

Criminalising Homosexuality and Understanding the Right to Manifest Religion

Yet, while the Constitution protects the right of people to continue with such beliefs, it does not allow the state to turn these beliefs – even in moderate or gentle versions – into dogma imposed on the whole of society.

South African Constitutional Court, 1998¹

This is one in a series of notes produced for the Human Dignity Trust on the criminalisation of homosexuality and good governance. Each note in the series discusses a different aspect of policy that is engaged by the continued criminalisation of homosexuality across the globe.

The Human Dignity Trust is an organisation made up of international lawyers supporting local partners to uphold human rights and constitutional law in countries where private, consensual sexual conduct between adults of the same sex is criminalised. We are a registered charity no.1158093 in England & Wales. All our work, whatever country it is in, is strictly not-for-profit.

¹ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15 (Constitutional Court), para. 137.

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Overview

- 01.** Consensual sex between adults of the same-sex is a crime in 78 jurisdictions.² These laws, in general terms, originate from two sources: the British Empire and Islam. The British variety was born out of political manoeuvring against religious authority, not adherence to religious doctrine, albeit these laws later took on a religious guise. Islamic countries that criminalise do so, generally, due to the influence of Sharia law on their criminal law.
- 02.** This briefing note covers three points of connection between religion and the criminalisation of homosexuality. First, it looks at the origins of today's laws that criminalise consensual same-sex intimacy. To say that these laws were based on religious doctrine is only partially true. In fact, 'buggery' laws were initially used by the state *against* the Church to wrestle power from the Pope in Rome. To the extent that these laws were based on religion, they were contemporaneous with laws that punish witchcraft, heresy and blasphemy, which have long since been repealed or fallen into obscurity.
- 03.** The note then examines whether, as a matter of international human rights law, adherence to religious doctrine has any bearing on whether the state is permitted to criminalise homosexuality. The answer to this is clear: the right to freedom of religion must be respected, but this right can never justify criminalising homosexuality or inflicting harm on lesbian, gay, bisexual and transgender (LGBT) people. To think otherwise is fundamentally to misunderstand the right to manifest one's religion.
- 04.** The third part of this note then sets out statements from religious leaders confirming that the state has no business criminalising homosexuality, no matter the religious beliefs of those in power or the population at large.

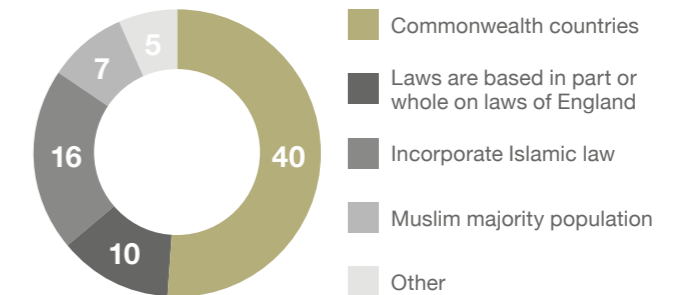
² For a full list, see: <http://www.humandignitytrust.org/pages/COUNTRY%20INFO/Criminalising%20Homosexuality>

The origin of modern laws that criminalise homosexuality

- 05.** In 1533, as a part of England's disengagement from the Roman Catholic Church, King Henry VIII passed the 'buggery' law, which for the first time made a secular crime of an act that had previously been an infraction of ecclesiastical law.³ The Buggery Act of 1533 was one of many steps taken by Henry VIII to break the influence of Rome in England and to seize the Church's land and property. Monasteries in England were portrayed by Henry's investigators as dens of '*manifest sin, vicious carnal, and abominable living*'.⁴ Henry's buggery law was passed to carry the death sentence and, importantly for his aims, provided for the seizure of property and applied to the clergy and layman alike.
- 06.** As England colonised North America and then as Britain's Empire spread, buggery laws went global. In this process, these laws were associated with religion. For instance, the East New Jersey law of 1683 described the crime of buggery as an '*offense against God*', and the Massachusetts Bay code of 1641 imposed the death sentence for buggery, heresy, witchcraft, and blasphemy.⁵ Thankfully Massachusetts' heretics, witches and blasphemers are no longer criminalised, and since 1974 nor are its gay and bisexual men.
- 07.** After the 13 American colonies' formal independence in 1783, buggery laws were spread on two fronts, being simultaneously replicated across the new states of the United States and in the colonies of Britain's

expanding Empire in Asia, Africa and the Pacific. For instance, the Indian Penal Code of 1860 made a crime of '*carnal knowledge against the order of nature*' and was later amended to include the crime of '*gross indecency*'. The references to '*the order of nature*', '*gross*' and '*indecent*' gave these crimes a distinctly moralistic religious undertone. The provisions of the Indian Penal Code were exported to Britain's colonies in Malaysia and East Africa, for example. At the same time, British laws including the 1861 Offences Against the Person Act and the 1885 Criminal Law Amendment Act were rolled out across West Africa.⁶ Today, 40 Commonwealth countries retain their British-era laws that criminalise homosexuality, as do up to 10 further jurisdictions whose laws are based in whole or in part on the laws of England (see Appendix). France, Spain, Belgium, The Netherlands and their colonies did not criminalise, as their legal systems were based on Napoleon's civil code that did not criminalise homosexuality.

78 countries criminalise homosexuality



³ Katz, J.N., '*The Age of Sodomitical Sin, 1607-1740*', in Goldberg, J., *Reclaiming Sodom*, p. 46.

⁴ *Ibid*, pp. 46 to 47.

⁵ *Ibid*, p. 47.

⁶ Metcalf, T.R., *Imperial Connections*, Ch. 1 'Governing Colonial Peoples', 2008, pp. 24, 25 and 31.

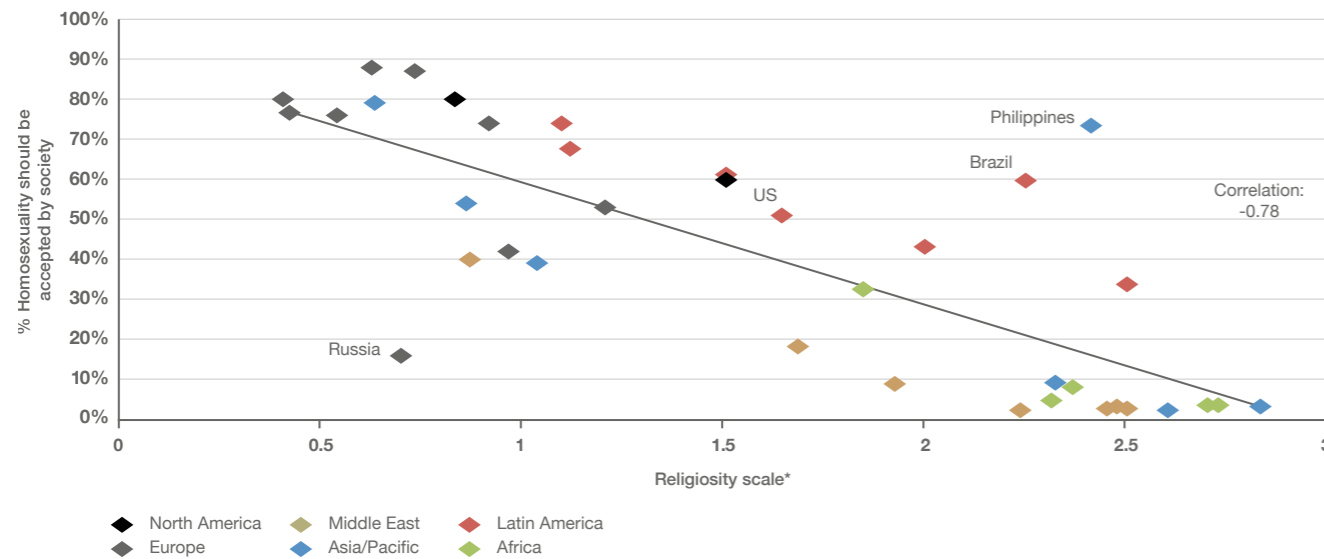
08. Of the remaining 28 jurisdictions that criminalise, 16 incorporate Islamic law into their domestic law and a further seven have a Muslim majority population (see Appendix). However, it is not as simple as concluding that these jurisdictions criminalise because they are Muslim;⁷ at least 19 Muslim-majority jurisdictions do not criminalise.⁸ Whereas for Britain's former colonies there is a clear connection between their laws that criminalise homosexuality and their colonial histories, in the Islamic world it cannot be said that there is a clear and direct causal connection between criminalisation and Islam.

09. Whether or not laws that criminalise homosexuality can be said to originate from religious doctrine, some proffer religion as a reason to retain these laws and to propagate homophobia. Highlighting this connection, in 2014 a report by the UN Special Rapporteur on freedom of religion or belief found that:

*[H]omophobic and transphobic violence against lesbian, gay, bisexual and transgender (LGBT) persons may also be perpetrated in the name of religion... Violence against women and against LGBT persons is often justified and given legitimacy by discriminatory laws based on religious laws or supported by religious authorities, such as laws criminalizing adultery, homosexuality or cross-dressing.*⁹

10. Furthermore, in 2013 a report by the Pew Research Center provided anecdotal evidence of a link between religion and homophobia. The report surveyed people in 39 countries, and found that 'there is far less acceptance of homosexuality in countries where religion is central to people's lives'.¹⁰ Plotted on a graph, the responses show a reasonably clear relationship between religiosity and intolerance towards homosexuality, albeit with some outlying countries.

Correlation between religiosity and tolerance of homosexuality



7 This topic has been explored by *The Economist* in its article *Straight but narrow*, 4 February 2012. Available at: <http://www.economist.com/node/21546002>

8 Albania, Azerbaijan, Bahrain, Bosnia & Herzegovina, Burkina Faso, Chad, Djibouti, Guinea-Bissau, Jordan, Kazakhstan, Kosovo, Kyrgyzstan, Mali, Niger, Tajikistan, Turkey, West Bank (State of Palestine), most of Indonesia, and Northern Cyprus.

9 UN General Assembly, *Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt*, 29 December 2014, UN Doc A/HRC/28/66.

10 The report's measure of religiosity was whether respondents considered religion to be very important, whether they believed it is necessary to believe in God in order to be moral, and whether they prayed at least once a day. Kohut, A., et al., *The Global Divide on Homosexuality*, (June 2013) Pew Research Center.

11. Yet, not all countries with a high level of religiosity and/or a low tolerance of homosexuality criminalise homosexuality. A report by the Pew Center cited by Sexual Minorities Uganda (SMUG)¹¹ shows only a limited correlation in sub-Saharan Africa between the importance of religion in citizens' lives and whether the country criminalises homosexuality:

12. No matter the source of homophobia – religion or otherwise – governments, legislatures and judiciaries in criminalising countries are tasked with determining whether the criminalisation of homosexuality is lawful. The next section of this note explores whether religious belief can ever justify criminalising consensual same-sex intimacy between adults. The answer is clear: it can never be legitimate to make a crime of other adults' consensual sexual conduct.

Fig 5: Respondents saying religion is very important in their lives

| Country | (%) | Is homosexuality criminalised? |
|---------------|-----|--------------------------------|
| Senegal | 98 | Yes |
| Mali | 93 | No |
| Tanzania | 93 | Yes |
| Guinea Bissau | 90 | No |
| Zambia | 90 | Yes |
| Rwanda | 90 | No |
| Cameroon | 89 | Yes |
| Ghana | 88 | Yes |
| Mozambique | 87 | Yes |
| Liberia | 87 | Yes |
| Kenya | 87 | Yes |
| Nigeria | 87 | Yes |
| Chad | 86 | No |
| Djibouti | 86 | No |
| Uganda | 86 | Yes |
| DR Congo | 82 | No |
| Ethiopia | 79 | Yes |
| South Africa | 74 | No |
| Botswana | 69 | Yes |

11 Data from Pew Research Center, *Tolerance and Tension: Islam and Christianity in Sub Saharan Africa*, 2010, used in SMUG, *Expanded Criminalisation of Homosexuality in Uganda: A Flawed Narrative*, 2014, p. 23.

Overview of the right to freedom of religion and its interaction with LGBT rights

13. The right to freedom of religion has a long history.¹² Under contemporary international law, the right is contained at Article 18 of the Universal Declaration of Human Rights, 1948 (UDHR), which affirms that ‘everyone has the right to freedom of thought, conscience and religion’. This right, along with its limitations, is further delineated at Article 18 of the International Covenant on Civil and Political Rights (ICCPR):

1. *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
2. *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
3. *Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*

14. Similar provisions exist in the major regional human rights treaties, such as the European Convention on Human Rights (ECHR, Article 9), the American Convention on Human Rights (Article 12), the African Charter on Human and Peoples’ Rights (Article 8), and the Arab Charter on Human Rights (Article 30). Similar rights are contained in national constitutions and domestic laws. Features common to most of these international treaties and domestic laws include:

- a) There is an absolute right to possess one’s own religion, thoughts and beliefs. This is the internal aspect of religion. The state can never require a person to reject his or her religion or cease believing something.
- b) There is also a right to manifest one’s religion. Manifestation is the external aspect of religion, which includes praying with others, and conduct such as wearing certain clothes or items. Manifestations can be restricted in certain circumstances.
- c) Religion cannot be imposed by the state on individuals. The right to freedom of religion also includes the right not to believe in any religion.¹³

15. Both the internal and external aspects of freedom of religion may, at times, interact with the rights of LGBT people. Regarding the internal aspect, religion and belief are to be interpreted broadly.¹⁴ As such, freedom of religion and belief allows any person to hold views on homosexuality, LGBT people and LGBT rights. People have an absolute right to believe what they will on these topics, positive or negative.

16. On the external aspect, there are limitations on how these beliefs can manifest externally in society. The ICCPR, the lynchpin of the international system of human rights with 168 state-parties, requires that no manifestation of religion or belief may amount to ‘advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’.¹⁵ Accordingly, a person has an absolute right to think the deepest homophobic thoughts, but there are limitations on how those views can manifest externally. Applying international human rights law, expressing a belief in the sinfulness of homosexuality is a justifiable expression of religious belief; provided that the language used does not rise to the level of hate speech. However, religious belief cannot justify legal restrictions on others forming a same-sex relationship. This is clear from the analysis of proportionality in the next section, and specifically the conclusions drawn on moral/religious justifications in *Toonen v. Australia*,

Dudgeon v. the United Kingdom and *Norris v. Ireland*, and similar conclusions in national case law from South African and Kenya. Such restrictions would amount to the imposition of specific religious beliefs on others, violating their rights, including the rights to privacy, equality and dignity.¹⁶

17. If individuals believe that homosexuality is contrary to their religion, they are free to manifest that belief by not forming a same-sex relationship. Human rights law will not protect any manifestation beyond this self-imposed abstention, and certainly would not allow the criminalisation of homosexuality on religious grounds. As Article 5 of the ICCPR records, one person’s rights cannot be used to destroy the rights of others:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein.

18. The United Nations (UN) Secretary-General Ban Ki-moon captured the essence of how religion interacts with the human rights of LGBT people in a UN brochure entitled ‘*The United Nations Speaks Out: Tackling Discrimination on Grounds of Sexual Orientation and Gender Identity*’:

“Let there be no confusion: where there is tension between cultural attitudes and universal human rights, rights must carry the day.”¹⁷

12 For example, Professor Urfan Khaliq cites a number of examples: ‘Under the Edict of Milan (313 CE) the Emperor Constantine granted religious freedom to Christians.... In 532 CE the Emperor Justinian entered into a treaty with the Persians which sought to allow Christians to practice their faith and to exclude them from the official faith Zoroastrianism... The Religious Peace of Augsburg of 1555 in the aftermath of the Reformation sought to protect religious freedoms in Europe and ease tensions between Protestant and Catholic princes. A number of treaties between various European powers and the Ottoman Empire also sought to protect religious freedoms.... Religious freedom thus has a strong claim to being one of the, if not the, oldest issues which we would now consider to be a human right in international law’; quoted from Khaliq, U., ‘Freedom of Religion and Belief in International Law: A Comparative Analysis’ in Emon, A. M., Ellis, M. and Glah, B. (eds), *Islamic Law and International Human Rights Law* (Oxford University Press, 2012), pp. 183 and 184.

13 For instance, the European Court of Human Rights in *Kokkinakis v. Greece* [1993] 17 EHRR 397 stated that the right to freedom of religion ‘is also a precious asset for atheists, agnostics, sceptics and the unconcerned’.

14 UN Human Rights Committee, *General Comment No. 22*, UN Doc CCPR/C/21/Rev.1/.

15 *Ibid.*

16 Another briefing note in this series, *Criminalising Homosexuality and International Human Rights Law*, discusses in further detail how the criminalisation of homosexuality violates the rights to equality, privacy and dignity and can amount to inhuman and degrading treatment.

17 OHCHR, UNDP, UNAIDS, WHO et al, *The United Nations Speaks Out: Tackling Discrimination on Grounds of Sexual Orientation and Gender Identity*, (New York, 2011).

19. To the extent that there is a purported religious justification for the criminalisation of homosexuality, the human rights of LGBT people prevail. Nor are religious or homophobic beliefs sufficient to exclude LGBT people wholesale from human rights protection. Internationally proclaimed human rights and domestic human rights protections apply to everyone, as can be seen clearly from the wording of these human rights documents. For example, in Article 2 of the UN's Universal Declaration of Human Rights:

“ [E]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind...

20. Likewise, as stated in a UN Human Rights Council report:

“ [A]ll people, including LGBT persons, are entitled to enjoy the protections provided for by international human rights law.¹⁸

21. With regard to the tensions between religious belief and LGBT rights, this UN report cited the 1993 Vienna Declaration and Programme of Action, which confirms that:

“ While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.¹⁹

22. These quotes confirm the proposition that the internal aspect of freedom of religion and belief is universal and absolute. But, where such internal beliefs are manifested externally to criminalise homosexuality, human rights law will be violated. Justifying the criminalisation of homosexuality on purported religious grounds is in stark contrast with human rights laws and norms. The human rights framework is all about proportionality. It is wholly disproportionate that a homophobic belief be translated into criminal sanctions imposed on others.

¹⁸ UN Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, 5.

¹⁹ UN General Assembly, *Vienna Declaration and Programme of Action*, A/CONF.157/23, 12 July 1993.

Religion and proportionality

23. The paragraphs below set out court decisions and statements on proportionality and freedom of religion, as made by courts and commissions interpreting international human rights law. These statements and decisions cover all regions and cultures. Two categories of decisions are discussed below. First, where LGBT people have asserted their right to privacy, equality, etc., and the state has attempted to justify the curtailment of those rights for religious or moral purposes. Secondly, where people have claimed that their rights to religious freedom have been violated; some of these cases interact with LGBT rights, others do not, but together they show how international human rights law delineates the right to religious freedom. These cases demonstrate how far the manifestation of religious belief can reach into the public domain, and thus inform about the interaction between religious belief and other potentially competing rights, including LGBT rights.

UN Human Rights Committee

24. The UN Human Rights Committee is the treaty body that interprets and monitors the implementation of the ICCPR. Its decision in *Toonen v. Australia* assessed whether Tasmania's laws criminalising homosexuality violated the right to privacy contained at Article 17 of the ICCPR. An issue for the Committee was whether the infringement of Mr Toonen's right to privacy could be justified on supposed moral grounds. The Human Rights Committee concluded that the right to privacy was infringed and that this right must prevail over the supposed moral justification:

While the State party acknowledges that the impugned provisions constitute an arbitrary interference with Mr. Toonen's privacy, the Tasmanian authorities submit that the challenged laws are justified on public health and moral grounds... The Committee cannot accept either that for the purposes of article 17 of the Covenant, moral issues are exclusively a matter of domestic concern ... [T]he Committee concludes that the provisions do not meet the "reasonableness" test in the circumstances of the case, and that they arbitrarily interfere with Mr. Toonen's right under article 17, paragraph 1.²⁰

25. Outside of the context of LGBT rights, the Human Rights Committee has used the reasonableness or proportionality approach to further define the scope of the right to manifest religion. For instance, in its decisions in 1989 in *Singh Bhinder v. Canada*, Canada was permitted to restrict a Sikh man's manifestation of religion via his wearing a turban, by requiring him to wear a safety helmet at work. In particular, the Human Rights Committee found that the use of helmets in employment for safety purposes was reasonable and compatible with the limitations on religious manifestation contained in Article 18(3) of the ICCPR. In this case, it was proportionate for the state to restrict religious freedom in order to create a safe working environment. This case exemplifies the restrictions that can be placed on the manifestation of religion under the ICCPR.

²⁰ *Toonen v. Australia* Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), paras. 8.4 to 8.6.

African Commission on Human and Peoples' Rights 🌍

26. The African Commission on Human and Peoples' Rights has not heard a decriminalisation case, but it has considered how to delineate the right to freedom of religion at Article 8 of the African Charter. Again, decision-making is driven by proportionality. In 2004 in the case of *Garreth Anver Prince v. South Africa*,²¹ Mr Prince claimed that smoking cannabis was a manifestation of his Rastafarian religion, so that South Africa's laws prohibiting the drug breached his right to freedom of religion. Drawing on the reasoning of the Human Rights Committee in *Singh Bhinder v. Canada*, the African Commission ruled that the restrictions on the use and possession of cannabis were reasonable as they served a 'general purpose' and affected Rastafarians only incidentally. The Commission also noted that the right to freedom of religion:

*Does not in itself include a general right of the individual to act in accordance with his or her belief. While the right to hold religious beliefs should be absolute, the right to act on those beliefs should not. As such, the right to practice one's religion must yield to the interests of society in some circumstances.*²²

27. In another case, *Amnesty International v. Sudan*, the African Commission considered the application of Sharia law to non-Muslims in Sudan, in light of both Article 8 of the Charter and Article 2, which provides for equal protection under the law. The African Commission ruled that:

“ [W]hile fully respecting the religious freedom of Muslims in Sudan [the Commission] cannot countenance the application of law in such a way as to cause discrimination and distress to others.²³

28. The Commission went on to emphasise that:

“ Trials must always accord with international fair-trial standards. Also, it is fundamentally unjust that religious laws should be applied against non-adherents of the religion. Tribunals that apply only Shari'a are thus not competent to judge non-Muslims, and everyone should have the right to be tried by a secular court if they wish.²⁴

European Court of Human Rights and European Commission of Human Rights 🇪🇺

29. The European Court of Human Rights in Strasbourg has produced a rich body of case law on both categories of decisions discussed in this note: first, the criminalisation of homosexuality and, secondly, limits placed on the manifestation of religion. Again, a proportionality approach is taken.

30. With regards to the first category, in the case of *Dudgeon v. the United Kingdom*, Northern Ireland's law criminalising homosexuality was challenged pursuant to the right to privacy protected by Article 8 of the European Convention Human Rights (ECHR). The UK Government argued that the law's interference with Mr Dudgeon's right to privacy was justified, in part due to the religious and moral standards of Northern Irish society, stating that:

“ [T]he general aim pursued by the legislation remains the protection of morals in the sense of moral standards obtaining in Northern Ireland... Northern Irish society was said to be more conservative and to place greater emphasis on religious factors, as was illustrated by more restrictive laws even in the field of heterosexual conduct.²⁵

31. The Strasbourg Court accepted that religion and morality were factors to be considered, but concluded that religious or moral views cannot justify criminalisation. In finding that Mr Dudgeon's privacy rights prevailed, the court stated that:

“ Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.²⁶

32. After this court decision, Northern Ireland's criminalising law was repealed. Seven years later, the Strasbourg Court considered the issue again in *Norris v. Ireland*, this time concerning the Republic of Ireland. The Irish Supreme Court had upheld Ireland's criminalising law, which led to Mr Norris taking the matter to Strasbourg. The Irish court had concluded that criminalisation was lawful and not inconsistent with 'the Christian and democratic nature of the Irish State'.²⁷ Christianity is entrenched into the Irish Constitution.²⁸

21 *Garreth Anver Prince v. South Africa* [2004] AHRLR 105 (ACHPR 2004).

22 *Ibid.*, para. 41.

23 *Amnesty International and Others v. Sudan* [2000] AHRLR 297 (ACHPR 1999), para. 73.

24 *Ibid.*

25 *Dudgeon v. the United Kingdom* [1981] ECHR 5, para. 46.

26 *Ibid.*, para. 60.

27 *Norris v. Attorney General* [1984] IR 36, cited in *Norris v. Ireland*, para. 24.

28 The Preamble starts: 'In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Éire [Ireland], Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ'.

33. However, the Strasbourg Court disagreed that religious views justify the criminalisation of homosexuality and repeated its earlier finding in *Dudgeon* (as quoted above).²⁹ The Strasbourg Court acknowledged that the Irish state has a 'margin of appreciation' on moral matters, so that its unique national culture and traditions might lead to a different result on the proportionality approach. Yet, even with Ireland's unusually religious Constitution, its margin of appreciation could not justify the state's interference with Mr Norris's privacy rights.³⁰ The criminalisation of homosexuality was found to be a disproportionate measure, notwithstanding religious or moral views in society. Ireland's criminalising laws were repealed after Strasbourg's judgment.

34. With regards to the second category of decisions, the Strasbourg Court has produced rich case law delineating the right to freedom of religion, protected under Article 9 of the ECHR. Some involve LGBT rights. These Article 9 cases again apply a proportionality approach.

35. The case of *Eweida v. the United Kingdom*³¹ concerned two applicants relying on Article 9 in circumstances that intersected with LGBT rights. The applicants included a registrar of births, deaths and marriages, and a relationship counsellor. They had been disciplined after refusing, respectively, to preside over civil partnership ceremonies and to counsel same-sex couples, as they believed these tasks would condone homosexuality in contravention of their Christian beliefs. The applicants contended that their refusal to carry out these tasks was a manifestation of their religious

beliefs. Taking a proportionality approach, the Strasbourg Court found against these two applicants. In particular, the majority ruled that a reasonable balance had been struck between the employers' right to secure the rights of others (here LGBT users of their services) and the applicants' right to manifest their religion.³²

36. Other decisions on Article 9, which do not concern LGBT rights at all, further show how the right to manifest religion is delineated. For example, in *Eweida*, there were two other applicants in addition to the two applicants referred to above. They both complained of a violation of their right to religious freedom by their respective employers disallowing them from wearing Christian crucifixes around their necks while at work. One applicant, a British Airways flight attendant, succeeded in her allegation that her right to manifest her religion had been violated. The Strasbourg Court held that the proportionality test required the state to accommodate her outward expression of religion in the workplace.³³ The second applicant, a nurse at a state hospital, did not succeed. The court held that the ban on her crucifix was proportionate, as the ban pursued health and safety on a hospital ward, which was a concern of greater importance (due to risk of injury if patients pulled the crucifix or infection if it came into contact with an open wound).³⁴ For one of these applicants, the proportionality test required that she be allowed to wear a crucifix at work; for the other it required that she refrain from wearing it. The factual circumstances of each applicant, including the potential for harm to others, dictated the different outcomes.

37. In another case, *Kokkinakis v. Greece* in 1993, the Strasbourg Court held that Greece violated Article 9 by convicting an elderly Jehovah's Witness couple for 'illegal proselytising'. The Court ruled that in doing so the Greek Government had interfered with their right to manifest religion.³⁵ The right to freedom of religion allows proselytising, but, as discussed below, there are limits to what can be preached so as to uphold the rights of others.

38. Turning to another area of case law on Article 9, the state has a positive obligation to protect those with religious beliefs from conduct that is an insult to their religion. One might argue that this positive obligation requires the state to shield people with a particular religious view from homosexuality. But this would be incorrect; the positive obligation is narrow. For instance, in 1991 a complaint was made against the UK alleging that it failed to protect the quiet enjoyment of Islamic religious belief. The applicants alleged that Article 9 of the ECHR required a positive act by the authorities to ban Salman Rushdie's book, *Satanic Verses*, and to prosecute Mr Rushdie for blasphemy. The case did not proceed past the Commission stage, which rejected the application, as freedom of religion was held not to include a right not to be offended.³⁶

39. Similarly, in a case against Poland concerning a picture of Jesus Christ and the Virgin Mary wearing gas masks, the complaint was rejected. The Commission held that 'members of a religious community must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith'.³⁷ However, when the work in question is not viewed as having broader societal value, greater sympathy is given to the religious applicant. In 1994, the Strasbourg Court upheld Austria's seizure and ban of a film that presented the Christian God as old, infirm and ineffective, Jesus Christ as a 'mummy's boy' of low intelligence and the Virgin Mary as an 'unprincipled wanton'. The Austrian authorities seized the film on the ground that it insulted Christians. Albeit in an authority that is now two decades old, the Strasbourg Court held that the ban did not violate the filmmakers' right to freedom of expression, as the film was 'gratuitously offensive' and the authorities were right to act:

*to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner.*³⁸

²⁹ *Norris v. Ireland* (1988), 13 EHRR 186, para. 46.

³⁰ *Ibid*, para. 45.

³¹ *Case of Eweida and Others v. the United Kingdom* [2013] Nos. 48420/10, 59842/10, 51671/10 and 36516/10.

³² *Ibid*, paras. 106 and 109.

³³ *Ibid*, para. 95.

³⁴ *Ibid*, paras. 99 to 101.

³⁵ *Kokkinakis*, at n. 13 above.

³⁶ *Choudhury v. the United Kingdom*, App. no. 17439/90, 5 March 1991.

³⁷ *Dubowska and Skup v. Poland*, App. nos. 33490/96 and 34055/96, 18 April 1997.

³⁸ *Otto Preminger Institut v. Austria*, App no. 13470/87, 20 September 1994, para. 49.

40. It should also be noted that the right to freedom of religion protected under Article 9 overlaps with the right to freedom of expression protected under Article 10. The proportionality approach also applies. In that regard, the Strasbourg Court has assessed the right to freedom of expression against the interests of LGBT people. The court's approach informs how it will deal with the manifestation of religion when it potentially conflicts with LGBT rights. In *Vejdeland v. Sweden*, the applicants challenged their convictions and (non-custodial) sentences for 'agitation against a group of persons with allusion to sexual orientation'. They were convicted for posting leaflets in school lockers headed 'Homosexual Propaganda', which, among other things, claimed that homosexuals are responsible for HIV and wish to legalise paedophilia. The applicants challenged their convictions on the ground that their right to free expression was violated. The Strasbourg Court found no violation. The court held that the leaflets amounted to 'serious and prejudicial allegations' and that:

[[]nciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner... In this regard, the Court stresses that discrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour".³⁹

Inter-American System

41. There has been no decriminalisation challenge heard in the Inter-American system, but it has produced case law to define the scope of the right to manifest religion. The jurisprudence of the Inter-American system on Article 12 of the American Convention mirrors that of the Human Rights Committee, African Commission and Strasbourg Court. It includes a number of cases concerning Jehovah's Witnesses, and legitimate limitations on the right to freedom of religion. In one case, *Jehovah's Witnesses v. Argentina*, the Inter-American Commission on Human Rights found that prosecuting members of that religion for refusing to swear oaths of allegiance, recognise the state and its symbols and to serve in the military violated Article 12.⁴⁰



Applying the proportionality test to the criminalisation of homosexuality and religious belief

42. As discussed above, decisions concerning the criminalisation of homosexuality and decisions concerning the delineation of the right to manifest religion all apply a proportionality test.
43. On the first category of cases, the decisions of the Human Rights Committee and the Strasbourg Court clearly show that it is wholly disproportionate for religious or moral beliefs to translate into the criminalisation of homosexuality. In each decision, criminalisation was found to be an unreasonable interference with privacy rights. Indeed, such laws undermine the idea of individual private autonomy that is an important component of the right to freedom of religion itself. This conclusion applied just as much to Ireland – with religion entrenched into its constitution – as to more secular Australia. Under international law, religious or moral beliefs simply cannot justify the criminalisation of consensual same-sex intimacy.
44. On the second category of cases, international law is consistent in applying a proportionality test when assessing how far religious belief can reach into the public domain. The proportionality approach is consistently used across all three regional

human rights commissions and courts (Africa, the Americas and Europe) and at the international level at the Human Rights Committee. As such, even in courts that have not heard a decriminalisation challenge, we can nonetheless conclude that the criminalisation of homosexuality breaches the international law applicable; criminalisation cannot meet the proportionality test. People of all religions are free to manifest their religious belief however they please, so long as the manifestation does not disproportionately affect others in society.

45. Some of the cases cited above exist at the borderline of how religious belief may manifest legitimately in society: a crucifix may be worn, but not if it causes risk to others; a safety helmet must be worn as it protects the individual himself; beliefs can be evangelised, but not if they incite hatred or exploit others; the conduct of others can be offensive towards religion, but not gratuitously so.

³⁹ *Vejdeland v. Sweden*, Application no. 1813/07, para. 55.

⁴⁰ *Jehovah's Witnesses v. Argentina* [1978] IACHR Case 2137.

46. Other cases are more clear-cut: religious-based law may never be imposed on anyone to restrict their adult, consensual behaviour; the state has only a narrow positive obligation to protect against conduct offensive to religious belief; and religious or moral beliefs rarely justify the infringement of others' rights. Religious freedom itself relies on respect for private autonomy and cannot therefore be used to justify destroying the autonomy and privacy of LGBT individuals.

47. The proportionality test falls firmly on the side of decriminalisation and equality for LGBT people. LGBT people having the freedom to live openly and equally may offend some with extreme homophobic views, but it is inconceivable that their doing so is 'gratuitously offensive' so as to warrant the curtailment of their rights by their arrest and imprisonment. Further, as a matter of established human rights law, even in countries where laws are influenced by religion, these laws cannot be imposed on society at large. Even, if it could ever be evidenced that religious law requires adherents not to engage in same-sex intimacy, this cannot be imposed on non-adherents. Even for willing adherents to the religion, the imposition of a jail sentence or capital punishment can never be proportionate.

National case law

48. The paragraphs above demonstrate the nature of the international law obligations that states have taken on between themselves regarding the treatment of people in their jurisdictions, and therein how religious rights and LGBT rights are to be upheld. The same reasoning has been applied in domestic courts when applying domestic law.

South Africa

49. In 1998 in the case of *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, the Constitutional Court of South Africa found the offence of sodomy to be inconsistent with the country's constitutional rights to equality, dignity and privacy. In doing so, the court drew a sharp distinction between the right of people to hold religious beliefs and the ability of the state to impose these beliefs on the whole of society. The court also pointed out that:

“ Such [religious] views, however honestly and sincerely held, cannot influence what the Constitution dictates in regard to discrimination on the grounds of sexual orientation.

...Yet, while the Constitution protects the right of people to continue with such beliefs, it does not allow the state to turn these beliefs – even in moderate or gentle versions – into dogma imposed on the whole of society.⁴¹

41 *National Coalition*, at n. 1 above, paras. 38 and 137.

50. In 2008, in *Strydom v. Nederduitse Gereformeerde Gemeente Moreleta Park*,⁴² a religious school argued before the Equality Court of South Africa that its constitutional right to freedom of religion trumped anti-discrimination laws, so it was free to fire a gay music teacher. The court distinguished between the right to hold religious ideas 'hostile to homosexual relationships', which was protected under the constitution, and the right to apply those beliefs in employment practices, which was not. In drawing a divide between 'external' and 'internal' freedom of religion, the court held that the school had discriminated against the teacher when it terminated his employment contract.

Kenya

51. In 2015, the High Court of Kenya gave judgment in a case concerning the registration of an LGBT non-governmental organisation. The court held that the national NGO board was wrong to refuse the registration, as this impinged on the freedom of association of LGBT people. The Kenyan High Court, like courts around the world, used a proportionality approach and held that religious beliefs cannot justify the curtailment of human rights for LGBT people:

“ The Board and the Attorney General rely on their moral convictions and what they postulate to be the moral convictions of most Kenyans. They also rely on verses from the Bible, the Quran and various studies which they submit have been undertaken regarding homosexuality.

We must emphasize, however, that no matter how strongly held moral and religious beliefs may be, they cannot be a basis for limiting rights: they are not laws as contemplated by the Constitution. Thus, neither the Penal Code, whose provisions we have set out above, which is the only legislation that the respondents rely on, nor the religious tenets that the Board cites, meet the constitutional test for limitation of rights.⁴³

United Kingdom

52. In 2012 in the case *Bull & Bull v. Hall & Preddy*, the English Court of Appeal reviewed a case regarding a same-sex couple who were refused accommodation at a hotel owned by a Christian family due to the owners' religious belief. The court held that restricting the hotel owners' right to manifest their religion was 'necessary and proportionate' to protect others against discrimination. In reaching this decision, the Court affirmed that:

“ No individual is entitled to manifest his religious belief when and where he chooses so as to obtain exemption in all circumstances from some legislative provisions of general application.⁴⁴

42 *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* [2008] 30 ILJ 868 (Equality Court).

43 *Eric Gitari v. NGO Board & 4 others*, [2015], Petition 440 of 2013, The High Court of Kenya at Nairobi, para. 121.

44 *Bull & Bull v. Hall & Preddy* [2012] EWCA Civ 83, para. 65.

United States

53. When the US Supreme Court decriminalised homosexuality at a federal level in 2003, it considered whether religious belief should influence its decision. It concluded that its role is not to apply its own moral code or that of society, but to uphold the rights of all:

The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code'.⁴⁵

54. This decision was in keeping with established US case law on the role of religion in legislation. For example, in *Stone v. Graham*, the US Supreme Court considered a Kentucky statute that required a copy of the Ten Commandments to be displayed in all public classrooms within the state. The court ruled that the statute was unconstitutional because it lacked a non-religious legislative purpose, in violation of the Establishment Clause of the First Amendment to the US Constitution.⁴⁶

55. In 1990, the US Supreme Court held in the matter of *Employment Division, Oregon Department of Human Resources v. Smith* that the 'free exercise of religion' clause in the First Amendment to the US Constitution does not excuse an individual from the obligation to comply with a law of general applicability that incidentally forbids or requires the performance of an act that his religious beliefs require or forbid.⁴⁷

This decision was subsequently followed by the Supreme Court of California in 2008 in the case of *North Coast Women's Care Medical Group v. San Diego County*. In that case, the court rejected an argument advanced by two doctors that they could lawfully refuse to perform an intrauterine insemination for a lesbian woman due to their religious objections and in breach of non-discrimination laws.⁴⁸

56. At present, there is some tension in the United States between LGBT rights and the rights of small businesses with religious values. In *Burwell v. Hobby Lobby* in 2014, the US Supreme Court held that 'closely held corporations'⁴⁹ could be exempted from a law to which its owners objected on religious grounds. In the circumstances of the case, this meant that the Hobby Lobby store could not be forced to pay for insurance coverage for contraception for employees. In reaching this ruling, the Court relied on the *Religious Freedom*

Restoration Act 1993, a federal law with the aim of 'ensur[ing] that interests in religious freedom are protected'. The more recent case of *Obergefell v. Hodges*, of June 2015, held that states must not discriminate against same-sex couples.⁵⁰ Commentators predict that in light of these two judgments, the US Supreme Court will have to delineate more precisely how religious freedom and LGBT rights are to be given effect in a proportionate manner.⁵¹

Canada

57. In *Chamberlain v. Surrey School District* of 2002, the Supreme Court of Canada considered whether a public school board could rely on religious objections of parents when it banned books and other resource materials that made reference to same-sex families. The Supreme Court held that the school board had failed to conform to their secular requirements and that its decision was therefore unreasonable.⁵²

Religion and government policy

58. Only a handful of disputes concerning the intersection of religion and LGBT rights find their way to courtrooms. However, all three arms of government should follow the sentiments expressed above regarding proportionality, i.e. this approach applies to the executive and the legislature when passing laws and forming policy just as much as it applies to the judiciary when making court judgments. Unfortunately, in some countries government policy is often disproportionate in terms of the influence given to religious groups, to the detriment of LGBT people. The examples of Ireland and the Caribbean region are briefly discussed below.

59. Ireland's 1937 Constitution instilled into the nation's legal framework the 'special position' of the Catholic Church. This provision was then removed in 1973, albeit the Preamble's reference to Christianity remains (see footnote 29 above). As discussed above, a judgment against Ireland at the Strasbourg Court held that criminalisation is not justified, notwithstanding the religious Preamble to the Irish Constitution. Another briefing note in this series, *Criminalising Homosexuality and Democratic Values*, discusses Ireland in further detail.

⁴⁵ *Lawrence v. Texas* 539 US 558 (2003), p. 10.

⁴⁶ *Stone v. Graham*, 449 US 39 (1980).

⁴⁷ *Employment Division, Department of Human Resources of Oregon v. Smith* [1990] 494 U.S. 872.

⁴⁸ *North Coast Women's Care Medical Group v San Diego County* [2008] Ct.App. 4/1 D045438.

⁴⁹ A closely held corporation is defined by the US Internal Revenue Service as one which 'has more than 50% of the value of its outstanding stock owned (directly or indirectly) by 5 or fewer individuals at any time during the last half of the tax year and is not a personal service corporation'.

⁵⁰ *Obergefell v. Hodges* 576 (2015).

⁵¹ For instance, see: Lupu, I. C., *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, (2015) Alabama Civil Rights & Civil Liberties Law Review, Vol. 7, no. 1.

⁵² *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86.

60. However, the link between religion and the state need not be constitutional or formal for religion to have a disproportionate effect on government policy. LGBT activists in a number of Caribbean nations have complained that churches hinder their governments' ability to pass legislation that protects the basic rights of LGBT people. For instance, in January 2001 Guyana's Parliament unanimously passed an amendment to the Guyanese Constitution to include sexual orientation as a prohibited ground of discrimination. However, after pressure was applied by religious groups, in an unprecedented move President Bharrat Jagdeo refused to sign the amending Bill into law, causing a constitutional crisis in Guyana.⁵³ Grenadian LGBT activist Richie Maitland cites this example from Guyana as one of many instances of the 'religious involvement in public policy in the Caribbean [that] often operates in ways that are not only harmful in their own right[s], but which fundamentally compromise "democracy"'.⁵⁴

61. Belizean Prime Minister Dean Barrow has expressed concern about the influence of churches on governmental policy towards LGBT people, in particular foreign evangelical churches. Prime Minister Barrow has stood firm in articulating that constitutional rights apply to all, including the LGBT population. He said in September 2013 during the annual independence address:

“ *A version of the culture wars has come to our country and it is souring the harmony and disrupting the rhythm of Belizean life. The golden knot that ties us all together, is in danger of coming loose ... [W]e cannot afford for Government and the Churches to be at odds. The filigree chain that links the two is a proud part of the national ornamentation, and it cannot be allowed to break*

*Government will therefore fully respect the right of the churches to propagate their understanding of the morality, or immorality, of homosexuality. What government cannot do is to shirk its duty to ensure that all citizens, without exception, enjoy the full protection of the law.*⁵⁵

When manifestation of belief harms others: protecting LGBT people from religious-inspired hatred

62. It is clear from the international and domestic law discussed above that the right to manifest religion, correctly understood, does not include the propagation of homophobic views. The state has a positive obligation to step in to protect LGBT people if a purported manifestation of religion causes harm to LGBT people. Additionally, it is not legitimate for a religious belief to translate into government policy that harms LGBT people, or restricts their freedom or physical integrity via criminal punishments. Where the state is complying with international law and human rights norms, it should not be permissible for LGBT people to be targeted on religious grounds by state or non-state actors. If the state is complying with its obligations, the opportunities for religious belief to manifest as aggressive homophobia should be few and far between.

63. However, Belizean Prime Minister Barrow's remarks above highlight a current phenomenon in some countries, whereby evangelical Christian groups (particularly from the United States) establish a presence and stoke homophobia. Much has been written about aggressive anti-LGBT sermons of certain US evangelicals. In a study entitled 'Colonizing African Values: How the US Christian Right is Transforming Sexual Politics in Africa', seven African countries were analysed by Dr Kapya Kaoma,⁵⁶ an Anglican priest from Zambia. Dr Kaoma stated that right-wing Christian groups wrongly paint homosexuality as 'un-African' and imposed by the West, whereas in reality it was not homosexuality but the Bible that arrived with colonialism. Dr Kaoma told *The Guardian* newspaper that:

“ *[The US evangelicals] seem to know they are losing the battle in the US, so the best they can do is to be seen to be winning somewhere... This gives them a reason to be fundraising in the US. Africa is a pawn in the battle they are fighting at home.*⁵⁷

⁵³ Denny, P., 'Comprehensive Gay Rights Bill at Risk', *Stabroek News*, 30 January 2001. Available at: <http://legalminds.lp.findlaw.com/list/queerlaw-edit/msg03708.html>

⁵⁴ Maitland, R., 'On Religion and Rights in the Caribbean', *Groundation Grenada*. Available at: <http://groundationgrenada.com/2013/10/07/on-religion-and-rights-in-the-caribbean/>.

⁵⁵ Reported by Pan Caribbean Partnership Against HIV&AIDS. Available at: <http://www.pancap.org/en/caribbean-news/2035-belize-pm-independence-speech-supports-equality-for-all-citizens.html>

⁵⁶ Available at: <http://www.politicalresearch.org/2009/12/01/globalizing-the-culture-wars-u-s-conservatives-african-churches-homophobia/#sthash.vQ0ZsyFu.dpbs>

⁵⁷ Smith, D., 'US evangelical Christians accused of promoting homophobia in Africa', *The Guardian*, 24 July 2014. Available at: <http://www.theguardian.com/world/2012/jul/24/evangelical-christians-homophobia-africa>

64. If such homophobia were propagated in their home countries, the state would act to limit their supposed manifestation of religion to prevent harm to others. These evangelists are violating international human rights norms. Compounding the conduct of evangelicals, political leaders in some places ignore their obligations to their LGBT citizens. As Dr Kaoma says:

“ **The presidents of Zambia, Zimbabwe, and Uganda themselves accused opposition parties of promoting homosexuality to undercut their influence and cater to powerful African religious conservatives.**⁵⁸

65. To give some examples, in 2013 a documentary entitled *'The Abominable Crime'* drew a link between evangelism and the increased enforcement in the 1980s and 1990s of Jamaica's laws that criminalise homosexuality.⁵⁹ Separately, the influence of US Pastor Scott Lively in stoking homophobia in Uganda has been reported widely.⁶⁰

66. Notwithstanding the lack of legal protection and the complicity of politicians in certain countries, evangelical preachers are not immune from legal repercussions. Pastor Lively's experience provides a cautionary tale to those who export homophobia abroad. He is currently the subject of an action in the US courts brought by the Ugandan human rights organisation Sexual

Minorities Uganda (SMUG). The claim was made under the US *Alien Torts Statute*, which allows US citizens to be sued in their home courts for torts 'committed in violation of the law of nations or a treaty of the United States'. The long arm of American law has allowed Pastor Lively to be pursued for compensation for his alleged perpetration of crimes against humanity against LGBT Ugandans.⁶¹ Additionally, during the course of proceedings it was discovered that a Ugandan Pastor known for his homophobic sermons, Martin Ssempe, is a dual US citizen and thus subject to US law. The organisation bringing the case on behalf of SMUG, the Center for Constitutional Rights, has requested that the US courts subpoena Pastor Ssempe:

*The Center for Constitutional Rights has learned that Martin Ssempe, a leading and notorious figure in the persecution of the LGBTI community in Uganda, is in fact a U.S. citizen. Ssempe is not himself a target of the lawsuit, but as a close ally of Scott Lively he has intimate knowledge of key facts in the case. As a witness who is a U.S. citizen, he is subject to the jurisdiction of the U.S. court presiding over the case brought on behalf of Sexual Minorities Uganda against Lively for the role he has played in the persecution of LGBTI people and organizations in Uganda.*⁶²

58 *Ibid.*

59 Ebony, 'The Abominable Crime Spotlights Homophobia in Jamaica', 18 February 2015. Available at: <http://www.ebony.com/entertainment-culture/the-abominable-crime-spotlights-homophobia-in-jamaica-999#axzz3pyup142x>

60 For instance, see Freeman, C., 'Have US evangelists helped to inspire Uganda's anti-gay laws?', *The Telegraph* online blog, 26 February 2014. Available at: <http://blogs.telegraph.co.uk/news/colinfreeman/100261161/have-us-evangelists-helped-to-inspire-ugandas-anti-gay-laws/>

61 For more information, see: Center for Constitutional Rights, 'Active Cases: Sexual Minorities Uganda v. Scott Lively': <https://ccrjustice.org/home/what-we-do/our-cases/sexual-minorities-uganda-v-scott-lively>

62 See: <https://ccrjustice.org/home/press-center/press-releases/anti-gay-ugandan-extremist-martin-ssempe-us-citizen-testimony>

Statements from religious leaders on LGBT matters

67. Fortunately, offsetting each homophobic remark supposedly based on religious principles, there is a statement from a religious leader that encourages compassion towards and the inclusion of LGBT people. Importantly, senior religious leaders are providing these positive comments, whereas the homophobia by-and-large originates from minor figures who can now use the internet and social media to propagate their views to a wider audience. Religion is part of the solution to homophobia, as can be seen by the statements below from religious leaders across different faiths and regions.

The Anglican Communion

68. In January 2016, the Primates of the global Anglican Communion issued a joint communiqué agreed at their 2016 global meeting. In it they unequivocally denounced laws that criminalise homosexuality (emphasis added):

“ **The Primates condemned homophobic prejudice and violence and resolved to work together to offer pastoral care and loving service irrespective of sexual orientation. This conviction arises out of our discipleship of Jesus Christ. The Primates reaffirmed their rejection of criminal sanctions against same-sex attracted people.**⁶³

The Primates recognise that the Christian church and within it the Anglican Communion have often acted in a way towards people on the basis of their sexual orientation that has caused deep hurt.

63 Primates 2016, Walking Together in the Service of God in the World, 15 January 2016. Available at: <http://www.primates2016.org/articles/2016/01/15/communique-primates/>

64 As reported by, Sherwood, H., 'Justin Welby says sorry to LGBTI community for hurt and pain caused by Anglican church', *The Guardian*, 15 January 2016. Available at: <http://www.theguardian.com/world/2016/jan/15/justin-welby-says-sorry-to-lgbti-community-for-hurt-caused-by-church>.

65 *Report of the Committee of Homosexual Offences and Prostitution*, September 1957, p. 38.

Where this has happened they express their profound sorrow and affirm again that God's love for every human being is the same, regardless of their sexuality, and that the church should never by its actions give any other impression.

69. In his closing press conference at the 2016 global meeting, the Archbishop of Canterbury, Justin Welby, added:

“ **It's a constant source of deep sadness that people are persecuted for their sexuality. I want to take this opportunity personally to say how sorry I am for the hurt and pain, in the past and present, that the church has caused and the love that we at times completely failed to show, and still do, in many parts of the world including in this country**⁶⁴

70. Long before the 2016 global Anglican Communion, the Church of England was instrumental in the decriminalisation of homosexuality in England & Wales. The fact that religious belief cannot justify criminalisation was articulated in the Wolfenden Report of 1957 by the then-Archbishop of Canterbury, Dr Geoffrey Fisher, who stated:

“ **There is a sacred realm of privacy... into which the law, generally speaking, must not intrude. This is a principle of the utmost importance for the preservation of human freedom, self-respect, and responsibility.**⁶⁵

71. The UK Parliament implemented the Wolfenden Report's recommendations in England & Wales when partial decriminalisation was brought about by legislative change in the *Sexual Offences Act, 1967*.

72. Prior to South Africa adopting a post-apartheid constitution and it decriminalising homosexuality, Anglican Archbishop of Cape Town, Desmond Tutu, sent a letter to the Constitutional Assembly urging it to include a sexual orientation clause in the final draft of the constitution. In the letter, Tutu argued that:

“It would be a sad day for South Africa if any individual or group of law-abiding citizens in South Africa were to find that the Final Constitution did not guarantee their fundamental right to a sexual life, whether heterosexual or homosexual.”⁶⁶

73. Archbishop Tutu has continued to challenge stigma and discrimination on the basis of sexual orientation, calling repeatedly for homosexuality to be decriminalised elsewhere. Some selected quotes from Archbishop Tutu are set out below:

“It isn't that it's questionable when you speak up for the right of people with different sexual orientation. People took some part of us [during apartheid] and used it to discriminate against us. In our case, it was our ethnicity; it's precisely the same thing for sexual orientation. People are killed because they're gay....”⁶⁷

I would refuse to go to a homophobic Heaven.... I would not worship a God who is homophobic.⁶⁸

All over the world, LGBT people are persecuted. They face violence, torture and criminal sanctions because of how they live and who they love. We make them doubt that they too are children of God – and this must be nearly the ultimate blasphemy.⁶⁹

74. In December 2014, an Anglican Minister in Jamaica, Sean Major-Campbell, invited members of Kingston's LGBT community to attend his service to commemorate Human Rights Day during which he washed the feet of two lesbian women. After a backlash from his congregation, he commented:

“It is quite understandable that some persons will have some difficulty because human sexuality is a difficult subject and, generally speaking, in our country and culture, we really do not have enough safe spaces for people to explore the subject, without feeling safe or judged, and that is true even of the Church itself.

The truth is the call to love is not just about your close friends and close family and those it is easy to love; the call transcends those we are not so comfortable with, as well.”⁷⁰

66 Tutu, D., 'Re: Retention of the Sexual Orientation Clause in the Bill of Rights' (2 June 1995), reproduced in Hoad et al, above n. 8. 222.

67 Pulliam Bailey, S., 'Desmond Tutu Talks Gay Rights, Middle East and Pope Francis', *Charisma News*, 16 September 2013. Available at: <http://www.charismanews.com/world/41002-desmond-tutu-talks-gay-rights-middle-east-and-pope-francis>

68 Speaking at a UN event in July 2013, as reported by *BBC News*: <http://www.bbc.co.uk/news/world-africa-23464694>

69 Statement at UN High Level Panel on Ending Criminal Laws and Violence, September 2010, Available at: <http://geneva.usmission.gov/wp-content/uploads/2010/09/Tutu.pdf>

70 Reported by Duffy, N., 'Jamaican priest washes the feet of lesbians and calls for 'respect' for human rights' *Pink News*, 10 December 2014. Available at: <http://www.pinknews.co.uk/2014/12/10/jamaican-priest-washes-the-feet-of-lesbians-and-calls-for-respect-for-human-rights/>

75. In May 2012, the Archbishop of York, John Sentamu, stated on his website:

“There is no question about the equality of all human beings, “heterosexual” or “homosexual”. None of us is of greater value than anyone else in the eyes of the God who made us and loves us. At the deepest ontological level, therefore, there is no such thing as “a” homosexual or “a” heterosexual; there are human beings, male and female, called to redeemed humanity in Christ, endowed with a complex variety of emotional potentialities and threatened by a complex variety of forms of alienation.”⁷¹

76. In a lecture to the World Council of Churches Ecumenical Centre in February 2012, the then-Archbishop of Canterbury, Dr Rowan Williams, stated that:

“The existence of laws discriminating against sexual minorities as such can have no justification in societies that are serious about law itself. Such laws reflect a refusal to recognize that minorities belong, and they are indeed directly comparable to racial discrimination.”⁷²

77. Bishop Christopher Ssenyonjo, the former Bishop of West Buganda in Uganda, called for the global decriminalisation of homosexuality during an informal interactive panel discussion at the United Nations in New York in April 2011:

“The criminalisation of homosexuality remains the most significant barrier that needs to be dismantled to reduce the spread of AIDS... We need to ask if our laws or beliefs help or prevent the spread of HIV and hinder or support families caring for loved ones. Over 80 countries still criminalise homosexuality and see it as a crime against God and nature. Denying people their humanity puts us all at risk because AIDS spreads fast in the darkness of ignorance.”⁷³

78. In May 2010, the Anglican Bishops of Southern Africa issued a joint statement opposing the sentencing of two gay men in Malawi to 14 years' imprisonment for 'unnatural acts and gross indecency'. They denounced the sentence as a 'gross violation of human rights' inconsistent with the teachings of the Scriptures 'that all human beings are created in the image of God and therefore must be treated with respect and accorded human dignity' adding:

“Though there is a breadth of theological views among us on matters of human sexuality, we are united in opposing the criminalisation of homosexual people... [we] appeal to law-makers everywhere to defend the rights of these minorities.”⁷⁴

71 Available at: <http://www.archbishopofyork.org/articles.php/2481/a-response-on-marriage-and-civil-partnerships>

72 Archbishop of Canterbury, Dr Rowan Williams, 'Human Rights and Religious Faith', World Council of Churches Ecumenical Centre in Geneva, 28 February 2012. Available at: <http://rowanwilliams.archbishopofcanterbury.org/articles.php/2370/human-rights-and-religious-faith>

73 *San Diego Gay & Lesbian News*, 'Bishop Christopher Senyonjo [sic] of Uganda speaks at UN gathering today', 8 April 2011. Available at: <http://sdgln.com/news/2011/04/08/bishop-christopher-senyonjo-uganda-speaks-un-gathering#sthash.UK5Lbv3E.dpuf>

74 Statement by the Anglican Bishops in Southern Africa, 'The Imprisonment of Stephen Monjeza and Tiwonge Chimbalanga', 26 May 2010. Available at: <http://archbishop.anglicanchurchsa.org/2010/05/imprisonment-of-stephen-monjeza-and-tiwonge-chimbalanga.html>

The Catholic Church ✝

79. Pope Francis told a former student in 2010 that *'in my pastoral work there is no place for homophobia'*⁷⁵ and declared in an interview in 2013 that:

“ If a homosexual person is of good will and is in search of God, I am no one to judge ... Religion has the right to express its opinion in the service of the people, but God in creation has set us free: it is not possible to interfere spiritually in the life of a person.⁷⁶

80. In March 2011, Archbishop Silvano M. Tomasi, Permanent Representative of the Holy See to the United Nations, delivered an address at the 16th Session of the UN Human Rights Council, which met to consider the topic of sexual orientation. He stated that:

“ [The Vatican affirms] the inherent dignity and worth of all human beings... A state should never punish a person or deprive a person of the enjoyment of any human right based just on the person's feelings and thoughts, including sexual thoughts and feelings.⁷⁷

79. In April 2014, Peter Turkson, a Vatican Cardinal and leader of the Pontifical Council for Justice and Peace in Ghana, criticised Uganda's anti-gay laws, stating that *'homosexuals are not criminals'*.⁷⁸

Other Christian denominations and cross-denominational statements

81. In April 2014, senior pastor of the Riruta United Methodist Church in Kenya, Pastor John Makokha, invited the LGBT community to join his church stating:

“ Gays and lesbians are children of God and created in his image... they should be accepted and affirmed as such. They deserve a place to worship and serve God.⁷⁹

82. Following recent litigation in Jamaica challenging laws criminalising homosexuality where a number of Christian groups have intervened to oppose the claim, senior Christian theologians wrote an editorial reminding local Christians of the need to respect the secular nature of Jamaican society:

“ The homosexual does not cease being a human person by his/her homosexuality, nor does the adulterer by his adultery, nor the liar by her lies. Holding firmly to the view that God's normative sexual standard is one man with one woman in the context of marriage does not entail 'looking down on' or treating as 'less than' those who are sexually contrary to God's norm.⁸⁰

83. Many other Christian institutions share this position. In 1972, the United Methodist Church formally resolved that, notwithstanding the attitude toward homosexuality found in the scriptures, gays and lesbians were entitled to full and equal civil rights.⁸¹ In 1987, the Unitarian Universalist General Assembly passed a resolution calling for the repeal of all laws governing private sexual behaviour between consenting adults.⁸² Likewise, the Quakers (Society of Religious Friends) have long taken the view that discrimination against LGBT people is incompatible with Christian values:

“ We affirm the love of God for all people, whatever their sexual orientation, and our conviction that sexuality is an important part of human beings as created by God, so that to reject people on the grounds of their sexual behaviour is a denial of God's creation.⁸³

Islam ☪

84. Several progressive Islamic organisations have distinguished between the Quran's apparent injunction against homosexuality and the religious implications of laws criminalising homosexuality. For example, the Al-Fatiha Foundation and the Progressive Muslim Union of North America both argue that these laws are incompatible with the values of tolerance and love espoused by Mohammed.⁸⁴ In March 2008,

Siti Musdah Mulia, Islamic scholar and Chair of the Indonesian Conference of Religions and Peace stated:

“ Homosexuality is from God and should be considered natural... In the eyes of God, people are valued based on their piety. The essence of the religion (Islam) is to humanise humans, respect and dignify them.⁸⁵

Judaism ✡

85. Three of the four major Jewish traditions openly support decriminalisation. Reform Judaism was the first to adopt this position. As early as 1965, the Women of Reform Judaism passed a resolution calling for decriminalisation of homosexuality, and twelve years later the Union for Reform Judaism and the Central Conference of American Rabbis (the Reform movement's rabbinical council) passed resolutions urging governments to decriminalise homosexuality.⁸⁶ According to Reconstructionist Judaism, discrimination against gays and lesbians constitutes a violation of Jewish values, including justice, human dignity, inclusivity and caring for those who need protection.⁸⁷

75 *The Guardian*, "'This is not like him': Kim Davis meeting shocks Pope Francis's gay ex-student", 4 October 2015. Available at: <http://www.theguardian.com/world/2015/oct/04/pope-francis-gay-former-student-shocked-kim-davis-meeting>

76 Spadaoro, A. S. J., 'A Big Heart Open to God: the Exclusive interview with Pope Francis', *America: The National Catholic Review*. Available at: <http://americamagazine.org/pope-interview>

77 Statement by Archbishop Silvano M. Tomasi, Permanent Representative of the Holy See to the United Nations in Geneva at the 16th Session of the Human Rights Council – General Debate Geneva, 22 March 2011. Available at: http://en.radiovaticana.va/news/2011/03/22/vatican_addresses_un_debate_on_sexual_orientation/en1-471925

78 Fox News, 'Vatican cardinal criticizes Uganda's anti-gay law but urges continued international aid', 8 April 2014. Available at: <http://www.foxnews.com/world/2014/03/04/vatican-cardinal-criticizes-uganda-anti-gay-law-but-urges-continued/>

79 Nzwilli, F., 'Amid widespread discrimination, he ministers to Nairobi's gays and lesbians', *The Washington Post*, 30 April 2014. Available at: http://www.washingtonpost.com/national/religion/amid-widespread-discrimination-he-ministers-to-nairobis-gays-and-lesbians/2014/04/30/961903b2-d08a-11e3-a714-be7e7f142085_story.html

80 Rev Dr Clinton Chisolm, 'A Radical Suggestion for Jamaican Christians', *The Gleaner*, 15 July 2013. Available at: <http://jamaica-gleaner.com/gleaner/20130715/cleisure/cleisure4.html>

81 Keyser, C., 'In the Aftermath of Atlanta', *Good News* (Summer, 1972) 38, 45.

82 General Assembly of the Unitarian Universalist Association, Business Resolution (1987).

83 Society of Religious Friends, Wandsworth Preparative Meeting, 1989.

84 Kincheloe, J. L., Steinberg, S. R. and Stonebanks, C. D., *Teaching Against Islamophobia*, (Peter Lang Publishing Inc, 2010), 192.

85 Khalik, A., 'Islam recognizes homosexuality', *The Jakarta Post*, 28 March 2008. Available at: <http://www.thejakartapost.com/news/2008/03/27/islam-039recognizes-homosexuality039.html>

86 Union for Reform Judaism (then Union of American Hebrew Congregations) 45th General Assembly, 'Rights of Homosexuals', 88th Annual Convention of the Central Conference of American Rabbis (November 1977).

87 Federation of Reconstructionist Congregations, Homosexuality and Judaism: *The Report of the Reconstructionist Commission on Homosexuality*, (1993).

86. While Conservative or Masorti Judaism had traditionally taken a more ambivalent stance towards homosexuality, in 1990 the Rabbinical Assembly, the leading international assembly for Conservative Jewish Rabbis, announced its support for 'full civil equality for gays and lesbians' and condemned all violence and discrimination against the LGBT community.⁸⁸ Though the Orthodox tradition has yet to adopt an official position on the issue, a number of Orthodox leaders argue that criminalisation of homosexuality is inconsistent with the Torah. In 2010, 104 Orthodox leaders released a joint statement that:

“ **Embarrassing, harassing or demeaning someone with a homosexual orientation or same-sex attraction is a violation of Torah prohibitions that embody the deepest values of Judaism.**⁸⁹

Eastern Religions

87. In contrast to Judaism, Christianity and Islam, homosexuality is rarely even discussed in the religions that originated in Asia. Confucian and Hindu texts are generally silent on the subject, while Buddhism does not treat homosexuality as sinful, a fact reflected in the laws of the pre-colonial Buddhist societies of Sri Lanka and Burma (Myanmar).⁹⁰

88. In May 2014, Ram Madhav, then spokesperson of Rashtriya Swayamsevak Sangh, India's leading Hindu think-tank was quoted as saying that, while he did not glorify certain kinds of behaviour covered by Section 377 of the Indian Penal Code ('unnatural offences') it was debatable whether they should be considered a crime. He reiterated the view in a conversation with India's leading daily newspaper.⁹¹

Academics' statements on religion and human rights

89. In addition to religious leaders speaking out on the need to respect and protect LGBT people, various religious leaders and scholars of religion have made the link between religion and human rights norms.

90. With reference to his own religious tradition, former Archbishop of Canterbury, Rowan Williams, wrote in 2012 on human rights and religious faith that:

“ **It is just as important for religious believers not to back away from the territory and treat rights language as an essentially secular matter, potentially at odds with the morality and spirituality of believers.**⁹²

88 Rabbinical Assembly, *Proceedings of the Rabbinical Assembly 52* (1990), 275.

89 Rabbi Yosef Adler et al., 'Statement of Principles on the Place of Jews with a Homosexual Orientation in Our Community' (July 2010). Available at: <http://statementofprinciplesnya.blogspot.co.uk/>

90 Asia-Pacific Coalition on Male Sexual Health and UNDP, 'Legal environments, human rights and HIV responses among men who have sex with men and transgender people in Asia and the Pacific: An agenda for action', (UNDP, 2010), 15.

91 Mukherji, A., 'Gay sex: RSS comment sparks hope on Section 377', *Times of India*, 28 May 2014. Available at: <http://timesofindia.indiatimes.com/india/Gay-sex-RSS-comment-sparks-hope-on-Section-377/articleshow/35644859.cms>

92 Archbishop Rowan Williams, 'Human Rights and Religious Faith', (28 February 2012). Available at: <http://rowanwilliams.archbishopofcanterbury.org/articles.php/2370/human-rights-and-religious-faith>

91. Abdullah Ah-Na'im, Professor of Law at Emory University, similarly argues in respect of Islam, that this approach is the only way of achieving the goal of the international human rights project:

“ **If the human rights [the Universal Declaration of Human Rights] proclaims are truly universal, they must be recognised as such by different societies as such on the basis of their own worldview, value system and practical experience.**⁹³

92. Charles Taylor, a scholar on Buddhism, has similarly demonstrated that Thailand's majority religion, Theravada Buddhism,

“ **provides an alternative way of linking together the agenda of human rights and that of democratic development' which 'provides a strong support for human rights legislation.**⁹⁴

Conclusion

93. International human rights law protects both the right to manifest religion and the rights of LGBT people. It is a misconception that religious belief and LGBT rights cannot exist in parallel, or that respecting one represents a setback for the other. Freedom of religion and LGBT rights can be complementary, rather than in conflict. In a recent address in New York, US President Barack Obama expressed a sensible and achievable aspiration:

“ **We affirm that we cherish our religious freedom and are profoundly respectful of religious traditions. But we also have to say clearly that our religious freedom doesn't grant us the freedom to deny our fellow Americans their constitutional rights.**⁹⁵

93 An-Na'im, A., 'The Universal Declaration as a Living and Evolving 'Common Standard of Achievement' in van der Heijden, B. and Tahzib-Lie, B. (eds), *Reflections on the universal declaration of human rights: a fiftieth anniversary anthology* (Brill, 1998) 45, 46.

94 Taylor, C., 'Towards a more inclusive human rights regime', in Bauer, J. and Bell, D. (eds), *The East Asian Challenge for Human Rights* (Cambridge University Press, 1999), 134

95 Fang, M., 'Obama Jabs GOP For Being Behind The Times On Marriage Equality', *Huffington Post*, 27 September 2015. Available at: http://www.huffingtonpost.com/entry/obama-mocks-gop-marriage-equality_56088e71e4b0af3706dcb44d

Appendix: English law and Sharia law influences in 78 jurisdictions that criminalise homosexuality⁹⁶

| Common law and mixed common law jurisdictions | | | Non-common law jurisdictions | | |
|---|---------------|--------------------------------|------------------------------|------------------------------|-----------------------|
| | Jurisdiction | System | | Jurisdiction | System |
| 1. | Antigua | Common law | 1. | Afghanistan | Mixed civil / Islamic |
| 2. | Bangladesh | Mixed common / Islamic | 2. | Algeria | Mixed civil / Islamic |
| 3. | Barbados | Common law | 3. | Angola** | Civil law |
| 4. | Belize | Common law | 4. | Bhutan** | Civil law |
| 5. | Botswana | Mixed civil/common | 5. | Burundi** | Civil law |
| 6. | Brunei | Mixed common / Islamic | 6. | Comoros | Mixed civil / Islamic |
| 7. | Cameroon | Mixed civil / common | 7. | Egypt | Mixed civil / Islamic |
| 8. | Cook Islands* | Common law | 8. | Eritrea | Mixed civil / Islamic |
| 9. | Dominica | Common law | 9. | Ethiopia** | Civil law |
| 10. | Gambia* | Mixed common / Islamic | 10. | Guinea | Civil law |
| 11. | Ghana | Common law | 11. | Indonesia (S. Sumatra, Aceh) | Civil law |
| 12. | Grenada | Common law | 12. | Iran | Islamic law |
| 13. | Guyana | Mixed civil / common | 13. | Iraq | Mixed civil / Islamic |
| 14. | India | Common law | 14. | Lebanon | Civil law |
| 15. | Jamaica | Common law | 15. | Mauritania | Mixed civil / Islamic |
| 16. | Kenya | Common law | 16. | Morocco | Mixed civil / Islamic |
| 17. | Kiribati | Common law | 17. | Saudi Arabia | Islamic law |
| 18. | Kuwait* | Mixed common / civil / Islamic | 18. | Senegal | Civil law |
| 19. | Liberia* | Common law | 19. | Somalia | Mixed civil / Islamic |
| 20. | Malawi | Common law | 20. | Togo** | Customary law |
| 21. | Malaysia | Mixed common / Islamic | 21. | Qatar | Mixed civil / Islamic |
| 22. | Maldives | Mixed common / Islamic | 22. | Syria | Mixed civil / Islamic |
| 23. | Mauritius | Mixed civil / common | 23. | Tunisia | Mixed civil / Islamic |
| 24. | Myanmar* | Common law | 24. | Turkmenistan | Mixed civil / Islamic |
| 25. | Namibia | Mixed civil / common | 25. | United Arab Emirates | Mixed civil / Islamic |

Appendix: English law and Sharia law influences in 78 jurisdictions that criminalise homosexuality⁹⁶

| Common law and mixed common law jurisdictions | | | Non-common law jurisdictions | | |
|---|------------------|---|------------------------------|--------------|-------------------|
| | Jurisdiction | System | | Jurisdiction | System |
| 26. | Nauru | Common law | 26. | Uzbekistan | Civil law |
| 27. | Nigeria | Mixed common / Islamic | 27. | Gaza | Unknown |
| 28. | Oman* | Mixed common / Islamic | 28. | Libya | Unknown / in flux |
| 29. | Pakistan | Mixed common / Islamic | | | |
| 30. | Papua New Guinea | Common law | | | |
| 31. | St Kitts | Common law | | | |
| 32. | St Lucia | Common law | | | |
| 33. | St Vincent | Common law | | | |
| 34. | Samoa | Common law | | | |
| 35. | Seychelles | Mixed civil / common | | | |
| 36. | Sierra Leone | Common law | | | |
| 37. | Singapore | Common law | | | |
| 38. | Solomon Islands | Common law | | | |
| 39. | South Sudan* | Unclear (if like Sudan, mixed civil / common) | | | |
| 40. | Sri Lanka | Mixed civil / common | | | |
| 41. | Sudan* | Mixed civil / common | | | |
| 42. | Swaziland | Mixed civil / common | | | |
| 43. | Tanzania | Common law | | | |
| 44. | Tonga | Common law | | | |
| 45. | Trinidad | Common law | | | |
| 46. | Tuvalu | Common law | | | |
| 47. | Uganda | Common law | | | |
| 48. | Yemen* | Mixed common / civil / Islamic | | | |
| 49. | Zambia | Common law | | | |
| 50. | Zimbabwe* | Mixed civil / common | | | |

*The 10 common law or mixed common law jurisdictions that are not in the Commonwealth

**The five non-common law jurisdictions that do not have a Muslim majority

⁹⁶ Source: <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html>



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