Protecting the human rights of SEXUAL MINORITIES in contemporary Africa

Sylvie Namwase & Adrian Jjuuko (editors)

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Special thanks also go to Prof Frans Viljoen and the Centre for Human Rights at the University of Pretoria for organising a colloquium on sexual minorities' rights in Africa where the various authors were able to share their work and build further on their ideas. Prof Viljoen supported and encouraged us to go through with this work, and we are honoured to have him write the preface to this book.

PREFACE

This collection of essays contains papers that have first been presented at a colloquium on sexual minority rights in Africa, which took place at the Centre for Human Rights, Pretoria, in December 2014. This event was made possible with the generous support of the Government of the Kingdom of Norway, through its Embassy in South Africa. These papers were subsequently peer-reviewed and reworked. The target audiences of this edited volume are scholars and students, as well as practitioners, government officials and all other role players who may have an impact on the rights of sexual minorities in Africa.

Writing the preface of this publication is a distinct privilege and makes me particularly proud.

First, its thematic focus is on homosexuality in Africa. This has long been a neglected topic. (See, however, DP Amory 'Homosexuality' in Africa: Issues and debates (1997) 25 *Issue: A Journal of Opinion* 5). Despite some recent developments (see eg S Tamale (ed) *African sexualities: A reader* (Pambazuka Press, 2011), and S Tamale and J Bennett (eds) *Research in gender and sexualities in African contexts* (CODESRIA, 2016), African scholarship and academia (outside South Africa) have largely neglected this as an area for research, writing and teaching. In this volume, fourteen essays focus on aspects of homosexuality, covering a wide rage of countries from across the continent.

Second, the disciplinary prism through which this topic is viewed is the legal. Its engagement is with law and rights. Issues of sexual orientation and gender identity in Africa have mostly inspired anthropologists and historians, in the early phases of engagement on the issue, and later on, sociologists, scholars of religious studies and other social scientists. With the rise of HIV incidence across the continent, and insights into the vulnerability to infection of particularly men having sex with men, public health perspectives were increasingly being brought to bear into this thematic domain (see eg M Epprecht *Heterosexual Africa?: The history of an idea from the age of exploration to the age of AIDS* (Ohio University Press, 2008)). However, celebrating a legal lens does not seek to invite or support a narrow legalistic or law-dominated discourse, but aims to at least include it as part of the conversation. Doing so adds dimensions of obligation and accountability.

Third, the editors and authors and contributors are African. The situation in nine countries (Botswana, Cameroon, Kenya, Mauritius, Mozambique, Nigeria, South Africa, Uganda and Zimbabwe) is reviewed; while other contributions are more regional in their perspective. This makes this publication one of the most comprehensive collections of African voices on this topic. African voices have largely been silent in the fledgling discourse on sexual minorities in Africa, which has been dominated by Western scholars. Early examples of writers who ventured into this terrain are: S O Murray and W Roscoe (eds) *Boy-wives and female husbands: Studies of African homosexualities* (St. Martin's Press, 1998); and SO Murray and W Roscoe (eds) *Islamic homosexualities: Culture, history, and*

literature (New York University Press, 1997). Murray and Roscoe are both Americans, the one an anthropologist and sociologist, the other an author and activist. Another prominent author and scholar is Marc Epprecht, who spent some time in Zimbabwe as teacher and lecturer. This dominance is unfortunate, as it reinforces perceptions and protestations that homosexuality is 'un-African'. The editors and, for the most part, the authors of this edited volume are also graduates of the Master's programme in Human Rights and Democratisation in Africa (HRDA), which has been presented by the Centre for Human Rights, University of Pretoria since 2000. Sylvie Namwase completed the HRDA in 2011, and Adrian Jjuuko in 2013. In the ambit of this programme, the Centre in 2010 started to present a one-week short course on the topic of sexual minority rights in Africa. In this short course, Master's students are joined by other participants, including Judges, government officials, members of national human rights institutions, leaders in civil society and academics, from all over Africa. This course, supported by the Government of Flanders, is now a firm part of the Centre's annual calendar of activities. The Centre's work in this domain has subsequently been expanded to the establishment of a Sexual Orientation and Gender Identity and Expression (SOGIE) Unit. In 2016, the Centre instituted scholarships for gay, lesbian, bisexual, transgender and intersex students attending the HRDA programme, supported by the Government of the Kingdom of the Netherlands, through its Embassy in South Africa.

Fourth, this edited volume adds to the growing scholarship of graduates of the Centre's various programmes, in particular the HRDA, as well as HRDA graduates who subsequently completed doctorates at the Centre and elsewhere. Examples of books brought together by graduates are: CB Murungu and J Biegon (eds) *Prosecuting international crimes in Africa (PULP, 2011)* and V Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (PULP, 2016). Appearing in 2016, marking 30 years since the establishment of the Centre in 1986, this book is a worthy addition to a burgeoning line of publications.

Fifth, the publisher is an African-based publisher, the Pretoria University Law Press (PULP). Few works on any topic related to homosexuality have thus far been published in Africa, by African publishers. Most of the relevant publications have been brought to light on foreign shores, and were often difficult to access. Prominent publishing houses have been: St Martin's Press, New York University Press, Cambridge University Press, University of Minnesota Press, Ohio University Press. As a full-text open access publisher, PULP tries to create greater access, and also endeavours to disseminate printed copies across the continent.

The promise of this publication has been made possible only through the dedication of the editors; the thoughtful contribution of the authors; the support of our donors; and the magnificent one-person PULP team, Lizette Hermann. On this occasion, she was assisted by Abiy Ashenati and Thomas White. Congratulations to all.

Frans Viljoen
Director, Centre for Human Rights, University of Pretoria

ABBREVIATIONS AND ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
AmCHR	American Convention on Human Rights
ANC	African National Congress
ASDSSA	Alteration of Sex Description and Sex Status Act
AU	African Union
CAC	Collectif Arc-en-Ciel
CAL	Coalition of African Lesbians
CAT	Convention against Torture
CEDAW	Committee on the Elimination of Discrimination Against Women
CFRN	Constitution of the Federal Republic of Nigeria
CGY	Cameroon Gathering Youth
DSM V TR	Diagnostic and Statistical Manual Text Revised
EACJ	East African Court of Justice
EctHR	European Court on Human Rights
ECOSSOC	Economic and Social Council
ECOWAS	Economic Community of West Africa
GALZ	Gays and Lesbians Association of Zimbabwe
HIV/AIDS	Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome
HRC	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILGA	International Lesbian and Gay Association
LEGABIBO	Lesbians, Gays, and Bisexuals of Botswana
LGBTI	lesbian, gay, bisexual, transgender and intersex
MDC	Movement for Democratic Change
MMM	Movement Militant Mauricien
MSM	men who have sex with men
NCGLE	National Coalition for Gay and Lesbian Equality
NGOs	non-governmental organisations
OAU	Organisation of African Unity
RENSIDA	Redenacional de Associações de pessoas vivendo com HIV/SIDA em Moçambique
SAA	Social Assistance Act (South Africa)
SAHRC	South African Human Rights Commission
SADC	Southern Africa Development Cooperation Tribunal
SOGI	Sexual Orientation and Gender Identity
SSMPA	Same-Sex Marriage (Prohibition) Act (Nigeria)
STIs	Sexually Transmitted Infections
TCB	Traditional Courts Bill (South Africa)
UNESCO	United Nations Educational, Scientific and Cultural Organization
UPR	Universal Periodic Review
WLSA	Women and Law in Southern Africa
ZANU-PF	Zimbabwe African National Union-Patriotic Front
ZRP	Zimbabwe Republic Police

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The Minister of Justice and Constitutional Development & 11 Others v Southern African Litigation Centre (SALC) (867/15) [2016] ZASCA 17

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Bruno L Kiwuwa v Ivan Serunkuma and Juliet Namazzi High Court Civil Suit 56 of 2006

Frank Mugisha, Dennis Wamala & Ssenfuka Warry Joanita v Uganda Registration Services Bureau, Miscellaneous case No 96 of 2016

Jacqueline Kasha Nabagesera, David Kato and Onziema Patience v Rollingstone Ltd and Giles Muhame, Miscellaneous Cause 163 of 2010

Jacqueline Kasha Nabagesera, Frank Mugisha, Julian Pepe Onziema, and Geoffrey Ogwaro v The Attorney General and Hon. Rev. Fr Simon Lokodo, High Court, Miscellaneous Cause No 33 of 2012

Jacqueline Kasha Nabagesera, Frank Mugisha, Julian Pepe Onziema, and Geoffrey Ogwaro v The Attorney General and Hon. Rev. Fr Simon Lokodo, Civil Appeal No 195 of 2014

Jjuuko Adrian v Attorney General, Constitutional Petition 1 of 2009

MIFUMI v The Attorney General of Uganda and Kenneth Kakuru, Constitutional Appeal No 2 of 2014

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United Kingdom of Great Britain and Northern Ireland

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Zimbabwe

Banana v The State 2000 4 LRC 621 (ZSC)

PART I: INTRODUCTION

CHAPTER 1

SEXUAL MINORITIES' RIGHTS IN AFRICA: WHAT DOES IT MEAN TO BE HUMAN; AND WHO GETS TO DECIDE?

Sylvie Namwase, Adrian Jjuuko** and Ivy Nyarango****

1 Introduction

The human rights of sexual minorities in Africa have occupied both the national and international media in recent times, with more calls for their elimination than their recognition. The latest opposition has come from African leaders in retaliation against threats by certain western nations to stop giving aid to African countries which do not protect the rights of sexual minorities.[1] One case in point is a statement that was made by the President of Zanzibar that 'gay rights' were unacceptable and that no laws in Zanzibar would be amended to accommodate homosexuals.[2] Leaders from other African countries have expressed similar sentiments.[3] This resistance against sexual minority rights is preceded by some key events that occurred in certain African countries namely: the signing into law in Uganda of the Anti-Homosexuality Act, 2014, which among other

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1 See generally, 'East Africa dares UK on homosexuality' *Daily Monitor* 5 November 2011 http://www.monitor.co.ug/News/National/-/688334/1267382/-/bhdag0z/-/index.html; (accessed 2 January 2012); Also see BBC 'Ghana refuses to grant gays' rights despite aid threat' 2 November 2011 http://www.bbc.co.uk/news/world-africa-15558769 (accessed 2 January 2012).

2 *Daily Monitor* (n 1 above).

3 Leaders from Uganda, Kenya, Ghana, Nigeria, and Zimbabwe have also denounced publicly 'gay rights' in retaliation to the threat to cut their Aid. See e.g. Chido Nwangwu 'Same-Sex Marriage and Homosexuality showdown: Nigeria's Senate President, Ghana's Minister insist they are "offensive" to Africans; UK Prime Minister threatens to withdraw aid, draws fire' 1 November 2011 http://www.usafricaonline.com/2011/11/01/same-sex-marriage-homosexuality-showdown-nigerias-senate-president-ghanas-minister-insist-they-are-offensive-to-africans-uk-prime-minister-threatens-by-chido-nwangwu/ (accessed 3 January 2012).

provisions introduced life imprisonment for homosexuality and the death penalty for so called 'aggravated homosexuality';[4] the killing of a Ugandan gay rights activist;[5] the arrest and prosecution of gay couples in Malawi[6] and Kenya[7] after they were alleged to have attempted to get married; reports of murder and 'corrective rape' against lesbians in South Africa;[8] and the signing into law of the 'anti-gay marriage bill' in Nigeria.[9] These events and the intense hatred and homophobia on which they ride, compel us to reconsider the rhetorical question: Are gay rights human rights? What does it mean to be human, and who decides who is a human worthy of rights and who is not?

In Africa, the most common retort in opposition to homosexuality is that it is 'un-African' and against religious values.[10] However, neither of these claims is made from a view that is informed about what homosexuality is or with due consideration to historical facts about homosexuality in Africa, or to the core message of religion, and above all, to the appreciation of human dignity as a core and universal component of international human rights and states' obligations under the several human rights instruments they have ratified. Moreover, the degree of violence, alienation, and humiliation that sexual minorities suffer in Africa is not reported enough, and the socio-economic implications of discrimination such as unemployment and the effects of stigmatisation on the spread of HIV are usually ignored.

The harsh reality this scenario presents is that, no matter how sensationalised and illogical arguments against homosexuality in Africa are, they still influence the discourse around the rights of sexual minorities, as is explored further in the book. What is more, some bills of rights contain explicit exclusion of the rights of sexual minorities, as is the case of Uganda's Constitution, which expressly prohibits same-sex marriage.[11] As such, while sexual minorities in most African countries struggle for recognition as equal citizens under the law, those in countries where this

4 The Anti-Homosexuality Act, 2014.
5 BBC 'Ugandan gay rights activist David Kato killed' 27 January 2011 http://www.bbc.co.uk/news/world-africa-12295718 (accessed 2 January 2012).
6 BBC 'Malawi gay couple get maximum sentence of 14 years' 20 May 2010 http://www.bbc.co.uk/news/10130240 (accessed 3 January 2012).
7 BBC 'Kenyan police raid "gay wedding" and arrest five men' 12 February 2010 http://news.bbc.co.uk/2/hi/africa/8512928.stm (accessed 3 January 2012).
8 BBC 'Illegal acts of corrective rape on the increase in South Africa' 1 June 2011 http://www.bbc.co.uk/news/world-africa-13615416 (accessed 3 January 2012).
9 The Guardian 'Nigeria President signs law imposing up to 14 years' jail for gay relationships' 13 January 2014 http://www.theguardian.com/world/2014/jan/13/nigerian-president-signs-anti-gay-law (accessed 3 January 2012).
10 See M Epprecht 'The "Unsaying" of indigenous homosexualities in Zimbabwe: Mapping a blindspot in an African masculinity' (1998) 24 *Journal of South African Studies* 631; BBC 'Homosexuality: Is it un-African?' 11 October 1999 http://news.bbc.co.uk/2/hi/talking_point/465849.stm (accessed 2 January 2012).
11 Constitution of the Republic of Uganda 1995, article 31 as amended.

recognition may have been achieved, such as in South Africa, continue to struggle for social and cultural recognition.

Cameron defines sexual orientation as 'erotic attraction in the case of heterosexuals to members of the opposite sex [and] in the case of gays and lesbians, to members of the same sex.'[12] Thus, the marginalisation of sexual minorities is based upon their identity. Their sexual preference or orientation is labelled 'deviant' and 'un-African' in order to justify discrimination and marginalisation. The understanding that heterosexual conduct is the sole natural form of sexual expression is grounded in a cultural framework that terms homosexuality immoral and pathological.[13] Ironically, morality is a concept that requires accommodation and tolerance.[14] As such, discrimination cannot co-exist with morality. Equality of citizens is a moral imperative that states should enforce.

2 Sexual minorities' rights: An overview

Sexual minorities have been defined as a group whose sexual identity, orientation or practices differ from the majority of the surrounding society.[15] Though the term seems to broadly cover different groups including sex workers, it is in common usage more restricted to refer to Lesbian, Gay, Bisexual and Transgender (LGBT) persons. However, in this book, the term is extended to cover intersex persons. In some chapters of the book, the LGBTI acronym is used. In international law, the minorities that are protected are so far restricted to linguistic, cultural and religious minorities.[16] As such, sexual minorities are technically not protected. However, this does not imply that sexual minorities are not entitled to protections that accrue to everyone else. All human beings are entitled to human rights by virtue of simply being human. As such, what is referred to in this book as sexual minorities' rights or LGBTI rights are in fact all the human rights protected in international law as applied to sexual minorities. It is not a special category of rights. The Yogyakarta Principles on the Application of International Human Rights Law in

12 E Cameron 'Sexual orientation and the Constitution: A test case for human rights' (1993) 110 *South African Law Journal* 450.

13 M Machera 'Opening a can of worms: A debate on female sexuality in the lecture theatre' in A Signe (ed) *Rethinking sexuality in Africa* (2004) 157.

14 JJ Shestack 'The philosophical foundations of human rights' (1998) 20 *Human Rights Quarterly* 201-234.

15 See for example SB Math & SP Seshadri 'The invisible ones: Sexual minorities' (2013) 137 *Indian Journal of Medical Research* (2013) 4–6; 4.

16 Article 27 of the International Covenant on Civil and Political Rights (ICCPR) provides 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to these minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.'

relation to Sexual Orientation and Gender Identity[17] (Yogyakarta Principles) are a useful guide in this regard as they show application of the different human rights standards to sexual orientation and gender identity. As such the use of the terms 'sexual minorities' rights' or 'LGBTI rights' in this book refers to the rights that have already been agreed upon by states as entitlements to all human beings.

The editors and chapter authors are also aware of the controversies surrounding terminology within the LGBTI discourse, such as exclusion of transgender and intersex people when using the terms sexual minorities or LGBTI. The book is alive to this concern, and therefore despite the fact that most legal discourses focus on LGB issues, efforts are made to specifically address transgender and intersex concerns particularly in the chapters on South Africa and Kenya as some progress has been made in the protection of transgender people's rights in these countries. Similarly, the chapter on Kenya has a long discussion on the rights of intersex persons as they have recently been dealt with by the courts. The editors and authors are also alive to the fact that African sexual and gender identities may not necessarily align with the 'sexual minorities' or 'LGBTI' terminologies. As such where specific identities or practices may not fit within the current conceptions of sexual minorities or LGBTI discourses, these have been specifically described and local terminologies used.

3 LGBTI rights vis-à-vis homophobia – which one is 'un-African?'

As with all issues related to sex in pre-colonial Africa, homosexuality was treated with discretion.[18] Perhaps what the opponents of gay rights in Africa are really uncomfortable with is the aggressiveness and openness with which gay rights are discussed today and the visibility of sexual minorities. Perhaps it is this, which is 'un-African'?

But in an era where it is universally recognised that everyone is born free and equal in dignity and in rights, should the right of sexual minorities to express themselves and demand for equal treatment and recognition be compromised for the sake of everyone else's comfort?

Almost all African countries are parties to international human rights instruments, which prohibit discrimination on the basis of sex or *other status* and oblige state parties to ensure the equal treatment and protection

17 These were drafted in 2006 by a group of international human rights experts. They can be accessed at http://www.yogyakartaprinciples.org/principles_en.pdf (accessed 30 August 2016).

18 Epprecht (n 10 above) 636.

of everyone under the law.[19] The Human Rights Committee (HRC) in *Toonen v Australia*[20] held that sex as a ground for non-discrimination under the International Covenant for Civil and Political Rights (ICCPR) includes sexual orientation. The position is buttressed in the HRC's decision in *Young v Australia*[21] in which the HRC stated that same sex partners have the right to receive government benefits in the same way as heterosexual domestic partners.

The HRC has also issued recommendations to state parties to improve state practices with regard to LGBTI individuals. Such recommendations have been made to, among others, the United Kingdom, the United States, Sudan, Colombia, Zimbabwe, Trinidad and Tobago, Hong Kong, Sweden, El Salvador, Egypt, the Philippines and Argentina.[22] The recommendations are general in nature and range from educational campaigns to repeal of anti-homosexuality legislation.[23]

In expounding the rights to privacy and to non-discrimination, the HRC has issued General Comments No 16[24] and 18.[25] In General Comment No 16, the Committee observed that states were not indicating in state reports whether they were observing their obligations under the ICCPR with regard to the right to privacy. It emphasised states' duty to take legislative, judicial and administrative measures to give effect to this right. Under General Comment No 18 it enunciated that non-discrimination is a principle of human rights protection which states are duty-bound to respect in fulfilment of their obligations under the ICCPR. The Committee on Economic Social and Cultural Rights (Committee on ESCR) in General Comment No 14 also recognises that the grounds for non-discrimination under article 2 of the International Covenant on Economic Social and Cultural Rights (CESCR) include sexual orientation. The Committee on ESCR has issued General Comments No 14,[26] 15[27] and 18[28] relating to access to healthcare, water and employment. General Comment No 14 on the right to the highest attainable standard of health under article 12 requires states to ensure that health-care and information on health-care are availed without discrimination of any form including

19 Universal Declaration of Human Rights (Universal Declaration) art 2 & 26; the International Covenant on Civil and Political Rights, (ICCPR) art 2; The International Covenant on Economic Social and Cultural Rights (CESCR) art 2.
20 Communication 488/1992, UNHR Committee (4 April 1994), UN Doc CCPR/C/50/D/488/1992 (1994).
21 Communication 941/2000, UNHR Committee (12 August 2003) UN Doc CCPR/C/78/D/941/2000 (2003).
22 UN human rights treaties, equality and discrimination, sexual orientation concluding observations, http://www.bayefsky.com/themes/equality_sexual_concluding_observations.php (accessed 22 August 2011).
23 As above.
24 CCPR General Comment No 16.
25 CCPR General Comment No 18.
26 CESCR General Comment No 14.
27 CESCR General Comment No 15.
28 CESCR General Comment No 18.

colour, race, sex or sexual orientation. General Comment No 15 addresses the right to adequate living under article 11 and the right to health under article 12. It emphasises that protection against discrimination cuts across all the obligations of the state in the CESCR and states must not discriminate in the provision of basic facilities, particularly to the marginalised and vulnerable. In General Comment No 18, the Committee restates the commitment to the protection of all persons including sexual minorities by stating that discrimination in access to and maintenance of employment on the basis of sexual orientation is prohibited.[29]

On its part, the Convention against Torture (CAT)[30] expands the Universal Declaration on Human Rights (Universal Declaration) and ICCPR's prohibition against torture and cruel treatment. Customary international law prohibits torture and, as such, the legal obligations created by CAT are binding on all states, including those that have not ratified CAT.[31] The Committee Against Torture supervises and monitors implementation of the CAT.[32] As a result of state-sanctioned harassment of LGBTI persons, the Committee against Torture has issued recommendations to several countries including Egypt and Brazil regarding the ill treatment of sexual minorities in detention facilities.[33] However, there is no mechanism to enforce compliance with the recommendations. Also, state reports due under CAT, as with those under other Covenants, are usually submitted late or not at all.

The Committee on the Elimination of Discrimination against Women (CEDAW Committee), which oversees the implementation of CEDAW, has elaborated the core obligations of states under article 2 on elimination of discrimination. The Committee's General Recommendation (GR) 28 clarifies that discrimination based on sex is interlinked with other factors including sexual orientation and gender identity, and requires states to condemn 'all forms of discrimination including forms not explicitly mentioned in the Convention or that may be emerging.'[34] Finally, the Committee on the Rights of the Child with oversight over the Convention on the Rights of the Child has issued General Comments No (GCs) 3[35]

29 n 28 above, para 12(b).
30 Convention Against Torture (CAT), GA Res 39//46(10 December 1984), http://www.un.org/documents/res/39/a39r046 (accessed 23 August 2011).
31 See Amnesty International 'Torture and the law' (November 2001), http://www.amnestyusa.org/Reports_statements_and_Issue_Briefs/Torture_and_the_law/page.do?id=1107981&n1=3&n2=38&n3=1052 (accessed 23 August 2011).
32 CAT (n 30 above) art 17.
33 See OHCHR, 'Conclusions and recommendations of the Committee against Torture: Egypt' UN Doc CAT/C/CR/29/4 (23 December 2002); Committee against Torture, 26th session, Geneva (30 April – 18 May 2001), http://www.ishr.ch/hrm/tmb/treaty/cat/reports/CAT_26.hmt#_ftnref6 (accessed 20 August 2011).
34 CEDAW, 16 December 2010, http://www2.ohchr.org/english/bodies/cedaw/comments.htm (accessed 20 August 2011).
35 CRC, General Comment No 3 (HIV/AIDS and the Rights of the Child), January 2003, UN Doc CRC/GC/2003/1 http://tb.ohchr.org/default.aspx?Symbol=CRC/GC/2003/3 (accessed 20 August 2011).

and 4,[36] which state that in providing health care services to children, states parties are under duty not to discriminate on the basis of sexual orientation.

The African Charter on Human and Peoples' Rights (African Charter) contains the rights to non-discrimination on the basis of sex, equal protection of *everyone* under the law, the right of *everyone* to respect of their *integrity, dignity and inviolability*.[37] The rights in the African Charter are applicable to everybody without distinction. The terms used to denote the bearers of rights are 'every human being', 'every individual' and 'everyone.'[38] Article 2 provides that there is no ground upon which anyone may be denied protection under the Charter. It contains an open-ended list of grounds on which states may not discriminate, ending with 'other status.' This means that individuals enjoy the rights in the African Charter irrespective of their gender identity or sexual orientation. While the rights of sexual minorities, like those of everyone else, may be limited, the limitation can only be by a rational process in line with article 27(2) and in the jurisprudence of the African Commission on Human and Peoples' Rights (African Commission) or the African Court on Human and Peoples' Rights (African Court).[39]

The Commission was called upon to consider the rights of homosexual persons in *William Courson v Zimbabwe*.[40] The complainant challenged the criminalisation of sexual conduct between men in Zimbabwe and the utterances of senior political figures condemning the practice. The Commission did not make a finding on the communication because the complainant withdrew the case.[41] However, in *Zimbabwean Human Rights NGO Forum v Zimbabwe*[42] the Commission stated that non-discrimination under article 2 aims to ensure equality of treatment for individuals irrespective of a number of grounds, including 'sexual orientation'. This reflects the interpretation given by the HR Committee to the non-discrimination provision in the ICCPR in *Toonen* and other cases.

36 CRC, General Comment No 4 (Adolescent Health and Development in the context of the CRC), 1 July 2003, CRC/GC/2003/4 http://www.unhchr.ch/tbs/doc.nsf/%28symbol%29/CRC.GC.2003.4.En (accessed 20 August 2011).

37 African Charter on Human and Peoples' Rights arts 2, 3, 4, & 5.

38 n 37 above, arts 2 to 17.

39 F Viljoen & R Murray 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 92.

40 *William Courson v Zimbabwe* (2000) AHRLR 335 (ACHPR 1995).

41 Nevertheless, it may be worth noting that the rapporteur made the following comment: '[b]ecause of the deleterious nature of homosexuality, the Commission seizes the opportunity to make a pronouncement on it … Homosexuality offends the African sense of dignity and morality and is inconsistent with positive African values.' See 16th ordinary session 1994 quoted in Evelyn A Ankumah *The African Commission on Human and Peoples' Rights – Practices and Procedures* (1996) 174.

42 *Zimbabwean Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) 169. The observations were *obiter dicta* since the case did not directly concern the question of sexual orientation.

The maltreatment of sexual minorities offends the standards set by these instruments and in most African states these standards are not recognised, as will be illustrated in subsequent chapters. It is suggested that because of this non recognition, these rights are in turn not taught in schools, are not publicised or respected by law enforcement officials, parliaments, judges and even heads of state as evidenced by some of the public statements made and discriminatory laws passed, which the chapters explore in their various themes. This scenario explains the present status of sexual minorities' rights in Africa.

4 An overview of the literature

There are a number of works that discuss and explore debates on homosexuality in pre-colonial Africa.[43] Homosexuality has been defined as sexual attraction to a person of the same sex.[44] It is submitted that homosexuality is in fact just that – a form of sexuality. As sexuality is a human and not *geographical* condition, one cannot purport to say that homosexuality is 'un-African' without the absurd implication that there were no human beings in pre-colonial Africa. Pre-colonial societies in Africa did not subject persons who could now be said to have been categorised as sexual minorities to the level of violence they are subjected to today in the form of seclusion, rejection, corrective rape, imprisonment, even death.[45] One study shows that relatives reconciled themselves to the homosexuality of family members, while in other instances they carried out secret cleansing rituals on the understanding that the person was possessed by spirits, but did not regard that person as evil.[46]

Scholars have refuted the proposition that homosexuality is a Western concept brought to Africa by white colonial masters or Arab slave traders. The sociologist Murray gives numerous accounts of cultural practices throughout Africa showing that same-sex conduct took place before colonialism.[47] Other studies show that sexual relations between men may not have been institutionalised in all instances but they were practised and

43 See generally, SO Murray & W Roscoe *Boy wives and female husbands: Studies on African homosexuality* (1998); Epprecht (n 10 above); D Amory 'Homosexuality in Africa: issues and debates' (1997) *A Journal of Opinion* 25; BS Pincheon 'An ethnography of silences: Race, (homo) sexualities, and a discourse of Africa' (2000) *African Studies Review* 43; also watch debate 'Is homosexuality un-African?' March 2011 http://mybigdebate.com/?p=214 (accessed on 4 January 2012); see also R Morgan & G Reid '"I've got two men and one woman": Ancestors, sexuality and identity among same-sex identified women traditional healers in South Africa' (2003) 5 *Culture, Health and Sexuality* 378.

44 n 12 above, 452.

45 See generally, Human Rights Watch (2003) 'More than a name: state sponsored homophobia and its consequences in South Africa' https://www.hrw.org/report/2003/05/13/more-name/state-sponsored-homophobia-and-its-consequences-southern-africa

46 Epprecht (n 10 above) 636; Murray & Roscoe (n 40 above) 64.

47 SO Murray 'Homosexuality in traditional Sub-Saharan Africa and contemporary South Africa' in Murray & Roscoe (n 40 above) 1-18.

largely tolerated.[48] Among the Baganda, Iteso, Langi, Bahima and Banyoro of East Africa, homosexuality was generally accepted and certain males were considered female and could marry men.[49] Similarly, reports show that among the Swahili-speakers of the Kenyan coast, there were numerous instances of same-sex relationships.[50]

The portrayal of homosexuality as un-African and alien is, therefore, inaccurate and contrary to established facts. In any event, it is contestable whether there actually exists an 'African culture' seeing as Africa is not homogenous and within it are varied cultures and practices. As well, culture is not static but changes over time in response to developments within society.[51]

There is however a dearth of literature to capture and compare how different countries in Africa have dealt with and continue to deal with this evolution, and how their action or inaction has influenced the evolution of rights of sexual minorities on the continent. This book is not a comparative work but rather an attempt at mapping the legal discourse on the subject of sexual minorities' rights in the selected African countries.

5 What this book aims to achieve

Much of the discourse on the recognition of the rights of LGBTI persons has been dominated by people from Western countries or by human rights organisations funded in part by Western nations, leading to the contention that sexual minority rights are an aberration imposed upon Africa by the West. This work aims to put forward cogent arguments for the recognition, protection and promotion of the rights of sexual minorities in Africa through the voices of Africans. It provides a forum for African human rights practitioners to analyse the situation of LGBTI individuals in light of recent constitutional, social and political developments and to propose strategies for legal and policy reform towards consolidating the rights of sexual minorities in Africa.

48 EE Evans-Pitchard 'Sexual inversion among the Azande' (1970) 72 *American Anthropologist* 1428-1434; M Roscoe 'The Mamluks' in SO Murray (ed) *Cultural diversity and homosexuality* (1997) 213-219.

49 S Tamale 'Out of the closet: unveiling sexuality discourses in Uganda' http://www.feministafrica.org/index.php/out-of-the-closet (accessed 20 September 2011); J Lawrence *The Iteso: Fifty years of change in Nilo-Hermitic tribe of Uganda* (1957) 24; J Driberg *The Lango: A Nilotic tribe of Uganda* (1923) 46; S Mushanga 'The Nkole of South Western Uganda' in A Molnos (ed) *Cultural source materials for planning in East Africa* (1973) 87; R Needham *Right and left in Nyoro symbolic classification* (1973) 67.

50 Murray & Roscoe (n 40 above) 80; see also D Kuria *Understanding homosexual people in pre-colonial Kenya* (2005)108-109; N Sussman 'Sex and sexuality in history' in BJ Sadock *et al The sexual experience* (1976) 7.

51 CI Nyamu 'How should human rights and development respond to cultural legitimisation of gender hierarchy in developing countries?' (2000) 41 *Harvard International Law Journal* 381.

The book has an introduction section that gives an overview of the book and the situation of sexual minorities in Africa. The second section covers the regulation of sexual orientation in the pre-colonial perspective. The third section has country perspectives from Botswana, Cameroon, Kenya, Mauritius, Nigeria, South Africa, Uganda and Zimbabwe. The fourth part discusses the situation of LGBTI rights in the African system. In the various contexts, the book explores the role of donors, western evangelists, the international community and the trend of international politics on the progress of sexual minorities' rights in Africa. It emphasises the significance of protecting sexual minorities' rights under the African human rights system and the protection of these rights in national jurisdictions.

The chapters contained in this volume map the discourse on sexual minorities' rights in light of recent legal, social and political developments on the national and regional scene in Africa; they aim to develop arguments and strategies which respond to contemporary issues facing sexual minorities in Africa with a view to advancing the protection of their rights; and to equip activists, researchers and policy makers with a consolidated analysis of the contemporary social-legal issues concerning sexual minorities' rights in Africa. They explore, compare and analyse the laws affecting sexual minorities in selected African countries. They also analyse the social, cultural, religious, economic and political factors influencing the progress of sexual minorities' rights on the continent. In addition, the authors of various chapters suggest new strategies for the advancement of sexual minority rights according to particular situations prevailing in their countries. The chapters in this book explore three broad questions:

- What is the current status of sexual minorities' rights in Africa?
- What are the unique or common factors influencing the protection of the rights of sexual minorities in Africa?
- How can the unique or common experiences of selected African countries be used to enhance the protection of rights of sexual minorities in Africa?

6 Methodology

In seeking to answer these questions, the chapters in this book compare and analyse the legal, social, political and economic situations and developments in selected African countries, identifying commonalities and differences in the history, economy, social structures, cultures and religions of these selected African countries to arrive at insightful and well-grounded conclusions. This is done through intensive desktop and library research, review and analysis of relevant historical and modern literature and analysis of relevant regional and global economic, social and political developments. The subject matter considered covers the period up to the

end of 2015; although some attempts have been made to update information to reflect subsequent developments where applicable.

7 Why this book is important now

Never before has the issue of sexual minority rights dominated Africa's social and political landscape as it has in recent years. The saying goes: 'strike the iron while it is still hot.' If there ever was a time to discuss, compare and consolidate the social, cultural, religious and political arguments pertaining to the issue of rights of sexual minorities in Africa, it is now while the subject is so topical. Unfortunately, the debate on the subject has thus far been sensational rather than logical or objective. The authors and editors hope that this book will become a reference point for a logical debate on the subject, providing an objective assessment of the diverse arguments and considering them in light of contemporary legal, religious and political developments in selected African countries.

One of the biggest challenges for advancing sexual minorities' rights in Africa is the lack of awareness. Right from the very basic training at undergraduate level, lawyers in Africa are hardly exposed to the subject of sexual minorities' rights compared to other subjects like women and children's rights. The result is that the 'would be' vanguards of the rights of sexual minorities in Africa are less aware of the subject. Such apathy feeds into homophobia, which then feeds into public institutions of law including the judiciary, where it may influence judicial decisions; the police and prisons, where it may contribute to maltreatment of sexual minorities; parliament, where it may advance the enactment of repressive laws and the executive where it may contribute to state-sponsored violence against sexual minorities. The book is specifically targeted at students and lecturers of the law in Africa, researchers in the area of rights of sexual minorities, Africa's political leaders, members of parliament, legal practitioners, medical practitioners, judges, law enforcement officials, the media, church leaders, traditional leaders, civil society organisations and the public at large. It is also hoped that decision makers in institutions within the African human rights system, particularly the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, which are key institutions in shaping the cause for rights of sexual minorities in Africa will find the book informative.

This book will hopefully fill the existing gap in knowledge and awareness of LGBTI rights issues in Africa; and in this way, help to throw some water on the fires of homophobia that are currently raging on the continent.

PART II: REGULATION OF SEXUAL ORIENTATION IN PRE-COLONIAL AFRICA

CHAPTER 2

A TRIPLE HERITAGE OF SEXUALITY? REGULATION OF SEXUAL ORIENTATION IN AFRICA IN HISTORICAL PERSPECTIVE

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1 Introduction

The profile of sexual orientation in Africa has not been constant at all times. This fluctuation is as a result of the convoluted journey most of Africa's socio-political institutions have had to take. Pre-colonial African societies observed largely indigenous religious and cultural traditions, which were fundamentally altered by early visitors, imperialists and missionaries.

The visitors interacted with indigenous institutions in multiple ways, in the process irrevocably distorting the continental socio-cultural landscape. On the East African coast, the Portuguese and the Arabs introduced unique civilisations, and their legacy included inputting into the local languages, cultures, political and social systems, agriculture, architecture, trade, and religion.[1]

Writing in this context, Oliver and Atmore have chronicled the following:[2]

> Here, trading settlements were known to the Greek geographers in the first century AD, while early mosques built of mud and thatch have been found which show the presence of Islam as early as the eighth or ninth century. Commercial settlements were established by Arab merchants from the Red Sea and the Persian Gulf; from the tenth century on, some of these were

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1 See for instance, BG Martin 'Arab migrations to East Africa in medieval times' (1974) 7 *International Journal of African Historical Studies* 367.

2 R Oliver & A Atmore *Africa since 1800* (5th ed) (2005) 30 – 31. It is also documented that 'between around 700 and 1500 AD, a majority of Muslim visitors to East Africa probably concerned themselves with some aspect of trade.' See for instance, Martin (n 1 above) 375.

> prosperous enough to have their public buildings made of the coral blocks and abounding on the coast.

EA Taiwo has told of a similar experience in West Africa. According to this narrative:[3]

> The religion of Islam had been firmly rooted in many societies in sub-Saharan Africa since the fifteenth century. Islam entered Hausa land in the early fourteenth century. About 40 Wangarawa traders brought Islam with them, and during the reign of Muhammad Rumfa between 1463 and 1499, Islam was firmly rooted in Kano.

On the other hand, the imperialists occasioned phenomenal transformation through systematic imposition of foreign social, political and legal systems in which distinct Western values were embedded. According to Lord Fredrick Lugard – the architect of colonialism in east, west and parts of southern Africa[4] – the advent of Europeans brought with it the mind and methods of Europe.[5] And the revolution was a fusion of material development, education and progress.[6] These outcomes were expected given that part of the 'dual mandate' pursued by British imperialism was the 'civilisation of natives':[7]

> It was the task of civilisation to put an end to slavery, to establish courts of law, to inculcate in the natives a sense of individual responsibility, of liberty, of justice, and to teach their rulers how to apply these principles; above all, to see to it that the system of education should be such as to produce happiness and progress.

Accompanying the British imperialists were Christian missionaries who saw their religion and civilisation as superior, and thus bestowing upon them high responsibility to 'save' the native populations. Oginga Odinga, a freedom fighter and Kenya's first independence Vice President, thus narrated a close encounter with the 'saviours':[8]

3 EA Taiwo 'Justifications, challenges and constitutionality of the penal aspects of Shari'ah law in Nigeria' (2008) 17 *Griffith Law Review* 184, 185. Regarding the introduction of Islamic customary law and its institutions, Yadudu has written: 'The Islamic legal order was brought to the pre-colonial part of Nigeria with the conversion of the people to Islam. This began in the 9th century with the Kanem Borno and spread in the 11th century to the rest of the region. However, the widespread application of the Islamic law and the formalisation of its judicial structures occurred only during the early part of the 19th century with the establishment of the Sokoto caliphate. This had occurred much earlier on a smaller scale under the Saifawa dynasty of Borno.' See AH Yadudu 'Colonialism and the transformation of Islamic law' (1992) 32 *Journal of Legal Pluralism and Unofficial Law* 110.

4 Regarding the conquest of the relevant regions of Africa, Lugard has written: 'During the first half of these thirty years, it was my privilege to assist in some degree in bringing under British control portions of Nyasaland, East Africa, Uganda, and Nigeria …' See Lord Fredrick Lugard *The dual mandate in British tropical Africa* (5th ed, 1965) 7.

5 Lugard (n 4 above) 5.

6 As above.

7 As above.

8 O Odinga *Not yet Uhuru* (1976) 42.

> But over the years it dawned on me that I had listened to many preachers and they seemed, all of them, to preach one thing in common – the suppression of African customs. They were not satisfied to concentrate on the word of the Bible; they tried to use the word of God to judge African traditions. An African who followed his peoples' customs was condemned as heathen and anti-Christian. Those who lived among and mixed easily with the non-Christians who were, after all, the majority, were themselves dubbed heathen. Tribesmen who kept many animals were condemned as anti-Christian because the possession of many animals meant it was possible for a man to marry and pay dowry for several wives. Any man married to more than one woman was anti-Christian. Villagers who lived in the traditional fenced-in clusters of huts were anti-Christian; if they were followers of the church they would group their houses near the church building, it was thought.

The three civilisations, traditional African religion, the Euro-Christian heritage and Islam, would later play an influential role on the continent. Granted this background, Mazrui rightly perceived contemporary Africa as the manifestation of this 'trinity'. He recounted[9]

> The twentieth century witnessed the full flowering of Africa's triple heritage (Africanity, Islam, and Westernization). This has developed into a major new paradigm for interpreting Africa – for viewing the continent as a convergence of three civilizations.

In the last five decades of independence, most African jurisdictions have undergone a process of internal reflection with the result that indigenous peoples have re-asserted, modified or annulled some of the values learned in the course of visitation and colonialism. With regard specifically to sexual orientation, jurisdictions like Kenya, Nigeria and Uganda appear to be reaffirming the colonial heritage and might have fared even 'better' than their 'mentors'. In what I have called 'second wave of criminalisation of homosexuality,' Nigeria and Uganda have expanded the scope of anti-homosexuality offences and prescribed harsher penal sanctions.[10]

9 AA Mazrui 'The re-invention of Africa: Edward Said, VY Mudimbe, and beyond' (2005) 36 *Research in African Literatures* 3, 68, 76. Of this aspect, it has also been noted: 'Professor Ali Mazrui … argues that African culture today must be "understood best in terms of its 'triple heritage', of indigenous, Islam, and western forces, which had arisen out of an ancient confluence of indigenous, Semitic, and Greco-Roman forces." Consequently, the combination of these diverse cultures and current trends in globalization have immensely disturbed the purity of African customary values. Thus, an African cultural tradition may, therefore, mean much more than extant traditional practices. Indeed, it may impute a blend of traditional African values, western way of life, and even Asiatic values or traditional practices.' See L Juma 'Reconciling African customary law and human rights in Kenya: Making a case for institutional reformation and revitalization of customary adjudication processes' (2002) 14 *Saint Thomas Law Review* 475.

10 Of the Same-Sex Marriage (Prohibition) Act, it has been written: 'This law is part of a larger trend towards criminalizing or re-criminalizing LGBTI identity, relationships, and expression in many countries around the world, including Russia and Uganda.' See the Executive Summary of the report, Leitner Center for International Law and Justice PEN Nigeria and PEN America. According to Solomon Ebobrah,

The new wave takes no chances as it is sufficiently methodical to ensure not only the proscription of homosexual acts but also the curtailment of crucial related entitlements of homosexuals like the rights to life, equality, free speech, association, and assembly, access to healthcare, housing, property, employment, privacy, human dignity, and family.[11] In almost all affected jurisdictions, proponents of expanded criminalisation of homosexuality have argued that homosexual conduct and relations are not culturally African, that they are a product of Western influence and values.[12] Not being indigenous, a strong case has been made for constitutional and even legal proscription of both homosexual conduct and orientation. Other states like Mozambique and South Africa have abandoned the colonial legacy by charting a new path. This chapter investigates these developments. It enquires into how selected Commonwealth countries, Africa, Kenya, Nigeria, South Africa and Uganda, have historically regulated sexual orientation with the view to situating the second wave of criminalisation into its proper context. The historical analysis is also aimed at discovering whether homosexuality is a Western import as claimed by advocates for expanded criminalisation of homosexuality in Africa. This important enquiry expends three distinct sections, each addressing a particular epoch: the pre-colonial period; the colonial aeon; and the post-colonial era.

2 Regulation of homosexual conduct during the pre-colonial period

As promised above, this part studies how traditional African societies dealt with sexual orientation before the advent of colonialism. A study of this kind has to reckon with a number of socio-cultural realities obtaining at the material epoch. It has, in the first place, to appreciate that regulation among native Africans did not always take formal structures and procedures. Africans had their own authentic methods of operating governance and justice systems, which may not always reconcile with the now dominant Western approach. Although some traditional societies such as the Wanga of Kenya, Baganda of Uganda, and Zulu of South Africa qualified to be called states, most others lacked a centralised

'the emerging legal regimes in Nigeria, Uganda and Zimbabwe represent the most aggressive and extreme forms of post-colonial legislative action against homosexuality in Africa. See ST Ebobrah 'Africanising human rights in the 21st century: Gay rights, African values and the dilemma of the African legislator' (2012) 1 *International Human Rights Law Review* 120.

11 See, for instance, D Harris 'Death by injustice: Uganda's anti-homosexuality laws, Christian fundamentalism, and the politics of global power' (2013) 3 *The Catalyst* 1, 2.

12 See L Vincent & S Howell '"Unnatural", "un-African" and "ungodly": Homophobic discourse in democratic South Africa' (2014) 17 *Sexualities* 475; M van Zyl 'Are same-sex marriages unAfrican? Same-sex relationships and belonging in post-apartheid South Africa' (2011) 67 *Journal of Social Issues* 339. According to Solomon Ebobrah the view that homosexuality is un-African is perhaps the greatest challenge for advocates of sexual minority rights. See Ebobrah (n 10 above) 113.

political authority, and functioned without codified law or regular systems of taxation.[13]

Instead:[14]

> Social cohesion was obtained through custom and consensus, not only within families but within clans and, as far as possible, between clans. Internally within the group there was minimal use of force and coercion, and greater reliance on traditional precedent.

Regulation in the traditional African sense therefore entailed more than just coercive laws or formal policies issuing from official governance structures. There was room for 'oral' customs and related moral principles which were often exerted without physical police or tangible criminal sanctions.

It is also important to mention that pre-colonial African systems were predominated by religion, which permeated nearly all aspects of life to the extent of making the separation of *faith* from *action* illusory. Practitioners of traditional African religion are known to experience their faith long before birth, throughout life, and way after death. As John Mbiti ably demonstrated:[15]

> Where the African is, there is his religion: he carries it to the fields where he is sowing seeds or harvesting a new crop; he takes it with him to the beer party or to attend a funeral ceremony; and if he is educated, he takes religion with him to the examination room at school or in the university; if he is a politician he takes it to the house of parliament.

Since traditional religion accompanied its subjects in virtually every undertaking, the regulation of sexual orientation in pre-colonial societies requires to be cast against a context whereby 'belief in the supernatural, and law may be fused and mutually supportive'.[16] G Tessman was, therefore, on point when he wrote:[17]

> Generally, one must consider sexual phenomena not in isolation but always in the context of the entire social situation, and not just with regard to material but to spiritual domains as well. This principle applies all the more to native peoples, whose customs present themselves to us as indeed incomprehensible and therefore silly, because we consider them entirely on their own, not in connection with their other customs and ways of seeing. Among the social

13 AA Mazrui *The Africans: A triple heritage* (1986) 68.
14 Mazrui (n 13 above) 69.
15 JS Mbiti *African religions and philosophy* (1969) 142.
16 JW Van Doren 'African tradition and western common law: A study in contradiction' in JB Ojwang & JNK Mugambi (eds) *The* SM Otieno *case: Death and burial in modern Kenya* (1989) 128.
17 G Tessman 'Homosexuality among the negroes of Cameroon and a Pangwe tale' trans B Rose in S Murray & W Roscoe (eds) *Boy-wives and female-husbands: Studies in African homosexualities* (1998) 149.

> customs that sexual practices significantly depend on, religion is by far the most decisive. Accordingly, it can be said: wherever a different religion appears in Africa, sexual activity is different as well.

The final rider has to do with the fact that there were close to 1000 different tribes and about 10 000 polities in Africa prior to imperialism and each had its own customs, religions and political systems.[18] This rules out the possibility of a precise African conception of sexual orientation. However, comparative experiences show general trends and patterns, which then make the enquiry amenable to some degree of generic academic analysis.

It is not controversial that heterosexual relationships leading to marriage and children were invariably cherished among African peoples.[19] Marriage was understood to be a religious obligation and sacrosanct responsibility for everyone.[20] Under appropriate circumstances, marriage was treated as the focal point where departed, present and future members of society met.[21] It was 'the point of hope and expectation for the unmarried and their relatives'.[22] A marriage climaxed once procreation had occurred[23] and the resultant family was considered 'the "fundamental element" and the "basic sphere of action" in African relationships.'[24] Naturally, therefore, the family was an individual's medium of integration into the clan and the wider society.[25]

A 'fecund marriage' was thus an ideal aspiration pursued by virtually every right thinking member of society. So prized was this ambition that 'infertile women and impotent men tended to have very low, if not despised social status.'[26] Invariably, impotence was considered a societal curse since, for Africans,[27]

> [i]nfertility and sterility block the channel through which the stream of life flows; they plunge the person concerned into misery, they sever him from personal immortality, and threaten the perpetuation of the lineage.

18 M Meredith *The state of Africa: A history of fifty years of independence* (2006) 2.
19 See M Epprecht '"Bisexuality" and the politics of normal in African ethnography' (2006) 48 *Anthropologica*, 187, 188 where it is stated: 'African societies traditionally placed an extremely high and prodigiously over-determined value on heterosexual marriage and reproduction'. Also, M Epprecht '"Hidden" histories of African homosexualities' (2005) 24 *Canadian Woman Studies* 138, 139.
20 Mbiti (n 15 above) 148.
21 As above.
22 As above.
23 As above.
24 L Magesa *African religion: The moral traditions of abundant life* (1997) 113.
25 As above.
26 Epprecht (n 19 above) 139.
27 B Kisembo *African Christian marriage* 105-106, as cited in Magesa (n 24 above) 134.

According to Caldwell and Caldwell, barren women would be subjected to dehumanising treatment such as isolation so as not to contaminate others or cause the death of children, forced divorce and indecent burials.[28] Low fertility was usually interpreted as evidence of sin and disapproval.[29] To the contrary, high fertility was not only cherished as a divine reward but also as evidence of the right behaviour.[30] African societies associated fertility in the marriage context with joy, the right life, divine approval, and approbation by both living and dead ancestors.[31]

Because of the high premium placed on the fruitful marriage institution, most African societies worked towards presenting an appearance of universal conformity to a fecund heterosexual norm.[32] In reality, however, this was sometimes a façade whose existence was socially protected by what Epprecht calls a deeply embedded culture of silence regarding the existence of alternative practices.[33] For this reason, the possibility of impotence among men or homosexual preferences existing in traditional societies could hardly be admitted, except as cases of spirit possession, witchcraft or like excuses.[34]

As part of this policy of silence, many African societies designed institutional mechanisms with potential to cover up for impotence and homosexuality. Among the Shona people of Zimbabwe, for instance, families would avoid the shame of a man's inability to sire children through the customary device of kupindira.[35] Under this custom, a male relative would secretly be invited to stand in for an impotent brother sometimes without the knowledge of the 'beneficiary.'[36] In so doing, the problematic fertility of a husband did not need to be exposed, and, therefore, the 'honour' of the family could be maintained.[37]

In like manner, it is possible that woman-to-woman marriages practiced in certain communities were conceived to accommodate lesbianism, albeit covertly. Writing on the sacred subject of homosexuality in Africa, Epprecht argued that these institutions acted to provide cover for lesbian-like sexual practices, including kissing, general touching, and even oral sex.[38] Woman-to-woman marriages are also renowned as traditional

28 JC Caldwell & P Caldwell 'The cultural context of high fertility in sub-Saharan Africa' (1987) 13 *Population and Development Review* 418.
29 Caldwell & Caldwell (n 28 above) 416.
30 As above.
31 As above.
32 M Epprecht 'The "unsaying" of indigenous homosexualities in Zimbabwe: Mapping a blindspot in an African masculinity' (1998) 24 *Journal of Southern African Studies* 635.
33 As above.
34 As above.
35 Epprecht (n 19 above) 139.
36 As above.
37 As above; Mbiti (n 15 above) 145.
38 Epprecht (n 19 above) 139.

panacea for barrenness among widows or married women. Under these customary marriages;[39]

> [a] woman past the age of [among the Nandi and Kipsigis] child-bearing and who has no sons, may enter into a form of marriage with another woman. This may be done during the lifetime of her husband, but is more usual after his death. Marriage consideration is paid, as in regular marriage, and a man from the woman's husband's clan has intercourse with the girl in respect of whom marriage consideration has been paid. Any children born to the girl are regarded as the children of the woman who paid marriage consideration and her husband.

There was also a tendency to explain away the existence of same-sex conduct in Africa as a learnt habit. This method imagines a distant past era in pre-colonial Africa devoid of homosexuality.[40] The change being witnessed, goes this theory, was wrought by invaders, explorers and traders.[41] A most famous illustration of this method at work is the allegation that Kabaka Mwanga of the Baganda Kingdom might 'have been corrupted toward bisexuality by his Muslim advisors at court'.[42] Speaking of homosexuality, a proponent of this view, Apolo Kagwa, is quoted as having stated:[43]

> These Arabs introduced into our country along with numerous disorders, an abomination which we had never practised and which we had never heard spoken of.

Addressing his people during the commemoration of the Uganda Martyrs' day, President Museveni immortalised the view that King Mwanga acquired homosexuality from the Arabs.[44]

The code of silence also found loud articulation in the abeyances of language since most indigenous dialects failed to assign specific terminology for homosexuality or related conduct arguably in the hope that the lacunae in vocabulary would eliminate the problem.[45] It is true for most indigenous societies that words referring to homosexuality are either inexistent or were only borrowed much later from other cultures and civilisations.[46] This background of silence and escapism explains why the question whether pre-colonial African societies practiced or condoned homosexuality continues to elicit considerable debate.

39 E Cotran *The law of marriage and divorce* (1968) 117.
40 S Nyanzi 'Dismantling reified African culture through localised homosexualities in Uganda' (2013) 15 *Culture, Health and Sexuality* 952 954.
41 As above.
42 Epprecht (n 19 above) 189.
43 JF Faupel *African holocaust: The story of the Uganda martyrs* (1984) 18.
44 This speech is cited in S Dicklitch, B Yost & B Dougan 'Building a barometer of gay rights (BGR)?: A case study of Uganda and the persecution of homosexuals' (2012) 34 *Human Rights Quarterly* 448, 458.
45 Epprecht (n 32 above) 636.
46 Epprecht (n 32 above) 637.

There are those who maintain that native traditions did not generally permit homosexual conduct. A writer on African religion, for instance, reported as follows:[47]

> Active homosexuality is morally intolerable because it frustrates the whole purpose of sexual pleasure and that of a human person's existence in the sight of the ancestors and God. Thus, homosexual or lesbian orientations cannot be allowed to surface, let alone be expressed actively. It is clear how such an expression would be directly antagonistic to what the ancestors and the preservation and transmission of life stand for.

Proponents of this school normally view homosexuality as a 'western invention' imposed upon native populations by remnants of colonising powers.[48] Being an imported concept, they hold that continental boundaries must shut it out.[49] While advocating for an earlier version of the Anti-Homosexuality Bill,[50] Dr James Buturo, then Uganda's Minister for Ethics and Integrity, argued that homosexuality and its diagnosis are both products of the West.[51]

This view has, however, been contested by writers like Scott Long who argued that 'there is no reason to suppose that white colonists brought same-sex behaviour to Africa for the first time.'[52] Long's argument lends credence to the theory abundant in academic literature that homosexuality was generally tolerated, ignored, or incorporated into many societies in the world before colonialism.[53] Dlamini concluded that the existence of homosexuality in African societies is beyond doubt.[54] Sweet wrote about the Kwayama, an ethnic group of planters and herders in Angola, in which, male spiritual leaders cross-dressed, did women's work, and became secondary spouses to men whose other wives were biologically female.[55] An ethnographical study of the African tribes of Cameroon similarly confirmed that no tribe had punishment for homosexual conduct

47 Magesa (n 24 above) 137.

48 See AJ Kretz 'From "kill the gays" to "kill the gay rights movement": The future of homosexuality legislation in Africa' (2012-2013) 11 *Northwestern Journal of International Human Rights* 216.

49 CE Finerty 'Being gay in Kenya: The implications of Kenya's new Constitution for its anti-sodomy laws' (2013) 45 *Cornell International Law Journal* 431 436.

50 Bill Supplement No 18, Uganda Gazette No 47, Volume CII dated 25 September 2009. Available at: http://www.publiceye.org/publications/globalizing-the-culture-wars/pdf/uganda-bill-september-09.pdf (accessed 9 April 2014).

51 Harris (n 11 above) 4.

52 S Long 'Before the law: Criminalizing sexual conduct in colonial and post-colonial southern African societies' m.hrw.org/reports/2003/safrica (accessed 8 April 2014).

53 See, for instance, JA Faucette 'Human rights in context: The lessons of section 377 challenges for western gay rights legal reformers in the developing world' (2010) 13 *Journal of Gender, Race and Justice* 417. See also JD Wilets 'From divergence to convergence? A comparative and international law analysis of LGBTI rights in the context of race and post colonialism' (2010-2011) 21 *Duke Journal of Comparative and International Law* 634.

54 B Dlamini 'Homosexuality in the African context' (2006) 67 *Agenda* 135.

55 JH Sweet 'Male homosexuality and spiritism in the African Diaspora: The legacies of a link' (1996) 7 *Journal of the History of Sexuality* 191. It is however important to

as no one felt harmed by it.[56] Due to a combination of factors such as the scarcity of women, the early betrothal of young girls to rich and older men and high bride-prices, young and poor Azande men would seek sexual satisfaction among their age mates until they got wealthy enough to acquire a wife for themselves.[57] Another source depicted some members of the Buganda royal family as having confessed that homosexuality was existent and tolerated before colonial rule.[58] This confession is consistent with anthropological and historical literature, which associate the reign of Kings (Mutesa and Mwanga) of the Baganda Kingdom with homosexuality. In this regard, J Faupel's survey of the story of the Uganda martyrs concluded that:[59]

> Whether the Arabs were solely responsible for its introduction or not, homosexuality seems to have been rife at Mutesa's Court … His son Mwanga was also an addict long before he succeeded to the throne.

To this day, there are allegations that many members of the Buganda royal family are homosexuals.[60] Ironically, Uganda's long serving President and avid critique of homosexuality, Yoweri Museveni, at one time acknowledged the presence of a few homosexuals in traditional societies observing that 'there was no prosecution, no killings and no marginalisation of these people'.[61] S Tamale corroborated this position when she wrote that, 'when we turn to the past, we find that, contrary to the popular belief, homosexuality in Uganda predates colonialism, and other forms of subjugation.'[62] A recent report by Sexual Minorities Uganda (SMUG) details some such recorded examples of homosexuality among pre-colonial African communities, including the fact that in some communities warriors had the moral latitude to cohabit with younger boys, usually under their mentorship,[63] and with whom they would engaged in same-sex relations.[64]

There are further explanations for same-sex conduct among indigenous Africans other than for sexual pleasure. Anal intercourse performed under the right conditions was used, in some communities, ritualistically, to appease the gods to, say, increase crop harvests, or protect

note that although men took other men as 'wives' in this culture, the economic component of the union is much more important than the sexual one. Thus, such marriage should not be equated with sex.

56 Tessmann (n 17 above) 157.

57 See generally, EE Evans-Pritchard *Sexual invasion among the Azande* (1970).

58 M Hollander 'Gay rights in Uganda: Seeking to overturn Uganda's anti-sodomy laws' (2009) 50 *Virginia Journal of International Law* 226.

59 Faupel (n 43 above) 18.

60 Hollander (n 58 above) 226.

61 Sexual Minorities Uganda (SMUG) *Expanded criminalisation of homosexuality in Uganda: A flawed narrative* (2014) 8.

62 S Tamale 'Out of the closet: unveiling sexuality discourse in Uganda' in CM Cole, T Manuh & SF Miescher (eds) *Africa after gender* (2007) 17-18.

63 SMUG (n 61 above) 7-8.

64 As above.

the participants from evil spirits.[65] Anal intercourse was also thought to bring greater virility in marriage. Among the Pangwe men of Cameroon, sexual conduct between men was considered 'wealth medicine.'[66] In addition to the aforementioned communities, same-sex relations are documented to have existed in many other African societies including the Siwah, El Garah, Basotho, Venda, Meru, Phalaborwa, Nuer, Bantu, Lovendi, Langi and Teso.[67]

It is therefore justifiable to conclude that the high societal premium placed on fertile heterosexual marriages in most African cultures necessitated institutional support systems that sometimes went as far as concealing or suppressing the existence of alternative sexual orientations. The presence of homosexual men in society was often overlooked through devices like silences and abeyances in language. By most accounts, many African societies silently sanctioned homosexual conduct either for its own sake or for ritualistic purposes such as military prowess or to acquire and retain power or wealth. At the same time, there is very little evidence to support the claim that pre-colonial African societies prohibited homosexuality.[68]

3 The colonial epoch and the reception of novel law

In this part, I demonstrate that the colonial experience vigorously shook the indigenous values and cultural institutions discussed above in a manner never anticipated before. The new epoch not only saw the transformation of the religious and moral traditions of native populations, it also fundamentally altered the style of government and the methods of social control. Africa would be a very different place, henceforth.[69] This part studies the imperial legacy on laws and institutions regulating sexual orientation in Africa. It first offers explanations of how foreign law set foot on the continent before discussing the received law in the specific context of sexual orientation.

3.1 The reception of foreign law

The turning point for the African region was the Berlin Conference of 1884-85, during which European powers (Belgium, Britain, France, Germany, Italy and Portugal), discussed the partition of the 'dark'

65 Epprecht (n 19 above) 188.
66 Tessmann (n 17 above) 149-162. See also Magesa (n 24 above) 137.
67 Wilets (n 53 above) 635.Tamale (n 62 above) 18.
68 Ebobrah (n 10 above) 117.
69 Commenting on the legacy of the British in Northern Nigeria, Yadudu has lamented that the colonial factor transformed the content and methodology of Islamic law together with its judicial institutions for the worse. See Yadudu (n 3 above) 112.

continent.[70] At the end of these deliberations, it was resolved that European powers seeking to colonise Africa would have to first declare their spheres of influence. Such proclamation was to be followed by effective control of the identified jurisdictions. Acting on these resolutions, the British *formally* seized control of many territories including Kenya, Nigeria and Uganda.[71]

Unlike Belgium, France and Portugal, Britain did not consider its colonies extensions of 'metropolitan Britain.'[72] Not being a part of the mother country, there was a challenge of applying the laws of the metropolis to the acquired territories.[73] This in essence meant that Britain had to find a juridical basis for introducing its laws into the new protectorates.[74] The tools devised for performing this revolutionary function were carefully crafted 'reception clauses' contained in, arguably, 'the most important statutes in the history of Anglophonic colonial Africa'[75] – the reception statutes.

The earliest African reception clause closely resembled that contained in the Gold Coast Supreme Court Ordinance of 1876, which provided:[76]

> The common law, the doctrines of equity, and the statutes of general application which were in force in England at the date when the colony obtained a local legislature, that is to say, on the 24th day of July, shall be in force within the jurisdiction of the court.

That historic clause became 'the progenitor of a whole line of offspring whose language varied only incrementally'.[77]According to Antony Allot, just like the Gold Coast, the first part of Nigeria to fall under overt British rule, Lagos, had the English law in force on 1 January1863 applied to it.[78] Slightly over a decade later, in 1874, the colonies of Lagos and Gold Coast were consolidated, impelling the re-enactment of the reception statute in 1876 to reflect this reality.[79] With the setting up of the Protectorates of Southern and Northern Nigeria on 1 January 1900, English law was

70 For a general reading on the subject, see JS Keltie *The partition of Africa* (1895); also, J Kopenen 'The partition of Africa: A scramble for a mirage?' (1993) 2 *Nordic Journal of African Studies* 117; also, S Towal 'Treaties, borders, and the partition of Africa' (1966) 7 *Journal of African History* 279.

71 Regarding the conquest of the relevant regions of Africa, Lugard has written: 'During the first half of these thirty years, it was my privilege to assist in some degree in bringing under British control portions of Nyasaland, East Africa, Uganda, and Nigeria …' See Lugard (n 4 above) 7.

72 ML Marasinghe 'Policies, purposes and aims of reception statutes in British colonial Africa' (1976) 12 *East African Law Journal* 1.

73 As above.

74 As above.

75 RB Seidman 'A note on the construction of the Gold Coast reception statute' (1969) 13 *Journal of African Law* 45-45.

76 Section 17 thereof.

77 Seidman (n 75 above) 45.

78 AN Allot 'The common law of Nigeria' (1965) 10 *International and Comparative Law Quarterly* 32.

79 As above.

retained by the same formula, but the effective date was updated appropriately. Further revisions were subsequently made, such as the 1914 Supreme Court Ordinance heralding the unification of Southern and Northern Nigeria.[80] Kindred provisions were introduced in the East African Protectorate initially through the 1897 Executive Order in Council, which proclaimed the reception of English law and declared the supremacy of common law over customary law where there was an overlap. Superimposed upon the reception clauses were other provisions aimed at clarifying the status and limits of indigenous law in relation to the received law. In this regard, the British operated a rather complex statute similar to the one originally found in the Supreme Court Ordinance of the Gold Coast.[81]

In nearly all cases, the reception clauses and other cognate provisions served at least three main 'colonial' ends. First, they had the effect of delivering the affected jurisdictions to the Crown in Britain.[82] Henceforth, the Crown would make laws for Commonwealth Africa, just as at Westminster. Second, the reception statutes effectively introduced the English common law, doctrines of equity and statutes of general application to the respective African colonies.[83] These sources acquired the force of law on the date the respective colony became a protectorate or when a local legislature was inaugurated. Third, existing customary law regimes[84] would continue to operate subject to certain crucial limitations. For instance, customary law could only apply in matters concerning natives affected or subject to it, or to other persons not subject to it where resort to another system of law would occasion injustice(s). In most cases, the reception clause excluded the application of customary criminal law. In South Africa, the British also permitted the Roman Dutch law to apply, although, again, 'they superadded the English common law, wherever and whenever it was possible to do so'.[85] The new regime also subjected applicable customary law to a 'repugnancy test' founded on a Euro-Christian conception of justice.

The repugnancy test usually entailed weighing African customary practices against the 'ideal' of Victorian morality and values. According to Justice Ocran:[86]

80 DA Akrofi 'Judicial recognition and adoption of customary law in Nigeria' (1989) 37 *American Journal of Comparative Law* 571. The entity now known as Nigeria was crafted in 1914 by British colonisers who amalgamated northern and southern regions with diverse backgrounds. See KSA Ebeku 'Beyond terrorism: Boko Haram attacks and national constitutional questions in Nigeria' (2011) 23 *Sri Lanka Journal of International Law* 10.

81 Act No 3 of 1863.

82 Seidman (n 75 above) 46.

83 Curiously, the Scottish Civil Code was not part of this export.

84 Mostly African and Islamic customary law.

85 Seidman (n 75 above) 45.

86 M Ocran 'The clash of legal cultures: The treatment of indigenous law in colonial and post-colonial Africa' (2006) 39 *AkronLaw Review* 465 475.

> The repugnancy clauses were meant to rule out laws and customs perceived to be against Christian values and morality or cruel and unusual standards of the colonizers. There were various formulations of these clauses. Some stated that the rules should not be repugnant to 'natural justice, equity and good conscience'. Others read: 'Not contrary to [religious] justice, morality or order'. Still others read: 'Not repugnant to morality, humanity or natural justice or injurious to the welfare of the natives'.

Ruling on a related issue, a British judge in an East African colonial court in 1938 frankly stated:[87]

> I have no doubt whatever that the only standard of justice and morality which a British court in Africa can apply is its own British standard. Otherwise we should find ourselves in certain circumstances having to condone such things, for example, as the institution of slavery.

Yet another colonial precedent failed to conceal its contempt for certain indigenous practices. Speaking to this issue, the Privy Council, in *Re Southern Rhodesia*, ruled as follows:[88]

> Some tribes are so low in the scale of social organisation that their usages and conception of rights and duties are not to be reconciled with the institution or legal ideas of civilized society.

In a West African case of *Loromeke v Nekegho and Ayo*,[89] Justice Simpson declared a Urhobo custom, which required a widow who declined to be 'inherited' by a man chosen by her late husband's family to return parts of the dowry and surrender custody of children to her in-laws, to be 'undoubtedly repugnant to natural justice, equity and good conscience'.[90] Similarly, in *R v Amkeyo*,[91] a colonial court ruled that a 'polygamous marriage' conducted under African customary law had no place in the new value-system. Apart from declaring such a 'marriage' repugnant to justice and morality, the Privy Council went further to describe such a relationship, pegged on the payment of dowry (and not limited in the number of women one could marry), simply as 'wife purchase'. Chief Justice Hamilton's entered the following memorable verdict:

> In my opinion, the use of the word 'marriage' to describe the relationship entered into by an African native with a woman of his tribe according to tribal custom is a misnomer which has led in the past to considerable confusion of ideas. I know of no word that correctly describes it; 'wife-purchase' is not altogether satisfactory, but it comes much nearer to the idea than that of 'marriage' as generally understood among civilized peoples.

87 *Gwao bin Kilimo v Kisunda bin Ifuti* (1938) 1 TLR (R) 403.
88 (1919) AC, 211.
89 [1957] 3 WALR 306.
90 [1957] 3 WALR 308.
91 [1917] 7 EALR 14.

It is clear that colonial judicial officers seized nearly all occasions to pronounce the superiority of English values whenever they came in competition with local customs. In all, the British succeeded early on in introducing their system of laws laced with Victorian morality. They also seized control of the institutions of enacting them. Although some latitude was given to existing native institutions, and customary law continued to apply in some cases, it was clear the colonisers had the last word in nearly all matters including the critical area of legislation. Through these mechanisms, a significant part of Africa was put under effective British control.

3.2 The formal regulation of homosexuality

Part of the native traditions and practices that would soon fall under the purview of the new institutions and value-systems were those relating to sexuality. In this regard, the British colonial officers in Africa did not endeavour to reinvent the wheel. Rather, they only needed to import into Africa penal enactments, which they had tried and tested in their initial colonies. Thus, although laws criminalising sexual conduct between persons of same sex in Commonwealth Africa have England as their cradle, their refinery and incubation occurred in India, Australia, the English-speaking Caribbean and other earlier colonies before eventual deployment to the newly acquired territories in Africa.

Following the separation between the English church and Rome, ecclesiastic crimes were transferred to the jurisdiction of secular courts in England for the first time in 1533. The inaugural secular statute described the offence of sodomy as the 'detestable and abominable vice of buggery committed with mankind or beast' and its punishment was death.[92] However, during the reign of Mary I, the offence was yet again put under the jurisdiction of ecclesiastical courts, a decision that was rescinded in 1563. The crime survived in this form in England until 1861. Perhaps because of its religious and moral foundations, William Blackstone described the 'abominable crime of buggery' as one of the most precious legacies bequeathed by the common law to its people.[93] This English heritage was further exported to England's colonies in five different forms.

The first model was the Elphinstone Code of 1827,[94] which was introduced in India on 25 July 1828 by dint of the Act for Improving the

92 M Kirby 'The sodomy offence: England's least lovely criminal law export?' in C Lennox & M Waites, (eds) *Human rights, sexual orientation and gender identity in the Commonwealth: Struggles for decriminalization and change* (2013) 62-63.

93 W Blackstone *Commentaries on the laws of England* (1765-1769) http://lonang.com/library/reference/blackstone-commentaries-law-england (accessed 14 August 2015).

94 Kirby (n 105 above) 65.

Administration of Criminal Justice in the East Indies.[95] This legislation stipulated:[96]

> And it be enacted, that every person convicted of the abominable crime of buggery committed with either mankind or with any animal, shall suffer death as a felon.

On 6 October 1860, the Governor General assented to a revised Indian Penal Code,[97] the Macauley version, which carried the following proscriptions:[98]

> Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
>
> Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

Similar phraseology was adopted a year later in Britain's Offences against the Person Act.[99] This statute legislated against 'unnatural offences' in the following terms:

> Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than ten years.[100]
>
> Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour.[101]
>
> Whenever, upon the trial for any offence punishable under this Act, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only.[102]

95 9 George IV. Cap LXXIV.
96 At LXIII.
97 Act No 45 of 6 October 1860. This Code was known as the Macaulay Code after its author Thomas Babington Macaulay. See Kirby (n 92 above) 66.
98 n 97 above, sec 377.
99 Chapter C, of 6 August 1861. An Act to consolidate and amend the statute law of England and Ireland relating to offences against the person.
100 n 99 above, sec 61.
101 n 99 above, sec 62.
102 n 99 above, sec 63.

Both the Indian and British 1860s models described the offence of sodomy as 'against the order of nature' and 'abominable', respectively, signifying their heavy moral basis. Further, penetration was a critical ingredient of the crime in both cases meaning that non-penetrative sexual acts between human beings or between a human person and an animal were not criminal. The definition also effectively left out acts between two females arguably because these have no capacity for penetration. To cure this anomaly, the British subsequently[103] amended the law in colonial India to accommodate the offence of 'gross indecency'.[104] By so doing, the scope of the Penal Code was expanded to cover sexual acts between persons outside of intercourse hence prohibiting not only sodomy, but erotic conduct between people of the same sex in general.[105] In the course of time, this model, embodied in section 377 of the Indian Penal Code, 'spread across immense tracts of the British Empire' without debate or 'cultural consultation,'[106] to the extent that Michael Kirby has in fact rated the Indian Penal Code, the most copied of all the templates.[107]

Like the Indian version, the Griffith model (named after Sir Samuel Hawker Griffith, who had drafted a criminal code for Queensland in 1901) was shipped to many jurisdictions[108] including Botswana,[109] Gambia,[110] Kenya,[111] Malawi,[112] Nigeria,[113] Seychelles,[114] Tanzania,[115] Uganda,[116] and Zambia.[117] Typical entities in this model legislation are ambiguously stated offences whose descriptions take different though kindred formations. A striking feature of this genre of provisions remains their vagueness – 'referring as they do to "unnatural offenses", or "carnal knowledge against the order of nature", or 'gross indecency.'[118] This version incorporates women in the description of the offence through the use of the neutral term 'person'. It also criminalises 'attempts to commit unnatural offences'.[119] For sexual intercourse to be against the order of

103 In 1885.
104 Faucette (n 53 above) 416.
105 As above.
106 S Ahmadi 'Islam and homosexuality: Religious dogma, colonial rule, and the quest for belonging' (2011-2013) 26 *Journal of Civil Rights & Economic Development* 556.
107 Kirby (n 92 above) 66.
108 Kirby (n 92 above) 67.
109 Penal Code, Chapter 08:01, Section 164 amended by the Penal Code Amendment Act 5, 1998.
110 Criminal Code, 1965, Section 144 as amended in 2005.
111 Chapter 63, Laws of Kenya, Section 162.
112 Penal Code, Chapter 7, Laws of Malawi, Section 153.
113 Criminal Code Act of 1916, Laws of the Federation of Nigeria; Cap C38 (rev ed 2004), Section 214-218.
114 Criminal Code of 1955, Section 151 www.seylii.org/sc/legislation/consolidated-act/158.
115 Penal Code of 1945, Section 154 as amended by the Sexual Offences Special Provisions Act, 1998.
116 Uganda Penal Code, Chapter 120, Laws of Uganda, Section 145.
117 Penal Code Act, Section 155 as amended by Act No 15 of 2005, section 155.
118 Long (n 52 above).
119 Kirby (n 92 above) 67.

nature, it must be penetrative. Kenya's Penal Code,[120] for example, still carries the following offence under the section 'Offences against Morality':[121]

> Any person who (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years: Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if – (i) the offence was committed without the consent of the person who was carnally known; or (ii) the offence was committed with that person's consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act.

For those colonies that interacted with Roman-Dutch imperialists, such as Namibia,[122] South Africa,[123] and Zimbabwe,[124] the defining word 'sodomy' was operative. The recently amended criminal code of Zimbabwe still reads:[125]

> Any male person who, with the consent of another male person, knowingly performs with that other person anal sexual intercourse, or any act involving physical contact other than anal sexual intercourse that would be regarded by a reasonable person to be an indecent act, shall be guilty of *sodomy* and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding one year or both ...

The other models of the offence were, the Fitzjames Stephen Code, based on Sir James Fitzjames' main works, *A general view of the criminal law*[126] and *Digest of the criminal law*;[127] and the Wright Penal Code, drafted by British jurist RS Wright for Jamaica.[128]

In all the aforementioned models, the crimes elude a stable definition. Their content keeps shifting 'according to alterable understandings of what 'nature', or social mores, would actually allow.'[129] It is possible that the

120 Chapter 63, Laws of Kenya
121 n 120 above, sec 162.
122 In Namibia, sodomy is a crime according to Roman-Dutch common law. See generally, Gender Research and Advocacy Project, *Namibian law on LGBT issues*, 2015. See also, *R v Goughand Narroway* (1926) CPD 159.
123 Sodomy in South Africa was initially proscribed in certain schedules of the Criminal Procedure Act (No 51 of 1977), the Security Officers Act (No 92 of 1987), and section 20A of the Sexual Offences Act (No 23 of 1957; section 20A).
124 Section 73, Criminal Law (Codification and Reform) Act, Chapter 9:23, Act 23/2004.
125 As above. Emphasis added. It is important to note that the crime of sodomy comes from Roman-Dutch law which punished the act with death. See R Louw 'Sexual orientation, the right to equality and the common-law offence of sodomy: *S v Kampher* 1997 (2) SACR 418 (C)' (1998) 11 *South African Journal of Criminal Justice* 112.
126 JF Stephen *A general view of the criminal law* (1863).
127 JF Stephen *Digest of the criminal law* (1887).
128 For a general discussion on these models, see Kirby (n 92 above) 66.
129 Long (n 52 above).

very stigma historically attached to these acts prevented an effective description. Besides the vagueness, the colonial laws do not cover marriage, civil unions or other associations of gays and lesbians. The original penal codes merely criminalise sexual conduct between persons or by persons with an animal or by persons against the order of nature. None of these statutes mention 'homosexuality' perhaps because the term had not found its way into legal discourse at the material times of their formulation.[130] This brand of penal regimes remains a glaring relic of the colonial era in most of Commonwealth Africa. As Wilets argued, British colonialism accounts for most of the contemporary hostility towards sexual minorities in Africa, and elsewhere.[131] According to this commentator;[132]

> [a]s of December 2008, over half the countries in the world with sodomy laws were former British colonies, and all of those countries' sodomy laws were imposed by the British … the British colonial legacy remains particularly potent in Africa and the Caribbean, where most former British colonies continue to retain their colonial-era sodomy laws.

It is therefore accurate to say that 'colonialists did not introduce homosexuality to Africa, but rather intolerance of it and systems of surveillance and regulation for expressing it.'[133] In addition to imposing Western legal implements, the British also sought to inculcate their mores in the legal systems under their domain. This means that the British regarded their own standards as the ideal barometer with which to measure the appropriateness of competing indigenous laws, customs and institutions.

There were, however, instances of colonial activities unwittingly enhancing African homosexuality. A case in point is the labour hostels like the mining compounds introduced by the imperialists. Mining industries such as those in South Africa brought together many male black migrant workers who were not usually allowed to bring their families or female friends.[134] To mitigate these fairly harsh and solitary conditions, 'miners would take new miners as wives, teach them ways of the mine and the nature of its work, and offer them protection in exchange for cooking and sexual favours.'[135] The colonial regimes also introduced boarding

130 According to Long (n 52 above), the term 'homosexuality' was invented in Europe in 1869, by a medical doctor, and took a long time to move from medical to legal discourse.
131 Wilets (n 53 above) 642.
132 Wilets (n 53 above) 643.
133 Dlamini (n 54 above) 135.
134 Dlamini (n 54 above) 129.
135 Dlamini (n 54 above) 130.

schools,[136] prisons and other detention centres where homosexual conduct has historically been known to thrive.[137]

Perhaps a better compromise would be to make a distinction between homosexual behaviour, which is omnipresent, and homosexual identity, which evolves under specific historic conditions.[138] What, therefore, might have been introduced to Africa is homosexual *identity* which is a construct of Western European culture in the late nineteenth century.[139] It follows that when some Africans argue that homosexuality is un-African, they are correct in the strict sense that the idea of translating same-sex sexual acts into a sexual identity only arrived in Africa with the bourgeoisification of sexuality in Africa.[140] As Thabo Msibi writes:[141]

> African societies have never historically had a 'gay' identity or pathologized 'homosexual' category, however, same-sex sexual attraction and expression were known to occur, but in usually hidden but sometimes even culturally accepted ways.

Finally, it is instructive that colonial authorities in Africa left behind new implements of regulating sexuality, which survive almost in their original states in most countries on the continent.

4 The regulation of sexual orientation in the post-colonial epoch

As a general rule, most common law jurisdictions in Africa retained the Penal Codes bequeathed by the British at independence.[142] According to Jjuuko, the new governments did nothing much more than simply renaming Ordinances as Acts.[143] The trend became so attractive that some

136 An argument has in fact been made that 'same-sex boarding schools breed homosexuals'. See Tamale (n 71 above) 19. Also, J Gay 'Mummies and babies' and 'friends and lovers in Lesotho' (1986) 11 *Journal of Homosexuality* 97.

137 See, for instance, S Gear 'Sex, sexual violence and coercion in men's prisons'. Paper presented at AIDS in Context International Conference, 4 – 7 April 2001, University of Witwatersrand, South Africa http://www.csvr.org.za/docs/correctional/sexsexualviolence.pdf (accessed 15 August 2015).

138 P de Vos 'Gay and lesbian legal theory' in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 335.

139 De Vos (n 138 above) 334.

140 De Vos (n 138 above) 337.

141 T Msibi 'The lies we have been told: On (homo) sexuality in Africa' (2011) 58 *Africa Today* 55.

142 See Kirby (n 105 above) 69 where it is stated: 'The criminal laws introduced into so many jurisdictions by the British imperial authorities remained in force in virtually all of them long after the Union Jack was hauled down and, one by one, the plumed Britannic viceroys departed their imperial domains'.

143 A Jjuuko 'The incremental approach: Uganda's struggle for the decriminalisation of homosexuality' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth: Struggles for decriminalisation and change* (2013) 381, 386.

civil law jurisdictions like Burundi took their cue.[144] As if oblivious of developments in international human rights law and other parts of the world including South Africa's unprecedented move to constitutionally protect the right to sexual orientation, Kenya, Nigeria and Uganda not only retained the pre-independence laws discussed above, they have also made attempts at further fortifying the legal and penal regimes inherited from the British. What the three countries share 'is an almost universal opposition to recognition of any kinds of gay rights'.[145] It will help to discuss these developments in more detail beginning with South Africa's exception.

4.1 The South African exception

South Africa's most praised journey towards the protection of sexual orientation solidified with the enactment of an Interim Constitution, and later a transformative Constitution,[146] which, at article 9(1) and (3), makes express reference to sexual orientation as a protected ground for non discrimination. Pro-gay rights activists led by organisations like the National Coalition for Gay and Lesbian Equality (the Coalition)[147] capitalised on the euphoria of freedom that followed the end of apartheid in South Africa.[148] Sexual orientation was therefore unlikely to be strongly opposed for protection as a ground for non-discrimination since equality and inclusion had been the uniting mantra of South Africa's independence.[149]

Just as the Coalition predicted, South Africa's phenomenal success in judicial protection of sexual minorities would occur incrementally.[150] The revolution commenced with a challenge to the criminalisation of sodomy and proceeded to the various aspects of same-sex relationships, before culminating into the questioning of the conventional family institution. The now vast and exemplary judicial jurisprudence on sexual orientation was heralded by less sophisticated litigation which merely contested the

144 See article 567, Law 1/05, 22 April 2009, concerning the revision of the Penal Code.
145 Wilets (n 53 above) 679.
146 See CF Stychin 'Constituting sexuality: the struggle for sexual orientation in the South African Bill of Rights' (1996) 23 *Journal of Law and Society* 455, where it is stated: 'In its new constitutional guise, the legitimacy of South African rights discourse is dependent upon its potential as a socially transformative instrument – as a tool for nation building and the reparation of past injustices'.
147 A coalition of LGBTI rights pressure-groups that has been at the centre of major litigations on sexual orientation in South Africa.
148 Stychin (n 146 above) 455. For a further discussion on the aspect, see, also, J Cock 'Engendering gay and lesbian rights: The equality clause in the South African Constitution' (2003) 26 *Women's Studies International Forum* 35.
149 Stychin (n 146 above) 455.
150 This plan ran its full course despite the intervention of other actors not affiliated to the Coalition in the litigation process. See B Goldblatt 'Same-sex marriage in South Africa – the Constitutional Court's judgment' (2006) 14 *Feminist Legal Studies* 261.

constitutionality of consensual intercourse between persons of the same sex. In *S v Kampher*,[151] for instance, Justice Farlam was invited to nullify the conviction of an applicant who had confessed to having consensual sex with another man.[152] The Judge responded to the invitation affirmatively in the process initialling the beginning of a new jurisprudential era.

In one of the earliest cases involving the Coalition, Langemaat, a policewoman, petitioned the Supreme Court of Appeal to invalidate certain rules of a medical scheme, which prevented her same-sex partner from being registered as a dependant.[153] The Court agreed with the application, finding that same-sex partners too have a right to support each other.

The Coalition would return to the judicial forum, this time to call upon the Constitutional Court to confirm that the common law offences relating to sodomy[154] were no longer constitutional.[155] Concurring with the petitioners, the Court found that these offences, all of which were aimed at prohibiting sexual intimacy between gay men, violated the right to equality since they unfairly discriminated against gay men on the basis of sexual orientation.[156] The Court found such discrimination to be unfair especially because South Africa's Constitution expressly includes sexual orientation as a prohibited ground of discrimination.[157] The judicial tribunal considered gay people a vulnerable minority group in society and on this basis declared attempts at criminalising their most intimate relationships inappropriate for the reason that they devalued and degraded them.[158] Exclusions of this kind therefore constitute a violation of their fundamental right to dignity.[159] In addition, the Court saw no logic in criminalising private conduct between consenting adults, which causes no harm to anyone else.[160] This intrusion on the innermost sphere of human life, the Court held, also violates the constitutional right to privacy.[161]

This judgment created a jurisprudential foundation upon which subsequent and more reformative decisions would be built. For example,

151 1997 (2) SACR 418 (C).
152 As above.
153 *Langemaat v Minister of Safety and Security and Others* 1998 (3) SA 312 (T).
154 Sodomy was proscribed in certain schedules of the Criminal Procedure Act (51 of 1977) and the Security Officers Act (92 of 1987), and section 20A of the Sexual Offences Act (23 of 1957; section 20A).
155 *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others,* CCT 11/98, decided on 9 October 1998.
156 Para 109, as per Sachs J.
157 As above.
158 n 156 above, para 120.
159 Para 36, as per Ackermann, with Chaskalson P, Langa DP, Goldstone J, Kriegler J, Mokgoro J, O'Regan J and Yacoob J concurring; para 120, as per Sachs J.
160 n 156 above, para 108.
161 As above.

in *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others,*[162] the Constitutional Court was asked to determine the question as to whether it was unconstitutional for immigration law to facilitate the immigration into South Africa of heterosexual foreign national spouses of South African nationals but not to afford the same benefits to South African gays and lesbians in permanent same-sex life partnerships with foreign nationals. The Court concluded that the rights of equality and dignity were closely related in this instance and that the impugned provisions reinforced harmful stereotypes of gays and lesbians.[163] The judges took the view that the immigration law portrayed gays and lesbians as lacking the inherent humanity to found families, a sad invasion on their dignity.[164] In the end, the impugned provision was held to discriminate unfairly against gays and lesbians on the intersecting and overlapping grounds of sexual orientation and marital status and seriously limiting their equality and dignity rights.[165] The Court accordingly held the omission of partners in permanent same-sex life partnerships from immigration privileges unconstitutional.[166]

The same golden thread of equality, non-discrimination and human dignity prevailed in the granting of equal adoption rights to a same-sex couple in *Du Toit and Another v Minister of Welfare and Population Development and Others* (*Lesbian and Gay Equality Project as amicus curiae*).[167] While confirming the decision of the High Court, the Constitutional Court found that the restriction of adoption by the Child Care Act and the Guardianship Act to married couples was discriminatory to the appellants on the grounds of sexual orientation and marital status.[168] It must be pointed out that at the time of the adoption application; same-sex marriage was not available to the applicants under the law. The Court also pronounced such discriminatory adoption criteria an infringement upon the cardinal principle of best interests of the child.[169]

Ultimately, on 1 December 2005, a day described as a proud one for South Africa,[170] the Constitutional Court decided in the ground-breaking case of *Minister of Home Affairs v Fourie*;[171] the first to legalise homosexual

162 CCT 10/99 [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999).
163 Para 42, as per Ackerman, with Chaskalson P, Langa DP, Goldstone J, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Yacoob J and Cameron AJ concurring.
164 As above.
165 n 163 above, para 40-42.
166 n163 above, para 89.
167 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC).
168 Para 26, as per Skweyiya AJ, as he then was, with Chaskalson CJ, Langa DCJ, Ackermann J, Du Plessis AJ, Goldstone J, Kriegler J, Madala J, Ngcobo J, O'Regan J and Sachs J concurring.
169 At para 22 of this decision, Skweyiya AJ found that 'excluding partners in same-sex life partnerships from adopting children jointly where they would otherwise be suitable to do so is in conflict with the principle enshrined in section 28(2) of the Constitution'.
170 Goldblatt (n 150 above) 261.
171 The Court of Appeal made its judgment on this case on 30 November 2004.

marriages on the African soil. The judges[172] were unanimous that the common law definition of marriage, as 'a union of one man with one woman, to the exclusion, while it lasts, of all others',[173] and section 30(1) of the Marriage Act,[174] which did not make provision for same-sex marriages,[175] failed the constitutional muster of equality,[176] non-discrimination,[177] privacy,[178] and human dignity.[179] Justice Sachs observed on behalf of the majority that[180]

> [s]ections 9(1) and 9(3) cannot be read as merely protecting same-sex couples from punishment or stigmatisation. They also go beyond simply preserving a private space in which gay and lesbian couples may live together without interference from the State. Indeed, what the applicants in this matter seek is not the right to be left alone, but the right to be acknowledged as equals and to be embraced with dignity by the law. Their love that was once forced to be clandestine, may now dare openly to speak its name. The world in which they live and in which the Constitution functions, has evolved from repudiating expressions of their desire to accepting the reality of their presence, and the integrity, in its own terms, of their intimate life.

In reaching this decision, the Constitutional Court counteracted the contention that international law recognises and protects only heterosexual marriages by distinguishing South Africa's unique circumstances. The Constitutional Court clarified that[181]

> [i]n contradistinction to the ICCPR, our Constitution explicitly proclaims the anti-discriminatory right which has held to lack support from the text of the ICCPR. Indeed, discrimination on the grounds of sexual orientation is expressly stated by our Constitution to be presumptively unfair.

Eventually, the apex judicial tribunal concluded that while it is accurate that international law expressly protects only the heterosexual marriage, it does not necessarily preclude the equal recognition of same-sex couples.[182] The majority opinion similarly overruled the widely held notion that the marriage institution must have 'procreative capacity' or potential. Regarding the view that same-sex marriages ran contrary to the main religious teachings, the Court retorted that 'it would be out of order to

172 Langa CJ, Moseneke DCJ, Mokgoro J, Ngcobo J, Skweyiya J, Van der Westhuizen J, and Yacoob J concurred with the judgment of Sachs J.
173 *Mashia Ebrahim v Mahomed Essop*, 1905, TS 59 at 61.
174 Act 25 of 1961.
175 According to Justice Sachs: 'The problem is that the Marriage Act simply makes no provision for them to have their unions recognised and protected in the same way as it does for those heterosexual couples. It is as if they did not exist as far as the law is concerned. They are implicitly defined out of contemplation as subjects of the law.' Para 77.
176 Sec 9(1) Constitution of the Republic of South Africa.
177 n 176 above, sec 9(3).
178 n 176 above, sec 14.
179 n 176 above, sec 10.
180 n 171 above, para 78.
181 As per Sachs, para 103.
182 n 181 above, para 105.

employ the religious sentiments of some as a guide to the constitutional rights of others'.[183] As a remedial measure, the Constitutional Court ordered the Parliament to enact, implementing legislation recognising same-sex marriages within 12 months failure to which section 30(1) of the Marriage Act would be read as including the words 'or spouse' after the words 'or husband' as they appeared in the marriage formula.

It is in response to this judicial decree that the Civil Union Act 17 of 2006, was passed to make provision for same-sex marriages in addition to the conventional form of marriage. Heterosexual and homosexual persons who meet the requisite criteria may by dint of the Civil Union Act conduct a 'marriage' either in its conventional form or in the form of a civil union. Only traditional marriages may still be transacted under the Marriage Act, although both legal regimes have similar legal consequences.

The above legislative frameworks and progressive judicial decisions have elevated South Africa's record to the extent of being considered an example in the protection of the right to sexual orientation. South Africa is now touted as the first country in the world to constitutionally ban discrimination based on sexual orientation and the fifth to legalise same-sex marriage.[184] However, like other African countries, there remain high levels of homophobia in South Africa explaining why its anomalous revolution has taken place through the Constitution and courts rather than through the Legislature. South Africa has also wavered ashamedly at the international stage whenever the critical question of sexual orientation has come up for discussion. In this sense, it has supported the right to sexual orientation while at the same time keeping silent about discriminatory practices in most African countries.[185] These notwithstanding, De Vos rightly equated these developments to a revolution. This writer has concluded that,[186]

> [g]iven the fact that South Africa is not a developed country and given, moreover, that attitudes towards same-sex desire amongst ordinary South Africans can hardly be described as enlightened, the adoption of legislation that now allows same-sex couples the choice of entering into a marriage seems little short of revolutionary.

The liberal jurisprudence by South Africa's Constitutional Court on the issue of sexual orientation has remained an isolated development with minimal influence in the region. Far from being inspired by South Africa, Kenya, Nigeria and Uganda have instead resorted to reinforcing the penal and even constitutional regimes bequeathed by colonial governments to

183 n 181 above, para 92.
184 Kretz (n 48 above) 209.
185 AM Ibrahim 'LGBT rights in Africa and the discursive role of international human rights law' (2015) 15 *African Human Rights Law Journal* 265.
186 P de Vos 'A judicial revolution? The court-led achievement of same-sex marriage in South Africa' (2008) 4 *Utrecht Law Review* 162, 174.

further marginalise gay and lesbian individuals, and advocates of their cause. The most retrogressive changes have taken place mainly through constitutional amendments and penal enactments. Meanwhile, as if to vindicate Ebobrah's view that 'judicial arms of African governments are better situated to protect and safeguard the rights of the most vulnerable minorities,'[187] some progressive judicial decisions with limited potential to mitigate these legislative damages are emerging. Despite scoring poorly in the protection of the right to sexual orientation, Kenya has had a better record than Nigeria and Uganda, which recently passed perhaps the most draconian anti-homosexuality laws in recent history.[188] I now review these jurisdictions.

4.2 Kenya: Between legislative exclusion and judicial leniency

Kenya's contemporary legislative agenda is inclined towards the marginalisation of those with minority sexual orientation. In addition to retaining the colonial crimes, which outlaw unnatural sexual offences, the people of Kenya seized the moment of constitutional reform to emphasise a strain of conservative moral philosophy that is dismissive of the right to sexual orientation. Thus, although the Bill of Rights emulates South Africa's[189] by prohibiting discrimination on an elaborate list of grounds,[190] it excludes the ground of 'sexual orientation'. This omission leaves open the view that discrimination on the ground of sexual orientation may be continued in the new constitutional order. The constitutional marginalisation of this entitlement is further articulated at article 45 of the Constitution, which perpetuates the idea that marriage is a preserve of adult persons of the opposite sex.[191] This threshold has since been consolidated by the Marriage Act,[192] which defines marriage as 'the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered ...'[193]

187 Ebobrah (n 10 above) 112, 113.
188 On this aspect, J Oloka-Onyango has stated that 'the direction in Kenya is decidedly more liberal than that taken in Uganda.' See J Oloka-Onyango 'Debating love, human rights and identity politics in East Africa: The case of Uganda and Kenya' (2015) 15 *African Human Rights Law Journal* 28 30.
189 See sec 9(3) of South Africa's Constitution.
190 Article 27(4) of the Constitution states: 'The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth'. The Constitution of Kenya, promulgated on 27 August 2010; Revised Edition 2010, Published by the National Council for Law Reporting with the Authority of the Attorney General. Emphasis added.
191 Article 45(2). As if taking cue from Kenya, Namibia's 2010 Constitution at article 14 (Act 7 of 2010) similarly preserves marriage for men and women of full age. Zimbabwe's 2013 Constitution (Act 20 of 2013) expressly provides that 'persons of the same sex are prohibited from marrying each other' (art 78).
192 Act 2 of 2014.
193 n 192 above, sec 3(1).

In practice however, there is a sense to which woman-to-woman marriages practiced under certain customary regimes may be recognised, at least for purposes of succession. In *Monica Jesang Katam v Jackson Chepkwony & Another,*[194] High Court Justice Ojwang (now Supreme Court judge) did not hesitate to protect the inheritance rights of a woman married to another woman under Nandi customary law. The Judge agreed with the petitioner that she;

> [w]as a 'wife', and, by the operative customary law, she and her sons belonged to the household of the deceased, and were entitled to inheritance rights, prior to anyone else.

Flowing from this logic, the same-sex marriage was read into the scheme of the Law of Succession Act,[195] placing the petitioner and her children in the first line of inheritance: the petitioner herself for being the 'wife of the deceased', and her children for being the children of the deceased. Notwithstanding the fact that contemporary woman-to-woman marriages conducted under Nandi customary law do not involve sexual intercourse, the *Katam* precedent is significant in the ongoing discourse on sexual orientation because it highlights the tough and immediate reality 'that among various ethnic groups in Africa a family system is in place which differs from the conventional one based on the male-female union'.[196] It thus may be time that these alternative family formations found overt legal articulation.

The High Court has had another opportunity, under the new constitutional framework, to adjudicate a matter on the general subject of sexual orientation and gender identity (SOGI). In a judicial review case, *Republic v Kenya National Examinations Council & Another Ex parte Audrey Mbugua Ithibu*,[197] the Superior Court of record directed the statutory examinations' body, the Kenya National Examination Council, to issue a new secondary education certificate to the applicant under a new name in spite of the fact that the change of name was occasioned by an impending sex change. According to the evidence adduced, the applicant, who was under treatment for gender identity disorder and was in the process of transitioning from male to female, had changed 'his' name from *Andrew* Mbugua Ithibu to *Audrey* Mbugua Ithibu and required relevant documentation to bear the new identity. In a bid to solve the question of the 'problematic' gender of the litigant, the presiding Judge[198] declared that it was not necessary for the examination certificate to indicate the gender of the bearer, a novel and major score for the SOGI movement.

194 [2011] eKLR.
195 Sec 29, Chapter 160, Laws of Kenya.
196 JB Ojwang *The common law, judges' law: Land and environment before the Kenyan courts* (2014) 122.
197 [2014] eKLR.
198 Korir J.

Eric Gitari v Non-Governmental Organisations Coordination Board & four Others[199] is yet another key milestone in the quest for equal treatment of homosexuals in Kenya. In this case, Eric Gitari, the promoter of three non-governmental organisations, sought to reserve with the Non-Governmental Organisations Coordination Board (NGO Board)[200] certain names for purposes of registration: Gay and Lesbian Human Rights Council; Gay and Lesbian Human Rights Observancy; and Lesbian Human Rights Organisation. The NGO Board advised against the proposed names mainly because homosexuality is both criminal and a taboo in Kenya's religious, cultural and moral setting. This prompted the petitioner to lodge litigation with the High Court to vindicate his right to freedom of association guaranteed at article 36 of the Constitution. Despite strong opposition by the NGO Board and other respondents, judges I Lenaola, M Ngugi and GV Odunga agreed with Gitari that:[201]

> [t]he term 'every person' in Article 36 properly construed does not exclude homosexual persons, and the petitioner therefore falls within the ambit of Article 36 of the Constitution, which guarantees to all persons the right to freedom of association.

Addressing the respondents' claim that homosexual acts are illegal in Kenya, the High Court ruled that 'the Penal Code does not criminalise homosexuality, or the state of being homosexual, but only certain sexual acts 'against the order of nature'.[202] In effect, the High Court made a distinction between the right to freedom of association, which applies to all persons including homosexuals, and certain specific homosexual acts which are criminal. Consequently, the High Court issued an order of *mandamus* directing the NGO Board to comply with its constitutional duty to ensure that the petitioner realises his right to equality and freedom of association.[203]

By Kenyan standards, the judicial pronouncements discussed above are quite revolutionary. They are a testament to the fairly progressive stance taken by Kenya's Judiciary with regard to human rights of sexual minorities. However, this reformation does not sit well with the political class, a section of whom have called upon respective government agencies to fully implement existing anti-sodomy laws, failure to which they promise to rally the public to action.[204] A fringe political party, the

199 [2015] eKLR. The other respondent was the office of the Attorney General. Audrey Mbugua Ithibu, Daniel Kandie and the Kenya Christian Professionals Forum joined the case as 1st, 2nd and 3rd interested parties. The Judges admitted Katiba Institute as *amicus curiae.*

200 The NGO Board is established under section 3 of the Non-Governmental Organisations Co-ordination Act, Chapter 134, Laws of Kenya. Part of its key mandate is to register non-governmental organisations.

201 n 199 above, para 76.

202 n 199 above, para 114.

203 n 199 above, para 148.

204 'MPs to fight homosexuality' *Daily Nation* 19 February 2014. Also, 'After Uganda, Kenya gears up for gay rights debate' *Voice of America* 5 March 2014.

Republican Liberty Party, has similarly proposed the enactment of a law punitive enough to eliminate homosexuals from society through draconian sentences such as public stoning of suspected homosexuals.[205] These later efforts however remain mere suggestions as no concrete measures have been taken for their implementation.

4.3 Nigeria as an exemplification of the second wave of criminalisation of homosexuality

In the preceding sections, I have noted that through expanded and punitive criminal sanctions, Africa has communicated its renewed resolve to completely alienate amorous relations between persons of identical sex. Nigeria best typifies this post-colonial paradigm. In January 2014, Nigeria enacted the Same-Sex Marriage Prohibition Act.[206] The preamble to this legislative instrument describes it as 'an Act to prohibit a marriage contract or civil union entered into between persons of the same sex, solemnisation of same, and for related matters.' True to this introduction, the Act prohibits all marriage contracts or civil unions entered into between persons of same sex.[207] It goes ahead to deny these institutions the benefits usually synonymous with heterosexual marriages.[208] The drafters were also careful to proscribe same-sex marriages solemnised in foreign countries hence stripping them of legitimacy once on Nigerian territory.[209] The legislation meddles into the realm of religion by explicitly prohibiting the solemnisation of gay marriages in places of worship[210] as well as renders invalid any certification issued to this effect.[211] Perhaps for the avoidance of doubt, the Act emphasises the recognition only of marriages contracted between persons of opposite sex.[212]

Unlike the initial regimes enacted by colonial authorities, this Act goes further to state that it is illegal to register gay clubs, societies or organisations;[213] and the proscription extends to any activities meant for their sustenance, including processions and meetings.[214] It is also illegal to register, operate or participate in gay clubs or organisations or to make public show of same-sex amorous relationships.[215] Finally, it is criminal to

205 'Kenya: An anti-gay bill of our very own? Really?' *The Star* 18 August 2014.
206 On 7 January 2014, the President of Nigeria signed into law the *Same-Sex Marriage Prohibition Act*.
207 Same Sex Prohibition Act 2014 sec 1(1). It is an offence punishable by imprisonment for 14 years to enter into these now criminalised unions (sec 5(1)).
208 n 207 above, sec1(1).
209 n 207 above, sec1(2).
210 n 207 above, sec 2(1).
211 n 207 above, sec2(2).
212 n 207 above, sec 3.
213 n 207 above, sec 4(1).
214 n 207 above, sec 4(1).
215 n 207 above, sec 5(2). The offence attracts 10 year prison terms.

aid or abet any of these acts or processes.[216] All these objects are achieved in just eight articles.[217]

Through a single and brief legislation, Nigeria has expressed its contempt for gays and lesbians and those who may be sympathetic to their cause in the strongest terms possible. Towards this end, the West African State has exhibited utter disregard for international human rights law which guards the rights to expression, association, equality and non-discrimination, human dignity and privacy. For Nigeria, colonial anti-sodomy laws needed more sting in the form of draconian penal sanctions.

4.4 Uganda and the winding walk toward popular anti-homosexuality legislation

Of the three case studies, it is Uganda that has formally grappled with the regulation of homosexuality the most. Like most other Commonwealth countries in Africa, Uganda has manifested a chronic allergy to the rights of sexual minorities. It has excelled in its anti-gay endeavours to the extent that 'if South Africa's constitutional position on sexual orientation is seen as a benchmark on a particular spectrum, then Uganda's position is at the extreme opposite end of such spectrum.'[218] Aside from retaining the colonial anti-sodomy laws on its statute books, post-independence Uganda has attempted concrete measures aimed at enhancing the scope of criminal sanctions against homosexuality.

The first step involved increasing the punishment for 'unnatural sexual offences' from a maximum sentence of fourteen years to life imprisonment.[219] Save for this amendment, section 145 of Uganda's Penal Code, which outlaws intercourse against the order of nature, remains identical to section 164 of Kenya's Penal Code, quoted earlier in this chapter.[220] An attempt to commit such crimes is also criminal and is punishable, upon conviction, by a seven-year prison term.[221] Uganda's Penal Code further prohibits 'indecent practices' by any person.[222]

In September 2005, Uganda 'advanced' its anti-homosexuality measures by altering the Constitution[223] to conceive marriage as an

216 n 207 above, sec 5(3). The offence attracts 10 years imprisonment.
217 See 'Nigerian President signs ban on same-sex relationships' *The New York Times* 13 January 2014.
218 JC Mubangizi & BK Twinomungisha 'Protecting the right to freedom of sexual orientation: What can Uganda learn from South Africa?' (2011) 22 *Stellenbosch Law Review* 331.
219 TM Lebron 'Death to gays!' Uganda's "one step forward, one step back" approach to human rights' (2011) 17 *Buffalo Human Rights Law Review* 185.
220 As above.
221 Sec 146, Uganda Penal Code.
222 n 222 above, sec 148.
223 See sec 10 of the Constitution Amendment Act of 2005, amending art 31 of the Constitution. The amendment acquired the force of law on 30 September 2005.

institution of only adult persons of opposite sex[224] and to unequivocally declare a marriage between persons of the same sex illegal.[225] Although these measures were meant to silence the then increasing voices in favour of gay rights, the amendment could easily have been superfluous as the 1995 Constitution already expressly provided that 'men and women of the age of eighteen years and above have a right to marry and to found a family …'[226] Notwithstanding the fact that Uganda's Constitution:[227]

> [o]utlaws discrimination on several grounds and provides that all persons are 'equal before and under the law in all spheres of political, economic and cultural life and in every other respect', it does not include an express reference to sexual orientation as a ground of discrimination.

During Uganda's Constituent Assembly, delegates made no argument for protection on the ground of sexual orientation, hence the exclusion.[228] Like in the case of Kenya, this omission creates a presumption that discrimination on the ground of sexual orientation is permissible by law. Indeed, the homophobic sentiment articulated through constitutional provisions has 'legitimised' human rights abuses against gays and lesbians in areas such as employment, housing and security.[229]

In 2007, a last-minute amendment to the Equal Opportunities Commission Act entails that the Equal Opportunities Commission (EOC) has no jurisdiction over matters 'involving behaviour which is considered to be (i) socially harmful, or (ii) unacceptable by the majority of the cultural and social communities in Uganda.'[230] This provision is understood by human rights actors to curtail the equal protection of moral minorities particularly homosexuals.[231]

Further sanctions were attempted in 2009, through the Anti-Homosexuality Bill (AHB),[232] but without immediate success. Despite enjoying overwhelming public support, and near-unanimity among parliamentarians, the Bill, which was moved by David Bahati, with the backing of conservative religious organisations in Africa and the United States, aborted due to pressure from influential persons like Ban Ki-Moon,

224 Article 31(1), Uganda Constitution.
225 n 223 above, art 31(2). According to J Mujuzi, during the Constitution deliberations, 'the Constituent Assembly was not supportive of same-sex marriages.' In fact the 'very idea was laughable.' See JD Mujuzi 'The absolute prohibition of same-sex marriages in Uganda' (2009) 23 *International Journal of Law, Policy and the Family* 278.
226 See the initial article 31(1).
227 Mubangizi & Twinomungisha (n 218 above) 339.
228 Mujuzi (n 225 above) 278.
229 S Tamale 'Laws and human rights' in S Tamale (ed) *Homosexuality: Perspectives from Uganda* (2007) 55-70, cited in Mubangizi & Twinomungisha (n 227 above) 340.
230 Sec 15(6), Equal Opportunities Commission Act, 2007.
231 Adrian Jjuuko of the Human Rights Awareness and Promotion Forum challenged Sec 15(6) of the Act in the case of *Jjuuko Adrian v Attorney General,* Constitutional Petition 1 of 2009. See Oloka-Onyango (n 188 above) 39.
232 Anti-Homosexuality Bill (n 50 above)

David Cameron, Barack Obama, Desmond Tutu, and Nelson Mandela.[233] It is widely believed that President Museveni exerted pressure on the lawmakers to vacate the initiative for the sake of Uganda's cordial international relations.[234] This would explain why Bahati's Bill continued to stagnate despite subsequent popular efforts to resuscitate it in 2010 and 2011.[235]

According to its own preambular provisions, the AHB was designed to fill the gaps in the Penal Code such as the lack of comprehensive provisions catering for anti-homosexuality; and inadequate provisions for penalising the procuration, promotion and dissemination of literature and other pantographic materials concerning the offence of homosexuality.[236] True to its intentions, the AHB provided for an elaborate catalogue of offences including: homosexuality; aggravated homosexuality; attempt to commit homosexuality; and the protection, assistance and payment of compensation to victims of homosexuality.[237] The Bill also sought to proscribe other related offences including aiding and abetting of homosexuality; conspiracy to engage in homosexuality; procuration of homosexuality by threats; detention with the intent to commit homosexuality; the running of brothels meant for homosexuality; celebration of same-sex marriages; and the promotion of homosexuality.[238] Perhaps the most controversial aspects of AHB were the imposition of death penalty for the offence of aggravated homosexuality[239] and the proposal to criminalise failure to disclose information relating to the offence of homosexuality and to punish this omission by a fine of up to three years imprisonment.[240] Had it become law in its original form, the Bill would have rendered any international legal instrument whose provision contradicted its spirit null and void.[241]

The AHB succeeded in sowing the seeds for homophobia in Uganda and neighbouring countries. Commenting on this Bill, Mubangizi and Twinomugisha concluded that there was no legal instrument (proposed or existing) in Uganda with the potential to promote homophobia like the AHB.[242] Msibi similarly commented that the immediate results of the Bill were 'a witch-hunt, approved publicly and supported by the State and the media.'[243] Oloka-Onyango validated these views by stating that:[244]

233 Kretz (n 48 above) 219.
234 Kretz (n 48 above) 220.
235 Kretz (n 48 above) 220.
236 Preambular para 2.1.
237 n 232 above, Part II.
238 n 232 above, Part III.
239 n 232 above, sec 3(2).
240 n 232 above, sec 14.
241 n 232 above, sec 18.
242 Mubangizi & Twinomugisha (n 218 above) 342.
243 Msibi (n 141 above) 59.
244 J Oloka-Onyango 'We are more than just our bodies: HIV/AIDS and the human rights complexities affecting young women who have sex with women in Uganda' 2012 Human Rights and Peace Centre Working Paper 36.

> The Bill led to a heightened situation of homophobia, not simply by attempting to translate the existing fear into legally-sanctioned forms of targeting the LGBTI community, but by increasing the penalties against same-sex behaviour, extending the sanctions for the alleged 'promotion' of such conduct to counsellors, lawyers and even academics, and providing for the Ugandan government to opt out of any international treaties that went against the spirit of the Bill.

On the contrary, faced with the potential hazards of the AHB, individuals and organisations working on the issue of sexual orientation in Uganda found new impetus for intensifying their solidarity, visibility, voice and activities.[245] In this sense, AHB brought the largely invisible and voiceless homosexuals to the limelight. The AHB also laid the foundation upon which anti-homosexuality legislation in Africa would be erected including Uganda's very own abortive Anti-Homosexuality Act (AHA) of 2014.

Walking in the immediate footsteps of Nigeria, Uganda in February 2014 captured world attention by finally enacting one of the most comprehensive and draconian legislations in the history of regulation of sexual orientation. The AHA not only innovated by expanding the scope of anti-homosexuality offences, it also stipulated very harsh sentences for the crimes. Crafted along the same lines as the aborted Bill, the Act introduced explicit references to 'crimes' such as: homosexuality;[246] aggravated homosexuality;[247] attempted homosexuality;[248] attempted aggravated homosexuality;[249] aiding or abetting homosexuality;[250] conspiracy to engage in homosexuality;[251] procuring of homosexuality by threats;[252] detention with intent to commit homosexuality;[253] use of premises (brothels) for homosexuality;[254] contracting of same sex marriage;[255] and promotion of homosexuality.[256] The sentences attached to these offences were harsh. The crimes of homosexuality, aggravated homosexuality, attempted aggravated homosexuality, and contracting of same-sex marriage attracted the sentence of life imprisonment. The law made provision for the cancellations of licenses for businesses found to contravene the draconian law[257] and the extradition of persons involved in acts amounting to the crimes.[258]

245 Nyanzi (n 40 above) 962.
246 Anti-Homosexuality Act 4 of 2014, sec 2.
247 n 246 above, sec 3.
248 n 246 above, sec 4(1).
249 n 246 above, sec 4(2).
250 n 246 above, sec 7.
251 n 246 above, sec 8.
252 n 246 above, sec 9.
253 n 246 above, sec 10.
254 n 246 above, sec 11.
255 n 246 above, sec 12.
256 n 246 above, sec 13.
257 n 246 above, sec 13(2).
258 n 246 above, sec14.

Despite intense international pressure against the legislative initiative, Uganda's lawmakers sold the Bill as a panacea to the 'promiscuous and immoral culture of homosexuality', which human rights activists and other foreigners were imposing upon the people of Uganda to the detriment of the crucial family institution and innocent children and youth.[259] The motion-movers were categorical that homosexuality and related practices are offensive to both Christian values and traditional African mores.[260] B Obua-Ogwal hailed the Bill as an important step in restoring marriage as a heterosexual union of man and woman.[261] He contended that this is what the Creator originally intended.[262] Obua-Ogwal's view tallied with that held by the Report of the Parliamentary Committee on Legal and Parliamentary Affairs, which explained the purposes of the Bill as being the strengthening of the nation's capacity to deal with emerging internal and external threats to the traditional heterosexual family; the provision of comprehensive and enhanced legislation to protect the cherished culture of the people of Uganda and legal, religious and traditional family values of the people of Uganda against the attempts of sexual rights activists seeking to impose their values of sexual promiscuity on the people of Uganda; and the need to protect the children and youth of Uganda.[263] Since these are the same arguments that some anti-gay sects of Christianity have variously fronted, one cannot ignore the influence of fundamentalist evangelical US churches with strong anti-gay theological basis in Uganda in this process.[264]

Although in clear minority, a report authored by parliamentarians Sam Otada Amooti, Fox Odoi-Oywelowo, Abdu Katuntu and Krispus Ayena, was resolute in its criticism of AHA. The report contended that the enactment of AHA would contravene many international conventions and treaties ratified by the State.[265] The Act was also singular for its ban on pro-lesbian, gay, bisexual and transsexual (LGBT) activities. As Adam Kretz noted:[266]

> Uganda's insistence on banning activities that could prove positive for nascent pro-LGBT political and social spaces creates a downward ratchet, eliminating any chance of social progress by banning the advocacy and political mechanisms by which such progress can be achieved.

Within six months of its enactment, the Constitutional Court of Uganda declared the AHA unconstitutional on the technical ground that

259 See Parliamentary Debates (Hansard) Official Report, Third Session – Second Meeting – Friday, 20 November 2013.
260 As above.
261 As above.
262 As above.
263 P Muvini, Speaking for the Committee on Legal and Parliamentary Affairs. See Parliamentary Debates (Hansard) (n 259 above).
264 Wilets (n 53 above) 680.
265 See Parliamentary Debates (Hansard) (n 259 above).
266 Kretz (n 48 above) 230.

Parliament did not summon the requisite quorum at the time of its passage.[267] Although substantive human rights questions were raised by the petitioners in this litigation,[268] the Constitutional Court chose to first determine the case on the issue of technicality hence preserving the possibility that the legislation could in the future be revived. Already, influential political actors have made statements to the effect that the aborted law might be reintroduced in the near future.[269] Informed by these factors, the Human Rights Awareness and Promotion Forum (HRAPF) decided to pursue the matter further at the East African Court of Justice, the idea being to draw a finding based on the merits of the case.[270] HRAPF also intends to 'transmit a message to other governments in the East African Community (EAC) that such legislative intervention violated the treaty of co-operation, which established the body.'[271]

While Uganda's legislative forums have fared badly in the protection of the rights of LGBTI persons, its Judiciary has on several occasions exhibited the capacity to protect these human rights. In *Victor Juliet Mukasa & Yvonne Oyo v Attorney General*,[272] the High Court ran to the defence of leaders of an LGBTI pressure-group who claimed to have had the privacy of their homes violated, correspondence interfered with, private property trespassed, and bodies assaulted. This happened when local government officials entered their premises forcefully, searched it and detained them unlawfully. During the time they were in illegal detention, further violations were committed including torture and physical harassment. In awarding damages to the appellants, Justice Arach Amoko invoked the rights to life, privacy, equality, equality before the law, non-discrimination, security of person, property, and the right not to be subjected to torture and other inhuman and degrading treatment.[273] Like in Kenya's *Gitari* case, discussed above, the High Court made a distinction between certain homosexual acts, which are criminal, and homosexual persons entitled to human rights.[274] According to Oloka-Onyango:[275]

> The *Mukasa* case is important, not simply because it was the first involving LGBTI individuals decided after the adoption of the relatively progressive 1995 Constitution, but also because of what it both said and omitted to say about this kind of discrimination.

267 See *Oloka-Onyango & 9 Others v Attorney General*, Constitutional Petition 8 of 2014.
268 The other human rights issues raised in this petition included: Discrimination, privacy, equality, and inhuman and degrading treatment.
269 'New anti-gay bill drawn up in Uganda' *Aljazeera* 20 November 2014.
270 *Human Rights Awareness and Promotion Forum v Attorney General of Uganda*, Reference 6 of 2014.
271 Oloka-Onyango (n 188 above) 45.
272 (2008) AHRLR 248 (UgHC 2008). Civil Division, Miscellaneous Cause 24/06.
273 n 272 above, paras 41-44.
274 n 272 above, para 41.
275 See Oloka-Onyango (n 188 above) 36.

In *Kasha Jacqueline, David Kato and Onziema Patience v Rollingstone Ltd and Giles Muhame*,[276] the High Court again ruled for sexual minorities. It issued both injunctive and compensatory orders against a newspaper that was serialising the names, pictures and private sexual lifestyles of homosexuals in Uganda (including the three applicants) under the caption 'Hang them: they are after our kids'. Despite sex against the order of nature being criminal in Uganda, the High Court found homosexual individuals to be entitled to rights such as dignity and privacy and protection from actual or future threats to life. VF Musoke-Kibuuka J reasoned that 'section 145 is narrower than gayism generally' and thus except for those specific elements criminalised under the Penal Code, homosexuals are entitled to the full dose of human rights. The call to violence against homosexuals is therefore unacceptable.

The above fairly progressive jurisprudence from Uganda's Judiciary was however, watered down in *Nabagesera and 3 Others v Attorney General and Another,*[277] where the High Court failed to protect the rights of participants who state authorities forcefully evicted from a workshop allegedly because it 'aimed at encouraging persons to engage in and or promote same-sex practices in the future'. Justice Musota reasoned that since the applicants were members of the LGBTI community in Uganda that encourages same-sex practices among homosexuals, their free exercise of the rights of expression, association and assembly would be prejudicial to the public interest. Thus, the High Court agreed with the State that 'it was reasonable and justified for the Minister to conclude that this workshop was engaging in direct and indirect promotion of same-sex practices which is prohibited by sections 145 and 21 of the Penal Code.'

Notwithstanding the *Nabagesera* case, the *Mukasa* and *Kasha* precedents remain exhibits of the potential of the judicial forum in Uganda to serve as an effective bastion of the rights of sexual minorities. For, in both cases, the courts identified homosexuals as human beings entitled to all the human rights. The High Court also made the useful observation that homosexuality is larger than the few acts criminalised under the Penal Code.

5 Conclusion

In conclusion, it is important to highlight that the history of sexual orientation in Africa is one of escalating marginalisation. Although traditional African societies exhibited preference for fecund heterosexual relations leading to marriage and children, they permitted homosexual conduct in certain instances such as during rituals meant to generate wealth, or to maintain magical or political power. Available literature does

276 Miscellaneous Cause 163 of 2010 (unreported).
277 Miscellaneous Cause 33 of 2012 (unreported).

not point to incidences of violence or penal condemnation of practitioners of homosexuality in traditional African societies. To the contrary, same-sex relations have existed in a variety of African societies including the Azande, Baganda, Basotho, El Garah, Kwayama, Langi, Lovendi, Meru, Nuer, Pangwe, Phalaborwa, Siwah, Teso, and Venda.

In line with the triple heritage theory, matters changed fundamentally with the coming of visitors and imperialists. Informed by their Judaeo-Christian morality, the imperialists introduced new laws, which had the effect of altering the social, cultural and political systems in a manner never before imagined. With respect specifically to sexual orientation, criminal sanctions were introduced to discourage the practice. The relevant colonial laws were vague, and not comprehensive.

On attaining independence, most jurisdictions retained the colonial criminal codes and their provisions on sexual orientation. Recently, efforts have been made to fortify these regimes of law and it is Nigeria and Uganda that have triggered what I call 'the second wave of criminalisation'.[278] The key attributes of this wave appears to be the expansion of the scope of anti-homosexuality offences introduced by the colonialists and the prescription of draconian penal sanctions. The new offences are unambiguous and 'call a spade a spade'. Unlike the colonial penal regimes, which contained euphemistic words like 'carnal knowledge against the order of nature', 'unnatural sexual offences' or 'sodomy'; the new codes have directly legislated against homosexuality, and the interpretations rendered are spot on. The new wave takes no chances as it is sufficiently methodical to proscribe not only homosexual acts but also homosexual identity in its entirety. Enabling entitlements such as the rights to association, assembly and privacy have equally been curtailed. Homosexual conduct between females also features prominently in the emerging codes. Similarly, marriages or unions based on homosexual orientation have been denied legitimacy.

To support the legal frameworks discussed above, their architects have presented various arguments. They have argued, for instance, that homosexuality is un-African – that it is both immoral and non-existent in traditional African societies. Other proponents have warned that allowed to thrive, these practices will promote the spread of HIV, rape, defilement and other sexual offences. But it is religious arguments that have been most prominent. For, most anti-gay crusaders have fronted the Bible and the Quran as the basis for criminalising homosexual conduct and relations, and punishing those with this orientation harshly. The adage that 'religion is a determining factor in defining societal attitudes towards homosexuality'[279] has proved real in the African context.

278 Already, there are efforts to enact a similar code in Kenya.
279 Wilets (n 53 above) 664.

PART III: COUNTRY CONTEXTS

CHAPTER 3

CULTURE VERSUS HOMOSEXUALITY: CAN A RIGHT 'FROM' CULTURE BE CLAIMED IN UGANDAN COURTS?

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1 Introduction

The argument that homosexuality is against African culture is one that has become all too familiar in the 'gay rights' debate in Africa, Uganda being no exception.[1] The popular retort has been that same-sex conduct has always existed in pre-colonial Africa and that it is instead colonial penal laws, which criminalised and punished homosexuality, that introduced a homophobic attitude in their colonies and that it is this homophobia, which is 'un-African.'[2] Similar sentiments against homosexuality are visible within the founding principles of the Anti-Homosexuality Bill (the Bill or AHB)[3], which sought to expand the criminalisation of same-sex conduct in Uganda. It must be noted that the Ugandan Parliament passed the Bill recently but it was soon struck down as unconstitutional on account of it having been passed without quorum in Parliament, in violation of the 1995 Constitution of Uganda, and the Parliamentary rules of procedure.[4]Prior to enactment, the Bill stated as some of its objectives: the establishment of a comprehensive legal framework for the protection of the traditional African family, the cherished culture of Ugandans as well as their traditional family values against attempts of sexual rights activists who are 'seeking to impose their values of sexual promiscuity on Ugandans.'[5] While in its final form, the law makes no reference to these

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1 See a collection of Newspaper articles expressing these views in S Tamale *Homosexuality: Perspectives from Uganda* (2007).

2 Sexual Minorities Uganda (SMUG) *Expanded criminalisation of homosexuality in Uganda: A flawed narrative* (2014) 3.

3 The Anti-Homosexuality Bill, Bill 18 of 2009 http://www.publiceye.org/publications/globalizing-the-culture-wars/pdf/uganda-bill-september-09.pdf.

4 BBC 'Ugandan MPs pass life in jail anti-homosexual law' 20 December 2013 http://www.bbc.co.uk/news/world-africa-25463942. See also: *Oloka Onyango & 9 Others v Attorney General.* Constitutional petition No. 8 of 2014. Full judgment: http://www.ulii.org/ug/judgment/constitutional-court/2014/14.

5 Anti-Homosexuality Bill (n 3 above) clause 1(1).

objectives; it may be argued that their existence in the Bill was indicative of the foundations of the anti-gay rights lobby.

The debate whether or not homosexuality offends African culture and should on that basis be criminalised has not been brought before Ugandan courts per se, although it has to some extent been discussed within a legal and human rights framework in the local media.[6] However, given that the final determination on the legality or otherwise of the arguments in this debate lie within an interpretation of the Constitution, it is important to examine how Ugandan courts have applied the Constitution on related matters.

This chapter therefore seeks to examine the interpretation and application of the right to culture in selected decisions of Ugandan courts, whilst exploring the jurisprudential implications of the opinions therein for the 'homosexuality versus culture' debate in Uganda. The chapter will show how Ugandan courts' approach to the right to culture has avoided a comprehensive discussion on the constitutional limitations to the right. The overall objective of the chapter is therefore to illustrate the opportunities, gaps and challenges, which current Ugandan jurisprudence on the topic presents for the 'homosexuality versus culture versus homophobia' debate, in light of the AHB and the prevailing attitudes against homosexuality in the country.[7] Due to practical limitations of time and space, the chapter focuses on two relevant decisions made by Ugandan courts after 1995, under the country's current Constitution. The selected decisions directly address some of the socio-legal tensions, which exist between culture and human rights on the key subjects of same clan marriage and dowry respectively.

The chapter is divided into five parts. The introduction constitutes part one. Part two lays a background for the discussion by presenting the normative framework regulating the right to culture in Uganda and at the regional and international levels. It explores the limits of the right to culture under international law. Part three discusses the complexity of defining 'African Culture.' Part four considers these limits and complexities by analysing two Ugandan court decisions where the right to culture was applied, whilst contextualising it within the 'gay rights' debate in Uganda and part five contains the concluding remarks.

6 See Tamale (n 1 above) 99, 106, 133 & 159 for opinions published as articles in local Ugandan newspapers exploring the subject of culture and the legal recognition of gay rights.

7 A survey done in 2007 by the Pew Research Centre found that 96 per cent of Ugandans were against homosexuality. See Pew Research Centre 'The global divide on homosexuality' (2013) 3.

2 The right to culture in Uganda

The 1995 Constitution of Uganda (Constitution) expressly recognises the right to culture under article 37, providing as follows:

> Every person has a right as applicable to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others.

This right is subject to limitation in respect of those cultures, customs or traditions, which are against the dignity and welfare or interest of women and which undermine their status.[8] It is further subject to the general limitation on rights in as far as the enjoyment of one person's right to culture should not prejudice the enjoyment of rights by others or the public interest.[9]

Article 37 of the Constitution has received no constitutional interpretation *per se* and as such its full legal parameters remain undefined. The Constitution recognises cultural objectives under Objective XXIV of the national objectives and directive principals of state policy, which provides:

> Cultural and customary values which are consistent with fundamental rights and freedoms, human dignity, democracy and with the Constitution may be developed and incorporated in aspects of Ugandan life.

Further that:

> The State shall –
>
> (a) promote and preserve those cultural values and practices which enhance the dignity and well-being of Ugandans …

While merely a stated objective with no binding legal force, this provision may be referred to in the interpretation of article 37. This is so given the harmonisation principle of Constitutional interpretation, which requires the Constitution to be read as a whole and that those provisions in it, which concern the same issue, must be considered together.[10] On this basis, article 246 of the Constitution may also be of relevance. In the furtherance of objective XXIV, the provision recognises the institution of traditional or cultural leaders in any area of Uganda in accordance with the customs, culture and aspirations of the people to whom it applies. However, in a careful balancing act to ensure the subservience of monarchical to constitutional governance, leaders may not exercise political power of the

8 The 1995 Constitution of the Republic of Uganda, art 33(6).
9 n 8 above, art 43.
10 See Oder JSC in *Attorney General v Major David Tinyefuza,* Supreme Court Constitutional Appeal 1 of 2007.

central or local government.[11] Moreover, any custom, tradition or practice relating to such a leader which undermines the rights of any person guaranteed under the Constitution is prohibited.[12] On a broader level, such custom would be void if it violates the Constitution.[13] Accordingly, this provision clarifies that Uganda is not a monarchy but a constitutional republic.

Uganda is a state party to international and regional treaties which recognise the right to culture and to which further recourse may be had in defining this right. The applicability of these treaties is founded in article 123 of the Constitution. CESCR recognises the right of everyone to participate freely in the cultural life of their community,[14] while the ICCPR recognises the right to pursue one's cultural development[15] and the rights of linguistic, ethnic or religious minorities to enjoy their culture in community with other members of their group.[16] The right to culture is also recognised in the Universal Declaration.[17] Although not regarded as a legally binding treaty, it has been argued that the Universal Declaration now forms part of customary international law from which it draws binding force.[18] An opposing view exists that it is certain provisions of the Universal Declaration such as non-discrimination, fair trial and freedom from torture, which have coalesced into customary law but not the entire declaration.[19] The latter argument however diminishes in significance when it is considered that the right to culture in the Universal Declaration is recognised in similar terms under the ESCR, and several other human rights instruments, which are legally binding. The Committee on ESCR makes a general reference to the 'right to take part in cultural life' when delineating the various other instruments, which use similar language in recognising the 'right to culture.'[20]

As a member of the African Union (AU),[21] Uganda has ratified a series of AU treaties where the right to culture is recognised. Some of such key treaties include: The African Charter on Human and Peoples' Rights (African Charter), which refers to 'the right to take part in the cultural life

11 The Constitution (n 8 above) art 246(3)(f).
12 n 8 above, art 246(4).
13 n 8 above, art 2.
14 CESCR, General Assembly Resolution 2200A (XXI), art 15. Uganda acceded to the CESCR on 21 January 1987.
15 ICCPR, General Assembly Resolution 2200A (XXI), art 1.
16 n 15 above art 27. Uganda acceded to the ICCPR on 21 June 1995.
17 The Universal Declaration of Human Rights (Universal Declaration), General Assembly Resolution 217 A (III), art 27.
18 J Dugard *International law: A South African perspective* (2005) 315.
19 As above.
20 Committee on ESCR General Comment No 21 on the Right to Culture, para 3 part I.
21 See list of AU member states at http://www.au.int/en/member_states/countryprofiles, see also Constitutive Act of the Organisation of African Unity (OAU) which later became the AU at http://www.au.int/en/sites/default/files/Constitutive_Act_en_0.htm.

of one's community'[22] as is used in CESCR. In similar language, the African Charter on the Rights and Welfare of the Child (ACRWC) recognises the rights of a child to participate freely in cultural life.[23] The African Charter recognises separately the right of all 'peoples' to cultural development with due regard to their freedom and identity.[24] The African Youth Charter also recognises the right to cultural development for youths in similar terms. It further protects the rights of ethnic minorities and youths of indigenous origin to enjoy their culture in community with other members of their group.[25] The Protocol to the African Charter on the Rights of Women in Arica protects the rights of women to 'a positive cultural context' and to participate fully in making of cultural policies.[26]

2.1 The right to culture versus the right 'from' culture: can one impose one's culture on another?

The 'right from culture' in this chapter is used to refer to the right not to participate in a specific culture or cultural practice. From the onset, it is important to begin the analysis of jurisprudence on the right to culture in Uganda with an exposition of some of the tensions that exist at the international and regional level between the right 'to' culture and a right 'from' culture. This is so because, as will be discussed in part three, there is a danger of pro-culturalists interpreting the right to culture in absolute terms as though to argue that in protecting this right, the state requires all its citizens to live within a certain specified cultural framework from which all their other individual rights can then be determined. The result of such an interpretation would be to force all people to exist as 'static cultural beings', and to define their rights and choices within that rigid cultural sphere, thereby propagating the very antithesis of the notion of human rights, which recognises individual autonomy and choice.[27]

This tension is particularly crucial to the 'homosexuality versus culture' debate that exists in Uganda. It attracts questions such as whether, if a culture disapproves of homosexual conduct, that in itself is sufficient ground to criminalise the actions of those who engage in it, based on, among other arguments, the right to culture. Moreover, when the argument is considered that the understanding of human rights in the African context differs from the western understanding of the same in as far as the former emphasises the individual's duty to his or her society

22 African Charter on Human and Peoples' Rights (ACHPR) OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982) art 17

23 African Charter on the Rights and Welfare of the Child (ACRWC) OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999.

24 African Charter (n 22 above) art 22

25 African Youth Charter July 2006, arts 10 and 2 respectively http://www.un.org/en/africa/osaa/pdf/au/african_youth_charter_2006.pdf (accessed 22 March 2016).

26 Protocol to the African Charter on the Rights of Women July 2003, art 17.

27 JJ Shestack 'The philosophic foundations of human rights' in C Heyns & K Stefiszyn (eds) *Human rights, peace and justice in Africa: A reader* (2006) 3-5.

while the latter tends to emphasise individual autonomy,[28] the discourse gets even more complex, as the chapter further explores. It would here be instructive, in determining a common legal position, to analyse the relevant aspects of African human rights treaties and international treaties concerning the right to culture and the promotion of culture.

2.2 Defining the right to culture under CESCR

In defining the normative content of the right to culture, the Committee on ESCR characterised the right as a 'freedom.' The Committee does not define 'freedom' but further enunciates on the right, by illustrating its components. According to the Committee's interpretation, culture for the purposes of implementing the right encompasses among others, ways of life, belief systems, ceremonies, rites, customs and traditions through which individuals, groups and communities express their humanity and give meaning to their existence as well as build their world view in contrast to external world forces.[29] The Committee further identifies states' obligations in respect of the right as twofold: (i) by way of abstention through non-interference with cultural practices and access to cultural goods; and (ii) by positive action through ensuring the existence of enabling conditions which need to exist to facilitate participation in and promotion of culture.[30] The language used in no way suggests an obligation upon states to require its citizens to live in accordance with a specific culture. Rather it obligates states to ensure that, should any of its citizens choose to live according to their culture, they are not hindered by prohibitive laws or a lack of facilities to enable them in that choice. Indeed the Committee proceeded to add:[31]

> The decision by a person whether *or not* to exercise the right to take part in cultural life individually, or in association with others, is a cultural choice and, as such, should be recognized, respected and protected on the basis of equality.

This element of choice – the right not to take part in a culture – is reflected again in defining the components of the meaning of 'participation' or 'to take part', which are also used by the African human rights treaties indicated earlier. According to the Committee on ESCR:[32]

> … participation covers the right of everyone alone or in association with others to choose his or her own identity, to identify *or not* with one or several communities or to change that choice …

28 See J Cobbah 'African values and the human rights debate: An African perspective' in Heyns & Stefiszyn (n 27 above) 35.
29 n 20 above, para 13 part II.
30 As above
31 n 20 above, para 7 part II (emphasis added).
32 n 20 above, para 15 (a) part II (emphasis added).

From the foregoing interpretations it is evident that the CESCR and indeed all other treaties, which protect the right to culture, envisage the element of choice as predicated on the principles of individuality and autonomy of the human being.

It is logical to expect a 'clash of rights' in a world with competing interests. To ensure that the rights of all persons are protected it is pertinent to appreciate that save for non-derogable rights,[33] no one right is absolute and rights may often be limited to accommodate other rights. In this sense, the human rights of one group or individual may not to be imposed or used to stifle the rights of others without justification within the recognised parameters.[34]

2.3 Limitations on the right to culture under CESCR

Like most human rights treaties, CESCR contains general limitations to the enjoyment of rights.[35] The right to culture is no exception and in promoting it, states are obliged to protect the enjoyment of all other rights in CESCR.[36] In juxtaposing the enjoyment of the right to culture with article 2 of CESCR on non-discrimination, the Committee on ESCR specifically states:

> In particular, no one shall be discriminated against simply because he or she *chooses* to belong or *not to belong* to a given cultural community or group or to practice or *not to practice a given cultural activity* …

Furthermore, in listing the state parties' core obligations, which have immediate effect in implementing the right to culture, the Committee on ESCR identified the obligation to respect everyone's right to identify *or not to* identify with one or more communities and the right to change their choice.[37]

In emphasising the element of choice and the need to protect it in the context of non-discrimination, the Committee on ESCR clarifies the prohibition of coercion by a cultural majority and reaffirms that not all human beings will choose to live as 'static cultural beings' and an individual should not be forced into a particular 'cultural life style' by those who choose to live as such.

However, a reading of the relevant legal instruments of the AU might create an impression to the contrary. Discussions abound as to the

33 Freedom from torture, discrimination etc.
34 Most limitations on rights are measured against the test which determines whether they are acceptable in a free and democratic society and whether the right itself is not rendered illusory.
35 CESCR (n 14 above) arts 4 & 5.
36 As above. See also General Comment (n 20 above) paras 17&18.
37 General Comment (n 20 above) para 55(b).

difference between the 'African concept of human rights' and the western concept of the same, the main emphasis being that while the latter propagates individualism, the former envisages the enjoyment of individual rights in consideration of the interests of the wider community on the basis of the 'I am because we are' (ubuntu) concept.[38] Most AU instruments on culture and rights are informed by a shared political, social and cultural history of many African countries. In particular, their shared colonial history informs the objectives and principles to protect, promote or assert 'African culture or traditions' in a considerable number of instruments.[39] Against this background it is pertinent to examine the divergence if any, of the scope of the right to culture under the African human rights system, from that provided by the Committee on ESCR based on the relevant international human rights treaties.

2.4 Defining the right to culture under the African human rights system

As noted above, the right to culture is recognised in a number of human rights instruments under the African human rights system in a language similar to that used under the relevant international human rights treaties. The right has been enforced by the African Commission on Human and Peoples' Rights (the African Commission) in a number of decisions, most prominent among them being *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v Kenya* (*Endorois* case).[40] This was a complaint brought against the Kenyan government by an indigenous minority group following denial of access to their traditional lands. In defining the right to culture under article 17(2) of the African Charter, the African Commission identified the nature of state's obligations on similar terms as those identified by the Committee on ESCR outlined above, namely abstention and positive action. The African Commission stated that the article required governments to[41]

> … take measures aimed at the conservation, development and diffusion of culture', such as promoting cultural identity as a factor of mutual appreciation among individuals, groups, nations and regions …

The African Commission gave examples of positive action as including the creation of opportunities and facilities to ensure that different cultures and

38 Cobbah (n 28 above).
39 See preamble of the Charter for African Renaissance, art 3 thereof. See also the preambles of the Cultural Charter for Africa, the African Charter on Human and Peoples' Rights, the African Youth Charter, and the African Charter on the Rights and Welfare of the Child.
40 Communication 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v Kenya* (*Endorois* case) Twenty Seventh Annual Activity Report.
41 n 40 above, para 247.

ways of life exist.[42] The Commission concluded by finding a violation by the respondent of both the abstention and positive action aspects of the right to culture, in as far as it restricted access by the Endorois to their ancestral lands, whilst failing to secure them the right to celebrate their cultural festivals and rituals thereon.[43]

The African Commission has also applied the right to cultural development under article 22 of the African Charter in an interstate communication by the Democratic Republic of Congo against Burundi, Rwanda and Uganda.[44] Affirming the 'abstention' aspect of states' obligation, the Commission found that the respondent states had violated the complainant's right to cultural development through its actions of indiscriminate dumping and mass burial of victims, defining the actions as barbaric and an affront to African historical traditions and virtues.[45]

Nowhere in the foregoing applications of the right does the Commission discuss the element of choice. This poses the question whether the right to culture is absolute under the African human rights system. It could be argued that the facts in those cases did not invite such a discussion. In any event, it leaves unanswered the question whether the right to culture is absolute under the African human rights system.

2.5 Limitations on the right to culture under the African human rights system

The African Commission has itself made the observation that unlike other rights in the African Charter, article 17 on the right to culture has no 'claw back clause,'[46] or what has been described as 'internal limitations', which attach to particular rights in the African Charter.[47] A further observation has been made that unlike conventional human rights instruments, the African Charter does not have a general clause limiting rights.[48] The impression is here immediately created that the right to culture under the African system may be absolute. In fact, the African Commission sought to explain the absence of a claw back clause to mean that few if any justifications were foreseeable to limit the right to culture.[49] However, in a series of decisions,[50] the African Commission has affirmed that rights

42 n 40 above, para 248.
43 n 40 above, para 249.
44 *Democratic Republic of Congo v Burundi, Rwanda & Uganda* (2004) AHRLR 19 (ACHPR 2003).
45 n 44 above, para 87.
46 *Endorois* case (n 40 above) para 249.
47 CH Heyns & M Killander 'The African regional human rights system' in Heyns & Stefiszyn (n 27 above) 202.
48 As above.
49 *Endorois* case (n 40 above) para 249.
50 See *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) paras 41 & 42, *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998), paras 67, 68, 69.

under the African Charter are subject to a general limitation clause couched as a *duty*[51] in article 27(2), which states:[52]

> The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

It is not clear whether these limiting grounds must be assessed independently, concurrently or incrementally. The Commission offers some guidance on the parameters of the limitation clause, stating that its application must meet the proportionality test, in the sense that a limitation on a right must be absolutely necessary for the advantages which follow, must not render the right being limited, illusory'[53] and must be founded on a 'legitimate' state interest.[54]

However, this in itself remains quite unsatisfactory. A preview of the African Commission's decisions offers no systematic illustration of the substantive and procedural application of article 27(2) to both provisions on the right to culture under articles 17 and 22 of the African Charter.

In *Prince v South Africa* (*Prince* case) the African Commission allowed a limitation on the complainant's right to practice his Rastafarian culture through a Rastafarian dress code, dietary code and use of cannabis among others. In so allowing, the Commission stated that granting the applicant unfettered power to practice Rastafarianism would 'violate the norms that keep the whole nation together.'[55] In what appears to have been an assessment of the state's interest, the Commission agreed that granting the complainant such a right would lead to 'anarchy' and found an outweighing balance in favour of the whole society against his right to culture.[56]

In outweighing the applicant's right to culture, the Commission did not show whether and how it balanced out the applicant's right against any of the rights limiting grounds that are listed in article 27(2) of the African Charter, namely; the 'rights of others, 'collective security', 'morality' and 'common interest'.

While the claim to culture in *Prince* was brought by a member belonging to a minority community, a systematic application of article 27 would have been particularly useful in providing some insights to definitions and a weighing scale for the 'culture and public morals versus choice and individual rights debate' which underpins the 'homosexuality

51 Heyns & Killander (n 47 above) 202-3 argue that duties under the African Charter are in fact limitations on rights as opposed to preconditions for the enjoyment of rights.
52 African Charter (n 22 above).
53 Constitutional Rights Project (n 50 above) para 42.
54 Media Rights Agenda (n 50 above).
55 *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) para 47.
56 n 55 above para 48.

versus culture' debate in Uganda. At a more critical level, it would have provided some insights into how a clash of cultures might be resolved under the 'right to culture.'

The apparent elevation of culture without choice under the African Charter and other African human rights instruments might appear to be contained in several provisions imposing duties on nationals of member states. One particularly outstanding provision is contained in article 29 of the African Charter, which provides that the individual shall also have the duty:

> To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society

Similar provisions exist in the African Youth Charter.[57]

However, it may be argued that as there is no practicality to the state's enforcement of duties against its citizens under human rights treaties,[58] the duties contained in African human rights instruments are but inspirational statements whose effect, if any, may be to limit the rights therein, but not to deter their enjoyment.[59] In the final analysis, there seems to be no basis under the African human rights system for an absolute application or imposition of the right to culture. This will be the object of further examination below.

2.6 The right *from* culture under the African human rights system: Locating the common ground

The African human rights system does not exist in a vacuum. In fact, it draws a lot of its provisions from the pre-existing international human rights system, which developed much earlier and which systems are acknowledged in the preambles of most of its treaties.[60] The relevance of international human rights under the African human rights system is sanctioned further in the process of enforcement of rights by its organs. This is evidenced in articles 60 and 61 of the African Charter, which enjoin the African Commission to 'draw inspiration' or to 'consider' international human rights instruments in reaching their decisions. The African Commission has referred to these provisions and even applied several international human rights instruments including the CESCR, in several of

57 n 25 above Art 26 (m) & (n).
58 See details in F Viljoen *International human rights law in Africa* (2012).
59 Heyns & Killander (n 51 above).
60 Reference to key AU human rights treaties including the African Charter, the African Youth Charter, The Protocol on the rights of women, the ACRWC, as well as the Constitutive Act of the AU shows a systematic reference to the wider UN treaty instruments and human rights systems.

its decisions.[61] Moreover, quite significant for the right to culture, the Pretoria Declaration on Economic Social and Cultural Rights in Africa further articulates that the right to culture entails among other things: 'Positive African values consistent with international human rights realities and standards.'[62]

This flexible and progressive approach to culture under the African human rights system is also visible in the Charter for African Cultural Renaissance whose objectives include the promotion by states of freedom of expression, human rights and cultural democracy. The Charter does not define 'cultural democracy' but the concept has been traced to the 1970s cultural debates in Europe and in the 1910s and 1920s in the United States of America, which called for cultural diversity in opposition to homogeneity and cultural imposition. Cultural democracy has been expounded to include the principle that several cultures can and do co-exist and that one culture should not be allowed to dominate another.[63]

In light of the foregoing, it is argued that upon a harmonised reading of articles 60 and 61 of the African Charter, the CESCR, and General Comment 12, issued by the Committee on ESCR leads to the conclusion that the right to culture under the African human rights system is not absolute. While culture is a prominent theme within the African Union system, it is largely contained in aspirational pronouncements not couched as a right, while the nature and scope of the right to culture itself requires states to exercise abstention and positive action in relation to those who seek to participate in their culture. As these parameters do not differ from the ones within the broader international human rights regime, it can be affirmed that the element of individuality or choice or a right 'from' culture that is recognised there under is recognised in the same terms under the African concept of the right to culture.

3 Problematising 'African culture'

The foregoing legal discussion, notwithstanding the complications of defining culture in substantive terms, is pertinent for an appreciation of the main discussion. This is more so in the African context where there are a

61 See *Endorois* case (n 40 above); *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) paras 49 & 52.

62 Pretoria Declaration on Economic, Social and Cultural (2004) para 9 http://www.achpr.org/files/instruments/pretoria-declaration/achpr_instr_decla_pretoria_esc_rights_2004_eng.pdf

63 See essay adapted from *Cultural Policy and Cultural Democracy* Chapter 11 of 'Crossroads: Reflections on the Politics of Culture*' (Talmage, CA: DNA Press, 1990, pp. 107-109).* Crossroads http://www.wwcd.org/cd.html and D Adams & A Goldbard 'Cultural Democracy: Introduction to an idea' (2005) http://www.wwcd.org/cd2.html (accessed on 3 December 2014). Although the Charter itself does not further articulate the concept of 'cultural democracy' although given its progressive stance; parallels can easily be drawn with the General Comment No 12 to include a right 'from' culture.

variety of communities practicing different cultures. According to the definition by the United Nations Educational, Scientific and Cultural Organization (UNESCO), 'culture is the set of distinctive spiritual, material, intellectual and emotional features of a society or a social group, which encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.'[64] The Committee on ESCR has commented on the right to culture stating that in its view, culture is a broad, inclusive concept encompassing all manifestations of human existence and further that the expression 'cultural life' is an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future.[65] The latter view is of particular relevance when considered in light of those cultural practices, which may have been lost, distorted, stunted or stagnated in the process of colonisation. In his discussion of Africa's colonial history, Mamdani states that colonisation through the process of state formation and market creations led to the radical dislocation of most of Africa's cultures.[66] He points to how in pre-colonial times customary disputes were probably resolved in homes, and that is to say, in the social fields in which they arose and that if any power was exercised by chiefs then it was not in absolutist terms but was achieved by means of consensus.[67] He argues that for the sake of facilitating colonial power, colonial chiefs were given 'non-customary' power, which they exercised absolutely and in so doing, created 'non-customary laws' without regard for cultural diversity and fluidity.[68] Moreover, he proceeds to explain that even with the onset of independence there was no framework to remedy these historical dislocations, thus maintaining colonial cultural homogeneity and rigidity with no regard for diversity.[69]

It is here submitted that with this analysis it is possible to problematise the modern concept of 'African culture' by drawing contrasting parallels between organic and grassroots developments of pre-colonial and post-colonial cultures among African communities on the one hand and the terminology 'African culture' on the other. 'African culture' suggests a homogenised top-down decalogue of what it means to live as an African. However, what it is in fact, is a way of life created by colonial processes and typically found in colonial legislations which persist across the continent. Key among such legislations are laws criminalising so called 'offences against the order of nature', which have been the vanguards of

64 UNESCO Universal Declaration on Cultural Diversity, 2001 fifth preambular paragraph); see also adopted by the Committee on ESCR GC No. 21 2009 para 10. See also, Charter for African cultural renaissance, 2006 preambular paragraph 3 (not yet in force).
65 General Comment (n 20 above) para 11.
66 M Mamdani *Citizen and subject, contemporary Africa and the legacy of late colonialism* (1996) 118-119.
67 As above.
68 As above.
69 As above.

recent harsher anti-homosexuality legislation in several African countries. Indeed, as Tamale has pointed out, most of what is referred to today as 'African culture' is a product of former colonial authorities and African male patriarchs.[70]

The foregoing discussion can be summed up in the following questions: when we refer to 'African culture' in defence of anti-homosexuality legislation or other cultural debate, to which Africa are we referring? Is it to pre-colonial Africa? Colonial Africa? Or post-colonial Africa? Is Africa a country? Does the concept 'African culture' take on different social-political meanings in each case and if so with what effect?

As time and space do not permit a thorough discussion of these questions, a few speculations may be made here for the purposes of this chapter.

3.1 'Ubuntu' and the concept of a homogenous 'African culture'

The truism 'Africa is not a country' applies not just to geographical facts but to cultural, historical and social facts. While the view has been expressed that there exists among the African people some common cultural ideologies centred in communitarianism and the concept of 'ubuntu',[71] it has been observed of 'ubuntu' that the term has no predetermined definition.[72] In *State v Makwanyane* it was stated as encompassing: [t]he key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality.[73]

The concept has been applied by Uganda's Constitutional Court in the case of *Salvatori Abuki & Another v Attorney General,*[74] where Tabaro J after referring to *State v Makwanyane* went so far as to declare that the concept of 'ubuntu,' is not exclusive to South Africa alone, but is embraced by all communities in Uganda as well, and that it is in fact a hallmark of all civilised communities.[75] He proceeded to endorse the opinions of Justice Madala and Langa in *Makwanyane* regarding 'ubuntu' as an 'African concept' embodying humanness, social justice and fairness, human dignity and 'true humanness.'[76] However, it must be stated here that while these decisions might claim some sort of commonality among African people on

70 S Tamale 'The right to culture and the culture of rights: A critical perspective on women's sexual rights in Africa' (2008) 161 *Feminist Legal Studies* 49.
71 S Tamale (n 70 above) 49.
72 C Himonga *et al* 'Reflections on judicial views of ubuntu' (2013) 16 *Potchefstroom Electronic Law Journal* 376.
73 *S v Makwanyane* (1995) 3 SA 391 (CC) para 308.
74 *Salvatori Abuki & Another v Attorney General* Constitutional Case 2 of 1997.
75 *Salvatori Abuki* (n 74 above) Judgment of Tabaro J.
76 As above.

the concept of 'ubuntu', they certainly are not claims to a uniform 'African culture'. Moreover, the claims themselves do not purport to be a codification of the meaning of the concept of 'ubuntu', respecting the fluid nature of the term. Indeed, scholars of African cultures have been mindful to emphasise Africa's cultural diversity even whilst recognising 'ubuntu' as a common value within them.[77] It is thus submitted that while references to 'African culture' by politicians and even in the African Charter and related documents might create the idea of some sort of codified culture among African communities, nowhere is such a phenomenon in evidence. While communities may share some common values, these by no means provide the exhaustive directory on 'African culture' nor are they meant to. Indeed it is hard to imagine the very idea of such a directory without fundamental internal contradictions. It is suggested therefore that reliance on the argument that homosexuality is against 'African culture' in order to reject the rights of sexual minorities on the continent ought to be approached with a more critical understanding of the ambiguities and contradictions belying such a concept. It is further proposed to do so with an understanding of the ways in which culture can be deployed as an essentialising tool and can be used to silence ideas and expressions that might be considered counter to the mainstream. This chapter analyses how the law deploys culture to achieve such a purpose.

3.2 Cultural essentialism and the politics of neo-colonialism

In light of the foregoing discussion, one might wonder why the loudest and most confident retort against protecting the rights of sexual minorities in Africa is that homosexuality is against 'African culture.' This sentiment has been loudest in the international arena and often comes laced with accusations of neo-colonialism against 'pro gay' western nations.[78]

In a modified version of her paper on the 'nation states of feminist theory,[79] Tamale points to a case of backlash against women's rights which is manifesting in the form of economic, religious and cultural fundamentalisms. She defines cultural essentialism or fundamentalism as the unquestioning adherence to a belief system often involving the 'freezing' of a people's culture for instance through codification, adding that it usually manifests through neo-liberal and neo-conservative

77 Tamale (n 70 above) 49.

78 See for example remarks by Uganda's speaker against Canadian Prime Minister at The Africa Report 'Angered Ugandan official vows to reintroduce anti-gay bill after Canadian spat', 31 October 2012 http://www.theafricareport.com/Society-and-Culture/angered-ugandan-official-vows-to-reintroduce-anti-gay-bill-after-canadian-spat.html (accessed 5 April 2015).

79 S Tamale 'The right to culture and the culture of rights, A critical perspective on women's sexual rights in Africa' modified version of a paper presented at a Conference on the theme, 'Up Against the Nation-States of Feminist Theory,' 30 June – 1 July, 2006; AHRC Research Centre for Law, Gender & Sexuality, University of Kent, UK.

politics.[80] She further postulates that in Africa when viewed against the background of political monopoly, economic deprivation and poverty, this backlash multiplies.[81]

It is submitted that perhaps this backlash is what is also at play in the gay rights in Africa standoff referenced above. Moreover, given Africa's colonial history, this backlash can easily be viewed as a unifying defence against neo-colonialism. Thus it is curious to observe this declaration in the preamble of the 1976 cultural charter for Africa, which is still in force today:[82]

> Recalling …
>
> [t]hat colonization has encouraged the formation of an *elite* which is too often *alienated* from its *'culture'* and susceptible to assimilation and that a serious gap has been opened between the said elite and the *'African popular masses* …'

While the foregoing paragraph makes quite a number of generalisations, which might hold significant social and political meaning, there exist no legal interpretations of these terminologies as used in the Charter. However, one can very easily make out a sense of cultural essentialism and the neo-colonial backlash alluded to in foregoing discussions. Viewed in terms of the current debate, this narrative fits right into the gay rights versus 'African culture' debate, where African LGBTI and gay rights activists might easily be dubbed the 'elite who have been assimilated' while the anti-gay rights group might be viewed as the 'African popular masses'.

Thus it is suggested here that in fact, given Africa's colonial history and the current reality of globalisation, there has emerged a definition of 'African culture', which is political. Such a definition is a deception, designed to serve as a moralising tool in interstate, intrastate, class and gender wars aimed at creating antagonisms, defences, and alliances, among other objectives, but while at the same time, leading to exclusion, dispossession and oppression. With this suggestion in the background, the chapter proceeds to examine how Ugandan courts have treated the right to culture thus far.

4 Objective constitutional application and tracing the right 'from 'culture in Ugandan courts

Having established the existence of a right 'from' culture at both the international and regional systems where Uganda interacts as a signatory,

80 As above.
81 As above.
82 Organisation of African Unity 'Cultural Charter for Africa' (July 1976), para 5 http://www.dac.gov.za/sites/default/files/Charter%20for%20African%20Renaissance_1.pdf.

an assessment can be made on how the right 'to' culture has been interpreted and applied in Ugandan courts and how these decisions might influence the homosexuality versus culture debate in Uganda. Two decisions are here instructive, one made by the High Court and another by the Constitutional Court.

In *Bruno L Kiwuwa v Ivan Serunkuma and Juliet Namazzi* (*Kiwuwa* case)[83] the High Court of Uganda barred the respondents from getting married on the basis that it would violate the local marriage customs of their tribe. It must be pointed out from the outset that the court made this decision despite the fact that the respondents had not sought to celebrate their union under customary law.

The plaintiff, Kiwuwa, also the biological father of the female respondent, Namazzi, sought a permanent injunction against a marriage by the respondents under the Marriage Act[84] on the basis that the respondents both belonged to the *Ndiga* (sheep) clan – by virtue of the fact that their parents were also members of that clan – and that same clan marriages were prohibited by the customs of the Baganda, to which tribe they belonged. The plaintiff claimed that such a marriage was against custom, 'abominable' and 'illegal' and further that on the basis of the right to culture under article 37 of the Constitution, the court was 'enjoined' to 'enforce' the custom in issue as the same was the right of the Baganda as a tribe.[85]

On their part, the defendants argued that the marriage even if found to be repugnant on a cultural basis, was not illegal under the Marriage Act as it was not within the written prohibited degrees of consanguinity which enumerates what family relations cannot marry under the Act.[86] It is also notable that the attempted marriage did not fall under the categories of incestuous sexual relations prohibited under the Penal Code Act.[87]

It is here instructive to explain that by Ugandan law, a marriage may be celebrated under one or more of several statutes, each governed by its own substantive and procedural rules. One may for instance choose to get married following the African traditional norms and customs under the Customary Marriage and Registration Act,[88] or they may choose to proceed without recourse to cultural or customary requirements under the Marriage Act, by way of a church marriage or a civil marriage at the registrar's office.[89] The respondents argued that as they did not seek to

83 *Bruno L Kiwuwa v Ivan Serunkuma and Juliet Namazzi* (*Kiwuwa* case) High Court Civil Suit 56 of 2006.
84 Marriage Act, Cap 251, Laws of Uganda.
85 n 83 above, 1 & 6.
86 n 83 above; Marriage Act (n 84 above) sec 34.
87 See The Penal Code Act cap 120, Laws of Uganda secs 149 & 150.
88 Customary Marriage and Registration Act, Cap 248, Laws of Uganda.
89 Marriage Act (n 84 above) secs 20 & 26.

celebrate their marriage under the Customary Marriages Act, their union could not be regulated by the custom, which the plaintiff sought to impose on them. Depending on one's choice, other forms of marriage may be celebrated under Islamic law[90] or following the Hindu customs.[91] The only common legal requirements for the marriages celebrated under any of the options are that the contractors be above the age of eighteen years, have both consented to the union and are heterosexual, as is their right under the Constitution.[92]

Clearly, the respondents tried to make the case that despite the existence of cultural norms regulating marriage among the Baganda, they had a choice under state law to opt out of their traditional African culture and celebrate their marriage outside it without recourse to its rules.

However, in finding for the plaintiff, the court took an approach of the right to culture as an absolute imposition with no room for the existence of the individual other than as a 'specific cultural being.' The court's decision turned on whether or not, even if the defendants were to procure a marriage under the Marriage Act, there existed a lawful impediment or just cause to the marriage under that Act, as provided in sections 10, 12, 13 or 21 and whether the plaintiff's claim comprised such an impediment.[93] In making this inquiry, Justice Remmy Kasule navigated the legal history, current laws and principles of state objectives on the promotion of culture, the right to culture and based on these, asserted the uncontested applicability and recognition of customary law, but gave little if any attention to an inquiry on how customary law interacts with other individual constitutional rights such as in this case, the right to marry.

In failing to balance the right to culture against other rights, the *Kiwuwa* decision illustrates rather vividly the erosion of choice or freedom 'from' culture, which dominates many discussions and instances of enforcement of the right to culture in the Ugandan context. To further demonstrate, the judge pointed out how the Marriage Act recognises and protects customary marriages, by, for instance, prohibiting and criminalising a monogamous marriage that is contracted subsequent to a subsisting customary marriage contracted with a different party.[94] The Judge further observes how the Marriage Act even recognises that a customary marriage may be translated into a civil marriage under the Act.[95] He makes a final assessment by stating:

90 See The Marriage and Divorce of Mohammedans Act, Cap 252, Laws of Uganda.
91 The Hindu Marriage and Divorce Act, Cap 250, Laws of Uganda.
92 See Art 31 of the Constitution of Uganda as amended by section 10 of the Constitutional Amendment Act of 2005.
93 Kiwuwa (n 83 above) 22.
94 Marriage Act (n 84 above) sec 49; Kiwuwa (n 89 above) 21.
95 Marriage Act (n 84 above) sec 29; Kiwuwa (n 89 above) 21.

> By acknowledging the validity of a customary marriage, the Marriage Act takes cognizance of the operation of marriage customary laws.

The judge then deduced further:[96]

> There is no provision in the marriage Act that *excludes* the observance of a customary law or practice by those intending to contract the type of marriage the Marriage Act allows.

With due respect to the judge, an inquiry into the recognition of customary marriage was not warranted as the defendants did not contest the validity of marriages contracted under customary law. The real question that ought to have emerged was whether there is any provision in the Marriage Act, which requires the observance of customary law or practice by those intending to contract a marriage under the Marriage Act. In stating that no provision in the Marriage Act excludes the observance of customary law, the learned Judge omitted to reason further that no provision in the Marriage Act requires its observance either.

The judge did acknowledge that the various legal regimes regulating marriage in Uganda were closed colonial constructions based on race and religion, with the Marriage Act being intended to regulate marriages between 'non African' Christians and the Marriage of Africans Act meant to regulate unions between African Christians.[97] However, by his own observation these distinctions have faded over the years and Ugandans now celebrate marriages under both Acts.[98] It appears to be rather forced therefore and quite mechanical after this observation, for the Marriage Act, which was meant for 'non African' Christians to then be construed to include procedural requirements for 'African Christians'.

In furthering his line of reasoning the learned justice Kasule relied on a scholarly article by Kakooza in which it was observed:[99]

> … Because of the fact that overtime, since the advent of the colonial era and Christianity (and Islam), native Ugandans kept to their customs in marriage, it became *necessary* for the religions to give due recognition to some of these customs in the celebration of marriage.

He further observed that as such, 'a marriage under the Marriage Act became a combination of both what is religious and what is customary although remaining essentially a church or civil marriage.'[100] The judge then concluded that although not within the prohibited degrees of

96 Kiwuwa (n 83 above) 21 (emphasis added).
97 Kiwuwa (n 83 above) 11.
98 Kiwuwa (n 83 above) 12.
99 See JM Kakooza 'The application of customary law in Uganda' (2003) 1 *Uganda Living Law Journal of the Uganda Law Reform Commission* as referred to in Kiwuwa (n 83 above) 20.
100 As above.

consanguinity, compliance with customary practice was a valid procedural requirement for the solemnisation of a marriage under the Marriage Act.

Aside from this being a misinterpretation of the law by the judge and an excessive reading into the law – for there is in fact no such requirement under the Marriage Act – it is submitted that the foregoing interpretation was incomplete. The Justice did not assess Kakooza's assertions against the individual right to marry and found a family which is recognised under the Constitution, and which stands unconditioned by traditional cultural procedures. The judge ought to have made a more critical assessment of Kakooza's statements in full light of the law for by stating that it became 'necessary' for religions to give due recognition to some of these customs, Kakooza did not analyse whether it then became a matter of law 'requiring' such recognition or whether it was merely a matter of practice. Kasule J also avoided making this analysis. By the same token, the fact that the interpretation was based on the reasoning that 'native Ugandans kept their customs in marriage' still begs the question of choice for those Ugandans today who may not want to keep to their 'customs in marriage' and who may want to contract their marriages or indeed enjoy aspects of their lives outside of those customs.

The judge's interpretation propagates the existence of the individual as a specific *cultural being* first and a *human being* later, thereby negating the human agency in making or changing cultures. It is argued therefore that the court erred by subjecting the right to marry to a limitation not envisaged under the Constitution but rather to one informed by popular cultural practice. This approach was also maintained by Mayambala, who in his appraisal of the *Kiwuwa* case and the right to marry and found a family in Uganda, left this question of 'choice' largely unexplored.[101] For instance, while he too highlights that the court took judicial notice of the 'notorious fact' of a fusion of religion and custom in the celebration of marriages under the Marriage Act in Uganda,[102] he does not examine whether this 'notorious fact' thereby bears the quality of law or crystallised into a legal requirement for the conclusion of a valid marriage under Ugandan law or remains merely that – a 'notorious fact' for the purposes of a specific case. The Constitution recognises the right of heterosexual adults to marry and found a family. How they choose to do it is not restricted to a specific culture. The failure in *Kiwuwa* and by *Mayambala* to engage this issue renders their discussion of the subject inconclusive.

The court's omission and approach to the right to culture as an absolute right is further evidenced by the absence of any real assessment of the respondents' rights against the plaintiff's rights as is required under the

101 RK Mayambala '*Bruno Kiwuwa v Ivan Serunkuma & Juliet Namazzi*: An appraisal of the right to marry and found a family in Uganda' (2007) 13 *East African Journal of Peace and Human Rights* 334.

102 Mayambala (n 101 above) 342.

general limitation clause to which all rights in the 1995 Constitution are subject. Article 43 of the Constitution provides:

> (1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.
>
> (2) Public interest under this article shall not permit –
>
> (a) political persecution;
>
> (b) detention without trial;
>
> (c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.

In a rather unsubstantiated conclusion, the court merely recognised that articles 31, 34 and 43 on the right to marry and found a family, the right to culture and the general limitation clause have to be read together. The Court then held that it did not: '… find it established that the observance of the custom in question violates any of the above articles or any provisions of the Constitution.'

It would have been quite insightful if the Court had, based on this provision weighed the extent to which the plaintiff could have constitutionally enforced his right to culture in article 34 against the defendants' right to marry and found a family. It would also have presented an opportunity for the Court to push the boundaries on requiring a constitutional standard for the justification of the cultural practice of refusing a same-clan marriage. As such, it would have been a useful basis on which to address more extensively the question of choice and how far it is affected by culture, and more importantly, whether under the Ugandan constitution, one can opt not to participate in one's specific culture or certain aspects thereof. To what extent can one assert their rights and lifestyle choices without recourse to a specific culture, as has been affirmed by the Committee on ESCR?

Related to this issue the judge in *Kiwuwa* referred to a Kenyan case of 1985,[103] where it was held that at that time there was no way in which 'an African citizen in Kenya could divest himself of association with the tribe of his father if the customs of the tribe were patrilineal, and further that the personal law in Kenya was first and foremost, customary law.' Guided by that decision, the High Court concluded that one could not change one's tribal origins and that as was the case in Kenya, personal law in Uganda was first and foremost customary law.[104]

103 *Virginia Edith Wamboi v Joash Ochieng Ongo & Omolo Sirange* [1982-88] IKAR 1049 cited in Kiwuwa (n 84 above) 27.
104 Kiwuwa (n 83 above) 31.

This was in direct contradiction to the acknowledgement by the same court earlier in the same judgment that there was no gainsaying that customary law was subject to the Constitution, which is the supreme law in Uganda.[105]Moreover, given that the decision relied upon was a Kenyan decision made way before the promulgation of the 1995 Constitution of Uganda, its application begs a further assessment of the status of interactions between culture, choice and autonomy under the present human rights regime.

The foregoing discussion is important for the homosexuality versus gay rights debate as it situates questions of individual autonomy in an overtly cultural context where, as evidenced by the *Kiwuwa* case, matters concerning sexual or emotional expressions are highly regulated by culture and this can be propagated through courts of law. The assertion that homosexuality is against 'African culture' begs the question whether one's sexuality or sexual expression is a *cultural* activity or a *human* activity which can be enjoyed outside specific cultural parameters. It further evokes the question whether as in the case of the various marriage laws in Uganda which provide for a 'cultural way' to get married, there is also a 'cultural way to have sex or to manifest one's sexuality' or whether the real issue is how cultural attitudes towards sexual activity should or should not affect an individual's sexual autonomy and if so then to what extent should they- given that one's sexuality is a *human* and not a *cultural* activity. Is one bound in a static cultural prison such that their very existence must at all times and in all decisions give way to the cultural dictates of the society in which one resides? Does the element of choice or freedom 'from' culture exist under the Ugandan Constitution?

4.1 The flexibility of culture on the question of dowry

In an interesting inverse application, article 37 was used to preserve culture, but with the majority of the justices of Uganda's Constitutional Court finding that Ugandans can actually contract marriage without reference to their culture. In what appears to be an antithesis to the cultural imposition by Justice Remmy Kasule in *Kiwuwa* that a marriage under the Marriage Act became overtime a combination of religion and custom, the Constitutional Court on this occasion pointed to marriage under other legal regimes as alternatives to marriage under customary law. In so stating, the Constitutional Court affirmed that Ugandans were *not* bound to customary regulations in contracting a marriage, indicating that marriage is in fact a *human* activity and not a *cultural* activity first.

105 Kiwuwa (n 83 above) 17.

These findings are contained in the Constitutional Court Decision of *Mifumi and 12 Others v the Attorney General and Kenneth Kakuru.*[106] In this case the petitioners sought to challenge among others, the constitutionality of the practice common in many cultures in Uganda of demanding for payment of bridal wealth as a condition precedent for a valid marriage and for a refund of the same on dissolution thereof under customary law. The petitioners claimed that payment of bride wealth perpetuated the 'ownership' of women as chattels undermining their right to dignity and equality in marriage and further that it undermined the intending couple's consent to marriage as recognised under article 31 of the Constitution. In finding that the practice did not violate the Constitution Justice Byamugisha observed:[107]

> The complaint raised by the petitioners that cultural practice of the bride's parents demanding payment of bride price from prospective son in-law interferes with the right to free consent of the parties who intend to marry. I do not agree. When parties choose the *type of marriage* they want to contract they cannot be said not to have freely consented to marry. Every *type of marriage* in Uganda has its 'legal' *or* 'cultural' requirements. If a person *chooses* to contract a *customary marriage* he is bound to observe the customs and rites of the given community into which he or she intends to marry.

In further affirming this stand, Justice Kavuma also noted:[108]

> I accept the contention of the respondents that since in Uganda there is a *variety* of *marriage options* from which those who intend to get married can *choose*, when two *adults choose to get married in a customary marriage* where bride wealth is recognized as a pre-condition to *such marriage*, then they do accept to observe all the features that go with it. None of them should, therefore, be heard to complain that her or his consent is fettered unless there is satisfactory evidence to support the contrary view.

This decision was appealed to the Supreme Court, which recently upheld these arguments.[109] It is noteworthy that the justices of the Constitutional Court referred to *types of marriage* that are regulated by different rules and procedures. Particularly instructive is Justice Byamugisha's observation that depending on the type of marriage, it may have 'legal' or 'cultural' requirements. It is argued that this distinction starkly demonstrates that not all marriages will have 'traditional cultural' requirements, as marriage is not a 'cultural activity' or a cultural decision *per se*, but rather a *human* activity first and foremost, which may then be regulated by external rules. Some of these rules may be traditional cultural rules, but which in the context of a *republic* as opposed to a *monarchy* are optional for the citizens.

106 *Mifumi and 12 Others v the Attorney General and Kenneth Kakuru* (MIFUMI) Constitutional Petition 12 of 2007.
107 n 106 above per Justice Byamugisha.
108 n 106 above per Justice Kavuma.
109 *Mifumi and 12 Others v Attorney General and Kenneth Kakuru* (MIFUMI Appeal) Constitutional Appeal 2 of 2014

A comparison of the reasoning of *Mifumi* against that in *Kiwuwa* presents the latter case as one in which the court went to great lengths to attach culture to the act of marriage, failing to separate or envisage the institution of marriage outside its longstanding existence as a cultural practise. The judge ignored the autonomous application of the human right to marry and found a family, which can exist outside of traditional cultural parameters. By so doing, he locked the defendants inside a 'cultural prison' in which they cannot exist or relate except as members of a specific ethnic group or clan.

It is noteworthy to highlight also that the court in the *Mifumi* case found that the practice of demanding a refund of bride price on the dissolution of marriage to be unconstitutional as: (i) it undermines the dignity of a woman and is thus contrary to article 33 of the Constitution; and (ii) it violates the right of women to equality to men during and after a marriage, contrary to article 31 of the Constitution. While this aspect of the judgment clearly subjected this culture to the Constitution, it was quite evidently based on the unconstitutionality of 'harmful cultural practices', which prompted the application of the clearly defined principles of dignity and the protection of women as a vulnerable group. It was an issue whose resolution was not located in a discussion of culture as a matter of choice *per se*. In the less obvious cases where cultural practices in themselves may be neither harmful nor unconstitutional, the unexplored issue remains whether the practices or attitudes are optional or compulsory.

The question thus follows: [i]f a Ugandan can exercise individual autonomy against culture in making personal and intimate decisions about marriage, can they do the same about their sexual expression, which as has already been suggested, like marriage is not a 'cultural' but rather a 'human' activity? Can a homosexual Ugandan, as a matter of choice, assert a right 'from' a culture that oppresses his or her sexuality? Or is that individual bound to exist according to *that* culture? Unfortunately *Mifumi* also did not apply systematically the limitation clause in article 43, which was yet another missed opportunity to explore the legal parameters within which a limitation on the right to culture might be exercised under the Ugandan Constitution.

4.2 Culture versus knowledge, phobia and rights

From the foregoing discussion, it can be argued that just like the decision to form a union with another autonomous being through the act of marriage; sexual orientation is first and foremost an intimate *human* experience that can and does exist outside of specific cultural confines. Further that one cannot refer to a 'cultural way of sexual desire or orientation' so as to assert that homosexuality is against 'African culture' unless one was to resort to the 'nature versus nurture debate', which this author believes would still be won on the side of choice, agency and

cultural fluidity. Indeed, what emerges is a moral attitude as to what is culturally unacceptable sexual *conduct* or expression within societies. The sexual autonomy of the individual and as such, their innate human right to exist as a sexual being without recourse to a certain culture remains and continues notwithstanding the views against it by members of that culture. It is on this basis that sexual minorities can assert their right to non-discrimination and equality before the law of a constitutional democracy that recognises their autonomous existence. If the facade of culture is removed, the cultural restrictions are revealed for what they truly are: issues of morality that can be changed through the acquisition of knowledge, then 'culture' cannot in and of itself be used as a basis to stifle individual autonomy. There must be more justification for a prohibition allegedly based on 'cultural norms.'

This is where it would be pertinent to apply the limitation clause, which protects the enjoyment of rights of individuals whilst respecting the rights of others, or limiting them within the justifications of a *free and democratic* society thereby curbing attempts to impose any right, particularly a right of the majority, as absolute.

This approach allows for an objective and critical application of the law, avoiding oppressive assertions based purely on temporal attitudes that can change with new knowledge. As observed by the Constitutional Court in a decision banning the offence of witchcraft in Uganda:[110]

> What might have been appropriate in Uganda in 1951 (which is contentious in this particular case with regard to the law in issue) is not necessarily appropriate, presently. Today there are many people in Uganda who will not feel in any way threatened with the suggestion that someone has ability to bewitch them. It is no exaggeration to assert that by virtue of skills and understanding of Science (whether social or physical) a big section of Ugandan society will pity rather than condemn those who believe in witchcraft. It is no consolation to the legislature to say that witchcraft may be known or understood in an African society, because, needless to emphasise, the test in article 28(12) of the Constitution must be met.

In a majority decision, the Constitutional Court found in that case that the definition of conduct constituting the offence of witchcraft was so ambiguous and as such failed constitutional muster in an assessment of the right to a fair trial under article 28 of the Constitution.[111]

While this decision did not directly address the right to culture, it does demonstrate the protective potential of an objective and balanced interpretation of the Constitution and how focusing on individual rights

110 *Salvatori Abuki* (n 74 above) Judgment of Justice JPM Tabaro 5.

111 The now obsolete Witch Craft Act Cap 108 Laws of Uganda did not define what witch craft is except to provide in the definition section (section 2) that it did not include *bona fide* spirit worship or *bona fide* manufacture of native medicine'.

and an individual's autonomy can safeguard against unjustified majoritarian and oppressive views based on phobia and moral panic that are wont to be propagated for the sake of majoritarian interests, however ill informed. This is particularly important considering that provision of the Ugandan constitution, which states that courts derive their power from 'the people' and must exercise it in conformity with their laws and aspirations.[112] But are the people always right?

Objectivity dims the light on 'group rights' and forces a logical examination of their justification before forcing a limitation on individual rights. Such is a discussion that would be relevant in the Ugandan context and would facilitate an extensive inquiry under the limitation clause contained in the country's Constitution. For instance, having argued that the prohibition of same-sex relations based on culture *per se* cannot warrant a violation of the equality clause against homosexuals, the next inquiry under the limitation clause would be whether such a prohibition would be 'in public interest' and called for in a free and democratic society. This would then perhaps lead to an examination of the validity if any, of certain absurd and scientifically unproven claims that have been made publicly in some circles within Uganda that homosexuals are paedophiles or are sexually violent,[113] or are recruiting children[114] and whether, if proven, the evidence would be sufficient ground for criminalising homosexuality 'in public interest', and in a 'free and democratic society.'

5 Concluding remarks

The foregoing discussion is still underdeveloped on Uganda's legal scene and is also still very 'one sided' in favour of the 'culturalists'. It is being driven by various forces, interests and influences including religious, historical, political and geo-political interests. This chapter sought to explore how Ugandan courts have handled the themes of culture and individual autonomy with a view to teasing out what some of the constitutional issues might be in light of the current homosexuality versus culture debate in the country. It sought to weigh our courts' attitudes on issues of culture and choice thus far and what they present for arguments in favour of the equal protection of the rights of sexual minorities, which are largely grounded in the concept of individual autonomy. From an expose into the *Kiwuwa* and *Mifumi* cases above, this debate has not been sufficiently litigated in a manner that can provide a real sense of direction as to how Ugandan courts might be inclined. However, a rather outstanding and somewhat worrisome trend is the dismissive manner in which courts have approached the general limitation clause, managing

112 The Constitution of Uganda (n 8 above) art 129.
113 See Tamale (n 1 above) 29, 84, 86.
114 'Uganda: Paper calls for gay people to be hanged' *The Guardian* 21 October 2010 http://www.wluml.org/node/6727 (accessed 1 July 2014).

only a cursory mention of it even in cases warranting a thorough examination as in the *Kiwuwa* case. The opportunity for such a discussion which had presented itself in a constitutional petition challenging the impugned Anti-Homosexuality Act was missed as the case was decided on a technical and not a substantive basis.[115] Uganda is therefore yet to see a fully fledged judicial analysis of the foregoing questions.

While the right to culture under the international human rights framework has been articulated by the CESCR Committee as expressly inclusive of the right not to participate in a certain culture, the same clarity has unfortunately not been obtained under the African human rights system. Whereas a case could be made for a more liberal reading of the right to culture under the African human rights charter, the absence of comprehensive jurisprudence from either the African Commission or the African Court remains a significant vacuum amidst very loud questions concerning culture, agency, and autonomy as discussed above. This state of affairs does not augur well for the direction of similar discussions in Africa's national courts. Against the background of globalisation, political and neo-colonial backlash, the omission provides but a shaky defence against the more firmly articulated concept of the right to culture under the international human rights framework.

Presented in the Ugandan context, it must be appreciated that culture as a concept exists within and is controlled largely in the political realm. This may very well be the case for several African countries. There it has the potential and has indeed been used to shape and apportion access to rights and it could even be a basis on which an individual's very survival hinges. As such, the lack of a substantive engagement within the legal frameworks and the courts of law over the normative content of culture and the limitations on the right to culture is a fundamental omission. While the legal framework obtaining in Uganda does recognise individual autonomy and has an entrenched basis for the protection of individual freedoms against repressive excesses, which might be imposed by a majority including under the guise of 'culture', the demarcations of this relationship are yet to be meaningfully tested in courts of law. Thus LGBTI communities and human rights activists in Uganda have to be alert to the weight accorded to culture, while also being weary of its complexity and of the demonstrated tendency of courts to simplify it in favour of a safer majoritarian finding.

115 *Oloka Onyango & 9 Others* (n 4 above).

CHAPTER 4

DECRIMINALISATION OF HOMOSEXUALITY IN KENYA: THE PROSPECTS AND CHALLENGES

*Seth Muchuma Wekesa**

1 Introduction

Kenyans remain unwavering in their resistance to homosexuality in the country.[1] The perception that homosexual conduct is abnormal and foreign to African culture is still deeply rooted in the minds of most Kenyans.[2] This makes the fight for the decriminalisation of same-sex sexual conduct harder.[3] Mutua has argued that much of the homophobia being experienced by lesbians and gays is not 'home grown'.[4] In Kenya much of the resistance to homosexuality can be traced to its colonial past.[5]

This chapter focuses on potential decriminalisation of homosexuality in Kenya. It examines how the provisions of the Constitution of Kenya can be interpreted in a progressive and creative manner to decriminalise homosexuality in Kenya. It constructs a constitutional argument for the decriminalisation of homosexuality based on five constitutional pillars: (a) The constitutional duty of the state to respect the rights of the vulnerable and marginalised; (b) equality and non-discrimination; (c) human dignity; (d) the right to privacy; and (e) the incorporation of international law into Kenya's domestic law.

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1 'Kenyan church rejects Mutunga, Baraza' *Africa news,* africanews247.com/news/Kenya-church-rejects-mutunga-baraza (accessed 18 November 2014).

2 Kenya Human Rights Commission 'The outlawed amongst us: A study of the LGBTI community's search for equality and non-discrimination in Kenya' (2011) 10 https://www.goethe.de/resources/files/pdf31/THE_OUTLAWED_AMONGST_US_1.pdf

3 Kenya Human Rights Commission (n 2 above) 11.

4 M Mutua 'Sexual orientation and human rights: putting homophobia on trial' in S Tamale (eds) *African sexualities*: *A reader* (2011) 89.

5 As above.

The paper starts with a discussion on the history of sodomy laws in Kenya. Then the current status of homosexuality in Kenya is examined. This is followed by a critical analysis of the relevant constitutional provisions with an aim of constructing a constitutional argument for the decriminalisation of homosexual conduct in Kenya.

2 History of section 162 of the Penal Code

One of the most common arguments made against protecting the rights of homosexuals in Kenya is that homosexuality is a foreign concept that was imported from the West,[6] and that homosexuality was unheard of in traditional Kenyan society.[7] Former president Daniel Arap Moi once stated that 'homosexuality is against African norms and traditions. Kenya has no room for homosexuals and lesbians'.[8] The counter-argument is that it is the anti-homosexuality laws, not homosexuality as such, that were imported from the West into Kenyan society.[9] Kenya experienced British colonialism, which tried to alter African values and legal practices fundamentally.[10] For example, there were no laws criminalising homosexual conduct between consenting adults in private before colonialism,[11] partly because such conduct was not recognised as 'gay' in the ways identity is defined today, nor deemed worthy of formal legal sanction.[12]

Kenya was governed by traditions and customs during the pre-colonial period.[13] Things changed in 1895 when the British colonised Kenya and instituted their own form of justice based on statutory laws that existed alongside traditional customs and practices.[14] Between 1897 and 1921 Kenya as a British colony applied the Indian Penal Code and other Indian Acts.[15]

6 CE Finerty 'Being gay in Kenya: the implications of Kenya's new Constitution for its sodomy laws' (2012) 45 *Cornell International Law Journal* 432.

7 JR Velles 'Out in Kenya: encountering friends like us' (2009) 16 *The Gay and Lesbian Worldwide* 45

8 News24 'Being gay in Kenya' http://www.news24.com/Africa/Features/Being-gay-in-Kenya-20060222 (accessed 18 November 2014); see also Kenya Human Rights Institute 'Rethinking contested rights: critical perspective on minority rights in Kenya' (2011) 9.

9 Kenya Human Rights Commission (n 2 above) 10.

10 IIK Nyarang'o 'The role of judiciary in the protection of sexual minorities in Kenya' Unpublished LLM thesis, University of Pretoria, 2011 3.

11 As above.

12 As above.

13 M Ndulo 'African customary law and women's rights' (2011) 18 *Indiana Journal of Global Legal Studies* 99.

14 JB Ojwang *Constitutional development in Kenya: Institutional adaption and social change* (1990) 23.

15 E Cotran 'The development and reform of the law in Kenya' (1983) 27 *Journal of African Law* 42. By the East Africa Order in Council 1897 (later repealed in the 1921 Order and applied to the protectorate), the jurisdiction of the supreme court and subordinates courts of Kenya was to be exercised 'so far as circumstances admit ... in

In 1930, the British replaced the Indian Penal Code with the Colonial Office Model Code, which was based on the Queensland Code of 1899.[16] The Kenyan Penal Code today is still largely similar to the Queensland Code.[17]

Despite the colonial masters setting up a parallel court system to administer justice based on the native law and custom of the people of Kenya, customary law gave way to English law if customary law was repugnant to justice and morality or inconsistent with the provisions of any Ordinances passed by the British.[18] The repugnancy clause had two implications for customary law. First, customary law was considered inferior to English law.[19] Second, the English ideal of legal norms, justice and morality was the test for the validity of customary law.[20] In criminal law matters, customary law gave way to the provisions of the Penal Code.[21]

Initially, customary criminal law was applied in Native tribunals subject to the supervision of district officers.[22] But gradually the tribunals were given jurisdiction to try certain offences under the Penal Code.[23] Where a tribunal or a court was given jurisdiction to try Penal Code offences, it was tried under the relevant sections of the Penal Code and not under the customary criminal law.[24] Eventually this resulted in the virtual disappearance of the customary criminal law.[25] By the end of the colonial period there were only ten offences which were tried under customary criminal law in the African courts.[26] Homosexuality was not among them.[27]

After independence in 1963, it was expected that the country would quickly embrace democracy and guarantee human rights and freedoms previously denied to Kenyans by developing its own jurisprudence relevant to its context.[28] Unfortunately, this did not happen.[29] The government inherited, recognised and applied the former British legal system, including its Colonial Office Model Code.[30]

conformity with the civil procedure and the Penal Code of India and the other Indian Acts which are in force in the colony.

16 H F Morris 'A history of the adoption of codes of criminal and procedure in British colonial Africa' (1974) 18 *Journal of African Law* 17.
17 Penal Code Act Cap 63, Laws of Kenya secs 162, 163 & 165.
18 Cotran (n 15 above) 43.
19 Ndulo (n 13 above) 95.
20 As above.
21 Cotran (n 15 above) 45.
22 As above.
23 As above.
24 As above.
25 As above.
26 As above.
27 As above.
28 Ndulo (n 13 above) 47.
29 As above.
30 As above.

Since the anti-sodomy laws in Kenya are provided for in the Penal Code, they are reflective of British norms and morality, as opposed to embodying the 'traditional Kenyan norm.'[31] This is not to say that homosexuals were celebrated or even accepted in pre-colonial Kenya nor were they legally sanctioned or prosecuted.[32] So the argument that being a homosexual is 'anti-Kenyan' fails to acknowledge the crucial role the Penal Code, which was introduced by the British, played in entrenching homophobia in the Kenyan legal system and its continuing role in preventing homosexuals in Kenya from attaining legal protection.[33] The next section discusses the current status of homosexuality in Kenya.

3 Current status of homosexuality in Kenya

As noted above, the anti-sodomy provisions in the Penal Code are a colonial inheritance.[34] Sections 162, 163 and 165 of the Penal Code are modelled on section 377 of the Indian Penal Code, which provided a template for sodomy laws that were introduced to East African colonies during the 1890s by the British.[35] This was done without taking into account the views of the Kenyans, with the aim of imposing European morality and culture on African 'natives'.[36]

Section 162 of the Penal Code provides:[37]

> Any person who has carnal knowledge of any person against the order of nature or permits a male person to have carnal knowledge of him or her against order of nature is guilty of a felony and is liable to imprisonment for 14 years.

Section 163 of the Penal Code provides that any person who attempts to commit any of the offences in section 162 is guilty of a felony and is liable to imprisonment for seven years.[38] Section 165 of the Penal Code outlaws committing, encouraging or attempting 'acts of gross indecency' between males and imposes a penalty of up to five years' imprisonment.[39]

These provisions criminalise homosexuality in Kenya, which it characterises as an unnatural offence.[40] The provisions act as a ban on homosexual individuals whose consensual same-sex sexual conduct is criminalised, thus undermining their rights as provided for in the

31 As above.
32 Finerty (n 6 above) 438.
33 As above.
34 Nyarang'o (n 10 above) 36.
35 As above.
36 Nyarang'o (n 10 above) 37.
37 n 17 above, sec 162.
38 n 17 above, secs 162 & 163.
39 n 17 above, sec 165.
40 Kenya Human Rights Institute (n 8 above) 14.

Constitution, as discussed below.[41] Britain, where the anti-sodomy laws were imported from, repealed its own sodomy laws in 1967, following the recommendations of the Wolfenden Committee Report of 1956 which concluded that homosexual acts between consenting adults in private implicates private morality outside the realm of law, and hence should not be criminalised.[42] Britain has also called on its former colonies to repeal their anti-sodomy laws and decriminalise homosexuality.[43] However, Kenya has continued to keep these provisions on its statute books.[44]

Although the provisions do not explicitly criminalise homosexuality, carnal knowledge has been taken by courts to include anal and oral sex and in some cases other non-procreative sexual acts such as mutual masturbation.[45] Although heterosexual couples also partake in these acts, the weight of the penal provisions over time has fallen on homosexual sex.[46] Due to the difficulty in proving carnal knowledge having taken place in private, the law has not been commonly applied in court judgments.[47]Achieving prosecution requires catching two individuals carrying out the sexual act, which usually takes place in private.[48] Nonetheless, the courts have in a few instances convicted persons for homosexual conduct. In *Francis Odingi v Republic*,[49] the accused was in 2006 sentenced to six years imprisonment for engaging in same-sex sexual activity.[50] Similarly, in *Julius Waweru Pleuster v Republic*,[51] the Court of Appeal upheld a trial court's conviction of the accused for committing the offence of sodomy.[52]

In March 2014 statistics from the National Police Service tabled before the National Assembly indicated that 595 cases of homosexuality had been handled by the police since 2010.[53] It is unclear if these 595 cases were actual prosecuted cases or included cases of police arrests with no charges being laid. The existence of the penal sanctions legitimises violence,

41 Kenya Human Rights Institute (n 8 above) 14.
42 Committee on Homosexual offences and Prostitution 'Homosexual offences and prostitution' 26 November 1958 http://hansard.millbanksystems.com/commons/1958/nov/26/homosexual-offences-and-prostitution (accessed 18 November 2014).
43 Human Rights Watch 'This alien legacy: The origins of sodomy laws in British colonialism' (2008) 1 https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism (accessed 22 March 2016).
44 Kenya Penal Code Act (n 17 above) secs 162, 163 & 165.
45 G Misra 'Decriminalizing homosexuality in India' (2009) 17 *Reproductive Health Matters* 21.
46 Misra (n 45 above) 22.
47 As above.
48 Nyarang'o (n 10 above) 38.
49 *Francis Odingi v Republic* (2011) eKLR.
50 *Francis Odingi* (n 49 above) para 12.
51 *Julius Waweru Pleuster v Republic* Criminal Appeal 177 of 2006.
52 *Julius Waweru Pleuster* (n 51 above) para 16.
53 Parliament of Kenya, National Assembly official records, Hansard, 26 March 2014, http://www.parliament.go.ke/plone/national-assembly/business/hansard/wednesday-26th-march-2014-1/view (accessed 12 February 2015). The regional breakdown of the cases was Central 85, Coast 63, Rift Valley 204, Nairobi 40, Nyanza 33, North Eastern 9, Garissa 3, Eastern 161, Kitui 16, Meru 103, Western 25 and Murang'a 27.

discrimination and stigmatisation in the enjoyment of rights and access to services.[54] A 2011 report by the Kenya Human Rights Commission documents the incidences of violence, discrimination and stigmatisation faced by homosexual persons.[55]

The Government's position in regard to (de)criminalisation of homosexuality is that homosexuality is culturally unacceptable in Kenya.[56] This position can be countered since the Constitution subordinates all cultures to itself.[57] Nevertheless, the position is reinforced by statements by influential Government officials and its actions. In November 2010, the then Prime Minister ordered the arrest and incarceration of all gay persons.[58] In March 2014, the Leader of the Majority in the National Assembly, while responding to questions on the failure of the Kenyan government to enforce criminal sanctions against homosexuality, equated homosexuality to terrorism.[59] In addition, executive action further illustrates the government's position. In October 2013, the Non-Governmental Organisations Coordinating Board, a government agency, was sued for failure to register a non-governmental organisation, the National Gay and Lesbian Human Rights Commission, which seeks to champion the rights of sexual minorities.[60] The Board declined to register the National Gay and Lesbian Human Rights Commission on the basis that the use of the terms 'gay' and 'lesbian' was culturally and morally unacceptable.[61] The High Court in July 2014 certified the petition as raising a substantial issue of law and a three judge bench was appointed to hear the petition.[62]

Instructively, certain government agencies and national human rights institutions have urged the Government to reconsider the continued criminalisation of homosexual conduct. The Kenya National Commission on Human Rights in its 2011 report on sexuality and reproductive rights in Kenya, while noting the lack of protection of the rights of homosexuals, recommended the decriminalisation of homosexuality.[63] The Kenya

54 Kenya Human Rights Commission (n 2 above) 23.
55 As above.
56 As above.
57 Constitution of Kenya 2010 article 2(4): 'Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid'.
58 'Arrest gays, Kenyan Prime Minister orders' *Capital News* 28 November 2010 http://www.capitalfm.co.ke/news/2010/11/arrest-gays-kenyan-pm-orders/ (accessed 12 February 2015).
59 Parliament of Kenya, National Assembly, official records, Hansard, 26 March 2014, http://www.parliament.go.ke/plone/national-assembly/business/hansard/wednesday-26th-march-2014-1/view (accessed12 February 2015).
60 *Eric Gitari v Non-Governmental Coordination Board and 4 Others* [2015], Petition 440 of 2013 High Court of Kenya.
61 *Eric Gitari* (n 60 above).
62 *Eric Gitari* (n 60 above).
63 Kenya National Commission on Human Rights 'Realising sexual and reproductive health rights in Kenya: a myth or reality' April 2012, 104 http://www.knchr.org/Portals/0/Reports/Reproductive_health_report.pdf (accessed 14 November 2014).

National AIDS strategic plan 2009-2013 noted that the criminalisation of homosexuality hindered gay men from accessing health rights in relation to HIV services and urged the State to align its policies with the Constitution.[64] Equally, in February 2014 the Cabinet Secretary in charge of health in February 2014, at the height of a national debate on homosexuality, adopted a sympathetic approach to homosexuality in relation to access to HIV services.[65]

The Kenyan public remains highly intolerant towards homosexuality. A study conducted in 2013 by Pew Research showed that 90 per cent of Kenyans felt that homosexuality is unacceptable in society.[66] This figure represents a 5 per cent decrease since 2007 when 95 per cent Kenyans held the view that homosexuality is unacceptable.[67] This intolerance is further illustrated by a number of incidences. At the height of the debate triggered by Ugandan Anti-Homosexuality Act of 2014, there were calls by members of the Kenya National Assembly for the stricter enforcement of the existing penal sanctions on homosexuality and the deregistration of organisations that champion the rights of gay persons.[68] Debate in the National Assembly on enforcement of the homosexuality laws was skewed in favour of criminalisation.[69] Further, civil society activists in Nairobi launched an anti-gay day supposedly to be marked on 24 February each year.[70]

In August 2014, Parliament made attempts to enact legislation that provides harsher and stricter penalties to those found engaging in homosexual conduct. The Anti-Homosexuality Bill of 2014 was introduced to the National Assembly by Edward Onwong'a Nyakeriga,

64 Kenya National AIDs Strategic Plan 2009/10 – 2012/13 'Delivering on universal access to services' November 2009, 6 http://www.nacc.or.ke/nacc%20downloads/knasp_iii.pdf (accessed 14 November 2014).

65 'Gay debate affecting fight against HIV, Macharia says' *Daily Nation* 28 February 2014, http://mobile.nation.co.ke/news/Gay-debate-affecting-fight-against-HIV-James-Macharia-says/-/1950946/2225564/-/format/xhtml/-/ge3d0c/-/index.html (accessed 14 November 2014).

66 Pew Research Global Attitudes Project 'the global divide on homosexuality' http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/ (accessed 12 February 2015).

67 Pew Research (n 66 above) 12.

68 'MPs to fight homosexuality' *Daily Nation* 18 February 2014, http://www.nation.co.ke/news/MPs-to-fight-homosexuality/-/1056/2212146/-/4bndb2z/-/index.html (accessed 12 February 2015); Parliament of Kenya, National Assembly official records, Hansard, 11 March 2014, http://www.parliament.go.ke/plone/national-assembly/business/hansard/tuesday-11th-march-2014/view (accessed 12 February 2015).

69 Parliament of Kenya, National Assembly official records, Hansard, 26 March 2014, http://www.parliament.go.ke/plone/national-assembly/business/hansard/wednesday-26th-march-2014-1/view (accessed 12 February 2015).

70 'Nairobi activists launch Anti-Gay Day in Kenya as Museveni beats about-out turn, signs bill' *Standard Digital News*, 25 February 2014, http://standardgroup.co.ke/lifestyle/article/2000105465/nairobi-activists-launch-anti-gay-day-in-kenya-as-museveni-beats-about-turn-signs-bill?pageNo=1 (accessed 12 February 2015).

Legal Secretary of the Republican Liberty Party.[71] According to him, 'the Bill aims at providing a comprehensive and enhanced legislation to protect the cherished culture of Kenyans' legal, religious and traditional family values against the attempts of sexual rights activists seeking to impose their values of sexual promiscuity on Kenyans.'[72] He further argues that 'there is need to protect children and youth who are vulnerable to sexual abuse and deviation as a result of cultural changes, uncensored information technology, parentless child developmental settings and increasing attempts by homosexuals to raise children in homosexual relationships through adoption, foster care or otherwise'.[73]

The Bill was modelled on the Ugandan Anti-Homosexuality Bill of 2009 that was signed into law in 2014.[74] Many clauses are taken from the Ugandan Bill nearly word for word.[75] The Bill provided for the offence of sodomy, which would punish Kenyan offenders with life imprisonment while foreigners would be stoned to death in public.[76] Those found guilty of 'aggravated homosexuality' would also be stoned to death in public.[77] It defined 'aggravated homosexuality' as including committing homosexual acts with a person under the age of 18 years; if the offender is a person living with HIV; if the person committing the act is in authority over the other person; being a serial offender; and where a person with disability is involved.[78] It also prohibits ratification of any international conventions and treaties, which are contrary to its provisions.[79]

The Bill was rejected by the Parliamentary Justice and Legal Affairs Committee on the basis that it was unconstitutional, its introduction was un-procedural and its content breached Kenya's international human rights obligations.[80] In addition, same-sex sexual conduct between consenting adults is already criminalised under section 162 of the Penal Code with a punishment of 14 years imprisonment. The Bill however was aimed at introducing tougher laws and harsher penalties.[81] The fact that the Bill was rejected does not mean that it will not surface again in the near future.

71 Pink News 'Kenya: New stone the gays law proposed by the MPs' http://www.pinknews.co.uk/2014/08/11/kenya-new-stone-the-gays-law-proposed-by-mps/ (accessed 19 November 2014).
72 Kenya Anti-Homosexuality Bill 2014, Preamble.
73 As above.
74 n 71 above
75 As above.
76 n 72 above, sec 2(1)(k).
77 n 72 above, sec 3(1).
78 n 72 above, sec 3(1) (a to f).
79 n 72 above Preamble.
80 Mamba Online 'Kenya "stone the gays" bill officially thrown out' 17 November 2015 http://www.mambaonline.com/2015/11/17/kenya-stone-gays-bill-officially-thrown/ (accessed 23 March 2016).
81 As above.

Arguably, section 162 of the Penal Code violates a number of provisions in the Constitution of Kenya thus should be declared unconstitutional. Such a declaration would pave way for the decriminalisation of same-sex sexual conduct in Kenya hence protecting the rights of gays and lesbians. The next section advances five arguments based on constitutional provisions in favour of decriminalisation of homosexuality in Kenya. Before getting into the arguments, the section begins with a brief historical background of the constitution-making process in Kenya.

4 The Constitution of Kenya

Before the enactment of the Constitution of 2010, Kenya was governed by the Independence Constitution, which was a British-made document that came into force in 1963.[82] One of the main reasons Kenyans were not satisfied with the Independence Constitution was the powerful and unaccountable office of the presidency.[83] Due to these shortcomings, the Constitution of Kenya Review Commission (Constitution Review Commission) was created in 2000 to comprehensively spearhead the review of the current Constitution by the people of Kenya.[84] In 2005 a very detailed report was released by the Constitution Review Commission on the shortcomings of the Constitution.[85] One of the issues that were discussed in the report was the deficiency of the Bill of Rights.[86] The report stated that the Bill of Rights was deficient because its rights could be easily limited or suspended.[87] It also did not only fail to protect socio-economic rights but also failed to recognise the principle of gender equality. In addition, it lacked mechanisms to enforce the rights that were provided.[88]

In November 2009, the proposed new Constitution of Kenya was published.[89] The public was given one month to review the draft and forward their comments to the Committee of Experts (CoE).[90] After 30 days, CoE presented the draft Constitution to the Parliamentary Select Committee on the constitutional review in January 2010.[91] After the

82 RM Maxon *Kenya's independence Constitution: Constitution making and end of empire* (2011) 19; The Constitution of Kenya Review Commission 'The final report of the Constitution of Kenya Review Commission' (2005) 21 http://www.constitutionnet.org/files/KERE-440.pdf

83 The Constitution of Kenya Review Commission (n 82 above) 34.

84 The Constitution of Kenya Review Commission (n 82 above) 9.

85 n 82 above 34.

86 As above.

87 As above.

88 As above.

89 The proposed new constitution was published by the Committee of Experts on 17 November 2009.

90 Committee of Experts on Constitutional Review 'The report of the committee of experts on the constitutional review issued on the submission of the reviewed harmonized draft constitution to the parliamentary select committee on constitutional review' 8 January 2010.

91 As above.

Parliamentary Select Committee made its comments, the draft Constitution was returned to the CoE, which incorporated the comments and revised and published the proposed Constitution on 23 February 2010.[92] Sixty seven per cent of Kenyans voted in favour of the proposed Constitution in August 2010 and it was signed into law by President Kibaki on 27 August 2010.[93]

Notably, the Constitution review process in Kenya debated the issue of homosexuality rights. In 2003, during the initial stages of the Constitution review, the technical committee drafting the chapter on the bill of rights unanimously elected to exclude 'sexual orientation' as a protected ground under the freedom from discrimination provision.[94] This, it was argued, was to ensure that the Constitution did not protect the rights of homosexual persons.[95] Similarly, the 2009 Constitutional review finalisation process spearheaded by the CoE expressly barred inclusion of homosexuality rights in the Constitution of Kenya 2010 on the grounds that inclusion of these rights would weaken public support for the draft constitution, potentially resulting in its defeat in the 2010 national referendum.[96] By way of illustrating, the 'NO' vote in the 2010 Constitutional referendum campaign anchored its arguments on the false propaganda that the Constitution guaranteed gay rights.[97]

While the efforts to constitutionally allow the inclusion of sexual orientation as a prohibited ground against discrimination under section 27 of the Constitution failed, the Constitution of Kenya 2010 incorporates three changes that have significant implications for the legality of anti-homosexuality laws in Kenya.[98] First, it contains an expansive Bill of Rights and places a duty on the state to observe, respect, promote, protect and, fulfil, the rights provided in the Bill of Rights.[99] Second, it incorporates international law into the domestic laws of Kenya.[100] Lastly, it states under article 2(4) that 'any law, including customary law that is

92 Committee of Experts on Constitutional Review 'The report of the committee of experts on the constitutional review' (2010) 13.
93 Committee of Experts Report (n 92 above) 14.
94 Constitution of Kenya Review Commission 'National Constitutional Conference verbatim report of the technical working committee B (TWC B) chapter 4 and 5 on citizenship and the bill of rights held in tent no 2 at Bomas of Kenya on 19 September 2003' 37-39 (accessed from the Kenya National Archives on 14 October 2014).
95 As above.
96 Committee of Experts on constitutional review 'verbatim record of the proceedings of the Committee of Experts during the Mombasa retreat at the Voyager (operational plan) held on 16 April 2009' 38 (accessed from the Kenya National Archives on 16 October 2014), quoted in FN Kabata 'Impact of international human rights mechanisms in Kenya' 2015 25.
97 Kenya Human Rights Commission 'Wanjiku's journey: tracing Kenya's quest for a new constitution and reporting on the 2010 national referendum' November 2010, 25.
98 Article 45 of the Constitution defines marriage as being between a man and a woman. It says every person has the right to marry a person of the opposite sex based on the free consent of the parties.
99 Constitution of Kenya article 21(1).
100 n 99 above articles 2(5-6).

inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid'.[101] The Constitution's stronger protection of the rights and fundamental freedoms of individuals, coupled with the increased recognition that discrimination based on sexual orientation violates international human rights law, provides a stronger legal framework for arguing that section 162 of the Kenyan Penal Code is currently unconstitutional.[102]

5 Exploring the potential for decriminalisation under the Constitution

The Constitution has excluded sexual orientation as a prohibited ground of discrimination and has expressly provided for marriage between persons of opposite sex.[103] It could be argued that the Constitution has impliedly prohibited same-sex marriages. However, there are other rights that potentially found an argument in favour of the decriminalisation of same-sex sexual conduct. The Constitution provides for the rights to equality and non-discrimination,[104] the right to dignity[105] and the right to privacy.[106] In addition, the Constitution, places a fundamental constitutional duty on the state to observe, promote, fulfil, respect and protect individual rights and fundamental freedoms in the Bill of Rights.[107] It also recognises treaties and conventions ratified by Kenya as being part of the Kenyan law.[108] It is based on the above provisions of the Constitution that I advance five arguments in favour of the decriminalisation of same-sex sexual conduct in Kenya.

101 n 99 above, art 2(4).
102 Finerty (n 6 above) 449.
103 Article 45 (2) of the Constitution provides that every person has a right to marry a person of opposite sex based on the free consent of the parties.
104 Article 27(2) of the Constitution states that equality includes the full and equal enjoyment of all rights and fundamental freedoms. Article 27(4) of the Constitution provides that the state shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress language or birth.
105 Article 28 of the Constitution states that every person has inherent dignity and the right to have that dignity respected and protected.
106 Articles 31of the Constitution provides that every person has the right to privacy which includes the right not to have their person, home or property searched; their possession seized; information relating to their family or private affairs unnecessarily required or revealed; and the privacy of their communication infringed.
107 Article 21(1) of Constitution states that it is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.
108 Article 2(6) of the Constitution provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

Gays and lesbians in Kenya experience violence, exclusion and discrimination.[109] They are harassed, abused and discriminated against on the basis of their sexual orientation.[110] They are physically abused and killed; they are expelled from school and targeted for hate speech.[111] This abuse and discrimination is perpetuated by society at large, including public officials.[112] As a result homosexuals are deprived of a number of rights, including the right to life, the right to privacy, the right to education, the right to non-discrimination, the right to health, the right to access justice and the right to dignity.[113] Provisions in the Penal Code criminalising homosexuality play a crucial role in these violations and create an environment that makes it easier for the violence to take place.[114]

Since the Constitution has placed a duty on state organs and public officials to respect, protect and promote individual rights, it follows that the government of Kenya has a duty to repeal laws that interfere with the enjoyment of rights.[115] This constitutional duty counters the argument that the government's duty is only to prevent actual abuse and discrimination taking place but not repeal the anti-homosexuality provisions in the Penal Code.[116] The duty to promote individuals' rights implies that the government must take progressive measures, including legislative measures, to remove conditions that result in violations of the Bill of Rights.[117] Due to the inherently discriminatory nature of section 162 of the Penal Code and its negative impacts on the enjoyment of the rights and fundamental freedoms guaranteed in the Constitution by homosexuals, it would be nearly impossible for the government to fulfil its duty to promote, respect and protect individual rights and simultaneously keep these provisions in the Penal Code.[118]

Those supporting anti-homosexuality laws could counter this claim by arguing that the rights of homosexuals are limited and there are a number of factors to be considered in limiting their rights.[119] They would argue that African culture and morality justify limiting the practice of homosexuality in Kenya, which in turn legitimise the penal provisions.[120] Such an argument cannot be sustained based on constitutional provisions.

109 Kenya Human Rights Commission (n 2 above) 18.
110 As above.
111 As above.
112 As above.
113 As above.
114 As above.
115 n 99 above, art 21(1); S Wekesa 'The rights of sexual minorities in Kenya: The value of the Constitution of Kenya 2010' a paper presented at Centre for Human Rights, University of Pretoria, South Africa on 10 December 2014 10.
116 Finerty (n 6 above) 451.
117 Communication 155/96 *Social and Economic Rights Action Centre v Nigeria*, para 46.
118 Finerty (n 6 above) 451.
119 n 99 above, art 25.
120 Finerty (n 6 above) 451.

First, some rights, such as freedom from torture and cruel, inhuman and degrading treatment, cannot be limited.[121] Second, any limitation on a right or fundamental freedom must be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.[122] The continued existence and application of section 162 goes against the principles of equality, freedom and human dignity and must therefore ultimately fail the constitutional test.[123] The arguments on how section 162 of the Penal Code violates the right to human dignity and equality are advanced later.

Even if African values and morality were grounds for limiting the application of the Bill of Rights to gays and lesbians, they certainly would not outweigh the effects of murder, false imprisonment, police brutality and discrimination that are fuelled by section 162.[124] Given the requirements for limiting rights in the Constitution, the arguments that the Bill of Rights does not offer any protection to homosexuals and that the anti-homosexuality laws are justified by African culture and morality, are no longer constitutionally viable.[125]

In article 21(3) the Constitution further clarifies that 'all state organs and all public officers have a duty to address the needs of vulnerable groups within society including women, older members of society, persons with disability, children, youth, members of minority and marginalised communities and members of particular ethnic, religious or cultural communities.'[126] Taking the literal interpretation of the term 'vulnerable' as used in article 21(3), linking it with the current status of homosexuality in Kenya, gays and lesbians could be viewed as a vulnerable and marginalised group in the country that requires a constitutional protection. Their vulnerability and marginality is based on their sexual orientation.

Although the Constitution of Kenya does not provide a definition for the term minority, international law has traditionally granted minority status on the basis of race, language, religion, ethnicity and culture. These groups have a shared characteristic. In order to extend the list to include sexual orientation, an argument based on the nature of the shared characteristics and rationale for minority protection has to be advanced. Gays and lesbians are the most affected negatively with the existence of

121 Article 25 of Constitution states that despite any other provision in this constitution, the following rights and fundamental freedoms shall not be limited; freedom from torture and cruel, inhuman and degrading treatment or punishment.
122 n 99 above, art 25.
123 Finerty (n 6 above) 451.
124 As above.
125 As above.
126 Article 21(3) of Constitution states that all State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.

sodomy laws. Such laws could be viewed as affecting them as 'a group'. Provided such laws exist, the enjoyment of full citizenship is reduced and gays and lesbians are discriminated and stigmatised as a group. In *L and V v Austria,* the ECHR held that 'the bias on the part of a heterosexual majority against a homosexual minority was similar to the negative attitudes towards those of different race, origin or colour.' The Court recognised the fact that individual sexual orientation is shared by a distinct group and its members thus constitute a protected minority group.[127]

In *Eric Gitari v Non-Governmental Coordination Board*, the National Gay and Lesbian Human Rights Commission (NGLHRC) applied to the board for registration of the organisation under the Non-Governmental Organisations (NGO) Coordination Board Act. The NGO Coordination Board, a government body, rejected the group's request to register in March 2013. In denying the application, the Board said that the name of the organisation was 'unacceptable,' and that it could not register it because Kenya's Penal Code 'criminalises gay and lesbian liaisons'. The organisation challenged the decision of the Board in the High Court on the basis that it violated their rights to freedom of association and equality and non-discrimination as guaranteed in the Constitution.

The High Court stated that it is undisputed that the Board is, as provided in article 21(1), under a constitutional duty to observe, respect, protect, promote and fulfil the rights and fundamental freedoms guaranteed in the Bill of Rights, and in particular, to uphold and address the needs of vulnerable groups as stated in article 21(3).[128] The constitutional duty on the Board, as a State entity, is to uphold the Constitution, which involves protecting, among other rights, the right of freedom of association of 'every person,' which includes the right to form an 'association of any kind'. To rely on its own moral conviction as a basis for rejecting an application is outside the Board's mandate and a negation of its constitutional obligations.[129]

5.1 Human dignity

Article 28 of the Constitution provides for every person's inherent right to dignity and requires this to be respected and protected.[130] According to a basic intuitive understanding, human dignity constitutes an expression of the respect and value to be attributed to each human being on the account of his or her humanity.[131] It mandates the respect of the person *qua* person,

127 Communications 39392/98 and 39829/98 *L and V v Austria* ECHR (9 January 2003).
128 Gitari (n 60 above) para 127.
129 As above.
130 Article 28 of the Constitution states that every person has inherent dignity and the right to have that dignity respected and protected.
131 E Lorraine 'Human dignity as a rights-protecting principle' (2004) 17 *National Journal of Constitutional Law* 325.

and symbolises the most basic form of respect the state owes to individuals.[132]

The concept of human dignity can be used as a tool of inclusion of the rights of gays and lesbians in Kenya. The concept of human dignity as a determinative tool identifies subjects of human rights.[133] The criterion justifying the bestowment of rights is the quality of being human.[134] There is a connection between equal citizenship and human dignity.[135] This connection is crucial because it underlines that human beings should be respected *qua* human beings irrespective of their sexual orientation. This means that it is their humanity that demands for them to be treated like other humans and be able to benefit from the same rights.[136]

Cameron illustrated that in South Africa, 'dignity fostered the notion of an inclusive moral citizenship in gay rights judgements'.[137] The function of the concept was to 'repair indignity, to renounce humiliation and degradation and to vest full moral citizenship in those who were denied it in the past'.[138] Indeed, the right to dignity was used as a tool of inclusion in South Africa to allow previously excluded gays and lesbians to enjoy the full benefits of citizenship.[139]

The High Court of Kenya in the case of *Republic v Kenya National Examination Council and the Attorney General ex parte Audrey Mbugua Ithibu*[140] stated that both articles 10 and 28 of the Kenyan Constitution, provided for the protection of human dignity. Human dignity was that intangible element that made a human being complete. It went to the heart of human identity. It further stated that every human had a value. Human dignity could be violated through humiliation, degradation or

132 C Jackson 'Constitutional dialogue and human rights: States and transnational constitutional discourse' (2004) 27.
133 A Jeffrey 'Dignity, legal pluralism and same-sex marriage' (2010) 75 *Brooklyn Law Review* 794.
134 Jeffrey (n 133 above) 795.
135 As above.
136 Jackson (n 132 above) 29.
137 E Cameron 'Dignity and disgrace: Moral citizenship and constitutional protection' in McCrudden, C (ed) *Understanding human dignity* (2013) 473.
138 As above.
139 As above.
140 *Republic v Kenya National Examination Council and the Attorney General ex parte Audrey Mbugua Ithibu* eKLR Judicial Review 147 of 2013; High Court at Nairobi. The case involved Audrey, a transgender woman who was the holder of a Kenya Certificate of Secondary Education (KCSE) awarded to her by the Kenya National Examination Council – KNEC in 2001. Sometimes in 2008 she was diagnosed and treated for gender identity disorder (G.I.D) and depression at Mathare Hospital and was still undergoing treatment for the two conditions. The applicant then changed her name from Andrew Mbugua Ithibu to Audrey Mbugua Ihtibu. Thereafter she embarked on changing the particulars on her national identity card, passport and academic papers so as to reflect her gender from male to female. Specifically in the instant matter, the applicant sought the removal of the gender mark from her KCSE certificate so that the certificate did not have any gender mark. The court held that the respondents failed to provide legitimate reasons for denying the applicant's request for the removal of the

dehumanisation. Human dignity was the cornerstone of other rights enshrined in the Constitution.

Similarly, in *Eric Gitari* the Court stated that both the Board and the Court itself are constitutionally mandated, when applying the Constitution, to give effect to the non-discrimination provisions in article 27 and the national values and principles set out in article 10, which include, at article 10(2), 'human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.'[141] An interpretation of non-discrimination which excludes people based on their sexual orientation would be in conflict with the principles of human dignity, inclusiveness, equality, human rights and non-discrimination. To put it another way, to allow discrimination based on sexual orientation would be counter to these constitutional principles. The Court further stated that article 259(2) provides that the Constitution shall be interpreted in a manner that advances human rights and fundamental freedoms in the Bill of Rights.[142] The rights to equality and dignity would not be advanced if people were denied the right not to be discriminated against based on their sexual orientation.[143]

It is submitted that human dignity has not only assumed this function in South Africa but also in Kenya since the Constitution provides for human dignity as both a human right as well as a constitutional value that should guide the courts when interpreting the Bill of Rights in the Constitution. Thus human dignity should be used as a tool of inclusion of gays and lesbians in Kenya to enable them to enjoy full benefits of citizenship.

Furthermore, the wording of article 28 of the Constitution of Kenya, which provides for the right to human dignity, is similar to section 10 of the South African Constitution, which provides for the same right.[144] Similarly, both the Kenyan Constitution and the South African Constitution recognise human dignity as a constitutional value, as well as

gender mark in the KSCE certificate. Records of any changes made could always be kept by KNEC and it could always verify the information when asked to do so. Criminals never clothed their nefarious activities with a semblance of legality by approaching the courts like the applicant had done. The Court further stated that the imposition of a candidate's gender mark was not a requirement of the law under Rule 9 of the Kenya National Examinations Council (Kenya Certificate of Secondary Education Examinations) Rules 2009. It could have been done as a tradition to assist in the proper identification of a candidate, but it was not a tradition backed by any rules. An order of Mandamus was issued to compel KNEC to recall the applicant's KSCE certificate issued in the name of Ithibu Andrew Mbugua and replace it with one in the name Audrey Mbugua Ithibu. The replacement certificate had to be without a gender mark.

141 Gitari (n 60 above) para 137.

142 Gitari (n 60 above) para 138.

143 As above.

144 Article 28 of Kenyan Constitution; section 10 of South African Constitution. They both provide that every person has inherent dignity and the right to have that dignity respected and protected.

an interpretative tool of the Bill of Rights. Thus, the Kenyan judiciary just like their South African counterparts could interpret the right to human dignity purposely and creatively with an aim of advancing it in order to extend it to the protection of the rights of homosexuals. The Constitutional Court of South Africa in the case of *National Coalition*[145] held that the criminalisation of homosexuality infringed the right to human dignity enshrined in section 10 of the South African Constitution. The Court further stated that the existence of a law which criminalises a form of sexual expression for gay men degraded and devalued them in the broader society and constituted a violation of their dignity thus infringed section 10 of the Constitution.

Reference to human dignity in progressive gay rights decisions extend far beyond South Africa. In the United States of America (United States) the Supreme Court in the case of *Lawrence v Texas,*[146] found that sodomy laws violated the petitioners' right to privacy and undermined their liberty. In delivering judgment for the court, Justice Kennedy went on to explain that such laws allowed the state to intrude into matters of intimate personal choices about the concept of existence, and what the universe and human life are about, questions which are central to human dignity and autonomy and which therefore cannot cede to compulsion by the state. It is worth noting that the reference here to human dignity, was made notwithstanding the fact that the American Constitution does not contain the right to human dignity. While some have argued that the concept of dignity referenced in *Lawrence v Texas* does not refer to the right to inherent dignity but rather refers to the substantive dignity which is not divorced from public morality.[147] The key point to be observed is that human dignity served as a basis for an expansion of gay rights in this context.

A similar position was taken by the Indian High Court in the case of *Naz Foundation v Government of NCT of Delhi & Others*, where the High Court of New Delhi invalidated section 377 of the Indian Penal Code to the extent that it criminalised 'carnal knowledge against the order of nature.'[148] The Court stated that section 377 violated the right to dignity of gays and lesbians in India because it denies a person's dignity and criminalises his or her core identity solely on the account of his or her sexuality. It further stated that criminalising homosexuality amounted to creating an unreasonable classification that targets homosexuals. Thus, continued criminalisation denies homosexuals their right to full personhood. Although the decision in *Naz Foundation* was reversed by the Supreme Court of India in *Suresh Kumar Koushal v Naz Foundation*[149] it

145 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA (CC) 1.
146 *Lawrence v Texas* 539 US 558 (2003).
147 KR Mukoski 'The constraint of dignity: *Lawrence v Texas* and public morality' (2013) 89 *Notre Dame Law Review* 451.
148 *Naz Foundation v Government of NCT of Delhi & Others* 160 *Delhi Law Times* 277.
149 *Suresh Kumar Koushal v Naz Foundation* Civil Appeal 10972 of 2013.

provides a clear analysis on how the right to human dignity could be violated by sodomy laws.

The foregoing analysis shows that the right to human dignity guarantees all persons the same inherent worth and respect whatever their differences may be. It appears that human dignity requires that homosexuals must be able to enjoy same rights as heterosexuals in Kenya. The criminal prohibition of gays and lesbians from engaging in sexual conduct is unacceptable and harms their dignity. In addition, human dignity has been invoked by judges to declare sodomy laws unconstitutional in a number of jurisdictions including those that contain no provision on human dignity in their constitution.

Therefore the courts in Kenya could declare section 162 of the Penal Code unconstitutional on the basis that it violates the right to human dignity of homosexuals as enshrined in article 28 of the Constitution as well as that it goes against one of the foundational values of the Constitution as provided in article 10 of the Constitution.[150] Section 162 of the Penal Code violates the human dignity of homosexuals by not allowing them to decide whom to engage in intimate relations with. Denying homosexuals the freedom to choose intimate partners while heterosexuals enjoy this freedom undermines their dignity as inherently 'free persons'. The courts could in similar fashion declare other laws which violate LGBTI rights unconstitutional. This would also ensure that the law treats gays and lesbians in the same manner as any other adult citizen.

5.2 Equality and non-discrimination

The Constitution explicitly provides for the right to equality and non-discrimination.[151] It prohibits discrimination on any ground including race, sex, pregnancy, marital status, health status, ethnic and social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.[152] Though the Constitution does not list sexual orientation as a prohibited ground of discrimination, the listed grounds are not exhaustive. The list is indicative with the operating words being 'on any ground including.' This allows persons suffering discrimination on grounds other

150 Article 10 of the Constitution recognises human dignity as one of the foundational values of the constitution of Kenya. These values bind all state organs, state officers, public officers and all individuals.

151 Art 27 of Constitution. Art 27(1) states that every person is equal before the law and has the right to equal protection and equal benefit of the law. Art 27(2) provides that equality includes the full and equal enjoyment of all rights and fundamental freedoms. Art 27(4) provides that the state shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, belief, culture, language or birth.

152 Art 27(4) of the Constitution provides that the state shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, belief, culture, language or birth.

than those indicated to mount a challenge.[153] This is strengthened by article 259(4) (b), which provides that the word 'includes' means includes but is not limited to.[154]

This approach was adopted by the ECHR, which relied on the listed prohibited grounds of discrimination in article 14 of the European Convention. The ECHR adopted the approach of locating sexual orientation in 'other status' as provided for under article 14 of the Convention. Article 14 of the Convention prohibits discrimination on a number of grounds including other status.[155] It argued that the list is not exhaustive since treaty provision use terms such as 'ground such as', 'including' or 'other status'.[156] Thus these are open-ended clauses that could cover other circumstances that may arise that are not included in the law.[157]

Therefore article 27(4) could be interpreted in the light of the decision of the ECHR, meaning the state is precluded from discriminating on the basis of any ground; arguably, sexual orientation is by implication included.[158] In *Eric Gitari* the Court stated that article 27(4), whilst it does not explicitly state that sexual orientation is a prohibited ground of discrimination, prohibits discrimination both directly and indirectly against any person on any ground. The grounds that are listed are not exhaustive – this is evident from the use of 'including' which is defined in article 259(4)(b) of the Constitution as meaning 'includes, but is not limited to.'[159] This interpretation approach gives judges in Kenya the discretion to extend the list to grounds that are not covered in section 27(4), such as sexual orientation particularly given the kind of discrimination and violence homosexual experience in Kenya.

However, decisions reached by regional human rights bodies such as the ECHR on decriminalisation of homosexuality are not binding on Kenya, they only have persuasive value. Moreover, so far there is no case that has been decided to indicate that judges have recognised additional grounds in their interpretation of article 27(4) of the Constitution.

The other argument that could be advanced is to include sexual orientation within the category 'sex' as a prohibited ground of discrimination in article 27(4) of the Constitution. The State is precluded from discrimination on the basis of 'sex', which arguably includes 'sexual

153 J Fitzgerald 'The road to equality? The right to equality in Kenya's new Constitution' (2010) 58.
154 n 99 above, art 259(4)(b).
155 *Sutherland v United Kingdom* ECHR Application 25186/94, Report of 1 July 1997 para 50.
156 M Thomas 'Teetering on the blink of equality: Sexual orientation and international constitutional protection' (1997) 366 *Boston College Third World Journal* 380.
157 Thomas (156 above) 380.
158 Gitari (n 60 above) para 131.
159 As above.

orientation.' Alternatively, the argument as to 'sex' as encompassing sexual orientation can also be linked to the term 'marginalised group' as defined in article 260 of the Constitution. It defined marginalised group as a group of people who, because of laws or practices before, on or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in article 27(4) (namely sex, race, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth).[160] Gays and lesbians have been discriminated before and are still facing discrimination on the basis of their sexual orientation. Sodomy laws have been used as a tool to perpetuate discrimination and promote violence. They have been subjected to hate speech, physically assaulted, harassed by the police and civilians, in some cases reminded in prosing for indefinite period of time. Some have not been able to access health services in fear of discrimination.

If the court rejects the argument that the word 'sex' includes sexual orientation, one could advance an alternative argument that sodomy laws discriminate on the basis of sex alone because the criminality of the sexual act committed by a man turns on the gender of his partner. In other words, if a sexual act committed by a man is *de facto* legal when committed with a woman, but illegal when committed with a man, the law itself discriminates based on the sex of the sexual partner.

One could also argue that section 162 of the Penal Code does not criminalise sexual activity between two women but only between two men. Thus the law discriminates based on sex. This argument was used by the Supreme Court of Hawaii in *Baehr v Lewin*[161] where the Court declared the law that denied marriage licenses to couples because they were of the same sex, unconstitutional.[162]

5.3 Right to privacy

Article 31 of the Constitution provides for the right to privacy.[163] Decisions from the US Supreme Court have recognised that every person is entitled to a realm of private intimacy where relationships can be

160 n 99 above, art 260.

161 *Baehr v Lewin*.Hawai'i Supreme Court. 74 Haw. 645, 852 P.2d 44. 5 May 1993.

162 The court in *Baehr* case remanded the issue whether or not compelling state interests existed to justify the law and the issue whether or not the law was narrowly tailed so as not to infringe unduly upon the rights of homosexual couples. The court did not specifically declare the law unconstitutional. However, for purposes of this chapter the method of analysis used in the case provides a useful template on which to structure an argument regarding the constitutionality of sec 162 of the Penal Code.

163 Art 31of the Constitution provides that every person has the right to privacy which includes the right not to have their person, home or property searched; their possession seized; information relating to their family or private affairs unnecessarily required or revealed; and the privacy of their communication infringed.

established without a justifiable interference from the state. As Blackmum J stated in the case of *Bowers v Hardwick,*[164] 'the right of an individual to conduct intimate relationships in the intimacy of his or her home seems to me to be at the heart of the constitution's protection of privacy.' A similar opinion was held by the US Supreme Court in the case of *Griswold v State of Connecticut*[165] and *Lawrence v Texas*,[166] where it stated that privacy goes beyond protection for physical spaces.[167] It is a right that allows every person to establish and nurture human relationships without interference from the outside world.[168] Similarly, in South Africa, in the case of *National Coalition for Gay and Lesbian Equality v Minister for Justice*[169] the Constitutional Court observed that expressing one's sexuality and forming sexual relationships were at the core of this area of private intimacy.[170]

State interference with privacy is justifiable when protecting its citizens from harm, in as much as such interference is proportionate to the harm posed.[171] However, interference with consensual homosexual conduct in private does not protect any citizen from any harm; it represents perceived symbolism and reinforces prejudice.[172] Therefore an argument founded on the right to privacy establishes that imposing criminal penalties on individuals involved in private consensual homosexual conduct is unfair particularly where private consensual heterosexual conduct is not punishable. The mere recognition of the right to privacy of homosexuals only lays the basis for the equal application of the law to homosexuals and heterosexuals.[173] This means that for the privacy argument to succeed it has to be considered together with the equality argument. The two arguments should not be separated since sodomy laws give rise to overlapping and mutually reinforcing violations of both the rights to equality and privacy.

A privacy argument alone would have damaging effects on the efforts to create a society that is non-stigmatising as far as sexual orientation is concerned. A privacy argument suggests that discrimination against homosexuals is confined to prohibiting conduct between adults of the same sex in the privacy of their bedroom. This is not enough because the right to privacy is not just about the bedroom; it is about the right to make

164 *Bowers v Hardwick* 478 (1986) 208.
165 *Griswold v State of Connecticut*, 381 US 479 (1965).
166 *Lawrence v Texas* (n 146 above) para 41.
167 As above.
168 As above.
169 *National Coalition* case (n 145 above).
170 As above.
171 Commonwealth Human Rights Initiative 'The impact of criminalizing same-sex sexual conduct in common wealth' (2011) 60.
172 Commonwealth Human Rights Initiative (n 169 above) 61.
173 D Kane 'Homosexuality and the European Convention on Human Rights: What rights' (1998) 11 *Hastings Comparative and International Law Review* 447.

fundamental decisions about intimate relationships without being punished.[174] The other weakness of the privacy argument would be that it might reinforce the idea that homosexual conduct is shameful and improper, which can only be tolerated when confined to the bedroom and its implications should not be approved outside the bedroom. Therefore, the privacy argument for the constitutional protection of gays and lesbians on its own is not enough as a standalone argument due to its own weaknesses.

5.4 Incorporation of international law

Articles 2(5) and 2(6) incorporate international law into domestic law. Article 2(5) provides that 'general rules of international law shall form part of the law in Kenya'.[175] Article 2(6) states that 'any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution'.[176] The Constitution further provides that the state must enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.[177] Ndulo has noted that these provisions imply that international human rights norms that prohibit discrimination are applicable in Kenya.[178]

Given that the Constitution provides that general rules of international law and treaties or conventions ratified by Kenya are part of Kenya's domestic law, and that laws that are inconsistent with the Constitution are invalid, Kenya has a constitutional obligation to repeal section 162 if it is not in line with international human rights law.[179]

The international community's stance on the rights of gays and lesbians is that anti-sodomy laws violate international human rights law and they violate the rights of homosexuals to non-discrimination and privacy as guaranteed in the international human rights instruments.[180] Besides, the binding international treaties to which Kenya is a party requires states to take positive measures to meet their international obligations, and the Constitution requires state organs to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.[181] Instead, anti-sodomy laws fuel an overall atmosphere of stigmatisation that promotes discrimination and human rights abuses against homosexuals. The inevitable conclusion

174 E Cameron 'Sexual orientation and the Constitution: A test case for human rights' (1993) 110 *South African Law Journal* 464.
175 n 99 above, art 2(5).
176 n 99 above, art 2(6).
177 n 99 above, art 21(4).
178 Ndulo (n 13 above) 99.
179 n 99 above, art 2(6).
180 Communication 488/1992 *Toonen v Australia,* UNHR Committee (1992) UN Doc CCPR/C/50/D/488/1992 (1994) para 8.7.
181 n 99 above, art 21(4).

from these provisions is that the anti-sodomy laws not only violate the Constitution but also violate international human rights law.

The HRC in *Toonen*[182] held that anti-sodomy laws violate the right to privacy of homosexuals as guaranteed under the ICCPR, regardless of whether the laws are enforced.[183] Gays and lesbians in Kenya face invasions of their privacy. Police officers invade their homes; and harass and abuse them.[184] As such, proponents of anti-sodomy laws cannot argue that sodomy laws do not have the same ramifications in the Kenyan context. Since Kenya is a party to the ICCPR, whose provisions are part of the domestic laws of Kenya pursuant to article 2(6) of the Constitution, it has an international obligation to comply with the provisions of the ICCPR. For that reason, anti-sodomy laws constitute a direct violation of the ICCPR, and by extension the Constitution.

In addition to violating the ICCPR, the anti-sodomy laws in Kenya contravene general principles of universality of human rights, equality and non-discrimination under international human rights law.[185] As noted in the UN High Commissioner's report on LGBTI human rights, article 1 of the UDHR states that 'all human beings are born free and equal in dignity and rights' and non-discrimination is a core human rights principle in the UN Charter and other human rights instruments.[186] In criminalising homosexuality between consenting adults in private, anti-sodomy laws discriminate against homosexuals and render them unequal to heterosexual individuals in the society.[187] Even if the laws did not contribute to stigmatisation and abuse, in preventing homosexuals from legally entering into relationships of their choice, anti-sodomy laws deprive them of one of the most fundamental aspects of being human.[188]

The previous section has identified and analysed five constitutional pillars that could be advanced in constructing a constitutional argument for the decriminalisation of homosexual acts in Kenya. The next section analyses the justifications that could be advanced by the State to keep sodomy laws. These justifications have to be weighed against the constitutional standards on limitation of rights. This limitation of rights analysis is based on article 24 of the Constitution, which provides for the limitation of rights.

182 *Toonen* (n 178 above) para 8.7.
183 As above.
184 Kenya Human Rights Commission (n 2 above) 18.
185 Finerty (n 6 above) 433.
186 UN High Commissioner for Human Rights 'discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity' (2011) 19.
187 Finerty (n 6 above) 455.
188 As above.

5.5 Limitation of the rights analysis

Constitutional rights and fundamental freedoms are not absolute. They have boundaries set by the rights of others and by important social concerns such as public health, public safety, public order and democratic values. The fact that gays and lesbians are entitled to equal protection of the law does not detract from the fact that their rights, like the rights of everyone else, may under certain conditions be limited. In the Kenyan Constitution, a general limitation in article 24 sets out specific criteria for the justifications of restrictions of the rights in the Bill of rights.[189] Limitation of a right means justifiable infringement of the right. The infringement would not amount to unconstitutional if it takes place for a reason that is accepted as a justification for infringing rights in an open and democratic society based on human dignity, equality and freedom. In other words, not all infringements of constitutional rights are unconstitutional. Where an infringement can be justified in accordance with article 24 of the Constitution, it will be constitutionally valid.

According to article 24(3) the State must justify a particular limitation by demonstrating to the Court that the requirements of article 24(1) have been satisfied. Article 24 of the Kenyan Constitution is modelled on section 36 of the South African Constitution. In determining whether a right has been infringed, the Court adopts a two-stage approach. First, the Court identifies a *prima-facie* infringement of a right guaranteed in the Constitution. If that has been established, the inquiry proceeds to assess the reasons given to justify the infringement. This assessment takes the form of a proportionality test, in which the value attached to the right, the extent of infringement and its effect on the right guaranteed are weighed against the constitutional importance and the effectiveness of the limitation in achieving its stated objective.

The constitutional arguments advanced above can only be complete after the State has been allowed to give clear, convincing and specific reasons to justify the retention of sodomy laws. Once that is given the court would assess the constitutional validity of the limitation with the aim of ensuring that the limitation does not diminish the essence of the right guaranteed.

189 Article 24(1) of the Constitution of Kenya provides that: [a] right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including:
The nature of the right or fundamental freedom;
The importance of the purpose of the limitation;
The nature and extent of the limitation;
The need to ensure that the enjoyment of rights and fundamental freedoms by any individual doe not prejudice the rights and fundamentals of others and;
The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

The Government of Kenya may invoke three grounds as justifications for the retention of sodomy laws. First, the state might argue that homosexuality goes against the African culture thus it is un-African. Criminalisation of homosexuals is aimed at protecting the cultural and moral values of the Kenyan society. Second, the state may argue that homosexuality is in conflict with majority morality. It could base its argument on recent research conducted that showed that majority of Kenyans condemn homosexual acts therefore decriminalisation of homosexuality would go against the popular views of Kenyans. Lastly, the State may argue that homosexuality goes against religious views. This argument would have its basis on the Bible and Quran to show that both Christianity and Islam prohibit homosexuality. Therefore decriminalisation of homosexuality will lead to destruction of society.

It is established in this study that sodomy laws limit the rights to human dignity, privacy and equality of gays and lesbians in Kenya. The next question is to determine whether the justifications given by the State are justifiable under article 24 of the Constitution and whether the limitation of the rights of gays and lesbians are justifiable in an open and democratic society.

In *Karua v Radio Africa Limited T/A Kiss FM Station and Others Nairobi* the High Court stated:

> On the question of what is justifiable in an open and democratic society, the questions which fall to be considered are the needs or objectives of a democratic society in relation to the right or freedom concerned. Without a notion of such needs, the limitations essential to support them cannot be evaluated ... The aim is to have a realistic, open, tolerant society and this necessarily involves a delicate balance between wishes of the individual and the utilitarian 'greater good of the majority'. But democratic societies approach the problem from the standpoint of the importance of the individual, and the undesirability of restricting his or her freedom. However in striking the balance certain controls on the individual's freedoms of expressions may in appropriate circumstances be acceptable in order to respect the sensibilities of others ... The limitation of constitutional rights for a purpose that it is necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on the proportionality ... [T]he fact that different implications for democracy, and where 'an open and democratic society based on freedom and equality' means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established but the application of these principles with particular circumstances can only be done on a case-by-case basis and this is inherent in the requirement of proportionality, which calls for the balancing of different interests.[190]

190 *Karua v Radio Africa Limited T/A Kiss Fm Station & Others Nairobi* Hccc 288 of 2004 (2006) 2 EA 117; (2006) 2 KLR 375.

The rights to human dignity, privacy and equality are not absolute and can be limited. However such limitation must be in line with article 24 of the Constitution, which states as follows:

> (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom …

In determining what is reasonable the standard to be applied is that of an open and democratic society based on human dignity, equality and freedom. This is the standard adopted in as provided in the Constitution. In *Kivumbi v Attorney – General* the Court stated:[191]

> The standard against which every limitation on the enjoyment of fundamental rights and freedoms ... is an objective one. The provision ... clearly presupposes the existence of universal democratic values and principles, to which every democratic society adheres. It also underscores the fact that by her Constitution, Uganda is a democratic state committed to adhere to those principles and values, and therefore, to that standard. While there may be variations in applications, the democratic values remain the same ... [D]emocratic values and principles are the criteria on which any limitation on the enjoyment of rights and freedoms guaranteed by the Constitution has to be justified. The Court must be guided by the values and principles essential to a free and democratic society. The following is a summary of the criteria for justification of law imposing limitation on guaranteed rights: (1) the legislative objective, which the limitation is designed to promote must be sufficiently important to warrant overriding a fundamental right; (2) the measures designed to meet the objective must be rationally connected to it and not arbitrary, unfair or based on irrational considerations; and (3) the means used to impair the right of freedom must be more than necessary to accomplish the objective.[192]

Article 24(2) requires the justification given in limiting the right to be clear and specific about the right to be limited and the nature and extent of the limitation. For the State to justify the limitation of the right, it must demonstrate that there is a legislation that allows limitation of the right. It is clear that sections 162, 163 and 165 of the Penal Code, which criminalises same-sex sexual acts limit the enjoyment of the rights to privacy, dignity and equality by gays and lesbians. A reading of these provisions indicates that the Penal Code does not criminalise homosexuality as an identity, or the state of being homosexual, but only certain sexual acts 'against the order of nature.' Therefore the State should not set out to prosecute people who identify themselves as gay or lesbian. This is because it is clear from penal provisions that such a sexual orientation is not necessarily criminalised. What is deemed to be criminal from the provision of the Penal Code is certain sexual conduct 'against the

191 n 99 above, art 24.
192 *Kivumbi v Attorney General* Constitutional Court Petition 9 of 2005 – 5/27/2008.

order of nature', but the provision does not define what the 'order of nature' is.[193]

The Government could also rely on article 27(4) of the Constitution, which does not list sexual orientation as a prohibited ground of discrimination thus gays and lesbians are not protected by that provision. It could argue that article 27(4) allows the state to discriminate against people on the basis of their sexual orientation. This argument would be flawed for two reasons. First, the absence of sexual orientation as one of the prohibited grounds in article 27(4) does not give the state freedom to discriminate against people. The word used in the article is 'including' the grounds listed therein; the list in article 27(4) is thus not closed, and is subject to interpretation to include such grounds as the context and circumstances demonstrate are a ground of discrimination. The grounds that are listed are not exhaustive. This is evident from the use of 'including' which is defined in article 259(4)(b) of the Constitution as meaning 'includes, but is not limited to.'[194]

In addition, even were article 27(4) not phrased in the broad language that prohibits discrimination against any person on any ground, the Court would have to look at the Constitution holistically, and would find that the principles of equality, dignity and non-discrimination run throughout the Constitution like a golden thread. Moreover, article 259(2) provides that the Constitution shall be interpreted in a manner that advances human rights and fundamental freedoms in the Bill of Rights.[195] The rights to equality and dignity would not be advanced if people were denied the right not to be discriminated against based on their sexual orientation.

Secondly, once a limitation is demonstrated, the burden is on the state to justify its conduct with reference to the law that allows it to infringe or limit the right. A person is not under any obligation, once they demonstrate a violation of their rights, to show that there is no justification for limiting their rights. The obligation to show that there is a law that justifies such limitation lies squarely on the State.[196]

In my view it would be difficult for the state to discharge that burden. The state would rely on the moral convictions of most Kenyans. They could also rely on a number of verses from the Bible and Quran as well as various studies conducted regarded homosexuality in the country. However, 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 moral and cultural values, nor the

193 Gitari (n 60 above) para 128.
194 n 99 above, art 259(4)(b).
195 n 99 above, art 259(2).
196 *Lyomoki & Others v Attorney General* (2005) 2 EA 127.

religious beliefs that the State cites, would meet the constitutional test for limitation of rights.

To refer to religious beliefs as a basis for imposing limitations on rights and freedoms of individuals would fly in the face of article 32 of the Constitution.[197] Freedom to profess religious beliefs also encompasses freedom not to do so. To put it in a different way, freedom of religion encompasses the right not to subscribe to any religious beliefs, and not to have the religious beliefs of others imposed on one.

The Kenyan Constitution is the supreme law of the land, and it requires conduct to be justified in terms of laws that meet the constitutional standard. The State has to act within the confines of what the law allows, and cannot rely on religious texts or its views of what the moral and religious convictions of Kenyans are to justify the limitation of a right. The State may or may not be right about the moral and religious views of Kenyans, but our Constitution does not recognise limitation of rights on these grounds. The Constitution is to protect those with unpopular views, minorities and rights that attach to human beings regardless of a majority's views. The work of a Court, especially a Court exercising constitutional jurisdiction with regard to the Bill of Rights, is to uphold the Constitution, not popular views or the views of a majority.

As the Court observed in the case of *John Harun Mwau & 3 Others v Attorney General & 2 Others*:[198]

> This case has generated substantial public interest. The public and politicians have their own perceptions of when the election date should be. We must, however, emphasis that public opinion is not the basis for making our decision. Article 159 of the Constitution is clear that the people of Kenya have vested judicial authority in the courts and tribunals to do justice according to the law. Our responsibility and the oath we have taken require that we interpret the Constitution and uphold its provisions without fear or favour and without regard to popular opinion … our undertaking is not to write or rewrite the Constitution to suit popular opinion. Our responsibility is to interpret the Constitution in a manner that remains faithful to its letter and spirit and give effect to its objectives.

197 Article 32 of the Kenyan Constitution states that every person has the right to freedom of conscience, religion, thought, belief and opinion.
(2) Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.
(3) A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person's belief or religion.
(4) A person may not be compelled to act, or engage in any act, that is contrary to the person's belief or religion.

198 *John Harun Mwau & 3 Others v Attorney General & 2 Others* Petition 65 of 2011 (Consolidated with) Petitions 123 of 2011 and 185 of 2011 (2012).

From the above analysis, the State may not be able to justify the retention of penal provisions that prohibit same-sex sexual acts in accordance with the requirements of the Constitution.

6 Conclusion

This chapter discussed the history of sodomy laws as well as the current legal status of homosexuality in Kenya. It advanced a constitutional argument for the decriminalisation of homosexuality in Kenya based on five constitutional pillars.

There is no doubt that sodomy laws were introduced in Kenya by the British during the colonial period. The provision of section 162 of the Penal Code remains the same as they were during the colonial times. Although homosexuality was not celebrated or even accepted, it was not criminalised and prosecuted under the African customary law. There were no laws criminalising same-sex sexual activity between consenting adults in private before colonialism. It is the anti-homosexuality laws, not the homosexual conduct itself that were introduced into Kenya.

It can be argued that section 162 of the Penal Code could be declared unconstitutional by the courts for violating a number of rights guaranteed by the Constitution as well as the fact that the Constitution incorporates international law into Kenya's national laws. Sodomy laws violate the rights to dignity, privacy and equality. They also go against Kenya's international obligations as stated in article 2(5) and 2(6) of the Constitution.

For the stronger protection of the rights of homosexuals in Kenya, equality, dignity and privacy arguments must be simultaneously invoked by the courts in every case. This is because equality and dignity give substantial protection to homosexuals in deciding how to conduct their private lives. A successful judgment would be the one that alludes to the constitutional notion of human dignity but furthermore invokes the spirit of equality between various forms of intimate association as well as precluding the intrusion of the government into the deeply personal realms of consensual adult expression of intimacy and one's choice of intimate partner.

However, there are a number of hurdles that the courts might face in its efforts to repeal section 162 of the Penal Code. There is widespread homophobia in the country among the general public, and religious and political leaders. It is very doubtful that there would be a sudden acceptance of gays and lesbians in Kenya simply because it has adopted a new Constitution and the courts have decided so. Cultural and religious values, as well as popular morality, might act as barriers to creating change

because they may put pressure on the government to retain the provision in the Penal Code.

In the face of these challenges, homosexuals have a number of options available to them to fight for the repeal of anti-homosexuality laws. These include networking and creating partnerships with mainstream human rights organisations and LGBTI organisations in Kenya and abroad, building up efforts to document violence against LGBTI persons, taking advantage of the current focus on gay rights in the international community and attempting to file a claim in the High Court to challenge the constitutionality of section 162 of the Penal Code.

CHAPTER 5 SOMEWHERE OVER THE RAINBOW: THE CONTINUED STRUGGLE FOR THE REALISATION OF LESBIAN AND GAY RIGHTS IN SOUTH AFRICA

Ella Scheepers and Ishtar Lakhani***

1 Introduction

It is often said that South Africa has one of the most progressive legal frameworks regarding lesbian and gay rights. However, it is also acknowledged that the rights on paper do not translate into the lived realities of lesbian and gay individuals in the country. In Africa where out of 54 countries, 38 countries have declared homosexuality as illegal, South Africa stands out as a beacon of light for LGBTI[1] people in Africa and around the world.[2] Although the rights afforded to sexual minorities in the country are worthy of recognition and applause there is still a long way to go before these rights are realised equally for all sexual minorities. This hard-fought-for legislation offers a well-developed framework wherein broader social struggles against racism, sexism, classism, homophobia and xenophobia can be fought.

This chapter begins by painting a brief outline of South Africa's socio-economic and political landscape, drawing attention to the steady increase of political conservatism and its subsequent impacts on the lives of vulnerable groups (including lesbian and gay people). Within this context the constitutional and legal landscape will be explored by reflecting on the history of the lesbian and gay struggle for rights through the Constitutional Court and the protection and promotion of those rights in legislation. The chapter goes on to use case studies to problematise the limitations of law in the realisation of rights. The case studies demonstrate how law fails to

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1 Acronym for lesbian, gay, bisexual, transgender, intersex.

2 M De Waal. 'LGBTI rights in SA – the constitutional dream and the not-so-dreamy reality' *Daily Maverick* June 2012 http://www.dailymaverick.co.za/article/2012-06-29-lgbti-rights-in-sa-the-constitutional-dream-and-the-not-so-dreamy-reality/#.U1nycKKj-Wm (accessed 29 July 2012).

achieve a holistic understanding of equality for lesbian and gay people in South Africa. It argues that in the context of systemic inequality on multiple fronts, there will be consistently differential access to rights and that the struggle for lesbian and gay rights needs to be situated in the broader struggle for social justice.

2 The 'Rainbow Nation': A brief political landscape

President Zuma wrote the following in his foreword to 'The 20 Year Review', a document produced to mark South Africa's twenty years of democracy since the end of Apartheid:[3]

> Democracy has brought freedom of movement and of association, the right to own property, freedom of expression and freedom of the press, the equality of women, religious freedom, workplace freedom and the right to strike and protest, all in an attempt to restore the human dignity that was stripped away from us in our colonial and apartheid past. Much has been done to address the systematic violence and land dispossession that was a characteristic feature of the apartheid era.

This statement paints an idyllic picture of South Africa as a progressive, liberal democracy. What is important to note is that in the 165 page document which covers a broad spectrum of issues from 'governance and administration', 'social transformation', 'infrastructure', 'safety and security' and the like, a reflection on the situation of sexual minorities in the country is completely absent. Although there are sections dedicated to 'women and gender equality', 'youth', 'people with disabilities' and 'vulnerable groups' the voice of sexual minorities is glaringly lacking. This failure to acknowledge sexual minorities as part of any minority and vulnerable group is an indicator of the rising exclusion faced by sexual minorities in the country. The symbol of South Africa as a 'Rainbow Nation' united in diversity was an identity foregrounded by political leaders in the early stages of liberation and continues to be used as a nationalistic symbol. This rainbow notion of a collective South African identity has served to mask the inequality that is still rife within the country.

South Africa's current socio-economic and political landscape is one of rising conservatism, which has served to increase the pressure placed on minority groups, especially those who 'deviate' from the heterosexual norm. This comes as no surprise considering the impunity with which the political leadership has expressed homophobic beliefs. The most obvious

3 Twenty Year Review: South Africa, 1994-2014 launched by President Jacob Zuma on 11 March 2014 www.dpme.gov.za/news/Documents/20YearReview.pdf (accessed 22 February 2016).

examples have been homophobic statements made in public by high-level leadership. In 2006 a statement made by the then Deputy President (and now current President) of South Africa, Jacob Zuma, clearly contravened the values enshrined in the country's Constitution.[4] He stated that same-sex marriage was a 'disgrace to the nation and to God' and 'that when I was growing up, unqingili (homosexuals) could not stand in front of me. I would knock him out'.[5] Furthermore, in 2010, Jon Qwelane was appointed as the South African ambassador to Uganda even though he was at the time facing allegations in the South African Equality Court for his article 'Call me names but Gay is not OK'.[6]

This rise in political conservatism has not only been expressed through comments and political appointments but through legislation as well. Pernicious pieces of legislation such as the controversial and regressive Traditional Courts Bill (TCB)[7] continue to pose a clear and present threat to an equal and free society. The TCB which was withdrawn, but which may nevertheless resurface, could render people in rural areas second-class citizens and threaten gender equality. Another piece of legislation, which supports the state's undermining of democratic freedoms is the State Information Bill,[8] also known as the Secrecy Bill, which threatens to substantially block public access to state information. Similarly, the proposed Policy Framework on Non-profit Organisations Law,[9] proposes sweeping amendments to the Non-profit Organisations Act of 1997, which governs non-profit organisations (NPOs). The proposed amendments threaten the independence of organisations many of which provide basic needs and services that the State should be providing.

Furthermore there have been retrogressive steps in terms of the rights of lesbian and gay people. In 2012 the Congress of Traditional Leaders in South Africa filed a draft document calling for the removal of LGBTI rights from the Constitution. A ruling party minister of parliament, chairperson of the constitutional review committee and head of the Congress of Traditional Leaders Patekile Holomisa said sexual orientation had always been a touchy subject of the ruling party's caucus. He said 'the great majority does not want to give promotion and protection to these things, but that the party's own policy dictated full rights for everyone'.[10]

4 Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution).
5 News24 'Zuma invokes gay wrath' 26 September 2006 http://www.news24.com/SouthAfrica/News/Zuma-invokes-gay-wrath-20060926 (accessed 20 February 2016).
6 Black Looks 'Jon Qwelane sneaks into Uganda' 2010 http://www.blacklooks.org/2010/04/jon-qwelane-sneaks-into-uganda/ (accessed 20 February 2016).
7 Republic of South Africa, Traditional Courts Bill B1-2012
8 Republic of South Africa, Protection of State Information Bill B6B-2010
9 Policy Framework on Non-Profit Organisations Law; Proposed amendments to the Nonprofit Organisations Act, Act 71 of 1997; a discussion document http://www.icnl.org/research/library/files/SouthAfrica/policy-framework-npo-law.pdf
10 'Stop protecting gays, traditional leaders tell the ANC' *City Press* 5 May 2012 http://www.citypress.co.za/news/stop-protecting-gays-traditional-leaders-tell-anc-20120505/ (accessed 22 February 2016).

He also stated that 'the last time this issue was discussed was about same-sex marriages. Most of the people in the caucus were opposed to it, but then Luthuli House and the leadership instructed us to vote for it'.[11]

The South African government has not only been complicit in active vocal and legislative attempts to close spaces and threaten hard-won constitutional progress, but has also been complicit through their inaction. South Africa's lack of response to the passing of Uganda's notorious 'anti-gay bill'[12] reflects an institutional apathy. More recently, gay activist Paul Semugoma was only allowed to stay in South Africa after human rights advocates voiced concerns over his safety if he were sent home to Uganda and fought for him to remain in the country.[13] The fact that the South African government has shown reluctance to condemn the violations of rights of lesbian and gay people living in other countries is indicative of their commitment, or lack thereof, to equality and the human rights enshrined in the Constitution.

The above political landscape is one of overwhelming inequality felt by minority groups. In the context of deep-seated inequality the presence of violence, in multiple forms, is part of the lived reality of the majority of the population. The Marikana Massacre of 2012, which resulted in the deaths of 34 striking mine workers, became symbolic of a new type of South African state, one which sanctioned violent oppression of the vulnerable by those with power and legal authority. This event mirrors other forms of violence experienced daily in South Africa such as gender-based violence, xenophobia and homophobia. Given South Africa's history of apartheid, levels of vulnerability are most often framed in terms of race and class, where the racial majority of the country is also the poorest. It is also widely acknowledged that levels of poverty and racism are clear impediments to accessing of rights. However, the intersectional nature of oppression goes deeper than a prioritising of population groups into race and class. South Africa has within it, deeply entrenched relationships and articulations of individual and group identities. The role of race, class, gender, geography and sexual orientation are significant given South Africa's history of apartheid and continued capitalist-based economy. Therefore how someone defines themselves and is defined by others, can be a deciding factor in their access to rights, their level of vulnerability to violence and the amount of power they can access to protect themselves. It is in this context of intersectional politics and identity that this chapter is situated.

11 As above.
12 The Republic of Uganda, The Anti-Homosexuality Act 4 of 2014.
13 R Davis 'Gay marriage rights no cause for complacency' *Daily Maverick* 2014 http://www.dailymaverick.co.za/article/2014-03-31-gay-marriage-rights-no-cause-for-complacency/#.U1oZp6I08qw (accessed 22 February 2016).

Although LGBTI has become the acronym, which is most frequently cited by organisations working in the sector as well as the media when referring to sexual minorities, in this analysis the terms 'lesbian and gay' are used. Using these two terms to identify subject populations is limiting, however the inclusion of bi-sexual, transgender and intersex groups would be a disservice to those populations. The complexity of these identities and particular issues faced by these populations would not be able to be fully explored in the scope of this chapter. It is also important to be cognisant of when and for what purpose the term 'LGBTI' is used as there is also a critique that the acronym is used too carelessly.[14]

3 Legal framework

In a socio-political context where there is extreme violence and discrimination against lesbian and gay people, it is important to frame their realities in a history of struggle for their rights. This applies particularly to those who exist in apartheid's historically marginalised communities in the new constitutional dispensation in South Africa. Looking back on this struggle and the legal framework that was incrementally developed, it is possible to highlight where the struggle for the rights of lesbian and gay individuals has fallen short in protecting and promoting the rights of all.

It is argued that the most important legal victory for the lesbian and gay community took place in the initial negotiations around the nature and flavour of the Constitution and in what type of society South Africans hoped to build in a new democracy. The struggle around the Constitution and the subsequent litigation process for equality provided a common goal for those people working on lesbian and gay issues. It created, for a number of years, an impression of unity within which all of the lesbian and gay communities appeared to be pulling together for a common cause.[15] This perhaps epitomised the concept of the Rainbow Nation or a notion of collective 'South Africaness' in the face of a deep and ongoing legacy of apartheid.[16] During the negotiations around the interim and final constitutions,[17] the lesbian and gay lobby was led by a coalition of organisations under the umbrella of the National Coalition for Gay and Lesbian Equality (NCGLE) formed in 1994. The coalition's first and primary campaign was for the inclusion of sexual orientation as a ground for discrimination in the draft constitution for the Republic of South Africa, which was in the process of being drafted. The right to equal protection and benefit of the law and the right to non-discrimination were

14 E Craven 'Racial identity and racism in the gay and lesbian community in post-apartheid South Africa' unpublished Masters thesis, University of the Witwatersrand, 2011 33.
15 As above.
16 Craven (n 14 above) 21.
17 Constitution of the Republic of South Africa Act 200 of 1993 (the 1993 Constitution); The Constitution (n 4 above).

the most basic, and some argue, the most important rights enshrined in the Constitution in light of the 'deep scars' of decades of systematic racial discrimination.[18]

In South Africa, gay liberation is charged with distracting from the struggle for a democratic non-racial future. The same charge used to be levelled at the women's movement. Both have subsequently proved that the struggle against oppression can enhance, not divide the offensive. The Gay and Lesbian Organisation of the Witwatersrand (GLOW), like the women's movement, believes that 'None Will Be Free Until All Are Free'.[19]

The many manifestations of inequality were inherited from the past, meaning that the constitutional commitment to equality could not simply be understood.[20] It was under this campaign for equality that the NCGLE actively sought the support and patronage of prominent African National Congress (ANC) leaders such as Frene Ginwala and those on the constitutional committee such as Albie Sachs.[21] They achieved a monumental victory with South Africa being the first country in the world to recognise sexual orientation as a prohibited ground of discrimination in a national Constitution.[22]

The narrowly focused lobby was highly successful in achieving the stated goal of retaining the sexual orientation clause in the final Constitution.[23] However, the lobby was criticised for not having a wider impact and not confronting homophobic attitudes and assumptions in South Africa.[24] However, it was argued that doing so would be too risky because of the strong possibility of a dangerous backlash.[25] It was evident that the campaign was not sufficient to shape the grassroots political movement necessary to build on the legal victories later achieved in the courts to challenge the deeply ingrained prejudices in South Africa. However, activists and others argue that the mere fact that the Constitution prohibits discrimination on the basis of sexual orientation has opened up a

18 I Currie & J De Waal *The Bill of Rights Handbook* (2007) 231.
19 P Noome 'The gay left' (1990) 43 *Exit 3* in P De Vos 'The inevitability of same-sex marriage in South Africa's post-apartheid state' (2007) 23 *South African Journal on Human Rights* 436.
20 Currie & De Waal (n 18 above) 231.
21 G Fester 'Some preliminary thoughts on sexuality, citizenship and constitutions: are rights enough?' (2006) *Agenda* 67 100-111.
22 Some of the most important sections include, section 9 of the Constitution, known as the equality clause, which provides for equality before the law, the right to equal protection and benefit of the law as well as full enjoyment of all rights and freedoms. As described above, secs 9(3) and 9(4) of the Constitution prohibit unfair discrimination on numerous grounds including sexual orientation, race, gender and sex.
23 De Vos (n 19 above) 440.
24 As above.
25 As above.

space for some in the community to express their sexual identity and to begin to resist oppression.[26]

The Constitution, through the Bill of Rights, further outlines a broad spectrum of rights that emphasise a holistic understanding of fundamental human rights. The Constitution protects a number of socio-economic rights, which require the state to implement progressive measures to achieve a minimum level of basic goods such as housing,[27] healthcare,[28] food,[29] water and social security,[30] education for all,[31] and others. However, in reality the majority of lesbian and gay individuals living outside the affluent and middle class will not have access to the full spectrum of rights. This must be taken into account in the implementation of laws and policies by the State to realise these rights.

Moreover, the perpetuation of both physical and psychological violence against lesbian and gay people violates numerous rights in the Bill of Rights. Most importantly, such violations are directed towards the rights to inherent dignity and the right of all people to have their dignity respected and promoted[32], the right to life[33] and right to freedom and security of person together with the right to bodily and psychological integrity.[34] In *S v Makwanyane* the Constitutional Court found positive duties imposed by the right to life to mean, at the very least that the State is under a constitutional obligation to protect its citizens from life threatening attacks.[35]Unfortunately, in the lived realities of many lesbian and gay people the State fails in this obligation to protect them against homophobic physical attacks.

To add to the constitutional framework, in its short history of democracy, South Africa has ratified several international instruments around the issues of the right to life and more specifically, around the rights for women.[36] Though these legal instruments are not binding the

26 P de Vos 'The Constitution made us queer: The sexual orientation clause in the South African Constitution and the emergence of gay and lesbian identity' in C Stychin & D Herman (eds) *Sexuality in the legal arena* (2000) 194, 196-198.
27 n 4 above, sec 26.
28 n 4 above, sec 27.
29 As above.
30 As above.
31 As above.
32 n 4 above, sec 10.
33 n 4 above, sec 11.
34 Section 12 of the Constitution includes the right to be free from all forms of violence from either public or private sources, not to be tortured in anyway, not to be treated or punished in a cruel, inhuman or degrading way.
35 *S v Makwanyane* 1995 (3) SA 391 (CC) para 117.
36 International Convention on Civil and Political Rights (ICCPR), entered into force 23 March 1976 and acceded to by South Africa on 10 March 1999; African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981; Convention on the Elimination of Discrimination Against Women, entered into force on 3 September 1981 and acceded to by South Africa on 9 January 1999; Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa (the Maputo Protocol), entered into force on 25 November 2005.

Constitutional Court emphasised that such instruments are important guiding principles in interpreting the Constitution.[37]

Using the hard fought for constitutional framework, the NCGLE embarked upon a strategic litigation strategy focused on ending the legal impunity that was condoned by the apartheid state. This legal impunity violated the right to equality and non-discrimination and had to be remedied through the amendment and adoption of various pieces of legislation. The approach of the NCGLE aimed to break legal barriers that entrenched their marginalisation and discrimination on the basis of sexual orientation.[38] The initial oppositional tactic of the NCGLE was conceptualised and organised by a small group of activists with a strong strategic litigation focus. The litigation strategy, referred to as the 'Shopping List', was presented by Justice Edwin Cameron during a meeting of the newly formed National Coalition for Gay and Lesbian Equality in 1994. This list included:

- The decriminalisation of sex between consenting adults; by abolishing the common law crimes of sodomy and 'unnatural sexual offences' as well as provisions of the Sexual Offences Act of 1957, which also criminalised such acts;
- Equalising the age of consent for heterosexual and homosexual sex acts;
- The legislative enforcement of non-discrimination, including in areas such as employment and the provision of public resources;
- Rights of free speech, association and conduct; and
- Formal recognition of permanent domestic partnerships, including the extension of partner benefits; rights to intestate inheritance; and fair and non-discriminatory assessment of abilities in relation to adoption and childcare.

It was acknowledged by the NCGLE that in conditions of extreme inequality, homophobia and social conservatism, the framework of basing on the Constitution for a legal reform strategy was advantageous.[39] It created a fair playing field for taking the fight forward for equality and non-discrimination. The first and most important case won by the coalition concerned, abolishing the common law crimes of sodomy and 'unnatural' sexual offences.

During 1997, the National Coalition for Gay and Lesbian Equality (NCGLE) and the South African Human Rights Commission (SAHRC) challenged the common law crime of sodomy as unconstitutional. In

37 In the case *S v Makwanyane* (n 35 above) the Court stated that both binding and non-binding public international law may be used as tools for interpretation.

38 W Isaack 'Crimes of hatred and prejudice: Violations of our fundamental human rights' in W Isaack *State accountability for homophobic violence* (2007) 47.

39 Lesbian and Gay Equality Project 'Claiming rights to build an LGBTI movement for social justice: The history, perspectives and strategy of the lesbian and gay equality project' Strategic document (2010) (unpublished).

NCGLE and the SAHRC v Minister of Justice and the Attorney General of the Witwatersrand (1998), the Constitutional Court decided it was no longer a crime for men to have sex with men. The Court then proceeded to extend many of the rights enjoyed by married heterosexual couples to (obviously unmarried) same-sex couples such as the right to adopt children, to enjoy immigration rights, to pension benefits, to inherit and finally the rights enjoyed by heterosexual couples through life partnerships.[40] The Constitutional Court stated:

> The sting of the past and the continuing discrimination against both gays and lesbians lies in the message it conveys, namely, that viewed as individuals or in their same-sex relationships, they do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships.[41]

The ticking off of the Civil Union Act as the last item on the 'LGBTI Sector Shopping list' resulted in perhaps the last visible and properly co-ordinated advocacy and mobilisation work done by the sector.[42] Justice Sachs in the *Fourie* and *Lesbian and Gay Equality Project* cases acknowledged that the list of authorities cited by the applicants showed nine South African superior court judgments dealing with sexual orientation, the majority of which had gone to the Constitutional Court. According to the 'Shopping List' and the law reform agenda for lesbian and gay equality it appears that what the lesbian and gay lobby set out to do, was largely achieved. There are still some unresolved legal matters,[43] particularly the lack of domestic partnership legislation[44] and a discriminatory Civil Union marriage law.[45]

However, the legal achievements were key in dismantling the legal impunity and discrimination condoned by the apartheid state. The current legal framework not only protects and promotes the rights of lesbian and gay people in terms of constitutional recognition and their rights to sexual freedom in law but also ensure equality within legislation. It was recognised that the attainment of legal rights and access to benefits did not

40 *National Coalition for Gay and Lesbian Equality v Justice* 1998 12 BCLR 1517 (CC); *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs and Others,*1999 17 (CC); *Satchwell v President of the Republic of South Africa & Another* 2002 9 BCLR 986 (CC); *Du Toit & Another v Minister for Welfare & Population Development & Others* 2002 10 BCLR 1006 (CC); *J & Another v Director General, Department of Home Affairs & Others* 2003 5 SA 621 (CC); *Gory v Kolver NO & Others* 2007 3 BCLR 249 (CC).

41 Fester (n 21 above) 107.

42 Equality Project strategic document (n 39 above).

43 J Burger 'What's left on the shopping list? Ideas on using litigation, law and legal advocacy in advancing lesbian and gay equality' Centre for Applied Legal Studies seminar 2007 (unpublished).

44 The Domestic Partnership Bill was tabled in 2008. However, there have been no substantial developments have been made to be voted on in Parliament.

45 The three key problematic provisions of the Civil Union Act are section 5 which states the need for religious organisations and denominations to apply to be designated before religious marriage officers are able to apply to conduct civil unions, section 6 which outlines the scope of the conscientious objection clause and section 8(6), which appears to limit the Act's application to same-sex couples.

necessarily improve the lives of those individuals who were supposed to be the target beneficiaries of the work of the Coalition.[46] As one of the activists who worked for the coalition remarked:[47]

> [T]hose benefits if you look at them don't really improve the lives of lesbian and gay people unless you're employed in a fairly well-off job and you travel internationally to meet some foreigner to come and marry you and all those kinds of things. Which is fine, well, it's great that they did that work, but it doesn't really incorporate the lives of most lesbians and gay people.

The rights and legal protections that were achieved – for example couples sharing a common home, joint pension rights, joint wills – seem to mirror neo-liberal assumptions about the role of relationships in the capitalist system.[48] These rights paint the heteronormative ideal of a nuclear family with a consistent, stable income. In consequence these rights benefit those who can afford medical aid and bank accounts, those who can adopt children, and those who have job security.

With rising homophobia on the continent, lesbian and gay individuals have sought refuge in South Africa in an attempt to escape their oppressive societies and in an effort to enjoy the legal rights afforded to those living within South Africa's borders. However, the *de facto* experience of rights for lesbian and gay people are enjoyed differentially. Taking cognisance of the intersectionality of lived experience, where stories of violence and prejudice go unchallenged, it is clear that there are multiple vulnerabilities. These are based on entrenched inequalities of race, class, gender, nationality and other differences.

The politics of strategic essentialism that was used to pursue the right to equality ignored the ways in which class, race and gender issues are inevitably intertwined with sexuality and this deepened community schisms along these lines.[49] Even the Constitutional Court has not yet recognised the intersectionality of discrimination.[50] Using a single ground focus to assess the impact of unfair discrimination without an analysis of how the discrimination itself manifested, only gives part of the picture. Recognition of intersectional discrimination will require courts remedying inequality to take into account different measures. This is a broader challenge for lesbian and gay communities and their activists and lawyers. This challenge will be defined by how interlocking struggles for social justice by lesbians and gay men are fought.[51]

46 De Vos (n 26 above) 447.
47 N Oswin 'Producing homonormativity in neoliberal South Africa: Recognition, redistribution, and the equality project' (2007) 37 *Signs: Journal of Women and Culture in Society* 662.
48 De Vos (n 26 above) 452.
49 Craven (n 14 above) 34.
50 S Ndashe 'Summary of legal opinion prepared for the 070707 Campaign' in W Isaack *State accountability for homophobic violence* (2007) 61.
51 Burger (n 43 above).

These struggles are being fought in an environment where *de facto* impunity in the new South Africa perpetrated by politicians and the state institutions only serves to support and fuel this brutally unequal reality. The subjective application and enforcement of rights are based on a historically racist, sexist and classist society and perpetuate the inequalities inherent in this type of system. This has been seen most severe in the rising levels of hate crime.[52] While no one is immune to violence based on their sexual orientation, a very definite trend has emerged around the targeting of black lesbian women for assault, rape and murder in the townships.[53]

It is this dearth of data on hate crime that the country's Department of Justice and Constitutional Development hopes to address with the 'Policy Framework on Combating Hate Crimes, Hate Speech and Unfair Discrimination.' The policy is the foundation for what will later become law and aims to 'send a clear message that hate crimes will not be tolerated in South Africa,' according to the then Justice and Constitutional Development Deputy Minister John Jeffery.[54] He said the new law would create a separate criminal category for hate crimes. Although it was created in direct response to the increase of hate crimes against lesbian, gay, bisexual, transgender and intersex (LGBTI) people in South Africa, the policy covers all forms of hate crimes, including xenophobic and racist attacks and hate speech.

Looking back on the struggle for rights in the Constitution and later the development of a non-discriminatory legal framework that was incrementally fought for, it is possible to highlight where the struggle for the rights of lesbian and gay individuals has fallen short in protecting and promoting the rights of all. The lived experience of violence and discrimination will be explored below in a section that further problematises the assumptions that rights can be used as a barometer to judge freedom in a country.

4 The continued search for the pot of gold

South Africa alleges to be a 'Rainbow Nation' on many fronts. Touched on previously was how the symbol of the rainbow is used to disguise the inequality experienced by the general population. It was also argued that the use of the rainbow to symbolise the collective of sexual minorities is equally as deceptive as the divisions in society based on race, class, gender, nationality and sexual orientation mirrors the division within the lesbian and gay 'community.' The legal victories won in the courts of South Africa

52 Craven (n 14 above) 35.
53 As above.
54 M Bendix 'South Africa's law to stop hate crimes against gays' *Inter Press Service* 2014 http://www.ipsnews.net/2014/02/south-africas-law-stop-hate-crimes-love/ (accessed 22 February 2016).

have had little bearing on the lives of many lesbian and gay people living in the country. These legal accomplishments have failed to 'trickle down'. Although they create a substantial framework that individuals and groups can utilise to access rights and seek justice, legal services for the general population (especially vulnerable groups), remains elusive. The South African Constitution provides a starting-point but enacting these rights requires much more.

In order to begin the realisation of rights it is important to acknowledge the impact of intersectionality on the experience of inequality and discrimination. Although it is true that given the current socio-political landscape, an individual's economic and social position often determines the levels of discrimination they experience. Lacking access to secure housing, adequate healthcare and reliable transport increases any individual's susceptibility to violence. Combine this with being considered a part of a sexual minority, the likelihood of that violence multiplies. Levels of vulnerability and inequality are not spread equally over the sexuality and gender spectrum.

The seemingly most egregious illustration of this differentiated access to rights could be illustrated by what has become to be crudely known as 'corrective' or 'curative' rape. The term 'corrective rape' is used to describe sexual violence against gay, lesbian or gender non-conforming people with the object of punishing them and attempting to 'correct' their perceived sexual deviance.[55]

> Those lesbians are too *tsatsaragh* – forward; proud of themselves. They don't greet the guys. Whatever we did, we are going to do again. We will fix them.[56]

In contemporary public discourse, this act of corrective rape has been constructed as a phenomenon that occurs where the victims are 'poor, black, lesbians from the township'.[57] It is necessary however, to recognise the problem with constructing of all corrective rape victims as being 'poor, black, lesbians from the township'. It detracts from the fact that multiple forms of violence are experienced by all lesbian and gay people and it tries to pigeonhole violence in a way that ignores the intersectional nature and context of violence. It also serves to reinforce racial stereotypes that only

55 S Phamodi 'Interrogating the notion of "corrective rape" in contemporary and public and media discourse"*Consultancy Africa Intelligence* 2 November 2011 http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=886:interrogating-the-notion-of-corrective-rape-in-contemporary-public-and-media-discourse&catid=59:gender-issues-discussion-papers&Itemid=267 (accessed 22 February 2016)

56 D Nath '"We'll show you you're a woman" violence and discrimination against black lesbians and transgender men in South Africa'(2011) *Human Rights Watch Report* 29.

57 Nath (n 56 above) 2 -10; see also: 'Crisis in South Africa: The shocking practice of "corrective rape" aimed at curing lesbians.' *The Independent* 4 January 2014 http://www.independent.co.uk/news/world/africa/crisis-in-south-africa-the-shocking-practice-of-corrective-rape-aimed-at-curing-lesbians-9033224.html (accessed 22 February 2016).

black communities are homophobic. In these cases victims of 'corrective rape' are discriminated against on the basis of their 'deviant' sexuality but also because they are poor and also because they are black and also because they are women. This is not to say that any form of discrimination is worse than another, rather that it is important to understand violence in a broader context of discrimination and disadvantage.[58]

Although the definition of 'corrective rape' is problematic, the increasing incidents of violence inflicted on black lesbians living in township locations does serve to reiterate how rights enshrined in the Constitution of South Africa are out of reach for many lesbian and gay people. The two polar extremes, to illustrate this point, would be that a South African, white, gay, male living in a suburb can access his constitutionally guaranteed rights with much more ease than a Zimbabwean, black, lesbian, female living in a township. In 2010 the former chair of the South African Human Rights Commission, Jody Kollapen, traced violence directed against lesbians to two factors: one, institutionalised prejudice deriving from the historical separation of people into categories with differential values; and two, the widespread problem of violence within South African society'.[59]

Although the rights to equality, dignity, life, freedom of movement and freedom of expression are technically protected by the state, the difficulty is protecting these rights in the face of rampant prejudice. This prejudice and social stigma against minority groups, particularly lesbian and gay individuals is not only perpetuated by general society including churches, employers, community leaders and family members but also perpetuated by officers of the state, who are charged with protecting these rights. In South Africa, the criminal justice system does not disaggregate between motives for crimes and the victim's sexual orientation. As a result there exists no statistics of homophobic violence. For example, if an individual is assaulted his or her sexual orientation, as a potential motive for the assault, is not taken into account. Therefore the case is logged as an assault and not necessarily a homophobic crime.

The starkest example of this gap between the Constitution, public attitudes and the ability to access rights is lesbian and gay individual's engagement with the criminal justice system. Unfortunately, the majority of violence experienced by lesbian and gay individuals goes unreported.[60] Not only do the victims feel that reporting the crime will leave them open to ridicule and prejudice from the wider community, but they fear the repercussions of the criminal justice system itself. The prejudice and

58 Nath (n 56 above) 2.
59 Nath (n 56 above) 14.
60 n 56 above 2.

homophobia of every aspect of the criminal justice system has been well documented.[61]

In the context of this chapter, which focuses on the realisation of rights by lesbian and gay people in South Africa, it is important to highlight the relationship between the police and lesbian and gay individuals as it is often the police that are the first port of call when it comes to the daily violations experienced. According to a Human Rights Watch (HRW) report, sexual minorities are often deeply hesitant to report any rights violations to the police, as they fear further discrimination at the hands of the police.[62] This fear is not unwarranted.

HRW cited that interactions that the participants in the study had with the police, could be broadly separated into three categories. The first was being verbally abused by the police and subjecting those who reported violations to secondary victimisation and victim-blaming:[63]

> The police said 'Why are you running away from men? They were only giving you what you wanted.' – Lesedi, describing the reaction of police at Lamontville police station, KwaZulu-Natal, when she went with a friend to report a rape.

The second category includes instances of police inefficiency, corruption, inaction and often the police themselves perpetuating their own prejudice and homophobia by exhibiting compliance with the perpetrators:

> They said to me, 'Okay, we hear your story but why are you dressing like a man?' They were laughing at me as they said this. They threatened to kick my ass in the police station. I felt stupid. They didn't write anything down.[64]

In the third category, the police themselves are the primary perpetrators of violence. To illustrate this point, the report describes an incident in which Sesi, Renang, and Saran were among a group of lesbians returning from the Ekurhuleni Pride march in Kwa-Thema township, that had been held to honour Eudy Simelane, a famous lesbian soccer player murdered in Kwa-Thema the previous year. A police van pulled up outside the restaurant and some policemen started beating and abusing the lesbians standing outside. The police took several of them to Vosloorus Police Station, where they taunted, attempted to extort, and beat them.[65]

These cases illustrate how incredibly difficult it is for sexual minorities to access justice at the very basic level of opening a case in the police station and how violence is inflicted with impunity. A quick glance at

61 See S Holland-Muter 'Outside the safety zone: An agenda for research on gender-based violence targeting lesbian and bisexual woman in South Africa' (2012).
62 Nath (n 56 above) 46.
63 As above.
64 Nath (n 56 above) 47.
65 Nath (n 56 above) 52.

South Africa's conviction statistics[66] suggests that one could argue that it is difficult for the 'average South African' to access justice and that the criminal justice system is generally overburdened and inefficient. However, the criminal justice system at an institution mirrors the structural inequality experienced by the population on a daily basis at multiple levels. Although legally every South African citizen has the right to access legal redress,[67] when that citizen suffers prejudice and discrimination at the hands of the very institution that is meant to assist them, then those rights cannot be realised. For example, in 2006, Zoliswa Nkonyana, a 19-year-old lesbian and activist from Cape Town had her case postponed thirty two times.[68]

Even when criminal cases of homophobic violence make it to court, the claimant often has to defend their right to equality to the very officers of the state that are charged with protecting that right. For example, in one case, the judge stated that the testimony of one of the parties as to whether she had consented to sex or not was not reliable because she had decided she was a lesbian after she had already born three children.[69]

South Africa's Constitutional Court is largely responsible for the rights afforded to sexual minorities in South Africa today but remains inaccessible to most people in South Africa due to its costly and lengthy process. The courts most people in South Africa have access to and deal with are not as well resourced or as progressive as the Constitutional Court. These are the family courts, the magistrate's courts, the sexual offences courts, the equality courts, and the maintenance courts. Most of these courts are grossly under-resourced.[70] It can be expected that aggrieved individuals seeking justice from these courts will face challenges including prejudice, discrimination, incompetence and corruption.

What these examples clearly illustrate is that South Africa has a long way to go before the majority of lesbian and gay individuals can access the rights afforded to them in the Constitution. As a result of lack of public education around the Bill of Rights and the Constitution, the likelihood that lesbian and gay people will use this framework fully is improbable. Moreover, those who perpetrate the discrimination are either blissfully ignorant of their duty to respect the rights of others or intentionally disregard these rights. It is only through structural transformation and the dismantling of systematic inequality that every person residing in South

66 Council of International Investigators *Crime stats simplified* http://www.crimestatssa.com/national.php (accessed 22 February 2016).
67 The Constitution (n 4 above) sec 34.
68 W Gieseke 'More delays in South African lesbian murder trial' *The Advocate* 10 March 2011 http://www.advocate.com/News/Daily_News/2011/03/10/More_Delays_in_South_African_Lesbian_Murder_Trial/ (accessed 24 February 2016).
69 Nath (n 56 above) 41.
70 L Vetten *et al Tracking justice: The attrition of rape cases through the criminal justice system in Gauteng* (2008) http://www.csvr.org.za/docs/tracking_justice.pdf (accessed 29 July 2014).

Africa regardless of their nationality, gender, race, class and sexual orientation can enjoy all the freedoms envisaged in the Constitution.

In the context of this chapter it is important to highlight the differential access to rights experienced by lesbian and gay people living in South Africa as discussed above. However, it is also important to reflect upon the inequality and discrimination that is experienced within the community itself.

Another example of the lack of acknowledgement of intersectionality in terms of unequal access to rights is the example of the Johannesburg Pride event. The first South African Pride was held in 1990 in Johannesburg when homosexuality was still illegal and it has run every year since. Johannesburg Pride has over the decades provided a space for celebrating gender and sexual diversity as well as a space for advocating for the rights of all sexual orientations and gender identities. At the very first Pride in 1990, Simon Nkoli, a gay anti-apartheid activist, said:[71]

> I am black and I am gay. I cannot separate the two parts of me into secondary or primary struggles. In South Africa I am oppressed because I am a black man and I am oppressed because I am gay. So when I fight for my freedom I must fight against both oppressions ... All those who believe in a democratic South Africa must fight against all oppression, all intolerance, all injustice.

This vision foregrounded the need for an intersectional approach for the fight for lesbian and gay rights. It highlighted the importance to resist oppression and discrimination on multiple fronts as in a South African context, oppression and discrimination was experienced on multiple fronts. However, Nkoli's and other early leaders' political vision did not remain the guiding principle for Pride for long. Over the next several years, the balance between celebration and protest started to tilt as Pride moved more and more towards becoming purely celebratory. This became one of the most divisive aspects of Pride, as only a small minority was affected by only homophobia. Most people in the country experienced homophobia as one of several oppressive factors; for them, there was little to celebrate as the legal reforms had not improved their day-to-day lives in any form.[72]

The ability to legally host an event that caters to sexual minorities is something that is available to few lesbian and gay individuals and groups across the continent. However, Pride, (not only in South Africa but all over the world)[73] has become an increasingly contested space. By the mid-2000s, Johannesburg Pride began to mirror the race, class and gender

71 Craven (n 14 above) 19.
72 S Phamodi 'Fracturing pink unity – thoughts on pride and challenging the centre' 12 March 2014 http://www.platformonline.co.za/home/index.php/reality1/item/335-fracturing-pink-unity-thoughts-on-pride-and-challenging-the-centre (accessed 22 February 2016)
73 Craven (n 14 above) 15.

inequalities in the country. The event increasingly catered to social elites and addressed only political rights and legal reforms (when it spoke of politics at all). It overshadowed the social and economic challenges faced by the majority of lesbian and gay people. The slant towards commercialisation became more obvious by the time the Johannesburg Gay Pride Festival Company started organising Pride. The language of advertising and the 'gay market/pink rand' had taken over the language of protest and struggle.[74]

The 2012 Johannesburg Pride event was disrupted by the One in Nine Campaign, a Johannesburg-based feminist collective. The rationale for the action was that Johannesburg Pride had become devoid of political meaning and content and that it was simply a commercial event that catered to the (mostly white) minority middle and upper classes while ignoring the issues confronting the vast (almost entirely black) majority of gay and lesbian individuals in and around Johannesburg.[75] It also accused Johannesburg Pride of perpetuating discrimination on the basis of race and class in restricting access to social venues by charging an entrance fee.[76] Another critique that was levelled against the Pride organisers was that the very route that the Pride march took served to exclude people based on class and race. The location of the march passed through predominantly white, middle class suburbs. This sent a particular political message about who owns Pride and what Pride should be about.[77]

Responses to the event have been mixed with many calling for the boycott of Pride. However, the biggest opposition was levelled at the One in Nine Campaign for their interruption of Pride, which created rifts and disunity in the lesbian and gay 'community'. What was highlighted by both the organisation of Johannesburg Pride, the resistance to it and the reaction it provoked is that the term 'lesbian and gay community' is quite abstract. Just because two people may share a similar sexual orientation, in a country as divided as South Africa, does not mean there will be any meaningful similarities between their lifestyles.

These divisions are evident of the types and frequency of violence experienced by particular minorities and also how the public responds to them. For example, earlier in the year a wedding venue denied a white, lesbian couple the right to get married even though a contract was signed.[78] This incident went viral over the internet to the point that it

74 C Shelver & N Sekete 'Johannesburg people's pride proposal to the City of Johannesburg' August 2013 (unpublished).

75 Johannesburg People's Pride Manifesto (2013)http://peoplespride.blogspot.com/p/pride-movement-of-protest-celebration.html (accessed 22 February 2016).

76 As above.

77 Shelver & Sekete (n 74 above).

78 'Cape venue refuses to host lesbian wedding' *Times Live* 27 March 2014 http://www.timeslive.co.za/lifestyle/2014/03/27/cape-venue-refuses-to-host-lesbian-wedding-after-signing-contract (accessed 22 February 2016).

received the attention of the South African Human Rights Commission. In the same month a gay, coloured man was tortured and killed while seven teenagers who were invited to watch the murder by a man who told them he was 'going to kill a *moffie*' (gay man), watched.[79]

In their analysis of these incidents Clayton and Thorne state:[80]

> Where one section is fighting for their rights on paper and another is literally fighting for its life, does it stop being helpful to refer to this as a 'community' – a political grouping united in action against homophobia? In the same way that it is unhelpful to speak about women or black people as having shared interests, is it time to acknowledge that LGBTI people in South Africa are not a collective?

Even when a certain number of shared experiences of discrimination can be discerned, the impact of the discrimination and priorities for intervention may be entirely different. Identifying a community, given these issues, becomes not just factually questionable but also extremely dangerous in that it assumes all lesbian and gay people within that community face the same inequality and discrimination. This will prevent appropriate and fair recourse. As Judith Butler puts it 'A movement that is alive has to have an intellectual life otherwise it will just repeat some of its terms. It should try to revise its own beliefs in the light of new political circumstances'.[81]

5 Conclusion

This analysis emerges at a time when there is widespread violence and all forms of oppression and discrimination against members of LGBTI communities, particularly lesbians and gay people from socio-economically marginalised backgrounds. Much of this oppression and violence happens with impunity. Government failure to adequately respond to this violence, as with all other forms of structural and interpersonal violence, has resulted in a situation in which all black lesbians who live in townships have to reconcile themselves to the very likely possibility that they will be raped and that, if they survive the attack, it is also extremely likely that they will receive little redress or justice.

The inadequate implementation of laws and policies, which has resulted in their failure to significantly change the lived realities of the vast majority of people in South Africa, has also received a great deal of

79 F Villette 'Teens invited to watch a gay murder' *IOL News* 28 March 2014 http://www.iol.co.za/news/crime-courts/teens-invited-to-watch-gay-murder1.1667720#.U1j4sKJHqRQ (accessed 18 February 2016).

80 M Clayton & T Godinho 'A queer understanding of commuinty' *Mail and Guardian though leader* 2 April 2014 http://www.thoughtleader.co.za/thornegodinho/2014/04/02/a-queer-understanding-of-community/ (accessed 18 February 2016).

81 Equality Project strategy (n 39 above) 29.

attention. However, this attention has not made the laws more effective. The existence of laws does not seem to have altered the mindsets of most people in South Africa – neither ordinary members of society nor those in public service, such as police officers, court officials and healthcare professionals. This calls into question the promulgation of new legislation like the proposed Hate Crimes Bill as it still focuses on legislation being the solution. The high levels of intolerance, prejudice and violence are indicative of a society that is out of touch with the values in the Constitution.

CHAPTER 6 FIRST CLASS CONSTITUTION, SECOND CLASS CITIZEN: EXPLORING THE ADOPTION OF THE THIRD-GENDER CATEGORY IN SOUTH AFRICA

*Busisiwe Deyi**

> Seldom our society realizes or cares to realize the trauma, agony and pain which the members of the transgender community undergo, nor appreciates the innate feelings of the members of the transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change.[1]

1 Introduction

States have a legitimate security interest in the documentation of persons entering, living within and exiting their borders. Identity documents are the easiest mechanism to achieve this aim and perform a dual function: assisting the state in executing its obligation of ensuring national security (crime prevention)[2] and signification of legal recognition for citizens before the law.[3] Legal recognition is a collorary to securing access to various socio-economic and political rights including housing, education,[4]

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1 *National Legal Services Authority v Union of India and others* (2012) writ petition 400 http://judis.nic.in/supremecourt/CaseRes1.aspx (accessed 20 April 2014) (*NALSA v Union of India*).

2 Republic of South Africa Identification Act 68 of 1997 sec 17(1) provides:
'An authorised officer may at any time request any person reasonably presumed to have attained the age of 16 years to prove his or her identity to that officer by the production of his or her identity card' (emphasis added).

3 M Bochnek & K Knight 'Establishing a third gender category in Nepal: Process and prognosis' (2012) 26 *Emory International Law Review* 23.

4 The admission policy for ordinary public schools Government Notice 2432 Government Gazette 19377 provides that '[w]hen a parent applies for admission of a learner to an ordinary public school, the parent must present an official birth certificate of the learner to the principle of the public school.'

healthcare and the right to vote.[5]

Although the right to vote will not be examined extensively in this Chapter, it is important to note its centrality to the right to dignity. The Constitutional Court has noted that: 'the South African green bar-coded identity document is central not only to accessing various state sponsored social assistance benefits,[6] but is also key to interactions with financial institutions.'[7]

However in the carrying out of its obligations, the state must balance them with the duty to 'respect, protect and promote'[8] the rights of all those affected. Identity documents are intimately connected to accessing citizenship. An identity document not reflecting one's gender expression inhibits the carrier's right to vote, access healthcare, education and other socio-economic rights. The importance of having identity documents reflecting one's correct gender expression and names is underscored by their centrality in interactions with public and private service providers. Legal recognition becomes a primary access point to substantive citizenship for transgender[9] and other gender non-conforming persons.

This chapter explores the implications and benefits of a recognition and inclusion of a third-gender category in South African identity documents. Part I examines intersections between gender recognition and access to substantive citizenship; Part II considers progressive international and foreign law recognising a third-gender category; Part III considers the discriminatory effects brought by the current binary gender-system of documentation and Part IV concludes by arguing the necessity of a third-gender category in the creation of an inclusionary and

5 Electoral Act 73 of 1998 Sec 88 provides; 'No person may apply to be registered as a voter in the name of another person, whether living, dead or fictitious.'

6 Regulation 11(a) –(b) of the Regulations relates to the application for and payment of social assistance and the requirements or conditions in respect of eligibility for social assistance. Government Notice R898 in Government Gazette 31356, provides that:
(1) The following original documents or certified copies thereof, must accompany an application for a social grant:
> An identity document of the applicant and his or her spouse; and in the case of a child support grant, a care-dependency grant or a foster child grant, an identity document or valid birth certificate of each child, care-dependent or foster child in respect of whom an application for a social grant is made.

7 Financial Intelligence Act 38 of 2001 requires all accountable institutions to 'establish and verify the identity of the client', section 21(a). An 'accountable institution' in terms of the Act's Schedule 1 includes estate agents, trust administrators, attorneys, persons who carry out the business of a bank, insurance brokers, casinos, businesses dealing in foreign exchange, a person who carries out the business of a financial services provider and their intermediaries, persons who sell or redeem travellers' checks and health service benefit providers i.e medical aid schemes.

8 Constitution of the Republic of South Africa Act 108 of 1996 sec 7(2).

9 Within the context of this chapter transgender 'incorporates all forms of gender variant people, including transsexuals, people with and without a [gender identity incongruence diagnosis], and people who identify as gender-queer or otherwise the monolithic, normative understanding of sex and gender.' See A Lloyd 'Defining human: Are transgender people strangers to the law?' (2013) 20 *Berkeley Journal of Gender, Law and Justice* 150.

transformative gender recognition system in order to allow all its citizens to exercise substantive citizenship.

2 Accessing gender recognition and substantive citizenship

An identity code is a key component of South African identity documents – it is the documentary DNA which attaches to your person. The number is a composite of the carrier's particulars, including one's gender. Section 7(2) of the Identification Act[10] provides:

> An identity number shall be compiled in the prescribed manner out of figures and shall, in addition to a serial index and control number, consist of a reproduction, in figure codes, of the following particulars, and no other particulars whatsoever, of the person whom it has been assigned, namely –
>
> (a) His or her date of birth and gender; and
>
> (b) Whether or not he or she is a South African citizen. (emphasis added)

The Act clearly understands gender as existing within a binary. The absence of gender-neutral alternatives is revealing. The Act's use of 'he' and 'she' with no reference to neutral gender pronouns, such as 'they, and them' signifies an adherence to an essentialist understanding of gender. Gender essentialism[11] is the idea that gender is biological and a natural manifestation of a person's birth-sex. This conception of gender produces gender hierarchism,[12] a system privileging and legitimising certain, often cisnormative,[13] forms of gender expression over others. Thus gender is understood as only existing within a man or woman binary emanating from male and female biological traits to the exclusion of alternative gender variations.

South African law is predicated on a hierarchal and essentialist conception of gender and the concomitant result is the erasure of transgender persons and a denial of access to basic human rights. Logically a legal system whose conceptions of its citizens are based on gender

10 n 2 above.

11 G Rubin 'Thinking sex: Notes for the radical theory of the politics of sexuality' in C Vance (ed) *Pleasure and danger: Exploring female sexuality* (1984) 278.

12 As above.

13 Cisnormative is a term which refers 'to the assumption that it is more "natural" or "normal" to keep the body intact than to transition or transform your sex or gender. The terms cisnormative is inspired by the terms "cisgender"and "cissexual" which refer to persons who do not change sex and gender (non-transgender people and non-transsexual people). According to its Latin etymology and its initial use in pure science, the prefix "cis" means that an element remains intact and static, unlike the prefix "trans" which means a passage and a transition from one state to another.' See A Baril & K Trevenen 'Exploring ableism and cisnormativity in the conceptualization of identity and sexuality disorders' (2014) 11 *Annual Review of Critical Psychology* 390-391.

essentialist conceptions necessarily excludes those who do not conform to this conception.

Citizenship has evolved from a formally coded status into a more human rights centred concept in the form of substantive citizenship.[14] Moving away from formalistic traditional nation-state roots to a participatory human rights centred conception has meant states acquire positive obligations towards citizens. Rather than a state being obligated to refrain from infringing rights, it has a duty to create enabling conditions fostering a progressive and transformative realisation of substantive citizenship.

Parallel to this development has been the critique by feminist scholars of the formalistic nation-state centred understandings of citizenship.[15] In arguing for a re-articulation of citizenship as a negotiated and fluid process rather than a static set of rights, obligations and entitlements, feminist scholars have illustrated the lack of nuance in the traditional formations of citizenship.[16] Both these developments have supported a move away from a formalistic towards a substantive understanding of citizenship.

TH Marshal presents substantive citizenship as composing of three correlative core elements – the civil, political and social.[17] The civil element is composed of individual-centred rights: the right to liberty of the person, the right to freedom of expression, religion and thought, the right to property including the freedom to enter into valid contracts, and the right to justice. The political element implicates the participatory element of substantive citizenship. This is the right to participate in political activities and to be part of bodies invested with political power, such as parliaments and local government structures. The social element has a socio-economic component and 'is a composite of a range of rights including the right to welfare and security, the right to share fully in the social heritage and to live the life of a civilised being according to the standards prevailing in the society.'[18]

14 L Cirolia and E Scheepers 'Regionalizing African civil societies: Lessons, opportunities and constraints' unpublished conference paper *Nordic African Institute and West Africa Civil Society Institute* Uppsala, 2014.

15 G Romeo 'Citizenship in the age of globalisation' (2011) 2 *Comparative Law Review*; A Schlyter 'Body politics and the crafting of citizenship in Peri-urban Lusaka' in *Feminist Africa body politics and citizenship* (2009) 24 African Gender Institute: Cape Town; C McEwan 'New spaces of citizenship? Rethinking gendered participation and empowerment in South Africa' (2005) 24; *Political Geography* 969; C McEwan 'Postcolonialism, feminism and development: intersections and dilemmas' (2001) 2 *Progress in Development Studies* 93; C McEwan 'Gender and citizenship: Learning from South Africa?' (2001) 16 *Agenda 47*; L Stephen 'Citizenship, and the politics of identity' (2001) 28 *Latin American Perspectives* 54; GW Seidman 'Gendered citizenship South Africa's democratic transition and the construction of a gendered State' (1999) 13 *Gender and Society* 287.

16 As above.

17 TH Marshall 'Citizenship and social class' in J Manza & M Sauder (eds) *Inequality and society* (2009).

18 Marshall (n 17 above) 148-9.

It is trite that these elements must be viewed as mutually supportive. Thus, identity documents which inhibit the second and third elements of citizenship hinder the state's ability to discharge its duty to respect, promote and protect rights contained in the Bill of Rights. A deeper comprehension of citizenship[19] produces a textured understanding of the unseen and unintended meanings of citizenship, within the South African context, and the constitutive processes interlinking transgender individuals, communities and representatives of the state.

This author would further argue that the absence of a third-gender category engenders institutional and informational erasure of transgender persons, resulting in the construction of exclusionary legislation and policies in the face of a constitution, which mandates an inclusionary legal culture. In other words, the continued development of legislation and policy reliant on a bi-sexed or – gendered system with no alternatives[20] is problematic as it results in the erasure of persons who fall outside of those gender constructs. This exclusion is the result of the lack of consideration of the luminal space occupied by transgender individuals. Liminality as an analytical tool:[21]

> refers to an in-between positionality where the margins of difference are blurred and manipulated in ways that scripted interactions are rendered seemingly unstable and inarticulate. Specifically, liminality refers to being between two 'socially [and legally] recognized states, whether individual or collective'.

From a gender context, South Africa's legal framework needs to acknowledge the liminal spaces occupied by transgender and other gender non-conforming individuals. Liminality allows for in-depth scrutiny of the ideological formations underpinning legal recognition and the resulting denial of citizenship of gender minorities.

The South African Constitution's principles of human dignity and substantive equality are fundamental to understanding substantive citizenship within the South African context. The Constitution's commitment to human dignity as a central part[22] of its construction of citizenship; a right closely related to equality is constitutive of its objective

19 Schlyter (n 15 above).

20 T Klein 'Configuring trans* citizens in South Africa: Somatechnic, self-formation and governmentality' in PW Gessler *et al* (eds) *Rethinking biomedicine and governance in Africa: Contributions from anthropology* (2012) 43.

21 B LeMaster 'Queer imag(in)ing: Liminality as resistance in Lindqvist's let the right one in' (2011) 8 *Communication and Critical/Cultural Studies* 107.

22 *S v Makwanyane & Another* 1995 3 SA 391 (CC) para 144 'The right to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter [two]. By committing ourselves to a society founded on the recognition of human rights, we are required to value these two rights above all others' see also *Ferriera v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 1 SA 984 (CC) paras 47-48.

of creating a transformative concept of citizenship.[23] Constitutions are political mechanisms through which states seek to limit conditions of precaurity[24] by establishing norms; conferring legal recognisibility; and determining who is, and who is not legible as a subject.[25] Through the Constitution, individuals claim access to the social and economic promises within it. Citizenship is often a key prerequisite for such claims: a condition for recognisability. Butler states:[26]

> [W]e have to be able to take into account differential allocation of recognisability. It seems that we must do this in order to understand those forms of living gender ... that are misrecognised or remain unrecognizable precisely because they exist at the limits of established norms of thinking embodiment and even personhood.

The experience of jurisdictions where the third-gender category has been adopted and is being implemented reveals the need for an incorporation of the full stratum of gender variance. Ensuring inclusion of all gender minorities begs a demolition of conventional understandings of gender. International law[27] sets a framework predicated on progressive principles regarding the legal recognition of transgender and gender non-conforming persons. Further a comparative analysis gleaned from foreign jurisdictions applying the third-gender category is instructive. The foregoing analysis of developments from foreign jurisdictions reveals the problematic issues encountered with respect to defining the third-gender category.

3 Third gender in international and foreign law

Feminist legal scholars[28] critique the prescriptive nature of law. From a gender perspective, the law's entrenchment of predominant norms as universal, natural and inevitable[29] necessitates a binate comprehension of gender rather than multitudinous. Identity documents currently allow only for registration as either male or female.[30] There exists a limited alternative for people who identify as neither, both or an assemblage of some of one or the other. However, there has been promising developments in the international and foreign law spheres which seek to expand and

23 *National Coalition for Gay &Lesbian Equality & Another v Minister of Justice & Others* 1999 1 SA (CC) 6 para 30.
24 J Butler 'Performativity, precarity and sexual politics' Lecture given at Universidad Complutense de Madrid (2009).
25 As above, iii.
26 As above.
27 Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity http://www.yogyakartaprinciples.org/principles_en.pdf.
28 'Feminist philosophy of law' Stanford Encyclopaedia of Philosophy http://plato.stanford.edu/entries/feminism-law/(accessed 18 November 2014).
29 As above.
30 The Constitution (n 8 above) sec 7(2)(a) provides for the registration of *his* or *her* gender (emphasis added). The section does not mention gender neutral alternatives.

incorporate the luminal spaces occupied by transsexual and gender non-conforming persons. The preamble of the Yogyakarta Principles (the principles) posits gender identity as referring to:[31]

> a person's deeply felt internal and individual experiences of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, other expressions of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

Gender identity must not be confused with sexual orientation which refers to 'a person's capacity for profound emotional, affectional and sexual attraction to, intimate and sexual relations with individuals of a different gender or the same gender or more than one gender.'[32]

Transgender[33] falls under the rubric of gender identity. It is important to understand the differences between sexual orientation and gender identity as the former has always been subsumed under the latter. This overshadowing has resulted in a negation of transgender struggles. Even though discourse around discrimination and prejudice on the grounds of sexual orientation runs along similar lines, there are divergences unique to transgender individuals.[34]

Transgender[35] is 'an umbrella term used to identify people whose gender identity, expression, behaviour or practice that cross over, cut across and move between, or otherwise queer socially constructed sex or gender boundaries including but not limited to transsexuals,[36] cross-dressers,[37] androgynous people,[38] gender queers,[39] gender non-conforming people,[40] butch lesbianism,[41] and indigenous identities such

31 n 27 above 6.
32 Yogyakarta Principles (n 27 above) 6.
33 International Commission of Jurists *Sexual orientation, gender identity and international human rights law practitioner's guide 4* (International Commission of Jurists: Geneva 2009) http://www.icj.org/practitioners-guide-no-4-sexual-orientation-gender-identity-and-international-human-rights-law/ 'A transgender person may be female-to-male (FTM) in that he has a gender that is predominantly male, even though he was born with a female body. Similarly, a person may be male-to-female transgender (MTF) in that she has a gender that is predominantly female, even though she was born with a male body or physical characteristics.'
34 S Kheswa 'Pride and protest' presentation for HUMA's public discussion in Langa, 21 February 2013 http://www.genderdynamix.org.za/wp-content/uploads/2013/04/Pride-and-Protest-Kheswa.pdf (accessed 15 March 2014).
35 Yogyakarta Principle (n 27 above).
36 Yogyakarta Principles (n 27 above) 'A transsexual person is one who has undergone physical or hormonal alterations by surgery or therapy, in order to assume new physical characteristics.'
37 Yogyakarta Principles (n 27 above).
38 As above.
39 As above.
40 As above.
41 J Hablerstam *Female masculinity* (1998) defines a butch lesbian as a female person who feel themselves more masculine than feminine.

as the Native American bedache or the Indian Hijra.[42] Transgender people can have a variety of sexual orientations; some can be heterosexual and others can express homosexual attractions.

The confusion around gender identity and sexual orientation is the result of societal assumptions about gender and sex. Essentialist assumptions which regard gender as necessarily flowing from sex have been critiqued by various queer[43] and feminist[44] theorists. Butler has, through her introduction of the concept of 'performativity,' deconstructed these assumptions and presented alternative understandings on gender and sexuality. Gender expression may, and can be expressed separately from assumed cisnormative[45] constructions.[46]

The discontinuity of sexed bodies from culturally constructed genders allows room for the cross-sectional existence of differently sexed bodies and genders. For example, female sexed bodies can perform masculine genders and male sexed bodies can perform feminine genders. Therefore, an understanding of gender or sexuality: behaviour, dress and other social constructs being regarded as elaborations on the basic biological facts of the body; seen as indistinguishable from sex,[47] leads to a misconstruction of transgender as a deviation from cisnormativity, an aspect of heterosexuality, and thus fitting within homosexuality rather than a mis-gendering of a sexed body.

Germane to constructions of gender and gender roles as naturally flowing from biological sex, when an individual of whichever gender behaves contrary to expected heterosexual constructions, they are deemed to be homosexual. Thus a transgender man is misinterpreted as lesbian; female attracted to other females instead of a heterosexual man– transgender individuals are seen through the prism of sexual attraction rather than gender identity.

International law developments on this issue have posited the right to legal recognition as central to the fostering of an enabling environment for

42 *NALSA v Union of India & Others* (n 1 above) para 44 'Hijras are biological males who reject their "masculine" [and] identify either as women, or "not-men", or "in-between man and woman", or "neither man nor woman". Hijras can be considered as the western equivalent of transgender/transsexual (male-to-female) persons [however] Hijaras have a long tradition/culture and have strong social ties formalized through a ritual called "reet" (becoming a member of Hijra community). There are regional variations in the use of terms refer[ing] to Hijara. For example, Kinnars (Delhi) and Arvanis (Tamil Nadu). Hijras may earn through their traditional work: "Badhai" (clapping their hands and asking for alms), blessing new-born babies, or dancing in ceremonies. [A] portion of Hijras engage in sex work for lack of job opportunities, while some may be self-employed or work for non-governmental organisations.'

43 J Butler *Bodies that matter: On the discursive limits of 'sex'* (1993).

44 JCH Lee *Policing sexuality: Sex, society and the state* (2011) 9.

45 Baril & Trevenen (n 13 above).

46 J Butler (n 43 above).

47 Lee (n 44 above).

transgender and gender non-conforming persons. Citizenship can only be accessed when one is a recognised legal subject. Although human rights are recognised as universal and attaching at birth, it is only when one is legitimised through the conferral of legal status that they can begin to claim rights.

3.1 International law

Principles developed from rights recognised under international law apply equally to transgender persons. The International Commission of Jurists (ICJ) and the International Service for Human Rights (ISHR) undertook to develop international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity. The Yogyakarta Principles were targeted at bringing greater clarity and coherence of state human rights obligations towards gender and sexual minorities.[48] Although only of persuasive value, the Principles provide important guiding criteria with respect to identity documents and transgender persons.

The Principles reflect and are drawn from a broad number of human rights instruments[49] and existing state obligations within current body of international human rights laws in relation to issues of sexual orientation and gender identity.[50]

The right to legal recognition is underscored by Principle three which states that: '(e)veryone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life.'[51]

This right obligates states to take legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity. Legal recognition means legislative and administrative measures are in place to ensure existence of procedures whereby identity papers indicating a person's gender, sex, or both, reflect the person's profound self-defined gender identity.[52]

The procedures envisioned above must be efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned.[53]

48 n 27 above, 7.
49 n 27 above.
50 As above.
51 n 27 above, 12.
52 As above.
53 As above.

From reading Principle three, it is clear that legal recognition of a transgender person's self-defined gender expression before the law is a central part of claiming citizenship. Not only does this affirm their sense of dignity but it ensures participation as fully functioning social and economic actors. The right to dignity buttresses the centrality of legal recognition as an access point to various rights including but not limited to the right to education, social security, health, equality and voting. Importantly through legal recognition, individuals can use legal recognition as a mechanism to claim access to rights denied through administrative discrimination.

The right to legal recognition is part of an interconnected web of mutually supportive rights. These include the right to universal enjoyment of human rights and the corollary state obligations to embody and integrate the indivisibility of rights in national laws; equality and the state's obligation to ensure progressive realisation of an environment which is free from discrimination and prejudice; right to freedom from torture and cruel, inhuman and degrading treatment; the right to work free from discrimination on the basis of gender expression; the right to the highest attainable standard of health; and the right to participate in public life.[54]

Jurisprudential comparisons provide an in-depth evidence based upon which to evaluate how these international principles have been transposed into national law. This gives South Africa with a greater working template from which to learn and improve.

3.2 Foreign law

3.2.1 Nepal

Third-gender as a category is hard to define. If gender is to be understood as fluid and multi-dimensional, then the possibilities around gender expression and identities are endless. This could present administrative difficulties, thus third-gender has to be defined in a manner as to allow some degree of certainty. In the decision of *Pant v Nepal,*[55] the Supreme Court, in declaring full and fundamental rights for all lesbian, gay, bisexual, transgender and intersex citizens, 'legally established a gender category in addition to male and female – calling it 'third gender.'[56]

54 Yogyakarta Principles (n 27 above).
55 *Pant v Nepal* Writ 917 of the Year 2064 BS (2007 AD) http://www.gaylawnet.com/laws/cases/PantvNepal.pdf.
56 Bochenek & Knight (n 3 above) 11.

The court did not set out rigid criteria for the categorisation and implementation of the third gender category. The court's primary criterion for legal recognition as third-gender is self-identification.[57] Departing from the pathologising and medico-legal framework traditionally followed post *Corbett v Corbett*[58] the court held that legal recognition would not be based on medical or other criteria, but rather on self-identification.[59]

However the implementation of the third-gender category has yielded administrative difficulties even in the face of progressive steps taken by government.[60] Part of the progressive implementation of the third-gender decision has seen the inclusion of gender and sexual minorities in the federal budgets.[61] This is a rare occurrence where gender and sexual minorities are mentioned outside of the arrests and human-rights violations paradigm they had come to be constantly associated.

It must be noted that the systems necessary for the implementation of the documenting process have not caught up with the Court's pronouncement. Thus registering as third-gender has not come without relentless advocacy at the local district level.[62]

3.2.2 India

The Indian Supreme Court's recent judgment illustrates the disconnect between formal citizenship and lived or negotiated citizenship which can happen when legislation and policy are enacted based upon binate constructions of gender. In *NALSA v Union of India,*[63] the Indian Supreme Court noted that the non-recognition of the identity of the transgender or Hijra community resulted in them facing extreme discriminations in all spheres of society, including in the use of public toilets, which resulted in sexual harassment. These discriminations were a clear violation of their right to equality.[64]

Importantly, the Court held that:[65] '[t]he expression "sex" used in Article 15 and 16 is not just limited to biological sex of male and female,

57 Bochenek & Knight (n 3 above) 19.
58 *Corbet v Corbet* (1970) 2 All ER 33. The Court expressed the view that any operative intervention should be ignored and the biological sexual constitution of an individual is fixed at birth and cannot be changed either by the natural development of organs of the opposite sex or by medical or surgical means.
59 Bochenek & Knight (n 3 above) 19.
60 As above.
61 Bochnek & Knight (n 3 above) 31.
62 As above.
63 *NALSA* (n 1 above).
64 *NALSA* (n 1 above) para 54 'Article 14 states that the State shall not deny to "any person" equality before the law or the equal protection of the laws within the territory of India. Equality includes the full and equal enjoyment of all rights and freedom.'
65 *NALSA* (n 1 above) para 59.

but intended to include people who consider themselves to be neither male or female.'

A normative altering aspect of the judgment is its pronouncement on the issue of gender determination. The court emphasised a psychological approach by stating:[66]

> When we examine the rights of transsexual persons, who have undergone [sex reassignment surgery], the test to be applied is not the 'Biological test', but the 'Psychological test', *because [the] psychological factor and thinking of [a] transsexual [person] has to be given primacy than binary notion[s] of gender.*

The recognition of gender expression outside of the man/woman binary is an important step towards recognising the fluidity of gender expression and away from heteronormative and cisnormative perceptions of gender expression. Those who identify as third-gender can use this category as a rights claiming tool and can advocate for explicit inclusion in social and economic policies.

3.2.3 Australia

Norrie[67] a case which resonates with the obstacles currently faced by transgender South Africans illustrates the dangers of restrictive legislative interpretation by administrative bodies. The question before the High Court was whether the Registrar of births, deaths and marriages had the power to register a change of sex under the Births, Deaths and Marriages Registration Act of 1995 as 'non-specific'; neither male nor female.[68] Norrie had applied to have her sex changed and registered under the Act as 'non-specific'.[69]

The court held that the Act did not require people who had undergone sex reassignment surgery to be registered as either male or female; 'the Act recognised that a person may be other than male or female and therefore may be taken to permit the registration sought, as "non-specific."'[70]

3.2.4 Kenya

The High Court of Nairobi, Kenya lost the opportunity to expand on the meaning of sex in *Richard Muasya v Hon Attorney General.*[71] The Court had

66 *NALSA* (n 1 above) para 34 & 75 (emphasis added).
67 *New South Wales Registrar of Birth, Deaths and Marriages v Norrie* 2014 HCA 11 (*Norrie*).
68 *Norrie* (n 67 above).
69 *Norrie* (n 67 above) para 12.
70 *Norrie* (n 67 above) para 46.
71 *Richard Muasya v Hon Attorney General*(2010) petition 27 of 2007 http://kenyalaw.org/caselaw/cases/view/72818/ (accessed 22 April 2014).

to determine what the legislator meant by the term 'sex'.[72] In refusing to interpret sex as to include intersex persons, the Courtwas of the opinion that the recognition of intersex as a possible separate category was best left to the legislature as had been the case in South Africa.[73]

An interesting observation is the court's confusion of sex and gender. The Court assumed sex denoted the presence of gender, thus for the court, creating an 'intersex' category would be akin to creating a third gender and not rather a third sex.

4 Progressive legislative developments

Implementation of a third-gender category as a possible option in identity documents is a contested area. However foreign jurisdictions tended to adopt one of three models, self-identification, minimal medical intervention and passport gender changes model.

Argentina,[74] Australia[75] and New Zealand[76] provide positive legislative examples for South Africa to follow. Transgender and gender non-conforming persons can register as third-gender or as 'non-specific' in their identity documents and passports.

Argentina follows the self-identification model allowing for changes based on a self-defining criterion. Without need for proof of medical intervention, a person may request that their recorded sex be amended to match their self-perceived gender identity.[77]

Australian law merely requires an applicant to provide:[78]

> [A] letter from a medical practitioner certifying that the person has had, or is receiving, appropriate clinical treatment for gender transition to a new gender, or that they are intersex and do not identify with the sex assigned to them at birth.

72 As above.
73 *Richard Muasya* (n 71 above) para 131.
74 http://www.tgeu.org/Argentina_Gender_Identity_Law (accessed 20 November 2014) Transgender Europe 'English translation of Argentina's gender identity law as approved by the senate of Argentina on May 8, 2012' http://tgeu.org/argentina-gender-identity-law/ (accessed 29 June 2016).
75 Australian Government 'Australian Government Guidelines on the Recognition of Sex and Gender' July 2013 https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.PDF (accessed 29 June 2016).
76 'Information about changing sex/gender identity' New Zealand http://www.passports.govt.nz/Transgender-applicants#gender identity (accessed 20 November 2014).
77 Gender Identity and Health Comprehensive Care for Transgender People Act 2012 Article 4.
78 n 75 above.

The New Zealand equivalent only allows changes of gender on one's passport. An applicant wishing to make such a change must 'complete a Statutory Declaration indicating the sex/gender they wish to be displayed (M,F, or X) and [h]ow long you have maintained your current sex'.[79]

Introduction of a third-gender option in South African identity documents is a necessary tool in ensuring that transgender and gender non-conforming individuals have their rights respected. Lack of recognition of persons falling outside the gender binary allows the disempowerment and disenfranchisement of gender minorities. The current binate system has resulted in the erasure of transgender and gender non-conforming persons by institutions responsible for social development and health. These institutions bear the duty to ensure access to socio-economic and political rights by the most vulnerable citizens. This is problematic because 'when an individual's cultural legibility is not affirmed by their identity papers, even everyday quotidian transactions become moments of vulnerability.'[80]

5 Discriminatory effects of a binate system

Legal reform should not only focus on the elimination of direct and intentional harm – as South African law reform has so far done. Although the most egregious forms of discriminatory exclusions of sexual and gender minorities have been eliminated,[81] little has been done in the elimination of gender norms which have a direct impact on the creation of legal systems and norms 'that distribute security or insecurity and vulnerability at the population level.'[82]

Population level control systems and interventions are particularly important because of the way trans* people struggle with gender categorisation in the purportedly banal and innocuous daily administration of policies and institutions such as homeless shelters, prisons, public benefits, documentation, health insurance among others.

This part of the chapter seeks to illustrate the exclusionary nature of norms and conceptions of gender through the analysis of existing gendered

79 n 76 above.

80 P Currah & T Mulqueen 'Securitizing gender: Identity, biometrics and transgender bodies at the airport' (2011) 78 *Social Research* 561-562.

81 See *National Coalition for Gay and Lesbian Equality &Another v Minister of Justice & Others* (CCT11/98) [1998] ZACC 15; 1999 1 SA 6; see also *Du Toit & Another v Minister of Welfare & Population Development & Others* [2002] ZACC 20; 2002 10 BCLR 1006; 2003 2 SA 198 (CC) (10 September 2002). See also Children's Act 139 of 2005 sec 231, see also *Minister of Home Affairs v Fourie & Another* [2005] ZACC 19, 2006 1 SA 524 (CC). See also, The Civil Union Act 17 of 2006; see also Employment Equity Act 55 of 1998 subsection 6(1) which protects LGBTI persons from being discriminated against on the basis of their sexual orientation and gender identity; see also *Satchwell v President of the Republic of South Africa & Another* [2002] ZACC 18; 2002 6 SA 1; see also *Gory v Kolver NO & Others* [2006] ZACC 20; 2007 4 SA 97 (CC).

82 D Spade *Normal life* (2015) 137.

laws and policies. It further explores the argument for opening up the idea of gender and analysing how it distributes and prohibits access within the current binate gender system in South Africa.

5.1 Spaces of invisibility

5.1.1 Shelter

'Homeless' is often equated with 'houseless'; the latter is used to describe a literal lack of accommodation whereas the former has evolved and describes a state of poor housing conditions considered to constitute inadequate accommodation.[83] Homelessness and houselessness represent points 'on a continuum between those who sleep without any formal shelter and those who have security of tenure in the form of ownership.[84] This section looks at homeless transgender people and their inability to access inclusive shelters.

South Africa views homelessness as a social dependency issue and allocates it under the Department of Social Development (the Department).[85] However, there exist no legislative or policy guidelines with respect to homeless shelters. Without broader constitutionally compliant normative guidelines, shelter rules, policies, and practices have had an exclusionary and discriminatory effect on transgender and gender non-conforming individuals.[86]

The failure to provide inclusive services can be attributed to a variety of reasons including lack of information on the transgender identity, and racial and gender discrimination.[87]

Placement of homeless individuals in dorms separated in accordance to a biologically sexed norm rather than self-defined genders means forcible exclusion of individuals who do not subscribe to sexed gender norms.[88] This renders homeless shelters inaccessible to transgender people as their bodies can occupy a liminal non-cisconforming space. The prevailing cisnormativity in shelter service provision excludes transgender people, with some shelters being unable to guarantee safety. Some of the main concerns for transgender people in the shelter system relate to

83 J Dladla *et al* '"That Place is kwaMnyamandawo": Fear and survival strategies among homeless women living in inner-city Johannesburg' (2004) para 2.1.
84 As above.
85 J Du Toit 'Local metropolitan government responses to homelessness in South Africa' (2010) 27 *Development Southern Africa* 111.
86 Gender DynamiX 'We fight more than we eat; shelter access by transgender individuals in Cape Town, South Africa' 2013
87 Gender DynamiX (n 86 above) 9-10.
88 Gender DynamiX (n 86 above) 10.

questions around bed assignment in gender segregated dorms and bathroom choice.[89]

The unintended effects produced by a binate system within the shelter system results in the exclusion of a marginalised group. With the introduction of a third-gender option, state organs accountable for the discharge of obligations in respect of particular rights would need to consider the practical implications attendant to the recognition of this minority group.

Similarly with the right to shelter, accessing the right to health can give rise to intense vulnerability for transgender persons. Using a template of gender applicable to a majority but which is not universal develops a culture of exclusion, which can only be remedied through targeted acts of recognition.

5.1.2 Health

The prevalence of same-sex and gender behaviour in South Africa is unknown. The stigmatisation of HIV infection and AIDS exacerbate the challenge of understanding the HIV epidemic among the LGBT community in South Africa.[90] Although the *National Strategic Plan on HIV, STIs and TB 2012-2016*[91] acknowledges and incorporates the transgender community, 'there are no targeted government HIV programmes to meet the needs of the [transgender] community.'[92]

> Currently, in South Africa, targeted health care services for LGBT people are provided primarily by LGBT organisations, whose funding is for the most part dependent on foreign donors. To ensure that health facilities, goods and services are accessible to LGBT people, without discrimination, requires concerted and programmatic efforts in which the public sector becomes the leading agent. Shifts need to take place at both individual and institutional levels to ensure accessible, tolerant, safe and inclusive health care services and programmes.[93]

Lack of programmatic attention to gender minorities is borne out by inaccessibility and disempowerment being key inhibitors to the right to health. The discriminatory attitudes of health-service providers are a growing concern with some transgender people opting to use private

89 Gender DynamiX (n 86 above) 2.
90 L Rispel & C Metcalf 'Are South African HIV policies and programmes meeting the needs of same-sex practising individuals?' in V Reddy *et al* (eds) *From social silence to social science same-sex sexuality, HIV and gender in South Africa* (2009) 175.
91 'South African National Strategic Plan on HIV, STIs and TB 2012-2016' http://www.sahivsoc.org/upload/documents/National_Strategic_Plan_2012.pdf.
92 Rispel & Metcalf (n 90 above).
93 As above.

medical services where they can afford it.[94] However, for those to whom public health services are the only way to access basic health services, the interaction can be a traumatising experience.[95]

It is interesting to note that where a transgender person presents fully or 'passes',[96] they experience fewer to no challenges from health service providers.[97] Conformity with cisnormative expectations results in greater accessibility to health services. However, where incongruence is found, through official documents, there is a decline in service provision and service providers become hostile and discriminatory.[98]

Even though there is a clear link between incorrect documentation and discriminatory provision of health services to transgender persons, the provision of proper documentation has been fraught with misinterpretation and lack of implementing regulations.

5.1.3 Alteration of sex description and sex status in South Africa

The Alteration of Sex Description and Sex Status Act[99] (ASDSS Act) was enacted to enable transsexual and intersex persons undergoing gender reassignment treatment to change gender-markers and names in their identity documents upon the alteration of their sexual characteristics through surgical or medical intervention.[100]

An application for the alteration of one's gender-marker in the birth register must be accompanied by the birth certificate;[101] and in the case of an alteration through gender reassignment – this would apply specifically to transsexual and transgender persons – the application must be accompanied by two medical reports. The first is by a medical practitioner stating the nature and results of any procedures carried out and any treatment applied.[102] The second report is from an independent medical practitioner, affirming the observations and results of the first.[103]

94 M Stevens 'Transgender access to sexual health services in South Africa: Findings from key informant survey' 2012 http://www.genderdynamix.org.za/wp-content/uploads/2012/10/Transgender-access-to-sexual-health-services-in-South-Africa.pdf.
95 As above.
96 To present publicly as one's preferred gender or 'To be viewed by the majority of individuals as one's identified rather than assigned gender' S Maguen 'Providing culturally sensitive care for transgender patients' (2005) 12 *Cognitive and Behavioral Practice* 479.
97 M Stevens (n 94 above).
98 (n 94 above) Health workers have been reported as telling trans* individuals that their sexual practice and gender identity is against the law.
99 Alteration of Sex Description and Sex Status Act 49 of 2003, South Africa.
100 n 99 above, secs 2(1).
101 n 99 above, secs 2(2)(a).
102 n 99 above, secs 2(2)(b).
103 n 99 above, secs 2 (2)(c).

Section 3(2) of the ASDSS Act provides that a person who has successfully applied for the alteration of their sex description is 'deemed for all purposes to be a person of the sex description so altered as from the date of the recording of such alteration.' Further, 'rights and obligations that have been acquired by or accrued to such a person before the alteration of his or her sex description are not adversely affected by the alteration.' In other words section 3(2) of the Act allows *post facto* recognition of gender expression because upon successful application for the alteration of their sex-marker, a transsexual person can alter the sex description on their driver's license, educational qualifications and any other official documentation to reflect their self-defined gender.

The alteration of one's sex description forms a significant part of a transsexual person's transitioning process; allowing transsexual person in material terms to live as their self-defined gender and be legally recognised in that capacity. This affirms their right to a life of dignity and freedom of expression; the Act in line with international and foreign developments affirms transsexual gender self-identity through a conference of legal status to the chosen gender. A further progressive aspect of the ASDSS Act is its allowance of alteration of sex description in the absence of surgical intervention.

However, the Act is not without problems. The minimum threshold for applicability of the Act – medical treatment – is too high within the context of South Africa as many transsexual people do not have access to appropriate hormonal replacement therapy. Groote Schuur Hospital in the Western Cape and Steve Biko General Hospital in Gauteng province are currently the only public hospitals, which provide transgender needs specific medical care.[104] Further, persons who have lived in their preferred genders without medical intervention are excluded. For them, engaging in everyday activities can be a traumatic experience. The incongruence between their outward gender expression and their identity documents acts as a magnet for discrimination and prejudice.

Added to this is the fact that implementation of the ASDSS Act is poorly insufficient. In monitoring the lack of compliance with the ASDSS Act, Gender DynamiX assessed 49 known applications pending before the Department;[105] its findings reported 40 percent cases pending for 18 to 24 months as a result of the Department's insistence on proof of surgical gender reassignment, which is not a requirement under the Act.[106]

104 Klien (n 20 above) 58-59.
105 M Nduna & R Hamblin 'Alteration of sex description and sex status Act and access to services for transgender people in South Africa' (2013) 6 *New Voices in Psychology* 56.
106 As above.

Further, the report revealed a lack of legal and administrative bridge between the ASDSS Act, the Civil Union Act[107] and the Marriage Act.[108] Four percent of the cases for alteration of sex were pending as a result of the Department's insistence on a mandatory divorce of a couple, married under the Marriage Act, where one partner's transitioning resulted in the couple being a same sex couple.[109]

The problems result from imbedded assumptions about sex and gender as binary biological phenomena, unalterable and consistent from birth to death. The ASDSS Act envisions a movement from one stable biological sex, through medical or surgical intervention, towards another. In other words the ASDSS Act standardises and normalises sex and gender within existing binaries. It does not admit transgender experiences, which are neutral, non-specific or existing within a luminal experience.[110] Therefore, on the Department's interpretation, a self-identified Hijra or even an intersex person who simply wants their intersex state, without medical intervention, recognised would not be able to have their gender reflected in their identity document.

A Hijra South African would be viewed as a cross-dresser within the context of the Department's interpretation. This limiting interpretation disempowers those transgender persons who exist outside the medico-legal boundaries thus preventing them from expressing and experiencing in full their right to religious observation, dignity and freedom of expression.

Various factors prevent the Act's potential to be a rights accessing tool. Firstly, the Department's incorrect interpretation is a huge hindering factor. Section 2 (1) states that a person may apply to the Director-General when there has been an alteration of 'sexual characteristics resulting in gender reassignment' through 'natural development'. The Act defines gender reassignment as a 'a process which is undertaken for the purpose of reassigning a person's sex by changing physiological or other sexual characteristics, and includes any part of that process'.[111] Thus, according to the Act, any person who is in the process of transitioning can apply to change their gender marker and this includes those persons who have not yet undergone actual surgery.

107 Civil Union Act 17 of 2006 of Republic of South Africa.
108 Marriage Act 25 of 1961 of Republic of South Africa.
109 Nduna & Hamblin (n 105 above) 56.
110 AL Swarr *Sex in transition: Remaking gender and race in South Africa* (2011) https://www.researchgate.net/publication/286600146_Sex_in_transition_Remaking_gender_and_race_in_South_Africa.
111 n 99 above, sec 1.

Clearly, the insistence on proof of surgical intervention is contrary to the Act. Additionally, no regulations are in place to ensure the systematic implementation of the Act.[112] The lack of regulations means no standardisation and no reliable criteria for the fulfilment of the requirements for an application.[113] Thus applicants are often given verbal reasons, which are inconsistent with the Act's explicit demands. Therefore 'the Department as an administrative agency creates and enforces its own requirements in opposition to the Act and the Constitution.'[114]

Lastly, unlike its Australian counterpart,[115] the Act provides no mechanism for alteration when in a foreign country. Similarly, no provision is made for the inverse situation where a foreign national permanently residing in South Africa undergoes medical and surgical treatment and needs to change their documentation. This *lacuna* is particularly stressful and demeaning for persons with refugee status who have often left their home countries without official documentation or are from a state where the birth registry is neither easily accessible nor available.

The ASDSS Act is a progressive piece of legislation that provides for the recognition of those seeking to transition into their self-defined gender identity. However, the problematic implementation and lack of regulations renders it a hindrance to accessing certain rights by transgender persons. The current lack of a clear regulatory framework is a denial of the right to access just administrative action.[116] There is need to reform the Act by broadening it to include a third-gender category, which would extend its provisions to transgender persons who do not fall within the current binary gender categories.

6 Third-gender in South Africa: where to from here?

Recognising 'the injustices of our past'[117] perpetuated through the systematic denial of millions of South Africans of the fullness of their dignity on the basis of gender, sex and sexual orientation amongst other grounds,[118] South Africa, through its Constitution, particularly the right to

112 General information about South African identity books/identity documents http://www.home-affairs.gov.za/index.php/identity-documents2 (accessed 20 November 2014).
113 n 112 above
114 Klien (n 20 above) 55.
115 *Norrie* (n 67 above).
116 The Constitution (n 8 above) sec 33.
117 The Constitution (n 8 above) Preamble para 1.
118 *South African Police Service v Solidarity obo Barnard* 2014 ZACC 23.

equality, seeks to ensure basic rights in order to 'improve the quality of life of all its citizens and free the potential of each person.'[119]

Section 9(1) recognises equality before the law and section 9(2) provides:

> Equality includes the *full and equal enjoyment of all rights and freedoms.* To promote the achievement of equality, *legislative and other measures designed to protect and advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.* (emphasis added)

Transgender and gender non-conforming persons are one of the groups of persons who were and are being individually and systematically discriminated against on the basis of their gender. It is an imperative that government ensure reformatory measures to protect and advance this category of persons and promote substantive equality. Legislative reform allowing for self-definition falls under those measures targeted at creating an environment that fosters the promotion of 'the realisation of the socio-economic needs of all, especially the vulnerable.'[120]

The South African identity document is needed to access a variety of socio-economic benefits.[121] The Social Assistance Act[122] (SAA) makes provision for social assistance and determines the qualification requirements. The SAA Regulations stipulate that a person applying for social assistance must include their identity document[123] and in the case of a child, the identity document or valid birth certificate of each child in respect of whom the application is made.[124]

Further, section 21(1) of the SAA provides:

> A person is guilty of an offence if such person, when applying for social assistance, furnishes information which he or she knows to be untrue or misleading in a material respect or makes a representation which to his or her knowledge is false

The cumulative effect of the provisions together with the obstacles presented by the ASDSS Act make it impossible for transgender persons to access financial assistance. This is contrary to the Constitution's imperative of ensuring equal access to the benefits of the law. When access

119 The Constitution (n 8 above) sec 9
120 The Constitution (n 8 above) sec 9(2)
121 See secs 4(a) – (f) of the Social Assistance Act 13 of 2004. The Minister of Social Development, with the concurrence of the Minister of Finance makes available child support, care dependency, foster child, disability, older person's and war veteran's grants from monies allocated for such purposes.
122 Social Assistance Act (n 121 above).
123 Regulation 11 (a) of The regulations relating to the application for the payment of social assistance and the requirements or conditions in respect of eligibility for social assistance *GN R898* in *GG 31355* (22 August 2008).
124 Regulations on payment of social assistance (n 123 above) Regulation 11(b).

to socio-economic rights is denied, the rights to equality and human dignity are necessarily implicated.[125] Without the provision of a third-gender category, transgender persons and gender-nonconforming persons cannot access the benefits of the SAA Act without compromising their right to human dignity and life.

There are various models that South Africa could pursue in order to ensure the full and inclusive coverage of persons with variant gender categories. In order to manage, implement and administer a third-gender category which encompasses the full range of varied gender expressions and for the inclusion of gender expressions and identities which have not yet been articulated through social and political movements, I propose the adoption of the following gender inclusive models for gender recognition.

The first is no-gender. This model seeks to remove the sex descriptor from the identity documents of all South African citizens. This would necessitate the creation of an identification system which is rather based on biometric technologies like fingerprints or randomised number selection based systems, which are not based on gender or race. The second model is the opt-in model. The opt-in model generates gender neutral numbers for all children at birth. The gender of the baby is simply indicated as an X on their birth certificate. Once a child turns 16 – the legal age at which they qualify for a green bar-coded identity document – they have the ability to choose their sex descriptor until such a time they qualify under the ASDSSA to change it.

Self-identification is the third model. This model would require legal reform of the current sex descriptor alteration legislative framework. The self-identification method is based on the premise that every form of gender identity expression is legitimate and therefore should be recognised. This model would necessitate the removal of medical and surgery requirements in order to qualify to access it. This approach would lead to the depathologisation of the transgender community as a trans* person would not need a medical diagnosis in order to qualify for a change in their gender marker or sex descriptor. Further, it would lead to an expansion of what 'sex' as a gendered category means. The liberalisation of gender from the bureaucratic grip of the state means that more marginalised persons are able to access economic benefits which will increase their life chances and lower their level of vulnerability as individuals and a group.

In conclusion, the secondary discriminations experienced by transgender and gender non-conforming persons can be directly linked to the lack of an inclusive gender-marker and gender-marker changing administrative process that respects their rights to dignity and equality.

125 *Khosa & Others v Minister of Social Development & Others; Mahlaule & Another v Minister of Social Development* [2004] ZACC 11 para 40.

The third-gender category in all its permutations is a measure that would be a step towards ensuring that the rights guaranteed to all are indeed accessible to all.

CHAPTER 7 THE SUPPRESSION OF SEXUAL MINORITY RIGHTS: A CASE STUDY OF ZIMBABWE

*Esau Mandipa**

1 Introduction

In Zimbabwe, LGBTI people have endured state-sponsored homophobia and harassment for quite some time due to a culture of denial of their rights, as will be shown in the chapter.

This chapter examines the inadequacy of Zimbabwe's legal framework with regards to the protection and promotion of the rights of LGBTI people. The new Constitution, which was adopted in 2013, dealt a heavy blow to the protection of sexual minority rights by explicitly prohibiting same-sex marriages. Although the Constitution includes some generous human rights provisions that can be read to extend protection to LGBTI people, the problem still remains with 'conservative,' 'not independent' and 'cultural' judges and magistrates who are not prepared to uphold sexual minority rights. Furthermore, the Criminal Law (Codification and Reform) Act of Zimbabwe (the Criminal Law Act), still penalises 'sodomy'.[1] The continued criminalisation of homosexuality has therefore hindered the protection of gay rights. Zimbabwe still has a long way to go with regards to the protection and promotion of the rights of LGBTI people. The issue of homophobia is not a new phenomenon in Zimbabwe. For the past years, politicians, church leaders and court officials have vilified homosexual orientation as 'un-cultural' and 'a threat to nationhood.'[2] The President is on record lashing at homosexuals by

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1 Criminal Law (Codification and Reform) Act, Cap 9:23, sec 73.

2 See A Mare 'Not yet Uhuru for LGBTI people in Zimbabwe' in Heinrich Boll Foundation *Struggle for equality: Sexual orientation, gender identity and human rights in Africa* (2009) 29.

describing LGBTI people as 'worse than pigs and dogs.'[3] The Zimbabwe Republic Police (ZRP) has not spared the LGBTI community and their representative organisations either. Arbitrary arrests and detention are common experiences for LGBTI people whilst police raids are the orders of the day for the LGBTI representative organisations.[4] After a brief introduction, the chapter begins with a discussion of the legal framework on sexual minority rights in Zimbabwe.[5] It will be indicated that Zimbabwe's Constitution does not provide meaningful protection of the rights of LGBTI people mainly due to its prohibition of same-sex marriages. It will also be indicated that the Criminal Law Act further aggravates this absence of protection through the criminalisation of sodomy. Thereafter, a discussion on the prospects for promotion and protection of sexual minority rights in Zimbabwe ensues. The chapter concludes with specific and general recommendations with regards to the effective realisation of sexual minority rights in Zimbabwe.

2 Legal framework

2.1 The Constitution

Zimbabwe adopted a new Constitution, which came into force on 22 August 2013.[6] The non-discrimination clause in the first drafts provided for non-discrimination on the basis of 'circumstances of birth,' 'natural difference or condition' and 'other status.' However, the Zimbabwe African National Union – Patriotic Front (ZANU-PF)[7] rejected the drafts arguing that such provisions could be read as including non-discrimination

3 See Africa Undisguised 'Zimbabwe President says homosexuals are worse than pigs and dogs' http://www.africaundisguised.com/newsportal/story/Zimbabwe-president-says-homosexuals-are-worse-pigs-and-dogs (accessed 27 September 2013). The same sentiments were also repeated by the President in July 2013 during the run up to the harmonized elections. See A Laing 'Robert Mugabe criticizes Barack Obama's gay rights stance' *The Telegraph* 24 July 2013.http://www.telegraph.co.uk/news/worldnews/africaandindianocean/Zimbabwe/10200191/Robert-Mugabe-criticises-Barack-Obamas-gay-rights-stance.html (accessed 27 September 2013). More recently, just like the Zimbabwean President, the Gambian President is on record asserting that LGBTI people are more deadly than natural disasters and are the biggest threat to human existence-see 'Gays more deadly than natural disasters, says the Gambian leader' *The Herald* 1 October 2013.

4 In Zimbabwe, the most known LGBTI organisation is the Gays and Lesbians Association of Zimbabwe (GALZ). Police Officers have been raiding GALZ offices with impunity over the past years.

5 The term 'sexual minority rights' refers to the rights of LGBTI people.

6 The new Constitution was adopted through a referendum that was held in April 2013. The Constitution received the Presidential Assent on Wednesday 22 May 2013. However, only some sections of the Constitution came into force on the day of the presidential assent including the Bill of Rights in Chapter 4 and a provision on elections in Chapter 7. The Constitution as a whole document came into force on 22 August 2013.

7 ZANU-PF is a political party led by President RG Mugabe and has been in power from the date of Zimbabwe's independence in April 1980. During the elections held on 31 July 2013, ZANU-PF won the majority in Parliament.

based on sexual orientation.[8] The final provision on equality and non-discrimination in the Constitution provides as follows:[9]

> Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock.

The height of suppression of sexual minority rights is evidenced by the intended exclusion of sexual orientation as a prohibited ground of discrimination. Thus, the constitution-making process in Zimbabwe was full of mockery for LGBTI individuals and of the very concept of gay rights.[10] This position is exacerbated by the fact that the non-discrimination clause's scope is limited; it is a self-contained clause that does not admit analogous grounds.[11] In other words, the non-discrimination clause is not open-ended so as to admit grounds that are not explicitly listed. The position would have been different for LGBTI people if the non-discrimination clause was not exhaustive as is the position with the non-discrimination clause of the African Charter on Human and Peoples' Rights[12] or the South African Constitution,[13] where analogous grounds of discrimination not specifically mentioned are also included by the use of terms such as 'other status' or 'including' among the list of protected grounds.

The Constitution further provides that 'persons of the same sex are prohibited from marrying each other.'[14] Thus, the main problem in Zimbabwe is the definition of marriage as excluding same-sex marriages. The provisions are an explicit denial of sexual minority rights in Zimbabwe.

However, it can be argued that the Constitution only prohibits same-sex marriages but does not extend the prohibition to same-sex relationships. There is also no definition of what marriage entails under the Constitution. Furthermore, LGBTI people can still find protection under

8 M Epprecht 'The Constitution process and sexual minority rights in Zimbabwe' Solidarity Peace Trust http://www.solidaritypeacetrust.or/1226/the-constitution-process-and-sexual-minority-rights-in-Zimbabwe/ (accessed 25 March 2014).

9 Constitution of Zimbabwe 2013 sec 56(3).

10 Epprecht (n 8 above).

11 See AF Bayefsky 'The principle of equality or non-discrimination in international law' (1990) 11 *Human Rights Law Journal* 5, where it is indicated that a structural dimension of an equality or non-discrimination norm which will affect its scope is whether it is open-ended or self-contained.

12 See African Charter on Human and Peoples' Rights, article 2, the non-discrimination clause, which makes use of the term 'or other status.'

13 In addition to having sexual orientation as a prohibited ground of discrimination, sec 9 of the South African Constitution makes use of the term 'including'; showing that the list of grounds upon which unfair discrimination is prohibited is not exhaustive.

14 Constitution (n 9 above) sec 78(3).

other generous human rights provisions of the Constitution, which are described below.

The founding values and principles under the Constitution include the recognition of fundamental human rights and freedoms.[15] The recognition of the inherent dignity and equal worth of each human being is also provided for.[16] In the same breath, Section 51 provides that every person has inherent dignity in their private and public life and the right to have their inherent dignity respected and protected. It is submitted that the Constitution extends protection to LGBTI people to an extent. The recognition of the inherent dignity and equal worth of each human being is important especially for LGBTI people who are normally treated without dignity.

Further, rights protected under the Constitution also extend protection to LGBTI people, especially the right to privacy[17] and the right to freedom of assembly and association.[18] It is submitted that privacy includes one's sexual behaviour and orientation. LGBTI representative associations can also find protection under the right to freedom of association. Moreover, when interpreting the Constitution, courts of law and other tribunals are mandated to promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom.[19]

International law and all conventions that Zimbabwe is a party to have to be also taken into account when interpreting the Constitution.[20] Relevant foreign law may be considered.[21] It is submitted that such provisions are important in that developments at the international level pertaining to the promotion and protection of sexual minority rights are guiding principles to be applied in Zimbabwe. To that extent, the Constitution at least consolidates the protection and promotion of sexual minority rights in Zimbabwe.

Similarly, the Constitution provides that freedom of expression does not include incitement of violence, advocacy of hatred or hate speech, malicious injury to a person's reputation or dignity, or malicious or unwarranted breach of a person's right to privacy.[22] The Constitution is therefore commendable in that statements like 'homosexuals are worse than pigs and dogs' are to be rendered unconstitutional in Zimbabwe in that they constitute hate speech.

15 n 9 above, sec 3(1)(c).
16 As above.
17 n 9 above, sec 57.
18 n 9 above, sec 58.
19 n 9 above, sec 46(1)(b).
20 n 9 above, sec 46(1)(c).
21 n 9 above, sec 46(1)(e).
22 n 9 above, sec 61(5).

Notwithstanding the above arguments, one can submit that, though the Constitution contains generous human rights provisions that can be used to extend protection to LGBTI people, it is critical to note that interpretation depends on the purposive interpretation of the provisions in question and the calibre of the judges and magistrates of the day. Given the strong perception that the current judges and magistrates in Zimbabwe are conservative and lack independence,[23] there appears to be little hope for an improved protection and promotion of the LGBTI people in Zimbabwe.

2.2 The Criminal Law (Codification and Reform) Act

This Act regulates criminal conduct and does not extend any protection to LGBTI people. Although there is no explicit reference to homosexuality, the Act criminalises sodomy. The Act provides:[24]

> Any male person who, with the consent of another male person, knowingly performs with that other person anal sexual intercourse, or any act involving physical contact other than anal sexual intercourse that would be regarded by a reasonable person to be an indecent act, shall be guilty of sodomy and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding one year or both.

For the past few years, this provision has been used to harass suspected gay people in Zimbabwe.[25] Police officers also tend to use the provision to harass members of the representative organisations for LGBTI people.[26] However, it is unclear as to how membership of LGBTI organisations link with the commission of sodomy.

3 Prospects for protection and promotion of sexual minority rights in Zimbabwe

Although the Constitution is promising in that it embodies generous provisions that can be read to extend protection to LGBTI people in Zimbabwe, there are slim chances for improvement in Zimbabwe because of the following reasons.

23 See L Madhuku 'The appointment process of judges in Zimbabwe and its implications for the administration of justice' (2006) 21 *South African Public Law* 345; L Madhuku 'Constitutional protection of the independence of the judiciary: A survey of the position in Southern Africa' (2002) 4 *Journal of African Law* 234.

24 Criminal Law Act (n 1 above) sec 73(1).

25 See generally: GALZ (n 4 above) 'GALZ LGBTI rights violations report, 2011' https://76crimes.files.wordpress.com/2012/08/violations-report-a54.pdf (accessed 9 February 2016).

26 See 'GALZ statement on the raid of its offices on 20 August 2012' http://www.galz.co.zw/?p=776 (accessed 23 August 2013); see also 'Police inch closer to prosecuting GALZ leader' http://www.radiovop.com/index.php?news=9471 (accessed 25 July 2013).

Lack of political will

The current ZANU-PF Government is hostile with regards to the recognition, protection and promotion of sexual minority rights. Not only is the President on record denying sexual minority rights but some Cabinet Ministers have recently taken the same stance.[27] Given the fact that ZANU-PF won the majority in parliament during the last elections held on 31 July 2013,[28] it is quite likely that there are no prospects for enactment of new laws or the amendment of existing laws so as to pave the way for the clear protection and promotion of sexual minority rights in Zimbabwe.

In addition, though the opposition Movement for Democratic Change Zimbabwe-Tsvangirai (MDC-T) party had been advocating for the recognition and protection of sexual minority rights in Zimbabwe for some time,[29] its sudden turn is also a cause of concern. Recently, the opposition MDC-T party made a startling turn that they would not embrace sexual minority rights even if voted into power.[30] It can thus be submitted that Zimbabwe still has a long way to go in cultivating the political willingness for the protection and promotion of sexual minority rights.

Judicial conservatism and perceptions of bias

There is a strong perception in Zimbabwe that the judges and magistrates are not independent of the ZANU-PF Government.[31] Given the position that the ZANU-PF is hostile to sexual minority rights, it becomes difficult to see how the magistrates and judges can embrace the rights in question.[32] In addition, the Bench is also conservative as opposed to being liberal.[33] It can be argued that, even if the Constitution contains generous provisions which extend protection to LGBTI people, the current crop of judges and magistrates appear not to be in a position to recognise sexual minority

27 The former Minister of Justice, who is now the current Minister of Finance, is on record stating that anyone who practices homosexuality in Zimbabwe will face the ugly side of the law – see Z Murwira 'No space for gay rights in the Constitution' *The Herald* 6 July 2012. The current Minister for Information and Broadcasting services also recently ushered sentiments to the effect that there is no place for gay rights in Zimbabwe – see L Gumbo 'Copac in gay storm' *The Herald* 7 May 2012 www.herald.co.zw/copac-in-gay-storm/ (accessed 21 October 2013).

28 ZANU-PF won two-thirds parliamentary majority during the 31 July 2013 general elections.

29 See 'PM taken to task over gay rights' *The Zimbabwean* 16 November 2011 https://www.thezimbabwean.co/2011/11/pm-taken-to-task-over/.

30 See 'Tsvangirai contradicts himself' http://www.zbc.co.zw/news-categories/top-stories/13285-tsvangirai (accessed 23 July 2013); See also 'Zimbabwe's Tsvangirai MDC denies tabling gay rights bid' *Zimbabwe Star* 6 July 2011.

31 See Madhuku (n 23 above).

32 See the case of *S v Banana* 1998 2 ZLR 533, where consensual sodomy between adults is confirmed to be an offence in Zimbabwe.

33 See D Matyszak 'Creating a compliant judiciary in Zimbabwe' in K Malleson & PH Russell (eds) *Appointing judges in an age of judicial power, critical perspectives from around the world* (2006); also see K Saller *The judicial institution in Zimbabwe* (2004).

rights. Furthermore, the judges and magistrates give cultural reasons for the continued demonisation of sexual minority rights.[34] There are therefore slim prospects for the recognition and promotion of sexual minority rights in Zimbabwe.

Hostile media

Media plays a very important role with regards to information dissemination and colouring of perceptions. However, the media in Zimbabwe is very hostile when reporting about sexual minority rights.[35] There is a culture of denial for LGBTI rights and this culture is rampant within the public media. More often than not, stories that portray LGBTI people as moral outcasts are given prominence in the newspapers, radio and television broadcastings.[36] Zimbabwe thus still has a long way to go in embracing sexual minority rights.

Religion

Religion is one of the major factors in Zimbabwe for the non-recognition of same-sex marriage. This is because the lack of procreative potential of the union is viewed as unnatural.[37] Zimbabwe is predominantly Christian and the definition of marriage under Christianity excludes same-sex marriages. In the English case of *Corbett v Corbett*, it was held that marriage as understood in Christendom may be defined as the voluntary union for life of one man and the woman to the exclusion of all others.[38]

Such a definition has been supported by moral arguments which conceive marriage as being ordained by God since biblical time and that any form of sexual activity between two males or two females is against the law of nature and against the will of God.[39] Churches in Zimbabwe are on record as openly denying sexual minority rights and calling for the healing

34 Heinrich Boll Foundation (n 2 above). See also the case of *S v Banana* (n 32 above) in which the former president of Zimbabwe was sentenced to a long time in prison for allegedly committing sodomy. Reasons proffered by the trial officer in that case include the need to conserve positive cultural practices and natural order.

35 See GALZ LGBTI violations report (n 25 above) 12.

36 See for example 'Editorial Comment: Gay rights cannot be foisted onto the world' *Chronicle* 7 October 2015 http://www.chronicle.co.zw/editorial-comment-gay-rights-cannot-be-foisted-onto-the-world/ (accessed 9 February 2016).

37 See TL Mosikatsana 'The definitional exclusion of gays and lesbians from family status' (1996) 12 *South Africa Journal on Human Rights* 549; E Cameron 'Sexual orientation and the law' (1992) 3 *South Africa Human Rights Yearbook* 87; L Wolhuter 'Equality and the concept of difference: Same sex marriages in the light of the final constitution' (1997) 114 *South Africa Law Journal* 389.

38 *Corbett v Corbett* [1970] 2 ALL ER 99. See also the case of *W v W* 1976 2 SA 308, 310E.

39 Mosikatsana (n 37 above) 550.

of LGBTI people.[40] Resultantly, stigma and rejection from churches are common experiences faced by LGBTI people in Zimbabwe.

4 Recommendations and conclusion

A number of legal reforms have to be taken in Zimbabwe for the protection and promotion of sexual minority rights, starting with the Constitution. Whereas the Constitution is applauded for generous human rights provisions, which may extend protection to LGBTI people, section 56, which provides for equality and non-discrimination, should be amended so as to explicitly include sexual orientation as a prohibited ground of discrimination. Alternatively, this may be done by the adoption of the term 'any other status' following the list of the grounds upon which discrimination is prohibited.

Apart from the Constitution, 'sodomy' has to be decriminalised in Zimbabwe. Not only is the crime of sodomy discriminatory against gay people, but the continuous criminalisation thereof serves further to suppress the rights of gay people, including the rights to freedom of association, choice, inherent dignity and privacy. To supplement the law, policies aimed at raising awareness within the society about the need to recognise, protect and promote the rights of LGBTI people ought to be adopted.

Conclusively, change at the individual level is of paramount importance. Individuals can learn to reject hate speech, stigma and homophobia. It is high time that Zimbabweans recognise and respect human difference. LGBTI people are part of humanity and have equal rights and bear equal obligations. As long as the culture of denial persists, this will further fuel discrimination and the spread of HIV.

There can be no definite prescription for how these suggested changes can be realised. However, an opportunity for movement towards this direction can be explored through targeted advocacy and litigation strategies by local LGBTI organisations such as the Gays and Lesbians Association of Zimbabwe (GALZ), which monitors and reports human rights violations against LGBTI community. GALZ has also established networks with local legal societies such as the Zimbabwe Lawyers for Human Rights and continues to operate in the challenging social and political context illustrated above.

40 See 'Gays, lesbians mentally sick' *Zimbabwe Newsday* 3 April 2014 http://www.zimbabwenewsday.co.uk/2014/04/gays-lesbians-mentally-sick-makandiwa/.

CHAPTER 8

A PSYCHO-LEGAL REFLECTION ON ISSUES SURROUNDING THE LGBTI COMMUNITY IN MAURITIUS

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1 Introduction

One might be tempted to conclude a discussion on sexual minorities' rights in Mauritius by saying that lesbians, gays, bisexuals, transgender and intersex (LGBTI) people are not persecuted and their rights are respected. Perhaps this would not be a wrong conclusion. To a large extent, it is safe to say that sexual minorities face much less difficulty to their lives in Mauritius compared to any other African state. However, if one looked closer, it might become evident that while LGBTI persons in Mauritius may be relatively safe from the law and state authority, they are not necessarily safe from society. While the law provides for significant protection of sexual minorities, they still have to face the wrath of society. This fact may not be so visible as it does not always manifest through violence.

The Republic of Mauritius, often labelled as the 'star' and 'key'[1] of the Indian Ocean, is also often referred to as a human rights paradise[2] on the African continent. Mauritius remains a favourite tourist destination and is equally showcased as a safe haven of peaceful cohabitation – of no political instability, violence or persecution of minorities. However, this chapter tries to paint a deeper picture of the Mauritian reality and argues that there are hidden cues of non-acceptance, discrimination and violence against

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1 http://www.ywamafrica.org/Southern/Mauritius/about-m/about-m.htm (accessed 9 January 2015).

2 The World Outline 'Mauritius: A honeymoon destination and human rights paradise?' http://theworldoutline.com/2013/10/mauritius-human-rights/ (accessed 8 January 2015).

minorities, with the LGBTI community presenting as one of the easiest targets.

For its adherence to the values and principles of participation and human rights, the Mo Ibrahim Foundation applauds the country by in 2014 placing it on the first rank of the Ibrahim Index of African Governance.[3] However, even though Mauritius is known for its peaceful co-existence and tolerance of multi-ethnic and religious groups, the discussion of LGBTI issues is not always openly received. It triggers the often unseen and untold side of Mauritians – the feelings of discrimination, intolerance, hatred and violence towards members of the LGBTI community. While it is commendable that the law as an institution does not really pose a major problem to the LGBTI community in Mauritius, we suggest that the psychological barriers towards acceptance remain a major hurdle. We also try to highlight the gap between the dictates of the law and the wishes of the majority of the Mauritian community.

Being ardent believers that human rights law cannot be discussed in a vacuum but has to be seen through a multidisciplinary lens, we propose a psycho-legal approach to the issue of homosexuality in Mauritius is proposed. Throughout the chapter, we have attempted to analyse the dissonance between the law being pro-LGBTI rights since there is no prohibition directly on sexual minorities on the one hand, and state institutions such as the police and ministries or the bigger section of the citizens being against the LGBTI community, on the other. The first part of the chapter assesses the Mauritian legal framework that seems more or less supportive of the LGBTI community while the second part discusses the psychological aspect, which represents the most daunting obstacle for the enjoyment of LGBTI rights in Mauritius. This helps to elucidate the distinction between what the dictates of the law are and where the problem lies in its implementation.

We argue that the mere inclusion of the principle of non-discrimination in the law does not suffice to alleviate the suffering that the LGBTI community faces in Mauritius. We observe that there is a disconnect between the law and the lived realities of people. In non-technical terms, this chapter will use Mauritius as a case study to show that LGBTI people do not only need legal protection from the law; they also need acceptance, love and protection from society.

The methodology adopted for this chapter is recording the narratives of and conducting interviews with members of the LGBTI community and different stakeholders such as individuals working in civil society organisations. The examples shared in this chapter have been taken from

3 Mo Ibrahim Foundation '2014 Ibrahim Index of African Governance: Country profiles' (2014) 34 http://www.moibrahimfoundation.org/iiag-resources/(accessed 8 January 2015).

the various narratives of the interviewees. The data was gathered from the face to face interviews with the participants on a one to one basis as well as group discussions. There is limited literature on the issues surrounding the LGBTI community in Mauritius and therefore narratives and interviews[4] were selected as the appropriate methodology to give more insight into the issues being discussed.

2 An overview of the legal framework in relation to homosexuality in Mauritius

In Mauritius, the Constitution is the supreme law of the land.[5] As mentioned earlier, while the issue of homosexuality is not widely discussed, LGBTI people remain a group of individuals whose rights continue to be violated, perhaps rarely by the state and more often by members of the Mauritian society. Chapter II of the Constitution provides for the protection of fundamental rights and freedoms of the individual. Articles 5, 11, 12 and 16, which provide for the protection of the right to personal liberty, protection of freedom of conscience, protection of freedom of expression, and protection from discrimination respectively, are crucial in understanding the complexity of factors preventing the full enjoyment of Constitutional rights by LGBTI persons in Mauritius as is further demonstrated below.

With reference to articles 5 and 11 of the Constitution, LGBTI individuals are not in an atmosphere conducive to the enjoyment of their rights to personal liberty and freedom of conscience, as they are often considered as 'non-conformist' since they do not fit in the hetero-normative confines that their society has laid. For example, one of the interviewees, when asked how the rights to personal liberty and freedom of conscience were violated or curtailed, stated that many parents confine teenagers to their homes once they come out as gay or lesbian.[6] Not only do the parents prevent them from going to school but they also stop their interaction with everybody else.[7] As such, with fear of reprisals many teenagers and other individuals who stay under the familial roof consider it unsafe to come out.[8]

4 The interviewees requested that their identities be kept anonymous. The interviews were conducted in 2 sessions on 5 and 10 January 2015. All the interviews (face to face and group) are on file with the authors.
5 Constitution of the Republic of Mauritius art 1.
6 Interviewee 1 (on file with authors).
7 As above.
8 As above.

2.1 Freedom of expression, freedom of assembly and the annual gay pride march

Mauritius holds a gay pride march every year. It was held for the first time in 2006.[9] The gay pride march is an assembly of individuals of the LGBTI community marching in the city centre of the capital city, Port Louis, with banners and posters related to issues concerning sexual minorities. A great number of local and international participants attend the pride which attracts an average of about 400 individuals every year, many of them belonging to the LGBTI community.[10] The gay pride march gives a platform to members of the LGBTI community to express themselves freely and even though the public may disapprove of it, the municipal council and the police have never stopped it on this account. A member of the Mauritian branch of the Young Queer Alliance, which is a non-governmental organisation working in the field of LGBTI rights, stated that 'the municipal council has been supportive of the cause and ensured that there was no hindrance to the assembly.'[11]

Even if the mainstream media does not write op-eds or articles about homosexuality, the gay pride march receives adequate coverage in the media. In fact, it is one of the rare events that is covered extensively by both print and online media. However, as one of the interviewees expressed, the media does not provide a strong platform for raising awareness about the issues surrounding the LGBTI community.[12] She maintained that the media engages in selective coverage and discussion of LGBTI issues. She further stated that while the media provides them some visibility, it was mostly done on international days such as the international day against homophobia. Thus it seems that for many members of the LGBTI community, their visibility in the media is mere tokenism instead of a genuine concern to their cause.

2.2 Domestic law

This section is divided into three parts. It paints a chronological picture of the laws related to sexual minorities' issues. It begins with an analysis of the criminalisation of sodomy in the Criminal Code followed by the introduction of the Sexual Offences Bill, which attempted to decriminalise sodomy and finally, it discusses the Equal Opportunities Act, which recognises sexual orientation as a ground of non-discrimination.

9 A Towle 'Mauritius holds first gay pride' 22 May 2006 http://www.towleroad.com/2006/05/mauritius_holds/ (accessed 15 January 2015).
10 As above.
11 Interviews (n 4 above).
12 Interviewee 1 (n 6 above).

2.2.1 Criminalisation of consensual same-sex acts in the Criminal Code

Homosexuality is not specifically criminalised in Mauritius. Like many former British colonies with inherited criminal legislation, the Criminal Code (1838) of Mauritius:[13] criminalises sodomy both among homosexual and heterosexual couples under section 250[14] and illegal sexual activity under section 249.[15] There has not been any change to these sections and even today consensual same-sex acts (often referred to as 'sodomy') remain criminal in Mauritius.

The act of sodomy is more associated with male homosexuals than female homosexuals due to the religious and legal definition given to the act.[16] Thus, at first glance, it appears that gay men are more penalised compared to lesbians, as it is assumed that only gay men engage in sodomy. JD Wong, spokesperson of *Collectif Arc en Ciel*, an NGO founded in Mauritius in 2005 to fight for the rights of victims of discrimination based on sexual orientation, mentioned in one of his interviews that it was inconceivable that in 2013, people are still linking sodomy to bestiality.[17] Sodomy and bestiality are two different crimes and the fact that section 250 of the Criminal Code, which criminalises both sodomy and bestiality, does not define the elements of the crime makes it even more difficult for the Mauritian population to distinguish between the two terms. The criminalisation of sodomy thus remains more applicable to males rather than females. The criminalisation of female homosexuality is not expressed overtly. Here, it is noteworthy that since homosexuals are not a homogenous group, a single classification of criminalisation of a sexual act weighs heavier on one side than the other.

In its 2013 human rights report on Mauritius, the US Department of State mentioned that in the cases of sodomy reported to the police, most pertained to heterosexual couples. No such cases of sodomy were reported from homosexuals.[18] Thus, this depicts that sodomy as an act extends to

13 Commonwealth Human Rights Initiative 'CHRI Africa: Promoting Human Rights in the African Members of the Commonwealth' http://chriafrica.blogspot.com/2011/07/lgbt-situation-in-mauritius.html (accessed 23 January 2015).

14 Criminal Code Act Cap 195 1838 sec 250 'criminalises sodomy and bestiality, finding that any person who is guilty of the crime shall be liable to penal servitude for a term not exceeding 5 years.'

15 n 17 above, sec 249 criminalises rape, attempt upon chastity and illegal sexual intercourse. Any person who is guilty of the crime of rape, shall be liable to penal servitude for a term which shall not be less than 5 years. Any person, who commits an indecent act ['attentat à la pudeur'] by force or without consent upon a person of either sex, shall be liable to penal servitude for a term not exceeding 5 years.

16 'Before homosexuality: Sodomy' 2015 http://www.banap.net/spip.php?article122 (accessed 25 January 2015).

17 Mauritius IDAHO Report 2013 http://dayagainsthomophobia.org/mauritius-idaho-report-2013/ (accessed 15 January 2015).

18 Mauritius 2013 Human Rights Report http://photos.state.gov/libraries/mauritius/882940/hrr-2013/hrr-mauritius-2013.pdf (accessed 15 January 2015).

both homosexuals and heterosexuals and therefore merely condemning male homosexuals for engaging in sodomy remains an act of selective persecution.

2.2.2 Sexual Offences Bill

The issue of sodomy and bestiality being in the same section without any clear definition of what constitutes these crimes remained a controversial topic for a long time in the Mauritian legal scenario. Furthermore, the criminalisation of sodomy was also a debatable topic. The Sexual Offences Bill (the Bill) was proposed as an alternative to address these issues. The Bill aimed at decriminalising sodomy as an act and engaging in a clear definition of what bestiality entails. The Sexual Offences Bill,[19] as proposed by the Law Reform Commission in 2007,[20] is still being debated in Mauritius and has not been passed by the Parliament, largely due to the change in the ruling party after the 2010 elections.

The midterm assessment report of the 17th session of Universal Periodic Review urged Mauritius to pass the Sexual Offences Bill as it concluded that sexual rights had only been partly implemented.[21] The passage of the Sexual Offences Bill would be a ray of hope for the LGBTI community, even if many of them wished for altogether different legislation, which would give them adequate recognition and provide stronger legal support in the face of injustice and discrimination.

The Sexual Offences Bill faced much political debate because the Mauritian population raised the issue of morality. As enunciated previously, it has been observed that there is a disconnect between the law and the lived realities of the people. While some individuals welcomed this Bill, it faced resistance from majority of the population including among members of Parliament, who often cited it as a threat to the morality and sanctity of the social fabric. Parliament has to date not approved of the Bill being passed into law.[22]

19 The Sexual Offences Bill VI of 2007, Explanatory Memorandum http://mauritius assembly.gov.mu/English/Documents/bill0607.pdf (accessed 13 January 2015).

20 Law Reform Commission 'Issue Paper: Commentary on the Human Rights Dimension of the Sexual Offences Bill VI of 2007' (2007) http://lrc.govmu.org/English/Documents/Reports and Papers/53 iss-hum-071009.pdf (accessed 16 January 2015).

21 UPR Info 'Mauritius: Mid-term Implementation Assessment' http://www.uprinfo.org/followup/assessments/session17/mauritius/MIA-Mauritius.pdf (accessed 16 January 2015).

22 'Sodomy halts debate on sexual offences bill' (2007) http://www.lexpress.mu/article/sodomy-halts-debates-sexual-offences-bill (accessed 10 January 2015).

2.2.3 The Equal Opportunities Act

While the introduction of the Sexual Offences Bill created a lot of divided opinion in the political and legal arena, the introduction of the Equal Opportunities Act was smoother. It included sexual orientation as a category alongside other categories for non-discrimination. It did not specifically target sexual minorities like the Sexual Offences Bill was assumed to do. The Equal Opportunities Act of 2008 prohibits discrimination on the grounds of age, caste, colour, creed, ethnic origin, impairment, marital status, place of origin, political opinion, race, sex, and *sexual orientation* in various spheres of activities, namely employment, education, provision of goods, services or facilities, accommodation, disposal of immovable property, companies, partnerships, societies, or registered associations, clubs, and access to premises and sports. The inclusion of the term 'sexual orientation' was a crucial step towards the recognition of LGBTI persons. It signalled that Mauritius recognised the danger of discrimination against LGBTI persons and had taken a step towards remedying it.[23] The Equal Opportunities Act was warmly received by the LGBTI community and civil society as it demonstrated a principle of non-discrimination cross-cutting through all segments of the population.

2.3 International treaties

The introduction of the Equal Opportunities Act was a positive step taken by the government with regards to the discrimination faced by the members of the LGBTI community. In addition to it, Mauritius also supported the UN Declaration on Sexual Orientation and Gender Identity on 11 December 2008, which shows, at least in principle, the willingness to bring change in the country. Mauritius did not restrict itself towards bringing a change on the national level but also acted in good faith with its position on the international fora. Furthermore, the signing of the Declaration was also gladly accepted by some individuals and civil society organisations in Mauritius. However, the Mauritian population still remains largely resistant to the notion of acceptance of the LGBTI individuals in their midst. Although Mauritius signed the Declaration, since it is mostly of persuasive value and does not place an obligation on the Mauritian state to change its laws, there has not been any major development after the signing of the Declaration. Also, Mauritius is a state party to the ICCPR and the African Charter where the clause of non-discrimination applies to everyone, without any distinction. By the ratification of these treaties, Mauritius has an obligation to protect the rights of each and everyone irrespective of one's sexual orientation.

23 Mauritius Equal Opportunities Commission 'Guidelines for Employers' (2013) http://eoc.govmu.org/English//DOCUMENTS/EMPLOYERSGUIDELINES.PDF (accessed 11 January 2015).

2.4 Cases of discrimination, arrests and torture of LGBTI persons

There have been several cases of discrimination and torture against the LGBTI community.[24] The rule of law has tried to protect the rights of the individuals of the LGBTI community; however, it is ironic that the institutions that are supposed to protect and implement the rule of law such as the police do not necessarily imbibe these views. Victims often face police officers who refuse to register their cases and instead blame them for the incident which happened to them.[25] Since the police often refused to register cases, it is difficult to have a record of how many incidents of assaults on members of the LGBTI community have occurred. We obtained the following information through narratives of the interviewees:

2.4.1 Homosexuals have 'dirty blood'

The following is an excerpt from the Equal Opportunities Commission Interim Report 2012 highlighting the discrimination that homosexuals have to go through even when they are volunteering for blood donation:[26]

> The case involving the Blood Donors Association of Mauritius and the Ministry of Health is one where the complainant alleges that he has been discriminated against on the basis of his sexual orientation. The complainant alleges that when one wishes to donate blood, there is a questionnaire one is required to complete, as part of the blood screening process. Part of the questionnaire asks the question whether the prospective donor has been involved in homosexual activities, and if the answer is in the affirmative, the prospective donor is permanently disqualified from donating blood. The complainant alleges that this part of the questionnaire discriminates against homosexuals as a group of persons and also stigmatises them as having 'dirty blood' as compared to heterosexuals.

The Government reported in the 2013 annual human rights report that it acknowledged that this was directly targeted at homosexuals and thus was discriminatory.[27] While the government claimed that it took action to remedy this anomaly, one interviewee confirmed that even though the wording of the questions had been changed, the figurative meaning behind remained the same.[28] For example, the question was changed from 'did you have sexual intercourse with person of the same sex' to 'did you engage in any illegal sexual activity?', which was still discriminatory towards members of the LGBTI community as it was still echoing the idea

24 Some of these cases were retrieved from newspaper publications. Others were gleaned from shared experiences of interviewees during the group discussions.
25 Interviewee 2 (on file with authors).
26 Mauritius Equal Opportunities Commission 'Interim Report, May-October 2012' 2012 http://eoc.govmu.org/English/Documents/eocweb.pdf.
27 Human Rights Report (n 18 above).
28 n 25 above.

behind 'having sex with person of the same sex'. Therefore, even though the blood donors association made some changes, the inherent idea of knowing a person's sexual activities was very much present, and as such a violation to their right to privacy.

2.4.2 A family kidnaps a lesbian girl

On 6 June 2010, a young girl was kidnapped from the beach by her own family members and confined to the family house to stop her from meeting her girlfriend. She belonged to the Muslim community and was repeatedly told by her parents that the other girl is trying to poison her mind.[29] The police refused to cooperate by refusing to register the case by highlighting that this is a familial issue and they did not want to be involved in it. In the same light, another girl was severely beaten by her parents and put in a mental asylum because she was thought to be possessed by the devil.[30] In none of these two cases did the police cooperate or try to offer protection to the victims in question.

2.4.3 Discrimination at the workplace

A homosexual male working in the capital recently faced discrimination at his workplace after he declared his sexual orientation. His employers accused him of soiling the reputation of the company.[31] The Equal Opportunities Act was in fact an attempt to provide solutions to such instances of discrimination, especially in the workplace. In 2010 and 2012, respectively, research carried out by the Integrated Biological and Behavioural Survey in Mauritius pointed out that 17 per cent of MSM [Men having Sex with Men] were ever refused service in Mauritius and that 10 per cent were refused employment, 8 per cent refused housing and 8 per cent were hit or kicked in the past year because of their sexual orientation (IBBS 2010). The same study revealed that 84 per cent of MSM reported receiving verbal insults and 7.4 per cent were assaulted because they were perceived to have sex with men (IBBS 2012). Both studies were conducted by the National AIDS Secretariat under the Prime Minister's

29 A Valenza 'Family kidnaps and holds lesbian hostage' http://ilga.org/family-kidnaps-and-holds-lesbian-hostage/(accessed 13 January 2015).

30 H Bangre 'Mauritius: kidnapped to "cure" their homosexuality' 24 August 2010 http://madikazemi.blogspot.com/2010/08/mauritius-kidna8pped-to-cure-their.html (accessed 13 January 2015).

31 'Homosexuality: Is it becoming more acceptable in today's modern society?' http://www.defimedia.info/news-sunday/society/item/29304-homo sexuality-is-it-becoming-more-acceptable-in-today-s-modern-society.html (accessed 14 January 2015).

Office and the Ministry of Health and Quality of Life with other partners and collaborators from civil society.[32]

2.5 NGOs, civil societies and individuals working in the field

The two main NGOs working in the field are: the Gay and Lesbian Alliance of Mauritius, and *Collectif Arc en Ciel* (CAC). The Gay & Lesbian Alliance of Mauritius maintains that LGBTI persons are not recognised in the eyes of the law in Mauritius.[33] They maintain that they would still want to see the LGBTI community be recognised as a specific category and be given all their rights and recognition. The CAC reports on the reality and daily discriminations faced by the LGBTI community in Mauritius. Even though the law condemns discrimination on the basis of sexual orientation, no possible concrete means are available to seek acknowledgement of and compensation for any discrimination or violence due to actual or presumed sexual orientation, as institutions of the law such as the police act as the first barrier towards obtaining justice. The National Human Rights Commission and the Equal Opportunities Commission prefer to receive and act on complaints received from heterosexual individuals as opposed to complaints received from homosexuals. CAC highlights the importance of raising awareness about any form of discrimination and of setting up local structures and facilities offering medical and psychological support to the transgender and transsexual community. CAC further wishes that all incitement or homophobic acts be acknowledged and punished by law and requested the establishment of support structures for victims of physical and psychological abuse, including specialised police units.[34] An activist in the field of sexual minorities in Mauritius, the former Attorney General Mr Rama Valayden, is often criticised of trying to pollute and corrupt the moral sanctity of Mauritians, as he wanted to legalise marijuana at the same time of decriminalising sodomy.[35] Mr Nicholas Ritter, the Director of CAC, is often looked down upon because of his HIV positive status and thus the efforts that he make towards the recognition of persons of the LGBTI community are received with a lot of contempt because of the stereotypes and stigma attached to associating homosexuality with sexual conduct which leads to the spread of HIV.[36]

32 N Fokeerbux 'Protection from homophobia for freedom of expression: the next issue on Mauritius LGBTIQ agenda?' (2014) https://theenlighteneddarkmage. wordpress. com/2014/02/04/protection-from-homophobia-for-freedom-of-expression-the-next-issue-on-mauritius-lgbtqi-agenda/ (accessed 10 January 2015).

33 The world outline (n 2 above).

34 Lemauricien 'COLLECTIF ARC-EN-CIEL: Un site internet pour etre plus accessible a la communaute LGBTI' (2011) http://www.lemauricien.com/article/collectif-arc-en-ciel-site-internet-%C3%AAtre-plus-accessible-%C3%A0-la-communaut%C3%A9-lgbti (accessed 10 January 2015).

35 'Mauritian gay people seek legal protection' *Mail & Guardian* 2006 http://mg.co.za/article/2006-05-23-mauritian-gay-people-seek-legal-protection (accessed 15 January 2015).

36 Interviewee 3 (on file with author).

One of the major problems faced by the NGOs, as narrated by an interviewee is the issue of funding.[37] It was observed that NGOs working in other fields receive funding from the Ministry of Social Welfare; however, their work in the field on LGBTI does not attract positive response from the Ministry. Thus this again reiterates the fact that even though the state may appear to be LGBTI friendly, when it comes down to institutions of the state, it does not translate into action. The interviewee also mentioned that the Ministry of Health does not invite the NGOs working in the field of LGBTI rights when it organises workshops on sexual and reproductive health. Moreover, it does not place the issue in its work plans despite repeated letters written by representatives of organisations working in the field of LGBTI rights, to the ministry.[38] This situation also has a ripple effect in the sense that NGOS do not focus their work specifically in the field of LGBTI rights. For example, CAC works more closely with sex workers and HIV positive individuals as compared to having a distinct division catering for the LGBTI community.

Moreover there is more support extended to heterosexual women who are victims of domestic violence and left homeless as compared to homosexuals who are forced to leave their family homes because of their sexual orientation. Women centres which provide shelter to victims of domestic violence refuse to admit the domestic violence faced by lesbians, transgender individuals or bisexuals.[39]

The following excerpt gives an idea of the psychological violence that the LGBTI community faces in Mauritius:[40]

> I shall illustrate my life as a gay teenager in the hell hole of Mauritius through just a few rhetorical questions to u.
> (1) Have u ever experienced walking towards a shop to get whatever and have straight guys scream out loud 'here comes the faggot, backs to the wall!' ha ha ha!
> (2) Have u ever had people get out of their seats in a picture theatre as u got seated next to them?
> (3) Have u ever experienced your very own father refusing a British Knighthood because of the shame of his own son being gay?
> (4) Have u ever experienced having to live as a hermit to avoid public humiliation?
> (5) Have u ever been forced to have sex with a woman/girl just to make sure that u didn't end up disfigured?
> (6) Have u ever been forced to walk longer distances to avoid people recognising u?

37 Interviewee 4 (on file with author).
38 n 12 above.
39 n 12 above.
40 'Being gay in Mauritius' Gay Mauritius News & Reports http://archive.globalgayz.com/africa/mauritius/gay-mauritius-news-and-reports-2008/ (accessed 8 February 2014).

> That was in a brief nutshell Mauritius for me. I can go further down the track to illustrate the Mauritian attitude towards gays, even outside of Mauritius. And there's more.
> (1) Have u ever been accused of being a pedophile just coz u're gay, by your very own btw?
> (2) Have u ever been told that u were not invited to family gatherings coz of your abnormality?
> (3) Have u ever been disinherited coz of your sexual orientation?
> (4) Have u ever experienced having no family at all just coz of your sexual orientation? ...

Thus the legal section of this article has discussed how the law in itself does not pose a major problem to the LGBTI community in Mauritius but it is mostly the institutions such as the police and ministries, which are the barriers in the acceptance and recognition of the LGBTI community in Mauritius. It also discussed the cases which some of the members of the LGBTI community had to face and received no support from the police. Furthermore this section also discussed the role played by the civil society organisations in Mauritius to fight for the rights of the LGBTI community. However, due to the backlash by the society, many NGOs are not ready to take up this cause or shift their focus to gender based violence instead of LGBTI rights. The next section demonstrates how, in the Mauritian scenario, the law is not the panacea but it is through inculcating a mindset change in the population towards a greater acceptance of sexual minorities which will bring positive results.

3 LGBTI and the political agenda

This section acts as a bridge between the legal section and the psychological aspect surrounding the LGBTI community in Mauritius. Politics plays an important role as many of the representatives are elected on the electoral campaign and the promises that they make to the nation. In this context, as a first of its kind, the 2014 elections campaign in Mauritius witnessed the LGBTI agenda in the electoral campaign of one of the mainstream parties. No party has ever openly proclaimed the inclusion of the LGBTI agenda in their electoral campaigns. The Labour Party in coalition with the MMM (Movement Militant Mauricien) put forward that there will be more positive action taken to end the discrimination that the LGBTI community faces in Mauritius should they win the elections.[41] However, even though this idea was on their political agenda, it was not discussed in the media. The print media discussed all the ideas mentioned in the electoral agenda of the Labour and MMM Party except the LGBTI issue. The same applied for the electronic media where several issues except the LGBTI agenda were discussed on national

41 Interviewee 2 (on file with the authors). The media did not discuss this aspect of the political manifesto during the campaign prior to the elections.

television. Thus, this again brings us to the fact that the media indulges in selective coverage whenever issues of LGBTI are brought up.

Furthermore, one of the questions that the interviewee asked when probed about his reactions on this issue was why the Labour Party did not put the same agenda into practice as they were the ruling party since 2005. He also felt that this was a political gimmick to win the elections instead of a real concern for the issues in the LGBTI community.[42]

4 Psychological analysis of homosexuality in Mauritius

As has been analysed previously, it can be observed that neither the law nor the state is the major problem area for LGBTI recognition and acceptance in Mauritius but it is mostly the institutions and in some cases individuals heading those institutions of the state, which pose a hindrance to the enjoyment of rights of the LGBTI community. The LGBTI community has been taken into consideration through different angles and perspectives and there have been a number of efforts by the state and the law to respect and promote their rights as mandated by the Constitution. The Equal Opportunities Act is a vivid example of the goodwill of the politicians to give everyone equal treatment and equal rights. However, even though the law may cater for the needs of all citizens and non-citizens through passing legislation that prevent anyone from indulging in discriminative practices, the LGBTI community in Mauritius still has a major hurdle to cross. As most of the interviewees demonstrate, the obstacle is the mindset of the Mauritian community. What can be gleaned from the analysis of the interviewees' narratives is that it is the deep-seated belief of morality, sanctity and purity of the institution of the heterosexual traditional family union that causes the major hindrance to the acceptance of homosexuals in Mauritius. Therefore, even though the Equal Opportunity Act prohibits discrimination, its implementation and the actual protection of LGBTI rights remain problematic.

By way of example, there have been a number of incidents of assaults on transgender persons.[43] However, those cases are neither reported by the media nor registered by police officers. One of the interviewees narrated that institutions such as the police engage in acts of discrimination towards the LGBTI community especially transgender individuals, however this does not escalate to the other groups such as the lesbian, gay and bisexual communities.[44] Their stance which they have repeatedly maintained in the face of such incidents is that the victim had looked for the trouble,[45]

42 As above.
43 Interviewee 1 (on file with the authors).
44 As above.
45 Interviewee 3 (on file with the authors).

insinuating a 'blame the victim' attitude. Therefore it can be observed that even though the law may prescribe the procedures of registering a reported complaint irrespective of whoever the complainant is, the police as the guardians of the rule of law and order in the country do not necessarily abide by or perform their duties when it comes to the LGBTI community due to their own personal beliefs. What will be discussed in the subsequent part of the chapter is how homosexuality is viewed and perceived from a psycho-social perspective. Using Bronfennbrenner's ecological theory, this section tries to delineate the different levels at which discrimination and inequality towards the LGBTI community exists in Mauritius.

In Mauritius, going against heteronormativity is akin to taboo, for example, it is rare to see people challenging the *status quo* in Mauritius.[46] People are known to be pacifists-with few cases of riots or violence occurring as compared to other countries.[47] However, attacks on transgender individuals specifically challenge this pacifist image of Mauritius. The 'islander mentality' which is described as being cut off from the rest of the world and thinking that by virtue of this one may be different from the rest somehow aptly characterises the Mauritian population.[48] Staying in our island very often closes us to the rest of the world. It is little wonder that questioning and changing our belief systems becomes uncomfortable. There is a widespread belief that homosexuality does not form part of the Mauritian heteronormativity which explains why there is so much resistance from the majority of the Mauritian population against accepting members of the LGBTI community, even with its progressive laws on LGBTI rights.

This section also places an important emphasis on the role played by the family as a societal institution. To paint the Mauritian psyche, it was important to give the historical background of Mauritius – the notion of the Mauritian identity (or hyphenated Identities, in this case) and the link to the continued extended nuclear family system.

4.1 Abnormal psychology perspective

Abnormal psychology for a long time classified homosexuality as a disorder in the Diagnostic and Statistical Manual.[49] It was categorised

46 S Wood 'Heteronormativity: why demystifying development's unspoken assumptions benefits us all' https://participationpower.wordpress.com/2013/11/06/heteronormativity-why-demystifying-developments-unspoken-assumptions-benefits-us-all/ (accessed 6 August 2016).

47 'Cultural diversity and the Mauritian society' http://vcampus.uom.ac.mu/soci1101/25cultural_diversity_and_the_mauritian_society.html (accessed 10 January 2015).

48 P Low 'Are you thinking like an Islander? Or more so like a cosmopolitan?' 2014 5 *International Journal of Business and Social Science* 59 http://ijbssnet.com/journals/Vol_5_No_9_August_2014/7.pdf (accessed 10 January 2015).

49 P Hickey 'Homosexuality: The mental illness that went away' *Behaviorism and Mental Health* 2011 http://www.behaviorismandmentalhealth.com/2011/10/08/homosexuality-the-mental-illness-that-went-away/ (accessed 15 January 2015).

with other mental disorders. The same concept was followed in Mauritius. In fact there was a case which was reported that a lesbian was beaten and sent to the mental hospital when her parents found out about her sexual orientation.[50] She was a Muslim and her being a lesbian was simply inconceivable to her family who were also Muslim. Her parents' only explanation was that 'she was mad' and this was a valid reason for her to be admitted in the mental hospital.[51]

Another incident happened where a teenager committed suicide because his school friends constantly teased him about being effeminate and he was tired of justifying that he was not gay. His family members say they fail to understand what drove him to commit suicide.[52] One of the interviewees said that due to fear of reprisals from family members, there are many homosexuals who refuse to come out.[53]

However, the fifth edition of the Diagnostic and Statistical Manual Text Revised (DSM V TR) declassified homosexuality as a psychological disorder.[54] What was previously considered as abnormal is no longer 'abnormal' but 'normal'. There has been a lot of debate as to what is considered normal or abnormal. Moreover, there has been criticism about the classification system of the DSM as it does not take into consideration the cultural relativity of different countries.[55] In Mauritius, however, it could be observed that the attitude towards the LGBTI community did not change with the times. Instead, there has been an increased resistance towards members of the LGBTI community. In the Mauritian psyche, homosexuals still belong to the abnormal category. An opinion or belief which is shared among many heterosexual youth in Mauritius is that 'being gay or lesbian is going against nature.'[56]

4.2 Social psychology perspective

One of the important premises of social psychology is the concept of identity.[57] Identity is defined as a person's perception and conception of his or her own self.[58] The way in which individuals identify themselves is unique. Homosexuals have a distinct identity of their own – it is about their idiosyncrasy and asserting their individuality. In creating and shaping the

50 Interviewee 3 (on file with authors).
51 Interviewee 1 (on file with authors).
52 As above.
53 Interviewee 3 (on file with authors).
54 Homosexuality was declassified as a mental disorder in 1973.
55 AN Chowdhury 'Culture, Psychiatry and Cultural Competence' in L L'abate (ed) Mental illnesses – understanding, prediction and control (2011).
56 n 12 above.
57 JA Howard 'Social psychology of identities' (2000) 26 *Annual Review of Sociology* 367 393.
58 See n 35 above.

identity of their off springs, the concept of nature and nurture both have an important role to play.

Parents maintain the strong line of difference between the roles of the two sexes.[59] They establish clearly defined gender roles. In many situations, parents are not able to distinguish between the gender roles and the sex of the offspring and this explains their behaviour in terms of constant threat and punishment towards the child if their male offspring, for example, dresses like a female.[60]

As one interviewee stated, parents would readily extend their support for others whose children are homosexuals but would refuse to do so when it came to their own children.[61] Accepting homosexuality, as many of the parents claim, is a sign of accepting what is changing. However, while externally they portray the semblance of acceptance, their deep-seated beliefs still remain the same.[62]

4.3 The 'us' versus 'them' concept

Tajfel and Turner proposed that the groups to which people belonged were an important source of pride and self-esteem. Groups give us a sense of social identity: a sense of belonging to the social world, a sense of sharing the same values and belief system. In order to increase our self-image, we enhance the status of the group to which we belong.[63] The concept of social identity is more broadly understood in terms of social affiliations such as liking the same football team, belonging to one school or organisation. In this context, we argue that the concept of social identity can also be extended to heterosexuals and homosexuals.

They further proposed that stereotyping (putting people into groups and categories) is based on a normal cognitive process, the tendency to group things together. In doing so, we tend to exaggerate:

(1) the differences between groups

(2) the similarities of things in the same group.

We categorise people in the same way. Categorisation seems to be one easy way of first labelling people and secondly associating certain specific traits with them. We see the group to which we belong (the in-group) as being different from the others (the out-group), and members of the same

59 R Suntoo 'Youth culture and development in Mauritius' (2011) 11 *Global Journal of Management and Business Research* 10 http://www.youthpolicy.org/national/Mauritius_2011_Youth_Policy_Briefing.pdf (accessed 20 January 2015).

60 n 12 above.

61 Interviewee 3 (on file with authors).

62 As above.

63 H Tajfel & JC Turner 'An integrative theory of intergroup conflict' in WG Austin & S Worchel (eds) *The social psychology of intergroup relations* (1979) 47.

group as being more similar than they are. Social categorisation is one explanation for prejudice attitudes (i.e. 'them' and 'us' mentality), which leads to in-groups and out-groups.[64]

Thus the in-group group and the out-group mentality or the us versus them concept can also be linked with the concept of the majority versus the minority. It is here suggested that in the Mauritian scenario, it is the rule of the majority; the discriminatory attitude of the majority towards the minority which has increased the resistance against the acceptance of sexual minorities in the country and also increased discrimination towards them. Therefore this concept of social identity helps us to understand the phenomenon of discrimination against the LGBTI community. The heterosexuals try to portray themselves as better and superior and look down on homosexuals.

4.4 Intersecting identities

The intersecting or intersectioning of identities describes the different roles played by all individuals in different spheres, segments and settings.[65] For example, one may be a rich white heterosexual father and the different identities which intersect are – the social class, the race, the sex and the gender role.

In Mauritius, the intersectioning of identities helps us to identify how the problems which members of the LGBTI community face differ from one segment to the other. For example, it is difficult for a housewife who is a lesbian to come out of her home as compared to a married male homosexual who gets to get out of the house and faces less restrictions than the former.[66]

4.4.1 Class issue

The class issue represents a major hurdle to some members of the LGBTI community in Mauritius. One of the interviewees stated that life can be extremely different for a rich homosexual who does not necessarily have to reside in Mauritius as compared to a poor homosexual who unfortunately does not have the adequate financial means to travel out of the country.[67] Moreover, the rich homosexual does not necessarily depend on his or her employer to earn a living, in comparison to the poor whose

64 SA McLeod *Social identity theory* 2008 http://www.simplypsychology.org/social-identity-theory.html (accessed 25 January 2015).

65 CA Parks 'Race/ethnicity and sexual orientation: Intersecting identities' https://myhs.ucdmc.ucdavis.edu/documents/41620/0/Patients+of+Color+-+Parks+Race+Ethnicity+and+Sexual+Orientation+Intersecting+Identities.pdf/34396501-16c2-40e9-88c7-4cdf6dbe7124 (accessed 18 January 2015).

66 Interviewee 4 (on file with authors).

67 Interviewee 4 (on file with authors).

only means of survival is employment in the public or private sector.[68] As explained earlier, there have been cases of discrimination against homosexuals in workplaces and they have mostly been in places where the working conditions are not regulated and thus it becomes difficult to keep track of the discrimination targeted against the LGBTI community.

4.4.2 Race issue

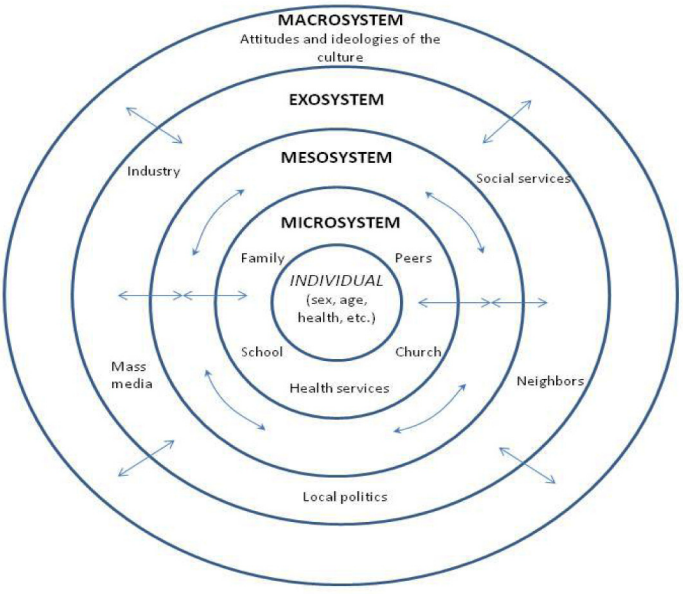
Since Mauritius is a multiracial society, there are myriads of races – from the Caucasians, Asians (Indo-Mauritians and Sino-Mauritians) and Afro-Creoles. In the economic ladder the Caucasians rank highest and the Afro-Creoles the lowest.[69] The Indo-Mauritians and Sino-Mauritians form the biggest upper middle income and middle income category.[70] This distinction has been perpetuated since the colonial times and the fact that the reigns of the economy are still controlled by the Caucasians in Mauritius extenuate this class differentiation. Although Mauritius is a multi-racial society and it appears that everybody co-exists peacefully, there are unwritten defined borders of separation. For example, it can be observed that the practice of interracial marriage is still a concept not accepted by many. Therefore, each race remains in their own circle. Thus, similar to the class issue, the race factor also plays an important role in the LGBTI community in Mauritius. A white homosexual gains more acceptance than an Asian homosexual as narrated by one interviewee on the predominance and importance of the race issue in Mauritius.[71]

4.5 Bronfenbrenner's ecological theory

The Bronfenbrenner's ecological theory serves to exemplify the different layers of identity and roles that homosexuals have to assume in their surroundings. The concept of the ecological theory emanated from developmental psychology, which explains the growth and development of the child with reference to his or her surroundings.[72] However, we have applied Bronfenbrenner's ecological theory model to consolidate our argument of intersectioning of identities and also highlight how the society is intertwined with the overlapping of the different segments such as the family, the school system, services and the employment field. The permeability of the surroundings also helps in elucidating the inter-

68 As above.
69 S Maurer 'Post-Colonialism: The so-called Malaise Creole in Mauritius' (2014) 10 *Antrocom Online Journal of Anthropology* 87 http://www.antrocom.net/upload/sub/antrocom/100114/10-Antrocom.pdf (accessed 20 January 2015).
70 The World Bank http://data.worldbank.org/country/mauritius (accessed 13 January 2015).
71 Interviewee 4 (on file with authors).
72 U Bronfenbrenner 'Ecological models of human development' *International Encyclopedia of Education* (1994) http://www.columbia.edu/cu/psychology/courses/3615/Readings/BronfenbrennerModelofDevelopment%28short%20version%29.pdf (accessed 25 January 2015).

sectioning of identities as has been discussed previously. Bronfenbrenner's ecological theory maintains that identities are not linear in nature but rather share a very intricate relationship in different spheres.[73] This is represented diagrammatically below:



The beginning of the individual's life starts with the microsystem and the mesosystem where it is the family, school and peers or playmates. It is the microsystem that stays closest to the individual. For members of the LGBTI community, it is breaking of the microsystem such as the family that is often the hardest since they remain the closest to the individuals, that is they are the persons of first contact to the LGBTI community. Few interviewees stated that they received family support however the biggest support came from their peers. Thus it could be gleaned that the family structure is not supportive enough to accept homosexuality in their midst. For members of the family it is again challenging the heteronormativity of the traditional family idea.[74]

4.6 Family system in Mauritius

Remaining in the realm of the microsystem and the mesosystem, to understand the issues faced by the LGBTI community in Mauritius, it

73 As above.
74 Interviewee 4 (on file with the authors).

becomes important to paint the typical Mauritian family system. The majority of the population is of Asian origin.[75] Mauritius has no indigenous population and thus it is the 5th generation of the indentured labourers who were brought from India and China post the abolition of slavery who currently form the majority of the Mauritian population. The population demographics are Indo-Mauritian 68 per cent, Afro-Creole 27 per cent, Sino-Mauritian 3 per cent, and Franco-Mauritian 2 per cent.[76]

The Asian community, especially the Indians still value community-living, as is evidenced by the existence of extended families which are founded on Indian values. Many families are still extended in nature with grandparents, parents and grandchildren staying under the same roof. In comparison with the western world where the autonomy and independence of children are valued, children in Asian communities tend to stay with their parents even after they become adults and get married. Therefore, as one interviewee narrated, it becomes 'suffocating' to continuously stay in the familial house knowing that one's parents and grandparents are in opposition to one's sexual orientation.[77] Many are forcefully married through the process of arranged marriages in order to hide their sexual orientation from the rest of society. In the saga of continued dependence versus independence, it is the freedom of the individual to live one's life on one's own terms that is put at stake.[78]

Moreover, even though the children may decide to leave separately after being financially independent, there are several landlords who will not allow two individuals of the same sex to stay together. For example, one interviewee narrated her episode of being refused to rent a house simply because she was going to stay with her partner who was of the same sex as her.[79]

4.7 Schools and schooling

Schools and schooling form a very important part in shaping the identity of the individual. They form part of the microsystem and the mesosystem in Bronfennbrenner's ecological theory. Primary schools and tertiary institutions are mostly co-educational institutions while the number of single-sex secondary schools out numbers the co-educational institutions. There is no sex education in the Mauritian curriculum, both for primary and secondary education.[80] Health education has recently been introduced

75 IndexMundi 'Mauritius Demographics Profile' (2014) http://www.indexmundi.com/mauritius/demographics_profile.html (accessed 25 January 2015).
76 As above.
77 Interviewee 5 (on file with the authors).
78 As above.
79 Interviewee 1 (on file with the authors).
80 SD Rughooputh 'Small island challenges in educational reforms: The case of Mauritius' http://irfd.org/events/wfsids/virtual/papers/sids_rughooputh4.pdf (accessed 14 January 2015).

in the primary curriculum but no mention is made of homosexuality. Furthermore, whenever the notion of family is mentioned, it is still the same stereotypical male-female family which is depicted. There are workshops held on sexuality in secondary schools at regular intervals. These workshops are normally conducted by the Ministry of Health purporting to create awareness on HIV prevention. However, these workshops concentrate mostly on heterosexual sex. No mention is made of homosexual sex and safety measures. This shows how the topic of homosexuality is completely left in the background.

There have been cases of peer pressure with regards to students who come out as gays or lesbians. Students have been bullied or constantly discriminated against.[81] There is a lack of counsellors in schools whenever such incidents happen. Even if there is the school counsellor, such practices are not usually observed for students who find it difficult to cope in situations of struggling with their sexual orientation. One interviewee also gave the example of a male homosexual teacher who was asked to resign from his job as the parents complained that he set a bad standard for their children who were his students. The parents equated his homosexuality to paedophilia and complained about the safety of their children.[82] Thus, this shows the level of strong resistance, misunderstanding and mistrust that parents and the school system in general have towards homosexuals.

The exosystem on the other hand shares a dual symbiotic relationship with the microsystem and the mesosystem – they reflect and influence each other. The exosystem consists of the industry, services, mass media and local politics. As enunciated previously, the mass media in Mauritius does not raise the topic of homosexuality. It is on very rare instances that a detailed article regarding the discrimination which exists towards the LGBTI community is highlighted in the media. Politicians also consider the LGBTI issue to be the least of their priorities. With the exception of the Equal Opportunities Act, which includes the clause of non-discrimination on the basis of sexual orientation, there has not been any other change in legislation. Moreover, even Parliament does not take up the issue of the LGBTI as a debatable topic. The stakeholders maintain that the parliamentarians turn a deaf ear to their requests and do not attend to their communiqués.[83]

In the Mauritian scenario, it is the macrosystem which consists of the values and the ideologies of the culture which poses the major problem to the acceptance of sexual minorities in Mauritius. The deep seated belief

81 Interviewee 1 (on file with the authors).
82 Interviewee 5 (on file with the authors).
83 General opinion of activists and civil society organisations, gleaned from the cumulative responses throughout the interviews.

system that homosexuality is abnormal is a hindrance to the enjoyment of rights of the LGBTI community.

4.8 Religion and the socio-cultural influence

The macrosystem deals with the cultural ideology of the society. In the Mauritian society, there is a strong influence of traditional cultures, which are fostered through the various norms, values and religious festivals celebrated in the country. The demographics of the different religious groups are as follows: Hindu 48.5 per cent, Roman Catholic 26.3 per cent, Muslim 17.3 per cent, other Christian 6.4 per cent.[84] Mauritians hold their religious views very closely and strongly. Traditions play a major role in their daily lives. It is ironic to see how gays and lesbians from other countries enjoy the beauty and serenity of Mauritius yet the native homosexuals can be driven away from their homes and country on account of their homosexuality.[85] It is indeed a peculiar dissonance on Mauritians' part to accept LGBTI tourists who may openly express their sexual orientation with no reprieve, but condemn and reject their fellow LGBTI citizens who would seek to also openly express themselves in their own country. As far as the religious indoctrination is concerned, the majority of Hindu fundamentalists think that homosexuality is a disease of the modern society, it is important to note that the topic has been illustrated in the Khajuraho caves of India and the Kamasutra[86] and has not been a subject of dissent since.

However, there is no overt display of indoctrination by religious group leaders at social gatherings or prayer sessions. But this is perhaps because the topic of homosexuality hardly comes up as a discussion in such contexts. As one interviewee stated '[T]he issue of homosexuality is not to be talked about – it is simply not acceptable'.[87] Whenever there are issues of coming out by homosexuals, many family members, especially the parents, seek the help and advice of religious leaders to 'guide and heal' their children.

5 The disconnect between law and reality

It is essential to highlight that when sexual orientation was included in the Equal Opportunities Act as a ground of non discrimination, very few people were aware of this fundamental change and those who were did not focus on its importance and did not popularise it. Other grounds of discrimination such as disability or HIV status were introduced with great

84 Mauritius Demographic Profile (n 75 above).
85 Interviewee 5 (on file with authors).
86 Religion Facts 'Hinduism and homosexuality' (2015) http://www.religionfacts.com/homosexuality/hinduism.htm (accessed 24 January 2015).
87 Interviewee 1 (on file with authors).

fanfare, as should be the case anyway, whereas the ground of sexual orientation was relegated to the background. It is safe to state that law-makers had the genuine interest of sexual minorities at heart when amending the law. However, they fell short of sensitising and educating the society on its existence and importance.

The disconnect between the law and realities pertaining to issues of homosexuality in Mauritius is evidenced by the lack of debate both in and outside Parliament. Debate is important as it is a means of clarifying misunderstandings about homosexuality. To reach consensus on this issue and to identify the institutions and structures to be set-up in order to reach a solution for the problem of resistance and non-acceptance of sexual minorities.[88] To reiterate the importance of debate on such issues and perhaps a missed opportunity to change the mindset of people towards homosexuality in Mauritius, parallels could be drawn from the amendment to criminal law legalising abortion in specific circumstances. Despite disagreement between various religious bodies and the state, debates at national level through media and focus groups, and in Parliament greatly helped to reach a consensus and to make the amendment understood and accepted by everyone.[89]

6 Conclusion and recommendations

LGBTI persons in Mauritius, even though partly recognised in the law through the Equal Opportunities Act, still face discriminatory attitudes from the society in general. There is no widespread acceptance of homosexuals in Mauritius and this is reflected at different levels – in the family, in the school, in the employment field and the political sphere. With the exception of two NGOs working in the field though peripherally, the LGBTI persons do not have an avenue to seek help whenever they feel they are being unjustly treated.

US Secretary of State Hillary Clinton has stated that '[g]ay rights are human rights, and human rights are gay rights, once and for all'.[90] This statement still needs to be internalised by Mauritians. They need to abide by the values of acceptance rather than tolerance that they preach and demonstrate in all other spheres of life except towards homosexuals. It

88 See NA Fokeerbux 'Homosexuality: Centralising the debate' (2011) https://theenlighteneddarkmage.wordpress.com/2011/07/05/homosexuality-centralising-the-debate/ (accessed 24 January 2015).

89 Y Buglow 'The Criminal Code (Amendment) Bill – is it not the green light to abortion' http://www.defimedia.info/news-sunday/society/item/12217-the-criminal-code-amendment-bill-%E2%80%93-is-not-the-green-light-to-abortion.html?tmpl=component&print=1 (accessed 20 January 2015).

90 TD Fitrell 'International Day Against Homophobia and Transphobia: Gay rights are human rights' LeMauricien (2012) http://www.lemauricien.com/article/international-day-against-homophobia-and-transphobia-idaho-gay-rights-are-human-rights (accessed 8 January 2015).

requires both an intellectual and humanitarian approach. Individual differences are what make the world – the beauty of it is how we accommodate those differences. For things to change, there needs to be a change in mindsets to realise that we are all human beings and nobody is allowed to subject any other individual to such atrocious discrimination due to their differences. Mauritius has an obligation to take appropriate measures to enforce its international human rights obligations. This is not only limited to legislative interventions. The Mauritian government must realise that legislative recognition has not necessarily translated into practical recognition. Consequently, there is the need for advocacy on attitudinal change for broader acceptance of LGBTI people in Mauritius.

CHAPTER 9

THE LEGAL STATUS OF SEXUAL MINORITIES IN MOZAMBIQUE

*Emerson Lopes**

1 Introduction

The acceptance of the rights of sexual minorities is not supported by most countries in Africa, founded on the argument that the recognition of these rights represents an affront to religious rights or fundamental values of African societies and African culture. However, each of these countries does have a legal framework which defines the rights of its citizens, and this includes those of its citizens that are sexual minorities. This chapter is a brief reflection on the legal status of rights of sexual minorities in Mozambique, including a consideration of the rules laid down in international treaties to which Mozambique is a party.

2 Rights of sexual minorities in light of international human rights treaties ratified by Mozambique

Mozambique ratified both the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (African Charter), which guarantee the rights to equality and freedom from discrimination.

Article 9 of the ICCPR secures the inherent dignity of persons deprived of liberty and articles 17 and 19 guarantee the rights to privacy and freedom of expression, while the African Charter under article 28 requires the promotion, respect for and reinforcement of 'mutual respect and tolerance' between all individuals.

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Articles 2 and 3 of the African Charter prohibit discrimination in an identical way to the ICCPR and require each individual to be equal before the law and be entitled to equal protection of the law.

3 Rights of sexual minorities in the light of Mozambique's domestic law

The Constitution of the Republic of Mozambique (the Constitution) is the primary source for an analysis of the status of rights of sexual minorities in Mozambique.

Although the word 'sexual minorities' does not appear explicitly in the Constitution, there are several clauses therein which incorporate the core components of the rights of sexual minorities. For instance, article 35 of the Constitution states that all citizens are equal before the law and reinforces that everyone should enjoy the same rights and be subject to the same duties, 'regardless of color, race, sex, ethnic origin, place of birth, religion, level of education, social position, marital status of parents, profession or political choice.' In other words, according to the Constitution of Mozambique, it is expressly prohibited to discriminate on grounds of sex or gender, at any levels, whether legislative, political, cultural, economic or social. While this constitutional provision appears to be in line with international obligations assumed by Mozambique, resulting from the aforementioned international treaties, one of the critical issues remains the incorporation of these norms within ordinary law. In fact, there is a major need in Mozambique for comprehensive law reform to ensure the compliance of existing legislation with provisions of the Constitution and international law. In general, constitutional provisions such as those in the Bill of Rights and the ratification of international treaties and covenants are ineffective if they are not supplemented by national legislation and regulations relating to human rights.

Although relations between persons of the same sex are not explicitly criminalised under ordinary legislation in Mozambique, there are some scattered legal provisions that give rise to concerns about the real guarantee of freedom from discrimination based on sexual orientation. For example, the now repealed Mozambican Criminal Code, which was in force until 29 June 2015,[1] prohibited 'unnatural vices' and ordered 'security measures' against those who regularly practice such 'vices against nature.' There was no definition of 'unnatural vices,' and many human rights activists raised concerns about the possible use of this prohibition tool to generate discriminatory interpretations of the Criminal Code in the sense of

1 Mozambique's Parliament adopted on 28 November 2014, the New Penal Code, after about 3 years of debates. The Code was subsequently ratified by the Mozambican President and Published in the Official Gazette 31 December 2014. It came into force on 29 June 2015, 180 days after its publication. See para 4 below.

persecution of individuals with minority sexual orientation in Mozambique.

Other statutory laws contain clear prohibitive language on same-sex marriages. Law 10/2004 of 10 August 2004, which codifies the family law in Mozambique, defines marriage as 'the voluntary and natural union between a man and a woman for the purpose of a family in full communion of life.'[2] This law also provides that a marriage contracted by two people of the same sex is considered a 'legally non-existent.' This provision therefore not only excludes LGBTI persons from marrying but also excludes them from enjoying the rights they would otherwise enjoy from the institution of marriage such as joint adoption and custody of children.

However, on a more positive note, Law 23/2007 of 1 August 2007, which codifies the Mozambican Labour Law, provides that all employees, without distinction based on sex, have the right to receive a wage and to enjoy equal privileges for equal work. It also enunciates that all provisions within the Law shall be interpreted in accordance with non-discrimination on grounds of sexual orientation or HIV and AIDS status, and any culpable violation of any principle laid down in the referenced Labour Law shall render the juridical act carried out in such circumstances null, without prejudice to civil and criminal liability incurred by the offender.[3] Accordingly, employers must respect employees' rights to privacy with regard to matters including personal relationships and sex lives and should ensure equal pay for employees regardless of their sexual orientation.

From the foregoing, it is evident that there is a lack of uniformity in the Mozambican legal system with respect to the rights of sexual minorities. While the labour law seems to be more progressive, other key ordinary legislation does not seem to accommodate this progressive trend.

4 The recent review of the Mozambique Penal Code

Mozambique's new Penal Code does not contain provisions on acts against the order of nature. These were removed as part of the process of overhauling the Code. This is a considerable advance towards the recognition of the rights of sexual minorities in the country.

Mozambique's civil society played an important role in contributing to the amendment of the aforementioned penal provisions. On May 2014, a coalition of non-governmental organisations (NGOs) working together on the Penal Code reform shared a comprehensive document with both observations and recommendations for reform that Parliament should

2 The Family Law, Law No 10/2004 of 25 August, art 7.
3 The Labour Law 23/2007 arts 4(3) & 108(3).

consider to ensure Mozambique lives up to its domestic, regional and international human rights obligations.

Notwithstanding the suppression of the discriminatory provisions, civil society organisations have pointed out that a step should have been taken further to expressly mention 'sexual orientation' as one of the prohibited grounds of discrimination. The new Penal Code established the crime of discrimination and establishes penalties for those who abuse others through the use of expressions, reflection of prejudice about race or colour, sex, religion, age, disability, disease, social status, ethnicity or nationality and where intended to offend the victim's honour and self-esteem. According to one civil society organisation:[4]

> The non-criminalisation of discrimination based on sexual orientation constitutes discrimination against sexual minorities, because it conveys the message that this group does not require the same legal protection given in other situations of vulnerability (in particular with regard to race or color, sex, religion, age, disability, disease, social condition, ethnicity or nationality).

Despite this, all actors are unanimous in recognising the crucial steps adopted at the legislative level in suppressing the criminalisation of same-sex relationships in Mozambique.

5 The institutional framework for the protection of the rights of sexual minorities in Mozambique

Although the Constitution provides for freedom of association, LAMBDA, the most prominent organisation advocating for sexual minorities' rights in Mozambique, has not yet been recognised by the government. The Ministry of Justice has also not yet granted legal authorisation to the organisation to operate in the country, despite a request being submitted about seven years ago.

During Mozambique's last review by the UN Universal Periodic Review (UPR) in February 2011 some of the state recommendations contained express reference to LGBTI rights. On that occasion, LAMBDA presented a report stating that, in January 2008, an application was made to the Registrar of Companies to incorporate LAMBDA as an NGO for the protection of sexual minorities' rights. On the date of the submission there had still not been a decision by the government, despite several meetings between LAMBDA's representatives and senior officials in the Ministry of Justice. LAMBDA stated that the lack of response violated the right of association established in the Constitution and that it constituted a

4 'Mozambique: Adopted Penal Code still contains human rights violations' *AllAfrica.com* (2014) http://allafrica.com/stories/201409250423.html (accessed 16 February 2016).

tacit rejection and discrimination based on sexual orientation and was, thus, in violation of article 20 of the Universal Declaration of Human Rights and article 20 of the Yogyakarta Principles. The Human Rights Council recommended that Mozambique take a positive decision regarding the incorporation of LAMBDA.

Some of the key recommendations made during the review relating to LGBTI issues, included that Mozambique:

- repeal the laws criminalising sexual relations between consenting adults of the same-sex and guarantee fully the right of association, including for NGOs working on the question of sexual orientation (France); and
- repeal criminal sanctions against sexual activity between consenting adults; ensure the right to freedom of association and enable the registration of NGOs working on issues of sexual orientation and gender identity (Netherlands).

6 The rights of sexual minorities in Mozambique and social perceptions on LGBTI rights

The attitude towards LGBTI persons and homosexuality in Mozambique is generally negative. Mass media plays an important role in forming and informing the public opinion on the subject. Negative voices tend to refer to homosexuality as being a western import with no roots in local culture and tradition. A number of local newspaper articles emerge, from time to time, in Mozambique debating the topic of homosexuality. One of the most controversial articles published in a local newspaper[5] was written by a prominent leader of the Muslim community in the country and also member of the National Commission on Human Rights. In this article he expresses the opinion that: same-sex marriage is beyond disgusting and is a threat to human nature and to the existence of the species on earth. He further suggests that gay people are worse than animals considering that at least animals do not mate with other animals of the same sex.[6] His statements were heavily criticised by the human rights community in the country who lamented that such an article could be written by a member of the National Commission on Human Rights. On a positive note, the Mozambican Bar Association issued a letter condemning the article and its content.[7]

5 A Mohamed 'A Importância do Casamento' *Jornal Zambeze* 2014.
6 As above.
7 A Mohamed 'A Importância do Casamento' *Jornal Zambeze* 2014 http://www.oam.org.mz/wp-content/uploads/CARTA-CDH-SHEIK-CNDH.pdf (accessed 13 February 2016).

6.1 Access to health care services

A study[8] carried out by LAMBDA indicated that health services are considered to be very difficult for LGBT individuals to access for a number of reasons including overcrowded health centres, lack of services that respond to the specific needs of men having sex with men (MSM) or ineffectiveness of services.[9] In general, health services are described as unfriendly or even hostile to MSM. This scenario may derive from the fact that basic training programmes for health professionals do not include matters of human rights and sexuality. So, instead of guidance and proper follow up, MSM that seek public health services reveal that they receive 'moral sermons with religious contents' or declarations about how sexual relations that involve people of the opposite sex are the model that all people must follow.[10] This scenario forces some MSM to seek treatment only when they are in an advanced state of illness. As discussed previously, most of the respondents to the study carried out by LAMBDA revealed that MSM do not test for HIV for two reasons. One reason is institutional and the other personal. At the institutional level the reasons mentioned include lack of trust and credibility in health services, with particular focus on the fact that the health professionals do not keep test results confidential when the result shows that they are HIV positive.[11]

There are a number of other local organisations that work with sexual health rights in Mozambique, such as WLSA (Women and Law in Southern Africa), Mozambique Human Rights League, NAIMA (a network of NGO's working in health and HIV and AIDS in Mozambique), *Forum Mulher*, and RENSIDA (*Redenacional de Associações de pessoasvivendo com HIV/SID AemMoçambique*).

6.2 LGBTI associations and the law

As seen from the foregoing, the LGBTI community in Mozambique faces a number of challenges, which include social stigma. These challenges make it hard to live openly. The reluctance of the government to authorise registration for LGBTI organisations such as LAMBDA only serves to further exacerbate this situation. The Ministry of Justice has remained reluctant to authorise the registration of LGBT associations as legal entities allegedly because this would contravene the provisions of the Law 8/91 (Law of the Associations) which states that associations should be incorporated on the basis of constitutional principles relating to the

8 See generally, LAMBDA 'MSM Study in Maputo City' https://www.lambdamoz.org/index.php/cat_view/1-publicacoes?lang=en&limit=5&limitstart=5 (accessed 3 February 2014).
9 As above.
10 As above.
11 As above.

moral, economic and social foundations of the country. On one occasion, during the Universal Periodic Review, the former Minister of Justice, stated that the country was confronted with profoundly entrenched cultural and religious habits and such issues, namely, the incorporation of LGBT associations were recent and Mozambique had only just begun to face them.[12] During the presentation of a preliminary report on the Human Rights Situation in Mozambique, the current Minister of Justice, Mr Abdurremane Lino de Almeida, stated that the registration of the NGO, LAMBDA was not amongst the priorities of the Executive.[13]

7 Conclusion

The legal framework still plays an important role in realising equal rights for LGBTI persons in Mozambique. However, the primary focus has to be placed on demanding further legislative change and changing social attitudes towards LGBTI persons. The revision of the Penal Code is one striking example. After the adoption of Mozambique's new Penal Code, there has been an intense campaign launched by LAMBDA pursuing its legal registration.[14] This campaign motivated a Mozambican television channel to open up, for the first time, space televising several local personalities in Mozambique defending LAMBDA's demand for registration. As discussed in this chapter, the media plays an important role in forming and informing the public opinion in Mozambique. Changes in attitude are only possible if people can express themselves freely and without fear of any form of legal persecution.[15]

12 Universal Periodic Review 'Mozambique' http://www.ohchr.org/EN/HRBodies/UPR/Pages/MZSession24.aspx (accessed 3 February 2016).
13 As above.
14 'Mozambique's only LGBT Organisation – Demanding official registration as an NGO' 2014 http://www.amsher.org/lambdaregistrationcampaign/ (accessed 16 February 2016).
15 'Ministro da Justiça afirma que Registo da Associação LAMBDA não é prioridade' http://www.lambdamoz.org/index.php/ultimas/60-ministro-da-justica-afirma-que-registo-da-associacao-lambda-nao-e-prioridade (accessed 5 November 2016).

CHAPTER 10 THE STATUS OF LGBTI RIGHTS IN BOTSWANA AND ITS IMPLICATIONS FOR SOCIAL JUSTICE

*Lame Charmaine Olebile**

> Debates on sexual inequality represent the most fundamental challenge to struggles for global democracy. One of the biggest challenges of our times is how to confront the complexities of intersecting oppressions so that people identified as sexual minorities, for example sex workers, lesbians, gays, transgendered, intersexed, rape survivors and people living with HIV/AIDS, are able to stand with full status on the same podium such as those representing groups fighting dictatorships, corruption, social injustice, insecurity, discrimination against women, or people with disabilities … Until we close the gap between different voices demanding justice and equality, embracing the infinite possibilities of our sexual, social, economic and political beings, the African renaissance or the transformation that we are striving for will forever remain a mirage.
>
> *Sylvia Tamale*[1]

1 Introduction

Reforming the laws that shape our social interactions is a key contribution to ensuring social justice. Laws that are just, are an essential element inherent in social justice and denote that an enabling framework for the guarantee of social arrangements that improve equality exists. Although this enabling environment is not limited to a just legal framework, laws lay the foundation for the institutions and relevant structures that enforce social justice norms. Guaranteeing social justice is the responsibility of the state as much as it is that of the individual. The state has a responsibility to pass legislation that aspires to the principles of equality and justice. It would therefore follow that the state also has a duty to remove legislative impediments to access to equality and justice. In the case of homosexuality, I would assert that this requires the state to remove laws that criminalise sexual interactions between consenting adults. The legal

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1 S Tamale 'If sexuality were a human being' in S Tamale (ed) *African sexualities: A reader* (2011).

framework pertaining to gay and lesbian communities in Botswana, as a determinant of access and enjoyment of social justice, is both discriminatory and contradictory itself to a certain degree.

Although various definitions of the concept of social justice exist,[2] Baldry explains social justice as the joint responsibility of both society and the individual to ensure systemic and structural social arrangements to improve equality, as a core political and social value.[3] These social arrangements include, but are not limited to, ensuring the fair redistribution of resources, equal access to opportunities and rights, a fair system of law and due process, the ability to take up opportunities and exercise rights and the protection of vulnerable and disadvantaged people.[4] Social justice, being synonymous with redistributive justice, therefore incorporates both the economic and social aspects of life.[5] The concept of social justice is comprehensive as it relates to the rights and responsibilities of all persons and the society. It is this definition that will be employed in the entirety of this chapter.

Against the global context of increasing conservatism and opposition to open discussions on sexuality,[6] it has become even more critical to encourage the framing of sexuality and sexual rights within the broader conversations of development and social justice. The undeniable fact of social injustices across the world call for an interrogation of how discriminatory and contradictory laws concerning sexual rights affect a particular community's access to social justice. With the use of the Botswana context as a case study, this chapter will explore how LGBTI persons are affected by a discriminatory and contradictory legal framework. It will also discuss the related implications for access to social justice.

2 Sexual orientation explained in sexual rights

The concept of sexual orientation has generally fallen under the broader framework of sexual rights. Whereas this has been unpacked to mean that sexual rights include the right of all persons to express their sexual orientation, with due regard for the well-being and rights of others, without fear of persecution, denial of liberty or social interference,[7] other definitions are able to place sexual rights in human rights. Such definitions

2 National Pro-Bono Resource Centre 'What is social justice' (2011) 1 *Occasional Paper* 6.
3 National Pro-Bono Resource Centre (n 2 above) 2.
4 n 2 above 3.
5 United Nations Department of Economic and Social Affairs 'Social justice in an open world: The role of the United Nations' (2006) 305 6.
6 H Armas 'Whose sexuality counts? Poverty, participation and sexual rights' (2007) 294 *Working Paper* 9.
7 International Council on Human Rights Policy 'Sexuality and human rights' (2009) *Working Paper* 8.

and discourse assert that sexual rights embrace human rights and include the right of all persons, free of coercion, discrimination and violence, to: (1) the highest attainable standard of sexual health, including access to sexual and reproductive health care services; (2) seek, receive and impart information related to sexuality; (3) sexuality education; (4) respect for bodily integrity; (5) choose their partner; (6) decide to be sexually active or not; (7) consensual sexual relations; (8) consensual marriage; (9) decide whether or not, and when, to have children; and (10) pursue a satisfying, safe and pleasurable sexual life.[8]

Even though this definition of sexual rights is comprehensive, it fails to articulate the repercussions of limiting a community's sexual rights. Armas asserts that the lack of sexual rights affects heterosexual majorities as well as sexual minorities-who are so often denied basic human rights and subjected to violence and exclusion.[9] However, gay and lesbian communities face discrimination due to the criminalisation of sexual behaviour directly related to them and therefore indirectly, their sexual orientation. In a context that criminalises same-sex activity, the policy analysis should focus on the effects of discriminatory legislation on the ability of gay and lesbian communities to access social justice, beyond the enjoyment of their sexual rights.

Although discussions on sexual orientation are enduring, in most Sub-Saharan African countries the rights of gay and lesbian individuals remain a controversial matter that is usually associated with high prevalence rates of HIV among men who have sex with men (MSM), traditional and religious fundamentalist-driven homophobic violence and state perpetuated injustices. The debates around sexual orientation and social justice are usually marred by the over-sexualisation of the identities themselves, isolating gay and lesbian people as purely sexual objects with no political and social identity. These debates are also heavily used as political bargaining or shaming tools, inciting increased levels of homophobia.[10] Growing anti-homosexuality traditionalist and religious opposition has increased their efforts to bar any inclusion and deliberations of sexual orientation in state policy and other key conversations.[11] This may be seen in the political and religious condemnation of homosexuality by the Evangelical Fellowship of Botswana.[12] It is partly due to the pressure exerted by these opposition groups that some states will not pass legislation that protects gay and lesbian people against discrimination and guaranteeing them no interference with their rights and access to social

8 International Council on Human Rights Policy (n 7 above) 9.
9 Armas (n 6 above) 9.
10 S Tamale 'Out of the closet: Unveiling sexuality discourses in Uganda' (2003) 2.
11 As above.
12 The Voice 'Evangelical Fellowship Botswana condemns homosexuality' 15 August 2013 http://www.thevoicebw.com/2013/08/16/evangelical-fellowship-botswana-condemns-homosexuality/ (accessed 22 September 2014).

justice. It is also partly due to this that some states enact legislation that further criminalises same-sex activity and homosexuality.[13]

3 Sexual behaviour and orientation in Botswana law

In this chapter, a clear distinction must be drawn between the concepts of sexual behaviour and sexual orientation in order to be consistent with the legal documents that implicitly refer to them.[14] It must be noted that a relationship is generally drawn between the two concepts as a certain sexual behaviour may be expected of a sexually active person of a certain sexual orientation. However, one's sexual behaviour may not necessarily be indicative of their sexual orientation. Botswana currently criminalises same-sex activity, regardless of one's sexual orientation.[15] Of course, it is gay and lesbian communities who stand an elevated chance of being socially and legally persecuted due to the immediate association of their sexual orientation with the criminalised same-sex behaviour.

Thirty eight countries in Africa currently criminalise same-sex activities to one or other degree,[16] and Botswana is among a few countries that rarely enforces this provision. According to the Botswana Penal Code:[17]

> [A]ny person who, whether in public or private, commits any act of gross indecency with another person, or procures another person to commit any act of gross indecency with him or her, or attempts to procure the commission of any such acts by any person with himself or herself or with another person, whether in public or private is guilty of an offence'. Section 164 provides that 'Any person who – (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or (c) permits any other person to have carnal knowledge of him or her against the order of nature; is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.

13 A Jjuuko & F Tumwesige 'The implications of the Anti-Homosexuality Bill 2009 on Uganda's legal system' (2013) 44 *Sexuality, Poverty and Law 9*; Institute of Development Studies 'Sexuality and social justice; What's law got to do with it?' (2015) 5-6.

14 Sexual orientation refers to the sex of those to whom one is sexually and romantically attracted. Categories of sexual orientation typically have included attraction to members of one's own sex (gay men or lesbians), attraction to members of the other sex (heterosexuals), and attraction to members of both sexes (bisexuals). While these categories continue to be widely used, research has suggested that sexual orientation does not always appear in such definable categories and instead occurs on a continuum. In addition, some research indicates that sexual orientation is fluid for some people; this may be especially true for women (American Psychology Association 2011).

15 Penal Code [CAP 08:01] of 2002 secs 164(a)(c) of the Republic of Botswana.

16 International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA)'s 'State Sponsored Homophobia Report: A World Survey of Laws: Criminalization, protection and recognition of same sex laws' 2013 37.

17 n 15 above, secs 164(a)(c).

The Penal Code also includes a provision on 'gross indecency', which states:[18]

> Any person who, whether in public or private, commits any act of gross indecency with another person, or procures another person to commit any act of gross indecency with him or her, or attempts to procure the commission of any such act by any person with himself or herself or with another person, whether in public or private, is guilty of an offence.

In Botswana, this law has been interpreted and enforced once in the judgment in *Kanane v State* (*Kanane* case).[19] This provision was interpreted as prohibitive of same-sex sexual activity. The facts of the case are that Utjiwa Kanane was accused of engaging in same-sex activity. He was arrested and charged with unnatural carnal knowledge and indecency contrary to sections 164(a) and section 167 of Botswana's Penal Code respectively.

The accused challenged the constitutionality of the foregoing criminal provisions before the High Court which held that the state may enact legislation that overrides the freedoms of association and conscience, and the right of privacy in order to defend public morality.[20] The judge stated that laws regulating morality, even in private and among consenting adults, are necessary to maintain a stable and healthy society and that, as such, laws prohibiting homosexual conduct under the labels of 'unnatural carnal knowledge' and 'gross indecency' do not violate constitutional rights.[21] On appeal to the Court of Appeal, it was held that the time had not yet arrived for the decriminalisation of same-sex conduct as there was as yet no identifiable class of gay men and lesbian women in Botswana who needed protection. It was further held that the attitude of the Botswana public showed no inclination towards the liberalisation of sexual conduct by regarding same-sex conduct acceptable.[22] In their judgments, both the High Court and Court of Appeal trampled upon the most intimate and private feature of an individual's life and this limitation cannot be considered to be proportional to the projected harm against public health and morality.[23]

It is submitted that the final decision by the Court of Appeal refusing to decriminalise same-sex conduct was unreasonable, unnecessary and was not informed by any research on the public's perceptions of homosexuality. Further, it is devoid of principles of justice and fulfils no particular legitimate aim of the state. The Court failed to fully assess the impact of such legislation on the lives of gay and lesbian individuals.

18 n 15 above, sec 167.
19 *Kanane v State*, 2003 2 BLR 64 (CA).
20 *Kanane v State* 1995 BLR 94.
21 As above.
22 n 19 above.
23 *Dudgeon v United Kingdom* (1981) ECHR 7575/76.

Similar questions have been extensively discussed by the South African Constitutional Court in *The Coalition for Gay and Lesbian Equality & Others v The Minister of Justice and Another.* The Court of Appeal in the *Kanane* case could have referred to this jurisprudence for a more progressive interpretation. In this case, the Court declared unconstitutional the offence of sodomy under the Criminal Procedure Act of 1997 on the basis that it violated the right to dignity under section 10 of the South African Constitution. In discussing the impact of this criminalisation by law, Ackermann J noted:[24]

> Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human … the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution [...] The harm caused by the provision can, and often does, affect his ability to achieve self-identification and self-fulfilment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays.

As explained by this declaration, the ripple effects of targeted discriminatory laws often-times go unconsidered as the issue of public morality, whether inspired by religion or culture, becomes a barrier to expanding the discourse on the impact of discriminatory legislation on social justice. Discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our societies.[25] In essence, subsequent effects of the Botswana anti-sodomy law create a condition of social anxiety and disadvantages gay and lesbian communities. It further imposes an excessive burden on gay and lesbian individuals as the association of their sexual orientation with criminality has ripple effects that result in homophobic discrimination and violence that the perpetrators feel justified in doing, social exclusion and heavily impacts on the socio-economic existence of gay and lesbian communities.[26] Even in the context of Botswana where the anti-sodomy law is currently not enforced, this does not protect gay and lesbian individuals from discrimination. The

24 *The Coalition for Gay and Lesbian Equality & Others v The Minister of Justice and Another* 1998 (11) SA 37 (CC) para 28-36.
25 *The Coalition for Gay and Lesbian Equality* case (n 24 above) 18.
26 Armas (n 6 above) 13.

Constitution makes no mention of either sexual orientation or gender identity as a possible ground upon which an allegation of discrimination can be made.[27] LGBTI persons are still not guaranteed any rights and they are reduced to what is referred to as 'unapprehended felons', thus entrenching stigma and encouraging discrimination in employment and insurance and in judicial decisions about custody and other matters bearing on orientation.[28]

Reports have indicated incidences of homophobic violence in Botswana. On 7 November 2006, Lesbians, Gays, and Bisexuals of Botswana (LEGABIBO) published a press release describing an individual who was ejected from a local nightclub on the grounds that she was 'a lesbian.' She was simply standing in line for a drink, when a man who identified himself as the owner of the club approached her. He proceeded to push her into the kitchen where he touched her chest and said, 'Identify yourself. Are you a man or a woman? We don't allow lesbians here.' She was then escorted off the premises by a security guard.[29]

The media also contributes to the hostility and discrimination by creating negative stereotypes of gay and lesbian people.[30] Incidences of violence experienced due to one's sexual orientation are rarely reported. This may be due to the lack of constitutional protection against discrimination based on sexual orientation. Moreover, the criminalisation of same-sex sexualities may create some apprehension to disclose all the facts of the violation experienced in fear of further discrimination and victimisation.

On the other hand, a legal provision prohibiting dismissal from employment on the basis of one's sexual orientation was enacted in 2010. The Employment Act Amendment 10 of 2010[31] was amended to include sexual orientation as a prohibited ground of discrimination. No legal matter has, however, been heard relating to this provision to date.

The inclusion of 'sexual orientation' as a prohibited ground for discrimination is without doubt an acknowledgement that gay and lesbian individuals face undue discrimination in the work place, including unfair dismissal based on their sexual orientation. However, the provision, as limited to 'unfair dismissal in the work place' in a legal framework that provides no other protection against discrimination, offers limited

27 M Tabengwa & N Nicol 'The development of sexual rights and the LGBT movement in Botswana' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth: Struggles for decriminalisation and change* (2013) 340.
28 *The Coalition for Gay and Lesbian Equality* case (n 24 above) 25.
29 BONELA and LeGaBiBo 'Letter to the Editor', *The Botswana Gazette*, 29 May 2006.
30 See eg N Ntibinyane, 'Homosexual teacher at FSS?' *Midweek Sun* 24 January 2007.
31 International Commission of Jurists (ICJ) 'Botswana – SOGI Legislation Country Report' (2013) http://www.icj.org/sogi-legislative-database/botswana-sogi-legislation-coun try-report-2013/ (accessed 27 September 2015).

protection. Gay and lesbian individuals experience diverse forms of discrimination in the workplace. For example, due to harassment and bullying, gay and lesbian people experience physical, psychological and structural violence.[32]

The lack of provisions for comprehensive legal protections in the employment sector, including protection from discrimination during the recruitment process, ensuring protection and equality in the work place as well as protection against unfair dismissal makes the 2010 amendment insufficient to protect against the wide range of violations highlighted above. In addition, the existence of anti-sodomy legislation that fosters discrimination and inequality in many spheres of life including the work place, creates an environment that discourages reporting of discrimination experienced by LGBTI persons, rendering the 2010 amendment ineffective. Reporting of homophobia-driven discrimination in the workplace may lead to visibility in the media and a forced exposure of one's sexual orientation, possibly resulting in exposure to various forms of violence.[33] This haphazard approach to legal reform, seemingly to protect gay and lesbian individuals, unfortunately ignores the otherwise multifaceted nature of social injustice they face.

4 The *LEGABIBO* case

The case of *Thuto Rammoge & 19 Others v The Attorney General*[34] (*LEGABIBO* case) is one that presents an opportunity for us to further explore the practical effects of the anti-sodomy legislation in other areas. The ability to exercise one's right to freely associate and organise around a common advocacy objective, in order to achieve legal reform constitutes access to social justice and ensures full participation in social and political processes.

The *LEGABIBO* case and the judgment that followed have set a precedent in Southern Africa. In the elaborate judgment handed down in 2014, the High Court held a strong position that the constitutional provision of enjoyment of the rights and freedoms is not selective.

LEGABIBO has attempted to gain legal status twice, first in 2007 and then in 2012, but to no avail. It therefore instituted a court case to challenge the decision made by the Registrar of Societies not to register

32 L Badgett *et al The relationship between LGBT inclusion and development: An analysis of emerging economies* (2014) 5.
33 Armas (n 6 above) 19.
34 *Thuto Rammoge & 19 Others v The Attorney General* (*LEGABIBO* case) Case MAHGB-000175-13.

LEGABIBO.[35] LEGABIBO has been in existence for over fifteen years since its establishment in 1998. Due to the apparent religious and legislative opposition to equality for gay and lesbian communities and the lack of an effective movement to support any efforts for change, LEGABIBO remained underground.[36]

In 2012 LEGABIBO applied for registration and by a letter dated 12 March 2012, the Director of the Department of Civil and National Registration rejected the application for registration on the grounds that Botswana's Constitution does not recognise homosexuals and that the application would violate section 7(2)(a) of the Societies Act,[37]which empowers the Director of the Department of Civil and National Registration (the Director) to refuse to register an organisation where it appears to him that any objectives of a society seeking registration were likely to be used for 'any unlawful purpose or any purpose prejudicial to or incompatible with peace, welfare or good order in Botswana.'[38] The case was first heard at the High Court on 18 March 2014 where the applicants sought judicial review on the basis that such refusal was irrational and illegal.

The group argued that the decision was irrational since the Director and Minister failed to apply their minds to the question whether to register LEGABIBO, and instead misconceived the provisions of the Constitution, and failed to consider the provisions of the Societies Act.[39] On 14 November 2014, the Botswana High Court declared the decision of the Minister of Labour and Home Affairs to refuse the registration of LEGABIBO to be in contravention of sections 3,[40] 12(1),[41] and 13(1)[42] of the Constitution of the Republic of Botswana in so far as the decision (of the Minister of Labour and Home Affairs) denied the applicants equal protection of the law and hindered the applicants in their enjoyment of the

35 Southern African Litigation Centre 'Challenging the refusal to register LEGABIBO in the High Court: Fact sheet for LEGABIBO case'http://www.southernafrica litigationcentre.org/1/wp-content/uploads/2014/02/Fact-sheet-for-LEGABIBO-case.pdf (accessed 28 April 2015).

36 Tabengwa & Nicol (n 27 above) 341.

37 Societies Act Chapter (18:01) secs 7(2)(a) of the Republic of Botswana.

38 *LEGABIBO* case (n 34 above).

39 As above.

40 Article 3 of the Botswana Constitution reads: 'every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, color, creed or sex'.

41 Article 12(1) of the Botswana Constitution states: 'No person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence'.

42 Article 13(1) of the Botswana Constitution reads: 'no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assembly freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests'.

right to freedom of expression, assembly and association, respectively.[43] Furthermore, the High Court set aside the decision of the Minister of Labour and Home Affairs by declaring the decision to deny LEGABIBO registration discriminatory in itself and in its effect, against the applicants, based wholly or mainly on sexual orientation of the majority of the applicants.[44] In this landmark judgment, the judge emphasised the strict difference between sexual orientation and sexual behaviour.[45] The generous interpretation of the Botswana legislation and the in-depth analysis employed was crucial to ensuring a positive judgment for LEGABIBO. This elaborate judgment contributes to the positive jurisprudence of Botswana on civil and political rights and goes further to partially restoring the dignity[46] that gay and lesbian people have been robbed of by the over-reaching of a law that criminalises their sexual activity and in extension, their sexual orientation.[47]

Armas stated as follows:[48]

> Participatory spaces can be used as much as instruments of moral control as tools for transformation. If the strongest groups of civil society are conservative organizations with more funding, resources, time, networks, influence and ability to articulate a coherent discourse without criticism, it is possible (as it was mentioned before) that these groups could dominate participatory spaces. Therefore, decisions taken in these spaces would reflect conservative ideas, legitimated as participatory decisions or the voice of the people.

The rejection of LEGABIBO's application for formal recognition is indicative of the structural exclusion of gay and lesbian persons and a concerted effort to minimise their participation in social and political processes, by rendering their associations illegal. The anti-sodomy legislation, in this case, provides justification for this biased exclusion. The added rigorous opposition by the Evangelical Fellowship of Botswana (EFB) to LEGABIBO's application is a strategic step to bar any progressive efforts towards ensuring access to social justice for LGBTI individuals.[49] Recurring arguments of morality are at the core of anti-homosexuality campaigns conducted by the EFB, making this a concept

43 *LEGABIBO* case (n 34 above) para 28-32.
44 n 34 above, para 33.
45 n 34 above, para 55.
46 n 34 above, para 32.
47 At the time of writing this chapter, the *LEGABIBO* case at the Court of Appeals had not yet been heard.
48 Armas (n 6 above) 20.
49 The EFB is structurally attempting to defeat all efforts of SOGI rights groups to lobby for inclusive legislation. Examples include the EFB filing an opposing affidavit to LEGABIBO's application regarding the denial to register as an association. The Fellowship has also intensified their actions by delegating the Vice President to vie for political office in the Botswana 2014 elections. See eg. Evangelical Fellowship Botswana 'Press release' http://www.efbotswana.org/news/view.htm?id=27 (accessed 30 September 2014).

that requires attention but which will not be explored in this chapter. Although the organisation was granted a positive judgment, the far-reaching inferences of the anti-sodomy laws cannot be ignored.

5 Conclusion

Several authorities have provided varied perspectives, from different contexts, on how anti-sodomy legislation directly affects the lives of LGBTI persons. While some have relied on the concept of the universality of human rights as expounded by the Universal Declaration, others have applied concepts of economic inclusion and investigated the related implications. Still others have explored the relationship between poverty, development and discrimination against LGBTI individuals in a given context. In the context of Botswana, it has been shown above how the legislation criminalising same-sex acts not only controls private consensual sexual activities between adults, but also acts as an impediment to access to social justice. The legislation whose purpose was to regulate moral conduct also limits the freedom to associate and organise lawfully as can be seen in the *LEGABIBO* case.

The existence of such legislation, as indicated above reinforces the systemic discrimination against LGBTI individuals.[50] It follows, therefore, that any legislation seeking to offer protection and guarantee equality on the basis of sexual orientation, but is enacted in a context that allows the continued criminalisation of same sex activity, provides little remedy for the systemic social injustices experienced by gay and lesbian individuals. While it has been proven that legal reform alone will not necessarily result in the shift in perceptions and an automatic alleviation of the injustices faced by gay and lesbian communities,[51] examples from Uganda[52] have shown how communities have used anti-sodomy legislation to justify homophobic violence and discrimination against gay and lesbian people. It is not a question of whether anti-sodomy legislation is enforced or not, it is a matter of fact that its simple existence is an obstruction to access to social justice for LGBTI persons which renders them helpless against violence[53] and discrimination[54] perpetuated against them because of their sexual orientation and gender identity. Therefore, it follows that discriminatory legislation, having no basis in reason and serving no legislative objective is unnecessary and must be removed.

50 *The Coalition for Gay and Lesbian Equality* case (n 24 above) 119.
51 Institute of Development Studies (n 13 above) 3.
52 Jjuuko & Tumwesige (see n 13 above) 5-6.
53 'Botswana MP says he hates gays and lesbians' *Pink News UKA* http://www.pinknews.co.uk/2011/02/11/botswana-mp-says-he-hates-gays-and-lesbians/ (accessed 24 September 2014).
54 'Evangelical fellowship Botswana condemns homosexuality' *The Voice* http://www.thevoicebw.com/2013/08/16/evangelical-fellowship-botswana-condemns-homosexuality/ (accessed 24 September 2014).

Additionally, constitutional protections must be enacted to ensure equality and access to social justice for LGBTI communities; thereby creating a legal framework that allows for the formal recognition of LGBTI organisations to raise awareness on issues of sexual orientation and gender identity, and to facilitate the safe reporting of violation of rights. As a social development process, ensuring access to social justice for all is one step in the restoration of dignity for LGBTI communities and their families who, by extension, experience this discrimination.

The role of the judiciary has become even more important as morally controversial cases are litigated. Dingake asserts as follows:[55]

> The legal profession has an essential role to play in protecting fundamental human rights – a role that becomes more pronounced when dealing with the most vulnerable groups in our society … Lawyers have a sacred duty to defend the human rights of all people without exception – bearing in mind, always that the issue of rights is not simply a matter of majoritarian preference. Just as a doctor has a sacred duty to preserve and prolong life, lawyers have a sacred duty to defend and protect the rights of all people – especially the rights of vulnerable groups in our society.

As was seen in the *LEGABIBO* case, the courts can be generous in their interpretation of the law and its application. It is also necessary that the courts seek to develop equality jurisprudence[56] that recognises the interconnectedness of oppressions justified by moralistic discriminatory legislation. Broadening understanding of legislation on moral grounds means understanding the following:[57]

> The law turns sexualities into a space through which instruments of state control and dominance can be deployed. For example, the criminal legal system in most African states attempts to regulate how, when and with whom we can have consensual sex. The offences of prostitution, abortion and adultery clearly curtail both women's and men's sexual autonomy (although … it is women's autonomy that is most severely under threat), and the criminalization of homosexuality affects both men and women who do not conform to the dominant ideology of heterosexuality.

In legislating, the state needs to use fundamental concepts of social justice, human rights and the right to development to secure a broad based protection for LGBTI individuals. The concept of social justice therefore provides an avenue through which a government may measure the legitimacy of its legal framework. The lack of enforcement of anti-sodomy legislation does not automatically ensure access to social justice for LGBTI

55 OBK Dingake 'The role of the judiciary and the legal profession in protecting the rights of vulnerable groups in Botswana' in Southern Africa Litigation Centre *Using the courts to protect vulnerable people: Perspectives from the judiciary and legal profession in Botswana, Malawi and Zambia* 2015 6.

56 *The Coalition for Gay and Lesbian Equality* case (n 24 above) 119.

57 Tamale (n 1 above) 3.

people.[58] Instead, the opposite is created; a state of social anxiety because the impact of these laws is of such a nature that a number of different protected rights are simultaneously infringed. In these circumstances, it would be as artificial in law as it would be in life to treat the concerns of LGBTI individuals individually rather than intersectionally and with a multidimensional approach for effective solutions.[59]

Further research to determine the impact of anti-sodomy legislation on the lived realities of gay and lesbian communities and to provide an in-depth analysis of their access to social justice should be undertaken. While it might be argued that 'basic needs' are a more immediate priority than sexuality for those in economic difficulty, basic needs can be contingent upon sexuality, for example where economic resources are dependent on a marital relation, or where homophobic or other sexual violence is a problem.[60] Basic needs are also interfered with when one is unfairly dismissed from employment due to their sexual orientation and when they are forced to move into temporary shelter fleeing from homophobic violence in their families. Access to social justice for gay and lesbian communities requires legislative reform and a commitment by the government and its institutions to ensure that no one is left behind.

58 International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) (n 16 above) 10.
59 *The Coalition for Gay and Lesbian Equality* case (n 24 above) para 114.
60 S Jolly 'What use is queer theory to development' 3 February 2002, lecture given at the Institute for Development Studies.

CHAPTER 11 HUMAN RIGHTS AND THE CRIMINALISATION OF SAME-SEX RELATIONSHIPS IN NIGERIA: A CRITIQUE OF THE SAME-SEX MARRIAGE (PROHIBITION) ACT

*Victor Oluwasina Ayeni**

1 Introduction

On 7 January 2014, the President of the Federal Republic of Nigeria formally signed into law the Same-Sex Marriage (Prohibition) Act (SSMPA).[1] The Act criminalises same-sex marriage,[2] public show of same-sex affection,[3] registration of 'gay clubs, societies and organisations',[4] among others, and imposes penal sanctions of 14 and 10-year jail terms for violations.[5] It also invalidates within the jurisdiction of Nigeria, certificates issued in respect of same-sex unions contracted outside Nigeria and any benefits accruing there from.[6] Through the combined effect of several of its provisions – especially sections 4 and 5 – the SSMPA prohibits gay, lesbian, bisexual, transgender and intersex (LGBTI) persons from holding meetings, associating or engaging in any form of advocacy aimed at promoting their basic human rights. The Act also shuts down the ability of LGBTI groups to organise in order to get support for their activities.[7]

Prior to the SSMPA, the Criminal Code, Penal Code and *Shari'a* laws applicable in various parts of Nigeria criminalised same-sex relationships with varying degrees of punishments including the death penalty. The laws reflect majority views on homosexuality in Nigeria. In a study carried out

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1 See the Schedule to the Same-Sex Marriage Prohibition Act, 2013. Although the Act was signed into law on 7 January 2014 and formally came into force on that date, sec 8 of the Act recommends that the Act should be cited as the Same-Sex Marriage (Prohibition) Act 2013.

2 Same-Sex Marriage (Prohibition) Act 2013 secs 5(1).

3 n 2 above, sec 5(2).

4 As above.

5 See generally n 2 above, sec 5.

6 n 2 above, secs 1(2).

7 n 2 above, secs 4 & 5.

by Pew Research Centre in 2010, 97 percent of Nigerians expressed disapproval for homosexuality.[8] Disapproval of homosexual relationships is not peculiar to Nigeria. In a world survey carried out in 2008, it was found that same-sex intercourse between women is criminalised in 41 countries while same-sex intercourse between men remains criminalised in 81 countries which includes almost all of Africa, the Middle East, and much of Asia.[9] Penalties in most cases range from a term of imprisonment to the death penalty.[10] Although the maximum term of imprisonment under the new SSMPA is 14 years, twelve states in the Northern region of Nigeria prescribe the death penalty for the offences of sodomy and adultery. This makes Nigeria one of the seven countries in the world with the death penalty for consensual homosexual conduct.[11]

Since its passage into law, the SSMPA has generated massive media upheaval. Many world leaders, human rights experts and notable international organisations have criticised the SSMPA for its stance on the rights of LGBTI persons to choose their sexual orientation and gender identity (SOGI).[12]

Much has been written in the last two decades on the emergence of a human right to SOGI.[13] Several United Nations (UN) treaty bodies have

8 Pew Research Centre 'Global acceptance of homosexuality' http://www.pew global.org/2013/06/04/global-aaceptance-of-homosexuality/ (accessed 22 August 2013).

9 AX Fellmeth 'State regulation of sexuality in international human rights law and theory' (2008) 50 *William and Mary Law Review* 815.

10 D Ottosson 'State-Sponsored homophobia: A world survey of laws prohibiting same-sex activity between consenting adults', An International Lesbian and Gay Association Report (April 2007) http://www.ilga.org/statehomophobia/State-sponsored-homophobiaILGA_07.pdf (accessed 24 August 2013).

11 Other countries include: Iran, Mauritania, Saudi Arabia, Sudan, United Arab Emirates and Yemen. See M O'Flaherty & J Fisher 'Sexual orientation, gender identity and international human rights law: Contextualizing the Yogyakarta Principles' (2008) 8 *Human Rights Law Review* 208.

12 For instance, the United Nations (UN) High Commissioner for Human Rights, Navi Pillay described the Act as 'draconian' for 'making an already-bad situation much worse; … rarely have I seen a piece of legislation that in so few paragraphs directly violates so many basic, universal human rights … the legislation: purports to ban same-sex marriage ceremonies but in reality does much more. It turns anyone who takes part in, witnesses or helps organize a same-sex marriage into a criminal. It punishes people for displaying any affection in public towards someone of the same-sex. And in banning gay organizations it puts at risk the vital work of human rights defenders who speak up for the rights of lesbian, gay, bisexual, transgender (LGBT) and intersex people' http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID =14169&LangID=E (accessed 22 September 2014); See also the comments of the Executive Director of the Joint UN Programme on HIV and AIDS (UNAIDS), Michel Sidibé, available at http://www.un.org/apps/news/story.asp?NewsID=46923&Cr= lesbian&Cr1=#.UtZ3RmRdWAE (accessed 22 September 2014).

13 See, for example, D Sanders 'Human rights and sexual orientation in international law' 20 April 2001 http://heinv.home.xs4all.nl/hearingintergroup/documents/ dougsanders.PDF (accessed 12 February 2017); LR Helfer &AM Miller 'Sexual orientation and human rights: Toward a United States and transnational jurisprudence' (1996) 9 *Harvard Human Rights Journal* 61; JD Wilets 'The human rights of sexual minorities: A comparative and international law perspective' (1995) 22 *Human Rights* 1.

made official statements bordering directly or indirectly on rights to sexual orientation and gender identity. For instance, the Human Rights Committee; Committee on Economic, Social and Cultural Rights; the Committee on Torture; Committee on the Elimination of Discrimination Against Women; and the Committee on the Rights of the Child have stated that discrimination against LGBTI persons on the basis of SOGI violate human rights obligations under the various treaties administered by them.[14] A patchwork of decisions from courageous judiciaries around the world has also bolstered international recognition of this burgeoning right.[15]

However, there is still much schism and contradictions on the exact content and scope of the right. Even SOGI terminologies are often misused. The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (the Yogyakarta Principles) which were adopted on 26 March 2007 were aimed at addressing this problem. This set of principles, though only soft law, has succeeded in providing a template for consistent use of terminology and comprehensive articulation of SOGI rights.[16] The Yogyakarta Principles have also taken the lead in collating experiences of human rights violations by people of diverse sexual orientations and gender identities; articulating the application of international human rights law to such violations and experiences; and elucidating on the nature of states' obligation with respect to SOGI rights.[17]

Although no legally binding international treaty has yet articulated the various ramifications of this emerging right, there is progress towards a common understanding among human rights experts, and a hard-earned compromise in countries with strong human rights tradition that criminalisation of intimate activity between two consenting adults is antithetical to the right to privacy and other basic human rights. Decriminalisation of homosexuality thus has become the fastest receding area of state discrimination against LGBTI persons in some parts of the world.[18]

14 Fellmeth (n 9 above) 830-831.

15 See *Lawrence v Texas* 539 US 558 (2003) Texas; *Leung T. C. William Roy v Secretary for Justice* 24 August 2005 & 20 September 2006 (Hong Kong); *Dhirendra Nandan & Another v The State* Criminal Appeal Case HAA 85 & 86 of 2005, decided on 26 August 2005 (Fiji); *Naz Foundation v The Government of NCT of Delhi and Others* Case WP(C) 7455/2001.

16 See Presentation of the United Nations High Commissioner for Human Rights (UNHCHR), Ms Louise Arbour, to the International Conference on Lesbian, Gay, Bisexual, and Transgender Rights, Montreal, 26 July 2006 http://www.unhchr.ch/huricane/huricane.nsf/view01/B91AE52651D33F0DC12571BE002F172?opendocument (accessed 24 August 2013).

17 Flaherty & Fisher (n 11 above) 233.

18 With the repeal of laws prohibiting same-sex intercourse in Armenia on 1 August 2003, Europe became totally free of laws criminalizing same-sex intercourse between consenting adults. See Fellmeth (n 9 above) 814; Sanders (n 13 above).

There is however a countervailing trend in Nigeria, and indeed the rest of Africa. The advances across the globe on SOGI issues, rather than stimulate a more tolerant culture towards LGBTI persons, have propelled horrendous reactions and a backlash narrative in Nigeria.[19] It should be recalled that the first ever Same-Sex Marriage (Prohibition) Bill in Nigeria was prepared in reaction to a small demonstration at the 2005 International Conference on AIDS and Sexually Transmitted Infections in Africa held in Abuja which urged African governments to take the health, social, and rights situations of men who have sex with men (MSM) seriously.[20] Since then, it became almost a form of social suicide to be homosexual in Nigeria. In February 2006, the National Defence Academy expelled 15 cadets suspected of homosexual acts after it performed anal examinations on them.[21] In August 2007, police officers in Bauchi State broke into a party and arrested 18 men suspected of same-sex relations, charging them with organising gay marriages, belonging to an unlawful society, committing indecent acts, and engaging in criminal conspiracy.[22] More recently, a young man identified as Sadiq was beaten to a pulp for allegedly being gay.[23]

Antagonists of homosexuality in Nigeria argue that homosexuality is alien to African culture; hence they label it as 'un-African'. The 'un-Africaness' of homosexuality is a very contentious notion. The notion has been used by many with varying, and sometimes contradictory connotations such as African unanimity against homosexuality;[24] African exceptionalism or exclusivity in relation to homosexuality;[25] or an outright denial of the existence of homosexuality in Africa.[26]

Until very recently, the Nigerian government adopted a policy of total denial. At the Universal Periodic Review (UPR) of Nigeria held in Geneva

19 A Divani 'Is homosexuality "un-African"?' http://m.thinkafricapress.com/url=http%3A%2Fthinkafricapress.com%2Fgender%2Fhomosexuality-un-african-colonialism (accessed 24 August 2013).

20 Human Rights Watch 'Together, apart organizing around sexual orientation and gender identity worldwide' (2009) 9 https://www.hrw.org/sites/default/files/reports/lgbt0509web.pdf (accessed 22 August 2013).

21 D Aken'Ova 'State-sponsored homophobia: Experiences from Nigeria' 28 November 2010 http://madikazemi.blogspot.com/2010/11/state-sponsored-homophobia-experiences.html?m=1 (accessed 24 August 2013).

22 As above.

23 E Ebhomele 'Nigerian gay arrested in Ogun Community' (2013) http://pmnews nigeria.com/2013/08/22/nigerian-gay-arrested-in-ogun-community/ (accessed 22 August 2013).

24 Proponents of this notion argue that all countries in Africa are unanimously opposed to homosexuality.

25 Proponents of this notion argue that Africa is exceptional with regard to the homosexuality debate because it is the only continent where homosexuality is abhorred.

26 F Viljoen 'Equal rights in a time of homophobia: An argument for equal legal protection of "sexual minorities" in Africa' (2013) 11 *University of Pretoria Expert Lecture* 35 http://www1.chr.up.ac.za/index.php/centre-news-2013/1185-university-of-pretoria-expert-lecture-series-by-prof-frans-viljoen.html (accessed 24 August 2013).

from 2-13 February 2009, the Nigerian Foreign Minister on 9 February 2013, stated as follows:[27]

> Mr President … the United Kingdom wanted to know the position of the Nigerian Government on lesbian, gay, bisexual and transgender rights. As we have indicated in our National Report, we have no record of any group of Nigerians, who have come together under the umbrella of 'Lesbian, Gay and Transgender' group, let alone to start talking of their rights … During our National Consultative Forum, we went out of our way to look for the Gay, Lesbian and Transgender group, but we could not come across Nigerians with such sexuality. If they are an amorphous group, then the question of violence against them does not arise, let alone negotiating special rights for them.

As would soon be revealed, homosexuality exists in Africa and indeed, in Nigeria.[28] The enactment of the SSMPA, no doubt, is an unequivocal acknowledgement by the Nigerian government that LGBTI persons exist in Nigeria. The other notion that Africans are unanimously opposed to homosexuality is also fallacious. For instance, same-sex sexual activities between adults have never been criminalised in Burkina Faso, Central African Republic, Chad, Republic of the Congo, Côte d'Ivoire, Democratic Republic of Congo, Gabon, Madagascar, Mali, Niger, and Rwanda.[29] In South Africa, not only is same-sex sexual activity legal, same-sex marriage is also recognised.[30]

There is nothing un-African about homosexuality. When leaders claim homosexuality is un-African or un-Nigerian, they usually base their claims on three main theses. The first is that homosexuality runs against the grain of religions practiced by Nigerians and Africans. More often than not, religious views, Biblical or Koranic, are invoked by religious leaders, legislators, government officials, and even courts to justify discrimination against LGBTI persons. At a meeting of over 300 African bishops held in Nigeria in 2004, President Olusegun Obasanjo described homosexuality as 'clearly un-Biblical, un-natural, and definitely un-African.'[31] The former Primate of the Church of Nigeria (Anglican Communion), Most Reverend Peter Akinola (as head of over 17 million Nigerian Anglicans and head of an African Anglican Bishop's group with a total flock of over 44 million) compared homosexuality to partnering with baboons, lions, dogs or

27 OHCHR, 'Human Rights Council – Universal Periodic Review' http://www.ohchr.org/EN/HRBodies/UPR/Pages/Highlights9February2009pm.aspx (accessed 24 August 2013).

28 See SO Murray &W Roscoe (eds) (1998) *Boy-wives and female husbands: Studies of African homosexualities* referred to in B Anderson 'Politics of homosexuality in Africa' (2007) 1 *Africana* 123.

29 LP Itaborahy 'State-sponsored homophobia: A world survey of laws prohibiting same-sex activity between consenting adults' May 2013 http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2013.pdf (accessed 22 September 2014).

30 Viljoen (n 26 above).

31 'Obasanjo backs bishops over gays' *BBC News*, 17 October 2004, http://news.bbc.co.uk/1/hi/world/africa/3955145.stm (accessed 28 September 2013).

cows.[32] Time after time, Reverend Akinola argued that 'same-sex marriage, apart from being ungodly, is unscriptural, unnatural, unprofitable, unhealthy, un-cultural, un-African and un-Nigerian.'[33] But as one author puts it, 'it seems incompatible to advance the argument that homosexuality was not part of a traditional African life-world untainted by external influences, and at the same time to argue that homosexuality is unacceptable to Africans on the basis of these very external influences, in the form of "imported" religions.'[34]

The second claim opposing homosexuality has been expressed on the basis of majority morality. It is undeniable that a majority of Nigerians despise homosexuality and there are many empirical studies demonstrating this. However, the African Commission on Human and Peoples' Rights has stated very explicitly that limitations of rights of any group of Africans cannot be based solely on the will of the majority.[35] The last of the three main theses used to justify anti-homosexuality sentiments in Nigeria draws from alleged cultural traditions disfavouring divergent sexual orientations and gender identities.

In this chapter, I argue that African culture is replete not only with homosexuality and same-sex relations but also demonstrates evidence of tolerance towards those who engage in homosexuality and same-sex affairs. Thus, the chapter investigates practices of same-sex relations in pre-colonial Nigeria, with a view to debunking the popular theory that homosexuality is un-African. This investigation emphasises particularly the role of colonial laws and other foreign systems of law in the evolution of legal prohibition of same-sex relationships in Nigeria.

The main thrust of the chapter however is to query the constitutional validity of the SSMPA. This constitutionality analysis will also be extended to other laws that criminalise sexual conduct between consenting adults. Although the Nigerian Constitution guarantees the main civil and political rights, section 45 of the Constitution provides occasions for the government to depart from these guarantees. Section 45 thus provides the legal basis not only for the new SSMPA but also for the retention of existing anti-homosexuality laws. In this chapter, I will argue that the criminalisation of same-sex relations between consenting adults is unsupportable under section 45; it is unconstitutional and a flagrant violation of international treaties to which Nigeria is a party. One aspect of Nigerian law with respect to homosexuality that is less frequently scrutinised is the legal validity of the death penalty imposed by *Shari'a* laws for the 'trivial' offences of sodomy and lesbianism. I will argue that imposing the death penalty for consensual same-sex conduct offends the

32 As above.
33 DV Biema *et al* 'Blunt Bishop' 2007 *Time International* (*South Pacific Edition)* 40.
34 Viljoen (n 26 above).
35 *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 70.

spirits of the Nigerian Constitution and international treaties to which Nigeria is a party. I will also elaborate on the SSMPA, its human rights implications for LGBTI community in Nigeria as well as the actual and potential impact of the SSMPA on countries battling with homophobia in Africa and beyond.

2 Same-sex relationships in pre-colonial Nigeria

From time immemorial, humans have never limited their sexual experience to heterosexuality. Whenever there is social contact between persons of the same sex, there usually exists some homosexual behaviour.[36] The history of same-sex relationships in Africa is a long one. Studies by historians, anthropologists and other researchers show that African culture had strains of same-sex relationships in a variety of degrees. The oldest evidence of homosexuality in Africa is a 4390-year-old Saqqara tomb in Egypt.[37] The tomb is home to an Egyptian male couple, *Khnumhotep* and *Niankhkhnum*, who were buried together for the afterlife.[38] This couple is portrayed in several Egyptian arts in the most intimate pose and nose-kissing position.[39] In the 1580s, Andrew Battel, an English prisoner of the Portuguese, was reported to have described natives of the Dombe area in the modern day Angola as 'beastly in their living, for they have men in women's apparel, whom they keep among their wives.'[40]

Apart from evidence from historians and ancient African arts, there is a growing body of modern research proving the existence of homosexual and transgendered persons in several parts of pre-colonial Africa. Murray and Roscoe's ground-breaking work, *Boy wives and female husbands: Studies of African homosexualities* empirically demonstrates the existence of same-sex love in at least 50 African societies. All the communities reviewed in the book had indigenous words – several words in each case – for describing homosexuals and depicting homosexuality.[41] In Nigeria, two clear instances of homosexuality and same-sex relationships in pre-colonial period will be given.

36 B Pincheon 'An ethnography of silences: Race, (homo) sexualities, and a discourse of Africa' (2000) 43 *African Studies Review* 12.

37 B Meersman 'Homosexuality is African' *Mail & Guardian* 2012 http://galck.org/index.php?option=com_content&view=article&id=159:homosexuality-is-african&catid=34:news&Itemid =108 (accessed 14 September 2013).

38 As above.

39 As above.

40 Murray &Roscoe (n 28 above) http://www.willsworld.org/africa.html (accessed 22 August 2013).

41 Murray & Roscoe (n 28 above).

2.1 Woman-to-woman marriage

The practice of woman-to-woman marriage has been documented in many Nigerian communities, including the Yoruba, Igbo, Ijaw, Nupe and Esan tribes.[42] Amongst the Igbo of Southeast Nigeria, gender construction is quite fluid.[43] Intestate succession among the Igbo and Yoruba people of Southeast and Southwest Nigeria favours the male child.[44] This resulted in preference for the male child. Although the male child is always preferred over and above the female, a man without a male child is permitted by custom to 'designate' one of his daughters as a son. This is done through the *nrachi* ceremony in parts of Idemili Local Government Area of Anambra State.[45] A daughter in respect of whom the *nrachi* ceremony has been performed may inherit her father's property.[46] The nrachi ceremony is usually performed where a man has only daughters but no son. In order to ensure the continuity of the family line, a man may persuade one of his daughters not to marry but to remain in the family with the hope of bearing a male heir.[47] However, the customary process of transfiguration from female-hood to male-hood requires an elaborate ritual.[48] In order to avoid such rites (and also to provide more options of child bearing for childless women), the institution of woman to woman marriage was devised.

The institution of woman-to-woman marriage has been in existence at least as early as the eighteenth century.[49] There are many variants of the practice, which may take any of the following forms: (a) a married, but childless, woman marries another woman on her own behalf while her marriage is still subsisting;[50] (b) a childless single woman marries another woman on her own behalf; and (c) a childless widowed or divorced woman marries another woman on her own behalf.[51]

42 W Dynes 'Homosexuality in Sub-Saharan Africa: An unnecessary controversy' (1982) 9 *Gay Books Bulletin* 20 referred to in KC Nwoko 'Female husbands in Igbo land: Southeast Nigeria' (2012) 5 *Journal of Pan African Studies* 77.

43 Divani (n 19 above).

44 EI Nwogugu *Family law in Nigeria* (2011) 401-402.

45 n 44 above, 402.

46 As above.

47 As above.

48 I Amadiume *Male daughters, female husbands: Gender and sex in an African Society* (1987) referred to in Nwoko (n 42 above).

49 R J Cadigan *et al* 'Woman-to-woman marriage: Practices and benefits in Sub-Saharan Africa' (1998) 29 *Journal of Comparative Family Studies* 89 http://www.questia.com/library/1G1-21263199/woman-to-woman-marriage-practices-and-benefits-in (accessed 22 August 2013).

50 SNC Obi *The customary law manual: A manual of customary laws obtaining in the Anambra and Imo States of Nigeria* (1977) 258.

51 N Otakpor 'A woman who is a husband and father: An essay in customary law' (2005) 69 Faculty of Law, University of Benin (Benin, Nigeria) Lecture Series 5, April 200569-70.

It must be noted that woman-to-woman marriage is not the same as traditional surrogacy.[52] It is also different from polygyny[53] or polyandry.[54] In all cases of woman to woman marriage, the primary purpose of such marriage is mainly procreative, although there could be other reasons. While in some cultures it is a barren wife in a marriage that takes a younger wife for herself, in other cases it is a wealthy and influential woman that does so. In Asaba, Delta State of Nigeria, an unmarried but prosperous woman who desires to have a family of her own may, if she cannot bear children, marry another woman to do so on her behalf.[55] The woman-husband provides the bride price for the new wife, who bears children through the husband of the woman-husband, a paramour or any male member of the woman-husband's family.[56] Among the Igbo people of Osumari area in Nigeria, a 'titled woman' is allowed to take a wife as part of the paraphernalia of her office.[57] Also, among the Mbaise people of Imo State Nigeria, all surviving female children of a family may collectively pay the bride price of a younger woman in the name of their eldest sister, if their father died without a male child.[58]

The existence of this practice has been documented in numerous judicial proceedings. In the case of *Meribe v Egwu,*[59] Nwanyiokoli, one of the wives of Chief Cheghekwu, because she was childless married her niece, Nwanyiocha, and contracted her husband (Chief Cheghekwu) for the purposes of raising heirs for her.[60] The niece had children from the affairs between her and Chief Cheghekwu, one of whom was the plaintiff in this case. Nwanyiokoli had brought the plaintiff up as her own son; she played the role of the plaintiff's natural and biological father. Nwanyiocha, her niece and wife, lived with her and she played the role of a husband to her. These happened while Nwanyiokoli was living in Chief Cheghekwu's house as one of his wives. When Nwanyiokoli died in 1937, the plaintiff performed the burial ceremony as the son of the woman. He inherited her properties including the land which was the subject of dispute. He had

52 There are two types of surrogacy: traditional and gestational surrogacy. In traditional surrogacy, a surrogate is impregnated naturally or artificially by a male partner; as a result any child born through traditional surrogacy is genetically related to the surrogate. This must be distinguished from gestational surrogacy where the pregnancy results from the transfer of an embryo created by *in vitro fertilization* (IVF). In this case, the child shares no genetic traits with the surrogate. Unlike women to women marriage, surrogacy creates no marital relationship, and the surrogate usually loses or surrenders legal or maternal rights over the child.

53 Polygyny is a form of plural marriage where a man is allowed to marry or to be married to more than one wife at a time.

54 Polyandry is a form of polygamy where a woman is allowed to marry or be married to two or more husbands at the same time.

55 Nwogugu (n 44 above) 64.

56 FE Esenwa 'Marriage custom in Asaba Division' *The Nigerian Field* (1948) Vol XIII No 2 referred to in Nwogugu (n 44 above) 64; PA Talbot *Tribes of the Niger Delta: Their religion and customs* (1967) 195-196

57 WN Eskridge 'A history of same-sex marriage' (1993) 79 *Virginia Law Review* 1420.

58 Nwoko (n 42 above).

59 *Meribe v Egwu* 1979 34 SC 23; 1976 NSCC 181 (Supreme Court of Nigeria).

60 For a full analysis of the case of *Meribe v Egwu*, see Otakpor (n 51 above).

farmed on the disputed land from the time of Nwanyiokoli's death in 1937, until 1971 when the defendant trespassed on it. The defendant was one of the children of Meribe, eldest son of Chief Cheghekwu, by another wife. The plaintiff sought title to all Nwanyiakoli's property, contending that under customary law, he was to be regarded as Nwanyiakoli's son. The defendant on the other hand argued that as the eldest surviving grandson of Nwanyiakoli's husband, he was entitled to inherit Nwanyiakoli, including any property she left behind.

During the trial of the case, the following evidence was given and accepted by the trial court:[61]

> It is the custom of our place that if a woman has no issue, she can marry another woman … any issue from the said woman would be regarded as an issue from the woman who married her for the purpose of representation in respect of estates and inheritance.

The trial judge accepted the evidence and agreed that it was in accordance with the prevailing native law and custom at the time. The judge however concluded that Nwanyiokoli did not marry Nwanyiocha for herself but for her husband. The Court nonetheless found in favour of the plaintiff on the ground that the marriage was validly contracted. On further appeal to the Supreme Court of Nigeria, the Court per Madarikan JSC reversed the decision of the trial Court and held as follows:[62]

> In every system of jurisprudence known to us one of the essential requirements for a valid marriage is that it must be the union of man and a woman thereby creating the status of husband and wife. Indeed the law governing any decent society should abhor and express its indignation of a woman-to-woman marriage, and where there is proof that a custom permits such an association the custom must be regarded as repugnant by virtue of the provision of section 14(3) of the Evidence Act and ought not to be upheld by the court.

In another case, *Helina v Iyere*,[63] the plaintiff (a woman), being childless, married the defendant (another woman) in accordance with Esan custom. Later, the defendant fell in love with a male teacher resident in their town. With the consent of the plaintiff, the defendant became pregnant for the schoolteacher. The plaintiff was responsible for all ante and post-natal care. When the baby boy was born, the plaintiff named the child Aigbesole and organised a christening ceremony. However, months after the birth of the child, the schoolteacher was transferred to the neighbouring town. The woman-wife eloped with him, taking the newborn along. The plaintiff thus

61 Otakpor (n 51 above) 73.
62 Otakpor (n 51 above) 74.
63 *Helina Odigie v Iyere Aika,* High Court of Bendel State of Nigeria, Ubiaja Judicial Division, Suit U/24A/79 (Unreported). See also Otakpor (n 51 above) 72-73; GO Okogeri 'Repugnancy of customary law' (1985) 1 *Nigerian Bulletin of Contemporary Law* 51-52.

instituted this case before a customary court seeking the return of her child, which the defendant had taken away. The customary court which comprised of the indigenes of that area, and who were very conversant with the customs of that community found in favour of the plaintiff. The court held that the plaintiff (woman husband) was culturally and legally entitled to custody of the child. On appeal to the High Court, however, the High Court Judge held the custom of woman-to-woman marriage to be odious and repugnant to natural justice, equity and good conscience. A similar outcome was also arrived at in the case of *Okonkwo v Okagbue.*[64]

The cases clearly demonstrate how colonial laws were used to reshape and redefine African understanding of 'natural justice, equity and good conscience'. While these cases do not show that woman-to-woman marriage is now valid in Nigeria, they however show beyond every shadow of doubt the existence of such practice amongst the indigenous people of Nigeria, prior to the introduction of colonial laws into the entities forming the modern day Nigeria. It is reported that the practice is still very much in vogue among the Onitsha people of Anambra States and the Ishans of Edo State, despite the Courts' disapproval of it.[65] Although the practice varies from one community to another, an ideal woman-to-woman marriage is one where a woman marries another woman for herself and on her own behalf. In all cases of woman-to-woman marriage, children born by the woman who is married (hereafter, woman-wife) belong to the woman who marries her (hereafter, woman-husband). The woman-husband usually occupies a very high status in society and enjoys all rights and privileges of her male counterpart.[66] She could break the kola nuts during meetings,[67] take traditional titles and participate in religious rites that women are normally excluded from.[68] It is believed that the gods consider woman-husbands no longer as women but as men. Most commentaries on woman-to-woman marriage in pre-colonial Nigeria are however largely desexualised. They focus only on the ceremonial and procreative aspects of the practice without taking a position on the sexual rights and responsibilities arising from such relationships.[69] There are no known limitations on the ways the woman-husband should relate with the woman-wife, and no custom explicitly prohibits erotic relations between the couple.

64 *Okonkwo v Okagbue* (1994) 9 *Nigerian Weekly Law Report* 301 (Supreme Court of Nigeria).
65 'same-sex marriage as old as time' *Thisday News* http://www.thisdaylive.com/articles/same-sex-marriages-as-old-as-time-/104345/ (accessed 22 August 2013).
66 Nwoko (n 42 above).
67 This is a cultural practice in Igbo land reserved only for men. See Nwoko (n 42 above) 76& 81.
68 As above.
69 See for instance Eskridge (n 57 above); Nwoko (n 44 above); Otakpor (n 51 above).

2.2 The Yan Daudu in Northern Nigeria

Prior to colonisation and the advent of the Islamists in the Northern part of Nigeria, Besmer recorded that in the pre-Islamic period, homosexuals and transvestites in the Hausa *Bori* cult were called *Yan Daudu*.[70] Meyer however asserted that the term 'Yan Daudu' is not the same as homosexuals, because not all Yan Daudu are homosexuals.[71] Yan Daudu are male cross-dressers who procure female prostitutes for male customers.[72] They also solicit suitors and arrange contacts for female prostitutes. 'Yan Daudu' usually receive commissions from female prostitutes and their customers for these services. There are however overwhelming reports of sexual relations between majority of the 'Yan Daudu' and other Hausa men. For instance, after extensive research and interaction with many 'Yan Daudu', Gaudio reported that the term 'gay' is appropriate for the genre of same-sex relationship found involving 'Yan Daudu' and other Hausa men.[73] These men, Gaudio stated, 'are conscious of themselves as men who have sex with men and who considered themselves to be socially distinct from men who do not have this kind of sex.'[74] 'Yan Daudu' who do not engage in homosexual sex are referred to as *mahaho* (meaning 'blind men'). Those who do engage in homosexual sex refer to themselves as *masubarka* (meaning 'those who do the business'). This is often abbreviated as *masuyi* (meaning 'those who do it').[75]

There is also another form of homosexual practice common among Hausa men. This involves older men who have sex with younger men, but neither of them are 'Yan Daudu.'[76] The older wealthier man is called *k'wazo* while the younger man who is 'sexually penetrated and receives presents like female sexual partners do' is called *baja*.[77] Evidence of this latter genre of homosexual practice abounds in court proceedings. For instance, in 2002, a 35-year old man named Attahiru Umaru, who had sexual intercourse with a seven year old boy, was sentenced to death in

70 FE Besmer *Horses, musician and gods: the Hausa cult of possession-trance* (1983). See also IH Abdalla 'Spirit possession as therapy: Bori among non-muslims in Nigeria' in IM Lewis, A Al-Safi & S Hurreiz (eds) *Women's medicine: The zar-bori cult in Africa and beyond* (1991); EE Evans-Pritchard *Neur religion* (1956); SO Murray 'Homosexuality in "traditional" Sub-Saharan Africa and contemporary South Africa' 15 available at http://www.sengai.free.fr/doc_et_pdf/africa_A4.pdf (accessed 15 September 2013); M Sinikangas 'Yan Dauda: A study of transgendering in Hausaland West Africa', A Master Thesis in Cultural Anthropology, Department of Cultural Anthropology and Ethnography, Uppsala University (2004).
71 Besmer (n 70 above).
72 As above.
73 RP Gaudio 'Male lesbians and other queer notions in Hausa' in Murray & Roscoe (n 28 above).
74 As above; Murray (n 70 above) 18.
75 As above.
76 As above.
77 As above.

Kaduna State.[78] Also, in 2001, Mahammed Fauzi, a 58-year old man who had homosexual relations with a 12-year old boy was sentenced to 2 years imprisonment after receiving 100 lashes.[79]

Drawing from the foregoing, there is no doubt that same-sex relationships, homosexuality and transgender persons were commonplace in pre-colonial Nigeria. Indigenous communities were most times tolerant of them, and usually considered homosexuality and transgendered practices as a form of amusement or entertainment.[80] The British colonialists however considered the practice as odious and abhorrent; thus the imposition of laws that inflict punitive sanctions on natives who engaged in them.[81]

3 The evolution of the legal prohibition of same-sex relationships

In this section, I set out briefly how British colonialists, through various legal instruments such as the Criminal Code and the Penal Code, introduced legal prohibition for same-sex relations in Nigeria. Thereafter, I turn to how native political and religious leaders, relying on colonial laws and 'foreign' religious precepts, introduce and toughen legislative standards, which prohibit sexual relations or marriage between persons of same sex.

3.1 The Criminal Code

Prior to colonialism, a large number of systems of criminal law existed in the geographical space now referred to as Nigeria.[82] For administrative convenience, the British colonialists carved up three distinct entities from this geographical space and labelled these as Lagos Colony, Southern Protectorate and Northern Protectorate respectively. At that time, many simple customary systems of law, enforced by the family units, the Chief-in-Council and other traditional institutions, existed in the Lagos Colony and the Southern Protectorate. In the Northern Protectorate, a highly systematised and sophisticated Moslem Law of Crime, based on the Maliki School was already in place.[83] First, English Common Law (of crime) was introduced to the Lagos Colony in 1863. In 1904, a Criminal

78 ON Ogbu *Human rights law and practice in Nigeria* (2013) 186; see also ON Ogbu 'Punishment in Islamic criminal law as antithetical to human dignity: The Nigerian experience' (2005) 9 *International Journal of Human Rights* 176-178, 186.
79 As above.
80 Murray (n 70 above) 18; Besmer (n 70 above) 19; Sinikangas (n 70 above).
81 Meersman (n 37 above).
82 The name 'Nigeria' was graciously given to the country following the 1914 amalgamation by Mrs Lugard, wife of the First Colonial Governor of Nigeria, Lord Lugard.
83 CO Okonkwo *Okonkwo and Naish: Criminal law in Nigeria* (2010) 4.

Code was introduced in the Northern Protectorate. The Code was extended to the whole country on 1 June 1916, following amalgamation of the various parts of the country in 1914.[84] This 1916 Code has since remained in force and forms the nucleus of Nigeria's penal system till date.

Chapter 21 of the Criminal Code contains the so-called 'offences against morality'. Under section 214 of this Chapter, *any person* who has carnal knowledge of any person against the order of nature or has carnal knowledge of an animal, or permits a male person to have carnal knowledge of him or her against the order of nature is guilty of a felony and liable upon conviction to 14 years imprisonment.[85] Attempt to commit any of the three legs of offence stated in section 214 is punishable by imprisonment for seven years.[86] The Code also provides that any male person, whether in public or private, who commits any act of gross indecency with another male, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person, whether in public or private is liable to imprisonment for three years.[87] The Code however fails to define what constitutes act of 'gross indecency.'

3.2 The Penal Code[88]

Since the introduction of the Criminal Code in 1916, the operation of the Code has attracted widespread criticism from the Northern part of Nigeria. The Northerners, who are predominantly Muslims, claimed the 1916 Queensland-modelled Criminal Code was drafted and suitable only for Christian society. This agitation and criticism led to the introduction of the Penal Code in the Northern part of Nigeria on 30 September 1960. Although the Penal Code was based on the Criminal Code of Sudan, the Code nonetheless has a strong link with English Law.

The Criminal Code of Sudan was modelled on the 1860 Indian Penal Code, drafted and imposed on Indians by the British. Currently, the 1916 Criminal Code operates in States of the old Southern Protectorate while the Penal Code operates in States of the old Northern Protectorate. It is thus arguable that the anti-sodomy provisions in the two Codes owe their existence to British colonial laws.[89]

84 n 83 above, 5.
85 Nigeria Criminal Code Cap 77 of 1916 Laws of the Federation of Nigeria 1990 sec 214.
86 n 85 above, sec 215.
87 n 85 above, sec 217.
88 Penal Code Law, Northern Region of Nigeria Law (NRNL) 18 of 1959. The law came into force on 30 September 1960. It was subsequently amended in 1963. The amended version is contained in Chapter 89, Laws of Northern Nigeria, 1963.
89 CA Johnson *Off the map: How HIV/AIDS programming is failing same-sex practicing people in Africa,* A publication of the International Gay and Lesbian Human Rights Commission (IGLHRC) (2007) 17.

By virtue of section 284 of the Penal Code, whoever has carnal intercourse against the order of nature with any man or woman is liable upon conviction to fine and imprisonment for a term which may extend to fourteen years. Section 405 of the Penal Code also provides that a male person who dresses or is attired in the fashion of a woman in a public place or who practices sodomy as a means of livelihood or as a profession is a 'vagabond'. Upon conviction, the offender is liable to maximum of one year imprisonment or a fine, or both.[90]

3.3 *Shari'a* Penal Codes

The Criminal and Penal Codes were the only laws criminalising same-sex relations in Nigeria until the introduction of the *Shari'a* legal system in 2000. It would be recalled that Nigeria returned to civil rule in 1999, after almost two decades of military dictatorship. Nigerians had barely settled down to enjoy the fruits of the democratic transition when the Executive Governor of Zamfara State (one of Nigeria's 36 federating states), announced that his state would adopt Shari'a Law as its penal code.[91] Eleven other states – Bauchi (2001), Borno (2000), Gombe (2001), Jigawa (2000), Kaduna (2001), Kano (2000), Katsina (2000), Kebbi (2000), Niger (2000), Sokoto (2000) and Yobe (2001) followed suit in the years indicated in brackets.[92] The *Shari'a* Penal Code applies to all Muslims and everyone who voluntarily consents to the jurisdiction of the Shari'a Courts established under the Code.

Chapter VIII of the various *Shari'a* Penal Codes contains what is referred to as '*Hudud* and *Hudud*-related offences. Four of these offences are related to sexual orientation and gender identity: sodomy (*Liwat*), lesbianism (*Sihaq*), vagrancy and acts of gross indecency. In most of the states where the *Shari'a* Penal Code is applied, the punishment for the offence of sodomy depends on the marital status of the offender(s). If the offender is unmarried, the punishment is caning with up to one hundred lashes plus a term of imprisonment ranging from one to seven years.[93] If

90 Penal Code (n 88 above) sec 407. The Penal Code also provides maximum of 2 years imprisonment or a fine for incorrigible vagabond. An 'incorrigible vagabond is any person who after being convicted as a vagabond commits any of the offences which will render him liable to be convicted as such again. See Penal Code (n 88 above) sec 405.

91 P Ostein 'A study of the courts systems of Northern Nigeria with a proposal for the creation of lower *Shari'a* Courts in some northern states' (1995) 5 referred to in LE Odeh 'The resurgence of Shari'a issue in contemporary Nigeria 1999-2009' (2010) 9 *Benue Valley Journal of Humanities* 5; see *Shari'a* Penal Code Law 2000, Law 10 of 2000, signed into law on 27 January 2000, coming into operation on 27 January 2000, Zamfara State Gazette Vol 3 No 1, 15 June 2000.

92 LP Itaborahy 'State-sponsored homophobia: A world survey of laws prohibiting same-sex activity between consenting adults' May 2012 34 available at http://ilga.org/ilga/en/article/1161 (accessed 22 September 2013).

93 Ostien (n 91 above) 60-70.

the offender is married, the punishment is death by stoning.[94] Lesbianism attracts caning with fifty lashes and an imprisonment term of up to five years, except in Kano and Kastina States where the punishment is death by stoning.[95] Acts of gross indecency (defined as exposure of nakedness in public, kissing in public or acts of similar nature) attract caning with up to forty lashes and imprisonment term ranging from one to seven years. Majority of the *Shari'a* Penal Codes equate cross-dressing with vagrancy, and prescribe caning with up to forty lashes plus imprisonment ranging from eight months to two years.[96]

3.4 The Same-Sex Marriage (Prohibition) Act

The Same-Sex Marriage (Prohibition) Act (SSMPA) was for the first time presented to the National Assembly (comprising the Senate and the House of Representatives) in January 2006 by the Federal Attorney General and Minister of Justice.[97] The purpose of the Bill as stated in its long title was to 'make provisions for the prohibition of sexual relationship between persons of the same sex, celebration of marriage by them and for other matters connected therewith'.[98] The Bill however did not pass the first reading.

In January 2007, an amended version of the Bill was again approved by the Federal Executive Council and sent to the National Assembly.[99] The 2007 Bill proposed five years imprisonment for anyone who contracts, performs, witnesses, aids, or abets a same-sex marriage.[100] The Bill provided five years' imprisonment for involvement in public advocacy on SOGI issues or forming an association the aim of which is to promote the rights of LGBTI persons.[101] The Bill also included a proposal to ban any form of relationship with gays or lesbians.[102] Despite the effort of the Obasanjo-led administration to advance its course, the Bill failed to scale through the various stages of legislative scrutiny.[103] In January 2009, another Bill titled Same Gender Marriage (Prohibition) Bill was presented before the National Assembly. This bill prescribed a two year imprisonment for consensual same-sex conduct.[104] The Same Gender

94 Some states like Bauchi, Kaduna, Kebbi, Yobe and Sokoto prescribe death penalty for sodomy irrespective of the marital status of the offender.
95 P Ostien *Shari'a implementation in Northern Nigeria 1999-2006* A Sourcebook Volume III (2007) 7.
96 As above.
97 Aken'Ova (n 21 above).
98 The Bill is reprinted in E Radner & A Goddard 'Human rights, homosexuality and the Anglican Communion: Reflections in light of Nigeria' https://www.fulcrum-anglican.org.uk/news/2006/20061121radner.cfm?doc=167&utm_source=StandFirm&utm_medium=post&utm_campaign=link (accessed 15 February 2017).
99 Aken'Ova (n 21 above).
100 As above.
101 As above.
102 As above.
103 As above.
104 As above.

Marriage (Prohibition) Bill, unlike its predecessors, prescribed stiffer penalties for those who aid and abet or witness the solemnisation of unions between persons of same sex or gender.[105] Like all its predecessors, this Bill too died a natural death. These Bills did not pass the various stages of legislative scrutiny because of the expiration of the legislative session in which some of them were introduced. This was clearly the case for the first two bills, which were introduced few months to the end of the legislative session. Arguably, the ill health and eventual death of President Yar'Adua could also be identified as one of the factors responsible for diverting public attention from the second and the third Bills.[106]

However, in 2011, Senator Domingo Obende sponsored a Bill titled 'Same-Sex Marriage Prohibition Bill 2011'.[107] The Bill had its first, second and third readings on the floor of the Senate on 13 July 2011, 27 September 2011 and 29 November 2011, respectively.[108] The Bill had earlier gone through a public hearing organised by the Senate Committee on Judiciary, Health and Human Rights.[109] The Senate received a report of the Senate Joint Committee on the Judiciary, Human Rights and Legal Matters and Interior on 29 November 2011.[110] The same day, the Senate dissolved into a Committee of the whole House to consider the report. After introducing amendments to four clauses of the Bill, the Bill was eventually passed by the Senate on Tuesday, 29 November 2011. One of the reasons for the quick passage of the 2011 Bill was the threat by Western countries, especially by British Prime Minister, David Cameroon, to cut foreign aid to countries with poor records on homosexual rights.[111] It should be recalled that this threat was made in the last quarter of 2011.

After passage by the Senate, the Bill was forwarded to the House of Representatives, which immediately forwarded it to the House Committee on Interior. During consideration and adoption of the Committee's report, the House proposed amendments to two clauses of the Bill after which the Bill was unanimously approved in a voice vote on 30 May 2013.[112] The various amendments suggested by the Senate and the House of Representatives were harmonised by a Conference Committee of both

105 As above.
106 The ill health of President Yar'Ardua left the country in confusion as regards the capacity of his Vice to act for him. When his successor, Dr Goodluck Ebele Jonathan, took over in May 2010, the election was only months away.
107 D Ugwu 'Nigerian same-sex marriage baninfringes individual rights' http://jurist.org/hotline/2011/12/damian-ugwu-nigerian-marriage.php (accessed 22 August 2013).
108 As above.
109 As above.
110 As above.
111 D Martin 'Foreign aid for countries with anti-gay rights records to be slashed, pledges Cameroon' *Daily Mail* 10 October 2011 http://www.dailymail.co.uk/news/article-2047254/David-Cameroon-Foreign-aid-cut-anti-gay-countries.html (accessed 13 February 2016).
112 'Nigeria anti-gay marriage Bill approved' *Huffington Post* http://m.huffpost.com/us/entry/3360107 (accessed 25 August 2013).

legislative Houses.[113] The report of the Conference Committee formed the basis of the final Same-Sex Marriage (Prohibition) Bill, which was passed by both the Senate and the House of Representatives on 17 December 2013.[114] The Bill became an Act of the National Assembly on 7 January 2014, having been signed into law on that day by the President of the Federal Republic of Nigeria.[115]

It is interesting to note that the SSMPA, which has attracted unprecedented media frenzy comprises only eight clauses or sections. Contrary to its title, the SSMPA does not prohibit only same-sex marriage. It goes further to prohibit civil unions and even amorous relationships between persons of the same sex.[116] The SSMPA denies registration to associations promoting SOGI ideas and imposes punitive sanctions on everyone who witnesses, aids or abets the solemnisation of same-sex marriage.[117] It defines marriage as 'a legal union entered into between persons of the opposite sex in accordance with the Marriage Act, Islamic Law or Customary Law'.[118] Same-sex marriage is defined as 'the coming together of persons of the same-sex with the purpose of living together as husband and wife or for other purposes of same-sexual relationship'.[119] Civil union is defined rather broadly as 'any arrangement between persons of the same-sex to live together as sex partners, including adult independent relationships, caring partnerships, civil partnerships, civil solidarity pacts, domestic partnerships, reciprocal beneficiary relationships, registered partnerships, significant relationships and stable unions'.[120]

The SSMPA prohibits marriages or civil unions between persons of the same sex and declares such marriage contracts or civil unions to be both invalid and criminal.[121] Only marriages contracted between a man and a woman are recognised as valid under the SSMPA.[122]

Thus, benefits of a valid marriage are denied to couples of same-sex marriages or civil unions.[123] Any person who contracts a same-sex marriage or civil union commits an offence punishable on conviction by 14 years imprisonment.[124] It is common-sensical that due to this prohibition,

113 See Federal Republic of Nigeria, National Assembly 'Report of the Conference Committee on a bill for an Act to prohibit marriage or civil union entered into between persons of same sex, solemnization of same and for other matters related herewith' 2011, dated December 2013.
114 Schedule to the Same-Sex Marriage (Prohibition) Act 2013.
115 As above.
116 n 114 above, secs 1, 2 & 4.
117 n 114 above, secs 4 & 5.
118 n 114 above, sec 7.
119 As above.
120 As above.
121 n 114 above, secs 1(1) & (2).
122 n 114 above, sec 3.
123 As above.
124 n 114 above, secs 5(1).

some Nigerians may travel to countries where same-sex marriage is legal in order to solemnise their same-sex marriages, and later seek to enforce the same in Nigeria. In order to avoid this state of affairs, the SSMPA stipulates that same-sex marriages or unions entered into in foreign countries shall be void in Nigeria, and no court in Nigeria shall enforce such marriages.[125]

The SSMPA also prohibits churches, mosques and other places of worship from solemnising marriages or civil unions between persons of the same-sex.[126] Should any place of worship defy the law and proceed to solemnise a same-sex marriage, two implications follow: first, any certificate issued to the same-sex couple shall be invalid; and second, every person who witnessed, abetted or aided the solemnisation of such marriage is liable upon conviction to 10 years imprisonment.[127] In what appears to be a rather poor example of legislative drafting, the SSMPA prohibits 'public show of same-sex amorous relationships'.[128] Any person who makes a public show of same-sex amorous relationship whether directly or indirectly commits an offence and is liable on conviction to a term of 10 years imprisonment.[129]

In order to clip the wings of civil society on same-sex marriage and SOGI issues generally, the SSMPA prohibits the registration of gay clubs, societies and organizations.[130] Any person who registers or supports the registration of gay clubs, societies and association is liable upon conviction to 10 years imprisonment.[131] However, by section 38 of Nigerian Constitution, freedom of association and assembly is recognised. This freedom presupposes that individuals can lawfully assemble and form associations to pursue legitimate goals without being registered as such.[132] In order to guard against such eventuality, the SSMPA prohibits the mere sustenance, processions and meetings of every gay club, society and association.[133] Thus, any person who operates or supports the operation, sustenance, processions or meetings of a gay club, society or association is liable upon conviction to 10 years imprisonment.[134] Jurisdiction over these offences is vested in the High Court of each state.[135] In the case of the Federal Capital Territory (FCT), jurisdiction is vested in the High Court of the FCT.[136]

125 n 114 above, secs 1(3).
126 n 114 above, secs 2(1).
127 n 114 above, secs 5(2).
128 n 114 above, secs 4(2).
129 n 114 above, secs 5(2).
130 n 114 above, secs 4(1).
131 n 114 above, secs 5(2) & (3).
132 This is so unless some laws require associations pursuing such goals to be registered.
133 n 114 above.
134 As above.
135 n 114 above, sec 6.
136 As above.

4 Human rights implications of the SSMPA

The implications of the SSMPA are threefold. First, the SSMPA violates a number of constitutionally guaranteed human rights of LGBTI persons. Second, it exposes the LGBTI community to wanton human rights abuses; and third, the SSMPA together with other anti-homosexuality laws violates well-established principles of international human rights law.

4.1 Violations of constitutional rights (direct violations)

The Nigerian Constitution guarantees the right to life,[137] dignity of human person,[138] personal liberty,[139] fair hearing,[140] privacy,[141] freedom of religion,[142] freedom of association,[143] freedom of movement,[144] and freedom from discrimination.[145] These rights are sacrosanct and fundamental.[146] However, section 45 of the Constitution (otherwise called the derogation clause) contains instances where these rights and freedoms can be derogated from. The derogation provisions of section 45 may be looked at in three categories.[147] The first category relates to rights, which may be derogated from by legislation in peacetime.[148] The rights derogable under this category include: right to private and family life,[149] right to freedom of thought, conscience and religion,[150] right to freedom of expression and the press,[151] right to peaceful assembly and association,[152] and right to freedom of movement.[153]

In order for a law that limits any of these rights to be valid, the government must show that such law is 'reasonably justifiable in a democratic society' in the interest of defence, public safety, public order, public morality or public health, or for the purpose of protecting the rights of other persons.[154] The second category relates to rights that may be

137 Constitution of the Federal Republic of Nigeria 1999, sec 33.
138 n 137 above, sec 34.
139 n 137 above, sec 35.
140 n 137 above, sec 36.
141 n 137 above, sec 37.
142 n 137 above, sec 38.
143 n 137 above, sec 40.
144 n 137 above, sec 41.
145 n 137 above, sec 42.
146 A Ullah & S Uzair 'Derogation of human rights under the Covenant and their suspension during emergency and civil martial law in India and Pakistan' (2011) 26 *South Asian Studies* 181.
147 Y Akinseye-George *Improving judicial protection of human rights* (2010) 326-327
148 n 137 above, secs 45(1).
149 n 137 above, sec 37.
150 n 137 above, sec 38.
151 n 137 above, sec 39.
152 n 137 above, sec 40.
153 n 137 above, sec 41.
154 n 137 above, secs 45(1).

derogated from only during periods of emergency.[155] These include rights to life[156] and personal liberty.[157] In order for the right to life and personal liberty to be validly derogated during emergency, there must be a law authorising the derogation and the measures taken pursuant to the law must be 'reasonably justifiable' and must also be taken only for the purpose of dealing with the situation that exists during that period of emergency.[158] The third category relates to rights that cannot be derogated from, whatever the circumstance.[159] These rights include the rights to dignity of the human person,[160] fair hearing[161] and freedom from discrimination.[162]

The import of the derogation clause in the Nigerian Constitution has been determined in a number of decided cases. In *Attorney General of Imo State v Ukaegbu,* the Court of Appeal justified as reasonable a law that enforces minimum standard of morality in schools.[163] In another case, *Attorney General v Chike Obi*, the Supreme Court also allowed a law that limits harmful speeches.[164] However, in the case of *IGP v ANP,* where the State sought to defend a Public Order law which limited the freedom of speech and assembly, by requiring citizens to obtain a police permit before holding a public gathering, the Court of Appeal noted that 'even though government purpose for enacting the law may be legitimate, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties'.[165] The Court also reminded parliament of its duty under the Constitution to guard fundamental rights jealously.[166] Before engaging further with the derogation provision, one point needs to be made clear. The Nigerian Constitution expressly forbids derogation in respect of the non-discrimination provision.[167] While the legislature is at liberty to limit rights 'generally', the Constitution frowns upon limitations based on any of the prohibited grounds stated under section 42 of the Constitution.[168] One of the prohibited grounds for discrimination under section 42 of the Nigerian Constitution is 'sex'.

In a 1994 Communication before the Human Rights Committee, *Toonen v Australia*, the Committee noted that reference to 'sex' in articles 2 and 26 of the ICCPR includes sexual orientation.[169] In subsequent cases,

155 n 137 above, secs 45(2).
156 n 137 above, sec 33.
157 n 137 above, sec 35.
158 n 137 above, secs 45(2).
159 n 137 above, sec 45.
160 n 137 above, sec 34.
161 n 137 above, sec 36.
162 n 137 above, sec 42.
163 *Attorney General of Imo State v Ukaegbu* 1985 4 NCLR FCA (Nigerian Court of Appeal).
164 *Attorney General v Chike Obi* 1961 1 All NLR 186 FSC (Supreme Court of Nigeria).
165 *IGP v ANPP* (2008) CHR 131, at 165-167, paras G-B (Nigerian Court of Appeal).
166 As above.
167 Constitution (n 137 above) sec 45.
168 n 137 above, sec 45.
169 *Toonen v Australia* Communication 488/1992 UN Doc CCPR/C/50/D/488/1902 (1994) 4 April 1994, para 8.7.

the Committee has maintained this inclusive interpretation of the non-discrimination clause. For instance, in *Joslin v New Zealand*, the Committee categorically stated that 'it is the established view of the Committee that the prohibition against discrimination on grounds of 'sex' in article 26 comprises also discrimination based on sexual orientation'.[170] The status of these decisions in the Nigerian legal system will be dealt with below. The Nigerian Constitution prohibits discrimination on the ground of sex.[171] This prohibition, as stated earlier, is absolute. No derogation is allowed. It goes without saying therefore that the SSMPA is unconstitutional and a violation of the right of LGBTI persons to non-discrimination on the ground of sex (which also includes non-discrimination on the basis of sexual orientation). Any law purporting to be a derogation of the non-discrimination clause is null by virtue of section 45(1)(b) of the Constitution.

Even if the 'sex includes sexual orientation' argument fails, the Nigerian government still cannot defend how every section of its repressive anti-homosexuality law will be considered 'reasonably justifiable' in a liberal and pluralist democracy such as Nigeria. The SSMPA clearly violates the rights of LGBTI persons to freedom of expression, association, assembly, privacy and family life. The right to privacy has been construed as the freedom of intimate conduct, association, and expression without fear of arbitrary state interference.[172] The realm of intimate association between consenting adults is considered the most fundamental of privacy concerns.[173] What two consenting adults do in the privacy of their home falls squarely in the province of private morality. Scholars believe governments may regulate such private conducts only if such regulation is necessary for the prevention of an identifiable harm.[174]

By criminalising harmless intimate conducts of law-abiding citizens in the privacy of their homes, the SSMPA violates the rights to privacy of LGBTI persons. By preventing LGBTI persons from creating public awareness, engaging in any form of advocacy and forming associations that promote their interests, the SSMPA clearly violates the constitutionally guaranteed rights of LGBTI persons to freedom of expression, assembly and association. From the express provisions of section 45 of the Nigerian Constitution, it is abundantly clear that constitutionally guaranteed fundamental rights cannot be limited merely on the basis of culture or religion. Thus, the SSMPA cannot be justified merely on the grounds that it promotes African cultural values. Certain

170 *Joslin v New Zealand* (902/1999), CCPR/C/75/D/902/1999 (2003); see also *Young v Australia* (941/2000), CCPR/C/78/D/941/2000 (2003) para 10.4.
171 Constitution (n 137 above) sec 42.
172 Fellmeth (n 9 above) 802. See also E Henderson 'Of signifiers and sodomy: Privacy, public morality and sex in the decriminalization debates' (1996) 20 *Melbourne University Law Review* 1023.
173 Fellmeth (n 9 above) 892.
174 See for example JS Mill, *On liberty* (1989) 15; referred to in Fellmeth (n 9 above) 894.

standards in line with democracy and freedom must be observed. The African Charter on Human and Peoples' Rights (African Charter) obliges individuals to preserve African values 'in the spirit of tolerance'.[175] By promoting a fabricated African value in the spirit of intolerance, the SSMPA clearly violates the African Charter, a treaty that forms part of Nigerian *corpus juris* having been domesticated pursuant to section 12 of the Nigerian Constitution.

4.2 Exposure to human rights abuse (indirect violations)

Almost on a daily basis, LGBTI persons are routinely attacked, beaten up and receive death threats.[176]A self-identified Nigerian gay man, Michael Ighodaro, narrated his encounter with hoodlums who severely beat him up.[177] However, he could not approach government hospitals for treatment not only out of fear that his sexual orientation would be disclosed but also because government hospitals usually require police reports before attending to injury cases. Going to a police station in order to get a police report so as to access treatment would be the equivalent of walking voluntarily into a lion's den as the police would instead arrest him simply for being gay. Several self-identified LGBTI persons have had to withdraw or have been forced to withdraw from school on account of their sexual orientation. In February 2006, the National Defence Academy expelled 15 cadets suspected of homosexual acts after it performed anal examinations on them.[178] In August 2007, police officers in Bauchi state broke into a party and arrested 18 men suspected of same-sex relations, charging them with 'addressing each other as women and dressing themselves as women'.[179] They were initially charged with sodomy but the charges were later changed to vagrancy. As at the end of 2009, the men's trial had been postponed several times, with five of the men released on bail and the remaining 13 in jail.[180] By the end of 2010, all the men

175 African Charter on Human Peoples' Rights, art 29(7).
176 H Murdock 'Nigeria: Where being openly gay comes at a steep price' *Global Post* http://www.globalpost.com/dispatch/news/regions/africa/nigeria/120802/nigeria-gay-rightsgoodluck-jonathan-hiv-aids (accessed 22 August 2013).
177 D Lyons 'Breaking social silences in Nigeria: A conversation with gay rights activist Michael Ighodaro' *The Huffington Post* 15 September 2013 http://m.huffpost.com/us/entry/3908443 (accessed 22 August 2013).
178 Aken'Ova (n 21 above).
179 Bureau of Democracy, Human Rights and Labour, US Department of State 'Country report on human rights practices; Nigeria' (2008) http://m.state.gov/md119018.htm (accessed 22 September 2014).
180 Bureau of Democracy, Human Rights and Labour, US Department of State 'Report on human rights practices: Nigeria' (2009) http://www.state.gov/j/drl/rls/hrrpt/2009/af/135970.htm (accessed 22 September 2014).

had been released on bail but no final resolution of the case had been reached.[181]

On 12 September 2008, four newspapers published the names, addresses and photographs of 12 members of the House of Rainbow Metropolitan Community Church, Nigeria's only gay-friendly church.[182] Consequently, some members of the church were threatened, stoned and beaten. It was reported that one woman was beaten by ten men.[183] As at the end of 2015, no action had been taken by government to bring perpetrators of the violence to justice.[184] In the years that followed, members of the church received many threatening emails, telephone calls and letters from unknown persons. The management of the church had to call off a conference on sexual rights and health scheduled to hold in Abuja and Lagos in December 2011 due to safety concerns.[185] Due to constant death threats, the church has now been disbanded and the founder of the church, Reverend Roland Jide Macaulay, has relocated to the UK where he is presently running his gay church, House of Rainbow Fellowship.[186] This demonstrates how homophobia impacts on the right to freedom of worship.

In 2011, a 25 year-old gay man, Rashidi Williams, was beaten up by a gang of people in Lagos State.[187] Another 60 year-old gay man was reportedly beaten to death on the streets during the spring of 2012.[188] On 22 August 2013, a young man identified as Sadiq was beaten to a pulp for allegedly being gay.[189] Being gay, lesbian or transgender in Nigeria comes

181 Bureau of Democracy, Human Rights and Labour, US Department of State 'Report on human rights practices: Nigeria' (2010) http://www.state.gov/documents/organization/160138.pdf (accessed 22 September 2014); see also Bureau of Democracy, Human Rights and Labour, US Department of State 'Report on human rights practices: Nigeria' (2011) http://www.state.gov/documents/organization/186441.pdf (accessed 22 September 2014).

182 Bureau of Democracy, Human Rights and Labour, US Department of State, 2008 (n 179 above).The House of Rainbow Church was founded by Reverend Roland Jide Macaulay on 2 September 2006 in a Lagos hotel hall decorated in rainbow colours. The church is an offshoot of the Universal Fellowship of the Metropolitan Community Church (UFMCC) which was established in the 1960s for homosexuals around the world.

183 As above.

184 Bureau of Democracy, Human Rights and Labour, US Department of State, 2011 (n 181 above).

185 As above.

186 As above; See also 'Go online if you're glad to be gay: One church's answer to rampant homophobia' *The Economist* 11 February 2010 www.economist.com/node/15503420 (accessed 13 February 2016).

187 L Ikeji 'A gay Nigerian man's tale' http://www.lindaikejisblog.com/2011/11/gay-man-in-nigeria.html (accessed 22 August 2013).

188 H Murdock 'Nigerian gay rights activists calls for dignity, acceptance' *Voice of America* 19 July 2012 http://www.voanews.com/content/nigeriangay_rights_activists_call_for_dignity_acceptance/1441447.html (accessed 22 August 2013).

189 E Ebhomele 'Nigerian gay arrested in Ogun community' *PM News* 22 August 2013 http://www.pmnewsnigeria.com/2013/08/22/nigerian-gay-arrested-in-ogun-community/ (accessed 13 February 2016).

at a very steep price.[190] More recently, on 13 February 2014, assailants armed with wooden clubs and iron bars, screaming that they were going to 'cleanse' their neighbourhood of gay people, dragged 14 young men from their bed and assaulted them at Gishiri, a shanty town near central Abuja.[191] Four of the victims were dragged to the nearby police station where they allegedly were kicked, slapped and punched by police officers.[192] The walls of the houses where the victims lived in Gishiri have been painted with graffiti, reading: 'Homosexuals, pack and leave'.[193]

In addition to the live cases of direct and indirect violations enumerated above, there is no denying the fact that the criminalisation of homosexuality under the SSMPA may increase the vulnerability of LGBTI persons to further human rights abuses. These human rights abuses may take the form of killing, torture, invasion of privacy, and discrimination in accessing economic and social amenities. Many LGBTI persons may be denied employment and some employment-related benefits.[194] They are also much likely to lose their jobs and may be ostracised from family, friends and community. Indirect violation may also take the form of profiling LGBTI individuals as sexual offenders. Intersex persons may be forced to undergo surgeries in order to 'correct' their genitals. The SSMPA may create an atmosphere for extortion and blackmail of LGBTI persons. Extortionists and blackmailers (who could be family members, close friends, bosses or law enforcement officers) usually threaten to publicly disclose the sexual orientation of their victim. In her tour of ten cities in Nigeria, Unoma Azuah reported several cases where lesbian women were forced to give up as much as half of their salaries to blackmailers in a bid to cover up their sexual orientation.[195] While these abuses are not the direct result of the SSMPA or other anti-homosexuality laws, these laws provide incentives and the necessary climate for the abuses to take place.

Nearly every time SOGI issues gain public visibility in Nigeria, a violent crackdown or some repressive legislative backlash usually follows.[196] It would be recalled that the first ever Same-Sex Marriage

190 CM White 'Human rights and the impact of criminalization: Legalizing homophobia in Jamaica, Nigeria, and Uganda' *International Criminal Law AWR* (2012) 21 scholarship.shu.edu/cgi/viewcontent.cgi?article=1325&context=student_scholarship (accessed 22 August 2013).

191 M Faul 'Men attacked by anti-gay mob in Nigeria' *The Washington Post Africa* 15 February 2014 http://www.washingtonpost.com/world/africa/men-attacked-by-anti-gay-mob-in-nigeria/2014/02/15/1c313e5c-967e-11e3-9616-d367fa6ea99b_story.html (accessed 22 September 2014).

192 As above.

193 As above.

194 Flaherty & Fisher (n 11 above) 211.

195 U Azuah 'Extortion and blackmail of Nigerian lesbians and bisexual women' in R Thoreson & S Cook (eds) *Nowhere to turn: Blackmail and extortion of LGBT people in Sub-Saharan Africa* A report of the International Gay and Lesbian Human Rights Commission (2011) 46-59.

196 See for instance, Divani (n 19 above).

(Prohibition) Bill in Nigeria was prepared in reaction to a small demonstration at the 2005 AIDS conference in Abuja (Nigeria) which urged African governments to take the health, social, and rights situations of men who have sex with men (MSM) seriously. More backlash came when British Prime Minister, David Cameron, threatened aid cut to countries still retaining anti-homosexuality laws.[197]

The vagueness of certain provisions of the SSMPA provides law enforcement officers much latitude in policing the private actions of LGBTI persons and other citizens. The SSMPA could also be used by overzealous law enforcement agents to falsely accuse same-sex persons such as immigrants and students who are cohabiting due to economic reasons. Anti-homosexuality laws generally denigrate the social status of LGBTI persons and increase their vulnerability to HIV infection.[198] It is reported that the HIV prevalence among MSM in six sites in Nigeria is around 17.2 per cent.[199] In addition to exposing LGBTI persons to human rights abuses, provisions of the SSMPA may impede public health outcomes, in particular the prevention and treatment of HIV and AIDS.[200] The provisions of the SSMPA may hinder the effectiveness of strategies and measures designed to contain the HIV epidemic. The most devastating impact of these laws is that they drive LGBT persons underground, forcing them into hiding. In extreme cases, LGBTI persons flee the country as refugees or asylum seekers. Being underground, the rights of LGBTI persons to access education, health and other social services including HIV/AIDS intervention programmes are severely impinged.[201]

4.3 Violations of international human rights law

Almost all major international human rights instruments contain a provision that permits states to derogate from their provisions in certain circumstances.[202] The derogation provisions of these treaties in a way are *in pari materia* with section 45 of Nigeria's Constitution. In 1984, a group

197 Martin (n 111 above). It should be recalled that it was in the month that David Cameron issued this threat that the Nigerian Senate passed the Same-Sex Marriage Prohibition Bill.

198 As above.

199 S Adebajo, *et al* 'Social and economic factors contributing to the HIV vulnerability of MSM in urban Nigeria: A qualitative study comparing Lagos and Kano' Poster Presentation, XIX International AIDS Conference, 22–27 July 2012, Washington, D.C.

200 Global Commission on HIV and the law 'Final Report of the Global Commission on HIV and the Law' 9 July 2012, 45-48; see also Commonwealth Secretariat 'A Commonwealth of the people: Time for urgent reform' 2011 recommendation 60, 100-102.

201 See White (n 190 above) 21-24.

202 See Universal Declaration of Human Rights (Universal Declaration) article 29(2); International Covenant on Civil and Political Rights (ICCPR) articles 12, 22 & 23; African Charter on Human and Peoples' Rights (ACHPR) article 16, European Convention on human Rights (ECHR) article 15; and American Convention on Human Rights (ACHR) article 27.

of eminent international law experts convened at Siracusa, Italy, to consider the limitation and derogation provisions of the ICCPR. This meeting gave birth to the Siracusa Principles on the Limitation and Derogation Provisions of the ICCPR. The Siracusa Principles were later, in 1985, adopted by the United Nations Economic and Social Council (ECOSOC).

According to the Siracusa Principles, in order for a limitation to be necessary, it must meet the following standards: (a) it must be based on one of the recognised grounds justifying limitations; (b) it must respond to a pressing public or social need; (c) it must pursue a legitimate aim; and (d) the limitation must be proportionate to that aim.[203] The burden of proving that these criteria have been met rests squarely on the state.[204] Even after all these requirements have been met, a state is further obligated to use no more restrictive means than are required for the achievement of the purpose of the limitation.[205]

A state invoking public morality as a ground for restricting some rights must demonstrate that the limitation is essential 'to the maintenance of respect for fundamental values of the community.'[206] Irrespective of the values a state seeks to preserve, it shall not under the guise of the limitation provision, breach the non-discrimination rule.[207] It is difficult to see how the SSMPA can be shown as essential to the maintenance of Nigeria's fundamental values. It is also not easy for the Nigerian government to justify that the discomfort some officious members of society feel at knowing someone, somewhere, is having a good time in a way they find unpleasant to imagine is proportionate to the penal sanctions prescribed in the SSMPA.

Several UN treaty bodies have made official statements affirming that criminalisation of intimate activity between two consenting adults is a violation of the most basic human rights for which the United Nations is consecrated. In *Toonen v Australia*,[208] the Human Rights Committee found that criminalisation of same-sex intercourse amounted to a violation of the rights to privacy,[209] equal protection of the laws,[210] and the non-discrimination provision of the ICCPR.[211] In *Young v Australia*[212] the

203 United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985), Principle 10.
204 n 203 above, Principle 12.
205 n 203 above, Principle 11.
206 Siracusa Principles (n 203 above), Principle 27.
207 n 203 above, Principle 28.
208 *Toonen v Australia* (n 169 above).
209 n 169 above, para 8.2.
210 n 169 above, paras 8.7 & 9.
211 As above.
212 *Young v Australia*, UN Human Right Committee, Communication 941/2000, 10.4-11 UN Doc No CCPR/C/78/D/941/2000 (2003).

Human Rights Committee found that the refusal of Australia to provide the homosexual partner of a veteran the same pension that it would have provided to a heterosexual spouse violated article 26 of the ICCPR. More recently, the Committee has been including in its Concluding Observations appeals to states to repeal criminal prohibition of same-sex relations.[213] Apart from the Human Rights Committee, other human rights treaty bodies have extended human rights protection to sexual minorities. The Committee on Economic and Social Rights, in its General Comment 14 stated that article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) proscribed discrimination on the basis of sexual orientation.[214] Time after time, the Committee on the Elimination of Discrimination Against Women (CEDAW) has called for the decriminalisation of lesbianism.[215] Pursuant to the Convention Against Torture (CAT), the CAT Committee has issued declarations criticising states for prison conditions that discriminate based on sexual orientation.[216] Based on these decisions, it is impossible to justify provisions of the SSMPA, the Criminal Code, Penal Code and *Shari'a* laws which criminalise consensual homosexual conducts between adults.

It must be noted however that these international standards do not apply directly in Nigeria.[217] Two principal theories govern the status as well the relationship between international law and domestic law. These are monism and dualism. The world's legal systems are divided roughly along these two theories.[218] Most of the common law countries adopt the dualist theory following British constitutional tradition and the civil law countries following French constitutional law adopt the monist theory.[219] Under the monist system, international law and domestic laws form part of a single system of law. Thus, international agreements duly ratified and published by a monist state automatically become part of the domestic *corpus juris*.[220] Such treaties enjoy primacy over other domestic legislations. In dualist systems on the other hand, international law and

213 See Concluding Observations of the UN Human Rights Committee: United Republic of Tanzania (18 August 1998) UN Doc CCPR/C/79/Add.97, 23.

214 See Committee on Economic and Social Rights, General Comment No 14 (11 August 2000) UN Doc E/C.12/2000/4 Art 12, p 18.

215 See Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Kyrgyzstan (27 January 1999) UN Doc CEDAW/A/54/38 pp 127-28.

216 See Concluding Observations of the Committee against Torture: Egypt (Nov 20, 2002) UN Doc CAT/s/XXIX/Misc.4 p 5(e).

217 See VO Ayeni 'Domestic impact of the African Charter on Human and Peoples' Rights and the Protocol on the Rights of Women in Africa' unpublished LLM Dissertation, University of Pretoria 2011 18.

218 The dichotomy between monism and dualism has been severely criticised. Some commentators now contend that application of international treaties depends on whether the treaty is self-executing or non-self-executing rather than whether the state applying the treaty is monist or dualist.

219 ME Adjami 'African courts, international law, and comparative case law: Chimera or emerging human rights jurisprudence?' (2002) 24 *Michigan Journal of International Law* 103.

domestic laws are considered two separate legal systems. Duly ratified treaties do not become part of the domestic laws until such treaties are domesticated.[221] Nigeria has adopted the dualist approach.[222] Section 12 of the Nigerian 1999 Constitution provides as follows:[223]

> No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

The implication of this is that the provisions of a treaty are not binding or enforceable within Nigeria unless and until the treaty in question has been domesticated. Although provisions of undomesticated treaties are not binding on Nigerian courts, these treaty provisions or interpretations given to them by the relevant treaty body may have a persuasive effect on municipal courts. In appropriate cases, especially where the provisions of a treaty and those of the Nigerian law are *in pari materia*, a Nigerian court may be constrained to adopt the interpretations given to the treaty provisions by any relevant international court or tribunal.

Another aspect of Nigeria's anti-homosexuality laws that contradict international human rights law is the prescription of the death penalty for homosexual conduct. It would be recalled that the then United Nations Special Rapporteur on Arbitrary Killings and Summary Executions, Philip Alston, visited Nigeria from 27 June to 8 July 2005. In his report after the visit, the Special Rapporteur noted that the imposition of the death penalty for homosexual conduct by 12 Northern Nigerian states constitutes a violation of international human rights law. Article 6(2) of the ICCPR, to which Nigeria acceded in 1993 without reservation, provides that the death penalty may only be imposed 'for the most serious crimes', especially crimes where there was an intention to kill which resulted in loss of life.[224] In response to the oral report delivered by Alston, the Nigerian ambassador to the United Nations, Joseph Ayalogu, stated:[225]

220 C Harland 'The status of the International Covenant on Civil and Political Rights in the domestic laws of state parties: An initial global survey through the UN Human Rights Committee documents' (2000) 22 *Human Rights Quarterly* 187.

221 F Viljoen *International human rights law in Africa* (2007) 536.

222 *Abacha v Fawehinm* May [2000] 6 NWLR (Pt 660) 228 SC; *Ibidapo v Lufthansa Airlines* [1997] 4 NWLR (Part 498) 124 at 150.

223 See also sec 12(1) of the 1979 Nigerian Constitution; sec 13 of the 1989 Nigerian Constitution, sec 74 of the 1963 Nigerian Constitution, and sec 69 of the 1960 Nigerian Constitution.

224 P Alston 'Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development' Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions A/HRC/8/3/Add.3 21-22.

225 Reprinted in Amnesty International 'Love, hate and the law: Decriminalizing homosexuality' http://www.amnesty.org/en/library/asset/POL30/003/2008/en/d77d0d58-4cd3-11dd-bca2-bb9d43f3e059/pol300032008eng.html (accessed 22 September 2014).

> The notion that executions for offences such as homosexuality and lesbianism are … excessive is judgmental rather than objective. What may be seen by some as disproportional penalty in such serious offences and odious conduct may be seen by others as appropriate and just punishment.

The Human Rights Committee has also stated in respect of Sudan which has similar laws that 'the imposition in [Sudan] of the death penalty for offences which cannot be characterised as the most serious, including committing homosexual acts, is incompatible with article 6 of the Covenant.'[226]

4.4 Impact of Nigeria's SSMPA on other African countries

The SSMPA could have dire consequences for state-sponsored homophobia in Africa. Nigeria is Africa's most populous country. Almost a quarter of the continent's population are Nigerians.[227]Given its vast size, resources, population and large market drive, it is not presumptive to state that Nigeria assumes some leadership roles in Africa. In the past, the country has exercised hegemonic influence on the continent by championing the establishment of continental organisations, supporting decolonisation, promoting regional economic development, and providing military aid and manpower during peacekeeping operations.[228] Given this frontline role, it is not unexpected that Nigeria's position on the homosexuality debate will have tremendous impact, directly or indirectly, on the politics of homosexuality in Africa.

The Nigerian SSMPA will no doubt give extra moral clout to anti-homosexuality sentiments in Africa. It will be cited by some moral entrepreneurs on the continent as additional evidence that homosexuality is 'un-African'. The SSMPA is likely to prompt more stringent legislation on same-sex relationships in other countries. Penal provisions in the SSMPA may become the new African minimum standard for the treatment of LGBTI persons. The SSMPA may also become another advocacy tool in the hand of moral entrepreneurs in other African countries to mobilise public support for their own anti-homosexuality legislation. The SSMPA is also very likely to serve as a template for legislators in other countries who may simply adopt facsimile versions of it or come up with their own anti-homosexuality bills but by means of duplication. Indeed, anti-homosexuality movements in other African

226 UN Human Rights Committee, Concluding Observations of the Human Rights Committee, Sudan (1997) UN Doc CCPRIC/79/Add.85 8.

227 EI Okunnu 'Nigeria's Leadership Roles in Africa and Daunting Challenges' *Economic Confidential* (8 September 2010) economic http://confidential.com/2010/09/nigerias-leadership-roles-in-africa-and-daunting-challenges (accessed 20 September 2013).

228 LM Marafa 'Sustaining Nigeria's leadership role in Africa' *Business Day* (2012) available at http://www.businessdayonline.com/NG/index.php/analysis/commentary/35738-sustaining-nigerias-leadership-role-in-africa (accessed 22 September 2013).

countries may begin to measure their success or failure with reference to the Nigerian SSMPA.

One critical lesson that African NGOs must learn from Nigeria is vigilance. The price of liberty is eternal vigilance. It would be recalled that in 2007, activists were able to stall the passage of an earlier version of the SSMPA after having notice of the legislative hearing on the repressive SSMPA.[229] However, during the passage of the SSMPA by the Nigerian House of Representatives on 31 May 2013, most NGOs had no prior notice of the vote.[230] This impresses on LGBTI organisations in other African countries to maintain uninterrupted liaison with their legislative assemblies. Closely related to the above is the need for acuity in advancing SOGI issues on the continent. One lesson clearly learnt from past experience in Nigeria is that it is precisely when SOGI issues gain visibility that homophobia follows in full with very violent crackdown and repressive legislative backlash.[231] This therefore impresses on LGBTI activists and organisations to always anticipate backlash and take proactive measures to minimise hostile reactions before embarking on a 'publicity stunt.'

5 Conclusion

This chapter set out to investigate the constitutionality and human rights implications of anti-homosexuality legislation in Nigeria. In order to thoroughly engage with this objective, the chapter addressed a wide range of issues including a historical expedition into the practices of same-sex relationships in pre-colonial Nigeria, the evolution of legal prohibition of same-sex relationships in the country, contents and constitutionality analysis of the new SSMPA, and also the implications of the SSMPA and other anti-homosexuality legislation on the human rights of LGBTI persons.

Flowing from the analysis in the chapter, it is irrefutable that sexual relations and marriage between persons of same-sex existed in pre-colonial and post-colonial Africa and continues to exist in modern day Africa.[232] The 'homosexuality is un-African' -argument therefore is only a charade. The chapter also argued that the imposition of the death penalty for

229 Human Rights Watch (n 20 above).

230 'Nigeria anti-gay marriage Bill approved' *Huffington Post* http://m.huffpost.com/us/entry/3360107 (accessed 25 August 2013) where the Chairman of Nigeria's National Human Rights Commission stated that he had knowledge of the parliament's vote in respect of the Bill only hours before the proceedings.

231 Viljoen (n 221 above).

232 EE Evans-Pritchard *Witchcraft, oracles and magic among the Azande* (1976); R Morgan & S Wierenga *Tommy boys, lesbian men and ancestral wives* (2005); N Hoad 'Tradition, modernity and human rights: An interrogation of contemporary gay and lesbian rights' claims in southern African nationalist discourses' (1998) 2 *Development Update* 32-43.

homosexual conducts by 12 states in Nigeria is a violation of international law; and also that criminalisation of consensual homosexual conduct is a violation of the constitutional guarantees of freedom from discrimination, freedom from arbitrary arrest and detention, right to personal liberty, dignity of the human person, freedom of expression and the press and freedom of association and assembly. Criminalisation of homosexuality constitutes a clog in the wheel of HIV/AIDS programmes designed for men who have sex with men (MSM) and women who have sex with women (WSW), thereby sabotaging national and international efforts at combating HIV/AIDS.[233] Anti-homosexuality laws also drive LGBTI persons underground, thereby impinging on the rights of LGBT persons to access educational and medical services.

While a constitutional challenge to the SSMPA is being awaited, the SSMPA is already creating an atmosphere of insecurity for the LGBTI community in Nigeria. Overzealous law enforcement officers have amplified their surveillance and crackdown on LGBT persons. Due to its over-arching impact on human rights of LGBTI persons, the SSMPA will continue to attract vociferous criticisms from local and international quarters. It is expected that if the current tempo of criticism and pressure is sustained, it may enthuse the parliament to consider the option of repealing or amending the SSMPA. In the unlikely event that the parliament fails to repeal or amend the SSMPA, there is no doubt that civil society organisations will mount a constitutional challenge against the Act. It is however unclear whether Nigerian courts will rise above prejudice to secure the rights of sexual minorities when called upon to do so.

It is important to note that state-sponsored homophobia in Nigeria is a pandora's box swarming with politics. It is less about public morality than it is about political power. Although anti-homosexuality legislation has been in existence in the Nigeria since 1916, it was not until the return to civil rule that they became political staple. Homophobia plays a vital role in dictating political outcomes in Nigeria. Unfortunately, this political angle is sometimes missing from analysis of homophobia. Some politicians resort to the politics of homophobia in order to score cheap political points and shore up support whenever the election is on the horizon. Christians and Muslims constitute an overwhelming majority of Nigeria's population. A Pew Research Centre survey showed,[234] 97 per cent of Nigerians expressed disapproval for homosexuality. Promoting an idea which aligns with the beliefs of 97 per cent of Nigerians and one which religious adherents could give up their lives to defend is a common strategy to influence political outcomes. Politicians in Nigeria usually prop up the homosexuality question ahead of re-election campaign or in a bid to

233 Flaherty & Fisher (n 11 above) 212.

234 Pew Research Centre 'Global acceptance of homosexuality' http://www.pew global.org/2013/06/04/global-aaceptance-of-homosexuality/ (accessed 22 August 2013).

distract the attention of the public from government's failings.[235] One question that has eluded answer is: why are Nigerian politicians so fixated on tackling homosexuality when there are myriad of problems in the area of poverty alleviation, corruption, power supply, Boko Haram insurgency, education, food security, Niger Delta unrest and other serious problems?

The political nature of homosexuality is more clearly demonstrated by the fact that none of the political parties in Nigeria has formally endorsed LGBTI rights, including political parties that are nationally acclaimed as liberal and progressive. Politics of homosexuality is also part of a deep-seated political tradition of African leaders blaming everything – failed infrastructure, corruption, even homosexuality – on colonialism and the West.

The legal prohibition of immoral conduct is based on rational rather than emotional considerations. Although immorality is considered a necessary ingredient while criminalising an act, it is never sufficient to criminalise an act based on immorality alone. While some degree of morality is essential to preserve law and order in society, experience shows that the survival of society consists not in the possession of a single morality, but in the mutual tolerance of different moralities. Single morality does not agree with the notion of a pluralist society, which is the import of sections 10 and 38 of the Nigerian Constitution. Article 29(7) of the African Charter obliges states and individuals to preserve African values 'in the spirit of tolerance'. Tolerance of harmless differences is a social value, a value which ranks among the top values that a liberal democracy such as Nigeria should pursue.[236] The concept of human rights was birthed on the prime conviction that tolerance of harmless differences, such as dissent in speech, religious beliefs or organisational affiliations is the true definition of human dignity. Intolerance on the basis of sexual conformity and majoritarian morality is the very antithesis of a pluralist, liberal, democratic state that Nigeria claims to be. Subordinating individual freedoms and human rights to religion-based, culturally defined moral revulsion rewrites the universality of human rights and turns the human rights clock backward by several decades.

The need for public education and awareness about these issues cannot be overemphasised. Homophobia is the direct consequence of a single story about sexuality. Why will most people not be in a state of panic? Throughout their lives, parents, teachers, religious and community leaders have told them that sexual attraction to persons of same-sex is an aberration; a form of sexual perversion. Educational materials referencing the various forms of sexual orientations and gender identities are usually

235 Aken'Ova (n 21 above). It would be recalled that the first ever Anti-homosexuality Bill was prepared in 2006 towards the infamous third term bid of President Obasanjo in 2007.

236 Fellmeth (n 9 above) 909.

non-existent in most schools in Nigeria. Children (most of whom are now adults) have been fed with all sorts of myths about homosexuality; for instance, 'homosexuals are promiscuous', 'homosexuals are deviant', 'it is un-African to be homosexual', 'homosexuals abuse children', 'God hates homosexuals', among others.[237] This is why education and aggressive public awareness is important.

The mass media should raise awareness around SOGI issues, promote tolerance and avoid the use of stereotypes in relation to such issues. Civil society organisations should facilitate and donor agencies should support training and awareness-raising programmes for judges, court personnel, prosecutors, lawyers and other government personnel regarding principles of equality and non-discrimination especially in the area of sexual orientation and gender identity. In Nigeria, as in other African countries, where the executive and legislature have joined forces to tighten the noose around the neck of LGBTI persons, salvation can only come from the judiciary. In many countries with progressive SOGI regimes, the judiciary has been in the forefront of defending the rights of LGBTI persons by slamming down anti-homosexuality laws.[238] The Nigerian judiciary is therefore called upon to rise above prejudice and secure the rights of LGBTI persons. Along this line, civil society organisations should as a matter of urgency mount a constitutional challenge of those *Shari'a* laws that impose the death penalty for homosexual conduct. A constitutional challenge should also be extended to the recently enacted SSMPA, which prohibits same-sex marriage and other homosexual conduct.

SOGI protection issues also should be introduced into school curricula. Police officers, prison personnel and other law enforcement officers should be trained on these issues. This will enable them to respond appropriately when the rights of LGBTI persons are trampled upon. Government should as a matter of priority guarantee the rights of LGBTI persons to effective remedies. There is no doubt that violence, harassment, discrimination, stigmatisation and prejudice directed at LGBTI persons undermine their integrity and dignity as human persons. Even if their conduct is criminalised (based on the current state of law in Nigeria), the law also provides a full complement of rights for persons accused of crimes, which must be respected before, during and even after their prosecution. Government therefore should ensure that measures are taken to impose appropriate criminal sanctions on citizens who unleash violence on LGBTI persons. All allegations of hate crimes perpetrated against LGBTI persons should be investigated promptly and thoroughly, and where appropriate evidence is found, those responsible should be prosecuted and duly punished. In line with trends in more progressive

237 See for instance T Msibi 'The lies we have been told: On (homo) sexuality in Africa' (2011) 58 *Africa Today* 54 -77.

238 See n 15 above.

nations, efforts should be put in place to repeal the SSMPA and other laws which criminalise same-sex relations between consenting adults.

CHAPTER 12 PROTECTING SAME-SEX RIGHTS IN NIGERIA: CASE NOTE ON *TERIAH JOSEPH EBAH V FEDERAL GOVERNMENT OF NIGERIA*

*Azubike Chinwuba Onuora-Oguno**

1 Introduction

Same-sex sexual orientation is strongly condemned within the religious and social spheres in most African countries, particularly in Nigeria. Individuals involved in same-sex relations have continued to face discrimination and are subjected to inhuman, cruel treatment and deprived of the right to freedom association among several other rights in Nigeria. The Constitution of the Federal Republic of Nigeria (1999) (Nigeria's Constitution) as amended provides for equality and prohibits any form of discrimination.[1] However, the Criminal Code and Penal Code prohibit same-sex relations.[2]

In the recent development of international law, the need to ensure respect for every individual has increased.[3] Relying on the prohibition of discrimination and inequality, respect for sexual orientation has gradually gained protection in international law.[4] The rationale behind the growing acceptance of same-sex sexual orientation is hugely premised on the reasoning that all human beings are equal and should be so treated irrespective of sexual orientation.[5] As conceptualised by Viljoen:[6]

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1 Federal Republic of Nigeria Constitution 1999, sec 42(1).

2 See generally Section 214, same sex relations are treated as 'unnatural carnal knowledge'.

3 F Viljoen *International human rights law in Africa* (2012) 260.

4 For instance, in Africa, the African Commission recently adopted Resolution 275: Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identityhttp://www.achpr.org/sessions/55th/resolutions/275/ (accessed 3 March 2015).

5 The Human Rights Council adopted a resolution – Human rights, sexual orientation and gender identity (adopted 17 June 2011) – A/HRC/RES/17/19.

6 F Viljoen 'Human rights in a time of homophobia: An argument for equal legal protection of 'sexual minorities' in Africa' *University of Pretoria Expert Lectures* 12 June 2013.

> Over the last decade or so, international acceptance of 'sexual minorities' has increased significantly, reflected in the consensus that a person's sexual orientation or gender identity should not be a basis for denying him or her the equal protection of the law …

Despite the growing acceptance by international law on the need to protect the rights of people who identify as lesbian, gay, bisexual, transgendered and intersex (LGBTI), Nigeria has continued to legally entrench discrimination against same-sex relationships.[7] This entrenched homophobia acquired some legal backing by the enactment of the Same-Sex Marriage (Prohibition) Act (SSMPA) of 2013. The enactment of this Act appears to be at variance with the aspirations of Nigeria's Constitution which prohibits discrimination based on sex, religion or tribe, circumstances of birth, guaranteeing freedom of association,[8] and the right to hold personal beliefs while living a private life.[9] It was on the basis of this perceived inconsistency that the SSMPA was subsequently challenged before the High Court of Nigeria in *Teriah Joseph Ebah v Federal Government of Nigeria (FGN)* (*Ebah's* case).[10]

This chapter is a brief note on the court's decision in this case and its implications on the human rights enforcement framework in Nigeria.

2 The legal framework of the Nigerian human rights system

Ebah's case was initiated through the Fundamental Rights (Enforcement Procedure) Rules 2009 (the FREP Rules). These rules were made by Nigeria's Chief Justice on the basis of a Constitutional provision allowing the Chief Justice to lay out the practice and procedure of the High Court in the enforcement of fundamental rights and freedoms.[11]

Under the FREP Rules, the court is called upon to enforce the Rules' overriding objectives at every stage of human rights action when exercising any power granted it by the Rules or any other law.[12] One critical overriding objective that the FREP Rules list is the advancement, through liberal and purposive interpretation, of the rights protected in Nigeria's

7 AC Onuora-oguno 'Same-Sex Marriage Prohibition Bill in Nigeria – Any human rights implications?' *AfricLaw* 11 June 2013 http://africlaw.com/category/contributors/azubike-onuora-oguno/ (accessed 3 March 2015).
8 Constitution (n 1 above) sec 40.
9 As above.
10 *Teriah Joseph Ebah v Federal Government of Nigeria (FGN)* (*Ebah's* case) Suit FHC/ABJ/CS/197/2014.
11 Constitution (n 1 above) sec 46(3).
12 Fundamental Rights (Enforcement Procedure) Rules 2009, (FREP Rules) preamble, para 1.

Constitution and the African Charter on Human and Peoples' Rights (African Charter).[13] Another overriding objective critical for this discussion is one that directs courts to encourage and welcome public interest litigation, and prohibits courts from dismissing any human rights cases for lack of *locus standi*.[14] The objective specifically states that human rights activists, advocates, non-governmental organisations or groups may institute an action on behalf of any *potential* applicant.[15] It is of little surprise that the high levels of enthusiasm for such progressive FREP Rules soon led some human rights scholars to front the argument that since the rules were made through powers granted under Nigeria's Constitution, they are part of and hold the same force of law as the Constitution.[16] This argument has been considered and rejected on the basis that some overly ambitious provisions of the FREP Rules might contradict the Constitution and that in such a case, while pertinent for the advancement of human rights, the FREP Rules will not override those in the Constitution and will be subordinated to the Constitution as the supreme law in Nigeria.[17] It has also been observed that the effectiveness of the FREP Rules in advancing the protection of human rights is curtailed by the fact that its overriding objectives, such as the objective requiring liberal interpretation of the Constitution and encouraging public interest litigation without *locus standi* limitations, are contained in its preamble, thereby undermining their enforceability as actionable substantive law.[18]

It is suggested that these two key observations about the legal status of the FREP Rules in relation to the Constitution and the status of the overriding objectives contained in the rules' preamble were at the centre of the decision in *Ebah's* case, which is discussed below.

3 Facts of *Ebah's* case

Mr Ebah brought his case before the Federal High Court of Abuja on October 22, 2014 by way of originating summons, challenging the provisions of the SSMPA.[19] The Act criminalises same-sex marriage with ten years' imprisonment as penalty for violation, and also bans LGBT organisations. The applicant argued that the Act was inconsistent with

13 FREP Rules (n 12 above) preamble, para 3(a).
14 FREP Rules (n 12 above) preamble, para 3(e).
15 As above (emphasis added).
16 See A Sanni 'Fundamental Rights Enforcement (Procedure) Rules 2009, as a tool for the enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The need for far reaching reform' (2011) 11 *African Human Rights Law Journal* 528; also see reference there to Court of Appeal decision in *Abia State University v Anyaibe* 1996 3 NWLR (Pt 439) 646 supporting this claim; also see E Nwauche 'The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A fitting response to problems in the enforcement of human rights in Nigeria?' (2010) 10 *African Human Rights Law Journal* 513.
17 Sanni (n 16 above) 528.
18 Sanni (n 16 above) 525.
19 Nigeria Same-Sex Marriage (Prohibition) Act 2013, secs 1(1)A, B(2), 2(1) & (2), (3).

Nigeria's Constitution, which guarantees freedom from discrimination.[20] He further challenged the legality of the Act[21] as it relates to sections 40 and 35 of the Constitution on the freedom of association and the right to liberty respectively. He also sought to challenge the Act as violating similar obligations under the African Charter[22] as well as the provisions of article 28 of the Charter, which provides that 'every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.'

The applicant argued that the SSMPA should be found unconstitutional and void in light of the foregoing inconsistencies. His originating summons was supported by a 22-paragraph affidavit and a written address supporting the relief claimed.

The respondent submitted a counter-affidavit and a preliminary objection, which was primarily based on the lack of *locus standi* by the applicant to initiate the case. The Court subsequently set out to determine the following issue: 'whether the applicant's suit before the Court is competent having regard to the provisions of Nigeria's Constitution'. The presiding judge laid out two premises to interrogate the concept of *locus standi*, the first being a justiciable action and the second being the presence of a dispute between the parties. Specifically, it was argued by counsel for the respondent:[23]

> Under public law, an ordinary individual or citizen or a taxpayer without more will generally not have a *locus standi* as plaintiff. This is because such litigations concerns public rights and duties which belong to and are owed by all members of the public including the plaintiff himself …

The applicant relied on the provisions of the FREP Rules, particularly the overriding objective which requires courts to encourage and welcome public interest litigation in the human rights field, and which prohibits the striking out of human rights cases for want of *locus standi*.

His arguments notwithstanding, the trial judge found that the preliminary objection raised by the respondent's counsel was apt and relied on the provisions of section 46(1) of Nigeria's Constitution (the *locus standi* provision), which provides as follows:

> Any person who alleges that any of the provisions of this chapter has been, is being or likely to be contravened in any state in relation to him may apply to a High Court in that state for redress.

20 n 19 above, secs 42(1)(A) and (B).
21 n 19 above, secs 4(1), 4(2), 5(1), 5(2) & 5(3).
22 n 19 above, art 2, 3(1) & 3(2).
23 n 10 above.

The judge held that:

> The applicant has no *locus standi* to bring this action on behalf of "Gay Community in Nigeria" in any case there is nobody or organisation in Nigeria called lesbian, gay, bisexual and transgender (LGBTI) community. Even the Applicant himself did not describe himself as a gay.

Based on this reasoning, the applicant's case was dismissed. The reasoning of the presiding judge clearly was based on the grounds that the applicant had not proved any injury to himself arising out of the SSMPA and as such, lacked the *locus standi* to initiate the action.

With reference to the foregoing facts and reasoning of the court, the subsequent discussion will address the impact of the decision in *Ebah's* case on the state of the law in Nigeria concerning not just the LGBTI community but public interest litigation generally.

4 Impact of the decision on human rights litigation

The judge did not make a substantive finding on whether the SSMPA violates Nigeria's Constitution but merely dismissed the application for lack of *locus standi*. A critical question arises whether substantial consideration was given to the overriding principles in the FREP Rules, which expressly forbid the dismissing of a case for want of *locus standi.* It is submitted that, had more consideration been given to this objective, the Court would have availed itself of an opportunity for testing the capacity of the FREP Rules to protect the rights of Nigeria's marginalised communities even in the most controversial of cases such as Ebah's.

Key issues regarding the interaction between the FREP Rules and the Constitution were left unaddressed. On reading the decision, it is evident that the judge considered the provisions of section 46(1) which grants *locus standi* for the enforcement of human rights, in isolation of section 46(2) which is the foundation for the FREP Rules made to facilitate the Court processes in the enforcement of human rights. There was also no real engagement with the express provision in the FREP Rules, which allow any human rights activist or advocate to make an application on behalf of any *potential applicant*. The emphasis on *potential applicant* is essential here as it is a clear waiver of the specificity which the Court seems to have erroneously required in citing the absence in Nigeria of anybody called lesbian, gay, bisexual or transgender and for citing the applicant's not being gay as a basis for striking out his application. It is submitted that the very import of this provision is that one needs only show that in principle the provisions of the impugned SSMPA could have an impact on the rights of certain individuals without strict proof.

The significance of the overriding principles was also not considered alongside the Constitution's *locus standi* provision in section 46(1). It is suggested that, had this been done, consideration would have been given to the overriding objective in the FREP Rules of a purposive and expansive interpretation of the Constitution. This would have further permitted a reading of the *locus standi* waiver in the FREP Rules as complementary and not contradictory to the *locus standi* provision in section 46(1) of the Constitution. This approach could have illustrated that the PREP Rules address unique cases of public interest litigation, which may not have been expressly stated in the Constitution.

The result of the Court's approach in *Ebah's* case was the complete disregard for the PREP Rules and a backtracking on the progressive developments Nigeria made in expanding the scope of possibilities for the protection of fundamental human rights under its Constitution.

Prior to the amendment of FREP Rules in 2009, the question of *locus standi* was well entrenched as it barred bringing actions before the courts in Nigeria where individuals were unable to show direct injury to themselves from an alleged human rights violation.[24] Under the old FREP Rules (1979), the protection of human rights was described as ineffective partly due to this strict requirement of *locus standi*.[25] With the embracing of democracy in Nigeria in 1999, respect for the rule of law was on a slow but steady rise and saw the amendment in 2009 of the 1979 FREP Rules.

A major highlight of the amendment was the overriding objective already featured above which suggested that the question of *locus standi* seemed to have been resolved. The new 2009 FREP Rules were lauded for their capacity to enhance the protection of human rights in Nigeria. Nwuche holds the view that the new Rules relinquishing the strong hold of *locus standi* held the potential for better enforcement of human rights.[26] However, to achieve this, the judiciary had to play a pivotal part in the quest for their effective utilisation.[27] Duru describes the Rules as 'a new boost in effective fight of human rights abuses'.[28]

It is submitted that the decision in *Ebah's* case casts aspersion on the potential of the 2009 FREP Rules. The application of the *locus standi* requirement under the Constitution, which is the supreme law in Nigeria, may have very well cast as unconstitutional the FREP Rules' overriding objective which waives the requirement for public interest litigants. From a broader perspective, this apparent tension between the FREP Rules and

24 Sanni (n 16 above) 520.
25 Nwauche (n 16 above) 503.
26 As above.
27 As above.
28 O Duru 'An overview of the fundamental rights enforcement procedure rules 2009' *Social Science Research Network* (2012) http://dx.doi.org/10.2139/ssrn.2156750 (accessed 3 March 2015).

the Constitution brought to bear by the restrictive approach in *Ebah's* case, is reminiscent of Sanni's warnings about the complications that can arise from according the FREP Rules constitutional flavour.[29] It is submitted, however, that had the judge had recourse to previous progressive decisions of the courts on the question of *locus standi* he might have reached a different conclusion as in many of these cases, Nigerian courts disregarded the requirement for *locus standi* and progressively interpreted the law to ensure that justice prevailed.[30] Such contradictions and tensions as were re-created in *Ebah's* case need not arise if the court applies the FREP Rules more progressively to ensure the protection of the most vulnerable of Nigerian citizens of which LGBTI individuals are part.

In the present case, it may be assumed that for the reasons of fear of apprehension and persecution by state machineries, LGBTI individuals in Nigeria might be unable to personally identify their sexual orientation when initiating a public interest action for the enforcement of their rights. With this consideration, it is submitted that the requirement by the judge that in a public interest application to enforce the rights of LGBTI persons, an applicant must disclose their sexual orientation or gender identity, was unreasonable and oblivious to considerations of the fear of exposure members of this community might face.

5 Conclusion

From the foregoing note, it is submitted that the judge in *Ebah's case* erred in law. It is hoped that the decision of the upper courts if the case is taken on appeal might be based on a more rigorous examination of some of the issues raised and might reach a different conclusion. Since the enactment of the 2009 FREP Rules, the prospects for a wider and more flexible framework for the protection of human rights in Nigeria seemed unlimited. It is unfortunate that the question of protecting the rights of sexual minorities in Nigeria should be used by the courts to backtrack the gains Nigeria has made thus far. Such a trend is detrimental not only for LGBTI Nigerians but for all Nigerians who may seek to enforce their various fundamental human rights in the future. Moreover, as argued above, *Ebah's* case was a missed opportunity for the High Court of Nigeria to test the FREP Rules' capacity to complement the Constitution of Nigeria in protecting the rights of all Nigerians.

29 Sanni (n 16 above) 526-8.

30 See generally the cases of *Chief Isiagba v Alagbe & Others* 1981 2 NCLR 424; *Alhaji Adefalu & Others v The Governor of Kwara State & Others* 1982 3 NCLR 1, as discussed in EA Taiwo 'Enforcement of fundamental rights and the standing rules under the Nigerian Constitution: A need for a more liberal provision' (2009) 9 *African Human Rights Law Journal* 546.

CHAPTER 13 THE STATUS OF SEXUAL MINORITY RIGHTS IN CAMEROON

*Michel Togue**

1 Introduction

In Cameroon, the rights of sexual minorities remain largely unrecognised and information on the subject is suppressed by the authorities. This lack of awareness has shaped the sexual minorities' rights debate with homosexuality dominating the discourse while little or no attention is paid to transgender, transsexual, bisexual and intersex individuals. Although homosexual practices have always existed in Africa, it is only recently that homosexuality became a subject of public discussion in various African countries, including Cameroon. For a long time, however, the false idea of a purely heterosexual Africa was maintained.[1] It is important to note that lesbian, gay, bisexual, transsexual and intersex (LGBTI) persons are from all races, all ages and they are an African reality whether people accept it or not.

Homosexuality is a crime and largely a taboo subject in Cameroon. A provision of Cameroon's Penal Code criminalising same-sex relations was brought into law by President Ahmadou Ahidjo through a 1972 Ordinance.[2] The provision is now article 347 *bis* of the Penal Code and it states that 'any person who has sexual intercourse with a person of his sex shall be punished with imprisonment of six months to five years and a fine of 20,000 to 200,000 CFA francs.' This provision of the Penal Code was used for the first time in May 2005, when the police raided a nightclub in

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1 R Kong 'L'homosexualité et le développement. A chacun ses ancêtres' *Editions Africa Venir Exchange & Dialogue* (2012) http://www.exchange-dialogue.com/index.php/en/events/other/119-lhomosexualite-et-le-developpement: L'homosexualité ne fait pas partie de la culture africaine (accessed 30 January 2013).

2 Human Rights Watch 'Criminalising Identities: Rights abuses in Cameroon based on sexual orientation and gender identity' 2010 2.

Yaoundé and arrested 32 persons on suspicion of engaging in homosexual conduct. The arrests triggered a torrent of anti-gay reactions from groups within political circles, the press and the clergy that were hostile to LGBTI people.[3] This was the beginning of a multifaceted debate surrounding gay rights in Cameroon and the heralding of a homophobic Cameroonian society. This provision of the law humiliates LGBTI individuals and puts them in a situation of pillory and total misery, but fortunately, it has also opened a gateway for the gay rights movement, which up to 2005 had largely remained in the closet.

Criminalisation of consensual same-sex relations based on section 347 *bis* is a serious and systemic human rights violation as it brings with it a myriad of other violations including torture, arbitrary detention and the denial of a fair trial. It puts LGBTI people beyond the protection of the law and leaves them vulnerable to violence, loss of liberty, exploitation and most importantly the denial of the right to the highest attainable standard of health. There is an urgent need for international intervention on LGBTI rights and protection in Cameroon. This chapter provides an insider's view of the horrendous situation and the inhuman, degrading treatment that LGBTI people face in Cameroon in their daily lives. It discusses how article 347 *bis* forces LGBTI individuals to suppress or deny who they are to protect themselves from harm and how it impacts an already fragile population. In the past years, LGBTI people have faced and are still facing serious and grave human rights violations. These cases range from minor to serious cases of degrading, inhuman treatment and torture. The reason is that those who are empowered to protect them look the other way or, too often, even join in the abuse.

This chapter looks at the status of the law, then the political forces and how they respond to LGBTI rights, and finally reflects on some avenues for hope that the situation of LGBTI people in Cameroon can be improved.

2 Political powers and LGBTI rights in Cameroon

2.1 Executive power

Discrimination against sexual minorities in Cameroon has been condoned by some of the highest-ranking government officials. When a wave of arrests of persons suspected of engaging in homosexual conduct took place in 2005, the then Vice Prime Minister and Minister of Justice of Cameroon

3 2005 Christmas Day homily of Victor Tonye Bakot, Archbishop of Yaounde, quoted by H Bangre 'L'Archveque s'insurge contre l'homosexualite lors de son Homelie de Noel' *Tetu Magazine* 3 January 2006; see also the 2005 homosexual lists published in the media 'Le top 50 des homosexuels presumes du Cameroun' *L'Anecdote* 24 January 2006; 'La liste complete des homosexuels du Cameroun' *L'Anecdote* 25 January 2006.

(Amadou Ali) called for the continued repression of sexual minorities by adding that 'African cultural values must be preserved [...] [and that] under African culture, homosexuality is not an accepted value by the Cameroon society.'[4] Following these statements, several newspapers seized the platform and used it to vilify suspected homosexuals, including some dignitaries, accused of practicing homosexuality.[5] Interestingly, this trend caught the concern of the highest national political office regarding respect for the right to privacy. It saw the President uttering the following statement of hope for the privacy and dignity of LGBTI persons in Cameroon:[6]

> The society of freedom and progress we strive to build implies common commitment to democratic institutions that we implement and the respect of humans in their most basic and sacred rights. For let us not forget, it is the cornerstone. This is unquestionably a difficult long-term task because of our ethnic, social and cultural diversity, requiring the cooperation of all to strengthen social peace and national unity. So, it is not acceptable that, because of uncontrolled rumour, we agree as it was the case recently, to speculate on the virtues and vices of a few. Freedom of communication and of the press is perhaps authorised, but has its own limit as to when it attacks the right to privacy and, private life and above all reputation, it becomes dangerous and need to be called to question, especially when private life and public order is to be preserved by all. I am therefore appealing to the spirit of responsibility and to the wisdom of communicators and journalists for them to respect the rules of ethics of their noble profession and henceforth take into consideration the principles of privacy inherent in all civilised societies.

The position of the head of state (Chief Executive) made some of us believe that LGBTI rights had the support of the highest office in the land, and would be protected by his subordinates. However, during its Universal Periodic Review (UPR) before the UN Human Rights Council in May 2009, Cameroon refused to accept the recommendations to decriminalise sexual relations between persons of the same sex, and even to look into the protection of some of these rights and those concerned, and instead advanced several reasons for not adhering to the UN Human Right Council recommendations and vehemently refused to protect the human rights of LGBTI individuals.

2.2 The politics of 'good' morals

Cameroon claims that the preservation of good morals is for the betterment of all Cameroonians, because homosexuality according to the Government is immoral and bad, a perverse act that should not be

4 Mr Amadou Ali, at a Press Conference on 25 May 2005, in Cameroon Tribune No 1460 27 January 2006.
5 *La Meteo* no 67, 4 January 2006 and *L'Anecdote* no 254, 24 January 2006 3-6.
6 P Biya, speech on the occasion of the 2006 Youth Day, 10 February 2006. The quotation is translated from French.

tolerated and it stated so emphatically at the UN.[7] However, homosexuality being moral or immoral, is not a governmental concern but an issue of private concern. Consequently, Cameroon's statement that this as an argument to condemn and exclude LGBTI individuals from political, social, economic life as has always been the case is a complete absurdity, which no democratic state should condone.[8]

Furthermore, criminalisation of homosexuality in Cameroon was justified using provisions of international human rights laws, which embody principles of protecting the family and which the government has used to bolster its morality and anti homosexuality stance, as explored below. To counter the argument of the proponents of human rights defenders, the Government of Cameroon stated that the criminalisation of homosexuality was not contrary to the international law in force, namely the provisions of article 12 of the Universal Declaration of Human Rights (Universal Declaration), and article 26 of the International Covenant on Civil and Political Rights (ICCPR), which provide protection to the family as the bedrock of the community. On this basis the state argued that given Cameroon's moral peculiarities, homosexuality was a danger to the family.[9] However, it is here submitted that what the LGBTI individuals are demanding in Cameroon poses no threat to the family. It is in fact a demand for respect of their private lives and intimacy which the government has no right to take from them, as per the Constitution which stipulates the protection of the home as a realm of private space where no one, not even the state, should interfere.

In addition, the foregoing presents a disparity of attitudes between the President of the Republic and his government regarding the protection of gay rights in Cameroon. It is a contradiction in principle to the aforementioned February 2006 speech of the President where he clearly indicated his view that sex was to remain a subject within the private realm. Responding to journalists while in Paris, France, on the issue, he stated the following:[10]

> Even before I became President, this offence was already punishable by my country's Penal Code. Now discussions are going on and could change in one way or the other. But as of now, it is an offence. We have just learnt that some persons held in custody and imprisoned for homosexuality have been released. So attitudes and mentalities are changing.

7 PM Mbonjo Camerounian minister of external relations, during his statement at the UN Human Right Council, Geneva, 2013

8 T Kouoh-Mourkoury *Les couples dominos, aimer dans la différence* (1983) 89.

9 As above.

10 Interview of the Cameroonian President to the media after holding talks with François Hollande. Interview and transcription by Ingrid Alice Ngoumoud'halluin (accessed 30 January 2013).

With a liberal attitude and optimistic outlook as depicted in the President's speech, one has to wonder why his government remains adamant in discriminating against sexual minorities. But could it also be that the President's liberal attitude only has practical application when those implicated under the law for acts of homosexuality are higher ranking personalities in society who have influence in the Republic? Is it only their sexual orientation that can be private and protected while that of others remains a public affair? After all, it was only after dignitaries started to be named by intrusive media reports that the President made these remarks and started invoking privacy. There was no show of similar support after the 2005 Yaoundé arrests. These arrests were the very first ever meted out on gay people in Cameroon, but did not meet with similar sympathy from the President. Perhaps this is also another way we should understand the wave of convictions of persons suspected of having same-sex relations and indeed the wider gay rights debate in Cameroon. This difference underscores the importance of class. While the executive power remains divided on the issue of sexual minority rights in Cameroon, the judiciary, on its own, has made life a misery for this group of persons.

3 Human rights and the protection of LGBTI individuals in Cameroon

There currently exists no final judicial pronouncement on sexual minority rights in Cameroon, as the Supreme Court is yet to deliver rulings on pending appeal cases. The various appeals lodged in the High Court follow a series of convictions for same-sex conduct, but were made after the state violated some constitutional rights and procedures;[11] some of which are highlighted below:

3.1 Violation of the right to liberty

In Cameroon the rights of persons in custody, whether LGBTI or heterosexual, are protected in section 118 of the Criminal Procedure Code as follows:[12]

> Police custody shall be a measure whereby, for purposes of criminal investigation and the establishment of the truth, a suspect is detained in a judicial police cell, wherein he remains for a limited period available to and under the responsibility of a judicial police officer ... The time allowed for remand in custody shall not exceed forty-eight hours, renewable once.

11 Sample of cases pending before the High Court: *Jean Claude Roger Mbede v General Prosecutor* November 2012; *Singakimiéjonas and Ndjomefrancky v General Prosecutor* January 2013.

12 Cameroon Criminal Procedure Code 2005 art 118.

From the foregoing, it is evident that the statutory period of police custody is set up to a maximum of two days and can only be extended by the approval of the state counsel. Yet analyses of cases related to procedures for homosexuality investigations revealed that suspects are held in jail for several days, sometimes even for longer than a week.[13] For example, E Bruno and M Henri, arrested on 20 September 2010 and held in custody, were not presented before the prosecutor until 5 October 2010, 15 days later. In another example, R Jean Claude was arrested and detained for homosexuality on 2 March 2011. He was only forwarded to the prosecutor on 9 March 2011, more than 7 days later, in flagrant violation of the law.

All this is done in violation of the law and the right to liberty and are often justified by the need for more time to gather evidence, but which evidence is usually non-existent for cases that are sometimes triggered by simple accusations. Sometimes, the cases are prolonged in order to give suspects time to find money to 'stifle' the case, and thus reduce shame on the victim. This in effect becomes a method of police extortion. Accused persons often complained of violence and beatings inflicted by police, in charge of investigations in the process of obtaining confessions of guilt that would justify continued detention on remand and based on a homosexuality conviction.

3.2 Violation of the right to human dignity

Dignity is central to the international conception of human rights. The preamble to the Universal Declaration of Human Rights (Universal Declaration) states that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.'[14] 'Dignity' has often been interpreted as being a right to bodily integrity, a right to personal autonomy over individual life choices, and having the ability to satisfy basic human needs.[15] As such, 'dignity' is deeply embedded with the right to equality, privacy, and freedom from inhuman and degrading treatment.

Criminalising LGBTI individuals in Cameroon infringes the LGBTI community's right to dignity in many ways. By denying rights to privacy and equality as described above, dignity is also infringed.

The UN Working Group on Arbitrary Detention has repeatedly clarified that the detention and prosecution of individuals 'on account of

13 Human Rights Watch 'Guilty by association: Human rights violations in the enforcement of Cameroon's Anti-homosexuality law' 2013 http://www.hrw.org/fr/reports/2013/03/21/coupables-par-association 41 (accessed 10 February 2017).

14 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

15 *Lawrence v Texas* 539 US 558 (2003).

their homosexuality' is arbitrary because it violates the ICCPR's guarantees of 'equality before the law and the right to equal legal protection against all forms of discrimination, including that based on sex', notwithstanding whether or not such executive acts are provided for in domestic law.[16] Such punitive measures, when based on nothing more than a fact of an individual's core identity, are a violation of an individual's dignity. Cameroon must address these violations against its LGBTI citizens.

3.3 Intrusive physical examinations and torture

Some examples of physical torture against LGBTI people in Cameroon that have been reported include beatings on the soles of the feet, blows with the blunt side of a machete, punches in the mouth, torn clothes, being tied to a chair for about eight hours, beatings with the butts of guns and belts, stripping, being hit with a metallic belt, being forced to swim in a gutter, burning plastic bags on one's chest, being forced to walk naked from the beach to the city, to list just some of the atrocities.[17]

Similar treatment has reportedly been inflicted by prison guards against persons convicted for same-sex acts. Cases include being beaten on the buttocks and legs with a big rubber tube containing a metallic cable, being forcefully shaved, being forced to sleep naked, being forced to lie on the ground while receiving water spray, and being forced to drink large quantities of water.[18]

Once suspects are arrested, authorisation is usually given to a medical doctor allowing him to examine their anus for evidence of penetration. When performing anal medical examinations on suspects, their genitals are photographed as part of the procedure. The suspects are also often asked to walk naked, offering a spectacle for the viewing pleasure of the public officials in charge of the investigation. Findings from anal medical examinations constitute the main basis to determine whether or not to confirm charges of homosexuality. Article 4 of the ICCPR contains a prohibition against torture. Unlike many other human rights, the freedom from torture and inhuman or degrading treatment or punishment is unqualified; it makes no provision for exceptions. While there is limited case law on this question, the European Court of Human Rights has recently held that the solitary detention of LGBTI constituted a violation of article 3 of the European Convention on Human Rights which is in *pari materia* with article 4 of the ICCPR, because it imposed mental distress and

16 Report of the Working Group on Arbitrary Detention E/CN.4/2004/3 15 December 2003, para 73; see also Working Group on Arbitrary Detention, Opinion 7/2002 (Egypt) para 27, UN Doc. E/CN.4/2003/8/Add.1; Opinion 22/2006 (Cameroon) para19, UN Doc. A/HRC/4/40/Add.1.

17 Human Rights Watch Report (n 13 above) 44-45.

18 n 13 above, 46.

hardship beyond that which was unavoidably inherent to detention, and thereby compromised the applicant's dignity. Importantly, the Court recognised that their sexuality was central to the denial of their article 3 rights.[19]Article 347 *bis* of the Cameroonian Penal Code gives rise to inhuman and degrading treatment and deprives sexual minorities of one of one of the most fundamental aspect of their identity, the expression of their sexual intimacy. Alexandre Paulikevitch argued that these so-called 'shameful' examinations have no real scientific value, in the sense that

> [t]he shape of the anus is not sufficient or conclusive evidence of homosexuality. According to medico-legal experts, only the presence of sperm in these parts can prove sexual act; yet it implies unprotected intercourse. In fact, doctors just take pictures of the anus, making their expertise with a total uncertainty.[20]

It is hereby argued that the expertise of the physician thus serves mainly to intimidate the suspect and get him to admit his homosexuality. The intrusiveness of this exam also reflects an intention to punish and humiliate the person being examined and is equivalent to cruel and inhuman treatment, in violation of the ICCPR and the Convention Against Torture.[21]

4 Legislative power

Cameroon's legislative opinion remains divided on the constitutionality of section 347 *bis* of the Penal Code. However, according to the Constitution, national laws must be in line with international law. Article 45 of the Constitution stipulates that 'duly approved or ratified treaties and international agreements shall, following their publication, override national laws.' The Constitution itself in its preamble clearly states that 'the state shall ensure the protection of the minorities'. It does not differentiate the types of minorities, meaning sexual minorities are included. Despite these provisions, sexual minorities in Cameroon are still facing serious injustice and discrimination.

This conflict between Cameroon's national laws and international conventions is a grave and serious problem that must be resolved. Cameroon ratified the ICCPR,[22] the Convention against Torture,[23] the

19 *X v Turkey* 24626/09 (9 October 2012).
20 L Stephan 'Au liban, les examens de la honte' *Le Monde* 10 June 2012 http://www.lemonde.fr/idees/article/2012/06/10/au-liban-les-examens-de-la-honte_1715656_3232.html (accessed 30 January 2013).
21 Human Rights Watch 'Criminalising identities: Rights abuses in Cameroon based on sexual orientation and gender identity' 2010 https://www.hrw.org/report/2010/11/04/criminalizing-identities/rights-abuses-cameroon-based-sexual-orientation-and28-29 (accessed 30 January 2013).
22 Ratified on 27 June 1984.
23 Ratified on 19 December 1985.

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[24] and the African Charter on Human and Peoples' Rights.[25] All these treaties clearly protect the right to non-discrimination and privacy and yet article 347 *bis* is discriminatory, and hence, it violates these rights as regards LGBTI individuals in Cameroon. Unfortunately, the continuous existence of section 347 *bis* on Cameroon's statute books will perpetuate harm, discrimination, violation of privacy among other human rights violations against LGBTI individuals. This law has not gone through any parliamentary procedure and has not been tested in the Constitutional Court.

5 Cameroon's homophobic social environment

5.1 The influence of religion (church)

The social environment in Cameroon perpetuates homophobia through the interaction of various social forces. The most prominent of these are religious leaders, who foster intolerance for sexual minorities, through their sermons, which a wide section of the Cameroonian public listen to. In 2005, extensive homophobic sentiments were triggered after a prominent authority in the Catholic Church delivered a Christmas sermon in which he vehemently denounced homosexuality as a crime that was taking root in the capital city Yaoundé.[26] He rooted his sermon in the story of a young student who had murdered his classmate on the grounds that the classmate had 'sexually harassed him.' As part of his sermon the preacher stated:[27]

> The power of money and the forces of evil want to impose on the people of God that you approve of homosexuality. However, homosexuality is a perversion of human sexual orientation towards eroticism which knows how to flatter the senses and to rebel against right reason. [...] The pseudo-modernity, liberalism should not lead Africans to infamy.

The foregoing sermon was an open gateway for several clergymen to repeatedly denounce homosexuality as a means of increasing the numbers in their congregations. Catholics have the most number of faithful in Cameroon and their preaching and dogma has a lot of impact on their Christians. Despite the fact the Catholic Church has influence as concerns homosexuality; the Catholic priests between themselves have divided opinions on the issue.[28]

24 Ratified on 23 August 1984.
25 Ratified on 20June 1989.
26 Victor Tonyé Bakot's homily (n 3 above).
27 C Gueboguo 'La question homosexuelle en Afrique' (2005) *Etudes africaines* 185.
28 As above.

Furthermore, the Muslim community does not embrace sexual minorities in Cameroon. Some Muslim clerics, like their Catholic counterparts, give open sermons against homosexuality, declaring it to be a curse from God which should be avoided by the population. However, some Pentecostal pastors are refusing to demonise LGBTI individuals in their churches and decide to preach tolerance and love. Some even combine religion and cultural beliefs to argue that Cameroonians' culture accepts sexual minorities. However, their more accommodating voices remain in the minority against the louder and less accepting ones.[29]

5.2 Cultural beliefs

In Cameroon, there are more than 200 ethnic groups with diverse cultures, customs and beliefs. It is important to know that cultural beliefs are another very significant hurdle to the LGBTI struggle in Cameroon. Some use cultural values as a reason to violate and not to protect the rights of LGBTI individuals.[30] However, many writers have carried out research and in their works and writings, have proven that homosexuality is part and parcel of Africa, and Cameroon in particular.[31] For example, Charles Gueboguo, the Cameroon writer on homosexuality, clarified the fact that homosexuality is not part of Western culture but part of African reality.[32] Conclusively, whether homosexuality is African or not, it is clear that traditional values must conform to and not displace internationally protected rights as is made clear by article 1(2), which requires Cameroon to 'recognise and protect traditional values that conform to democratic principles, human rights and the law.'

5.3 The creation of anti-gay organisations

A number of civil associations established in the country have also made the 'hunt against homosexuals,' their creed. Associations such as the Cameroon Gathering Youth (CGY) have used the stigmatisation and denunciation of homosexuals as their motto.[33] This association recently organised what it called 'the Day against Homosexuality' where it marched along the streets of the capital with placards bearing strong messages against homosexuals, all without any interruption from the Police.[34] Regretfully, there was and there remains no counter reaction to the foregoing trend from human rights organisations, who, although aware

29 JB Kenmogne *Homosexualité, églises et droits de l'homme* (2014) 40-47.
30 FE Boulaga (2002) 2 *Terroirs* 7.
31 G Tessmann 'Homosexuality among the Negroes of Cameroon and a Pangwe Tale' in SO Murray & W Roscoe 'Boy wives and female husbands' (1998) *Studies in African Homosexualities* 149-161.
32 Gueboguo (n above 27).
33 The leader of this anti-gay association is called Barlev Sismondi Bidjoka. He participated at many debates to fight against homosexuality.
34 Day against homosexuality organised in Yaoundé on 21 August 2013.

of this persecution, continue to evade a holistic approach to human rights, which embraces all persons including sexual minorities. The National Commission for Human Rights and Fundamental Freedoms in Cameroon still has not thought it necessary to adopt an official position for the preservation of the human rights of persons discriminated against on the basis of their sexual orientation.

6 Glimmer of hope: Creation of LGBTI organisations

Despite all the foregoing challenges, the creation of LGBTI organisations in Cameroon presents a glimmer of hope for LGBTI rights.

In Cameroon, amidst the HIV/AIDS pandemic and the violation of human rights, sexual minorities have decided to take charge of their own destinies. This extends not just to the fight against HIV and sexually transmitted infections (STIs), but also to the struggle for the knowledge and ownership, respect and protection of their rights. These associations are established in the two main cities of Cameroon, Douala and Yaoundé. They have adopted various strategies in order to be able to serve their communities. Many of them function on the legal protection of human rights. They function as human rights and HIV/AIDS NGOs, and not as LGBTI NGOs because they were registered as human rights NGOs. The reason for this is that if in their statute books and bylaws they mention LGBTI rights protection, the competent authority will most likely not sign or register them. The authorities will claim that homosexuality is not permitted in Cameroon. So under the canopy of protecting human rights, which includes LGBTI rights as well, they are able to reach out to their vulnerable community. However, the Association for the Defense of Gays and Lesbians Equality (ADEFHO Cameroon) is the only legally registered NGO working specially on LGBTI rights.

These NGOs, especially those found in big cities like Douala and Yaoundé, have about 10 permanent or devoted workers, members and some voluntary workers, who are devoted in the LGBTI rights movement in Cameroon and to the complete eradication of the HIV/AIDS pandemic. NGOs like ADEFHO Cameroon, *Alternatives Cameroon* and CAMNAFAW have large success stories as regards LGBTI rights. Some of their work on human rights violation is forwarded to the UN. ADEFHO has also helped to free many gays and lesbians who are arrested and imprisoned for homosexual practices between consenting adults.[35]

In 2009, research ('Crimilisation des identités: Atteintes aux droits humains au Cameroon fondées sur l'orientation sexuelle et l'identité de

35 Human Rights Watch Report (n 21 above) 54.

genre'/Criminalisation of identities: infringement of human rights in Cameroon on the basis of sexual orientation and gender identity) was carried out by ADEFHO Cameroon, *Alternatives Cameroon*, Human Rights Watch (HRW) and the International Gay and Lesbian Human Rights Commission. The main findings of the research show that the law criminalising homosexuality targets a specific group of Cameroonians who are the victims of violence and ill-treatment and who are persecuted. Their human rights are violated. Also the existence of a law criminalising homosexual acts makes these people more vulnerable to attack, and as the target, they live constantly in fear.

Finally, it is also important to know that most of these NGOs face a lot of problems. Firstly the government fights them basing on claims that these associations promote homosexuality in Cameroon; and secondly, most of these associations need financing to carry out their activities and pay their staff. These organisations report multiple abuses, violations and extortion to which sexual minorities fall victim almost daily.[36] The newly created LGBTI associations in Cameroon work closely with partner international organisations and also have the support of some members of the diplomatic community within Cameroon.[37]

There are also some courageous lawyers who agree to represent accused members of the LGBTI community despite the stigma that their actions are likely to attract and the possibility of reprisals against them.[38] These lawyers have defended more than 30 cases in the past few years and some of these cases are pending in court.[39]

7 Conclusion

From the foregoing, it is evident that the status of sexual minorities' rights in Cameroon hangs in the balance as support for it remains feeble and is drowned out by louder condemnation fuelled by leading religious and political figures. Such an atmosphere leaves little or no room for objective debate and analysis of issues such as public health and human dignity, which affect all citizens regardless of sexual orientation. It is arguably the same atmosphere that explains the paradox of local human rights organisations which shy away from the human rights of sexual minorities and the duality of a liberal Constitution and a liberal President whose public statements indicate support for gay rights, yet his government

36 See generally, the International Federation for Human Rights (FIDH) 'Cameroon: Homophobia and violence against defenders of the rights of LGBTI persons: International Fact Finding Mission report' 2015 https://www.fidh.org/IMG/pdf/report_cameroun_lgbti_eng_final.pdf.

37 As above.

38 These are mainly two: the pioneer Alice Nkom, and the author of this chapter, Michel Togue.

39 Files on record with the author who is one of these lawyers.

actively pursues a policy of discrimination against sexual minorities and refuses to cure the defect, which is section 347 *bis* of the Penal Code of Cameroon.

PART IV: THE AFRICAN HUMAN RIGHTS SYSTEM

CHAPTER 14 THE PROTECTION AND PROMOTION OF LGBTI RIGHTS IN THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM: OPPORTUNITIES AND CHALLENGES

*Adrian Jjuuko**

1 Introduction

During the 55th Ordinary Session of the African Commission on Human and Peoples' Rights (African Commission) held between 28 April and 12 May 2014, in Luanda, Angola, the African Commission passed its first ever resolution on issues of sexual orientation and gender identity. The resolution is titled '*Resolution on the Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity.*'[1] In the Resolution, the Commission condemned the violence meted out upon individuals based on their sexual orientation or gender status, and called upon states to end impunity for such acts of abuse. Almost a year after this historic resolution, the African Commission also reversed its decision to deny observer status to the Coalition of African Lesbians (CAL).[2] These two steps were brave steps as indeed, soon after they were taken, the Executive Council of the African Union which is made up of Ministers of Foreign Affairs and to which the African Commission reports, requested the Commission to take into account 'the fundamental African values, identities and good traditions' and to withdrawal the observer status granted to the CAL.[3]

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1 The African Commission on Human and Peoples' Rights 'Resolution on the Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity': Adopted at the African Commission on Human and Peoples' Rights (the African Commission), meeting at its 55th Ordinary Session held in Luanda, Angola, from 28 April to 12 May 2014 http://www.achpr.org/sessions/55th/resolutions/275/ (accessed 28 July 2014).

2 The African Commission on Human and Peoples' Rights 'The Final communiqué of the 56th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 21st April – 7 May 2015' para 25(v) http://www.achpr.org/files/sessions/56th/info/communique56/56thos_final_communique_en.pdf (accessed 15 August 2016).

3 African Union Decision on the Thirty-Eighth Activity Report of the African Commission on Human and Peoples' Rights, DOC.EX.CL/Dec 887 (XXVII).

All these came at the backdrop of a new wave of homophobia that is sweeping across Africa. More dangerous than any of those that preceded it, this wave is state-backed and uses the tool of the law.[4] Starting in Uganda in 2005 with a constitutional amendment expressly prohibiting same-sex marriages,[5] it went to Nigeria with the Same-Sex Marriages (Prohibition) Bill 2006, then to Zimbabwe with the sexual deviancy law- an amendment to the country's criminal code that criminalises any sexual contact by homosexual persons, then to the Gambia,[6] back to Uganda with the Anti-Homosexuality Bill 2009,[7] then immediately to Rwanda,[8] then to the Democratic Republic of Congo,[9] then Liberia,[10] Botswana,[11] Cameroon,[12] Malawi[13] and finally Kenya and Tanzania, which were reported contemplating tabling bills akin to the Ugandan one.[14] Chad also plans amendments which are intended to punish homosexuality with prison sentences of 15 to 20 years and fines of 50,000 to 500,000 Central African francs.[15] Nigeria's Bill is now law.[16] Uganda's became law,[17] but the Constitutional Court nullified it a few months later on the ground that when passing it, the legislature did not follow the laid down procedure on quorum contrary to the Constitution.[18] However, plans are underway to

4 For a deeper discussion of this new trend see D Nzioka 'A look at Africa's anti-gay laws: African countries "dealing" with gays the best way they know how – further criminalization' *Pambazuka News*, 10 February 2014 http://www.pambazuka.org/en/category/features/90732/print (accessed 27 April 2014).

5 Constitution of the Republic of Uganda 1995 art 31(2a), which was inserted in the Constitution through Section of the Constitution (Amendment) Act (No 1) 2005.

6 With the President Yahya Jammeh promising a tougher law against homosexuals in 2008.

7 Tabled in October 2009 by Ndorwa West MP, Hon David Bahati.

8 Where parliament debated whether to criminalise consensual same-sex relations on 16 December 2009.

9 Sexual Practices Against Nature Bill, 2010 which seeks to criminalise homosexuality and zoophilia as unnatural offences.

10 Liberia introduced two bills on homosexuality in 2012, one prohibiting and criminalising same-sex marriages, and the other targeting the promotion of gay sex.

11 Botswana developed a draft policy on HIV, which allowed the police and immigration officials to arrest men who have sex with men and sex workers and to deport and evoke the work permits of foreigners.

12 Cameroon plans to increase the penalties for consensual same-sex sexual acts under the law to 15 years' imprisonment and a fine of 2 million Central African Francs.

13 Where the government denied that the President had in November 2012 promised to suspend all laws that criminalized homosexuality.

14 For Kenya see 'After Uganda, Kenya gears up for anti gay law' *KenyaNews247* http://www.kenyanews247.com/news/after-uganda-kenya-gears-up-for-gay-rights-debate#.U1wnFMduH9I. For Tanzania, see E Muga 'Dar plans to introduce tougher anti gay Bill' *The East African* 29 March 2014 http://www.theeastafrican.co.ke/news/Dar-plans-to-introduce-tougher-anti-gay-Bill--/-/2558/2262374/-/iq7xix/-/index.html (accessed 26 April 2014).

15 See LGBTI Weekly 'New laws aimed at curbing homosexuality proposed in Chad' 25 September 2014 http://lgbtweekly.com/2014/09/25/new-punitive-laws-aimed-at-curbing-homosexuality-proposed-in-chad/ (accessed 22 March 2015).

16 The Same-Sex Marriage (Prohibition) Act, 2013 which was signed into law by President Goodluck Jonathan on 7 January 2014.

17 The Anti-Homosexuality Act 2014, which came into force on 10 March 2014.

18 The case of *Prof J Oloka Onyango & 9 Others v Attorney General* Constitutional Petition 8 of 2014.

have it restored by parliament[19] and the Attorney General lodged a notice of appeal against the decision.[20] The Gambia has already passed an amendment to its Penal Code introducing the offence of 'aggravated homosexuality' punishable with death.[21] Only Rwanda formally dropped its plans.

All these devices to recriminalise and expand the scope of criminalisation are further additions to the existing laws criminalising same-sex relations that were inherited from the colonialists.[22] This wave is supported by most of the leaders, some of whom have expressed strong anti-gay sentiments.[23] These same leaders make up the Assembly of Heads of State and Government of the African Union, which is the political body with the power to galvanise consensus around issues in Africa and which supervises and oversees the African human rights system.[24]

This poses the African human rights mechanisms, chief among which is the African Commission, with the challenge of having to take on the mantle for the protection and promotion of LGBTI rights in the African system within a largely hostile environment. The Resolution and the granting of observer status to the CAL by the African Commission are a great step in the right direction, and an indication of the great potential that the African system has to protect and promote LGBTI rights. They however cannot be considered in isolation and a bigger picture shows that other organs within the African human rights system have not done much to protect and promote LGBTI rights. There is thus a lot of potential for the African human rights system, just like there are lots of challenges.

This chapter discusses the work that the African system has so far done in protecting and promoting LGBTI rights, and compares it with the work done at the UN level and at other regional levels. It then discusses the potential that the system has to protect and promote LGBTI rights as well as the challenges that it currently faces in trying to do this.

19 'MPs start process to re-table gay bill' *The Daily Monitor* 3 September 2014.
20 'Gov't appeals antigay law ruling' KFM, 11 August 2014 http://kfm.co.ug/news/govt-appeals-anti-gay-law-ruling.html (accessed 10 October 2014).
21 Gambia Criminal Code (Amendment) Act, 25 August 2014. Supplement 'C' to The Gambia Gazette 15 of 16 October 2014.
22 For example Uganda's Anti-Homosexuality Act 2014 never repealed the Penal Code provisions which were adopted in 1950. They would still operate alongside each other.
23 The outstanding ones are: Yahya Jammeh of the Gambia, Robert Mugabe of Zimbabwe, Yoweri Museveni of Uganda, and Paul Biya of Cameroon.
24 See art 9(1) of the AU Constitutive Act, which provides for the roles of the Assembly. These include: to determine the common policies of the AU and to monitor implementation of policies and decisions of the AU as well as ensuring compliance.

2 LGBTI rights: A contested category of human rights in Africa

There is perhaps no category of human rights that is as controversial as LGBTI rights worldwide. It is now almost settled that children's rights, women's rights, and the rights of religious, linguistic and cultural minorities are worthy of protection. Not so for LGBTI rights. This chapter deliberately uses the term 'LGBTI rights' – rather than sexual orientation or gender identity – in the sense that the terms 'children's rights' or 'women's rights' are usually used, not to suggest special categories of rights, but rather to refer to the same rights applicable to everyone but as applied to a marginalised group of people, in this case LGBTI persons.

The above notwithstanding, popular opinion, especially in most parts of Africa is hugely hostile to these rights. Whereas everyone agrees that all human beings are entitled to the right to food or the right to health, or the right to freedom of expression, somehow they are not so sure when the human being in question is a person who can be classified under the LGBTI acronym. Indeed, some people go as far as doubting the very existence of LGBTI people.[25] LGBTI issues are largely not regarded as human rights issues but rather as moral, cultural or religious issues. This approach limits LGBTI issues to sex and looks at everything about LGBTI people with sexual lenses. This kind of approach would imply that one is required to first conform to the moral, religious or cultural standards before one can demand human rights.

The concept of cultural relativism is usually raised to support the argument that LGBTI rights are not within the realm of rights recognised by African states. This ties in with the common myth that homosexuality is an import from Europe,[26] and its sister myth that western countries are intent on promoting homosexuality in Africa in order to destroy the 'traditional African family.'[27] As such, most African states do not consider themselves bound to recognise or respect LGBTI rights.

As a result, LGBTI persons are usually subjected to abuse, encouraged to keep their sexual orientation or gender identity secret or else risk the wrath of the people or the government or both. Common abuses against LGBTI persons in Africa include: rape, denial of education, denial of access to justice, denial of appropriate health services, exclusion from social circles, family denials, exclusion from succession, hate speech, and

25 For a long time, some African leaders like President Museveni of Uganda denied the existence of gay people in their countries.

26 For a critical analysis of this myth, see Binta Bajaha 'Post colonial amnesia: The construction of Homosexuality as 'un-African' http://www.lse.ac.uk/genderInstitute/pdf/graduateWorkingPapers/bintaBajaha.pdf.

27 This was specifically included in Uganda's Anti-Homosexuality Bill as one of the justifications for the Bill. See Anti-Homosexuality Bill, 2009 (Uganda) preamble.

in extreme cases; murder.[28]All these are unfortunately not seen as serious violations of human rights, which they would have been if they had been committed against any other category of persons.

This has not always been the situation in Africa, however. Despite evidence to the effect that homosexuality was practised in Africa from time immemorial, there is no evidence of systematic or society sanctioned discrimination or criminalisation of same-sex conduct.[29] What existed was tolerance of difference and rituals to cleanse those who were suspected of being engaged in these practices, but certainly not criminalisation even in the traditional or customary sense.

Homophobia in Africa can be said to have manifested itself in four major waves. The importation of Victorian morality into Africa marked the beginning of the first wave of homophobia. Most of the British colonies were obliged to apply the laws applicable in Britain and India at the time and these laws criminalised same-sex conduct.[30] The French colonies did not have such laws though some former French colonies deliberately decided to introduce these laws after independence.[31] Many of the colonial laws were maintained after independence. However, they were largely ignored until the HIV scourge started.

The HIV scourge marked the beginning of the second wave of homophobia. HIV/AIDS was initially blamed on gays since it begun as 'a gay disease' when it first hit gay men in the United States of America. When the epidemic struck in Africa, it moved with this label, and gay men started being blamed for spreading the virus. In some places like Uganda, this led to an amendment in the punishment for same sexual relations, which was increased from fourteen years imprisonment to life imprisonment.[32]

The third wave of homophobia started in the late 1990s and continued until the first half of the 2000s. This was led by right wing evangelical Christians who were inspired by their colleagues in the United States. During this period, anti-gay groups were struggling against decriminalisation of same-sex relations in the US but eventually lost when

28 For a general overview of the status of LGBTI persons in Africa, see Human Rights Campaign Foundation & Human Rights First 'The state of human rights of LGBTI persons in Africa' July 2014 http://www.humanrightsfirst.org/sites/default/files/HRF-HRC-Africa-Report.pdf (accessed 4 November 2016).

29 Interestingly, President Yoweri Museveni of Uganda who signed the oppressive Anti-Homosexuality Act into law is also of this view. See Yoweri Museveni 'Homosexual Bill' 28th December 2014, 3-5. Available at http://www.patheos.com/blogs/warrenthrockmorton/2014/01/17/full-text-of-letter-from-ugandas-president-museveni-to-speaker-of-parliament-kadaga/ (accessed 29 July 2015).

30 Human Rights Watch 'This alien legacy: The origins of "sodomy" laws in British colonialism' (2008) 25.

31 For example Senegal.

32 Penal Code Amendment Act of 1990.

Lawrence v Texas[33] was decided. This new wave called for the further criminalisation of homosexuality and enforcement of existing laws.[34] What followed was a hate campaign that regarded homosexuals as being responsible for among other things the Nazi atrocities and a campaign to decimate Christianity and the institution of a family.[35] The second and third waves of homophobia also awakened members of the LGBTI community who stood up against the discrimination and the hate that were being driven by these campaigns. Beginning in South Africa with the inclusion of sexual orientation as a protected ground in the Constitution of 1996, followed by court victories outlawing criminalisation of same-sex conduct, activists in other countries became inspired to speak out and resist the hatred. The result was that it could no longer be denied that LGBTI people existed and continue to exist in Africa. However, with the increased visibility also came increased intensity of the hate campaigns against LGBTI people. Perhaps an example of how court victories inspire repressive laws is in Uganda when the court victory in *Victor Mukasa & Yvonne Oyoo v Attorney General* (*Mukasa* case)[36] was curiously immediately followed by the tabling of the Anti-Homosexuality Bill, 2009.[37]

The fourth wave of homophobia in Africa started in the second half of the first decade of the 21st century (2005-2009) and continues to date. It started when populist politicians joined the anti-gay movement and started agitating for further criminalisation.[38] This started in Uganda, with the amendment to the Constitution prohibiting same-sex marriages.[39] The way in which this amendment was done was so quietly and shrewdly executed that it was clearly the work of a well organised group with a clear agenda.[40] This set off a response from the human rights movement which hinges on the recognition of LGBTI people as citizens who are worthy of rights and protection. Many other countries immediately followed suit as already described in the introductory section.

33 *Lawrence v Texas* (2003) 539 US 558.

34 K Kaoma *Globalising the culture wars: US conservatives, African churches and homophobia* (2009) 6.

35 See for example S Lively 'The pink Swastika: Homosexuality in the Nazi Party' (1995).

36 High Court Miscellaneous Cause No 247 of 2006.

37 The Mukasa decision was delivered on 22 December 2008, an anti gay conference was hosted by the family Life Network between 5 to 8 March 2009, the then Minister of Ethics and Integrity promised a tough law on homosexuality and the Bill was tabled in October 2009 barely a year thereafter.

38 This is what happened in 2005 in Uganda when same-sex marriage prohibition was included in the amendment to the Constitution, and later when the Anti-Homosexuality Bill was tabled in 2009. The same thing happened in Rwanda in 2009. See Nzioka (n 4 above).

39 See n 5 above.

40 For detailed explanation of how this was done, see JD Mujuzi 'The absolute prohibition of same-sex marriages in Uganda' (2009) 23 *International Journal of Law, Policy and the Family* 277–288, 282-284.

3 The African human rights system and LGBTI rights

The African human rights system is based primarily on the African Charter on Human and Peoples' Rights (African Charter). The African Charter lays down the rights recognised in the African system. It establishes the African Commission as the body with the mandate to promote and protect human rights in Africa.[41] The African Charter is supplemented by the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol), and the Protocol to the African Charter on the establishment of the African Court on Human and Peoples' Rights. The former builds on article 18 of the African Charter to elaborate on women's rights and the latter establishes the African Court on Human and Peoples' Rights. A separate charter on the rights of the child also exists.[42] It establishes a different mechanism for its enforcement, the African Committee of Experts on the Rights and Welfare of the Child.

The almost continent-wide African human rights system operates under the African Union (AU) since the African Charter and all the other human rights instruments were adopted under the auspices of the AU or its predecessor, the Organisation of African Unity (OAU).[43]

The system is buttressed by sub-regional systems. These exist at the economic bloc levels. They are based on treaties among the different states in the different sub-regions. Though they are economic blocs, they all have human rights as a founding principle and established bodies mandated to enforce states' conformity with the founding principles including human rights. These treaties are: the Treaty Establishing the East African Community, the Treaty of the Economic Community of West African States, and the Treaty establishing the Southern Africa Development Community. The Courts established under these treaties with a human rights mandate are: the East African Court of Justice, the Economic Community of West Africa (ECOWAS Court) and the Southern Africa Development Community Tribunal for the SADC region.

The sub-regional systems are also backed up by the different political organs established for the different sub-regions, especially the Summits of Heads of State, and the legislative assemblies established under these systems. The courts and tribunals rely on these bodies for standard setting and for ensuring enforcement of their decisions.

41 African Charter on Human and Peoples' Rights CAB/LEG/67/3 art 30.
42 This is the African Charter on the Rights and Welfare of the Child.
43 All 55 African countries with the exception of Morocco are members of the African Union.

3.1 The AU Constitutive Act

This is the foundational document for the African Union, and therefore the basis of all instruments within the African system. It lists respect for democratic principles, human rights, the rule of law and good governance as among the principles that govern the AU.[44] It does not say anything about LGBTI rights. This is not strange; for indeed it does not mention any other category of human rights. The fact that it mentions human rights is enough to presume that all categories are included.

3.2 LGBTI rights in the African Charter

The African Charter is the main human rights instrument in the African human rights system and one which all the other instruments refer to. Indeed, it is the one that lays down the rights that are recognised within the African system. Just like most other international instruments, there is no mention of LGBTI rights in the African Charter. This however, does not mean that the African Charter omits these rights. To the contrary, it is an indication that all rights apply to LGBTI people just like any other persons.

The African Charter was adopted in 1981 following the end of some of the bloodiest struggles against colonialism.[45] Colonialism had portrayed African peoples and states as inferior to their European colonisers, and therefore the African Charter was adopted in part to ensure equality of all persons. It was also adopted at the end of the bitter dictatorships of Bokassa,[46] Idi Amin,[47] and Nguema,[48] which had greatly disempowered citizens. This was also the era of the struggle against apartheid in South Africa. Thus, the African Charter was born out of the need to protect the rights of individuals and peoples and especially the marginalised. This background is clearly reflected in the preamble to the African Charter which, quoting the words in the preamble of the Charter of the Organisation of African Unity (OAU Charter), states that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples'. The preamble to the African Union Constitutive Act, which replaced the OAU Charter, affirms the need to protect human and peoples' rights, democratic principles, good governance and the rule of law.[49] It would therefore be absurd to imply that LGBTI people were excluded from this scheme and that discrimination against them is sanctioned by the African Charter. A life

44 Constitutive Act of the African Union 2001 art 4(m).
45 Mozambique, Angola and Zimbabwe had gained independence, the first two in 1975, and the latter in 1980 after long and bloody armed struggles where many lives were lost.
46 In the Central African Republic, 1972-1979.
47 In Uganda, 1971-1979.
48 In Equatorial Guinea, 1968-1979.
49 AU Constitutive Act (n 44 above) preamble.

free from persecution on the basis of one's sexual orientation is key to the enjoyment of freedom, equality, justice and dignity. These rights cannot be realised in a context of discrimination, inequality and persecution.

The African Charter also its inspiration from international instruments which have now been interpreted to protect LGBTI rights. The preamble to the African Charter clearly indicates an intention to complement rather than replace the United Nations (UN) human rights system. It directly recognises the UN Charter and the Universal Declaration of Human Rights (Universal Declaration), which are the foundational documents of the UN human rights system. Moreover, article 60 requires the African Commission to draw inspiration from international law on human and peoples' rights including other African instruments, the UN Charter, the Universal Declaration and other UN instruments. Since the UN human rights system has explicitly recognised the fact that the rights in the Universal Declaration and other international systems apply equally to LGBTI persons, the African Commission ought to interpret the African Charter in the same way. Article 61 requires the African Commission to take into consideration only African practices that are consistent with international norms on human and peoples' rights. Therefore the African system complements rather than divert from the international system.

The African Charter also employs universalist language which is all inclusive. Although it is couched in very careful language in order to reflect a unique system, the general scheme of language used in the African Charter shows that human rights are universal and apply to all regardless of difference. In prescribing rights, the African Charter uses the language of 'every person', 'every individual,' 'every human being,' or 'every citizen' and for negative rights, it uses 'no one'. In the plural form, it uses the term 'all peoples'. This is inclusive language, which does not allow exclusion of particular individuals or groups.

Furthermore, the African Charter recognises individual rights. It recognises the rights to equality; freedom from discrimination; life and integrity of the person; dignity; liberty and security of the person; to be heard; conscience, profession and religion; receive information; free association; assembly; movement and residence within the borders of a state; civic participation; property; work; the highest standard of physical and mental health; education; and family.[50] Article 2 of the African Charter, and its subsequent interpretation by the African Commission,[51] puts all doubt to rest when it declares that the rights recognised in the African Charter apply to 'every individual ... without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other

50 n 41 above, arts 2-17.

51 See African Commission (n 1 above); *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) para 169.

status.' The listing of 'sex' and 'other status' also shows that sexual orientation and gender identity can be included here in light of the developments in the UN human rights system.[52] The inclusion of the right to equality,[53] as well as dignity[54] which are the key rights that have been articulated in other systems in respect of LGBTI persons, also shows that the African Charter values these same rights equally. The only right that could be said to be missing is the right to privacy. Murray and Viljoen[55] argue that this right can be implied in the Charter under the right to dignity, the right to life and integrity of the person, and the right to liberty and security of the person using the concept of implied rights which was adopted by the African Commission in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria.*[56]

The African Commission has indeed interpreted these rights as including LGBTI persons. In its resolution on protection against violence and other human rights violations against persons on the basis of their real or imputed sexual or gender identity,[57] it alluded to various articles of the African Charter as the basis of the resolution and the premise on which the violence and human rights violations suffered by LGBTI persons cannot be accepted. In particular, the commission refers to articles 2,[58] 3,[59] 4,[60] and 5.[61] The citing of these articles and provisions as the backdrop of the resolution and the authority that gives the resolution legitimacy and legality is evident of the fact that the African Commission itself has taken the step of reading LGBTI rights into the rights enshrined in the African Charter. By bringing LGBTI persons within the ambit of the protections of the Commission, and in essence the Charter, the resolution defeats any argument to the effect that LGBTI rights are not covered by the provisions therein. Regarding equality and non discrimination, the African Commission in *Zimbabwe Human Rights NGO Forum v Zimbabwe*, the African Commission stated in passing that the aim of the principle of equality and non-discrimination 'is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.'[62]

52 This was expressly recognised in the Human Rights Committee's decision in *Toonen v Australia*, Communication 488/1992, para 8.7.
53 n 41 above, art 3 and 19.
54 n 41 above, art 5.
55 R Murray & F Viljoen 'Towards non discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2009) 29 *Human Rights Quarterly* 86-111, 89-90.
56 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).
57 African Commission (n 1 above).
58 Freedom from non-discrimination
59 Equality before the law and the right to equal protection of the law.
60 Respect to life and integrity of the person.
61 Right to respect of dignity and prohibition of torture, degrading, cruel or inhuman treatment or punishment.
62 *Zimbabwe NGO Forum* case (n 51 above).

Furthermore, the African Commission in November 2010 adopted the guidelines and principles on Economic, Social and Cultural rights in the African Charter on Human and Peoples' Rights.[63] These guidelines were intended to close the implementation gap of the Charter, which gap was caused by failure for the Charter provisions to clearly detail contents of the economic, social and cultural rights protected therein and the corresponding implied state obligations for each right. In these guidelines, the African Commission defines the term prohibited grounds of discrimination to include the ground of sexual orientation[64] and defines the term vulnerable and disadvantaged groups to include LGBTI persons.[65] Considering that the guidelines are an interpretative tool for the Charter, the inclusion of sexual orientation and LGBTI persons in this resolution shows that the Commission intends that the Charter be interpreted as inclusive of LGBTI rights.

The individual rights identified in the African Charter are subject to internal limitations through claw-back clauses for particular articles, and generally via the limitation clause in article 27(2). Article 27 is to the effect that all the individual rights and freedoms recognised in the Charter shall be exercised 'with due regard to the rights of others, collective security, morality and common interest.' The African Commission has interpreted this clause and laid down parameters that have to be followed. The limitation must be in the form of a law of general application.[66] Morality is one of the grounds allowed in the limitation but the African Commission has indicated before that popular will does not necessarily define what is moral or what is in the public interest.[67] Therefore, public opinion in Africa being largely against homosexuality does not automatically imply that the rights of LGBTI persons are not protected in the African Charter.

The African Charter imposes duties on individuals. Every individual has duties towards their family and society, the state and other legally recognised communities and the international community. In particular, individuals have the duty not to discriminate and to exercise respect and tolerance towards each other.[68] These duties apply to all persons including LGBTI persons. Although duties like the preservation of culture and moral wellbeing of society are included, they are imposed in the 'spirit of tolerance, dialogue and consultation'.[69] Accordingly, we can conclude

63 African Commission 'Guidelines and principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf (accessed 10 February 2017).
64 n 63 above, para 1(d).
65 n 63 above, para 1(e).
66 *Constitutional Rights Project and others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 44.
67 *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 69.
68 African Charter (n 41 above) 28.
69 African Charter (n 41 above) 29(7).

that the concept of duties does not exclude LGBTI people from enjoying the rights in the African Charter.[70]

Finally, the African Charter, just like many UN instruments, is a living document. It was drafted in such a way that it can embrace future developments and that is how it also ought to be interpreted.[71] At the time the African Charter was adopted, Africa was more engrossed in liberation struggles and dictatorships, and the violations of the rights of LGBTI people had not yet gained the current visibility. Today this has changed, as discrimination and abuse of other rights of LGBTI people has reached worrying levels. The African Charter certainly can adapt to these developments and have these violations addressed. Indeed the same happened with indigenous peoples. The African Charter does not contain the word indigenous but the African Commission has nevertheless made a number of significant decisions around indigenous peoples' rights.[72]

Therefore, the absence of express mention of LGBTI rights in the African Charter cannot be interpreted as meaning that LGBTI rights are not protected in the African Charter. All the rights in the African Charter apply to all persons regardless of their differences or status including sexual orientation or gender identity. Moreover the background, the structure, and the interpretation of the African Charter all point to the fact that all individuals and peoples are included.

3.3 LGBTI rights in the African Women's Protocol

The African Women's Protocol directly flows out of the African Charter and is based on it. It expressly points out in articles 2 and 18 that the rights protections contained therein are applicable to all without discrimination and mandates the protection of women from discrimination respectively.[73] Like other human rights instruments, the protocol does not expressly mention LGBTI persons or their rights. However, in interpreting and providing guidance on the interpretation and implementation of the protocol, the African Commission has included the ground of sexual orientation on the list of grounds on which women are discriminated against, which should be prohibited. This has been done in two general

70 Also see Murray & Viljoen (n 55 above)

71 F Viljoen *International human rights law in Africa* (2012) 267.

72 In the *Endorois case* (*Centre for Minority Rights Development (Kenya) & Another on behalf of the Endorois Welfare Council v Kenya*, Communication 276/03 2009 AHRLR 75 (ACHPR 2009), the Endorois were recognised as an indigenous community (Also the existence of the *African Commission Working Group on the Rights of Indigenous Communities/Populations* speaks volumes).

73 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2013 Preamble.

comments.[74] These general comments, which are intended to give interpretative guidance on the protocol and clarify on the obligations of the states parties, show that the provisions of the protocol have to be interpreted in a way that extends their protection and relevance to LGBTI persons, in this case especially lesbian, transgender and intersex women. These general comments are in addition to the inclusive interpretation that has been given to the African Charter,[75] from which this protocol is derived. The Protocol also defines gender to include all persons of the female gender, which can include transgender women and intersex persons who identify as being part of the female gender.[76] Of particular relevance to lesbian and transgender women are the provisions on the rights to dignity;[77] right to life, integrity and security of the person;[78] elimination of harmful practices;[79] access to justice and equal protection of the law,[80] health and reproductive rights;[81] right to positive cultural context;[82] and the right to inheritance.[83]

3.4 LGBTI rights in the African Court Protocol

The African Court Protocol establishes the African Court. The African Court is given jurisdiction to 'adjudicate cases and disputes submitted to it concerning the interpretation and application of the [African] Charter, the Protocol establishing the Court, and any other relevant human rights instrument ratified by the states concerned.'[84] This gives it a wide jurisdiction that even incorporates UN human rights instruments and the rights protected therein. It also gives the African Court the jurisdiction to issue advisory opinions 'on any legal matter relating to the Charter or any other human rights instruments,' at the request of 'a member state of the AU, any of its organs or any African organisation recognised by the AU.'[85] In adjudicating cases, the Protocol prescribes that the African Court shall apply the African Charter and any other related human rights instruments ratified by the state concerned.[86] As such the African Court can apply the

74 General Comment on art 14(1)(d) and (e) of Maputo Protocol para 4 http://www.achpr.org/instruments/general-comments-rights-women/; General Comment No 2 on art 14(1)(a), (b), (c) and (f) and art 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, para 12 http://www.achpr.org/instruments/general-comment-two-rights-women/
75 See earlier discussion on LGBTI rights in the African Charter.
76 n 73 above, 1(k).
77 n 73 above, 3.
78 n 73 above, 4.
79 n 73 above, 5.
80 n 73 above, 8.
81 n 73 above, 14.
82 n 73 above, 17.
83 n 73 above, 21.
84 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights 1998 art 3.
85 As above 83, 4.
86 African Court Protocol (n 83 above) 7.

African Charter and even the UN instruments, which all protect the rights of all persons including LGBTI persons.

3.5 LGBTI rights in the African Children's Charter

The African Children's Charter protects the rights of children in Africa. It defines a child as 'any person below the age of eighteen years.'[87] This is an all-inclusive definition that covers all children. The rights protected apply to all children regardless of, among others, 'sex' and 'other status.'[88] As already seen, sexual orientation and gender identity can be read into the text using these two entry points.[89] Interestingly, the African Children's Charter protects the right to privacy, which the African Charter and the African Women's Protocol do not.[90] The best interests of the child should be the primary consideration in all actions concerning the child.[91] This is particularly important for transgender and intersex children when making decisions about gender identity and sex development. The African Children's Charter's provisions are tailored to children and the important ones for LGBTI children are protection against child abuse and torture;[92] parental care and protection;[93] parental responsibilities;[94] protection against harmful social and cultural practices;[95] protection of refugee children;[96] protection from sexual exploitation;[97] and prevention of sale, trafficking and abduction of children.[98] All these provisions can help in the protection of children who may identify as LGBTI from abuse.

3.6 LGBTI rights in the sub regional instruments

The Treaty for the Establishment of the East African Community

This treaty establishes the East African Community. It provides for the principles governing the community, which include democracy, rule of law, good governance, social justice and 'the maintenance of universally accepted standards of human rights which include inter alia, provision of equal opportunities and gender equality as well as the recognition, promotion and protection of human and people's rights in accordance with

87 African Charter on the Rights and Welfare of the Child CAB/LEG/24 1990, art 2.
88 Above, art 3.
89 See n 51 above.
90 This right is protected in art 10 of the African Children's Charter.
91 n 87 above, 4.
92 n 87 above, 16.
93 n 87 above, 19.
94 n 87 above,20.
95 n 87 above, 21.
96 n 87 above, 23.
97 n 87 above, 27.
98 n 87 above, 29.

the provisions of the African Charter on Human and Peoples' Rights.'[99] These principles constitute a direct incorporation of the African Charter provisions. As such, the discussion on the African Charter above as regards LGBTI rights applies equally to the East African Treaty.

The SADC Treaty

The Southern African Development Community Treaty (SADC Treaty)[100] establishes the Southern African Development Community (SADC). The treaty provides for the principles upon which the SADC is based and they are: human rights, democracy and the rule of law.[101] This treaty also directly introduces human rights as one of the principles that must be respected by the SADC states, and indeed since human rights include LGBTI rights, then it can be said that the SADC Treaty recognises the broad spectrum of human rights which include LGBTI rights.

The ECOWAS Treaties

The ECOWAS is based on two treaties: The Treaty of the Economic Community of West African States[102] (The Treaty of ECOWAS), and the Revised Treaty of the Economic Community of West African States, July 24, 1993 (the Revised Treaty of ECOWAS). The Revised Treaty of ECOWAS in article 4(g) enjoins states to adhere to the principles of recognition, promotion and protection of human rights in accordance with the provisions of the African Charter on Human and Peoples' Rights. The African Charter as detailed above protects the rights of all persons including LGBTI persons.

4 Protection of LGBTI rights within the African system: An assessment of progress to date

As detailed above, LGBTI rights are part and parcel of the human rights protected in the African regional and sub regional human rights instruments. Below is an analysis of what each of the bodies has done so far as regards the achievement of LGBTI rights:

99 Treaty for the Establishment of the East African Community 1999 art 6(d) and 7(2).
100 As above, 16(2).
101 East African Treaty (n 99 above) arts 4(c) and 6(1).
102 The Treaty of the Economic Community of Western African States, adopted 28 May 1975.

4.1 AU Constitutive Act organs

There are various organs established under the AU Constitutive Act. These organs are: the Assembly of the Union;[103] the Executive Council;[104] the Pan-African Parliament;[105] the Court of Justice;[106] the Commission;[107] the Permanent Representatives Committee;[108] the Specialised Technical Committees;[109] the Economic, Social and Cultural

103 It is established under art 6 of African Union Constitutive Act. It is the highest organ of the AU and it is made up of Heads of State and Governments or their accredited representatives. It meets at least once a year. It determines the common policies of the AU. In terms of human rights, it adopts the human rights treaties; and also oversees the work of the African Commission under art 45(4), 52, 53, 58, and 59 of the African Charter and appoints members of the African Commission on Human and Peoples' Rights under art 33 of the African Charter.

104 This is established under art 10(1) of the AU Constitutive Act. It is composed of the ministers of Foreign Affairs or such other designated ministers. It meets at least twice a year in ordinary sessions. Its functions are: To coordinate and take decisions on policies in areas of common interest to the member states including foreign trade, energy, food, water, transport, insurance, and education (art 13(1) of the AU Constitutive Act). It in reality carries out most of the work of the Assembly and as such it is actually the body that considers the reports of the African Commission.

105 This is provided for under art 17 of the AU Constitutive Act and its operations provided for in the Protocol to the Treaty establishing the African Economic Community relating to the Pan-African Parliament (PAP Protocol). The PAP is meant to represent all the peoples of Africa. It has among other functions and powers, the power to 'examine, discuss or express an opinion on any matter and make any recommendations it may deem fit relating to inter alia matters pertaining to respect of human rights, the consolidation of democratic institutions and the culture of democracy as well as good governance and the rule of law' (art 11(1) of the PAP Protocol.

106 This is provided for under art 18 of the AU Constitutive Act and established under the Protocol of the Court of Justice of the African Union which was adopted on 11 July 2003 in Maputo. This protocol is yet to come into force and so the court has not yet been established. However, the Protocol on the Statute of the African Court of Justice and Human Rights which was adopted 2008 but is yet to come into force, proposes the merger between the Court and the African Court on Human and Peoples' Rights.

107 This is established under art 20 of the AU Constitutive Act. It is the secretariat of the AU. It is headed by a Chairperson who is elected by the Assembly and its functions, structures and regulations are determined by the Assembly. One of its departments is the Department on Political Affairs under which the African commission on Human and People's Rights operates as a Division.

108 The PRC was established under art 21 of the AU Constitutive Act. It is composed of Permanent Representatives to the AU and other plenipotentiaries of member states. It has the responsibility of preparing the work of the Executive Council and acting on the Executive Council's instructions.

109 These are established under art 14 of the AU Constitutive Act. They are supposed to be composed of ministers or senior officials responsible for sectors falling within their respective areas of competence but they are not yet in operation. The Seven Specialised Technical Committees that are envisaged are: The Committee on Rural Economy and Agricultural Matters; the Committee on Monetary and Financial Affairs; the Committee on Trade, Customs and Immigration Matters; The Committee on Industry, Science and Technology, Energy, Natural Resources and Environment; the Committee on Transport, Communications and Tourism; the Committee on Health, Labour and Social Affairs; and the Committee on Education, Culture and Human Resources.

Council;[110] and the financial institutions.[111]

Whereas each of these can be said to have a role in the protection of human rights, the ones mostly concerned are: The Assembly of Heads of State and Government (Assembly), the Executive Council, the Permanent Representatives Committee, the Pan African Parliament, the AU Commission, and the Peace and Security Council. None of these has however dealt with LGBTI issues directly except for the Executive Council, when in its consideration of the report of the African Commission it requested the Commission to reverse the decision to grant observer status to CAL.[112]

4.2 The African Commission and LGBTI rights

The African Commission has developed more jurisprudence than any other African human rights body. However, not much of it is directly on LGBTI rights. Nevertheless, in the many years of its existence and more especially during the last decade, the African Commission has more directly engaged with LGBTI rights. The African Commission has both a protective and promotional mandate. Its protective mandate is composed of the communications procedure. The rest of its work is promotional including consideration of state reports; special procedures; and undertaking research and missions. The African Commission has engaged with LGBTI rights in the following areas:

4.2.1 Communications procedure

The African Commission receives and determines complaints of violations of the rights protected under the African Charter. It can handle communications between states and between individuals and states.[113] No single communication has been decided by the African Commission concerning LGBTI rights from when the Commission started until the end of 2015. The only communication filed involving a question of sexual orientation was a communication relating to the legal status of homosexuals in Zimbabwe. The communication queried the domestic legislation passed by Zimbabwe criminalising sexual contact between consenting adult men in private. However, the communication was

110 This was established under art 22 of the AU Constitutive Act. It is as an advisory organ composed of different social and professional groups of the members states of the AU. Under art 22(2), its composition, powers, and functions determined by the AU Assembly,

111 These are provided for under art 19 of the AU constitutive Act and they are three: are three: The African Investment Bank (AIB), the African Monetary Fund (AMF) and the African Central Bank (ACB).

112 African Union (n 3 above).

113 African Charter (n 41 above) arts 52 and 53 respectively.

withdrawn by the applicant before it was considered,[114] thus depriving the African Commission of a chance to pronounce itself on these rights.

However as earlier discussed, the commission has, in one communication included sexual orientation among the protected grounds for non discrimination.[115] Though the case was not necessarily concerned with sexual orientation, the fact that the Commission included it on its list of protected grounds is remarkable.

4.2.2 Consideration of state reports

As part of the promotional mandate of the African Commission, it is required to examine state reports that are supposed to be submitted every two years.[116] This is a non-adversarial and public process. The African Commission has, on many occasions, questioned states concerning the status of LGBTI rights. For example, during the examination of the Cameroon report in 2006, the African Commission, in its Concluding Observations, expressed concern 'for the upsurge of intolerance towards sexual minorities'.[117]

However, there is inconsistency in the African Commission's treatment of LGBTI rights, as the body does not always address issues concerning sexual minorities even when participating NGOs raise them. For example, in the Concluding Observations in respect of Uganda's second periodic report, the African Commission clearly acknowledges that it received reports from the International Gay and Lesbian Commission and Sexual Minorities Uganda, but makes no mention of LGBTI rights at all in the Concluding Observations.[118] Again, during the consideration of Uganda's fourth periodic report, the African Commission did not raise the issue of the Anti-Homosexuality Bill, 2009, which was then pending before Uganda's Parliament and which had been brought to its attention by different organisations.[119]

On a more positive note, the African Commission usually commends states when they do something positive for LGBTI persons; for example, it commended Uganda for investigating the murder of gay rights activist

114 *William A Courson v Zimbabwe* (2000) AHRLR 335 (ACHPR 1995).
115 *Zimbabwe Human Rights NGO Forum* case (n 51 above).
116 African Charter (n 41 above) art 62.
117 Concluding Observations on the first periodic report of Cameroon, African Commission on Human and Peoples' Rights, adopted at the Commission's 39th ordinary session, 11-25 May 2005 para 14.
118 Concluding Observations on the second periodic report of the Republic of Uganda, African Commission on Human and Peoples' Rights, adopted at the Commission's 40th ordinary session, 15-29 November 2006.
119 See generally, Concluding Observations on the fourth periodic report of the Republic of Uganda, African Commission on Human and Peoples' Rights, adopted at the Commission's adopted at the Commission's 49th ordinary session 28 April-15 May 2011.

David Kato thus showing that crimes against LGBTI people should not go un-investigated and unpunished.[120] It also commended Mauritius for enacting the Equal Opportunities Act of 2008, which includes sexual orientation among the grounds on which discrimination is prohibited.[121]

4.2.3 Engagement by special mechanisms

The African Commission's special mechanisms, notably the rapporteurs and the working groups, have occasionally engaged with issues of LGBTI rights. Most recently, the Special Rapporteur on Human Rights Defenders in Africa issued a press release on the implications of the Anti-homosexuality Act on the work of Human Rights Defenders in Uganda.[122] The Special Rapporteur reminded Uganda of its international obligations, including those under the African Charter and the United Nations Declaration on Human Rights Defenders. She called upon Uganda to 'take the necessary steps for the effective protection of all persons against discrimination and violence, regardless of their sexual orientation, and to maintain an atmosphere of tolerance towards sexual minorities in the country'.[123] She also issued a press release condemning Nigeria's enactment of the Same-Sex Marriages (Prohibition) Act 2013.[124]

The mandate of the African Commission's Committee on HIV extends to men who have sex with men.[125] Indeed, in its report on the visit to Cameroon, the Committee, together with the Special Rapporteur on the Rights of Women in Africa, reported on responses received on questions raised on the rights of sexual minorities.[126] In its mission to Namibia in 2001, one of the Commissioners asked Namibian authorities about the legal status of LGBTI people in Namibia.[127]

120 n 119 above, para 11.

121 Concluding Observations and Recommendations on the 2nd, 3rd, 4th and 5th fourth periodic reports of the Republic of Mauritius, African Commission on Human and Peoples' Rights, adopted at the Commission's 45th ordinary session 13-17 May 2009, para 15.

122 Press Release on the implications of the Anti-Homosexuality Act on the work of Human Rights Defenders in the Republic of Uganda http://www.achpr.org/press/2014/03/d196/ (accessed 25 April 2014).

123 As above.

124 Press Release on the Implication of the Same-Sex Marriage (Prohibition) Act 2013 on Human Rights Defenders in Nigeria http://www.achpr.org/press/2014/02/d190/ (accessed 25 April 2014).

125 Resolution on the establishment of a Committee on the Protection of the rights of people living with HIV and those at risk, vulnerable to and affected by HIV, 26 May 2010.

126 See Report of the joint mission of the mechanisms of the special rapporteur on the rights of women in Africa and the Committee on the Rights of People living with HIV, and those at risk, vulnerable to, and affected by HIV to the republic of Cameroon paras 25 and 30 http://www.achpr.org/files/sessions/53rd/mission-reports/cameroon-promo-2012/misrep_promo_cameroon_2012_eng.pdf (accessed 25 April 2014).

127 Report of the promotional mission to the Republic of Namibia, 2 to 6 July 2001, DOC/OSS(XXX)244, 7 http://www.achpr.org/files/sessions/30th/mission-reports/namibia/achpr30_misrep_promo_namibia_2001_eng.pdf (accessed 25 April 2014).

4.2.4 General Comments and resolutions

This is perhaps the area where the African Commission has made the most significant accomplishments as regards LGBTI rights. The recent resolution on violence based on sexual orientation and gender identity status was the crowning achievement in this regard. For the first time, the African Commission dedicated a full resolution to LGBTI issues. The resolution condemned violence and human rights violations suffered by LGBTI persons and activists and called upon states parties to the Charter to ensure these violations are adequately dealt with. The resolution was historic not only because it was the first resolution dedicated to LGBTI rights, but also because it squarely put LGBTI rights within the express reach and protection of the African Charter. Before this, the Commission had simply included LGBTI persons in broader resolutions; for instance, the Resolution on the establishment of a Committee on the protection of the rights of people living with HIV and those at risk, vulnerable to and affected by HIV, which include men who have sex with men.[128]

In addition to the above, the Commission has also continuously listed sexual orientation among the grounds upon which discrimination against women occurs in the 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 and General Comment No 2 on article 14(1)(a), (b), (c) and (f) and article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.[129] Similarly, the Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights[130] include sexual orientation in the prohibited grounds of discrimination and include LGBTI persons among vulnerable and disadvantaged groups of people whose rights need to be protected.[131]

4.2.5 Granting of observer status to organisations

The African Commission has shown double standards in the granting of observer status to organisations. Granting observer status is an administrative process. Usually once the organisation fits the criteria laid down in the Criteria for the Granting of and for Maintaining Observer

128 Resolution 163 adopted at the 47th session of the Africa Commission (26 May 2010); as above.
129 General Comments (n 74 above).
130 African Commission (n 63 above).
131 African Commission (n 63 above) paras 1(d) and (e) respectively.

Status with the African Commission on Human and Peoples' Rights (1999), an organisation will be granted observer status.[132] One of the instances that stands out is the initial denial and the subsequent granting of observer status to CAL. The reason given for the initial refusal of CAL's application was that 'the activities of the said Organisation do not promote and protect any of the rights enshrined in the African Charter.'[133] The denial of observer status to CAL contrasted with the African Commission's earlier grant of observer status to an LGBTI organisation, *Alternatives Cameroon* just a year earlier.[134] This lent credence to speculations that the inclusion of the word 'lesbians' in CAL's name was one of the unstated reasons for the denial. The stated reason left the Commission in a precarious situation for it seemed to suggest that LGBTI rights are not recognised in the African Charter, a position that was indefensible in light of the analysis above and also in light of the developments in other regional and international systems.[135] It also seemed to forestall any possibility of LGBTI people seeking refuge from the African Commission, as well as justifying most African states' assertions that the African Charter does not protect LGBTI persons.

To its credit, the Commission eventually granted observer status to CAL without much fuss on 25 April 2015, ending a seven year protracted confrontation.[136] Despite not specifically reporting the granting of observer status to CAL, the Executive Council of the African Union to which the African Commission reports, made Decision EX.CL/887(XXVII) requesting the Commission to withdraw the observer status granted to CAL and to review its criteria for granting observer status.[137] The Commission reported back to the Executive Council that,[138]

> ... following extensive deliberations, the Commission decided to undertake a detailed legal analysis on this matter, including considering issues relating to the Commission's relationships with its various stakeholders, the notion of African values, the legal basis for the grant of Observer Status by the

132 Indeed of the 12 organisations that were considered during that session, 10 were granted observer status, one was deferred pending a query raised under the criteria and only CAL was rejected. African Commission on Human and Peoples' Rights, 28th Activity Report, para 33, EX.CL/600(XVII), 8

133 Activity report (n 132 above) 8.

134 Twenty-sixth Activity Report of the African Commission on Human and Peoples' Rights, para EX.CL/529(XV), para 11.

135 Viljoen (n 71 above).

136 The granting of observer status was simply reported in the African Commission's 38 Activity Report as '... seven (7) NGOs were granted Observer Status, bringing the total number of NGOs with observer status to four hundred and eighty five (485).' See African Commission on Human and Peoples' Rights '38th Activity Report of the African Commission on Human and Peoples' Rights' at para 14. Available at http://www.achpr.org/files/activity-reports/38/actrep38_2015_eng.pdf (accessed 13 August 2016).

137 n 3 above.

138 The African Commission on Human and Peoples' Rights '39th Activity Report of the African Commission on Human Rights' para 50 available at http://www.achpr.org/files/activity-reports/39/actrep39_2015_eng.pdf (accessed 13 August 2016).

Commission, and the implications of withdrawing or retaining the observer status of NGOs.

The Commission further stated that they were informed that the matter is now before the African Court on Human and Peoples' Rights. This was a bold response to the Executive Council, which reports to the AU Assembly, which is made up of heads of states. By the time of writing this chapter, the Executive Council had not yet responded, but clearly this is far from over. This is yet another indication that the African Commission is getting bolder as regards the protection of the rights of LGBTI persons.

4.2.6 Engagement with NGOs

The African Commission actively engages with NGOs. It allows issues of LGBTI rights to be raised on the floor. Perhaps the time when most NGOs took to the floor over the rights of sexual minorities was during the session that followed the decision to deny CAL Observer status. Allowing NGOs to raise such issues shows the African Commission's willingness to engage on LGBTI rights issues.

The African Commission's activity reports bear testimony to this engagement. For example in its 30th Activity report, the African Commission reported that it had received information on, among others, the rights of sexual minorities.[139] The African Commission also allows the resolutions and observations made by the NGO Forum preceding its meetings to be shared and included in the report. Indeed, reports of increased intimidation, harassment and homophobic attacks directed at people of different sexual orientation' in Burundi, Malawi, Rwanda and Uganda, were raised by the NGO representatives and subsequently reported in the African Commission's 28th Activity Report.[140] On another occasion, NGOs were allowed to prepare a paper on LGBTI rights[141] and to meet with the Commissioners to discuss LGBTI rights.[142]

4.3 The African Court on Human and Peoples' Rights

The African Court on Human and Peoples Rights complements the protective mandate of the African Commission.[143] It makes final

139 Thirtieth activity report of the African Commission on Human and peoples Rights, EX.CL/717 (XX) para 252.
140 Twenty eighth activity report of the African Commission on Human and peoples Rights, EX.CL/600(XVII) para 17.
141 See 26th Activity Report (n 101 above) and S Ndashe 'Seeking the protection of LGBTI rights at the African Commission on Human and Peoples' Rights' *Feminist Africa* (2011)15, 17-38, 27-31.
142 Ndashe (n 141 above) 27-31.
143 African Court Protocol (n 84 above) art 2.

decisions[144] which are binding on the states parties.[145] The Court is given powers to make appropriate orders to remedy the violation where one is established.[146] The African Court is also given powers to issue provisional measures in cases of extreme gravity and urgency and where it is necessary to prevent irreparable harm to persons.[147] Access to the African Court is granted to individuals and NGOs, provided that the state concerned has made a declaration allowing this. So far, only seven states have done so and this has greatly limited the use of the African Court for human rights cases. Not surprisingly, the African Court has not yet handled any LGBTI rights issues.

4.4 The sub-regional courts

4.4.1 The East African Court of Justice

The East African Community Treaty establishes the East African Court of Justice (EACJ) to adjudicate disputes arising from the treaty. The East African Court does not have a human rights jurisdiction *per se*, although it can consider human rights issues by virtue of article 6(d) if what is raised is not a violation of human rights *per se* but rather a violation of the treaty provisions.[148] As such, since it may be argued that the African Charter protects LGBTI rights as discussed above, cases concerning the violation of article 6 through a violation of the rights protected in the African Charter can be brought before the EACJ. Indeed, a reference challenging Uganda's Anti-Homosexuality Act 2014 was filed with the EACJ on 23 April 2014 by Human Rights Awareness and Promotion Forum (HRAPF), a Ugandan NGO.[149] The reference challenges section 5(1) on the immunity of 'victims' of homosexuality to be tried for any offence committed when 'protecting' themselves against homosexuality; section 7 on aiding and abetting homosexuality and section 13(1)(b), (c), (d) and (e) on the promotion of homosexuality. These provisions are said to be directly in violation of the fundamental principles of good governance, rule of law and human rights enshrined in the EAC Treaty. The case was still pending at the end of 2015.

144 n 84 above, art 28(2).
145 n 84 above, art 30.
146 n 84 above, art 27(1).
147 n 84 above, art 27(2).
148 This was established in *Katabazi and Others v Secretary General of the East African Community and Another (Uganda)* (2007) AHRLR 119 (EAC 2007).
149 *Human Rights Awareness and Promotion Forum v Attorney General of Uganda* Reference 6 of 2014.

4.4.2 The ECOWAS Court

The ECOWAS treaty establishes the ECOWAS Community Court in article 15. It is independent,[150] and issues binding judgments.[151] The ECOWAS Community Court is open to individuals and NGOs.[152] The ECOWAS Community Court has jurisdiction to hear human rights cases.[153] It has never handled a case concerning LGBTI rights. However, it has handled many cases on human rights generally and has developed a very progressive jurisprudence.

4.4.3 The SADC Tribunal

The SADC Treaty provides for the establishment of the SADC Tribunal whose role is 'to ensure adherence to, and proper interpretation of, the provisions of the SADC Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it'. The Tribunal applies 'applicable treaties, general principles and rules of public international law and any rules and principles of the law of Member States'.[154] In *Mike Campbell v Zimbabwe*, Case 2 of 2007 (*Campbell* case), the SADC Tribunal declared that it had the power and competency to adjudicate human rights cases.[155] Following this decision, the highest organ of the SADC, the Assembly called for a review 'of the role, functions and terms of reference of the SADC Tribunal' which was to be undertaken and concluded in six months.[156] The summit also did not appoint judges to the tribunal or renew mandates and thus effectively suspended the operations of the Tribunal. By the time the tribunal was suspended, no LGBTI case had been taken before it. A new Protocol taking away the tribunal's human rights jurisdiction and limiting it to interstate complaints was adopted by the Summit in 2014,[157] but by the time of publishing this chapter, it has not yet come into force.

Therefore, whereas there is quite a lot going on at the African Commission level as regards LGBTI rights, not much has been done at the African Court and at the sub regional levels. The case against Uganda at the EACJ promises to be the first LGBTI case before the sub-regional

150 ECOWAS Treaty (n 99 above) art 15(3).
151 n 99 above, art 15(4).
152 n 99 above, art 3 of that Supplementary Protocol A/SP.1/01/05.
153 n 99 above, by virtue of art 9(4) and 10(d).
154 Article 21(b) of the Protocol on the Tribunal in the Southern African Development Community, 2000.
155 *Campbell* case, Case 2 of 2007, 25.
156 Southern African Development Community 'Communiqué of the 30th Jubilee Summit of SADC Heads of State and Government' 17 August 2008 para 32 http://www.sadc.int/files/3613/5341/5517/SADC_Jubillee_Summit_Communique.pdf.pdf (accessed 25 April 2014).
157 Southern African Development Community 'Protocol on the Tribunal in the Southern African Development Community' http://sadctribunalcoalition.org/sadc-tribunal/protocol/2014-sadc-tribunal-protocol/ (accessed 25 April 2014).

courts. Even so, there is more that needs to be done at the African Commission level, as it has not fully utilised all its powers to provide robust protection and promotion of LGBTI rights.

5 The approach of other international and regional systems on LGBTI rights

LGBTI rights are controversial all over the world. However, other human rights systems have been able to avoid the controversy by taking away issues concerning LGBTI persons from the realm of morals and placing them in the realm of human rights. It is not an issue that is left within the state's margin of appreciation due to the fact that human rights apply to all persons, and that LGBTI rights are not different from the rights of everyone else. This section examines the approach taken by the UN human rights bodies, and by other regional bodies in the Inter-American and the European human rights systems.

5.1 LGBTI rights at the UN level

None of the UN human rights instruments contains any direct reference to LGBTI rights. In this regard, they are just like those in the African system. However, the different UN human rights bodies have applied the existing rights to LGBTI persons in the following ways:

5.1.1 UN Charter based bodies

The UN Charter recognises human rights as one of its principles.[158] The UN Charter creates many bodies with different mandates, all of which have a role to play in the protection of human rights. There is still little consensus among the UN member states on whether LGBTI rights are indeed human rights duly recognised by the UN. Nevertheless, the General Assembly, which is made up of all member states, has so far adopted six resolutions that regard sexual orientation as protected.[159]

The UN Human Rights Council also adopted a resolution in 2011 calling for a study and a panel discussion on sexual orientation and gender identity.[160] The Office of the High Commissioner for Human Rights

158 United Nations 'Charter of the United Nations' 1945, art 1(3).

159 These are Resolutions: A/RES/69/182; A/RES/67/168; A/RES/65/208; A/RES/63/182; A/RES/61/173; A/RES/59/197 and A/RES/57/214, which all concern extra judicial, summary or arbitrary executions.

160 Office of the High Commissioner for Human Rights 'Human Rights Council resolution – Human rights, sexual orientation and gender identity' (adopted 17 June 2011) – A/HRC/RES/17/19 and Human Rights Council resolution – Human rights, sexual orientation and gender identity (adopted 26 September 2014) – A/HRC/RES/27/32.

(OHCHR) conducted a study into the violations of LGBTI rights all over world, which was presented and discussed in a panel discussion at the Human Rights Council's session on 12 March 2012.[161] It also adopted another resolution in 2014 requesting the OHCHR to 'update the earlier report with a view to share good practices and ways to overcome violence and discrimination, in application of existing international human rights law and standards.'[162]

The Economic and Social Council (ECOSOC) is in charge of accrediting organisations for observer status. It has so far accredited a number of LGBTI organisations. However, there was initial confusion when the International Lesbian and Gay Association (ILGA) applied. It was first denied observer status, then it was granted, suspended, and then granted again.[163] Nevertheless, it is now almost certain that once an organisation fulfils the conditions, it will be granted observer status.

Therefore, despite the contention that still exists among states on the status of LGBTI rights, the tide is clearly in their favour.

5.1.2 Treaty based bodies

The various human rights treaties ratified by member states create bodies that interpret them. These bodies have the powers to interpret the treaties through the issuance of General Comments, examining periodic state reports and issuing Concluding Observations and through the receipt and handling of complaints arising from violations of a treaty. The various treaty bodies have dealt with LGBTI issues in the following ways:

The Human Rights Committee

The Human Rights Committee (HRC or the Committee) is the monitoring body established under the ICCPR. It is a Committee of experts tasked with the duty of interpreting the ICCPR. It also examines state reports and makes recommendations, it issues general comments as a way of interpreting the treaty, and it hears communications from states, individuals and non-governmental organisations on the violations of the ICCPR.

161 Office of the High Commissioner for Human Rights 'United Nations Human Rights Council Panel on Sexual Orientation and Gender Identity' (7 March 2012) http://www.ohchr.org/EN/Issues/Discrimination/Pages/PanelSexualOrientation.aspx (accessed 14 March 2015).

162 n 160 above.

163 Pink News 'International Gay and Lesbian Association finally wins accreditation' http://www.pinknews.co.uk/2011/07/26/international-gay-and-lesbian-association-finally-wins-un-accreditation/ (accessed 25 April 2015).

In hearing communications, the Committee has dealt with issues concerning LGBTI rights under the right to equality and non-discrimination and the right to privacy. Under non-discrimination, the Committee has dealt with four aspects: criminalisation of same sex relations, rights of partners in same-sex relations, same-sex marriages and freedom of expression. Regarding the criminalisation of same-sex relations, in *Toonen v Australia,* the Committee interpreted the reference to sex in articles 2(1) and 26 as including sexual orientation and found that criminalisation of same-sex relations was inconsistent with the ICCPR.[164] It found that criminalisation of same-sex relations without criminalising opposite sex relations was discriminatory. On the rights of same-sex partners, it found discrimination in a case where a partner living in a same-sex relationship was denied pension rights simply on the basis of sexual orientation,[165] and where a person was denied pension because of his sexual orientation.[166] On marriage rights, the Committee found in *Joslin v New Zealand*[167] that the right to marry under article 23 extended only to marriage between a man and a woman and so denial of same-sex marriages did not constitute discrimination under article 26. It was only as regards freedom of expression, that it left a margin of appreciation for Finland to determine which radio programs could be aired in, *SETA v Finland.*[168] Under the right to privacy, the Committee found in *Toonen's* case that criminalisation of consensual same-sex relations was a violation of the right to privacy, which is protected under article 17(1).[169]

In considering state reports, the HRC has expressed itself on the need for states to ensure that sexual minorities enjoy all rights, including the right to life, freedom from torture, and ensuring that sexual minorities enjoy all other rights.[170] The HRC has also raised concerns about the existence of laws criminalising same-sex relations when examining state reports.

The Committee on Economic, Social and Cultural Rights

This Committee on Economic, Social and Cultural Rights (ESCR Committee) is established under the International Covenant on Economic, Social and Cultural Rights (CESCR). It also interprets the Covenant,

164 *Toonen* (n 52 above) para 8.7.
165 Communication 941/2000, *Young v Australia*, UNHR Committee (18 September 2003), UN Doc CCPR/C/78/D/941 (2000).
166 Communication 1361/2005, *X v Colombia*, UNHR Committee (14 May 2007) UN Doc CCPR/C/89/D/1361 (2005).
167 Communication 902/1999, *Joslin v New Zealand*, UNHR Committee (30 July 2002) UN Doc CCPR/C/75/D/902 (1999).
168 Communication 14/1991, *S.E.T.A v Finland*, UNHR Committee (2 April 1982) UN Doc CCPR/C/OP/1 (1985).
169 As above.
170 M O'Flaherty and J Fisher 'Sexual orientation, gender identity and international human rights law: Contextualising the Yogyakarta Principles' (2008) 8 *Human Rights Law Review* 2 222.

reviews state reports, and has the power to hear individual complaints.[171] The ESCR Committee has considered issues of sexual orientation in General Comments and in Concluding Remarks.

In General Comments, the ESCR Committee has addressed sexual orientation in General Comments No 20 on non-discrimination,[172] No 18 on the right to work,[173] No 15 on the right to water,[174] and No 14 on the right to health.[175] In General Comment 20, the Committee interpreted 'other status' as used in article 2(2) as including sexual orientation and gender identity.[176] The Committee advised states to ensure that 'a person's sexual orientation is not a barrier to realising Covenant rights, for example, in accessing survivor's pension rights.'[177]

In Concluding Observations on State Reports, the ESCR Committee also raised concerns about the treatment of people on the basis of their sexual orientation.[178]

The Committee on the Rights of the Child

This committee is established under the Convention on the Rights of the Child. The Committee has also considered sexual orientation in General Comments and in Concluding Observations.

In General Comments No 3 on HIV/AIDS and the Rights of the Child and No 4 on Adolescent Health and Development in the context of the Convention on the Rights of the Child,[179] it was emphasised by the Committee that article 2 protected all human beings below the age of 18 without any distinction including on the basis of sexual orientation.[180]

In its Concluding Observations on States' Reports, the Committee has on various occasions expressed concern on discrimination against LGBTI children.[181]

171 Optional Protocol to the African Charter on Human and Peoples' Rights, A/RES/63/117 on 10 December 2008.
172 General Comment No 20, UN Doc E/C.12/GC/20 10 June 2009.
173 Committee on Economic, Social and Cultural Rights, General Comment No 18: The right to work, E/C.12/GC/18, 24 November 2005
174 Committee on Economic, Social and Cultural Rights, General Comment No 15: The right to water, E/C.12/2002/11, 26 November 2002.
175 Committee on Economic, Social and Cultural Rights, General Comment No 14: The right to the highest attainable standard of health, E/C.12/2000/4,11 August 2000.
176 n 172 above, para 32.
177 As above.
178 Interights *Non discrimination in international law* (2011) 141.
179 General Comments No 3 on HIV/AIDS and the Rights of the Child and No 4 on Adolescent Health and Development in the context of the Convention on the Rights of the Child UN Doc CRC/GC/2003/4 (1 July 2003).
180 n 179 above, para, 6.
181 Interights (n 178 above) 142.

The Committee Against Torture

This Committee is established under the Convention against Torture (CAT). In General Comment No 2, on the implementation of article 2 by states parties,[182] the treaty body mandated as the guardian of the CAT included sexual orientation and transgender identity as grounds for non-discrimination in laws and practice and called upon states parties to protect all persons against torture.

The CEDAW Committee

This Committee is established under the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The CEDAW Committee interprets the CEDAW, reviews states reports, and receives complaints. It has dealt with issues of sexual orientation in general Comments and Concluding Observations.

In General Recommendation No 28 on 'The Core Obligations of States Parties under article 2 of the CEDAW' the CEDAW Committee noted that that sex discrimination is often linked with other factors such as sexual orientation and gender identity and thus called upon state parties to legally recognise and prohibit such intersecting forms of discrimination.

As regards Concluding Observations, the CEDAW Committee has also adopted several concluding observations to states' reports that deal with sexual orientation, for example Panama in 2010[183] and Kyrgyzstan in 1999.[184]

The CERD Committee

This Committee is established under the Convention on the Elimination of Racial Discrimination (CERD). The CERD Committee has powers to interpret the Convention, review state reports and hear individual complaints. The CERD Committee has rarely addressed sexual orientation discrimination and even then, it has only done so in its concluding observations. This was when it expressed concern over a law, which would require at least one person to be a Czech citizen in order for two people of the same sex to marry.[185]

182 Committee Against Torture, General Comment No 2, UN Doc CAT/C.GC.2/CRP.1/Rev.4 (23 November 2007) para 21.
183 For example Panama 2010.
184 Concluding Observations of the Committee on the Elimination of Discrimination Against Women regarding Kyrgyzstan, dated 5 February1999, A/54/38 para 128.
185 Concluding Observations of the Committee on the Elimination of Racial Discrimination Regarding Czech Republic 11 April 2007, CERD/C/CZE/CO/7 para 18.

5.2 LGBTI rights under the other regional systems

There are two other well-developed regional systems beside the African system: the Inter-American system and the European system. Their approaches to LGBTI rights are discussed below:

5.2.1 The Inter-American System

The Inter-American system is based on the American Convention on Human Rights (American Convention) and the American Declaration on Human Rights. There is no specific provision on LGBTI rights but the Convention protects all human rights and provides, in article 1, that the rights contained in the Convention apply to all persons. Article 24 is the non-discrimination provision. Neither article 1 nor article 24 contain a reference to sexual orientation or gender identity, just like all other international instruments. However, article 1 includes sex and the term 'other social condition'.

The Inter-American Commission on Human Rights and the Inter-American Court on Human Rights are the main human rights bodies in the Inter-American human rights system. The Commission has powers to examine state reports, interpret the treaty and handle cases concerning violations of the Convention. The Inter-American Court receives cases from the Inter-American Commission.

The Inter-American human rights system has dealt with LGBTI rights, especially through consideration of cases. The most recent case is *Karen Atala v Chile*,[186] which concerned denial of custody of children to a lesbian mother. The Court established that sexual orientation and gender identity are categories protected by the American Convention on Human Rights and that discrimination based upon these categories is prohibited. It also emphasised that all families of all individuals regardless of sexual orientation and not necessarily 'traditional' families are protected.

In *Marta Lucía Álvarez Giraldo v Colombia,*[187] in an admissibility ruling, the Inter-American Commission admitted a case concerning the decision not to authorise intimate prison visits because of the prisoner's sexual orientation on the basis that doing so could constitute a violation of article 11(2) on the right to privacy. This was despite the state's argument that Latin American culture has little tolerance towards homosexual practices in general.

186 *Karen Atala v Chile,* IAm Comm of HR (24 February 2012) OEA/Ser.L/V/II.130 Doc 22 rev 1

187 *Marta Lucía Álvarez Giraldo v Colombia,* IAm Comm of HR (4 May 1999) OEA/Ser.L/V/II.106 Doc 3 rev 211.

In *José Alberto Pérez Meza v Paraguay*,[188] the Inter-American Commission considered a case of discrimination based on the state's prohibition of same-sex marriages. However, it was dismissed because the applicant was unable to substantiate the claim.

5.2.2 The European system

Just like the other regional systems, there is no mention of the term 'LGBTI rights' in the European Convention on Human Rights, and neither is there a reference to 'sexual orientation' or 'gender identity'. Despite this, the system has developed in such a way that LGBTI persons have had their rights fully recognised and upheld within this system. Activists and LGBTI persons have been able to bring cases before the now obsolete European Commission on Human Rights[189] and the European Court on Human Rights (European Court). The Commission and the Court have been proactive and have taken brave steps to develop jurisprudence on LGBTI rights despite the silence of the founding instrument on these rights.

The European human rights system has dealt with LGBTI rights primarily through the determination of cases by the European Court on Human Rights.

Criminalisation of homosexuality was found to be a violation of the right to respect for private life in *Dudgeon v the United Kingdom.*[190] Criminalisation has been consistently regarded as a violation in all subsequent cases.[191] Prosecutions for indecent acts were also found to be in violation of article 8 on respect for private life in *ADT v the United Kingdom.*[192]

The European Court on Human Rights has found that the existence of a higher age of consent for male homosexual acts than for heterosexual acts constitutes discriminatory treatment contrary to article 14 taken in conjunction with article 8 on respect for private life.[193]

188 *José Alberto Pérez Meza v Paraguay* Petition 19/99, Report 96/01, 10 October 2001

189 The European Commission on Human Rights was abolished by Protocol 11 which came into force in 1998. Before that individuals did not have direct access to the Court. They had to go through the Commission which if it found the complaint to be well founded would launch a case in the court on the individual's behalf.

190 *Dudgeon v the United Kingdom* ECHR (23 September 1981) ser A 45.

191 *Norris v Ireland* (1988) ECHR 26 and *Modinos v Cyprus* (No 15070/89, 22 April 1993).

192 *A.D.T. v The United Kingdom* (2001) 31 EHRR 33. The same happened in *Laskey, Jaggard and Brown v the United Kingdom* (1997) 24 EHRR 39.

193 *H.G. and G.B. v Austria* (Nos 11084/02 and 15306/02, 2 June 2005) and *S.L. v Austria* (No. 45330/99, 9 February 2003) and *L. and V v Austria* (Nos 39392/98 and 39829/98, 9 February 2003) and *R.H. v Austria* (No 7336/03, 19 January 2006).

Exclusion from the military of homosexual persons has also been considered by the European Court on Human Rights. In *Smith and Grady v the United Kingdom,*[194] expulsion of the applicants from the Royal Air Force solely on the basis of their homosexuality was found to have breached their rights to privacy under article 8(2).[195]

Discrimination based on sexual orientation in relation to custody of children has also been prohibited and declared a violation of the right to a private life.[196] Also in adoption matters, exclusively using sexual orientation to deny adoption has been found to constitute discrimination.[197] This line of jurisprudence set aside the earlier decision in *Fretté v France* where the state was given a wide margin in light of the lack of agreement on the status of this issue in the various countries.[198]

The European Court has also pronounced that same-sex partners have the same rights as opposite sex partners.[199] The right to marry of same-sex partners has been deliberated and the jurisprudence has been developing. In *Schalk and Kopf v Austria*[200] the European Court did not find denial of same-sex marriage to be contrary to article 12. However, it also declared an unmarried same-sex couple without children to be a family for the purposes of article 8. Same-sex marriages were however left within the discretion of each state, and thus states enjoy a wide margin of discretion on this matter.

LGBTI rights have also been considered in cases concerning freedom of assembly. In *Baczkowski and Others v Poland*,[201] the European Court found a violation of articles 11 and 14 when a demonstration march held to raise awareness on minority issues, including the rights of homosexuals was denied. It was held that the ban not only interfered with freedom of assembly, but was also effected in a discriminatory manner. The same was held in *Alekseyev v Russia.*[202]

6 The potential for the African human rights system on LGBTI rights

The African regional human rights system has clearly not yet fully embraced LGBTI rights. Compared to other international human rights

194 *Smith and Grady v The United Kingdom* (1999) 29 EHRR 493; (2000) 29 EHRR 549.
195 Also see *Lustig-Prean and Beckett v the United Kingdom* (1999) ECHR 71.
196 *Salgueiro Da Silva Mouta v Portugal* (2001) 31 EHRR 47.
197 *E.B. v France* (2007) ECHR 211.
198 *Fretté v France* (2002) 38 EHRR 438.
199 *Karner v Austria* (2003) 38 EHRR 528., *P.B. and J.S. v Austria* (2012) 55 EHRR 31, and *Mata Estevez v Spain* (2001) ECHR 896.
200 *Schalk and Kopf v Austria* (2010) ECHR 1996.
201 *Baczkowski and Others v Poland* No 1543/06, 3 May 2007.
202 *Alekseyev v Russia* Nos 4916/07, 25924/08 and 14599/09, 21 October 2010.

systems, it has barely made progress. Only the African Commission among all the many organs seems to be alive to LGBTI issues, and even then, this has just begun and has not been fully tested. Even the few steps taken by the African Commission are threatened by the unprecedented direct interference of the AU political bodies. This state of affairs makes the African system to appear to be hostile to LGBTI rights. Nevertheless, the system holds a lot of potential for the protection and promotion of LGBTI rights that it may be just a matter of time before LGBTI rights are fully embraced just like in the other regional system as discussed below:

6.1 Progressive and adaptive human rights documents

The African human rights documents are progressive documents that can be adapted to changing circumstances. The African Charter has been described as a living document – one that can adapt to circumstances and stand the test of time.[203] It has so far been in place for 35 years, and during that period, it has been tested and challenged but it has not been broken. Adopted after the overthrow of the brutal dictatorships of Idi Amin and Bokassa, it went on to live through different periods where human rights in Africa where greatly violated including the repressive military dictatorships in Nigeria,[204] apartheid in South Africa,[205] and the civil wars in Uganda,[206] Angola,[207] and Mozambique.[208] It also lived through the change from the OAU to the AU and it still subsists to date.[209] When it became clear that women needed special protection within the African system, the Maputo Protocol was adopted, and when it came to children, the African Children's Charter was adopted. When there was need for a court to give more teeth to the Charter, the African Court Protocol was adopted. The sub-regional instruments have also similarly been able to survive and to be based upon it in the protection of human rights. Such a robust, fast-growing and living human rights system can easily adapt to changes to recognise and expressly protect sexual minorities. Already, even without express protection, the African Charter and other

203 Viljoen (n 71 above).

204 Nigeria had a further military junta from 1983-1998. This was the time when decisions like *SERAC*, *International Pen and Others v Nigeria*, were decided against the military regime of Nigeria.

205 Apartheid officially ended in 1994 with the adoption of South Africa's Interim Constitution, 1993 which provided for equal protection of all persons.

206 After disputing the elections in 1980, Yoweri Museveni started a guerilla war against the then government, which raged on from 1981-1986. Soon afterwards, different rebel groups the most notable among which is the Lord's Resistance Army fought the government until 2012 and then they reportedly moved on to the Central African Republic.

207 Angola had a bitter civil war from 1975 to 2002.

208 Mozambique also had a bitter civil war from 1977 to 1992.

209 The Organisation of African Unity became the African Unity in 2003 and the Constitutive Act of the African Union replaced the OAU Charter. The change was meant to drive African into the future. The African Charter is one of those instruments that remained in force.

instruments are being based on to protect and promote LGBTI rights as already discussed.[210]

6.2 The leadership of the African Commission on LGBTI rights

The African Commission has, after a long period of resistance towards protection of LGBTI rights, finally taken the lead with the passing of the resolution and the granting of observer status to CAL. This is an important step that legitimises the protection and promotion of LGBTI rights within the African system. A precedent has been set which other organs can replicate, and which has also perhaps emboldened the Commission to do more. It is steps like these that perhaps made it possible for the East African Court of Justice to hear the case challenging Uganda's Anti-Homosexuality Act on its merits rather than first dispose of the preliminary objections.[211] Over the years, there has been a visible and marked change in the African Commission's approach towards LGBTI issues, from clear hostility to now passing protective resolutions and recognising organisations working to protect LGBTI rights regardless of their having names that explicitly make reference to same-sex relations.[212] This has enabled more organisations to be able to engage more with the African Commission on LGBTI rights, which may help to bring LGBTI issues more to the table. There is thus a lot of potential for the Commission to further lay down standards on LGBTI rights and take the lead on protecting LGBTI people and promoting their rights, and also to act as an example which the other organs within the system can follow.

6.3 Progressive and innovative human rights jurisprudence

The African Commission is credited with having a robust jurisprudence. In interpreting the African Charter, the Commission has gone beyond what is expressly written in the Charter and found more innovative ways of redressing human rights violations. One of the innovative approaches that stands out is interpreting article 1 of the African Charter in a way that requires domestic law to be brought into conformity with the Charter.[213] The second innovative approach is that of implying rights, which was first adopted in the *SERAC* case.[214] Also, its protection of minority rights even without express provisions, as was done in the *Endorois* case, is remarkable.[215] The sub-regional systems have also produced progressive

210 See section 3.1.2 above.
211 The *HRAPF* case, n 149 above.
212 For the history of LGBTI activists engagement with the African Commission, see Ndashe (n 141 above).
213 See *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005) para 51.
214 *SERAC* case (n 56 above).
215 *Endorois case* (n 72 above).

and innovative decisions like the *Katabazi* decision in the East Africa Court of Justice[216] and the *Campbell* decision in the SADC Tribunal.[217] The *Katabazi* case opened the way for human rights litigation before the EACJ within limited circumstances, something that has enabled a number of human rights cases to be entertained by the court. The Campbell decision showed a tribunal that was willing to withstand the political pressure and make a decision in favour of the protection of human rights. Despite the fact that the tribunal was later suspended reportedly due to this decision, it made the point that human rights have to be respected even for politically unpopular causes. This all shows a tenacious system that can evolve and survive to even deal with issues like sexual orientation and gender identity.

6.4 The recent developments within the international human rights system and other regional systems on LGBTI rights

The African human rights system does not operate in a vacuum. It continuously interacts with other international human rights systems. It is quite clear from the above discussion that the UN system, the European system and the Inter-American system are all now largely in favour of protection of LGBTI rights. The international system is particularly important because all African countries are also part of the UN system and the developments there therefore affect them and some are binding on them. The regional systems are also of persuasive importance more so the Inter-American system since many of the political and economic conditions in most American states are similar to those in Africa. Therefore, of all the systems, it is the African system that is lagging behind, and this is unlikely to go on for so long as the systems continuously interact with each other.

6.5 Increased political stability and the move towards democratisation in Africa

The move from the OAU to the AU led to important changes in the political situation in Africa. One of the most remarkable changes was on overhauling the old principle of non intervention in a state's internal affairs. Now, states can intervene when human rights are being violated in a member state.[218] This may seem to be rhetoric but it is also backed up by developments in Africa. The African Union has for example taken a strong

216 n 148 above
217 n 155 above
218 The Assembly has the power under art 4(h) of the AU Constitutive Act to collectively order military intervention in a member state without its consent in cases of serious and massive human rights violations amounting to war crimes, genocide and crimes against humanity.

stand against unconstitutional changes of governments, and election fraud.[219] All these developments reflect a move towards democratisation. One of the key tenets of democracy is respect for human rights and the protection of minorities' rights. It thus makes it easy to protect LGBTI rights within a democratic framework. This move towards democracy has a lot of potential for the African system to protect and promote LGBTI rights.

6.6 Changes in public opinion on homosexuality

While research still shows that an overwhelming majority of people in Africa are opposed to homosexuality, there are some tell tale signs that there is more acceptance and acceptability in the recent past than ever before. In South Africa, lesbians, gays and bisexuals are protected from discrimination based on their sexual orientation within the Constitution, and South Africa was the first country to do this in the world.[220] As a result, LGBTI people can legally engage in consensual adult same sex activity,[221] get married,[222] jointly adopt children,[223] donate blood,[224] declare their status as part of the armed services,[225] and get employed[226] just like anyone else. Transgender persons and intersex persons can legally change their gender markers on official documents,[227] change their names and do sex changes and corrective surgeries.[228] This has all been in a span of 20 years. South Africa may be a special case because of its history, but recently Mozambique followed suit and decriminalised same-sex relations. Cases challenging laws criminalising same-sex conduct have

219 This is reflected in the AU Constitutive Act; The Lomé 'Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government' (Lomé Declaration), 2000; and The African Charter on Democracy, Elections and Governance, 2007.
220 The South African Constitution Act 108 of 1996 sec 9(3).
221 *The National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* 1998 (6) BCLR 726 (W)
222 See generally Civil Union Act 17 of 2006.
223 Children Care Act 38 0f 2005 Sec 231(1)(a)ii); *Du Toit v Minister of Welfare and Population Development and others* 2002 (10) BCLR 1006.
224 'SA finally ends gay blood donation ban' *Mamba Online* 20 May 2014 available at www.mambaonline.com/2014/05/20/sas-gay-blood-donation-ban-finally-ends/ (accessed 15 February 2016).
225 A Belkin & M Canaday 'Assessing the integration of gays and lesbians into the South African National Defence Force' (2010) 38 *Scientia Militaria: South African Journal of Military Studies* 1.
226 Employment Equity Act 55 of 1998 sec 6(1).
227 Alteration of sex description and sex status Act 49 of 2003 sec 2(1).
228 Alteration of sex description Act (n 227 above).

been brought before the courts in Botswana,[229] Kenya,[230] and Malawi.[231] Cases challenging discrimination and seeking equality and protection have been brought in Uganda,[232] Kenya,[233] and Botswana[234] and the majority

229 *Kanane v The State* 2003 (2) BLR 67 (CA).

230 A case was filed before the High Court in Nairobi by the National Gay and Lesbian Human Rights Commission (NGLHRC) challenging the constitutionality of Kenya's sodomy laws. For details see 'Activists sue to overturn Kenyan anti-gay law' 76 *Crimes* 15 April 2016 https://76crimes.com/2016/04/15/kenya-group-launches-case-seeking-to-decriminalize-gay-sex-lgbtq-nation/ (accessed 15 August 2016).

231 In 2014, the High Court of Malawi on its own motion moved to examine the constitutionality of the sodomy laws and called for interested parties to apply to join the case as amicus curiae. The decision is yet to be made.

232 Ten cases have so far been brought before the courts of law by Ugandan activists in Uganda since 2007 following what Jjuuko has described as 'the incremental approach.' Eight of these have been filed in Uganda courts, one at the regional court and one in the US. The cases are: *Victor Mukasa & Yvonne Oyoo v Attorney General*, High Court Miscellaneous Cause No 247 of 2006 which challenged the actions of state officials in forcefully entering the house of an LGBTI activist and subjecting her guest to degrading treatment including fondling and denial of toilet facilities; *Adrian Jjuuko v Attorney General*, Constitutional Petition No. 1 of 2009 on the constitutionality of sec 15(6)(d) of the Equal Opportunities Commission which stops the Equal Opportunities Commission from investigating matters regarded as immoral or socially unacceptable by the majority; *Kasha Jacqueline, David Kato Kisuule & Pepe Julian Onziema v The Rollingstone Newspaper,* Miscellaneous Cause No 163 of 2010 which challenged the publication of pictures, names and addresses of suspected LGBTI person; *Jacqueline Kasha Nabagesera, Frank Mugisha, Julian Pepe Onziema, and Geoffrey Ogwaro v The Attorney General and Hon. Rev. Fr Simon Lokodo*, High Court Miscellaneous Cause No 33 of 2012 which unsuccessfully challenged the actions of the Minister of Ethics and Integrity in stopping an LGBTI skills training workshop; *Jacqueline Kasha Nabagesera, Frank Mugisha, Julian Pepe Onziema, and Geoffrey Ogwaro others vs. the Attorney General and Rev. Father Simon Lokodo,*Civil Appeal No 195 of 2014 which is a pending appeal against the High Court's decision in the Lokodo case; *Prof. J. Oloka Onyango, Hon. Fox Odoi-Owyelowo, Prof. Morris Ogenga-Latigo, Andrew M. Mwenda, Dr. Paul Semugoma, Jacqueline Kasha Nabagesera, Julian Pepe Onziema, Frank Mugisha, Human Rights Awareness and Promotion Forum and the Centre for Health, Human Rights and Development (CEHURD) v Attorney General*, Constitutional Petition No 008 of 2014 which successfully challenged the constitutionality of the Anti-Homosexuality Act 2014; *Frank Mugisha, Dennis Wamala & Ssenfuka Warry Joanita v Uganda Registration Services Bureau*, Miscellaneous case No 96 of 2016 which challenges the refusal to register Sexual Minorities Uganda as a company limited by guarantee. The case before the East African Court of Justice, the *HRAPF* case, challenges the act of passing the Anti-Homosexuality Act with provisions that are not in line with the rule of law principles in the East African Treaty; and the case before the US courts is *Sexual Minorities Uganda v Scott Lively,* Civil Action No 3:12-CV-30051-MAP challenging the actions of US evangelical Scott Lively in promoting Uganda's Anti-Homosexuality Act.

233 Kenya has so far brought four court cases related to sexual orientation and gender identity: *Richard Muasya v Hon. Attorney General,* (2010) petition 27 of 2007 which was an unsuccessful petition on recognition of third gender; Baby 'A' (suing through her mother, E.A.) and The Cradle the Children Foundation v Attorney General, Kenyatta National Hospital, and the Registrar of Births and Deaths [2014] eKLR, Petition No 266 of 2013 in which the court proposed that intersex persons should be recognised in the law as such; *Republic v Kenya National Examination Council and the Attorney General ex parte Audrey Mbugua Ithibu* eKLR Judicial Review 147 of 2013 which successfully challenged the refusal to change gender makers for a transgender person; and *Eric Gitari v Non-Governmental Coordination Board and 4 Others* [2015], Petition 440 of 2013 High Court of Kenya which successfully challenged the refusal to register the National Gay and Lesbian Human Rights Commission as an Non Governmental organisation;

234 *Thuto Rammoge &19 Others v The Attorney General,* Case MAHGB-000175-13.

have been successful.[235] This shows a positive move towards protection of LGBTI rights and persons. Further criminalisation has only so far succeeded in the Gambia despite many countries trying to do so.[236] This shift in public opinion, though slow, has the effect of reassuring the different human rights organs that protection is done in the interests of a sizeable number of African citizens.

6.7 The presence of committed LGBTI activists across the continent

Almost in every country, small pockets of LGBTI persons and groups are fighting back, and organising. Indeed, even the move towards recriminalisation itself can be said to be a reaction to the increased visibility and the increased gains of LGBTI groups.[237] At the African Commission, and at the NGO Forum preceding the African Commission sessions, there are many groups that go to talk about LGBTI rights, and they may even perhaps constitute one the biggest lobby groups at every session. The case at the EACJ was brought by HRAPF, which is a group that advocates for the rights of LGBTI persons supported by a Coalition of over 50 organisations that worked to oppose Uganda's Anti-Homosexuality Act.[238] The different groups also share across countries and actively interact and engage at the African Commission level.[239] There is thus a growing LGBTI movement in Africa which is slowly changing perspectives and which is also engaging regional mechanisms. The fruits of the efforts of this group are seen with the adoption of progressive resolutions at the African Commission and the fact that LGBTI rights always remain on the table. It is groups like these that influence change as they keep the issues on the agenda, file cases, and demand for action. The African Commission's reversal of its decision to deny observer status to CAL came after intense lobbying and engagement by different civil society organisations, which eventually overcame the resistance of the states.[240] With legitimate African voices continuously lobbying for more protection, it is just a matter of time before the system fully embraces LGBTI rights.

235 In Uganda, only one case has so far been lost on all grounds, the *Lokodo* case in Uganda, which is also currently on appeal. In Kenya, only the intersex cases have been partly unsuccessful.

236 Gambia Criminal Code (Amendment) Act, 25 August 2014, n 25 above.

237 For example, there is a marked proximity between the date of the victory in the Mukasa case in Uganda and the tabling of the Anti-Homosexuality Bill. The *Mukasa* decision was delivered on 22 December 2008, an anti gay conference was hosted by the family Life Network between 5 to 8 March 2009, the then Minister of Ethics and Integrity promised a tough law on homosexuality and the Bill was tabled in October 2009 barely a year thereafter.

238 The Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL).

239 Sibongile (n 141 above).

240 As above.

7 Challenges for the African human rights system

Whereas the African system is clearly full of potential for the protection of LGBTI rights, there are also a number of challenges that need to be overcome. These are:

7.1 The rise of a conservative streak of pan-Africanism

Across Africa, there is a new growth of pan Africanism. Many Africans are standing up to protect and preserve African values and identities and to challenge foreign dominance. This is even seen at the African Union level, where heads of state always talk about the need to revive Africa and for Africa to claim its place in the world. This pan-Africanism has led to strengthening of the AU, and regional blocs and led to the introduction of progressive mechanisms like the African Peer Review Mechanism and the New Partnership for Africa's Development (NEPAD). The downside of this is however the adoption of a conservative trend in certain respects which simply drags the continent back and which is bad for the progress of human rights. In many African countries, homosexuality is seen as a foreign import,[241] and therefore the rhetoric goes that western countries seeking to dominate Africa are using homosexuality as one of the ways to erode African culture and values. This group thus seeks to protect African values and culture through fighting homosexuality. This is done through further criminalisation, preaching of hate against LGBTI people, and denouncing them as agents of the west and denigrating them. This rhetoric causes more harm as LGBTI people are exposed to harm and further violation of their rights. Also when taken on by leaders, abuses and violence are given a cloak of legitimacy in the name of pan-Africanism. Behind all recriminalising efforts is a group claiming to be protecting African values or morals or cultures. This is a challenge that the African system has to deal with since this stand is also taken by the people that they report to, the Assembly of the AU and by implication, the Executive Council. The 'request' from the Executive Council to the African Commission to reserve the CAL observer status decision clearly shows that this is a battle that the African Commission and other human rights institutions have to fight with the political bodies sooner rather than later.

7.2 The lack of political will

Whereas many states claim to be democratic and to care about human rights, the facts on the ground do not seem to support that. Many African states are led by pseudo dictators posing as democrats. In Zimbabwe, Robert Mugabe has ruled for 36 years and is currently presiding over a

241 Binta Haja (n 26 above).

failed state. In Uganda, Yoweri Museveni has so far ruled for 30 years and there is massive repression of the opposition and increased militarisation of the state. In Ethiopia, Rwanda, Equatorial Guinea, Sudan, the Gambia, Swaziland and many other countries, there is little space for political agitation, and even countries like South Africa where democracy has taken root, incidents like the hosting and failing to arrest a wanted international criminal do occur.[242] These are the same leaders who make up the AU Assembly to which the African Commission reports and which takes the lead on standard setting. It is on this same kind of base that both the OAU and AU were built, with leaders more interested in political aggrandisement that promoting democracy and promoting human rights. The Gambia where the African Commission is based is headed by an autocrat.[243] LGBTI rights unfortunately are among the first category of rights that usually fall prey to such leaders as denouncing homosexuality helps to give them the much needed legitimacy at critical times. It is therefore not surprising that Mugabe, Museveni and Jammeh are some of the leading opponents of homosexuality in Africa.[244] Therefore, it will take a long time before LGBTI rights are embraced by the leadership of Africa due to their own selfish interests, and as long as they do not embrace them, it will be difficult to achieve full protection.

7.3 Political instability

While there is marked progress and development towards stability politically, many parts of Africa remain mired in wars, and most of the countries are poor. There are wars still going on in South Sudan, Democratic Republic of Congo and Somalia. There is terrorism in Kenya, illegal changes of government in Guinea (Conakry) and skirmishes and purges in Burundi. This political instability affects economic development, which in turn affects the funding to the African Commission and other human rights bodies, and also renders their decisions academic as they cannot easily be implemented. Human rights are usually the first victims of such instability and LGBTI rights more so.

242 In 2015, South Africa invited and hosted Sudanese President Omar El Bashir who was indicted by the International Criminal Court (ICC) and the government let him leave the country despite an interim order issued by the High Court ordering that he should be arrested. See *Southern African Litigation Centre (SALC) v The Minister of Justice and Constitutional Development & 11 Others*, Case No 27740/2015. The Supreme Court of Appeal later found that the government acted unconstitutionally in failing to arrest Bashir. See *The Minister of Justice and Constitutional Development & 11 Others v Southern African Litigation Centre (SALC)* (867/15) [2016] ZASCA 17 (15 March 2016).

243 President Yahyah Jammeh rose to power in 1994 through a coup d'etat and has kept a tight stranglehold on the presidency.

244 n 23 above.

8 Conclusion

The above analysis has shown that whereas the African Commission has passed a resolution specifically dedicated to LGBTI rights, as well as engaged in different ways on LGBTI issues, the other bodies in the African system have barely engaged with LGBTI rights. However, to be fair, the system has rarely been tested with cases concerning LGBTI rights. Thus, the story of LGBTI rights activism at the African Commission is relatively new as NGOs have just started taking the struggle to the regional bodies.[245] Therefore, the blame cannot be entirely on the human rights bodies, for they usually deal with what has been brought before them. This state of affairs is largely caused by, among other things, the fact that the human rights treaties do not explicitly protect LGBTI rights, the current impasse in international law over the scope of LGBTI rights, the lack of pro-activeness of the human rights bodies and the limited engagement of LGBTI rights activists with the African human rights system. Nonetheless, all indications are that this is slowly changing and that both the human rights bodies and the NGOs are taking LGBTI rights issues in Africa more seriously. If the African system takes full advantage of its potential, protection of LGBTI rights in Africa will be easily achieved.

245 Sibongile (n 141 above).

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