸³ The group has also taken to “holding out slogans and banners that promote inclusiveness, tolerance, peace, and compassion.”¹⁸⁴

One particularly innovative strategy used by LeGaBiBo that demonstrates the unique power of queer rights concerns the idea of *botho*. *Botho* is a concept in Botswana that expresses a commitment to creating a just and compassionate society.¹⁸⁵ In embodying the concept of *botho*, LeGaBiBo knew it would be useful to use the practice of a *pitsō*, a meeting convened by a Setswana¹⁸⁶ authority figure, to discuss queer rights issues.¹⁸⁷ By creating a queer-centered *pitsō*, LeGaBiBo was able to start removing cultural taboos around sexuality by using the “higher order” cultural significance of a *pitsō*.¹⁸⁸ The success of the queer *pitsō* in Botswana culminated in 2013 when LeGaBiBo activists met with traditional Dikgosi chiefs at a *pitsō* to discuss queer rights. At the *pitsō*, the chiefs acknowledged that traditional Setswanan culture accepted same-sex relationships and agreed on a simple and clear agenda to address queer rights in Botswana.¹⁸⁹

LeGaBiBo, and the other queer rights groups in Botswana, make it apparent that on-the-ground social movements are influential. Not only did LeGaBiBo engage in democracy-enhancing tactics, such as marches and educational campaigns, but it also legitimized positive legal change,

178. LeGaBiBo, founded in 1998, was galvanized by the arrests for sodomy and the *Kanane* decision. After seven years of trying to officially register as an independent organization in Botswana, the group finally succeeded in 2014. MUZENDA, *supra* note 176, at 5.

179. *Id.* at 26 (noting that RIA focuses on transgender and intersex rights in Botswana).

180. The group was created in 1993 by various lawyers seeking to advocate for legal and policy reform. *Id.* at 21.

181. This group was founded by human rights activists in 2001 to address HIV- and AIDS-related issues. *Id.*

182. *Id.* at 22.

183. *Id.* at 16.

184. *Id.* Such marches have made ignoring the need for increased queer rights difficult.

185. *Id.* at 24.

186. *Tswana*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Tswana> [<https://perma.cc/2PV4-73A2>] (last visited Jan. 25, 2020).

187. See MUZENDA, *supra* note 176, at 24 (noting that a *pitsō* is not simply a meeting, but a grouping of cultural significance whose meaning implies a “certain duty to attend and pay attention”).

188. *Id.*

189. See *id.*

granting queer people greater recognition by using the *pitsô* to discuss queer issues. The latter tactic of engaging with traditional African leaders to discuss pre-colonial histories of queerness in Botswana also helped queer activists in the country combat the notion that queerness is un-African, and thus atypical, in Botswana.

b. Demosprudence and the High Court of Botswana

LeGaBiBo's efforts and strategies appear to have been effective because, in 2019, the country's highest court set aside provisions in Botswana's penal code that criminalized sodomy.¹⁹⁰ Like the CCSA, the High Court of Botswana's opinion in *Letsweletse Motshidiemang v. Attorney General*, which decriminalized sodomy, can be read as a demosprudential piece. At the beginning of its opinion, the High Court asks the reader to consider "[w]hat regulatory joy and solace is derived by the law, when it proscribes and criminalises such conduct of two consenting adults, expressing and professing love to each other . . . ?"¹⁹¹ In this way, the court alludes to the unjust nature of the law and its incoherence when considering the actual experiences of people in Africa.¹⁹² The court continues to declare that the Constitution of Botswana should be an inclusive document "laden with values and beliefs associable with democracy," thus evoking a positive vision for the future through a constitutional framework, much like Justice Sachs did in the *Fourie* decision.¹⁹³ Towards the end of its opinion, the court quotes one of Africa's most prolific social movement leaders: Nelson Mandela. The High Court pronounces that when confronted with the idea that being LGBTQIA was un-African, Mandela rejected this notion, stating that being gay was "just another form of sexuality that has been suppressed for years."¹⁹⁴ Through its seminal opinion in *Motshidiemang* the High Court successfully used a demosprudential rhetorical approach to paint the picture of a better, more inclusive society.

3. Mozambique

Unlike Botswana, Mozambique does not have many queer organizations mobilizing within its borders. LAMBDA, established in 2008 by Danilo da Silva, is the only organization in Mozambique fighting for queer rights in the country at this time.¹⁹⁵ Like many social movements, the political climate in Mozambique has forced LAMBDA to operate through non-elite means due to its lack of official government recognition.¹⁹⁶

190. See *Criminalising Homosexuality*, *supra* note 23.

191. *Letsweletse Motshidiemang v. Att'y Gen.*, [2019] BLR ¶ 3 (Bots.).

192. See *id.*

193. *Id.* ¶ 71.

194. *Id.* ¶ 210.

195. See generally *id.*

196. The Mozambican state has continuously failed to legally register LAMBDA as a non-governmental organization—a status the group has sought since 2008. This is so despite the Constitutional Council of Mozambique's decision, declaring that the failure to register LAMBDA goes against the country's constitution. Ruth Baldacchino & Helen Kennedy, *Foreword* to LUCAS RAMÓN MENDOS, *STATE-SPONSORED HOMOPHOBIA* 11 (Lucas

While it is difficult to determine the exact influence of LAMBDA's fight for official recognition upon Mozambique's government, its government's decision to decriminalize same-sex intimacy in 2014 was no doubt influenced by the efforts of the organization.¹⁹⁷ The Mozambican was not alone, however, in its amenability to LAMBDA's efforts. In a 2014 letter, written to all African leaders in a distinctly demosprudential manner, former President of Mozambique Joaquim Chissano, asked African leaders to end queerphobia in the continent.¹⁹⁸ Chissano emphasized the notion of a more accepting society when he asked Africa's leaders "to look ahead to what the future is calling forth."¹⁹⁹ Chissano went on to quote Mandela, who said that "[t]o be free is not merely to cast off one's chains, but to live in a way that respects and enhances the freedom of others."²⁰⁰ Just as the High Court of Botswana did in its *Mothshidiemang* opinion, Chissano's use of Mandela's words is meant to legitimize the change he feels should occur in African countries around queer rights. Moreover, Chissano was likely unable to voice his opinions while serving as president for fear of political fallout. There is no doubt that the political elite in Mozambique thought that queer issues were unpopular due to their perceived Western roots. This lends credence to the notion that LAMBDA, as a local queer group, is best suited to combat the notion of queer "otherness."

LAMBDA's efforts are numerous and display the power of social movements to create lasting legal change. The group has been successful by basing their strategies on Mozambican culture rather than mimicking a Western queer rights approach. LAMBDA has organized various vox pops, or meetings, with Mozambican citizens, asking questions about their perceptions of queer people.²⁰¹ In addition, LAMBDA has worked to change the perception of queer people in the country through establishing a radio station,²⁰² screening queer movies, publishing monthly articles in the national newspapers *Zambeze* and *Canal de Mocambique*, and producing an academic journal about LGBTQIA people called "The Colours of

Mendos eds., 13th ed. 2019), <https://ilga.org/state-sponsored-homophobia-report-2019> [<https://perma.cc/U3EH-3ATZ>]; Rui Garrido, *Recent SOGI Developments in Angola and an Overview on Other African Lusophone Countries*, in STATE-SPONSORED HOMOPHOBIA, *supra* 196, at 98.

197. Agence France-Presse, *Mozambique Scraps Anti-Gay Law*, *GUARDIAN* (June 29, 2015), <https://www.theguardian.com/world/2015/jun/30/mozambique-scraps-anti-gay-law> [<https://perma.cc/H4YX-BRDZ>].

198. See Joaquim Chissano, *An Open Letter to Africa's Leaders—Joaquim Chissano, Former President of Mozambique*, *AFR. REP.* (Jan. 14, 2014), <https://www.theafricareport.com/4886/an-open-letter-to-africas-leaders-joaquim-chissano-former-president-of-mozambique/> [<https://perma.cc/46SN-QYLQ>].

199. *Id.*

200. *Id.*

201. TAHILA PIMENTAL, OTHER FOUND., *CANARIES IN THE COAL MINES: AN ANALYSIS OF SPACES FOR LGBTI ACTIVISM IN MOZAMBIQUE* 19 (2017), http://theotherfoundation.org/wp-content/uploads/2017/06/Canaries_Mozambique_epub_Draft2_CB2.pdf [<https://perma.cc/XE24-PFVC>].

202. The program is called "Purple Coffee," and is available in Maputo, Beira, and Nampula. *Id.*

Love.”²⁰³

However, LAMBDA’s success in helping to decriminalize same-sex intimacy did not occur in a vacuum. In accomplishing this goal, the group created alliances with various feminist groups in Mozambique, including Women and Law in Southern Africa and the Movement of Young Feminists.²⁰⁴ Alliances with feminist organizations allowed LAMBDA and feminist groups to lobby successfully for the simultaneous decriminalization of same-sex intimacy and legalization of abortion.²⁰⁵ And with the help of some feminists, LAMBDA has successfully shifted the discussion around queer rights, generating greater political support for such rights.²⁰⁶ LAMBDA has used non-elite means to reach the public and democratize the queer rights discussion in the country, namely through social media.²⁰⁷ The group’s most notable achievement was, of course, contributing to the decriminalization of same-sex intimacy—which would not have been possible without its efforts.²⁰⁸

Conclusion

This Note has argued that the primary approaches employed by the West to encourage greater rights and recognition of queer people in Africa, namely (1) public castigation, and (2) monetary sanctions, are deeply flawed. These methods are not only less effective than other alternatives, but they can actually worsen the lives of queer people in Africa. Many Africans may perceive these approaches as a form of Western cultural imperialism, thus leading them to rebel and target queer individuals. Instead of the current Western approach, the theory of *demospudence*, and of creating legal and social change through social movements, reveals that if Western authorities wish to create sustainable rights for queer people in Africa, they should simply support local social movements because social movements have succeeded in creating such rights in the past.

203. *Id.* at 20.

204. *Id.* at 8.

205. In partnership with the Ministry of Women, LAMBDA has also participated in a health workshop where it distributed informative pamphlets on health, focusing on same-sex relationships. *See id.*

206. *See id.* at 13.

207. *Id.* at 12.

208. This decision was largely symbolic therefore pressure was needed to encourage the Constitutional Council of Mozambique to act.