

Criminalising Homosexuality and the Rule of Law

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

Preamble to the Universal Declaration of Human Rights, 1948

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.

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Foreword, by Sir Jeffrey Jowell QC

Democracy, human rights and the rule of law constitute the three interlocking parts of the constitutional structure that ensures equal respect for human dignity in any society. Democracy requires representative government. But even a fairly elected government should not be able to invade an individual's human rights. The rule of law allows access to those rights (which otherwise could exist on paper alone), through fair trials before independent courts. Yet the rule of law does more work still, by requiring equal application of law, and that law itself should not be arbitrary, or arbitrarily applied.

This briefing note is original in that it looks at the criminalising of homosexuality through the prism of the rule of law. It would have been much easier simply to proclaim the criminalisation of homosexuality as an affront to liberty, equality or human dignity. The rule of law perspective, however, highlights just how making homosexuality a crime cuts against the grain of the rule of law as a pillar of a fair and accountable society. The briefing note therefore provides an intellectual framework for understanding why these laws are not only unjust to individuals but also an affront to a country's constitutional values.

The briefing note outlines a number of components (or 'ingredients' as Tom Bingham called them) of the rule of law and shows how criminalisation of homosexuality offends a number of them (such as inequality, arbitrariness, detention without reasonable justification, proportionality, and breach of international human rights standards). The content of the briefing note thus provides very useful practical support to those seeking to overturn existing laws.

As Vikram Seth has written about the criminalisation of homosexuality in India, a country which professes to observe democracy, human rights and the rule of law:

“ ...To undo justice, and to seek
To quash the rights that guard the weak –
...With specious reason and no rhyme.
This is the true unnatural crime.¹

Sir Jeffrey Jowell QC

Director of The Bingham Centre for The Rule of Law

Overview

01. The criminalisation of consensual same-sex intimacy offends against the Rule of Law. From a procedural point of view, criminalisation means that rights granted to all citizens in national constitutions, domestic laws and via international treaty obligations are being dis-applied to the lesbian, gay, bisexual and transgender (LGBT) minority. From a substantive point of view, criminalisation is inconsistent with the human rights that should be present in a well-functioning domestic system, and which are indeed protected by the rights-based international system.
02. Where the Rule of Law is truly present, criminalisation will cease. Criminalisation is both symptomatic of a failure of the Rule of Law and indicative that efforts to instil the Rule of Law to a meaningful degree have failed to take root. Tackling the criminalisation of homosexuality is an integral part of wider efforts to instil and uphold the Rule of Law, to promote democracy, and to uphold universally recognised human rights.
03. The term 'Rule of Law' was popularised in the 19th century by British jurist A.V. Dicey, who viewed it as one of two pillars of the constitution, alongside 'sovereignty'.² Today, the term Rule of Law is used to describe and assess the basic institutional frameworks for enforcing laws and dispensing justice.
04. Perhaps the quintessential modern description of the Rule of Law was provided by Tom Bingham, former Lord Chief Justice of England and Wales, who defined it as:
“ [A]ll persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.³
05. Lord Bingham elaborated by providing eight fundamental components of the Rule of Law:
 - a) The law must be accessible and so far as possible intelligible, clear and predictable.
 - b) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.
 - c) Equality before the law.
 - d) Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.
 - e) The law must provide adequate protection of fundamental human rights.

The meaning of the Rule of Law

¹ Seth, V., 'Through Love's Great Power', The New York Review of Books, 20 March 2014 Issue.

² Dicey, A.V., An Introduction to the Study of the Law of the Constitution, 9th ed., 1945.

³ Bingham, T., The Rule of Law, 2010, p. 8.

- f) Means must be provided for resolving, without prohibitive cost or inordinate delay, *bona fide* civil disputes which parties are themselves unable to resolve.
 - g) Adjudicative procedures provided by the state should be fair.
 - h) The rule of law requires compliance by the state with its obligations in international law as well as in national law.⁴
06. Similar concepts exist such as *Rechtstaat* in German and *État de droit* in French. In 2011, the Council of Europe's Venice Commission set out to examine the similarity between these concepts and to provide a universal definition of the Rule of Law. The Venice Commission approved Lord Bingham's definition and set out in six elements the essence of the overlapping concepts found in different legal traditions:⁵
- a) Legality, including a transparent, accountable and democratic process for enacting law.
 - b) Legal certainty.
 - c) Prohibition of arbitrariness.
 - d) Access to justice before independent and impartial courts, including judicial review of administrative acts.
 - e) Respect for human rights.
 - f) Non-discrimination and equality before the law.
07. The Rule of Law is placed at the core of documents underpinning states and their institutions. For example, the term is used in international human rights instruments (such as the United Nations Universal Declaration of Human Rights), regional human rights treaties (such as the European Convention on Human Rights), written constitutions (such as South Africa's 1996 Constitution) and constitutional instruments (such as the UK's *Constitutional Reform Act, 2005*).
08. Lord Bingham's principles and the Venice Commission's elements offer a mixture of formalistic aspects to the Rule of law (such as legal certainty and equality before the law), and substantive elements (including the protection of human rights). Older commentaries on the Rule of Law often focused on the formalistic, but today the division between the formal and substantive is less important. It is clear that the Rule of Law requires more than a formalistic adherence to the laws and procedures that happen to be in force at a particular moment in time. The Rule of Law is not merely rule *by* law. Rather, it rejects arbitrary power, whatever its alleged source or justification. For the Rule of Law to be upheld, fundamental human rights must be respected. Sometimes these substantive rights must be interfered with, but the Rule of Law requires that interference may occur only when it is justified: necessary, proportionate and not arbitrary.

4 *Ibid.*

5 The European Commission for Democracy Through Law (Venice Commission), Report on the Rule of Law, adopted by the Venice Commission at its 8th plenary session 25–26 March 2011, paras. 36 and 41.

Criminalising homosexuality offends the Rule of Law

09. The Rule of Law alone is reason to object to the criminalisation of homosexuality. The Appendix to this briefing note addresses this through Lord Bingham's eight fundamental components of the Rule of Law, by showing how criminalisation offends against each of these. The Appendix also offers a few encouraging examples of LGBT rights taking root via adherence to these components of the Rule of Law.
10. In more general terms, most countries guarantee fundamental rights and freedoms in their domestic laws or via their treaty obligations. It is well established, from decisions of domestic, regional and international courts and tribunals that laws that criminalise consensual same-sex intimacy violate these rights.⁶ Therefore, applying the ordinary law of the land in force in most jurisdictions, the criminalisation of homosexuality must be held to be unlawful. At the domestic level, criminalisation breaches fundamental human rights, such as privacy, dignity and equality, contained in domestic law. At the international level, criminalisation is a breach of treaty obligations. Where criminalisation persists in parallel with these laws and obligations, the Rule of Law has failed.
11. The Rule of Law sits at the core of the Human Dignity Trust's purpose, namely to assist LGBT people challenge laws that criminalise consensual same-sex intimacy. We do not seek law reform, rather we seek the mere enforcement of existing rights possessed by LGBT people and other citizens alike. How our purpose intersects with the Rule of Law was considered by the English courts when granting us charitable status:
- “ [T]here is constitutional supremacy and a legitimate role for the court in interpreting and enforcing superior constitutional rights where the domestic law is thought to be in conflict with those rights.⁷
12. Our aim in supporting activists and their lawyers in seeking to overturn laws that criminalise homosexuality is to seek no more than to uphold existing laws and treaty obligations. The decriminalisation of homosexuality is the pursuit of the Rule of Law.
13. Other examples of how criminalisation offends against the Rule of Law include:
- a) **Inequality in the application of the law to LGBT people**, including the fundamental rights contained in constitutions and treaty obligations. Even where these rights are generally respected, the Rule of Law flounders if LGBT people do not enjoy these rights in the same manner as their heterosexual peers. LGBT people are not asking for any special rights, rather the application of existing rights.

6 For example, South Africa's Constitutional Court held that criminalisation is contrary to the rights to equality, privacy and dignity (*National Coalition for Gay and Lesbian Equality v. Minister of Justice* CCT 11/98 [1998] ZACC 15, paras. 27 and 32); the US Supreme Court held that criminalisation is contrary to the rights to equality and privacy (*Lawrence v. Texas* 539 US 558 (2003), pp.14, 15, 18); the European Court of Human Rights has determined that criminalisation *per se* is contrary to the right to privacy (e.g. *Norris v. Ireland* [1988] ECHR 22, para. 38), and that differing criminal laws for heterosexuals and homosexuals regarding ages of consent is contrary to the rights to equality (e.g. *L and V v. Austria*, Application No. 39392/98 para. 54); the Human Rights Committee determined that criminalisation is contrary to the rights to privacy and equality (*Toonen v. Australia*, Communication No. 488/1992, U.N. Doc-CCPR/C/50/D/488/1992 (1994), paras. 8.6 and 8.7).

7 *The Human Dignity Trust v. The Charity Commission for England and Wales*, First Tier Tribunal (Charity) General Regulatory Chamber, Appeal number: CA/2013/0013, para. 96.

b) **Criminalising laws persecute on the arbitrary basis of identity.** Laws that criminalise the physical acts of same-sex intimacy, in effect, criminalise the LGBT identity. LGBT people are often assumed to be criminals, placing them outside of other legal protection. Differential treatment must be grounded in legitimate aims, such as national security, health or morals, public safety, or the protection of rights of others. None of these justifications applies to the criminalisation of homosexuality so as to justify the disapplication of rights to LGBT people. Criminalisation is arbitrary.

c) **The arrest, detention and prosecution of LGBT people amounts to persecution.** LGBT people are singled out by reason of their identity. LGBT people are, and are viewed by the state and society as, un-apprehended felons. To use the full force of the state through the criminal law to target a defined group of people on the basis of their immutable identity amounts to inhuman and degrading treatment. There can be no justification for this.

d) Even if a justification could be found, any interference with the human rights of LGBT people on the basis of their sexual orientation or gender identity **needs to be necessary in a democratic society and proportionate.** The burden is on those interfering with LGBT people's human rights to justify the legality of their laws, actions or failure to act or protect. **Proportionality under such circumstances imposes a very exacting test.** Failure to meet this test is a failure of the Rule of Law. It can **never be necessary or proportionate to criminalise consensual sex between adults,** no matter what the supposed aim.

14. When one considers the substantive rights associated with the Rule of Law too, the case against criminalisation becomes even more compelling. The former United Nations Secretary-General, Kofi Annan, captured this in his definition of the Rule of Law:

“ **A principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.**⁸ (emphasis added)

15. These rights include privacy and dignity, equality and non-discrimination. The criminalisation of consensual same-sex intimacy is incompatible with these fundamental human rights norms.

Particularly relevant is the International Covenant on Civil and Political Rights (ICCPR), which with 168 state-parties is a lynchpin of the international human rights system.

The treaty body that interprets the ICCPR, the Human Rights Committee, has determined that criminalising homosexuality violates the right to privacy (Article 17(1) of the ICCPR), and that the right to non-discrimination (Article 26) protects against discrimination on the ground sexual orientation.⁹ The Human Rights Committee is not alone in its conclusion. The treaty bodies of the remaining core international human rights instruments also include the protection of sexual minorities in their work.¹⁰ Criminalisation is not compatible with the rights-based international system. Simply put, if a legal system is to adhere to the Rule of Law, it cannot have in its substance the criminalisation of consensual same-sex intimacy.

The arbitrariness of criminalisation: there can be no justification

16. An essential element of the Rule of Law is the absence of arbitrariness, both in terms of how the law is enforced and what the law attempts to regulate. For the state to regulate any aspect of a person's life there must be a justification and it must be necessary and proportionate to do so. This is captured by a quote from one of South Africa's leading public lawyers at the time the country moved from apartheid to democracy, and from rule by law to the Rule of Law:

“ **If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired at its command.**¹¹ (emphasis added)

⁸ Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies (2004).

⁹ *Toonen*, at n. 6 above, paras. 8.6 and 8.7.

¹⁰ The Committee on Economic, Social and Cultural Rights determined that the phrase 'other status' in ICESCR Article 2(2) (equal protection/non-discrimination) implicitly includes sexual orientation (CESCR General Comment No. 20, UN-Doc-E/C.12/GC/20/2009, paragraph 32); the Committee on the Rights of the Child determined that Article 2 of its treaty (equal protection/non-discrimination) prohibits different ages of consent for heterosexuals and homosexuals (Concluding Observations of the Committee on the Rights of the Child: (Isle of Man), UN-Doc-CRC/C/15/Add.134/(2000), paragraph 22); the Committee on the Elimination of Discrimination Against Women called for the decriminalisation of lesbianism (Report of the Committee on the Elimination of Discrimination against Women, UN-Doc-CEDAW/A/54/38 (1999), paragraphs 127, 128); the Committee on Torture determined that its treaty protects against discriminatory treatment in prisons based on sexual orientation (Concluding Observations of the Committee against Torture: Egypt, UN-Doc-CAT/s/XXIX/Misc.4 (2002), paragraph 5(e)). The UN's sixth treaty body, the Committee on the Elimination of Racial Discrimination, only addresses the prohibited ground of race. Another briefing note in this series, *Criminalising Homosexuality and International Human Rights Law*, covers this topic in more detail.

¹¹ Mureinik, E., *A Bridge to Where? Introducing the Interim Bill of Rights, 1994*, 10, SAJHR 31 at 32.

17. Just like there can be no justification for apartheid based on race, there can be no justification for criminalising the consensual sexual behaviour of adults in private. Where criminalisation persists, domestic law and international law are applied arbitrarily. Heterosexuals are not regulated in the same manner. But, the issue of criminalisation and the Rule of Law is not just about the physical act of sexual intimacy. Where criminalisation persists, a whole identity is criminalised. Every aspect of a person's sense of self is criminalised, stigmatised and subject to the feeling of shame. There can never be a justification for this, no matter the cultural, religious or historical background of the criminalising country. Justifications for criminalisation based on religion and culture have been found false around the world, as discussed further in the Appendix.¹² Religious freedom and culture must be respected, but not where this freedom undermines the dignity of others.

18. The 'justification' approach to the Rule of Law also demonstrates how the Rule of Law interlocks and overlaps with democracy and human rights. The substantive rights protected by the Rule of Law vest with individual people against the authorities. In that regard, it will be no surprise that the majority of authoritarian regimes criminalise homosexuality.¹³ For the Rule of Law to be upheld, all must enjoy substantive rights – even the marginalised, regardless of what those in a position of authority or the population at large believe. In that regard, British judges Lord Hoffmann and Lady Hale have said, respectively, that equality is in itself 'one of the building blocks of democracy',¹⁴ and that 'democracy values everyone equally, even if the majority does not'.¹⁵

19. To take a real life example on the arbitrariness of criminalisation, the UN Human Rights Council's Working Group on Arbitrary Detention concluded in respect of Cameroon's criminalising laws and arrest of gay men:

[T]he existence of laws criminalizing homosexual behaviour between consenting adults in private and the application of criminal penalties against persons accused of such behaviour violate the rights to privacy and freedom from discrimination set forth in the International Covenant on Civil and Political Rights...

*The Working Group text concludes that the deprivation of liberty of the above-mentioned 11 persons was arbitrary, and that regardless of the fact that they were ultimately released.*¹⁶

¹² This topic is discussed further in the briefing note in this series, *Criminalising Homosexuality and the Right to Manifest Religion*.

¹³ This topic is discussed further in the briefing note in this series, *Criminalising Homosexuality and Democratic Values*.

¹⁴ *Matadeen v. Pointu and Minister of Education and Science* [1999] AC 98 (PC), para. 109.

¹⁵ *Chester v. Secretary of State for Justice* [2013] UKSC 63, para. 88. See also *Ghaidan v. Godin Mendoza* [2004] 2 AC 557 (where it was held that a same-sex partner is entitled to same inheritance rights as an opposite-sex partner): '[U]nequal treatment' is the reverse of rational behaviour... Power must not be exercised arbitrarily' (per Lady Hale).

¹⁶ *François Ayissi et al. v. Cameroon*, Working Group on Arbitrary Detention, Opinion No. 22/2006, U.N. Doc. A/HRC/4/40/Add.1 at 91, 2006, paras. 19 and 20.

20. This quote again demonstrates the difference between the Rule of Law and rule by law. Even where criminalising countries follow to the letter their criminal laws and procedures when arresting and sanctioning LGBT people, they nonetheless act in an arbitrary manner and offend against the Rule of Law.

21. At the other extreme, where criminalising laws subsist on national statute books without being enforced, these laws are still arbitrary and offend against the Rule of Law. As Lord Walker said in a House of Lords judgment when reflecting on decriminalisation in the UK and Ireland:

“To criminalise any manifestation of an individual's sexual orientation plainly fails to respect his or her private life, even if in practice the criminal law is not enforced.”¹⁷

22. Likewise, the Human Rights Committee determined that criminalising laws:

“[I]nterfere with the author's privacy, even if these provisions have not been enforced for a decade.”¹⁸

23. There is no such thing as 'benign' criminalisation of gay men and women through official moratoria or a blind-eye approach to enforcement. The mere existence of such laws on the statute book diminishes LGBT people's sense of self. The persistence of these laws is arbitrary and offends the Rule of Law.

¹⁷ *M v. Secretary of State for Work and Pensions* [2006] UKHL 11, para. 83.

¹⁸ *Toonen*, at n. 6 above, para. 8.2.

Appendix: analysis of criminalisation – offending each fundamental component of the Rule of Law

The first column of the table below sets out the eight fundamental components of the Rule of Law provided by Tom Bingham, former Lord Chief Justice of England and Wales.¹⁹ The second column then tests whether and how criminalisation offends against these components. In doing so, the table provides case studies of how the Rule of Law has been undermined by continued criminalisation, plus some examples of good Rule of Law on the issue of criminalisation and LGBT rights more generally.

Lord Bingham's Fundamental Components	The criminalisation of homosexuality offends against these Fundamental Components
<p>1. The law must be accessible and so far as possible intelligible, clear and predictable</p>	<p>Per Lord Bingham:</p> <p>“ if you and I are liable to be prosecuted, fined and perhaps imprisoned for doing or failing to do something, we ought to be able, without undue difficulty, to find out what it is that we must or must not do on pain of criminal penalty”.²⁰</p> <p>Applied to criminalisation:</p> <p>Many criminalising jurisdictions retain British colonial-era laws against ‘carnal knowledge against the order of nature’ and ‘gross indecency’, or similar. The <i>actus reus</i> of each of these offences (i.e. the conduct criminalised) is often undefined. What amounts to ‘against the order of nature’ and ‘indecent’, therefore, is dependant on the subjective beliefs of the arresting police officer and presiding judge. The breadth of these nebulous offences allowed British courts (in the past) and allows other Commonwealth courts today to prosecute successfully same-sex couples for an undefined number of acts. This legal uncertainty and unintelligibility alone is reason enough to conclude that these laws offend against the Rule of Law.</p> <p>Further, governments in some criminalising jurisdictions place moratoria on the enforcement of laws that criminalise homosexuality. Although this situation is preferable to the state actively pursuing arrests and prosecutions, it creates legal uncertainty as moratoria can be lifted or ignored, which is often realised only upon the first arrest and prosecution. Legal certainty and predictability are achieved only by the repeal of these laws.</p>

¹⁹ Bingham, at n. 3 above.

²⁰ *Ibid*, p. 37.

Lord Bingham's Fundamental Components	The criminalisation of homosexuality offends against these Fundamental Components
	<p>Case studies:</p> <p>India's Supreme Court (not the Delhi High Court, which was overturned) commented on the vagueness of its criminalising law:</p> <p><i>[N]o uniform test can be culled out to classify acts as ‘carnal intercourse against the order of nature’. In our opinion the acts which fall within the ambit of the section can only be determined with reference to the act itself and the circumstances in which it is executed.</i>²¹</p> <p>The Singaporean Court made a similar conclusion with regards to ‘gross indecency’. In 1997 the then-Chief Justice, Yong Pung How, held that there was no actual definition of ‘gross indecency’ and that the <i>actus reus</i> for this offence would essentially evolve with the times:</p> <p><i>What amounts to a grossly indecent act must depend on whether in the circumstances, and the customs and morals of our times, it would be considered grossly indecent by any right-thinking member of the public.</i>²²</p> <p>Such ‘know-it-when-the-authorities-see-it’ criminal laws dis-enable citizens from regulating their behaviour within the limits of the law, and thus offend against this first component of the Rule of Law. It is particularly disappointing that, having recognised the ambiguity and unintelligibility of their laws that criminalise homosexuality, both the Indian and Singaporean courts upheld these laws. Those decisions demonstrate a failure by the courts to uphold the first component of the Rule of Law, especially in circumstances where they had recognised the unintelligibility of these laws.</p> <p>The deficiency of moratoria was also demonstrated in Singapore. In that country, there were ministerial statements in Parliament indicating that Singapore's criminalising laws would not be proactively enforced. About this moratorium, the Singaporean Court of Appeal stated:</p> <p><i>[T]here is nothing to suggest that the policy of the Government on s 377A [the criminalising law] will not be subject to change... Therefore, as long as s 377A remains in the statute books, the threat of prosecution under this section persists, as the facts of this case amply illustrate.</i>²³</p> <p>The accused in that case was arrested, despite the moratorium, and he ultimately lost his challenge to have s 377A declared unlawful (as discussed further below at component 5).</p>

²¹ *Naz Foundation v. Suresh Kumar Koushal*, Civil Appeal No. 10972 of 2013, p. 77.

²² *Ng Huat v. Public Prosecutor* [1995] 2 SLR 783, para. 27.

²³ *Tan Eng Hong v. Attorney-General*, 2012, SGCA 45, 21 August 2012, para. 182.

Appendix: analysis of criminalisation – offending each fundamental component of the Rule of Law

Lord Bingham's Fundamental Components	The criminalisation of homosexuality offends against these Fundamental Components
2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion	<p>Per Lord Bingham:</p> <p>“Legislation should not confer ‘excessive and unchallengeable discretions on ministers (to be exercised, in practice, by officials)’ and, likewise, ‘[t]he job of judges is to apply the law, not to indulge their personal preferences.’²⁴</p> <p>Applied to criminalisation:</p> <p>All legal rights must be applied to LGBT people without discretion. Discretion leaves the legal system lacking legal certainty. Further, interference is permissible only if it is justified.²⁵ Cultural, religious and historic justifications for criminalising homosexuality are not reasonable justifications. Grounding criminalising laws on these supposed justifications lends excessive discretion to the legislature and the courts to apply their own concept of morality over and above domestic and international human rights protection.</p> <p>In addition, LGBT people often face arbitrary harassment by arms of the state, most notably by the police. Laws that criminalise consensual same-sex intimacy, in effect, criminalise the LGBT identity, leaving LGBT people vulnerable to harassment and persecution even where there is no evidence of sexual intimacy having taken place. Further, the vagueness of many criminalising laws allows judges wide discretion to convict accused persons and to validate the discriminatory conduct of arms of the state towards LGBT people.</p> <p>Looking again at moratoria, these amount to providing the authorities with prosecutorial discretion. The Rule of Law cannot be present when a Minister or senior member of the police has discretion as to whether to start and end a moratorium. Those living under the moratorium face the constant threat that it will end.</p> <p>Case studies:</p> <p>Supposed cultural, religious and historic justifications have proved false time and time again when legislatures and courts with good Rule of Law credentials have examined the issue. 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:</p> <p>“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.²⁶</p>

²⁴ Bingham, at n. 3 above, pp. 49–51.

²⁵ This topic is discussed further in the briefing note in this series, *Criminalising Homosexuality and the Right to Manifest Religion*.

²⁶ Report of the Committee of Homosexual Offences and Prostitution, September 1957, p. 38.

Lord Bingham's Fundamental Components	The criminalisation of homosexuality offends against these Fundamental Components
	<p>England and Wales implemented the Wolfenden Report's recommendations when partial decriminalisation was brought about by legislative change in the <i>Sexual Offences Act, 1967</i>.</p> <p>Other courts considering this issue have found the same sentiment, that religion, culture and tradition are not justifications for criminalisation. South Africa's Constitutional Court's approach demonstrates a good application of the Rule of Law when it considered and dismissed religious justifications for criminalisation:</p> <p><i>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.</i>²⁷</p> <p>This view of the South African court was approved by the Kenyan High Court in a case concerning the freedom of association of LGBT people. The Kenyan High Court provided a wonderfully apt conclusion on the interaction of religion with LGBT rights:</p> <p><i>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.</i>²⁸</p> <p>The United States Supreme Court drew the same conclusions about religion and tradition in its judgment that declared the criminalisation of homosexuality as unconstitutional:</p> <p><i>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.'</i>²⁹</p>

²⁷ *National Coalition for Gay and Lesbian Equality*, at n. 6 above, paragraph 137.

²⁸ *Eric Gitari v. NGO Board & 4 others* [2015], Petition 440 of 2013, The High Court of Kenya at Nairobi, para. 121.

²⁹ *Lawrence v. Texas*, at n. 6 above, p. 10.

Appendix: analysis of criminalisation – offending each fundamental component of the Rule of Law

Lord Bingham's Fundamental Components

The criminalisation of homosexuality offends against these Fundamental Components

These statements and decisions from Europe, Africa and America show that where the Rule of Law prevailed, religion, culture and tradition cannot amount to a justification for limiting the rights of LGBT people. This same outcome was made against different sets of beliefs, different cultures and at different points of history.

Turning to ministerial and judicial discretion and poor Rule of Law, in February 2012 Uganda's Minister for Ethics and Integrity, Reverend Simon Lokodo, arrived at and shut down a LGBT advocacy workshop taking place at the Entebbe resort outside of Kampala. His rationale was that LGBT people freely associating and advocating for their rights amounted to their inciting one another to commit unlawful sex acts. In a subsequent court judgment in June 2014, the High Court of Uganda relied on Uganda's 'carnal knowledge' and 'gross indecency' laws, in conjunction with laws that prohibit incitement and conspiracy, to uphold the Minister's decision. No intimacy had taken place; merely a discussion about LGBT rights. The Court was unwilling to protect the attendees' freedom of expression to discuss LGBT rights issues, as it determined that this freedom does not extend to the promotion of 'illegal acts' and the Minister acted in the 'public interest'. The discretion allowed of the Minister and the courts to interpret this legislation and the term 'public interest'³⁰ with such breadth offends against the second component of the Rule of Law.

In the past, the English domestic courts possessed the same wide discretion to interpret the nebulous offence of 'gross indecency' until defences to it were introduced in 1967 (namely, two men, over 21 years of age, in private) and it was finally repealed in 2003. For example, in *R v. Hunt*, which concerned an allegation of two males exposing themselves to each other, the Lord Chief Justice made his personal views on the facts of the case clear:

“ I do not propose to go through the disgusting evidence in this case. The movements of the appellants, who are two grown men, had caused some suspicion and they were watched by the police. They were found in a shed in positions in which they were making filthy exhibitions the one to the other.³¹

What the judge subjectively views as 'disgusting' has no place in his judgment if the Rule of Law is to be upheld. The case *R v. Hunt* also demonstrates the overlap between the undue discretion in component 2 of the Rule of Law and the legal uncertainty in component 1. In *R v. Hunt* 'gross indecency' was interpreted to include situations where there had been no physical contact, a fact that was commented on in the Wolfenden Report, which ultimately led to the offence being repealed in England and Wales.³²

³⁰ *Kasha Nabagasera and others v. Attorney General and Lokodo*, No. 033 of 2012.

³¹ *R v. Hunt* [1950] 34 Cr App R 135, p. 26.

³² Wolfenden Report, at n. 26 above, p. 38.

Lord Bingham's Fundamental Components

The criminalisation of homosexuality offends against these Fundamental Components

3. Equality before the law

Per Lord Bingham:

“ The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation'.³³

Applied to criminalisation:

National constitutions and international human rights instruments often open with a statement that the rights contained therein apply to all, for example the ICCPR opens with:

[In] recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family... [State Parties] Agree upon the following articles.

To deny LGBT people rights due to sexual orientation or gender identity creates a two-tiered system of law that offends against the Rule of Law.

Justification is relevant here too. As Lord Bingham states, equality before the law applies unless there is an **objective** difference that justifies differential treatment. Certain categories of person can be treated differently due to a characteristic that objectively differentiates them from the rest of society. A reasonable justification must be based on objective grounds, not subjective views (e.g. based on religion, culture or tradition). Examples of objective justification include 'sectioned' psychiatric patients whose liberty is deprived for their own safety and the safety of others, and children who lack the same freedoms as adults due to their lack of capacity. Health concerns, in particular HIV, have been posited as an objective reason to treat LGBT people differently. These arguments are devoid of merit in fact and law.

Case studies:

The UN's Human Rights Committee has dispelled any doubt that human rights apply equally to LGBT people, notwithstanding that consensual same-sex intimacy is criminal in a jurisdiction. In its communication *Toonen v. Australia*, the Committee determined that LGBT people are entitled to equal treatment, and that Article 26 of the ICCPR prohibits discrimination on the ground of sexual orientation.³⁴

³³ Bingham, at n. 3 above, p. 55.

³⁴ *Toonen*, at n. 6 above, para. 8.7.

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Further, the Human Rights Committee in *Toonen* dismissed supposed health arguments for criminalisation:

*[T]he criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV.*³⁵

Since *Toonen*, multiple studies have shown a link between criminalisation and increased HIV transmission, further dispelling the myth that differential treatment of LGBT people in the criminal law is necessary.³⁶

More generally, recently at a domestic level there have been examples of the Rule of Law being upheld via equality before the law. On 24 April 2015, the Kenyan High Court held that LGBT people enjoy free association rights under the Kenyan Constitution, which thus allows the registration of LGBT human rights organisations. Encouragingly, the court also held that the Kenyan Constitution's non-discrimination clause implicitly protects against discrimination on the ground of sexual orientation.³⁷ In a similar registration claim, the Botswanan High Court held that LGBT people enjoy the same fundamental rights as others under the Botswanan Constitution, and concluded that the refusal of registration infringed the constitutional rights to freedom of expression, assembly and association.³⁸ These courts upheld the rights of LGBT people, notwithstanding the fact that consensual same-sex intimacy remains criminal.

Conversely, Uganda exemplifies poor Rule of Law, as equality before the law has been discarded. In the aforementioned Lokodo judgment the applicants were deemed not to enjoy freedom of expression to advocate for LGBT rights due to the illegality of same-sex intimacy.³⁹

A further example of poor equality before the law can be seen in Jamaica's amendment to its constitution to dis-apply its human rights provisions to Jamaica's sexual offences laws, including those that criminalise homosexuality. This constitutional amendment expressly bars LGBT people from the same constitutional protection enjoyed by heterosexual people on matters of sexual intimacy.⁴⁰ It compels the courts to close their minds to human rights arguments when assessing challenges to laws that criminalise homosexuality, yet they may consider these human rights arguments when hearing other challenges.

³⁵ *Ibid.*, para. 8.5.

³⁶ This topic is discussed further in the briefing note in this series, *Criminalising Homosexuality and Public Health: Adverse Impacts on the Prevention and Treatment of HIV and AIDS*.

³⁷ *Eric Gitari v. NGO Board & 4 others* [2015], Petition 440 of 2013, The High Court of Kenya at Nairobi.

³⁸ *Thuto Rammoge & others v. the Attorney General of Botswana* [2014] MAHGB-000175-13.

³⁹ Bingham, at n. 3 above, pp. 15–16.

⁴⁰ The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 repealed and substituted Chapter III of the Constitution (Charter of Fundamental Rights and Freedoms). The new Chapter III continues to protect fundamental rights, such as privacy and equality. Yet, it includes a new section 13(12) that states: 'Nothing contained in or done under the authority of any law in force immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, relating to (a) sexual offences; (b) obscene publications; or (c) offences regarding the life of the unborn, shall be held to be inconsistent with or in contravention of the provisions of this Chapter'.

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The UK's own history in this area is informative. Until 2001, different ages of consent applied to heterosexual and homosexual sex. From 1967 until 1994, the age of consent for sex between men was 21 years old; in 1994 it was reduced to 18 years old; and it was finally reduced to 16 years old (parity with heterosexual sex) in 2001. This differential treatment was applied due to those aged 16 to 21 supposedly lacking capacity to decide whether to engage in same-sex relations and to their supposed vulnerability to being preyed upon. The European Commission of Human Rights determined the issue in 1997 in *Sutherland v. United Kingdom*, which resulted in the 2001 law that equalised the age of consent. In that case, the UK Government argued:

*[First] certain young men between the ages of 16 and 18 do not have a settled sexual orientation and that the aim of the law is to protect such vulnerable young men from activities which will result in considerable social pressures and isolation which their lack of maturity might cause them later to repent: it is claimed that the possibility of criminal sanctions against persons aged 16 or 17 is likely to have a deterrent effect and give the individual time to make up his mind. Secondly, it is argued that society is entitled to indicate its disapproval of homosexual conduct and its preference that children follow a heterosexual way of life.*⁴¹

The UK Government's arguments were rejected outright by the Commission. The different ages of consent were found to breach the right to privacy and to discriminate on the ground of sexual orientation. On the first argument, the Commission referred to the prevailing view of the medical profession showing the falsity of the UK Government's argument:

*The BMA Council concluded in its Report that the age of consent for homosexual men should be set at 16 since the then existing law might inhibit efforts to improve the sexual health of young homosexual and bisexual men. An equal age of consent was also supported by the Royal College of Psychiatrists, the Health Education Authority and the National Association of Probation Officers as well as by other bodies and organizations concerned with health and social welfare.*⁴²

On the second argument, the Commission firmly dismissed the UK Government:

As to the second ground relied on – society's claimed entitlement to indicate disapproval of homosexual conduct and its preference for a heterosexual lifestyle – the Commission cannot accept that this could in any event constitute an objective or reasonable justification for inequality of treatment under the criminal law.

The above court decisions demonstrate how Lord Bingham's third component of the Rule of Law, equality before the law, is offended when LGBT people are treated differently, but upheld when they are treated in the same manner as other citizens.

⁴¹ *Sutherland v. United Kingdom*, Application No. 25186/94, Report of the Commission, para. 63.

⁴² *Ibid.*, para. 60.

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<p>4. Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably</p>	<p>Per Lord Bingham:</p> <p>“ It is an elementary principle that anyone purporting to exercise a statutory power must not act beyond or outside the power conferred. ... There are countries in the world where all judicial decisions find favour with the powers that be, but they are probably not places where any of us would wish to live’.⁴³</p> <p>Applied to criminalisation:</p> <p>A known problem in criminalising countries is police extorting LGBT people at threat of arrest. LGBT people are left vulnerable to this conduct due to criminalising laws placing them outside the law and its normal protection of citizens. Separately, the courts in criminalising jurisdictions must be free to interpret their national constitutions, other domestic laws, and international human rights instruments without interference from the other arms of government.</p> <p>Case studies:</p> <p>Again, Uganda's Minister Lokodo's conduct in shutting down the LGBT advocacy workshop demonstrates a public officer exceeding the reasonable interpretation of the limits to his power. Another example from Uganda is the Speaker of Parliament convening in December 2013 an inquorate session to vote on legislation. In that session, the <i>Anti-Homosexuality Act</i> was passed and subsequently signed into law by President Museveni, despite the Ugandan Constitution stipulating that a quorum must be present in Parliament. Demonstrating good Rule of Law credentials, Uganda's Constitutional Court ultimately struck down the law.⁴⁴</p> <p>Turning now to instances of political interference, which are suspected in court cases concerning LGBT rights, but cannot be confirmed, it is tempting for governments to show anti-LGBT sentiment to appeal to a conservative or religious electorate or to make a scapegoat out of a vulnerable minority group to distract from other issues. On the related issue of social and religious influences, judges (or ministers) being affected by these influences amounts to an unreasonable exercise of their powers, as discussed above in component 2.</p>

⁴³ Bingham, at n. 3 above, pp. 63 and 65.

⁴⁴ *Oloka-Onyango & 9 Ors v. Attorney General* [2014] UGCC 14.

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<p>5. The law must provide adequate protection of fundamental human rights</p>	<p>Per Lord Bingham:</p> <p>“ A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed. So to hold would, I think, be to strip ‘the existing constitutional principle of the rule of law’.⁴⁵</p> <p>Applied to criminalisation:</p> <p>This fifth component of the Rule of Law is highly relevant to criminalisation. If the substance of domestic law protects fundamental human rights, criminalisation should end. At the same time, as Lord Bingham recognises, these fundamental human rights must be adequately protected. This means that interference with these rights can only occur when it is justified, necessary and proportionate.</p> <p>Criminalisation is an egregious human rights violation. In and of itself, criminalisation subjects the LGBT community to inhuman and degrading treatment. It violates the basic human rights to privacy, dignity and equality. The criminalisation of same-sex intimacy does more than prohibit certain sexual acts, it criminalises identity, takes away dignity, and denies LGBT people a private sphere in which they can live as themselves. Where a domestic system lacks laws or procedures to address these violations, it lacks the Rule of Law. Where laws and procedures exist in theory, but are inadequately enforced, the system too lacks the Rule of Law.</p> <p>There are multiple court decisions, communications from treaty bodies, and statements from international organisation that state that the criminalisation of homosexuality breaches fundamental human rights.⁴⁶ To give two brief quotes on this matter, in 2008 the UN General Assembly adopted a declaration urging states:</p> <p>“ to ensure that sexual orientation or gender identity may under no circumstances be the basis for criminal penalties.⁴⁷</p> <p>In 2012, the current Secretary-General, Ban Ki-moon, stated:</p> <p>“ It is an outrage that in our modern world, so many countries continue to criminalise people simply for loving another human being of the same sex.⁴⁸</p> <p>Again, moratoria on arrests and prosecutions of those who engage in same-sex intimacy are not sufficient to uphold human rights.</p>

⁴⁵ Bingham, at n. 3 above, p. 67.

⁴⁶ Another briefing note in this series, *Criminalising Homosexuality and Working Through International Organisations*, covers this topic in more detail.

⁴⁷ Letter dated 18 December 2008 from the Permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the United Nations addressed to the President of the General Assembly, UN-Doc-A/63/635, signed by 66 member states.

⁴⁸ Ban Ki Moon, *Leadership in the fight against homophobia*, New York, 11 December 2012.

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On the matter of the **adequate** protection of human rights, there must be proportionality where human rights are interfered with. Not all rights are absolute. People's rights can be interfered with, but only if there is a justification **and** the interference is necessary and proportionate with that justification. Sentencing is also relevant. It goes without saying that to imprison, degrade or even execute individuals for having consensual same-sex intimacy is disproportionate.

Case studies:

In jurisdictions with good Rule of Law credentials, court challenges to laws that criminalise same-sex intimacy are inevitably successful, notwithstanding political or social opposition. The United States achieved federal decriminalisation via the case *Lawrence v. Texas*, in which the Supreme Court held that criminalisation is contrary to the constitutional right to privacy.⁴⁹ South Africa achieved decriminalisation via the case *National Coalition*, in which the Constitutional Court held that criminalisation is contrary to the Constitution's provisions on non-discrimination, privacy and dignity.⁵⁰ Northern Ireland's and the Republic of Ireland's criminalising laws were held by the European Court of Human Rights in Strasbourg as contrary to the European Convention's protection of private life. In the Irish case, the domestic court's failure to declare the criminalising laws as incompatible might be seen as a failure of the Rule of Law, but it must be remembered that the domestic Rule of Law mechanisms in Ireland includes referrals to Strasbourg, which ultimately led to the repeal of these laws.

The jurisdictions whose courts have upheld their criminalising laws are: Botswana,⁵¹ Zimbabwe,⁵² India,⁵³ and Singapore.⁵⁴ Botswana's and Zimbabwe's judgments are lacking as they do not consider and make no reference to key human rights instruments, including the ICCPR and the Human Rights Committee's communication in *Toonen*, despite Botswana and Zimbabwe being state-parties at the time of the court cases. The judgment from Singapore is disappointing, albeit explicable as Singapore lacks the legal human rights protection afforded in many other jurisdictions and it is not a party to the ICCPR. The decision from India is highly disappointing given India's constitutional human rights protection and its being a state-party to the ICCPR. These examples demonstrate different failures of the Rule of Law: failures of the formalistic Rule of Law, as not all applicable human rights protection was applied; and failures of the substantive Rule of Law, as adequate human rights protection was lacking.

⁴⁹ *Lawrence v. Texas*, at n. 6 above, p. 18.

⁵⁰ *National Coalition for Gay and Lesbian Equality v. Minister of Justice* at n. 6 above, paras. 27 and 32.

⁵¹ *Kanane v. the State* (2003) (2) BLR 67, Court of Appeal, 30 July 2003.

⁵² *Banana v. State* [2000] 4 LRC 621, Supreme Court, 29 May 2000.

⁵³ *Koushal v. NAZ Foundation*, Civil Appeal No. 10972 of 2013, Supreme Court.

⁵⁴ *Tan Eng Hong v. Attorney General* [2014] SGCA 53, Court of Appeal.

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On the subject of moratoria, the Singaporean Court of Appeal made some useful comments in its earlier judgment to determine the accused's standing to challenge the law (see component 1 above). However, the ultimate judgment discussed above, unfortunately, upheld Singapore's criminalising laws. A much better approach to the insufficiency of moratoria in upholding human rights comes from the European Court of Human Rights in Strasbourg. In the case of *Dudgeon v. UK* from Northern Ireland, where the applicant had been actively investigated by police, the court held:

*[T]he maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life... either he respects the law and refrains from engaging – even in private with consenting male partners – in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.*⁵⁵

In the subsequent case *Norris v. Ireland* from the Republic of Ireland, the Strasbourg Court held:

*It is true that, unlike Mr Dudgeon, Mr Norris was not the subject of any police investigation. However, the Court's finding in the Dudgeon case that there was an interference with the applicant's right to respect for his private life was not dependent upon this additional factor... The Court therefore finds that the impugned legislation interferes with Mr Norris's right to respect for his private life.*⁵⁶

In a further case, the Strasbourg Court found that the right to privacy is still violated, even where there is an official moratorium on bringing prosecutions under the law that criminalises homosexuality:

*It is true that since the Dudgeon judgment the Attorney-General... has followed a consistent policy of not bringing criminal proceedings in respect of private homosexual conduct on the basis that the relevant law is a dead letter. Nevertheless, it is apparent that this policy provides no guarantee that action will not be taken by a future Attorney-General to enforce the law... Against this background, the Court considers that the existence of the prohibition continuously and directly affects the applicant's private life.*⁵⁷

⁵⁵ *Dudgeon v. United Kingdom*, 4 EHRR 149 (1981), para. 41.

⁵⁶ *Norris v. Ireland*, at n. 6 above, para. 38.

⁵⁷ *Modinos v. Cyprus*. Application no. 15070/89, 22 April 1993, paras. 23 and 24.

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The above Strasbourg Court cases from the UK and Ireland, also inform us about the proportionality element of the Rule of Law. The Strasbourg Court in *Norris* stated:

*[T]he Court considers that, as regards Ireland, it cannot be maintained that there is a 'pressing social need' to make such acts criminal offences. On the specific issue of proportionality, the Court is of the opinion that 'such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. 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' (quoting from *Dudgeon*, para. 60).*

Proportionality was also discussed in *Sutherland v. United Kingdom*, the case concerning the unequal age of consent, in which the Commission commented:

Even if, as claimed in the Parliamentary debate, there may be certain young men for whom homosexual experience after the age of 16 will have influential and potentially disturbing effects and who may require protection, the Commission is unable to accept that it is a proportionate response to the need for protection to expose to criminal sanctions not only the older man who engages in homosexual acts with a person under the age of 18 but the young man himself who is claimed to be in need of such protection.

For Lord Bingham's fifth component of the Rule of Law to be upheld, there must be both a justification to curtail the rights of an individual, and that curtailment must be proportionate to achieving that justification. As the judgments discussed above show, where the Rule of Law is present: (1) the curtailment of the fundamental human rights of LGBT people can rarely, if ever, be justified, and (2) even if a reasonable justification can be found, it can never be proportionate to impose criminal sanctions on consenting adults. Any outcome at court other than decriminalisation demonstrates a failure of the Rule of Law, either as the domestic system does not contain substantive human rights, or due to these human rights not being adequately protected by the courts.

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6. Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which parties are themselves unable to resolve

Per Lord Bingham:

“ Lord Bingham applied his component 6 to civil disputes, but his sentiment applies to criminal laws too: *'An unenforceable right or claim is a thing of little value to anyone'*.⁵⁸

Applied to criminalisation:

In addition to the Rule of Law problems discussed that are specific to LGBT people, the poor functioning of courts in many criminalising countries facilitates the continuance of criminalisation, as the courts do not have the capacity, experience or appetite to determine a challenge to criminalising laws. Additionally, for LGBT people to access dispute resolution on any LGBT-related issue (whether it be criminalisation, or freedom of expression, etc), they must, in effect, declare to the authorities that they are 'un-apprehended felons'. The risk of attracting criminal investigation and sanctions acts as a barrier to LGBT people accessing justice to assert their constitutional and other rights.

Case studies:

The aforementioned *Lokodo* case in Uganda was adjourned multiple times prior to it being heard by a judge. When it was heard and judgment was handed down, as discussed above, the court found that fundamental rights in Uganda's constitution do not apply in disputes to be resolved between the State and LGBT people. The applicants in this case, and many others, also took great personal risk when accessing the dispute resolution mechanisms to which they are entitled.

A more calculated barrier to LGBT people accessing the courts to enforce their rights is Jamaica's constitutional amendment, which bars LGBT people from proper judicial adjudication on the issue of criminalisation (as discussed above at component 3). Since Magna Carta, 800 years ago, it has been accepted that no person shall be condemned *'except by lawful judgment of his peers or by the law of the land'*. Jamaica's constitutional amendment to dis-apply constitutional human rights (the highest law of the land) to the issue of criminalising homosexuality amounts to a serious digression from the Rule of Law, as the human rights protection in the constitution is now unenforceable on the issue of criminalisation.

⁵⁸ Bingham, at n. 2 above, p. 85.

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7. Adjudicative procedures provided by the state should be fair	<p>Per Lord Bingham:</p> <p>“ First, it must be recognized that fairness means fairness to both sides, not just one... It must, secondly, be accepted that fairness is a constantly evolving concept, not frozen at any moment of time... The constitution of a modern democracy governed by the rule of law must, thirdly, guarantee the independence of judicial decision-makers’.⁵⁹</p> <p>Applied to criminalisation:</p> <p>This component encompasses many of the other components listed. For the Rule of Law to be maintained, LGBT people must be able to challenge effectively laws that criminalise homosexuality. LGBT people’s access to a fair trial is compromised by: the unclear and unpredictable laws used to prosecute them; the degree of discretion that such uncertainty provides courts; the unequal constitutional and other protection afforded to them in court rooms; the political and societal pressure that pollutes court decisions on LGBT matters; and states’ tendencies to apply less rigorous standards of human rights to them. In general, where the formal principles of the Rule of Law are lacking, substantive human rights principles cannot entrench for LGBT people.</p>
8. The rule of law requires compliance by the state with its obligations in international law as well as in national law	<p>Per Lord Bingham:</p> <p>“ [T]he rule of law in the international order is, to a considerable extent at least, the domestic rule of law writ large... the international rule of law may be understood as the application of the rule of law principles to relations between States and other subjects of international law’.⁶⁰</p> <p>Applied to criminalisation:</p> <p>Nation states agree to international treaties as sovereign equals and, in doing so, create rights and obligations between themselves. The ICCPR prohibits the criminalisation of same-sex intimacy, as determined by the Human Rights Committee in its communication <i>Toonen v. Australia</i>.⁶¹ The ICCPR has 168 state-parties, of which 58 criminalise same-sex intimacy. As discussed above in paragraph 15, the treaty bodies that interpret other UN human rights treaties view discrimination against LGBT people as a violation of their treaties.⁶²</p>

⁵⁹ Bingham, at n. 3 above, p. 91.

⁶⁰ Bingham, at n. 3 above, p. 111.

⁶¹ *Toonen*, at n. 6 above.

⁶² Again, another briefing note in this series, *Criminalising Homosexuality and International Human Rights Law*, covers this topic in more detail.

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	<p>Case studies:</p> <p>Whenever the criminalisation of LGBT people or discrimination against them has been considered by regional human rights courts or human rights treaty bodies, it has been held to violate treaty obligations. <i>Toonen</i>, <i>Dudgeon</i> and <i>Norris</i> have already been mentioned regarding the ICCPR and ECHR respectively. Further, the Inter-American Court of Human Rights held that the American Convention on Human Rights is violated by discrimination against LGBT people (<i>Case of Atala Riffo and Daughters v. Chile</i>, Judgment (2012)⁶³). Likewise, the African Commission in <i>Zimbabwe Human Rights NGO Forum v. Zimbabwe</i>, confirmed that Article 2 of the African Charter, which prohibits discrimination on the grounds of ‘other status’, among others, also extends to protect persons on the basis of ‘sexual orientation’.⁶⁴</p> <p>Although the European, American and African courts interpret international treaty law applicable at the regional level, the protection contained in these regional treaties is near identical to the protection contained in the ICCPR and other international treaties. As the Jamaican international lawyer and judge at the International Court of Justice, Patrick Robinson, stated:</p> <p>“ The UN Charter and other instruments of universal, or near universal, coverage may be seen as instruments with centripetal, normative forces supporting an international rule of law. However, the pull of national sovereignty often functions as a centrifugal, normative force gravitating away from an international rule of law. Regional instruments, although confined to a specific geographical area, may nonetheless have features that are consistent with and, in fact, serve to promote an international rule of law... The need to observe the rule of law at the international level is as urgent as it is at the domestic level.’⁶⁵</p>

⁶³ ACHR, Report No. 139/09 (merits), Case 12.502.

⁶⁴ *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication 245/02, May 2006, paras. 169–170. See also, General Comments on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, para. 4.

⁶⁵ Robinson, P., *Affirming the International Rule of Law*, EHRLR 2012, Issue 1, 32, pp. 33 and 43.

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