UNIVERSITY OF HULL

Protecting Non-Heterosexual Rights in Africa: *Reformed Universalism,* the African Charter and Domestic Constitutions in Africa

Being a thesis submitted in partial fulfilment of the requirements for the degree of Doctor of Philosophy in Law in the University of Hull

By

Fortune Ezeah

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I certify that all material in this thesis that is not my own work has been identified and that no material has previously been submitted and approved for the award of a degree by this or any other University.

Dedication

This thesis is dedicated to God almighty for his infinite mercy, love and divine favour towards my life.

It is also dedicated to the loving memory of my beloved father, Chief Ozioko Sunday Ezeah, who passed away in the second year of my programme (12th June 2019). May his soul continue to rest in peace, Amen.

Acknowledgement

I am extremely grateful to my supervisors Prof. Lindsay Moir and Dr Rob Clucas for their support, noble guidance, invaluable advice, continuous encouragement and patience during my PhD. Your immense knowledge and vast experience have contributed tremendously towards the success of this research.

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A special thank you goes to my mother for her profound love and support all through my life, I could not have wished for a better mother than you.

Abstract

The right of non-heterosexual people to dignity, liberty and equality is an inviolable right that has gained momentum globally and has become a cornerstone of human rights movements around the world. But for non-heterosexual people in a majority of African states, freedom from discrimination, violence and prejudice is still a luxury that they cannot currently afford owing to deeply entrenched resistance to the recognition and protection of non-heterosexual rights in Africa. Developing effective legal frameworks for enshrining the rights of non-heterosexual people in Africa is, therefore, imperative to ensure the roll-back of oppressive homophobic laws, practices and policies in these African states.

This thesis proposes and develops the *reformed universalism* legal paradigm for protecting and advancing the rights of non-heterosexual people in Africa by addressing the resistance of African states to the imposition of 'foreign' values on them through international legal instruments. The *reformed universalism* paradigm embeds the universalism of the human rights of non-heterosexual people but utilises domestic and regional legal instruments in African states to protect these rights, thus ensuring that the rights are not considered as 'foreign' or internationally imposed by western powers. The thesis argues that the African Charter on Human and People's Rights and the domestic constitutions of African states have adequate provisions from which derivative human rights of sexual minorities can be founded and espoused by the regional and domestic Courts in African states, notwithstanding the conservative leanings of the judiciaries in these states. The thesis further examines the implementation mechanisms necessary to institutionalise legal protection frameworks for non-heterosexual people in African states, focusing on the regulatory and policy imperatives required for the enforcement of non-heterosexual rights in these states.

The thesis adopts a blend of doctrinal and socio-legal research methodologies with a transnational study of the constitutions of all 54 African states to examine the amenability of these domestic constitutions to incorporating non-heterosexual rights. The thesis argues that despite staunch objections of African states, there are sufficient legal instruments within their domestic jurisdictions and at the regional level that can be utilised to protect non-heterosexual rights and these instruments can be effective to halt the pervasive homophobia in these African states if dutifully applied by the domestic and regional Courts.

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List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights 1981
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
ET	Employment Tribunal
GANHRI	Global Alliance for National Human Rights Institution
ICCPR	International Covenant on Civil and Political Rights
ICPD	International Conference on Population and Development
ILGA	International Lesbian and Gay Alliance
IPPF	International Planned Parenthood Federation
LGBT	Lesbian, Gay, Bi-Sexual and Transgender
NANHRI	Network of African National Human Rights Institutions
NHRI	National Human Rights Institutions
SDGs	Sustainable Development Goals 2015
SRHR	Sexual and Reproductive Health and Rights
UHRC	Uganda Human Rights Commission
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
UNDR	Universal Declaration of Human Rights
UNHRC	United Nations Human Rights Council
WAS	World Association for Sexual Health
WHO	World Health Organisation

CHAPTER ONE

Introduction

1.1 Background of Study

Within African societies, the subject of sexuality is often debated in hushed tones, as a form of a taboo subject,[1] and advocates of same-sex rights quickly become social and cultural outcasts, for promoting 'deviant', 'unnatural' and 'unspeakable' activities.[2] The opposition to non-heterosexuality does not stop at socio-cultural denunciation within African societies but is often grounded in concrete legal instruments staunchly outlawing non-heterosexual practices on pain of imprisonment or other physical penalties.[3] In Benin,[4] Ethiopia,[5] Nigeria,[6] Gambia,[7] Zambia,[8] Kenya[9] and Malawi,[10] for instance, same-sex activities are prohibited under the Criminal Codes of these countries and punishable by up to 14 years imprisonment. Stiffer punishments ranging from life imprisonment to the death penalty are also contained in the Criminal Codes of some African states such as Tanzania,[11] Uganda[12] and Mauritania. [13] Despite the

[1]Kristen Cheney, 'Locating Neocolonialism, "Tradition," and Human Rights in Uganda's "Gay Death Penalty" (2012) 55(2) *African Studies Review* 77-95.

[2] Marc Epprecht, 'Sexual minorities, human rights and public health strategies in Africa'(2012) 111(443)*African Affairs* 223–243.

[3]Neville Hoad, 'Between the White Man's Burden and the White Man's Disease: Tracking Lesbian and gay Human Rights in Southern Africa', (1999) 5(4) GLQ 559-584.

[4]Article 88 of Benin's Penal Code punishes homosexual acts with one to three years of imprisonment and a fine of CFA franc (XOF) 100,000 – 500,000 (about US$210–$1,050).

[5] Criminal Code of the Federal Democratic Republic of Ethiopia 2004, art. 629.

[6] Criminal Code Act of 1916, section 214, Laws of The Federation of Nigeria, Cap. C38 (rev. ed. 2004).

[7] Criminal Code of 1934, section 144, 3 Laws of Gambia, Cap. 8:01 (rev. ed. 2009).

[8] Penal Code of 1931, section 155, VI Laws of The Republic of Zambia , Cap. 87 (rev. ed. 1995).

[9] Penal Code of 1930, section 162, 15 Laws of Kenya, Cap. 63 (rev. ed. 2012).

[10] Penal Code of 1930, section 153, Laws of Malawi, Cap. 7:01 (rev. ed. 2010).

[11] Penal Code of 1945, section 154, Laws Of Tanzania, Cap. 16 (rev. ed. 2002) – homosexual acts are punishable by 14 years and up to Life Imprisonment.

[12] Penal Code of 1950, section 145, Laws Of Uganda, Cap. 120 (Rev. Ed. 2000) - homosexual acts are punishable by 14 years and up to Life Imprisonment.

[13] Article 308 of the Mauritanian Penal Code 1983 punishes homosexual acts by Muslim men with death by stoning.

overwhelming global trend towards promoting non-heterosexual rights in western jurisdictions and elsewhere, many African states are moving further in the opposite direction with recent legislative attempts to increase the penalties for non-heterosexuality. In Ghana, for instance, a new legislative bill was introduced in August 2021[14] seeking to increase the penalty for homosexual sexual activities from the current 3 years' penalty under section 104 of the Criminal Code 1960.[15]

In 2014, the Ugandan parliament passed the Anti-homosexuality Act[16] which proposed a life imprisonment sentence for homosexual sex between consenting adults (originally, the death penalty was proposed but later reduced to life imprisonment following backlash from civil society and the international community); In the same 2014, the Nigerian President signed into law the Anti-Same Sex Marriage Act[17] which banned same-sex marriages, prohibited organisations and groups promoting same-sex marriages in the country and imposed a 14-year imprisonment term for violation of the provision. These and many more legislative provisions in African states pose a real danger for non-heterosexual persons in the continent who face imprisonment and violence/lynching for their sexuality. In 2019, the High Court of Zambia sentenced two men to 15 years in prison for having consensual sex in the privacy of their hotel room;[18] in 2018, 47 men were arrested and charged to Court for alleged same-sex activities in Nigeria;[19] in Sudan and Northern Nigeria,[20] under the Sharia legal system adopted

[14] 'Supporters and opponents face off over Ghana's anti-LGBT law', *Reuters* (*12th November 2021*) <Supporters and opponents face off over Ghana's anti-LGBT law | Reuters> accessed 20th January 2022.

[15] Criminal Code 1960, Laws of Ghana.

[16] Anti-Homosexuality Bill No. 18 of 2009, §§ 1 & 2, Bills Supplement to the Uganda Gazette No. 47, vol. CII, Sept. 25, 2009. Note that this Act was subsequently nullified by the Constitution Court of Uganda on technical grounds, i.e., lack of requisite quorum by parliament when the bill was passed.

[17] Same Sex Marriage (Prohibition) Act, 2013, sections 4 and 5 (enacted Jan. 7, 2014).

[18] 'Country Reports on Human Rights Practices: Zambia' (*US Department of State, 2019)* https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/zambia/ accessed 19th May 2021 - the two men were convicted of same-sex sexual conduct by the Kapiri Mposhi Magistrates Court in August 2018. On November 27, the Lusaka High Court upheld their conviction and imposed the 15-year minimum sentence .

[19] 'Nigeria 2018 Human Rights Report' (*US State Department Report, 2018)* 41, < https://www.state.gov/wp-content/uploads/2019/03/Nigeria-2018.pdf> accessed 14th June 2021.

[20] Human Rights Watch, 'World Report 2020 - Nigeria' < https://www.hrw.org/world-report/2020/country-chapters/nigeria#e81181> accessed 21st May 2021.

there, homosexual sex carries a potential death penalty;[21] there are also widespread cases of violence against people across the continent on account of their sexuality.[22]

Of the 72 states globally where non-heterosexual activities are criminalised, 32 are in Africa, revealing the large scale of the problem in African states.[23] It is seriously concerning that, amid the increasing global recognition of the inalienable human rights of non-heterosexual persons, 32 of the 54 states in Africa still have explicit legislative provisions criminalising non-heterosexual intercourse between consenting adults with penalties ranging from imprisonment to the death penalty. 30 of these 32 states have ratified the International Covenant on Civil and Political Rights (ICCPR) 1966[24] even though 18 of them have submitted themselves to the jurisdiction of the UN Human Rights Committee by ratifying the Optional Protocol to the ICCPR.[25] The ratification of the ICCPR which prohibit discrimination of any kind has not influenced the legislative criminalisation of non-heterosexual sexual activities in these states. Table 1.1 below maps the legislative prohibition of non-heterosexuality in 32 African states, highlighting the relevant statutory provisions and penalties under these provisions.

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[21] This is based on the interpretation of the prohibition of homosexuality in the following passages of the Quran - QUR'AN, Sūra II: Al-Baqarah, verse 187; Sūra XXX: Ar-Rüm, verse 21; Sūra IV: An-Nissa, verse 1; Sūra III: Ã'lay Imrãn, verse 41; Sūra VII: Al-A'rãf, verse 81; Sūra XXVII: An-Naml, verse 55. See Javaid Rehman and Eleni Polymenopoulou, 'Is Green a Part of the Rainbow? Sharia, Homosexuality and LGBT Rights in the Muslim World' (2013) 37(1) *Fordham International Law Journal* 3. However, in July 2020, Sudan abolished the death penalty for homosexual acts. See 'Great first step' as Sudan lifts death penalty and flogging for gay sex' (*Reuters, 16th July 2020)* <https://www.reuters.com/article/us-sudan-lgbt-rights-trfn-idUSKCN24H30J> accessed 9th June 2021.

[22] See 'Mapping anti-gay laws in Africa' (*Amnesty International UK Report, 2018*) < https://www.amnesty.org.uk/lgbti-lgbt-gay-human-rights-law-africa-uganda-kenya-nigeria-cameroon> accessed 12th May 2021. Amnesty's report documents at least 15 different cases of violence against homosexual persons across African states including Nigeria, Cameroon, Uganda and Kenya.

[23] 'Hundreds in hiding as Tanzania launches anti-gay crackdown' *The Guardian (*5th November 2018) <https://www.theguardian.com/world/2018/nov/05/tanzania-gay-people-in-hiding-lgbt-activists-crackdown> accessed 18 November 2019.

[24] International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49.

[25] Office of the High Commissioner for Human Rights, United Nations, 'Ratification status by country or by treaty' <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en&gt> accessed 16th January 2022.

Table 1.1 Mapping Legislative Prohibition of Non-Heterosexual Activities in African States

State	Legislative Provision	Penalty
Algeria	*Penal Code* (Ordinance 66-156 of June 8, 1966) Art. 338	Imprisonment 2 months - 2 years
Burundi	Law No. 1/05 of 22 April 2009 concerning the revision of the *Penal Code* Article 567	Imprisonment 3 months - 2 years
Cameroon	*Penal Code* of 1965 and 1967, as amended in 1972	Imprisonment 6 months - 5 years
Chad	Criminal Code 2017	Imprisonment 3 months - 2 years
Comoros	Penal Code of the Federal Islamic Republic of Comoros Article 318	Imprisonment 1 - 5 years
Eritrea	*Penal Code of 1957* (inherited from Ethiopian rule) Article 600: Unnatural carnal offences	Imprisonment 10 days - 3 years.
Ethiopia	Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004 Article 629: Homosexual and other Indecent Acts	Imprisonment 10 days - 5 years
The Gambia	*Criminal Code 1965*, as amended in 2005 Article 144: Unnatural offences	Imprisonment 14 years
Ghana	Criminal Code, 1960 (Act 29), as amended to 2003 Section 104: Unnatural Carnal Knowledge	Imprisonment 1 - 3 years
Guinea	Penal Code of 1998 Article 325	Imprisonment 6 months - 3 years.

Kenya	Penal Code (as amended by Act No. 5 of 2003) Section 162: Unnatural Offences Section 165: Indecent Practices Between Males Section 155: Indecent practices between males	Imprisonment 5 – 14 years
Lesotho	Prohibited under the Common law of Lesotho.	Unclear
Liberia	*New Penal Law*, Volume IV, Title 26, Liberian Code of Laws 1976 Articles 14.74, 14.79 and 50.7	Imprisonment up to 1 year
Libya	Penal Code of 1953 as amended by Law 70 of 2 October 1973 Article 407(4) Article 408(4)	Imprisonment up to 5 years
Malawi	Penal Code Chap. 7:01 Laws of Malawi Section 153: Unnatural offences Section 154: Attempt to commit unnatural offences Section 156: Indecent practices between males Section 137A: Indecent practices between females	Imprisonment 5 – 14 years
Mauritania	Penal Code of 1984 Article 308	Death by public stoning
Mauritius	Criminal Code of 1838 Section 250: Sodomy and bestiality	Imprisonment Up to 5 years
Morocco	Penal Code of November 26, 1962 Article 489	Imprisonment 6 months - 3 years
Namibia	Prohibited under the Roman-Dutch common-law	Unclear

Nigeria	Criminal Code Act, Chapter 77, Laws of the Federation of Nigeria 1990 Section 214: Unnatural offences Section 217: Indecent practices between males Same-Sex Marriage (Prohibition) Act 2013 Section 1(1) Section 5 Section 4(2) Section 5(2)	Imprisonment Up to 14 years
Senegal	Penal Code of 1965 Article 319 (third paragraph)	Imprisonment 1 - 5 years
Sierra Leone	Offences against the Person Act 1861 Section 61	Life imprisonment
Somalia	Penal Code, Legislative Decree No. 5/1962 Article 409: Homosexuality	Imprisonment 3 months - 3 years.
South Sudan	Penal Code Act 2008 Section 248: Unnatural Offences	Imprisonment Up to 10 years
Sudan	The Penal Code 1991 (Act No. 8 1991) Section 148: Sodomy Section 151: Indecent Acts	Imprisonment. Up to 5 years Flogging - 100 lashes Death sentence or life imprisonment if convicted for the third time
Swaziland	Prohibited under the Common Law	Unclear
Tanzania	Penal Code of 1945 (as amended by the Sexual Offences Special Provisions Act, 1998 Section 154: Unnatural of offences[1] Section 138A: Gross indecency	Imprisonment 20 years – Life imprisonment

Togo	Penal Code of 13 August 1980 Article 88	Imprisonment 1 year and 3 years
Tunisia	Penal Code of 1913 (as modified) Article 230	Imprisonment Up to 3 years
Uganda	The Penal Code Act of 1950 (Chapter 120) (as amended) Section 145: Unnatural offences Section 148: Indecent practices	Imprisonment 7 years – Life Imprisonment
Zambia	Penal Code Act (as amended by Act No. 15 of 2005) Section 155: Unnatural offences Section 158: Indecent practices between persons of the same sex	Imprisonment 15 years – Life Imprisonment. 25 years – Life Imprisonment if one party is under 18
Zimbabwe	Criminal Law (Codification and Reform) Act (Effective July 8, 2006) Section 73: Sodomy	Imprisonment Up to 1 year

Source: Data gathered from Legislative study of African states.[26]

Even in the absence of legislative provisions in some of the other African states, non-heterosexual persons are often lynched, lesbians raped and other grave acts of violence and indignity inflicted on them on account of their sexuality.[27]

[26] Lucas Paoli Itaborahy and Jingshu Zhu, '*State Sponsored Homophobia Report'*, (International Lesbian, Gay, Bisexual, Trans and Intersex Association, 6th ed, May 2013).

[27] U.N. Human Rights Council, 'Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity', Rep. of the U.N. High Comm'r for Human Rights, 42, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011).

The widespread opposition to non-heterosexuality in African states is shown in Figure 1.1 based on a joint study conducted by Amnesty International and the International Lesbian and Gay Association (ILGA).[28]

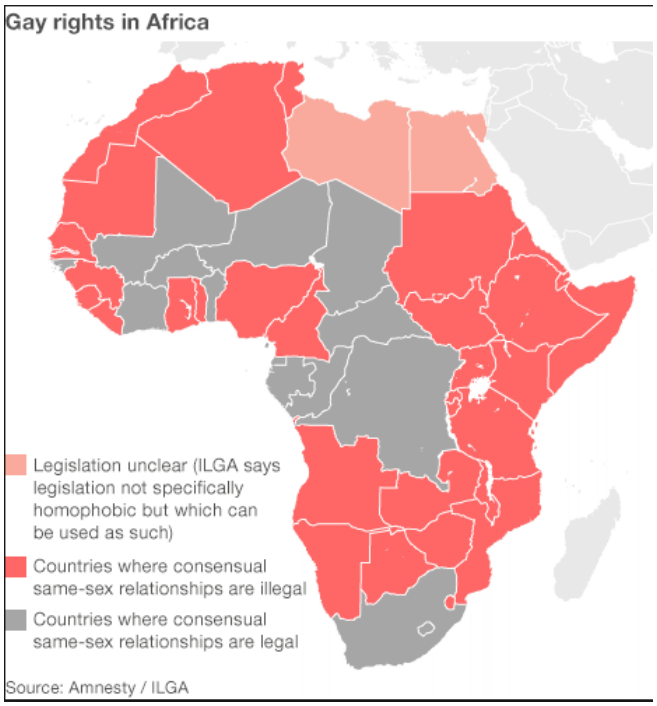

Figure 1.1 State of Non-Heterosexual Rights in Africa

Source: Amnesty International/ILGA 2019

In some of the states where non-heterosexual sexual activities are technically legal as shown in Figure 1.1, this is mostly because the relevant criminal codes are silent on non-heterosexual activities or do not have any provisions from which its prohibition can be inferred (e.g., prohibiting sexual intercourse 'against the order of nature') rather than contain explicit provisions protecting or promoting non-heterosexual rights. The only exception to this situation is South Africa where the Constitution[29] explicitly protects the rights of non-heterosexual persons.[30] Therefore, while not criminalising non-heterosexual activities, the absence of explicit legislative protection of non-

[28] ILGA, 'Where is it Illegal to be Gay in Africa? *Newsweek,* (7 October 2019) <http://www.newsweek.com/where-it-illegal-be-gay-africa-630113>accessed 8 November 2020.
[29] Constitution Constitution of the Republic of South Africa, 1996.
[30] Section 9 prohibits discrimination on grounds of sexual orientation and this applies to both government and private entities.

heterosexual rights in the remaining 21 African states renders non-heterosexual persons still subject to harassment, victimisation, bullying and other forms of political, social and economic reprisals on account of their sexuality.

While it is easy to broadly categorise African states as retrogressive and not meeting up with the contemporary recognition of non-heterosexual rights globally, there are deeper legal, religious and cultural issues involved regarding the nature of human rights and the variation of activities that are accorded 'rights' across different jurisdictions. In essence, while some rights are unanimously regarded as human rights, e.g. right to life, right to freedom, liberty, fair trial, freedom from torture etc., the recognition of other recently emerging non-traditional rights, such as same-sex rights and the right to die, as human rights vary according to jurisdictions and the absence of universal recognition of these rights as human rights call into question the stage at which a right can be regarded as a human right.

In light of the staunch resistance to non-heterosexual rights in African states and the widespread scale of the persecution of non-heterosexual people, it is important to critically analyse the fundamental basis for the denunciation of the rights of non-heterosexual people in Africa and, more importantly, analyse how to overcome the obstacles to the legal recognition of non-heterosexual rights in African states. This research explores the fundamental legal basis upon which the protection of non-heterosexual rights in Africa can be premised and the legal, regulatory and policy imperatives to ensure these rights are translated from legal instruments into practical tools for ensuring non-heterosexual persons are accorded dignity, respect and protection from oppression on account of their sexuality.

1.2 Conceptualising Non-Heterosexual Rights

Advocating positive legal rights for non-heterosexual orientations generates considerable discussions in contemporary human rights fora across the globe at the international, regional and domestic levels. As an emergent area of human rights focus, few subjects are as divisive and passionately debated in developing countries as the question of the ascription of 'human rights' tag to private sexual activities or orientations of individuals and the push for legal recognition of such rights.

While humans have always been diverse in sexual orientations from earliest recorded history,[31] it is only in recent decades that strong discussions began to be held regarding whether sexual orientations evoke elements of people's human rights and the extent to which such rights are inviolable by legal and constitutional instruments. These discussions were largely influenced by the rising Human Immuno-Deficiency Virus (HIV) pandemic at the time and the role that suppressing the free expression of sexuality by sexual minorities was significantly contributing to a greater impact of the virus on sexual minorities.[32] The discussions, which began at the international level, culminated in the first reference to sexuality and sexual health in a World Health Organization (WHO) technical report in 1975[33] which in turn led to greater focus on the subject at both international and national levels.[34]

1.2.1 Religious Objections to Non-Heterosexual Rights

Debates on the ascription of human rights as a label relating to non-heterosexual orientation usually involve polarised arguments between proponents of the

[31]Francis Mondimore, *A Natural History of Homosexuality* (John Hopkins University Press, 1996) 3; Michael K. Sulliva,'Homophobia, History, and Homosexuality: Trends for Sexual Minorities' (2004) 8(2-3) *Journal of Human Behaviour in the Social Environment* 13.

[32]World Health Organisation, 'Sexual health, Human Rights and the Law' (2015) <http://apps.who.int/iris/bitstream/handle/10665/175556/9789241564984_eng.pdf;jsessionid=CA3CBB71910D4CB069895D79CAC4165D?sequence=1>accessed 21 May 2018.

[33] WHO, 'Education and treatment in human sexuality: the training of health professionals' Technical Report Series, No. 572. Geneva: World Health Organization; 1975.

[34]Saida Alia, Shannon Kowalski, Paul Silva., 'Advocating for sexual rights at the UN: the unfinished business of global development' (2015) 23 (46) *Reproductive Health Matters* 31-37.

universalism of rights and their application to sexual minorities and opponents of such views based on religious and cultural grounds. Religious opposition is generally based on the supposed 'sinfulness' and abhorrence of non-heterosexual activities according to religious codes or doctrines,[35] particularly in the Bible and Quran. Religious opposition is usually expressed by a refusal to participate in any activity seemingly giving support to the permissibility of non-heterosexual relations[36] and is increasingly becoming a significant challenge to the advancement of the rights of non-heterosexual people even in countries where non-heterosexual relations are legally permissible.[37]

A 2019 global Pew Research project that surveyed respondents across countries from all the continents found that:

> there is a strong relationship between a country's religiosity and opinions about homosexuality. There is far less acceptance of homosexuality in countries where religion is central to people's lives – measured by whether they consider religion to be very important, whether they believe it is necessary to believe in God in order to be moral, and whether they pray at least once a day. [38]

This religious divide on the acceptance of homosexuality means that countries in Africa, the Middle East and parts of Asia-Pacific where there is a stronger adherence to religious principles have the least acceptance of homosexuality, as seen in Figure 1.2 below-

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[35] "All We Want is Equality" Religious Exemptions and Discrimination against LGBT People' (*Human Rights Watch, February 2018*) <https://www.hrw.org/report/2018/02/19/all-we-want-equality/religious-exemptions-and-discrimination-against-lgbt-people> accessed 12th June 2021.

[36] ibid.

[37] Examples can be seen in the refusal by some businesses and organisations to provide services to homosexual persons in the United States and the United Kingdom where homosexual relations are legally permissible and sexual orientations are a protected characteristic under the laws of various US states and the Equality Act 2010 of UK. E.g. the refusal of masterpiece bakery to prepare a cake for a gay wedding in *Masterpiece Bakery v Colorado Civil Rights Comission* discussed below in section 1.2.2.2 of this chapter, page 23. Also, the same can be seen in the UK in *Lee v Ashers Baking Company Ltd and Others (Northern Ireland)* also discussed below in section 1.2.2.3 of this chapter, page 26.

[38] 'The Global Divide on Homosexuality**:** Greater Acceptance in More Secular and Affluent Countries' (*Pew Research Centre, May 2019)* <https://www.pewresearch.org/global/2020/06/25/global-divide-on-homosexuality-persists/> accessed 21st May 2021. The report documents the major findings of the Pew Research Center survey on attitudes to homosexuality conducted among 38,426 people in 34 countries from May 13 to Oct. 2, 2019.

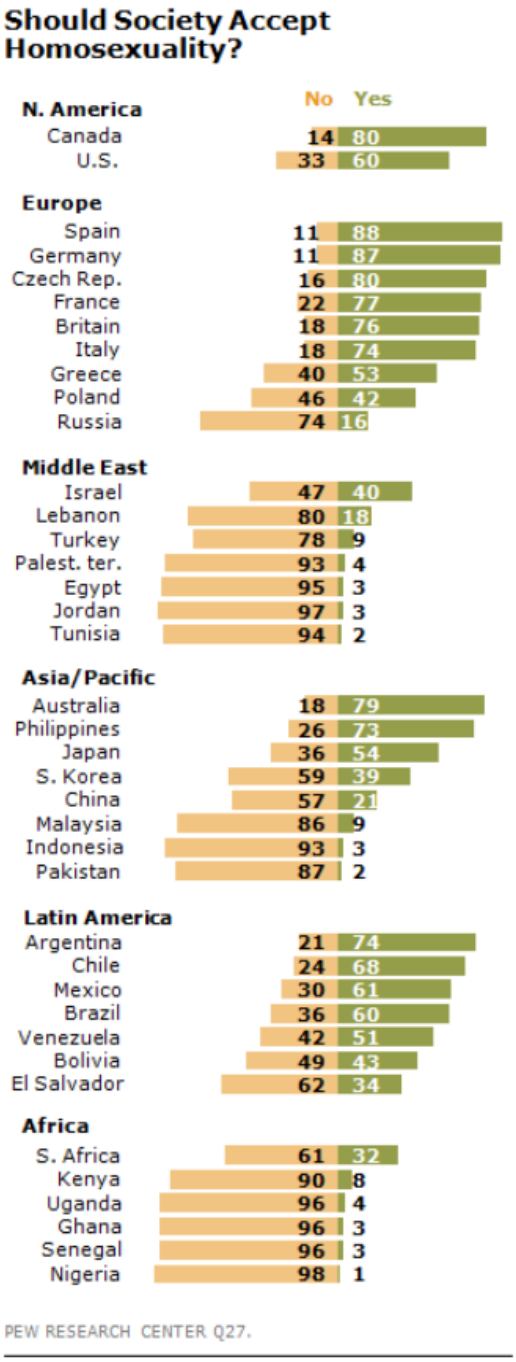

Figure1.2 Global Divide on Acceptance of Non-Heterosexuality

Source: Pew Research Centre May 2019[39]

As seen in Figure 1.2 above, Africa, the Middle East and parts of Asia-Pacific are the only areas in the world where there is overwhelming resistance to homosexuality with

[39] ibid.

as high as 93 - 98% negative views on homosexuality in some of these countries. The Pew Research survey demonstrated the link between religiosity and acceptance of homosexuality by asking respondents whether they consider religion to be very important in their daily lives. The results of the survey showed that an overwhelming majority of respondents in African and Middle Eastern states considered religion to be very important (and this aligns with the negative views on homosexuality as these respondents that considered religion very important also had a negative view of homosexuality) while only a minority of respondents in North America and Europe considered religion to be very important.[40] The findings of this research support earlier research done by Allport and Ross at Harvard University which established a 'curvilinear relationship' between religious adherence and prejudice whereby people with strong religious inclinations are more prejudiced than people with less fervent religious observations.[41] Allport and Ross explain this phenomenon thus:

> a certain cognitive style permeates the thinking of many people in such a way that they are indiscriminately pro-religious and, at the same time, highly prejudiced.[42]

This relationship between religion and prejudice exists even in developed countries where strong religious adherence is often a predictor of prejudice towards homosexuality. Thus, even in these developed countries, the survey showed that there was a significant disparity in the acceptance of homosexuality between those who considered religion as important and those who did not. In the United States of America, for example, 57% of religious people accepted homosexuality while 86% of non-religious people accepted homosexuality. The same trend was observed in the UK (67% v 90%); Canada (60% v 93%); France (65% v 98%); Germany (73% v 91%); Australia (61% v 85%) and Spain (77% v 93%). This significant disparity between views on homosexuality by religious and non-religious persons in developed countries is shown in Figure 1.3 below:

[40] ibid.
[41] Gordon W. Allport And J. Michael Ross, 'Personal Religious Orientation And Prejudice' (1967) 5(4) Journal of Personality and Social Psychology, 432 - 443.
[42] ibid, 432.

People who see religion as less important in their daily lives are more accepting of homosexuality

% who say homosexuality should be accepted by society

	Religion is very important	Religion is NOT very important	Diff
	%	%	
Israel	22	62	+40
Czech Rep.	27	65	+38
South Korea	13	51	+38
Canada	60	93	+33
U.S.	57	86	+29
Slovakia	22	51	+29
Greece	34	62	+28
Turkey	19	45	+26
France	65	89	+24
Australia	61	85	+24
Poland	29	53	+24
UK	67	90	+23
Sweden	73	95	+22
Hungary	34	53	+19
Germany	73	91	+18
Italy	62	80	+18
Argentina	67	84	+17
Netherlands	79	95	+16
Spain	77	93	+16
Lithuania	18	31	+13
South Africa	52	63	+11
Brazil	66	76	+10
Bulgaria	24	34	+10
Lebanon	10	19	+9
Mexico	65	73	+8

Note: Only statistically significant differences shown. Respondents who said religion was somewhat, not too or not at all important in their lives make up the "Religion is NOT very important" category.
Source: Spring 2019 Global Attitudes Survey. Q31.

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Figure 1.3 Influence of Religious Belief on Acceptance of Homosexuality

Source: Pew Research Survey 2019[43]

Religious resistance to non-heterosexual rights is a prominent feature of the resistance to homosexuality in African countries.[44] However, it is also evident in the developed

[43] ibid.

[44] See the Pew Research Survey 2019 (ibid). See also Adrian Van Klinken, 'Christianity and same-sex relationships in Africa' in Adrian Van Klinken (ed), *Christianity and Controversies over Homosexuality*

western nations, where religious objections to non-heterosexual activities have mostly focused on the denial of goods or services to persons on the basis of their sexual orientation. In this regard, the Courts have had to balance the right to religious liberty and beliefs against the rights of sexual minorities to freedom of expression and the pursuit of happiness.

Nevertheless, it is imperative to note the growing split among religious sects globally over the acceptability of non-heterosexual rights. From 2000 onwards, an increasing number of religious sects have gradually begun accepting non-heterosexual rights including allowing the conduct of same-sex marriages and ordaining non-heterosexual members as priests.[45]

This great religious divide is most evident between the 'protestant' and 'orthodox' religious sects globally with the sects within the former group gradually adopting a liberal approach to non-heterosexuality while the orthodox religious sects remain staunchly against non-heterosexual rights. Therefore, many of the orthodox religious institutions have remained firmly against non-heterosexual rights, including the Roman Catholic Church, the Orthodox Jewish movement, the Church of Jesus Christ of Latter-day Saints, the Southern Baptist Convention, the National Baptist Convention, and the Assemblies of God.

The religious divide is highlighted in the Pew Report below –

in Contemporary Africa (Routledge, 2016) 2; Kevin Ward, 'Same-Sex Relations in Africa and the Debate on Homosexuality in East African Anglicism,' (2002) 84(1) *Anglican Theological Review* 87; Patrick Awondo, 'The Politicisation of Sexuality and Rise of Homosexual Movements in Post-Colonial Cameroon,' (2010) 37 *Review of African Political Economy* 315-328.

[45] See the Pew Research Survey 2019 (ibid).

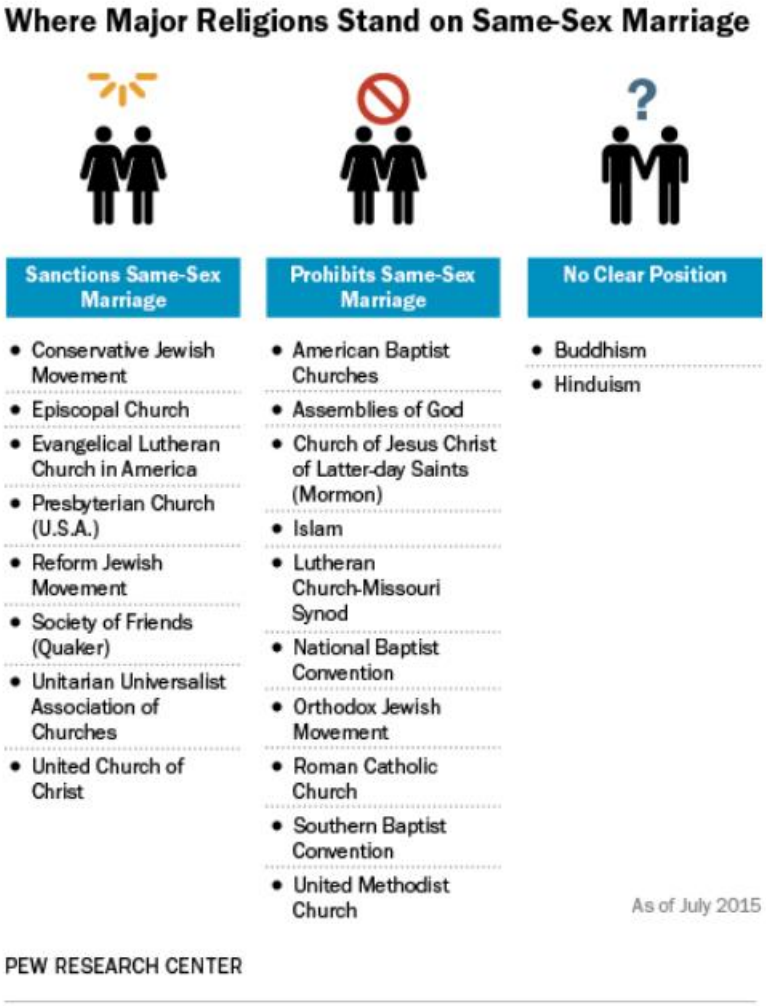

Figure 1.4: Religious divide over Non-Heterosexuality.

In the United Kingdom, the Church of England (the official church of the UK) adopts a nuanced approach to non-heterosexuality and is, therefore, not in the graph above. While the church maintains the general religious stand that marriage is between a man and a woman – and will not sanction the celebration of same-sex marriage – it supports ***celibate*** same-sex relationships and civil partnerships.[46] Consequently, the Anglican Church which is the non-UK version

[46] 'GRACE and Disagreement: Shared Conversations on Scripture, Mission and Human Sexuality' (*Church of England, 2014), available at* <https://www.churchofengland.org/sites/default/files/2018-05/Grace%20and%20Disagreement%202%20A%20Reader%20%E2%80%93%20writings%20to%20resource%20conversation_1.pdf> [accessed 07 October 2022].

of the Church of England permits the ordination of same-sex Bishops provided they are declared celibate. An internal split has, therefore, arisen within the Anglican church between the Global North (Western nations) and the Global South (developing countries) regarding the permissibility of same-sex unions. The Global South consists of mostly Anglican churches in Africa and they staunchly resist the move towards the acceptability of non-heterosexuality in the church.[47]

Without delving into the theological and ideological basis of the religious divide between the different sects, it suffices to state that there is no longer a unanimous rejection of non-heterosexuality from a religious perspective (at least in western developed jurisdictions) as portions of religious units are gradually warming up to the acceptability of non-heterosexuality. Nevertheless, the staunch resistance of the conservative religious sects accounts for the opposition to non-heterosexual activities even within developed nations; while religious opposition continues to underlie the staunch resistance to non-heterosexuality in developing nations.

1.2.2 Religious Rights Vs Non-Heterosexual Rights in Western Jurisdictions

The tension between religious rights and non-heterosexual rights is not an exclusive feature of developing countries in Africa, the Middle East and Asia-Pacific nations. It also features prominently in western jurisdictions despite the high rate of acceptability of non-heterosexuality. In many western jurisdictions, the Courts have grappled with balancing the rights of religious organisations and individuals with strong religious beliefs to exercise exclude people from goods and services on account of their non-heterosexuality. Thus, in the UK, US and European nations, various cases have arisen on this issue and the decisions of the Courts in these cases highlight the fact that

[47] Harriet Sherwood, 'Anglican church still tying itself in knots over same-sex marriage' (*Guardian, 3 August 2022)* < https://www.theguardian.com/world/2022/aug/02/anglican-church-still-tying-itself-in-knots-over-same-sex-marriage> [accessed 28 September 2022].

religious objection to non-heterosexuality is accorded some recognition by the Courts on account of the competing human rights involved – the right to religious beliefs and the right to freedom from discrimination on account of sexual orientation.

1.2.2.1 The Equality Act 2010 and Religious Objections to Non-Heterosexuality in the UK

In the UK, religious beliefs[48] and sexual orientation[49] are both protected characteristics under the Equality Act 2010 which prohibits discrimination because of specific protected characteristics, including sexual orientation (section 12) and religion or belief (section 10). Thus, where individuals or organisations raise religious objections to the employment of non-heterosexual people or providing goods or services to non-heterosexual people, there is a clash between two protected characteristics.

In employment situations, Schedule 9, Paragraph 2 of the EA attempts to balance these conflicting rights by providing an exemption for organised religions from compliance with the non-discrimination principle for sexual orientation. Paragraph 2(a) provides that:

> 2 (1)A person (A) does not contravene a provision mentioned in sub-paragraph (2) by applying in relation to employment a requirement to which sub-paragraph (4) applies if A shows that—
>
> (a)the employment is for the purposes of an organised religion,
>
> (b)the application of the requirement engages the compliance or non-conflict principle, and
>
> (c)the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it).

Under this provision, religious organisations are entitled to refuse employment to non-heterosexual people in compliance with their religious doctrines. As a result, catholic

[48] Equality Act 2010, s 10.
[49] Equality Act 2010, s 12.

churches are legally entitled to refuse to employ non-heterosexual persons on account of their religious doctrine which opposes non-heterosexuality. The tenuous attempt of the Equality Act 2010 (EA) to balance these competing rights has been heavily criticised on the ground that it institutionalises social inequalities to the detriment of sexual minorities. Waites[50] argued that formal equality in the law and institutional arrangements 'may conceal and even perpetuate social inequalities' in their application[51] while Clucas[52] was more explicit in his criticism of the EA's deference towards organised religions in employment situations, arguing that 'there is no formal equality in the Equality Act, as far as the interrelationship of some of the rights relating to religion and sexuality are concerned'.[53] While these criticisms raise critical questions about the scope of the exemption for organised religion and its potential to undermine the basic concept of equality for non-heterosexual persons, it is arguable that such exemption is necessary to preserve the sanctity of religious doctrines and avoid a legislative erosion of the fundamental beliefs of religious adherents. Compelling an organised religion to employ a person whose sexual orientation runs fundamentally counter to its religious doctrine is to critically erode the religious belief of such an organisation.

Although the EA provides a religious exemption for employment situations, there is no exemption for discrimination on grounds of religious beliefs for the provision of goods and services and it, therefore, falls to the Courts to undertake a delicate balancing of these competing rights under the EA. In *Bull and another v Hall and another,*[54] Lady Hale of the UK Supreme Court expressed this point thus –

> The issues in discrimination law are difficult enough, but there are also competing human rights in play: on the one hand, the right of Mr and Mrs Bull to manifest their religion without unjustified limitation by the state; and on the other hand, the right

[50] M Waites, 'Equality at last? Homosexuality, Heterosexuality, and the Age of consent in the United Kingdom' (2003) 37(4) *Sociology* 637-655.

[51] ibid, 640.

[52] Rob Clucas, 'Religion, Sexual Orientation and the Equality Act 2010: Gay Bishops in the Church of England Negotiating Rights Against Discrimination' (2012) 46(5) Sociology 936, 938.

[53] ibid 940.

[54] [2013] UKSC 73.

> of Mr Preddy and Mr Hall to enjoy their right to respect for their private lives without unjustified discrimination on grounds of their sexual orientation.[55]

Notwithstanding this difficulty, in adjudicating the balance between these competing rights, the UK Courts have largely leaned towards the protection of the rights of non-heterosexual persons against discrimination on grounds of religious beliefs. Some of these cases will be briefly discussed below.

Bull and another v Hall and another

This case concerned the denial of hotel accommodation to a non-heterosexual couple on account of the religious beliefs of the hotel owners. Although the case was brought under the Equality Act 2006 (the predecessor to the Equality Act 2010) because the dispute arose in 2008, the decision of the Court on the relevant legal principles applies equally to the provisions of the Equality Act 2010.

The brief facts of the case were that Mr Preddy and Mr Hall were civil partners who lived in Bristol. They planned a short break in Cornwall. On 4 September 2008, Mr Preddy made a booking at the Chymorvah Private Hotel for a double bedroom for the nights of 5 and 6 September. Mr and Mrs Bull owned the Hotel. They were devout Christians who sincerely believed that the only divinely ordained sexual relationship was that between a man and a woman within the bonds of matrimony. This belief was explicitly stated in the hotel's online booking form thus: "*Here at Chymorvah we have few rules, but please note, that out of a deep regard for marriage we prefer to let double accommodation to heterosexual married couples only – thank you*". Twin bedded and single rooms, on the other hand, would be let to any person regardless of marital status or sexual orientation. When Mr Peddy and Mr Hall arrived at the hotel, they were refused the double bedroom when Mrs Bull discovered that they were a same-sex couple. Their booking fee was immediately refunded. Aggrieved, they complained to

[55] ibid, 3.

the Equality and Human Rights Commission (EHRC) and filed a claim against the hotel and its owners.

The primary issue before the Court was whether the hotel owners were entitled to discriminate against the same-sex couple on account of their religious beliefs (which were also protected under the Equality Act). The Bristol County Court ruled in favour of the same-sex couple, holding that this was unjustified discrimination against them on account of their sexual orientation and awarded £1800 each to them as compensation for injury to feelings.[56] Dissatisfied, Mr and Mrs Bull appealed to the Court of Appeal against the judgment. The Court of Appeal upheld the County Court's judgment and dismissed the appeal, but granted leave to appeal to the Supreme Court.[57] A year after the Court of Appeal's decision in *Bull,* the Court of Appeal also decided a similar issue in *Black v Wilkinson*[58] with very similar facts, except that this concerned a Bed and Breakfast run in a family home by owners who objected to non-heterosexuality on religious grounds. The Court of Appeal reached a similar decision, holding it to be direct and unjustified discrimination against the same-sex couples notwithstanding that this related to the owners' private residence which they used for commercial accommodation business.

The Supreme Court was, thus, faced with two similar cases relating to religious objection to non-heterosexuality in the provision of goods and services (although the appellant in *Black* subsequently withdrew the appeal). In its judgment, the Court examined all relevant pieces of anti-discrimination legislation in the UK and concluded that this constituted unjustified discrimination against the same-sex couple. The Court rejected the religious belief argument of Mr and Mrs Bull, holding that:

> To permit someone to discriminate on the ground that he did not believe that persons of homosexual orientation should be treated equally with persons of heterosexual orientation would be to create a class of people who were exempt from the discrimination legislation. We do not normally allow people to behave in a

[56] Hall & Anor v Bull & Anor [2011] EW Misc 2 (CC) (04 January 2011).
[57] [2012] EWCA Civ 83.
[58] [2013] EWCA Civ 820.

> way which the law prohibits because they disagree with the law. But to allow discrimination against persons of homosexual orientation (or indeed of heterosexual orientation) because of a belief, however sincerely held, and however based on the biblical text, would be to do just that.[59]

The Supreme Court in this decision explicitly rejected religious objections to non-heterosexual rights as that would create an exemption from anti-discrimination law which was unjustifiable.

Catholic Care (Diocese Of Leeds) v Charity Commission For England And Wales

A similar decision had been reached in *Catholic Care (Diocese Of Leeds) v Charity Commission For England And Wales*[60] albeit by the Upper Tribunal (Tax And Chancery). In this case, the appellant was a Roman Catholic charity that had previously been involved in the provision of adoption services on behalf of the local council, i.e. identifying and screening potential parents willing to adopt children, placing children for adoption and providing some support for the parents after adoption. Following the enactment of the Equality Act 2010, it applied to the Charities Commission to amend its memorandum of objectives to incorporate a clause specifying that it would only process adoption for heterosexual couples living in a 'Nazarene Family'[61] setting i.e. a father, a mother and child. The appellant's aim in incorporating this clause was to take advantage of the exemption in section 193 of the Equality Act which exempts charities from the anti-discrimination provisions when acting in pursuance of their charitable instruments. The Charities Commission refused the appellant's application on account that the aim was purely to discriminate against non-heterosexual people. The appellant challenged this decision at the First-Tier Tribunal (General Regulatory Chamber (GRC)) (Charity)[62] which also rejected the application. Dissatisfied, the appellant appealed to the Upper Tribunal (Tax And Chancery).

[59] [2013] UKSC 73, 12.
[60] [2012] UKUT 395 (TCC).
[61] ibid, 3.
[62] [2011] UKFTT B1 (GRC) Reference Number: CA/2010/0007.

In its decision, the Tribunal upheld the decision of the GRC that the appellant's objective was purely discriminatory and was not justifiable within the ambits of the law because the appellant, by providing adoption services on behalf of the local council, was acting on behalf of a public authority and could not rely on its religious beliefs to exclude members of the public with protected characteristics. This decision prevents religious charity groups from seeking to take advantage of section 193 of the Equality Act to incorporate discriminatory provisions into the memorandum of objectives in the course of providing services on behalf of a public authority. The legal principle that emerges from this decision is that while the EA 2010 grants religious organisations exemptions from some of its anti-discrimination provisions, if a religious organisation is providing a service on behalf of a public authority like a local council, it cannot rely on those exemptions and will be bound by the EA's anti-discrimination provisions including sexual orientation as a protected characteristic.

Nevertheless, the decision is restricted to the particular circumstances of the case (i.e. provision of services by charities on behalf of public authorities) because UK law permits religious discrimination against same-sex couples in the area of marriage. Under the Marriage (Same-Sex Couples) Act 2013, sections 1 and 2 permit religious organisations/churches to refuse to conduct same-sex marriages in accordance with their religious beliefs. This exemption is a significant one as research by the University of York and Leeds has shown that over 99.5 per cent of churches in England and Wales rely on this exemption to refuse marriage ceremonies for same-sex couples.[63]

1.2.2.2 *Lee v Ashers Baking Company Ltd and Others (Northern Ireland)*

Notwithstanding the decisions in *Bull* and *Catholic Care,* a 2018 decision by the UK Supreme Court[64] regarding the balance of religious beliefs and non-heterosexual relations created some obfuscation on the legality of religious objections to the provision of goods and services to non-heterosexual persons by refusing commercially

[63] Paul Johnson, Robert Vanderbeck, 'Sacred Spaces, Sacred Words: Religion and Same-sex Marriage in England and Wales' (2017) 44(2) Journal of Law and Society 2.
[64] Lee v Ashers Baking Company Ltd and others (Northern Ireland) [2018] UKSC 49.

openly available services to them. This decision appears to have curtailed some of the progress made in *Bull* and *Catholic Care* towards protecting non-heterosexual people from discrimination in the provision of goods and services.

In *Lee v Ashers Baking Company,*[65] a case that emanated from Northern Ireland, Ashers Baking Company had been approached by Gareth Lee to bake a cake with the message '*support gay marriage'* on the cake. Ashers Baking refused on the ground that this violated its owners' religious beliefs that gay marriage is inconsistent with Biblical teaching and, therefore, unacceptable to God.

Mr Lee challenged this decision as discriminatory on grounds of sexual orientation under the Equality Act (Sexual Orientation) NI Order 2006 and a Belfast County Court[66] and the Court of Appeal for Northern Ireland[67] both found not only that this constituted direct discrimination against Mr Lee on account of his sexual orientation, but also that there was no need to consider the bakery owner's religious beliefs. Dissatisfied, the bakery owner appealed to the Supreme Court which held that:

> The [European] Convention [of Human Rights] rights to freedom of thought, conscience and religion and freedom of expression are clearly engaged by this case. Article 9(1) provides that "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance…" *Article 9(2) permits limitations on the freedom to manifest one's religion or beliefs but not on the freedom to hold them.*[68] (Italics added)

[65] ibid.

[66] Gareth Lee v Ashers Baking Company & 2 Ors, Judgment of the County Court of Northern Ireland on 19th May 2015, available at < https://www.equalityni.org/ECNI/media/ECNI/Cases%20and%20Settlements/2015/Lee-v-Ashers_Judgement.pdf> accessed 12th May 2021.

[67] Gareth Lee v Ashers Baking Company & 2 Ors Case No MOR10086, Judgement of the Court of Appeal of Northern Ireland delivered on 24th October 2016, available at <https://www.equalityni.org/ECNI/media/ECNI/Cases%20and%20Settlements/2016/AshersFullJudgement-Appeal.pdf> accessed 13th May 2021.

[68] Lee v Ashers Baking Company Ltd and others (Northern Ireland) [2018] UKSC 49 at 84.

Referring to the European Court of Human Rights' decisions in *Kokkinakis v Greece*[69] and *Buscarini v San Marino,*[70] the Supreme Court held that 'obliging a person to manifest a belief which he does not hold has been held to be a limitation on his article 9(1) rights'.[71]The Court also referred to Article 10 of the European Convention on Human Rights which enshrines the right to freedom of expression.[72] The Court's decision was, therefore, based on the fact that:

> the bakery was required, on pain of liability in damages, to supply a product which actively promoted the cause, a cause in which many believe, but a cause in which the owners most definitely and sincerely did not'.[73]

The Court, therefore, reversed the findings of the County Court and Court of Appeal and held that the bakery did not discriminate against Mr Lee on account of his sexual orientation, as the basis for the refusal of service was the specific message which Mr Lee had requested to be imprinted on the cake – a message which the bakery's owners objected to on account of their religious beliefs.[74]

Notwithstanding the outcome of the case, the decision did not in any way endorse religious discrimination of non-heterosexual persons. The Court emphasised this point thus:

> Articles 9 and 10 are, of course, qualified rights which may be limited or restricted in accordance with the law and insofar as this is necessary in a democratic society in pursuit of a legitimate aim. *It is, of course, the case that businesses offering services to the public are not entitled to discriminate on certain grounds. The bakery could not refuse to provide a cake - or any other of their products - to Mr Lee because he was a gay man or because he supported gay marriage*. But that important fact does not amount to a justification for something completely different - obliging them to supply a cake iced with a message with which they profoundly disagreed. In my view, they would be entitled to refuse to do that whatever the message conveyed by the icing on

[69] (1993) 17 EHRR 397.
[70] (1999) 30 EHRR 208.
[71] ibid pg. 15.
[72] ibid, pg 15
[73] ibid, pg. 16.
[74] ibid.

> the cake - support for living in sin, support for a particular political party, support for a particular religious denomination. The fact that this particular message had to do with sexual orientation is irrelevant to the FETO claim.[75] (italics added)

The decision of the UK Supreme Court met with mixed reaction on both sides of the socio-cultural divide with some literature criticising it as a judicial endorsement of homophobia and the triumph of religious liberty over equality rights[76] while other literature praised the decision as long-awaited judicial recognition of the sanctity of religious beliefs and prohibition of compelled speech that contradicts a persons' deeply held religious belief.[77] A critical review of the decision shows that the focus was not on whether the religious belief of the appellants should trump the respondent's equality right, but whether the appellants can be compelled to perform an act that conflicts with their deeply held religious beliefs. Viewed from this perspective, the Court correctly interpreted the competing rights between the parties in finding in favour of the appellant as it will herald a new anomalous era in human rights adjudication if a person can be compelled to produce a message he/she vehemently disagrees with. An example of such anomaly would be a heterosexual couple compelling a gay baker to produce a cake with the inscription '*Gay marriage is a sin*' or '*Oppose Gay Marriage*'; or a Christian compelling an Islamic baker to produce a cake with the inscription '*Christianity is the only way to salvation'*. In the first example, the gay baker refusing to bake a cake with such an inscription would be deemed discrimination on grounds of sexual orientation while in the latter example, it would be deemed discrimination on grounds of religious beliefs if *Lee v Asher* had been decided otherwise.

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[75] ibid, pg 19.

[76] Emma Fitzsimons, 'A Recipe for Disaster - When Religious Rights and Equality Collide through the Prism of the Ashers Bakery Case' (2016) 15 Hibernian LJ 65.

[77] Andrew Hambler, 'Cake, Compelled Speech, and a Modest Step Forward for Religious Liberty: The Supreme Court Decision in Lee V. Ashers' (2018) 181 Law & Just -Christian L Rev 156; Eugenio Velasco Ibarra 'Lee v Ashers Baking Company Ltd and Others: The Inapplicability of Discrimination Law to an Illusory Conflict of Rights' (2020) 83(1) Modern Law Review 190-201.

1.2.2.4 *European Court of Human Rights' (EctHR) Decisions*

It is also important to consider the approach of the ECtHR in adjudicating the conflict between religious beliefs and non-heterosexual rights. In several cases, the ECtHR has been required to rule on the balancing of religious objections and non-heterosexual rights in EU states. In two key decisions - *Ladele v. The United Kingdom*[78] and *Gary McFarlane v. The United Kingdom*[79] - the ECtHR upheld the protection of non-heterosexual rights over religious objections.

In *Ladele v. The United Kingdom,* the Applicant was employed by the London Borough of Islington (a local public authority) from 1992 until 2009. In 2002, she became a Registrar of Births, Deaths and Marriages. Her job involved registering births and deaths, conducting civil marriage ceremonies and registering such marriages. However, based on her Christian beliefs, she held the view that marriage is the union of one man and one woman for life and sincerely believed that same-sex civil partnerships, which she described as 'marriage in all but name', were contrary to God's law. Based on her religious beliefs, therefore, she refused to conduct civil partnerships for same-sex couples and lost her employmenty as a result. She filed a discrimination claim at the Employment Tribunal, arguing that her dismissal was discriminatory on grounds of her religious beliefs. The Employment Tribunal (ET) upheld her claim and held that her dismissal was discriminatory as the Borough 'placed a greater value on the rights of the lesbian, gay, bisexual and transsexual community than it placed on the rights of [the first applicant] as one holding an orthodox Christian belief'.[80] However, the Borough appealed to the Employment Appeal Tribunal (EAT) which reversed the findings of the ET and held that the Borough's action was a proportionate means to achieving a legitimate aim of protecting the rights of sexual minorities.[81] The EAT held that the Equality Act (Sexual Orientation) Regulations 2007 took precedence over any right which a person might otherwise have by virtue of his or her religious belief to

[78] Ladele v The United Kingdom [2011] ECHR 737.
[79] Gary McFarlane v The United Kingdom [2013] ECHR 37, Application No. 36516/10.
[80] London Borough of Islington v Ladele ET/3323784/2008
[81] London Borough of Islington v Ladele [2008] EAT/0453/08

practise discrimination on the ground of sexual orientation.[82] Ladele appealed to the Court of Appeal which rejected the appeal and upheld the EAT's decision.[83] Having been refused leave to appeal to the Supreme Court, Ladele approached the ECtHR. The ECtHR, in its decision, held that the national authorities had a wide margin of appreciation[84] when it comes to striking a balance between competing Convention rights and that the national authorities in this case have not been shown to have exceeded this margin of appreciation.[85] Thus, the claim was rejected by the ECtHR. Essentially, therefore, the ECtHR was of the view that the national authorities (UK domestic Courts) were within the margin of appreciation to prioritise non-discrimination of non-heterosexual persons over the right to religious beliefs.

In the second case, *Gary McFarlane v The United Kingdom,* McFarlane worked for Relate (a charity organisation providing counselling for couples) as a Counsellor from May 2003 until March 2008. He was a practising Christian and an elder of a large multicultural church in Bristol. He refused to provide sexual counselling services to same-sex couples as part of his job on account of his religious belief that homosexual activity was sinful and that he should do nothing which directly endorsed such activity. He was dismissed by his employer and brought a claim before the Employment Tribunal arguing that his dismissal was discriminatory on grounds of religious beliefs contrary to the Employment Equality (Religion or Belief) Regulations 2003. The ET held that McFarlane's dismissal was a proportionate means of achieving a legitimate aim and the discrimination claim failed.[86] McFarlane's appeal to the Employment Appeal Tribunal was rejected as the EAT held that the ET had properly dismissed his claim.[87] McFarlane's application for leave to appeal was rejected by the Court of Appeal which held that:

[82] ibid.
[83] Ladele v London Borough of Islington [2009] EWCA Civ 1357
[84] Margin of Appreciation and its application to the variation of universally applicable human rights is discussed in detail in Chapter 3.2.4, page 105.
[85] Ladele v The United Kingdom [2011] ECHR 737, at 746.
[86] McFarlane v Relate Avon Ltd ET/0106/08.
[87] McFarlane v Relate Avon Ltd [2009] UKEAT 0106 09 3011.

> there is no more room here than there was there for any marginal balancing exercise in the name of proportionality. To give effect to the applicant's position would necessarily undermine Relate's proper and legitimate policy. [88]

McFarlane thereupon filed a claim before the ECtHR claiming a violation of article 9 of the ECHR by the domestic Courts. The ECtHR, in its decision,[89] concluded, again, that the UK had a wide margin of appreciation in balancing non-heterosexual rights with the protection of religious beliefs under national law and that it had not been shown that the UK had exceeded its margin of appreciation. Consequently, the claim was rejected by the ECtHR. In essence, as with *Ladele's case,* the ECtHR accepted the UK's prioritisation of non-heterosexual rights over religious beliefs.

The ECtHR's decision reveals the liberal interpretation of the Court in balancing the competing rights of religious beliefs and non-heterosexuality and by deferring to the state's margin of appreciation, the Court conceded that member states are within their rights to balance these competing rights in the order they deem most appropriate to achieving a legitimate aim. While the UK Supreme Court's decision in *Lee v Asher* in 2018 appears to grant religious objections to non-heterosexuality a strong footing, this appears to only extend to the provision of skilled services in forms that constitute compelled speech, because in other areas of general public life (e.g. in employment law), the UK Courts accord priority to non-heterosexual rights over religious objections.[90] This position of the UK Courts was articulated by Laws LJ in *McFarlane's* case thus:

> The promulgation of law for the protection of a position held purely on religious grounds cannot, therefore, be justified. It is irrational, as preferring the subjective over the objective. But it is also divisive, capricious and arbitrary. We do not live in a society where all the people share uniform religious beliefs. The precepts of any one religion – any belief system – cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in the cold would be less than citizens; and our

[88] McFarlane v Relate Avon Ltd [2010] EWCA Civ B1, at pg 11.
[89] Gary McFarlane v The United Kingdom [2013] ECHR 37.
[90] See *Bull* and *Catholic Care* cases.

> constitution would be on the way to a theocracy, which is of necessity autocratic. The law of a theocracy is dictated without option to the people, not made by their judges and governments. The individual conscience is free to accept such dictated law; but the State, if its people are to be free, has the burdensome duty of thinking for itself.[91]

1.2.2.3 Religious Rights Vs Non-Heterosexual Rights in the US: *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission*

It is important to also consider the approach of the US Supreme Court to a similar dispute decided in the same year as *Lee v Asher,* as it is a pointer to the general approach of the Courts in developed western nations to accord some level of respect for religious beliefs in the conflict with non-heterosexual rights.

Masterpiece's case, which was decided in 2018,[92] came three years after the US Supreme Court had recognised the right to same-sex marriage across the US in *Obergefell v. Hodges,*[93] a decision which had ushered a new era in the recognition of the rights of non-heterosexual persons to equality under the US Constitution. It was, therefore, anticipated that the Supreme Court would take a similar approach in denouncing discrimination against non-heterosexual persons on the basis of religious beliefs.

The facts of the case are thus - Masterpiece Cakeshop was a bakery based in Denver, Colorado and provided bakery services to the public. In 2012, Masterpiece was approached by a gay couple with a request to bake a cake to celebrate their wedding. Masterpiece refused, based on the owner's religious beliefs on the sinfulness of gay weddings. A complaint was filed by the couple to the Colorado Civil Rights Commission under the state's anti-discrimination law[94] which prohibited discrimination on grounds

[91] McFarlane v Relate Avon Ltd [2010] EWCA Civ B1 at pg 24.
[92] Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission 584 U.S. (2018) No. 16–111.
[93] (2015) 576 U.S. 644.
[42] Colorado Anti-Discrimination Act (CADA), Parts 3-8 of Colorado Revised Statutes (C.R.S.) Title 24, Article 34.

of sexual orientation. The Commission, in its final order,[95] found that the bakery had discriminated against the couple and issued specific orders for the bakery to make the cake for the same-sex wedding.[96] Dissatisfied, the bakery challenged the Commission's findings and orders at the Colorado Court of Appeal and lost.[97] It then approached the US Supreme Court for relief arguing that the finding violated the owner's rights to religious beliefs under the US constitution. Essentially, the case before the Court was whether a person could refuse to provide a publicly available service to a non-heterosexual person(s) on account of his sexual orientation.

In its decision,[98] the United States Supreme Court held that sincerely held religious beliefs of individuals opposed to non-heterosexual activities are to be fairly considered by governmental authorities while balancing the protection of sexual minorities from discrimination. In a very narrow ruling, the Court held[99] that the Commission had shown hostility towards the appellant's religious belief in reaching its decision and this led to a reversal of the Commission's finding. While not pronouncing on the substantive balancing of religious liberty and non-heterosexual rights, the Court emphasised that religious beliefs are firmly enshrined rights that must be considered in the protection of non-heterosexual persons from discrimination. In the words of Justice Kennedy:

> the outcome of cases like this in other circumstances must await further elaboration in the Courts, all in the context of recognizing that *these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without*

[95] Charlie Craig and David Mullins v. Masterpiece Cakeshop, Case No CR2013 – 0008, State of Colorado Civil Rights Commission, Final Order, <https://www.aclu.org/legal-document/craig-and-mullins-v-masterpiece-cakeshop-commissions-final-order> accessed 8th June 2021.

[96] ibid, page 2 of the Commission's Final Order. The Commission's order against Masterpiece Bakery included an order to bake the requested cake for the Applicant to to provide cakes for same-sex weddings; comprehensive staff training on the public accomodations section of CADA; Review of its firm policies on providing services to the public to accord with CADA; Quarterly compliance report to the Commission for two years from the date of the order detailing measures taken to remedy the civil rights infringement.

[97] Craig v. Masterpiece Cake Shop et al., No. 14CA1351 (Colo. Ct. of App. August 13, 2015).

[98] Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission 584 U.S. (2018) No. 16–111. Argued December 5, 2017—Decided June 4, 2018, available at <https://www.supremeCourt.gov/opinions/17pdf/16-111_j4el.pdf> accessed 12 May 2021.

[99] ibid, see pages 16-18 of the judgment.

> *subjecting gay persons to indignities when they seek goods and services in an open market.*[100] (italics added)

Essentially, the Court held religious beliefs and the protection of non-heterosexual rights to be parallel and competing rights that must be delicately balanced in each case, thus opening the way for lower Courts to devise appropriate balancing structures between both competing rights. Nevertheless, the failure of the Supreme Court to address the central substantive question of whether religious beliefs can be a basis to deny service to non-heterosexual persons under non-discrimination laws creates uncertainty for both sides on the reconciliation of religious beliefs and non-heterosexuality rights in the US.[101] The decision may even suggest the Court's leaning towards religious freedom over non-heterosexual rights as three members of the majority panel (Justices Gorsuch, Alito and Thomas) argued that the Commission's decision violates the Petitioner's religious freedom under the First Amendment of the US Constitution.[102]

One certain conclusion from the decision, however, is that religious objection to non-heterosexuality is not rhetorical or insignificant and must be given significant weight in balancing both rights. Justice Kennedy criticised the Commission's disregard for the Petitioner's religious belief in the following passage:

> To describe a man's faith as 'one of the most despicable pieces of rhetoric that people can use' is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the

[100] ibid, pg 17.

[101] Erwin Chemerinsky, 'Not a Masterpiece: The Supreme Court's Decision in Masterpiece Cakeshop v. Colorado Civil Rights Commission' (2018) 43(4) The Ongoing Challenge to Define Free Speech 8, available at <https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/not-a-masterpiece/> accessed 12th June 2021.

[102] See the concurring judgments of JusticesGorsuch, Alito and Thomas on pages 35 – 49 of the case record, available at <https://www.supremeCourt.gov/opinions/17pdf/16-111_j4el.pdf> accessed 12th May 2021.

> solemn responsibility of fair and neutral enforcement of Colorado's anti-discrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.[103]

The outcomes in *Masterpiece* and *Ashers Baking* are judicial expositions of the need to balance religious beliefs with the protection of non-heterosexual persons, not an endorsement of religious discrimination against non-heterosexual persons. One similarity between the decisions of the US and UK Supreme Courts in *Masterpiece* and *Ashers Bakery* is that the UK Supreme Court explicitly considered the expression of a message on a cake as a form of artistic speech by the bakery and three of the majority panel in the US Supreme Court case also considered the baking of a cake for a same-sex wedding as a form of artistic expression which cannot be compelled by non-heterosexual persons. Thus, it appears that the highest Courts in both countries are willing to draw the line between refusing general services to non-heterosexual persons on religious grounds (which would be a violation of the non-discrimination statutes) and compelling a religious objector to express an opinion/message which the person objects to on religious grounds as the latter will violate the objector's right under the ECHR and the First Amendment to the US Constitution respectively. These decisions, therefore, rejected equality legislation / anti-discrimination laws being used as an offensive weapon to compel speech / artistic expression by individuals resisting on religious grounds and in so doing, establishes the limit of equality legislation in the broader context of other competing human rights.

1.2.3 Religious Objections to Non-Heterosexuality in African States

Religious objection to non-heterosexual rights in African states is a fundamental stumbling block to the protection of non-heterosexuality, as religious opposition is relied upon to truncate any legislative recognition of the rights of non-heterosexual persons. There are no case law discussions of religious objections to non-heterosexuality in African states because there is no question of balancing between

[103] ibid, pg 16.

these competing rights. In these states, the rights are not competing as religious beliefs unequivocally trump the rights of non-heterosexual persons and the former is used as a platform to reject the latter.[104]

Additionally, most of the recent legislative steps in African states to further entrench homophobia into their legal system has mostly received fervent religious support from the organised religions in these states. In Ghana, for instance, the public debate in August 2021 regarding the Anti-Same Sex Bill, termed the 'Family Values Bill' introduced in parliament was championed by Ghana's Pentecostal Council (a religious affiliation of all Pentecostal churches in Ghana), the Catholic Diocese of Accra and the Anglican Church.[105] The same situation occurs in almost every African state where recent legislative attempts have been made to deepen the criminalisation of non-heterosexual activities.

Several literary attempts have been made to explain the rationale behind the staunch religious objections to non-heterosexuality in African states. Van Klinken argues that this opposition stems from the view of non-heterosexuality within religious sects as a '*sign of the end times*' and a manifestation of the demonic infestation of humanity.[106] Hakeem and Isike argue that the staunch religious objection in Africa is premised on an ultra-strict interpretation of portions of the Bible, particularly in the book of Leviticus, which condemns non-heterosexuality.[107] They argue that African religious leaders have adopted an unflinching interpretation of these scriptures without nuances and consideration of other overriding themes in the Bible promoting love and non-discrimination.

Nevertheless, there is a growing movement within the religious sects in African states pushing for the recognition of non-heterosexual rights. This movement represents a modern perspective of the religious approach to non-heterosexuality

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[104] Adriaan van Klinken, 'Christianity and Same-Sex Relationships in Africa' (2016) *Routledge Companion to Christianity in Africa* 3.

[105] 'Supporters and opponents face off over Ghana's anti-LGBT law', n 14.

[106] Adriaan Van Klinken, 'Gay rights, the devil and the end times: public religion and the enchantment of the homosexuality debate in Zambia' (2013) 43(4) Religion 519-540.

[107] Onapajo, Hakeem, and Christopher Isike, 'The Global Politics of Gay Rights: The Straining Relations between the West and Africa' (2016) 6(1) Journal of Global Analysis 21 – 45.

in Africa and is, therefore, largely still within the fringes of religious doctrines. Van Klinken et al argue that this movement is confined almost exclusively to 'African Christian theologians, being professional theologians who are academically trained and are working in the field of African theology'.[108] Consequently, the modern religious approach to non-heterosexuality in Africa is largely confined to the academic field and influenced by western ideologies on the subject reflected in the academic field of theology and amongst 'religious' students in various African academic institutions. Masson and Nkosi surveyed students in different academic institutions in South Africa who identified as 'religious' and discovered that there is a liberal view of non-heterosexuality among most of these students.[109] They, therefore, argue that religion and non-heterosexuality in Africa can be complementary, at least among the young generations.

Nevertheless, religious objection is not the only basis for the opposition to non-heterosexuality in African states, as it often operates in addition to (and sometimes interchangeably with) the cultural objections to non-heterosexuality which forms the second pillar behind the rejection of the rights of sexual minorities in African states.

1.2.4 Cultural Objections to Non-Heterosexual Rights

Cultural objection to non-heterosexual activities is predicated on cultural relativism[110] and the attempt to circumscribe non-heterosexual orientation in alignment with the cultural differences and social acceptance levels in different societies. Cultural relativism and universalism of rights are two opposing concepts that are at play in the sexual rights debates as attempts to internationalise inviolable rights for sexual

[108] Van Klinken, Adriaan S. and Gunda, Masiiwa R, 'Taking Up the Cudgels Against Gay Rights? Trends and Trajectories in African Christian Theologies on Homosexuality' (2012) 59(1) Journal of Homosexuality 114, 138.

[109] F. Masson S. Nkosi, 'Christianity and Homosexuality: contradictory or complementary? a qualitative study of the experiences of Christian homosexual university students' (2017) 31(4) South African Journal of Higher Education 12.

[110] Cultural relativism is discussed in chapter 3.3, page 115.

minorities face stiff opposition from dissenting countries mostly from the Middle East, Africa and Asia-Pacific.[111]

Further conceptual difficulties involve the resolution of the conflict between legal idealism relating to the natural given rights of persons to enjoy innate sexual preferences that conflict with the legal positivist situations in some countries with explicit legal prohibition of such natural desires. Although the moral basis of determining what sexual desires are 'natural' is founded on a philosophical interpretation of natural law influenced by Roman Catholic philosophers including leading natural law theorists like John Finnis,[112] Robert George[113]and Richard Duncan,[114] other analyses of 'natural' sexual desires adopt a more flexible approach which incorporates non-heterosexual desires as included in the spectrum of natural human sexual desires.[115]

The scope of cultural objections to non-heterosexual rights and its impact on the denunciation of non-heterosexual rights in African states is discussed in further detail under the discussions on cultural relativity in chapter 3.[116] Suffice to state at the point, however, that cultural objection to non-heterosexuality is a major platform for the non-recognition of the rights of non-heterosexual persons in these states on the basis that same-sex activities are 'un-African', a violation of the cultural beliefs of these African societies and threaten to erode the cultural value system in these societies. Cultural objection to non-heterosexuality is so strong in many African societies that there are severe extra-legal punishments for such acts at the cultural level including social

[111] Universalism of human rights is discussed in Chapter 3.2, pages 97-114.
[112] John M. Finnis, 'Law, Morality, and "Sexual Orientation" (1994) Scholarly Works Paper 205 {online} http://scholarship.law.nd.edu/law_fa culty_scholarship/205 accessed 12 May 2018.
[113] Robert George, 'Making Men Moral: Civil Liberties and Public Morality'(1993)165, 166.
[114]Richard Duncan, 'Wigstock and the Kulturkampf Supreme Court Storytelling, the Culture War, and Romerv.Evans' (1997) 72 Notre Dame L. Rev. 345.
[115] Brent L. Picket, 'Natural Law and the Regulation of Sexuality: A Critique'(2004) Richmond Journal of Law and the Public Interest 2.
[116] Chapter 3.3, page 115.

ostracization, lynching, confiscation of properties and banishment from the communities.[117]

Many literary works by leading scholars in African societies argue strongly in favour of the continued criminalisation of non-heterosexuality on a mixed basis of cultural and religious objections. Obasola[118] argues that homosexuality is 'a perversion… totally abhorrent to God'[119] and should, therefore, be criminalised; while Chiroma and Magashi[120] argue that homosexuality should be criminalised in African societies because it is regarded as unnatural and stifling human procreative capacity and attracts strong societal aversion. Onuche[121] focused mostly on the procreative ability of heterosexuality and its importance for the growth of African societies. He postulated that:

> Marriage constitutes the focus of existence. Life in the community in its different facets revolves around and climaxes in marriage and procreation. This traditional concept of marriage is being challenged by the demand for legal recognition of same-sex couple.[122]

These literary views are in keeping with the general tenor of public opinions regarding non-heterosexuality in African states. An opinion poll conducted in 2015 in Nigeria, for instance, found that 95% of respondents supported the criminalisation of non-heterosexuality on account of cultural and religious sentiments.[123] Figure 1.2[124] also supports this assertion with over 90% support for the criminalisation of non-

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[117] Jonathan Chimakonam and Ada Agada, 'The Sexual Orientation Question in Nigeria: Cultural Relativism Versus Universal Human Rights Concerns' (2020) 24 Sexuality & Culture 1705–1719.

[118] K. Obasola, 'An ethical perspective of homosexuality among the African people' (2013) 1(12) European Journal of Business and Social Sciences 77–85.

[119] ibid, 80.

[120] M Chiroma & A. I Magashi, 'Same-sex marriage versus human rights: The legality of the "anti-gay & lesbian law" in Nigeria' (2015) 4(1) International Law Research, 11–23.

[121] J. Onuche, 'Same-sex marriage in Nigeria: A philosophical analysis' (2013) 3(12) International Journal of Humanities and Social Science 91–98.

[122] ibid 93.

[123] Ngozi Okonjo-Iweala Polls, 'Perceptions of Nigerians on LGB rights: Poll report May 2015'. Retrieved May 21, 2021 from <https://www.noi-polls.com/documents/Perceptions_of_Nigerians_on_LGB_Rights_-_Poll_Report_Final_June2015>.pdf.

[124] Page 12.

heterosexuality across African states. Even in South Africa where non-heterosexuality is constitutionally protected, over 61% of respondents support its criminalisation.

1.3 Global Recognition of Non-Heterosexual Rights

Despite the broad recognition of human rights across the globe, sexual rights as an emergent area of human rights have generally developed at a varied pace across jurisdictions with significant variations in state practice. Thus, while the traditional human rights proclaimed in the Universal Declaration of Human Rights (UDHR) 1948[125] are accorded almost universal recognition, other areas of human rights that have emerged after the UDHR and the other fundamental international human rights instruments such as the International Covenant on Civil and Political Rights 1966[126] and the International Covenant on Social and Economic Rights 1966,[127] continue to be subject to relativist interpretations and expressions until they attain a minimum level of universal acceptance. The adoption and protection of these human rights precepts, therefore, vary among different cultures and necessarily reflect national idiosyncrasies.

In this respect, these emergent rights are universal in terms of their scope and their importance for the dignity of humans, but because of the time it takes for their acceptability to spread around various societies around the globe, they remain relative in the interim, allowing for societal flexibilities in their interpretation and application until there is a sufficient spread of their acceptability for such rights to develop the status of binding objective human rights which all societies are expected to respect.[128]

In respect of the rights of sexual minorities, there is clear variability in state practice concerning the acceptance of the human rights status of non-heterosexual

[114] Universal Declaration of Human Rights Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

[126] International Covenant on Civil and Political Rights United Nations, Treaty Series, vol. 999, p. 171, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 23 March 1976, in accordance with Article 49.

[127] International Covenant on Economic, Social and Cultural Rights United Nations, Treaty Series, vol. 993, p. 3. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 3 January 1976, in accordance with article 27.

[128] Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, 2001) 12.

orientations. The Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity, adopted in November 2006[129] attempted to cloak non-heterosexual rights with a garb of universalism, declaring that the right to freedom of sexual expressions and orientations is an inviolable human right tied to the equality and dignity of humans. The Yogyakarta principles went further to highlight several obligations on states to, amongst others, 'amend any legislation, including criminal law, to ensure its consistency with the universal enjoyment of all human rights'.[130] The Yogyakarta Principles were updated in 2017 with the 'Yogyakarta Principles Plus 10' which added nine new principles to the original ones including the right to protection from poverty[131] of non-heterosexual persons and the right to sanitation.[132] The Yogyakarta Plus 10 principles also provided for additional state responsibilities in respect of the protection, promotion and advancement of the rights of non-heterosexual persons by state and state bodies.

However, the Yogyakarta Principles have never been formally accepted or endorsed by the United Nations and the attempt to make gender identity and sexual orientation new categories of non-discrimination rights have been repeatedly rejected by the General Assembly, the UN Human Rights Council and other UN bodies with the member states of the UN roughly split in half on the subject as shown in Figure 1.4 below.

[129] The Yogyakarta Principles were a set of principles formally developed by a group of 29 international human rights experts following an experts' meeting held in Yogyakarta, Indonesia from 6 to 9 November 2006. The group was organised by the International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organisations.
[130] Principle 1.
[131] Principle 34
[132] Principle 35

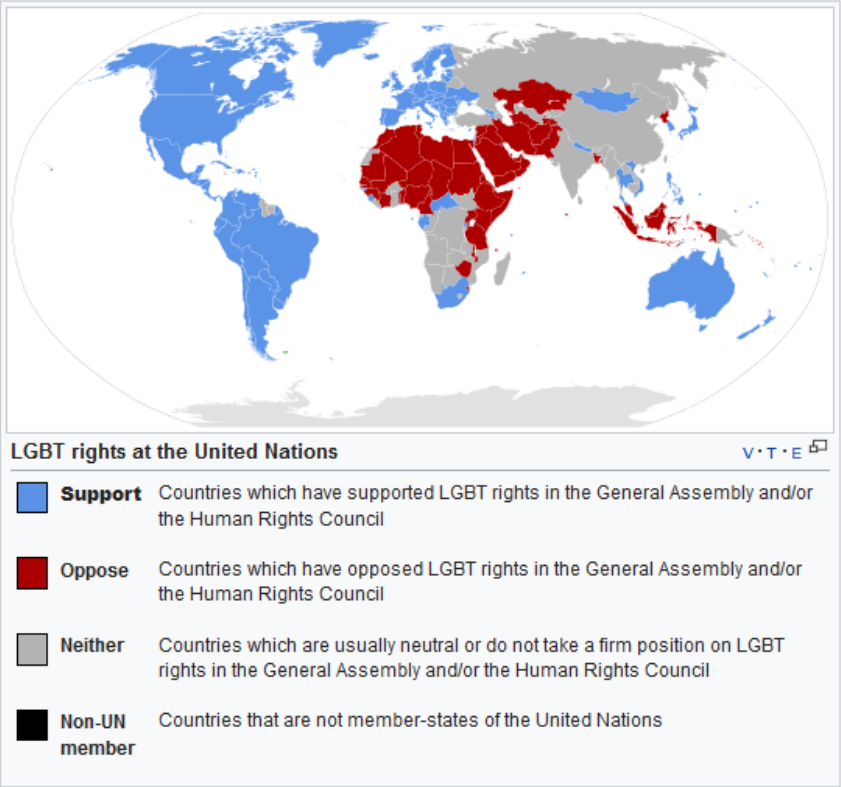

Figure 1.4 Global State of Non-Heterosexual Rights

Source: ILGA 2020[133]

Figure 1.4 above shows the variability of state acceptance of the rights of non-traditional sexual orientations with a defined pattern surrounding its acceptance. States in North and South America and Western Europe are largely in support of LGBT rights while states in the Middle East and Africa are largely opposed to LGBT rights. States in Eastern Europe and Asia are largely neutral in UN discussions on LGBT rights but domestically, they do not have legal instruments promoting or protecting non-heterosexual rights.

In total, over 77 countries have explicit legislation proscribing LGBT activities while over 97 countries (including the 77 with the explicit proscription of homosexuality) in the world are either opposed to the international recognition of LGBT rights or are

[133] 'State-Sponsored Homophobia: Global Legislation Overview - Updated Edition' (*ILGA*, 2020) 12 <https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf> accessed 9th June 2021.

neutral.[134] In these circumstances, it is arguable that it will not be appropriate to apply universal rights to any prescription of non-traditional sexual orientations. To do so may be tantamount to imposing the view of supporting states on opposing states. While proponents of LGBT rights would argue that such rights are 'universal', there is a major question of who determines the universality of rights and at what point rights accrue a universal status. Undoubtedly, imposing the status of universality on rights that are sharply contested by almost equally divided states would buttress the imperialistic criticism attached to the universalism of rights – i.e. the potential to impose rights on other countries based on the views of some countries.

To a large extent, it is arguable that universalism of rights can only be achieved through a gradual growth and expansion of the acceptance of certain rights by states across the globe. It cannot be imposed by one faction of states based on the perceived inviolability of such rights determined by such faction of states. The Universal Declaration of Human Rights was unanimously propagated and accepted by a majority of states based on the unqualified acceptance of the rights propagated therein which have, over the years, come to be accepted by a majority of states as basic inviolable rights to which all humans are entitled. On the other hand, a cultural relativist interpretation continues to apply to non-heterosexual rights in countries opposed to their adoption while a great debate rages on how to achieve the legal recognition of these non-heterosexual rights in these opposing states while respecting their cultural differences.[135]

The objection to non-heterosexuality and the rights of sexual minorities is not based on a uniform moral platform as these objections vary across a range of moral compasses. In essence, while non-heterosexuality is considered morally valid in some jurisdictions and societies, other societies have no definitive moral stance on it, leaving it open to different interpretations.[136] In such societies, the vague position on non-

[134]Report of the United Nations Special Rapporteur on Human Rights and Sexual Education, 23 July 2010, UN Doc. A/65/162Archived September 27, 2012, at the Wayback Machine., para 23.
[135] Eva Brems, *Human Rights: Universality and Diversity* (n 121) 15.
[136] Sean Aas and Candice Delmas, 'The ethics of sexual reorientation: what should clinicians and researchers do?'(2016) 42(6) *Journal of Medical Ethics* 21.

heterosexuality creates a form of an optional moral standard whereby no moral judgment is passed on the subject which is left to legal positivist measures to determine the status of such acclaimed human rights. In other societies, a strong moral objection exists to any form of non-heterosexuality and any attempt to introduce a human rights perspective to the recognition of this right is resisted and prohibited.[137] This relativity of treatment of a form of sexual expression shows that some element of cultural relativity is inherent in a consideration of sexual orientation, as societies have different standards for ascertaining what is acceptable in terms of sexual conduct and what is unacceptable.

In his dissenting judgment in the landmark US case of *Lawrence v Texas,*[138]Justice Scalia declared that the majority opinion "effectively decrees the end of all morals legislation," and referred to the inherent contradiction of the Court's judgment nullifying criminal legislation prohibiting same-sex relations while several criminal laws banning adult incest, as well as fornication, bigamy, adultery, bestiality and obscenity, can remain valid. In an earlier case, *Bowers v. Hardwick,*[139]Justice White had declared that 'it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.'

The analysis in this section shows that there is an inescapable element of moral judgment in terms of ascertaining acceptable forms of sexual conduct and this is relative to each society. As McDonnell stated, 'if the Court does ever protect incest, it will happen only when most Americans are unwilling to throw people in jail for that type of behaviour'.[140]

[92]Ofelia Schutte, 'A Critique of Normative Heterosexuality: Identity, Embodiment, and Sexual Difference in Beauvoir and Irigaray (1997) 12(1) *Hypatia* 45.
[138]Lawrence v Texas (2013) 123 S. Ct. at 2495 (Scalia,J., dissenting).
[139] 478 U.S. 186 (1986).
[140]Brett H. McDonnell, 'Is Incest Next' (2004) 10 *Cardozo Women's L.J.* 337, 338.

1.4 Non-Heterosexual Rights under International Human Rights Instruments

Ascribing human rights labels to sexuality issues raises debates because they do not form part of the traditional bouquet of rights generally acknowledged as human rights under the conventional human rights instruments adopted by nations at the international level. The United Nations Universal Declaration of Human Rights 1948, for instance, makes no mention or reference to sexuality, sexual orientations or preferences as a protected category of human rights. Across many jurisdictions in the world, non-heterosexuality remained prohibited up until the 1970s and into the 21st Century. The rapid growth of legislative and judicial recognition of sexual rights in many jurisdictions in the 21st Century has coalesced sexual rights into a burgeoning area of rights for which the human rights appellation is often attached. However, the polarity at the various national levels on the recognition of these rights has resulted in the lack of binding international legal instruments on the subject. The United Nations Human Rights Council has pushed for the adoption by the General Assembly of a resolution advancing the human rights of sexual minorities. The resolution which was adopted by the Human Rights Council on 30 June 2016 provides for protection against violence and discrimination based on sexual orientation and gender identity.[141] This resolution was staunchly opposed by over 70 countries representing the bloc of countries where sexual minorities are not given legal protection.[142]

In *Toonen v. Australia*[143]the United Nations Human Rights Committee categorically stated that legislation criminalizing consensual same-sex relations between adults are in violation of international human rights law and this has sparked heated academic debate regarding the nature of human rights and whether they are determined by universal recognition or capable of subjective recognition.

[134] Protection against violence and discrimination based on sexual orientation and gender identity (adopted 30 June 2016) - United Nations General Assembly Resolution A/HRC/RES/32/2.
[142] United Nations Human Rights Office of the High Commissioner: Report on Resolution A/HRC/RES/32/2 adopted 30 June 2016.
[143]Toonen v. Australia, (1994)Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992.

While major attention focuses on homosexuality when issues of sexual orientation and preferences arise, it is often forgotten that other sexual orientation such as sexual relations between relations (incest) is legislatively prohibited in a significant number of developed western nations that support sexual human rights and voted in support of the United Nations General Assembly declaration on sexual rights in 2016, including Australia, New Zealand, United Kingdom, United States, Sweden, Germany, Portugal and Denmark. In the German case of *Patrick Stübing v Germany,*[144]the Appellant challenged paragraph 173 of the Criminal Code of Germany which prohibited sexual activities between relations. He argued that the law violated his right to sexual self-determination. The Constitutional Court of Germany upheld the law and stated that it was within the powers of the state to define the bounds of acceptable sexual practices and justified the ban on the grounds of public health, self-determination and the protection of the family and society. On an application to the European Court of Human Rights (ECtHR), the application was rejected on the ground that the Appellant's right to private and family life under article 8 of the European Convention of Human Rights (ECHR) was not violated as 'the German authorities had a wide margin of appreciation in confronting the issue".[145]

In the United Kingdom, when the UK government was moving towards greater acceptance of sexual rights for same-sex and transgender persons, the same government passed the Sexual Offences Act 2003 which reiterated the criminalization of incest. This is based on the unchanging social-cultural view of incest as 'morally wrong' and to be 'condemned' and thus the recognition of human rights for sexual liberalities is not yet extended to this particular form of sexual liberality which remains legislatively prohibited.

Stubing's case and the UK example reveal that there is an inherent socio-cultural subjectivity about the bounds of sexual human rights which each country is willing to accept.[146] Although not all cases of differences in legislation/legal precepts are

[144]Stübing v Germany (no. 43547/08), 12 April 2012.
[145] Chamber judgment; Stübing v. Germany 12.04.12 Press Release 12/04/2012.
[146] This is discussed in further details in Chapter 2.5, pg 67.

attributable to socio-cultural preferences, as national, geographic and economic circumstances may account for variations in legal provisions amongst countries with similar socio-cultural preferences, differences in the legal treatment of sexual preferences/non-heterosexual conducts are tied to cultural relativity as socio-cultural preferences of a given society determine the legal treatment accorded to such sexual rights. Consequently, in every case where the legal attitude to non-normative sexual orientations has changed in favour of sexual rights, it is always subsequent to a corresponding change in socio-cultural perspectives of the society towards sexual rights. For instance, in the Republic of Ireland and Australia where the legal position has recently changed to accommodate same-sex rights, this has always accompanied empirical proof of a change in socio-cultural perspectives in such societies towards sexual rights confirmed through referendums conducted in these countries which affirmed support for sexual rights.

The Declaration on sexual rights by the World Association of Sexual Health proclaims the human right to sexual liberty and sexual self-determination without any restrictions and frowns at legislation restricting the sexual liberties of citizens, yet many developed western states only interpret this sexual human right to apply to same-sex relationships and transgender rights, omitting the fact that incestual relationships between consenting adults can be interpreted to fall within the bounds of sexual liberties and sexual determination which can be deemed a human right from an objective, universal perspective.

Notably, the declaration by the Constitutional Court of Germany that the legislative ban on incest is justifiable on grounds of ‘public health, self-determination and the protection of the family and society’ is the same argument used by many states in Africa to justify the legislative criminalization of same-sex activities and transgender rights. For instance, when the Nigerian government passed the Anti-Same Sex Marriage Act 2014, it argued that it was in fulfilment of section 45 of the Nigerian

Constitution[147] which entitles the legislature to pass laws to protect public health, public morality and family and society.[148]

So, where do we draw the line between the objective, universal assessment of sexual rights as human rights and the acceptance and recognition of relativity in the human rights' assessment of sexual orientations based on acceptable socio-cultural values within different societies? This research seeks an answer to this question.

1.5 Research Objectives

The central aim of this thesis is to critically discuss the fundamental legal basis for recognising non-heterosexual rights as protectable human rights in African states. Given the strong religious and cultural objections to non-heterosexual rights in African countries, protecting non-heterosexual rights require fundamental legal instruments enshrined within the legal systems of these states that will override domestic legal instruments and present non-heterosexual people in African states with a legal avenue to challenge discriminatory treatments against them.

Considering that the denunciations of non-heterosexual rights are often incorporated within domestic legal instruments in most African states, legal instruments to protect these rights must have overriding status over domestic legislation to be effective. In this sense, it requires legal instruments of constitutional or supra-national status to enshrine the protections of non-heterosexual rights in Africa. Consequently, the research explores constitutional provisions in African states to discover which ones are capable of being used as protective mechanisms for non-heterosexual rights in these states. The focus in this regard is on the fundamental rights provisions in the bill of rights of the constitutions of many African states. The freedom from discrimination and equality provisions in these constitutions are capable of being interpreted as enshrining

[147] Constitution of the Federal Republic of Nigeria 1999 (as amended).

[148] 'Nigeria passes law banning homosexuality' *The Telegraph,* 14 January 2014 <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/nigeria/10570304/Nigeria-passes-law-banning-homosexuality.html> accessed 8 November 2017.

the rights of non-heterosexual persons to freedom from discrimination on account of their sex and equality before the law.

While freedom from discrimination on grounds of sex has conventionally centred on discriminatory treatment between men and women, the recent decision of the US Supreme Court in *Bostock v. Clayton County*[149] has opened a new vista through which non-heterosexual rights can be interpreted to come within the non-discrimination provision present in the constitutions of almost all African states. By relying on this non-discrimination provision, non-heterosexual persons can push for the recognition of their rights by the domestic Courts as a fundamentally guaranteed right under the relevant constitution.

This research also analyses the provisions of the African Charter on Human and Peoples' Rights 1981 to highlight the provisions within the Charter that are capable of creating a protection framework for non-heterosexual persons. It focuses on the rights to equality and freedom from discrimination under the Charter and the jurisprudence of the regional judicial bodies – the African Commission on Human and Peoples Rights, the African Court on Human and Peoples Rights and ECOWAS Court – to argue in favour of an enhanced application of the Charter's provisions to the protection of non-heterosexual persons in African states.

The research goes beyond advocating for the formal recognition of non-heterosexual rights in the legal systems of these states and considers the institutional and regulatory mechanisms that are essential to achieving effective protection for non-heterosexual persons in African states. In some African states with constitutional recognition of non-heterosexual rights, such as South Africa, homophobia remains rampant in practice within its societies because of the non-incorporation of relevant institutional and regulatory frameworks to translate this legal protection into a practical denunciation of homophobia in the fabric of African societies. This research will, therefore, critically examine the relevant systems and processes through which stakeholders and non-

[149] (2020) 590 U.S.

heterosexual persons can enshrine these protection systems in the daily lives and activities of non-heterosexual persons in Africa.

In advancing these research aims, this thesis proposes *reformed universalism* as a theoretical human rights paradigm within which non-heterosexual rights can be promoted and protected in African states. *Reformed universalism* relies on universalism as its foundation, but acknowledges elements of relativity in the normative contents of these non-heterosexual rights and advocates for the utilisation of regional and domestic legal instruments for promoting non-heterosexual rights with African states. Essentially, *reformed universalism* canvasses a universalist approach but stronger margins of appreciation for African states in applying domestic and regional instruments to protect non-heterosexual rights within their states. This approach may result in slower incorporation of non-heterosexual rights and potentially slightly different scope of rights for non-heterosexual persons than available in western jurisdictions, but this initial progress will lay the foundation for the greater incorporation of non-heterosexual rights within the legal systems of these states. The *reformed universalism* approach portends a greater chance of success than pushing for the acceptance of non-heterosexual rights under a 'universal' human rights umbrella which African states sternly resist as a neo-colonialist tool.

This research goes beyond the emotive arguments on sexuality and human rights and critically examines the crosslines between the legislative prohibition of non-traditional sexual activities and the nature of human rights. It analyses the application of the concepts of *reformed universalism* to non-heterosexual orientation in African states and examines whether a delicate balancing of universalist human rights' principles with domestic and regional human rights provisions can foster better acceptance by African countries of non-heterosexual rights and avoid the neo-colonialist, imperialist objections by African states towards the universalism of human rights in the field of sexual orientation. *Reformed universalism* advocates regional and domestic approaches to enshrining non-heterosexual rights which incorporates some level of relativity in the normative interpretation of these non-heterosexual rights and their implementation. By conceding some levels of relativity in the scope of these rights

through the expansion of the margins of appreciation for African states in enforcing non-heterosexual rights, *reformed universalism* creates a platform that enables African states to incorporate non-heterosexual rights within their domestic legal systems in ways that align with their unique cultural values.

1.6 Research Questions

This research addresses three key questions:

1) Is the *reformed universalism* paradigm a suitable approach to enshrining the protection of non-heterosexual rights in African states?

2) Can the human rights provisions in the African Charter and domestic constitutions of African states be sufficiently utilised to protect non-heterosexual rights?

3) What are the regulatory and institutional mechanisms for translating these legal provisions into practical significance for the dignity and protection of non-heterosexual people in African states?

The first question focuses on exploring the theoretical underpinnings of the *reformed universalism* paradigm which this thesis proposes and develops to overcome the reluctance of African states to the universalism of human rights in the field of sexual orientations.

The second question critically examines the regional and domestic legal instruments that can be utilised to promote and protect non-heterosexual rights within the *reformed universalism* paradigm, focusing on the non-discrimination and equality provisions of the African Charter and domestic constitutions of African states. By re-interpreting ‘discrimination on grounds of sex’ in a broader form, the protection of non-heterosexual rights can become a derivative right within legal instruments that are indigenous to the African states, thus overcoming the neo-colonialist resistance of these states to international legal instruments or precepts.

The third question examines the implementation of this derivative right within African states by analysing the regulatory frameworks, institutions and mechanisms required to ensure effective implementation of these rights in Africa given the strong socio-cultural resistance within African societies.

1.7 Research Methodology

In conducting this research, three distinct research methodologies were adopted. Firstly, this thesis predominantly adopts a doctrinal approach to the analysis with critical discussions of applicable legal instruments, case law, theoretical principles of human rights and their application within societies. The thesis relies on principal legal instruments at the international, regional and domestic levels and how these instruments influence the legal frameworks within states. The thesis also utilises secondary sources including books, articles and other written works in analysing the theoretical underpinnings of human rights from the universal and relativist perspective.

Secondly, the thesis undertakes a transnational study of the domestic constitutions of African states to reveal the amenability of these states' domestic legal system to the incorporation of non-heterosexual rights, i.e. to show that non-heterosexual rights are not alien to the legal systems in African states and can become a derivative right within these constitutional documents with an imaginative, liberal and progressive interpretation of the extant provisions in the bill of rights.

In conducting the transnational study, the thesis utilised the 'Constitute Project' database which contains the constitution of all 196 states in the world from which the constitutions of the 54 African states were obtained and the researcher analysed the bill of rights within these constitutions for rights protective of non-heterosexuality.

Thirdly, the thesis adopts a socio-legal approach to the discussions related to the implementation of non-heterosexual rights in African states. Socio-legal research helps us to understand how the law works in practice and goes beyond the black letters of the law, to a study of the range of sociological and empirical conditions necessary for

the effective implementation of prescribed legal instruments. It builds a more contextual analysis and focuses on the 'law in action'.[150]

In conducting a socio-legal study of non-heterosexual rights in African states, this thesis provides a contextual, practical perspective to the implementation of the legal protection of non-heterosexual rights in Africa. This ensures that the discussions in the thesis go beyond theoretical expositions of what the law could be, to an analysis of how it interacts with social and cultural factors within these African states to create an effective legal protection framework. The need for examining the practical implementation of these laws is based on the general acceptance that having laws in the statute books will hardly be sufficient to protect non-heterosexual people from indignity, prejudices and discrimination in societies with deeply entrenched religious and cultural objections to the very existence of these non-heterosexual persons. Thus, the thesis examines the institutional and regulatory mechanisms that can practically help non-heterosexual persons to secure the dignity of their persons and equality before the law.

1.8 Research Outline

The thesis is divided into six interconnected chapters addressing the various aspects of the research and linked together to provide a comprehensive analysis of the protection of non-heterosexual rights situation in Africa and provide support for the hypothesis of this research.

Following this chapter is chapter two which sets the theoretical basis of the research by conducting a literature review of existing academic works on the subject of non-heterosexual rights globally and the theoretical concepts developed in the literature for discussing human rights. Chapter two critically discusses the concept of legal positivism and how legislative prohibition of non-heterosexual activities in African

[150] Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Education 2007) 112.

states operate within legal positivism to the detriment of non-heterosexuals. It further critiques the concept and limitations of legal positivism as it applies to non-heterosexual rights in African states.

Chapter two also examines the historical treatment of non-heterosexual rights in African states, the relevant international human rights instruments on the subject and the socio-cultural approaches of African states to the subject, focusing on the personification of the gay identity as an important factor behind homophobia in many African societies.

Chapter three develops the concept of *reformed universalism* which is at the core of this thesis. The chapter analyses the opposing concepts of cultural relativity and universalism of rights and their respective impacts on the protection of non-heterosexuality. While human nature itself is, in various forms, culturally relative, the application of cultural relativity as a concept to non-heterosexuality potentially conflicts with the notion of the universality of human rights under which non-heterosexuality is generally considered a universal right of all humans. Chapter three, therefore, examines the mutual restraining impact of both concepts on each other, whereby the universality of human rights serves as a check on the potential excesses of relativism by preventing the repression of minorities while cultural relativism restrains the excesses of the universalism of rights by preventing the potential imperialistic imposition of rights by more culturally advanced societies. After highlighting the shortcomings of both concepts and their limited applications, chapter three proposes the adoption of *reformed universalism* as the appropriate paradigm for propagating non-heterosexual rights within African states. By shifting focus from a strong universal approach to non-heterosexual rights to a more culturally adaptive reformed universalist framing of non-heterosexual rights, a bottom-up approach to the acceptance of non-heterosexual rights can develop within African states which will enable the gradual recognition of non-heterosexual rights and incorporation into legal instruments in these states.

Chapter four explores the implementation of reformed universalism within African states and it critically analyses the legal situation in African states regarding the

treatment of non-traditional sexual rights. The chapter examines current regional human rights instruments in Africa, particularly the African Charter on Human and Peoples Rights 1981 and how it impacts the protection of non-heterosexual rights in the continent.

Chapter four further examines the domestic constitutions of African states to discover how reformed universalism can be incorporated into these constitutions through the reliance on derivative rights for non-heterosexual persons based on the human rights to non-discrimination on grounds of sex and equality provisions. In respect of both the African Charter and domestic constitutions, the chapter argues that a re-interpretation of the non-discrimination provision in these legal instruments can constitute the fundamental basis for implementing reformed universalism in African states. To buttress this argument, the chapter undertakes a comparative transnational study of the domestic constitutions of all 54 African states, pointing out available provisions within these constitutions that can ground a reformed universalist interpretation of non-heterosexual rights.

Chapter four also critically examines the judicial approach to non-heterosexual rights in African states, focusing on the regional judicial bodies that interpret and apply the provisions of the African Charter and how their decisions and the provisions of the African Charter influence domestic Courts within African states when interpreting domestic legal provisions. The chapter, therefore, identifies how these judicial forums can become tools for propagating the reformed universalism interpretation of human rights that are accommodative of non-heterosexual rights in African states.

Chapter five adopts a socio-legal approach in discussing the practical implementation of the reformed universalism paradigm in African states. It discusses the mechanisms for the enforcement of these rights by individuals, NGOs and national institutions. It also identifies the technical hurdles that must be overcome in enforcing these rights. Chapter five also analyses the conflicts between the domestic constitutions of African states and the African Charter and the role that monism and dualism play in resolving

this conflict. Finally, the chapter examines methods of overcoming the social conservatism that predominantly exists in African states.

Chapter six is the conclusion to the thesis and it summarises the discussions in this thesis, highlights the key conclusions and knowledge provided in the study and directions for future research on the subject.

1.9 Importance of the Study

This research touches on a sensitive subject within African societies that some literature by African scholars avoid owing to the unfavourable cultural view of the subject in these societies. While human rights organisations and sexual rights activists in Africa focus on pushing for legislative recognition of non-heterosexual rights based on its acceptance in western jurisdictions and acclaimed status as universal human rights, this approach has proved counter-productive on account of the unfavourable disposition of African states towards any feeling of a western imposition of values on them.

This research explores the theoretical issues underpinning the treatment of sexual rights in Africa and proposes a conceptual framework – *reformed universalism* - that has the potential to be effective in protecting the rights of sexual minorities in Africa without compromising the strong adherence to cultural beliefs in these societies. This is vital to increasing the acceptability of non-traditional sexual rights within African societies and by proposing and analysing the concept of weak cultural relativity in the legal treatment of non-traditional sexual rights, this research introduces an innovative approach that balances the interests of proponents of sexual rights with defenders of cultural values. This approach avoids the confrontations usually evident whenever debates around sexual rights are raised in any legal setting involving many African countries both at the domestic and international levels.

This research, therefore, makes an important contribution to knowledge in the field by introducing an innovative conceptual framework that has the potential to effectively promote the recognition and protection of the human rights of sexual minorities in

African states where lynching, maiming and other prejudicial and discriminatory acts against non-heterosexual persons are carried out with impunity.

CHAPTER TWO

Theoretical Foundations of Non-Heterosexual Rights and the History of Non-Heterosexuality in Africa

2.1 Introduction

Non-heterosexual sexual rights as a sub-set of universal human rights is a subject of debated academic opinions reflected in inconsistent national policies across countries around the globe.[1] The theoretical underpinnings for determining the validity of objections to the grant of the status of human rights to non-heterosexual expressions require an analysis of the various bases for such objections ranging from moral basis founded on a philosophical interpretation of natural law influenced by Roman Catholic philosophers, to religious objections based on biblical opposition, and cultural objections.

Sexual rights transcend a human rights struggle as these rights invoke a political struggle between nations of different cultural and ethnoreligious inclinations[2] and are, therefore, caught between "repression and danger on the one hand and exploration, pleasure and agency on the other".[3]Although sexuality can be deemed intimate and personal, it is often subject to power relations in both the private and public domains and is highly politicised. It is unsurprising, therefore, that the Sustainable Development Goals (SDGs) 2015 omit sexuality and sexual rights in its goals, even though these rights are intertwined with sexual and reproductive health and rights.[4]

[1] Gilbert Herdt*, Moral Panics, Sex Panics: Fear and the Fight Over Sexual Rights* (New York University Press, 2009).
[2] Shirin Heidari, 'Sexual rights and bodily integrity as human rights (2015) 23(46) *International Journal on Sexual and Reproductive Health and Rights* 23.
[3]ibid.
[4] United Nations (UN) General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, New York: UN, 2015, <http://sustainabledevelopment.un.org/post2015/transformingourworld> accessed 23 January 2019.

Political consensus on the term ‘sexual rights’, although fiercely debated over the past decades, has never been reached[5] and this lack of political consensus is responsible for the absence of any binding international human rights instruments protecting sexual rights and the variations in domestic practice in respect of the protection and advancement of sexual rights across states in the world.

Resistance stems from countries' claims to radically different understandings (and fears) of what ‘sexual rights’ includes and therefore might bind them to. It can be concluded, then, that the norms concerning the exercise of sexuality are not predetermined, but rather learned socially as ‘each culture, in each historical era, constructs symbols and signs of what is acceptable and desirable in sexual terms’.[6]

This chapter has three aims. First, it reviews the history and development of sexual rights as a subset of human rights at the international level, its close affinity to reproductive health and the ambit of these sexual rights as elucidated by international institutions involved in the advancement of various aspects of sexual and reproductive rights.

Secondly, it analyses the role of natural law in the exposition of non-heterosexual rights. It examines literary discussions on the nature and scope of sexual rights under natural law theories and the leading exposition of this subject by leading natural law theorists including Aquinas and Aristotle. It then analyses the role that moral values play in determining the permissibility of sexual activities in states across the globe by undertaking a comparison of incest and non-heterosexuality.

Thirdly, it analyses the history of non-heterosexuality in African societies, the factors influencing the strong aversion to non-heterosexual rights in these societies and why the development of a ‘gay identity’ has stiffened opposition to non-heterosexual rights in African societies. It explores the transformation of African societies from a historically tolerant view of non-heterosexual activities to virulent opposition to non-heterosexuality within a few generations due, in large part, to the influence of colonialism,

[5] S. Hawkes, K. Buse. ‘Sights set on sexual rights in global culture wars: implications for health’, The Lancet Global Health Blog. 21 Sept. 2015.

[6] Saida Ali, Shannon Kowalski & Paul Silva, ‘Advocating for sexual rights at the UN: the unfinished business of global development’(2015) 23(46) *International Journal on Sexual and Reproductive Health and Rights* 86.

Christianisation and the threat of non-heterosexuality to the patriarchal foundations of African societies.

2.2 History of Sexual Rights and its Linkage with Universal Human Rights

In 1948, the General Assembly of the United Nations (UN) adopted and proclaimed the Universal Declaration of Human Rights (UDHR), the first step towards establishing an international human rights law and a global system of human rights protection within the UN framework. This system embraces all human beings in all their abstraction and generality. The construction and recognition of human rights have, since then, evolved and expanded into areas of vital importance for the preservation of human dignity including areas hitherto not within the realm of the public sphere, on subjects frowned upon due to ethnoreligious and cultural beliefs such as sexual and reproductive rights.

Sexual rights as a concept and sub-set of universal human rights began to be discussed at the international level towards the end of the 1980s, following the outbreak of the HIV/AIDS epidemic, primarily by the gay and lesbian movement, which was joined by part of the feminist movement. According to Mattar,[7] the term ‘sexual rights’ was introduced as part of a bargaining strategy at the International Conference on Population and Development (ICPD), held in Cairo, Egypt, in 1994 to guarantee a place for reproductive rights in the final text of the Cairo Declaration and Programme of Action - the inclusion of the term "sexual" radicalized the language, and negotiations for its removal involved keeping the expression "reproductive rights". As a result, the term "sexual rights" does not appear in the final document of the Cairo Programme of Action.[8]

[7] Laura Davis Mattar, ‘Legal Recognition of Sexual Rights - a Comparative Analysis with Reproductive Rights’ (2008) 5(8) *International Journal on Human Rights* 2.

[8] See the Cairo Plan of Action Conference Reports, International Conference on Population and Development Programme of Action (UNFPA, 1994) <https://www.unfpa.org/sites/default/files/pub-pdf/programme_of_action_Web%20ENGLISH.pdf> accessed 03 July 2020.

Nevertheless, these rights were broached again in discussions at the 4th World Conference on Women. According to paragraph 96 of the Beijing Declaration and Platform for Action:

> The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behavior and its consequences.[9]

Mattar[10] points out that the emergence, albeit still incipient, of the concept of sexual rights has only occurred from a negative approach, i.e. expressing the right to not be the object of abuse or exploitation, in the corrective sense of combating violations. She asks, then: 'why is it so much easier to assert sexual freedom in a negative way, and not in an affirmative, emancipatory sense? Why is it easier to reach a consensus on the right not to be abused, exploited, raped, trafficked or mutilated in one's body, but not the right to fully enjoy one's own body?'[11]

The answer to Mattar's poser lies in the historical linkage between sexual rights and reproductive rights. As argued by Miller, et al, the importance of reproduction as the ultimate purpose of sexual relation is not shaped only by the discourse on women and their role in society. It is also linked to the discourse on sex, as a means not only of restricting sexual relations between people of the same sex, since this does not produce children, but also restricting the exercise of sexuality by women outside marriage. As a result, 'any sexual expression associated with obtaining pleasure, not reproduction, is rejected.'[12]The accepted norm, then, based on this link between sex and reproduction, could be none other than heterosexuality. This was (and still is)

[9] Fourth World Conference on Women Beijing Declaration and Platform for Action, Beijing, China - September 1995, Action for Equality, Development and Peace.
[10]Laura Davis Mattar, 'Legal Recognition of Sexual Rights' (n 7) 5.
[11]See also Cook, R. 'International Human Rights and Women's Reproductive Health' (1993)24(2)Studies in Family Planning73-86.
[12] A.M. Miller, M.J. Roseman, 'Sexual and Reproductive Rights at the United Nations: Frustration or Fulfilment? Reproductive Health Matters (2011) 19(38) 102–118.

considered the 'natural' form of sexual relation, which was only possible as a result of the repression against other forms of sexual expression.[13]

As a result, sexual rights as a subset of human rights at the international level is often discussed, not in isolation, but as an integral part of sexual and reproductive health and rights (SRHR). SRHR is the concept of human rights applied to sexuality and reproduction. It is a combination of four fields that in some contexts are more or less distinct from each other, but less so or not at all in other contexts. These four fields are sexual health, sexual rights, reproductive health and reproductive rights. Often, the Non-Governmental Organisations that fight for sexual rights are broadly focused on reproductive rights also. They include IPPF (International Planned Parenthood Federation), ILGA (International Lesbian and Gay Alliance), WAS (World Association for Sexual Health - formerly known as World Association for Sexology), and International HIV/AIDS Alliance.

However, unlike the other three aspects of SRHR, the struggle for sexual rights include, and focus on, sexual pleasure and emotional sexual expression. One platform for this struggle is the WAS Declaration of Sexual Rights.[14] At the 14th World Congress of Sexology (Hong Kong, 1999), the WAS adopted the Declaration of Sexual Rights, which originally included 11 sexual rights.[15] It was heavily revised and expanded in March 2014[16] by the WAS Advisory Council to include 16 sexual rights such as the right to autonomy and bodily integrity, the right to be free from torture and cruel, inhuman, or degrading treatment or punishment, the right to be free from all forms of violence and coercion, the right to privacy, the right to the highest attainable standard

[13] Alice M. Miller, et al, 'Sexual rights as human rights: a guide to authoritative sources and principles for applying human rights to sexuality and sexual health' (2015) 23(46) *International Journal on Sexual and Reproductive Health and Rights* 23.

[14] 'Declaration of Sexual Rights', World Association for Sexual Health <https://worldsexualhealth.net/wp-content/uploads/2013/08/Declaration-of-Sexual-Rights-2014-plain-text.pdf> accessed 09 December 2020.

[15] These rights are the right to equality and non-discrimination; life, liberty, and security of the person; autonomy and bodily integrity; freedom from torture and cruel, inhuman, or degrading treatment or punishment; freedom from all forms of violence and coercion; privacy; highest attainable standard of health; enjoy the benefits of scientific progress and its application; information; education and enter, form, and dissolve marriage and other similar types of relationships;

[16] The revised version can be found at 'Declaration of Sexual Rights 2014' (WAS) <https://worldsexualhealth.net/wp-content/uploads/2013/08/declaration_of_sexual_rights_sep03_2014.pdf> accessed on 12 January 2020.

of health, including sexual health; with the possibility of pleasurable, satisfying, and safe sexual experiences and the right to enjoy the benefits of scientific progress and its application.[17]

This 1999 WAS declaration influenced the Yogyakarta Principles drafted by a group of international law experts[18](which were launched as a set of international principles relating to sexual orientation and gender identity on 26 March 2007), especially on the idea of each person's integrity, and right to sexual and reproductive health.[19]

Before the 2007 Yogyakarta Principles, sexual rights as a subset of the human right to health had been introduced as part of the Millennium Development Goals (MDGs)in 2000.[20] Although sexual and reproductive health was not explicitly stated as one of the goals in the MDGs, it was an important component to Goals 3 (Promote gender equality and empower women) and 5 (Improve maternal health) of the MDGs. Following the increased advocacy on the need for improved sexual rights, and influenced by the Yogyakarta Principles, sexual and reproductive rights sexual achieved greater prominence in the health (Goal 3) and gender equality (Goal 5) goals of the Sustainable Development Goals (SDGs) than they had in the MDGs. Nevertheless, one of the most important elements conspicuously absent in the MDGs and SDGs is explicit and progressive language on sexual rights, with respect to many aspects of sexuality and sexual health, including sexual orientation and gender expression.[21]

The close affinity of sexual rights with reproductive rights has seen the World Health Organisation (WHO) involve itself in efforts to promote sexual rights as part of its agenda to improve human health around the world generally. In 2015, WHO published a report calling for a progressive effort to address the intersection of sexuality, sexual

[17] Eszter Kismödi and others, 'Sexual Rights as Human Rights: A Guide for the WAS Declaration of Sexual Rights' (2017) 29(1) International Journal of Sexual Health, 12.

[18]Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, March 2007, available at: http://www.refworld.org/docid/48244e602.html [accessed 3 August 2018].

[19] Piero Tozzi, 'Six Problems with the "Yogyakarta Principles", International Organisation Research Group Briefing Paper Number 1 April 2, 2007.

[20] 'Millenium Development Goals' (MDGs) (United Nations, 2000) <https://research.un.org/en/docs/dev/2000-2015> accessed 20 December 2018.

[21] A. Starrs. 'A Lancet Commission on sexual and reproductive health and rights: going beyond the Sustainable Development Goals' (2015) Lancet. 386.

health and human rights in a comprehensive manner.[22] The report restated the importance of attainment of sexual health, that is, a pleasurable, fulfilling and safe sexual life without coercion, discrimination and violence, through respect and protection of human rights.

The WHO report signifies the growing involvement of international organisations (particularly those involved in human rights and developmental agendas) in the push for increased recognition and protection of sexual rights as not just a subset of reproductive health rights, but also a subset of human rights on its own. Different international documents that recognise the human rights aspect of sexuality and sexual health, i.e., sexual rights include the recent report of the UN High Commissioner of Human Rights that condemns discrimination and violence on grounds of sexual orientation and gender identity,[23]and an unprecedented joint statement by several UN agencies calling states to take responsibility to end violence and discrimination against those with non-heteronormative sexual expression, orientation and gender identity.[24]

Arguably, sexual rights can be taken as comprising all rights related to sexuality, whether civil, political, economic or cultural and include rights related to reproduction. Sexuality Policy Watch, a global forum of researchers and activists, observed that the concept of sexual rights enables us to address the intersections between sexual orientation, discrimination and other sexuality issues – such as restrictions on all sexual expression outside marriage or abuses against sex workers – and to identify root causes of different forms of oppression.[25]Seen from this perspective, sexual rights can have an important transformational potential for both “sexual minorities” and “sexual majorities” as they encompass the broad range of rights and protections necessary for the advancement of the dignity and health of non-heterosexual people.

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[22] World Health Organization (WHO), “Sexual health, human rights and the law”, World Health Organization. Sexual Health, human rights and the law. 2015. (Geneva, Switzerland).

[23] Report of the Office of the United Nations High Commissioner for Human Rights. Discrimination and violence against individuals based on their sexual orientation and gender identity. 2015. (Geneva, Switzerland).

[24] ILO, OHCHR, UNDP, UNESCO, UNFPA, UNHCR, UNICEF, UNODC, UN Women, WFP W and U. UN statement: ‘Ending Violence and Discrimination Against Lesbian, Gay, Bisexual, Transgender And Intersex People, Geneva, Switzerland <http://www.who.int/reproductivehealth/publications/gender_rights/lgbti-un-statement/en/>accessed 28 July, 2018.

[25] I. Saiz. ‘Bracketing Sexuality: human rights and sexual orientation – a decade of development and denial at the UN’. Sexuality Policy Watch Working Papers, No. 2. November. 2005.

2.3 Non-Heterosexual Rights under International Law

The contentious nature of sexual rights as positive rights protectable under human rights instruments makes it difficult to determine the scope and contents of these rights mostly due to its close ties with reproductive health rights under which a large part of its protection has developed over the years. As discussed earlier,[26] insofar as different aspects of reproductive health and sexuality are linked, this is reflected both in the naming of some reproductive rights as also sexual rights and in the common application of certain human rights principles to those issues.

Nevertheless, to have a clear grasp of the ambit of sexual rights, it is useful to adopt the 2006 WHO working definition of sexual rights which sets out the scope of these sexual rights in their pure form, unaffiliated with reproductive health rights. Adopting this definition provides a clear guide on the ambits of the rights proposed to be included in the scope of sexual rights under international law and appropriately covers the broad range of rights related to the protection, promotion and advancement of the interests of non-heterosexual people. Also, this was the first exposition of the range of sexual rights by a formal international institution and, therefore, represents the benchmark for creating legal frameworks for the protection of the rights of non-heterosexual people. According to this definition:

> The fulfilment of sexual health is tied to the extent to which human rights are respected, protected and fulfilled. Sexual rights embrace certain human rights that are already recognized in international and regional human rights treaties, supported in consensus documents and found in national laws. Rights critical to the realization of sexual health include:
>
> - The rights to life, liberty, autonomy and security of the person
> - The rights to equality and non-discrimination
> - The right to be free from torture or to cruel, inhuman or degrading treatment or punishment
> - The right to privacy
> - The rights to the highest attainable standard of health (including sexual health) and social security

[26] Chapter 2.2, pages 58-59.

- The right to marry and to found a family and enter into marriage with the free and full consent of the intending spouses, and to equality in and at the dissolution of marriage
- The right to decide the number and spacing of one's children
- The rights to information and education
- The rights to freedom of opinion and expression
- The right to an effective remedy for violations of their fundamental rights

The application of existing human rights to sexuality and sexual health constitutes sexual rights. Sexual rights protect all people's rights to fulfil and express their sexuality and enjoy sexual health, with due regard to the rights of others, within a framework of protection against discrimination.[27]

Similar definitions of sexual rights have been put forward by other international organisations, such as the International Planned Parenthood Federation,[28]and the World Association of Sexual Health[29].

Nevertheless, the lack of consensus amongst nations regarding the acceptability of non-heteronormative sexual rights has hindered the adoption of an acceptable definition of sexual rights. States opposed to non-heteronormative sexual rights usually block all references to sexual rights in human rights discussions, seeing it as an attempt to foist the 'homosexual agenda' on other nations.[30] In 2011, the first United Nations resolution on sexual orientation and gender identity, Human Rights Council Resolution 17/19, was passed.[31] It expressed "grave concern" at violence and discrimination against individuals based on their sexual orientation and gender identity. Resolution 17/19 lists the core legal obligations of states with respect to the human rights of non-heterosexual people as including:

i. To protect individuals from homophobic and transphobic violence;
ii. To prevent torture and cruel, inhuman and degrading treatment;

[27]WHO,'Developing sexual health programmes: a framework for action', *(WHO: Geneva 2010*), pg. 4
[28] International Planned Parenthood Federation. Sexual rights: an IPPF declaration. 2006; IPPF: London.
[29] World Association of Sexual Health. Declaration of sexual rights 2014 <http://www.worldsexology.org/resources/declaration-of-sexual-rights> accessed 08 July 2021.
[30] Joke Swiebel, 'Lesbian, gay, bisexual and transgender human rights: the search for an international strategy' (2009) 15(1) Contemporary Politics 3.
[31] 7 June 2011, A/HRC/RES/17/19.

iii. To repeal laws criminalizing homosexuality;
iv. To prohibit discrimination based on sexual orientation and gender identity;
v. To safeguard freedom of expression, association and peaceful assembly.

These obligations of states are based on the Universal Declaration of Human Rights and subsequent international human rights conventions. This resolution was significantly opposed by 19 States predominantly from Africa and the Middle East.[32]This opposition was based on what these states perceive as the 'homosexual agenda' at the UN.[33]Mauritania, speaking on behalf of the Arab Group, opposed any discussion of the subject of sexual orientation claiming that debate on the issue would lead to further discord among the Member States and undermine the Council's effective response to human rights issues. According to members of the Arab group, attempts to impose the controversial topic of sexual orientation were aimed at creating new rights for specific cultural values which would have negative effects on social structures.[34]

For the African Group, they focused on the importance of respecting cultural and religious values when it came to dealing with human rights issues and rejected any attempt to impose concepts or notions on certain behaviours which did not fall into the internationally agreed set of human rights. The focus on cultural and religious opposition by African states reflects the strong desire of African states to preserve their cultural values under which non-heteronormative sexual activities are viewed prohibitively. Nigeria, for instance, which recently enacted the Anti-Same Sex Marriage Act in 2014, argued that developed nations and other state supporters of non-heteronormative rights were seeking to forcefully enforce their cultural values abroad and this threatens the preservation of the African cultural systems.[35]

[32]The states are Angola, Bahrain, Bangladesh, Cameroon, Djibouti, Gabon, Ghana, Jordan, Malaysia, Maldives, Mauritania, Nigeria, Pakistan, Qatar, Republic of Moldova, Russian Federation, Saudi Arabia, Senegal and Uganda. Burkina Faso, China and Zambia abstained

[33]See Gennarini, 'UN Delegates Walk Out on Sexual Orientation Panel at Human Rights Council', PRN:2011/451, 15 March 2012, available at: <c-fam.org/friday_fax/un-delegates-walk-out-on-sexual-orientation-panel-at-human-rights-council/> accessed 08 August 2020.

[34] See Summary of Discussion, 7 March 2012, available at: <www.ohchr.org/Documents/Issues/Discrimination/LGBT/SummaryHRC19Panel.pdf>accessed 08 May 2018.

[35]See Dominic McGoldrick, 'The Development and Status of Sexual Orientation Discrimination under International Human Rights Law' (2016) 16 Human Rights Law Review 613–668.

The basis of the argument against any non-heterosexual rights by the African and Arab groups, therefore, is that in the absence of a universal agreement to require states to recognize sexual orientation and gender identity as prohibited grounds for discrimination, no state should be compelled to do so against its wishes as any attempt to force through a change in this respect would challenge the principles of cultural pluralism and threaten the common ownership of the international human rights programme.[36]In essence, seeing that non-heteronormative sexual rights conflicted with the teachings of various religions and with the cultural and traditional values of these African and Arab states, imposing the concept of human rights for these activities would breach the social and cultural rights of communities concerned.

Despite this opposition, the Human Rights Council, in 2014, adopted Resolution 27/32[37] on Human Rights, Sexual Orientation and Gender Identity[38]which called for increased protection of the rights of non-heteronormative individuals to freedom from discrimination, oppression and violence. Notwithstanding this advancement in the recognition of non-heteronormative sexual rights under international law, the opposition by the Arab and African states has resulted in the absence of any international treaty on the subject which remains a controversial one at the international level.

One of the main planks for opposing non-heteronormative sexual rights is that it runs counter to natural law and the natural order of sexuality. This necessitates a consideration of the place of non-heteronormative sexuality under natural law.

2.4 Natural Law and Non-Heterosexual Orientations

There is a longstanding debate about whether the law is ‘natural’ or ‘positive’. While legal positivism argues that the law is socially constructed, i.e. the law is created by an authority within a society, those who believe in natural law, meanwhile, assert that the

[36]ibid.

[37] By a vote of 25 in favour and 14 against. The states that voted against it are Algeria, Botswana, the Coˆte d’Ivoire, Ethiopia, Gabon, Indonesia, Kenya, Kuwait,the Maldives, Morocco, Pakistan, the Russian Federation, Saudi Arabia and theUnited Arab Emirates. There were seven abstentions (Burkina Faso, China, Congo, India, Kazakhstan, Namibia and Sierra Leone).

[38]6 September 2014, A/HRC/RES/27/32.

law must reflect universal morals and protect rights that are inherent to being human. This school of thought argues that some laws exist by nature and which pre-determine the validity of any positive law handed down by an authority. As the fourth-century Christian philosopher, St. Augustine wrote, 'an unjust law is no law at all.'[39]

Natural Law refers to the tradition of reading into nature, laws that are not merely descriptive, but prescriptive. For adherents of natural law, nature does not merely state natural facts, but also offers a moral code, or reveals a moral order, usually anchored in a supreme divine being whose intentions can be read in nature. In Christian theology, natural law is that part of God's teaching that can be discerned through nature (as opposed to revelation or grace or scripture).[40]

Discussion of natural law predates Christianity, but Christian theologians such as Aquinas are key figures in developing the theory. Seeing that natural law draws validity from a higher and absolute moral authority on what constitutes justice, Christianity provided a clear authoritative figure - God – to act as the source of these natural laws and this explains why much of the natural law theory has close links with Christian philosophers, predominantly Roman Catholic philosophers. Finnis, a Catholic natural law philosopher, traces much of his thinking to ideas first expressed by Aquinas.

Natural law became the basis of both sacred and secular law, including laws regulating sexual practices. From the perspective of natural law, nature is viewed as the basis for morality and civil law. Significantly, however, natural law does not refer to the regularities found in the natural world as discovered by natural scientists, who, qua scientists, are not engaged in ethical evaluations of the natural world.[41]The main appeal of natural law is that it provides a clear moral criterion in a world affected by moral ambiguities and disagreement.

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[39]Lawrence W. Reed, 'Augustine: Searching for Truth and Wisdom: Real Heroes: Augustine of Hippo' Foundation for Economic Education, 04 March, 2016 <https://fee.org/articles/an-unjust-law-is-no-law-at-all/>accessed 10 August 2018.

[40] Weithman, Paul J, 'Natural Law, Morality, and Sexual Complementarity'in David M. Estlund and Martha C. Nussbaum, eds. *Sex, Preference, and Family: Essays on Law and Nature* (New York: Oxford University Press,1997).

[41] Finnis, John. 'Law, Morality, and 'Sexual Orientation' (1995) 9 Notre Dame Journal of Law, Ethics, and Public Policy 1049-76.

The natural law tradition began with the Stoics of ancient Greece, who viewed reason as mankind's common tool, one connecting human beings to the natural reality of the cosmos that revealed itself and its objective principles through the natural light of human reason. Aristotle later argued,[42] moreover, that nature and its laws also reveal a common telos, or purpose, shared by all mankind; namely, it is human nature to achieve happiness through cultivation of the right habits of virtue as naturally befit a human being and appear 'good' to reason. St. Thomas Aquinas rearticulated the Aristotelian conception of natural law in a Christian context, writing that 'a law is nothing else but a dictate of practical reason emanating from the ruler who governs a perfect community,' by whom is meant God, whose will be the 'eternal law'[43]

Aquinas adds that 'this participation of the eternal law in the rational creature is called the natural law.'[44] Human laws that do not reflect this grounding are simply not laws, properly speaking. Aquinas then argues that natural law governs all of nature, but, unlike the brutes, only man possesses a will of his own and can choose to ignore the natural law or, worse, become habituated to defying it and so reject that to which he is naturally inclined, acting not according to reason and virtue, which incline him to know God, but according to his basest instincts.[45]

Aquinas believed that everyone should always be open to the realization of these goods and hence never oppose them. According to him:

> We should be positively oriented towards these goods and promote them as much as we can because it is the first precept of law that good is to be done and promoted and evil is to be avoided. All other precepts of the natural law are based upon this: so that all the things which the practical reason naturally apprehends as man's good belong to the precepts of the natural law under the form of things to be done or avoided.[46]

The natural law theory of morality has existed in both classical and Thomistic forms. In its classical form, Moral laws are conceived as varying from nation to nation and are viewed as positive laws, that is, as laws prescribed by legislative authorities. Hence,

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[42] ibid.
[43]Aquinas, St. Thomas,*Treatise on Law*(Washington, D. C.: Regnery, 1956).
[44] ibid, 15.
[45] ibid, 17.
[46]Baumgarth, W., and Regan,S.J., (eds.), 'St. Thomas Aquinas on Law, Morality and Politics,' (Hackett, 1988)

they are mere artefacts of society and conventions which are not really binding.[47] This conventionalist view, an early cultural relativism, was opposed from the time of Plato and Aristotle to Cicero and beyond. For them, morality is natural, not conventional. This is because there is a natural law that must be obeyed whether it is written down by legislative authorities or not.[48]On the Thomistic account, 'natural law theory is a theory about the relationship between morality and human nature, the theory that who we are determines how we ought to act. There is a way of living that is in accordance with human nature, this kind of natural law theory holds, and morality prescribes that we live such a life'.[49]

Natural law is generally relied upon to condemn non-heteronormative sexual orientation on the basis that 'certain sins are against nature; thus contrary to sexual intercourse, which is natural to all animals, is unisexual lust, which has received the special name of the unnatural crime.'[50] It is from Aquinas' moral systematization of natural law that the general condemnation of same-sex behaviour received its most enduring legal justification in the Western tradition. Finnis directs his argument against same-sex marriage, on the natural complementarity between male and female both as physical beings (that is, sexual parts of male and female fit) and as emotional beings with personalities and physical, emotional, and spiritual needs.[51]

Claims that homosexual activity violates natural law continue to be part of the doctrinal foundations of many religions including the Catholic Church and Sharia law. According to Christian biblical teachings, God destroyed an entire city – Sodom and Gomorrah- predominantly because the people of that city engaged in homosexual activities.[52]Under Islam, the Koran stipulates that men having sex with each other should be punished, but it doesn't say how - and it adds that they should be left alone if they repent.[53]The death penalty which some Islamic states like Saudi Arabia, Iran

[47]Lanre-AbassBolatito, 'The Natural Law Theory of Morality and the Homosexuality Debate in an African Culture' (2012) 9 Journal of African studies 12.
[48]Holt, T., (2008), 'Philosophy of Religion: Natural Law Theory'. Available online at: <http://www.philosophyofreligion.info/christian-ethics/naturallawtheory/> accessed 09 August 2018.
[49]Barcalow, E., *Moral Philosophy: Theory and Issues* (Wadsworth Publishing Company, 1994).
[50] Weinreb, Ll., *The Moral point of view', in Natural Law, Liberalism, and Morality* (Clarendon Press, Oxford, 1996) 195–212, 195.
[51]Finnis, John. 'Law, Morality, and 'Sexual Orientation' (n 41), 1052.
[52] Genesis 19 in the bible narrates the story of Sodom and Gomorrah.
[53] Quran 7:80-84.

and Sudan impose on homosexuality instead comes from the Hadith or accounts of the sayings of the Prophet Muhammad. The accounts differ on the method of killing, and some accounts give lesser penalties in some circumstances.[54]

Throughout cultures and traditions, religion has played a considerable role in the repression of homosexuality. Unsurprisingly, many religious scholars of the three monotheistic religions—Christianity, Judaism, and Islam—find homosexuality unacceptable.[55]Divine revulsion features prominently amidst a range of justifications for rampant discrimination and violation of the fundamental human rights of LGBT communities. Nevertheless, it is frequently Islam that is portrayed as "the source of unbridgeable difference,"[56] and the one that continues to prescribe the most serious penalties both in this world as well as hereafter. Furthermore, in the contemporary world, it is arguably faith in Islam that is most likely to contribute to the creation of stereotypes and Islamic extremism.[57]

Araujo expressed the major tenet of the natural law argument against non-heteronormative sexual rights when discussing the opposition to same-sex marriage rights, thus-

> marriage under the law of nations can only be based on the complementary union of one man and one woman that is freely contracted and publicly expressed, which has the potential for transmitting human life and is the subject of authentic human rights norms.[58]

This 'complementary' notion of male and female biologically fitting together for procreation and sexual activities is based on the natural idea of what should be biologically acceptable and follows along the line of Finnis' argument against same-sex marriage based on the natural complementarity between male and female reproductive organs.

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[54]Javaid Rehman, 'Is Green a Part of the Rainbow? Sharia, Homosexuality and LGBT Rights in the Muslim World' (2013) 37(1) Fordham International Law Journal 12.

[55]Tom Boellstorff, 'Between Religion and Desire; Being Muslim and Gay in Indonesia', in Sexualities In Anthropology 306.

[56] ibid, 23.

[57]Javaid Rehman, ibid.

[58] Robert J. Araujo, 'Natural Law and the Rights of the Family', (2010) *1 International Journal of the Jurisprudence of the Family*, 198.

The obvious and fatal critique of the natural law opposition to non-heteronormative sexual activities is that it selectively derives a normative stance from a description of the sex organs and other biologically- determined structural features of men and women. It presupposes that the essence of sexual activities in humans is exclusively procreative in nature, ignoring the emotional connection and satisfaction derivable from sexual activities beyond just its procreative function.

As a result, limiting human sexual activities to just procreative function is a restrictive understanding of sexual conduct by natural law thinkers. Even amongst heterosexual persons, sexual activities serve far greater purposes than just procreation but is usually used as means of expressing emotional and intimate connections between persons beyond just procreation. In this regard, the complementarity or otherwise of the sexual organs of both sexes are immaterial in determining the acceptability of non-heteronormative sexual activities under natural law.

2.5 Incest, Non-Heterosexuality and Moral Values

Sexual relationships and activities are private, intimate affairs between parties that are inescapably defined by their level of acceptability within a society. The intimate nature of sexual relations should ordinarily mean the non-involvement of the society in defining their acceptability, but paradoxically, fewer subjects attract social judgments like sexual relations. Across jurisdictions, the validity of sexual relations is always defined by the moral values of the society within which the participants reside. These moral values are translated into legislative norms upholding acceptable sexual relations and criminalising unacceptable sexual relations. Therefore, with few exceptions,[59] the legality of specific sexual relations in domestic jurisdictions is a reflection of the moral values/social perceptions of the society.

Consequently, variations in the legality of sexual activities/orientations across jurisdictions dependent on the moral values of the society are inevitable. The attempt of developed western jurisdictions to demonise African states for their moral stance on non-heterosexuality overlooks the crucial fact that every country

[59] E.g. the imposition of homophobic values by European colonisers in Africa. See Chapter 2.6, page 75.

in the world applies subjective moral values in determining the validity of specific sexual activities/orientations. This is evident in the legal treatment of incest viz-a-viz non-heterosexuality across the globe as well as in the divergence in the treatment of polygamy across jurisdictions around the world.

Polygamy refers to a marriage relationship between three or more people in contrast to monogamy which is a marriage between two people. Usually, polygamy will involve a man marrying two or more wives and is generally permitted in some religions, cultures and areas in the world.

Monogamy is the standard approach to marriage in Europe, the Americas and almost all of the developed world. In these jurisdictions, polygamy is referred to as 'bigamy' and is expressly statutorily prohibited through legislative instruments with penalties typically involving terms of imprisonment. In the UK for instance, bigamy is prohibited under section 57 of the Offences Against the Person Act 1861 with imprisonment for up to 7 years. On the other hand, polygamy is legal and common in much of Africa, parts of East Asia and the Middle East, and is generally permitted under Islamic law as shown in Figure 2.1 below -

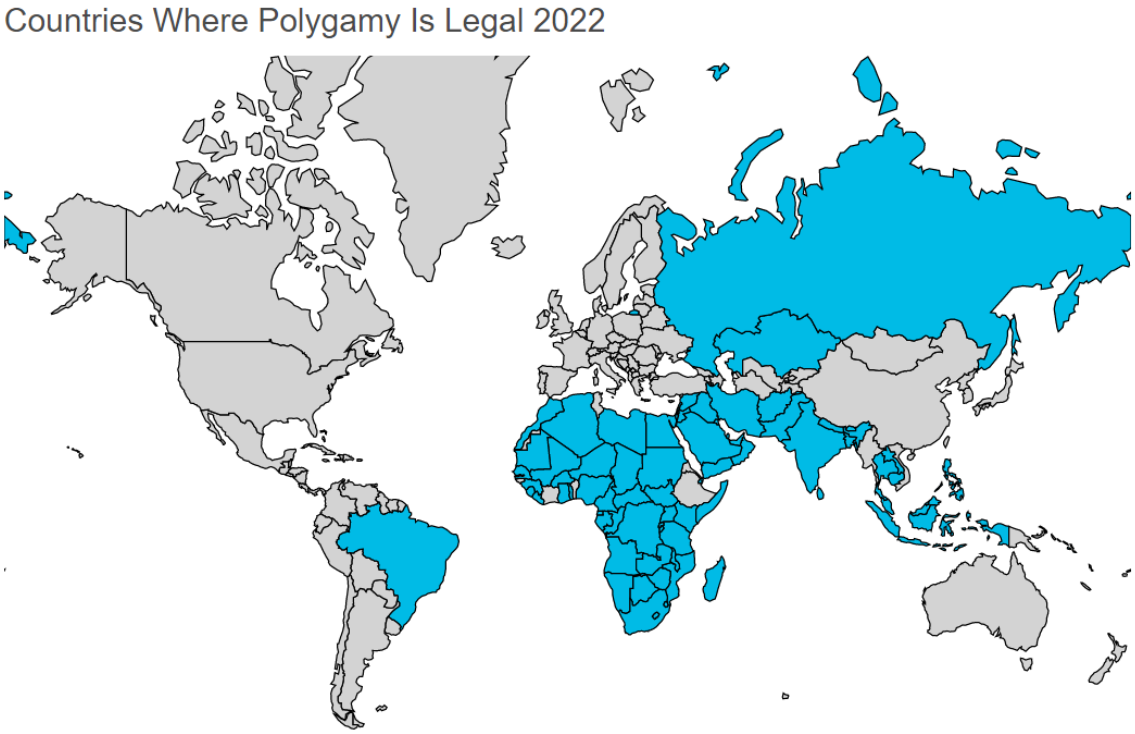

Figure 2.1 Countries where polygamy is legal in 2022.

Considering that polygamy involves marriage (and by extension, sexual relations) between consenting adults, the prohibition of such relationships in western jurisdictions while permitting same-sex relationships and marriages highlight the moral basis for permitting sexual activities and relationships between parties. The prohibition of polygamy in western jurisdictions is primarily based on the moral values of these western societies that view marriages involving more than two parties as immoral and against societal harmony. No biological or legal reason explains the prohibition of polygamy beyond society's revulsion at the practice. On the other hand, for many countries in Africa, Asia and the Middle East, societal acceptance of this practice translates into legal permission for the practice.

Indeed, a superior court in New York, US has echoed the incomprehensible distinction between same-sex marriages and polygamous (or polyamorous) marriages. In ***West 49th St., LLC v. O'Neill***,[60] a New York Civil Court Judge ruled that polyamorous relationships are entitled to the same sort of legal protection given to two-person relationships. This case reiterated a 1989 decision of the New York State Court of Appeal in ***Braschi v. Stahl Assocs. Co.***[61] which held that persons in polyamorous relationships should be entitled to the same legal protections as those in two-person relationships. The underlying basis of these decisions is that prohibiting sexual relations and marriages is unlawfully discriminatory to the parties in such consensual relationships. Consequently, like the legal prohibition of incest, moral values play a dominant role in determining acceptable forms of sexual relations and partnerships which is a point developed nations do not consider in their condemnation of the stance of African countries on non-heterosexuality.

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[60] 'NYC judge rules polyamorous unions entitled to same legal protections as 2-person relationships' (*New York Post, 8 October 2022*) <https://nypost.com/2022/10/08/nyc-judge-rules-in-favor-of-polyamorousrelationships/?utm_campaign=SocialFlow&utm_medium=SocialFlow&utm_source=NYP Twitter> [12 October 2022].

[61] 74 NY2d 201 (1989).

Incest refers to sexual relations/bonds between persons related by blood. There are several similarities between the global treatment of incest and the treatment of non-heterosexuality across jurisdictions. First, there is a variation in the legality of incest across the globe. While many states (such as the United Kingdom[62] and the US) expressly prohibit incest based on degrees of consanguinity (blood relationship) but not affinity (relationship based on marriage, e.g. step-siblings), other states (such as Spain[63] and the Netherlands[64]) do not prohibit it in legal instruments. For the latter states, while not affirmatively permitting incest, it is not legislatively prohibited and this failure to prohibit means parties can legally engage in it in these jurisdictions. Some states, like Germany, selectively prohibit incest only for heterosexual people but not for homosexual people[65] thus impliedly permitting incest for homosexual people.

In terms of punishment, amongst states that expressly prohibit it, the penalty ranges from a minimal prison sentence to life imprisonment and even the death sentence. See Figure 2.1 below:

[62] Sections 25 and 64 of the Sexual Offences Act 2003.
[63]Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, s. 12.
[64]Dutch civil law book 1, articles 41 and 42.
[65]Paragraph 173 of the Criminal Code of Germany.

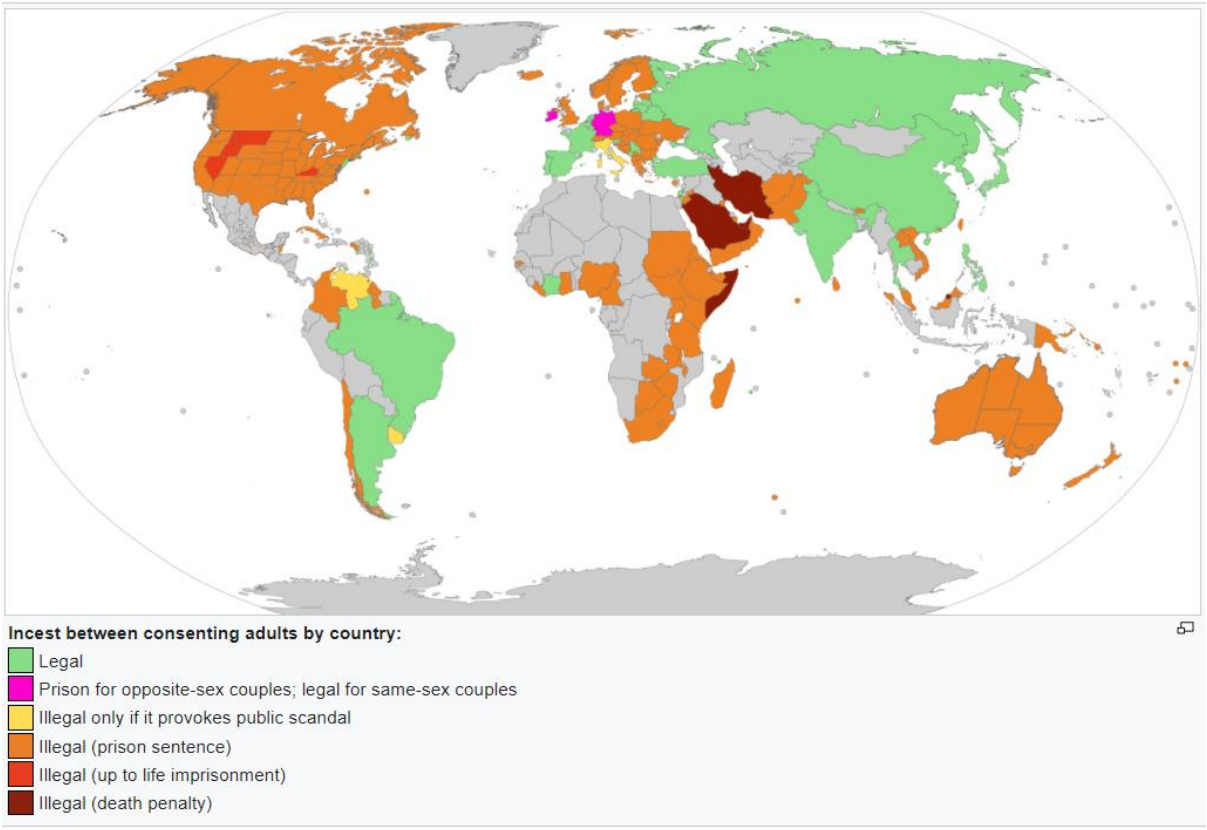

Figure 2.1 Global Map on the Legality of Incest

Source: Data gathered from a legislative study of domestic laws

This disparity in the global treatment of incest is similar to the legality of non-heterosexuality globally in terms of legislative prohibition and penalties which varies widely across jurisdictions dependent on the societal view of non-heterosexuality.

The second similarity is that the prohibition of incest and non-heterosexuality across jurisdictions is based on the same ground – the biological relationship between the parties. While this biological relationship in incest relates to a familial factor – belonging to the same biological family (blood relationship), in non-heterosexuality, it relates to belonging to the same biological sex. Thus, whether societies frown upon a sexual act because of the biological family relations or the biological sex relation, the disapproval of such act is predicated on biological factors beyond the control of the participants involved. No one can change their family blood relations the same way no one can their biological sex.

The third similarity is the potential human right to privacy involved in the criminalisation of incestuous relationships between consenting adults. Because incestuous

relationships are done in private, the prohibition of such activity potentially implicates the human rights to privacy of the parties under relevant human rights instruments. This point was raised in the German case of *Patrick Stübing v Germany*[66] challenging the prohibition of incest under the Criminal Code of Germany. Other potential human rights issues raised in defence of non-heterosexual activities such as non-discrimination, right to family (including marriage, adoption, inheritance) are equally implicated in the prohibition of incest in developed western jurisdictions. Thus, there is the inevitable human rights question involved where two adult siblings are refused a marriage license for no other reason than their biological relationship – the same question asked by homosexual couples before the legalisation of gay marriage in many western nations.

The fourth similarity is that most of the legal prohibitions of incest and non-heterosexuality are largely symbolic and hardly enforced through legal mechanisms. In many states with legal prohibition of incest, there are very few (if any) legal prosecutions of parties for engaging in such acts. In the UK, for instance, there is hardly any specific prosecution for incest recorded so far. Similarly, there are very few cases of persons prosecuted for non-heterosexual activities in many states where it is illegal. Even in African states, actual criminal prosecutions for non-heterosexuality are rare and have been recorded in very few instances. Rather, for both incest and non-heterosexuality, social consequences are more common than legal consequences and the legal prohibitions are mostly representative of society's visceral response to such acts. However, one major way that legal consequences are manifested is through the discriminatory impacts of policies on persons in an incestuous or homosexual relationship. Thus, incestuous couples cannot apply for a marriage license in most states across the globe the same way homosexual couples are prohibited from marriage rights in many African states. The same applies to discriminatory impacts in other ancillary areas like adoption, inheritance rights, taxes etc.

The fifth similarity is that the basis for their criminalisation in different states essentially hinges on the visceral moral repulsion to their practice within the society and not on any scientific or medical basis. At this point, it is important to analyse the often-cited

[66] Discussed in Chapter 1.4, page 41.

defences for the criminalisation of incest to highlight their untenability. First, the differing power relations between parents and children or older family members and younger ones is sometimes raised as justification for criminalising incest. This is not a sustainable argument as the prohibition of incest in many states (like the UK) is a blanket prohibition of all forms of sexual relations with blood relations regardless of the ages of the parties concerned.[67] Undoubtedly, where sexual intercourse involves a minor family member, it is a sexual crime on its own without specific reference to the incestuous aspect. Thus, sexual relations between twin siblings is still prohibited even though they are of the same age and no power relations are involved. Secondly, the medical explanation often relied upon relates to genetic outcomes for inbred offsprings of family members. While this is a valid concern, it is predicated on heteronormativity whereby procreation is a potential outcome in the incestuous relationship. It, therefore, does not explain the blanket prohibition of incest including that between same-sex family members where procreation is not a possible outcome.[68] Sexual intercourse between father/son; mother/daughter, siblings of the same sex etc. are still prohibited in all states with legal prohibition of incest (except Germany). Moreover, a targeted prohibition of procreation between family members would address this medical concern, if that was the basis for its prohibition.[69]

It is clear, therefore, that the prohibition of incest is primarily based on the moral revulsion to the idea of sexual intimacy between family members, in other words, the 'unnaturalness' of familial sexual intercourse.[70] It is also based on society's need to preserve the family unit which is a building block of society. In essence, incest is prohibited in a majority of states because it 'does not feel right' for members of the same family to be engaged in sexual intercourse and it is considered immoral, unnatural and socially unacceptable. This moral revulsion then translates into the legal prohibition of incest. On the other hand, in other states where incest is permissible

[67] The Sexual offences Act 2003, UK, distinguishes between familial sexual intercourse involving persons below 18 under section 25 and involving parties above 18 under section 64.
[68] The only exception is Germany, which prohibits incest only between heterosexual persons, presumably on the basis of this concern for procreation.
[69] Markus Dubber, 'Policing Morality: Constitutional Law and the Criminalization of Incest' (2011) 61(4) 737-759.

[70] Robert Fischer, 'Why Incest is Usually Wrong' (2012) 19(1) Philosophy in the Contemporary World 17-31.

(mostly due to the absence of legal prohibition of the act), there is less social revulsion to the act or such revulsions are not strong enough to warrant legislative prohibition of familial sexual relations, even though parties engaged in the act in these states may face social condemnation from the society.

Drawing parallels between the treatment of incest globally (and particularly in western states) and the treatment of non-heterosexuality in Africa, it is apparent that the basis for the criminalisation of incest in many states is the same basis for the criminalisation of non-heterosexual activities in African states – i.e., it is unnatural, immoral and 'does not feel right' for parties of the same sex to engage in sexual activities. Nevertheless, the developed western jurisdictions that utilise these moral values (unnaturalness) to criminalise incest, display a strong aversion to African states applying the same moral values to criminalise non-heterosexuality. Meanwhile, non-heterosexuality was criminalised in many of these developed western jurisdictions up to recent decades until their moral values changed in favour of non-heterosexuality. In the UK, non-heterosexuality only became legal in 1967 and the UK government had to recently issue a posthumous pardon to over 1000 gay men convicted for homosexuality under the abolished law.[71] In the US, the criminalisation of non-heterosexuality remained in the statute books of some states (e.g. Texas) even up till 2003 when it was nullified following a US Supreme Court decision.[72]

Even more perplexing in the stance of the developed western states concerning non-heterosexuality in Africa is the realisation that state-sanctioned homophobia was mostly introduced into African societies by these western states during colonialism. As Table 1.1[73] shows, many of the statutes in African states criminalising non-heterosexual activities were laws introduced by the European powers during colonialism.[74] As will be discussed in section 2.6 below, prior to colonialism, many African societies were largely tolerant of non-heterosexual activities which served mostly functional and spiritual purposes, but the introduction of Christianity and colonial

[71] Owen Bowcott, 'UK issues posthumous pardons for thousands of gay menTuring's law' *(Guardian, January 31st 2017)* <https://www.theguardian.com/world/2017/jan/31/uk-issues-posthumous-pardons-thousands-gay-men-alan-turing-law> accessed 18 June 2021.
[72] *Lawrence v. Texas* 539 U.S. 558 (2003).
[73] Page 4.
[74] This is discussed further in the subsequent section - Chapter 2.6, page 75 - looking at the historical development of homophobia in African societies.

laws prohibiting sodomy largely contributed to the entrenchment of homophobic values in these societies. Post-colonialism, these African societies have fully embedded this intolerant attitude in their cultural values and the developed western states have turned around to criticise African states for having these homophobic cultural values.

The three key points to be made out here from the comparison of incest and non-heterosexuality are – a) legal regulation of permissible sexual activities is inevitably influenced by the moral values of a society and this applies to all states across the globe – developed and developing states. b) attempts to foist the moral values of one society on another society regarding permissible sexual activities will always be met with staunch resistance and can only be achieved with some elements of force/coercion – as the European colonial powers ironically achieved with the foisting of homophobic values in African societies during colonial times. The same result cannot be achieved in a post-independent Africa. c) there are fundamental conceptual difficulties with imposing human rights labels on the expression of specific sexual orientations because it raises critical questions on the exclusion of other forms of sexual activities that meet the same criteria. This is particularly so where the latter remains criminalised in states ascribing human rights labels to the former.

The above discussion is not a defence of incest in any form nor arguing for the equal legalisation of incest globally. As Fischer stated, incest is always wrong and can never be justified.[75] It is also not a defence for the application of cultural relativism[76] in non-heterosexual rights by African states, but an analysis of the inevitable and fundamental influence of moral values on the permissibility of sexual activities in society generally. This comparison also aims to show that African states are not backward, primitive societies living in the dark ages for their criminalisation of non-heterosexuality, but they are simply doing what every other society in the world does – i.e. apply moral values in judging sexual activities. Finally, the comparison shows the hypocritical stance of developed western states in their condemnation of African states for relying on moral values in judging permissible sexual activities while applying the same moral platform to criminalise other forms of sexual expressions. Developed western states selectively

[75] Robert Fischer, 'Why Incest is Usually Wrong' (n 68) 18.
[76] Cultural relativism is discussed in further details in Chapter 3.3, page 114.

rely on moral revulsion to criminalise incest while African states broadly rely on moral revulsion to criminalise both incest and non-heterosexuality.

Notwithstanding the above similarity, there are important differences between incest and non-heterosexuality that explain the divergent legal approaches to them in many states. Firstly, the personification of the 'gay identity'[77] largely means that non-heterosexual people have a collective identity, a visible presence and a minority status as a group that make them the potential subjects of human rights labels. Incestuous persons, on the other hand, largely operate in utmost secrecy and have not formed any collective identity, visible presence or groups that can constitute a minority group capable of becoming subjects of human rights labels. Although there has been a gradual growth of Genetic Sexual Attraction (GSA) groups[78] similar to the LGBT group, the continuing strong moral revulsion against incest makes these groups lack any form of visibility. This ensures that incest and the sexual attraction of people towards biological relations continue to be treated differently from non-heterosexuality. Secondly, and more importantly, non-heterosexual people around the globe face persecution, abuses, violence and other forms of inhuman treatment on account of their sexuality which raises the necessity for instituting human rights protection for them. Incestuous persons, on the other hand, do not face the same level of violence, persecution and abuses that non-heterosexual people face. Even in African states where non-heterosexual people are beaten, maimed and dehumanised, people caught in incestuous affairs are not subjected to similar levels of violence and dehumanisation notwithstanding the strong moral revulsion to incest in these societies. A plausible explanation is that the personification of the 'gay identity' make non-heterosexual persons an identifiable group, unlike incest which is conducted in utmost secrecy.

Nevertheless, considering the serious harms faced by non-heterosexual persons in African states, it is important to develop legal approaches to protect their rights despite the moral revulsion to non-heterosexuality in Africa. An innovative legal approach is required and Chapters 3 - 5 of this thesis will conceptualise, develop and demonstrate

[77] This is discussed further in the subsequent section in chapter 2.6, page 75.
[78] See 'Genetic Sexual Attraction', (Cumbria City Council, UK, July 2020) <https://www.cumbria.gov.uk/eLibrary/Content/Internet/537/6379/6423/17162/42709145735.pdf> accessed 17th December 2021.

the potential effectiveness of the *reformed universalism* legal paradigm in changing the narrative in African states by utilising domestic and regional human rights instruments.

Before considering appropriate legal approaches, it is important to critically analyse the historical perceptions of non-heterosexuality among African societies, from pre-colonial times to the current period, to discover the origins and basis of the strong revulsion to non-heterosexual activities in these societies. This understanding will be critical in designing a bespoke legal paradigm for protecting non-heterosexual rights in African states.

2.6 Historical Perceptions of Non-Heterosexual Activities in Africa

> African societies have never historically had a 'gay' identity or a pathologized "homosexual" category; however, same-sex sexual attraction and expression were known to occur, but in usually hidden but sometimes even culturally accepted ways.[79]

Epprecht's study of non-heterosexual activities in African societies[80] revealed the complex history behind non-heterosexual conducts amongst the various societies in Africa and concluded with interesting findings which debunked some myths regarding non-heterosexuality in Africa. The study also exposed a new dimension to the pervasive homophobia sweeping across the continent – the western-styled personification of a 'gay' or 'homosexual' identity which is alien to the African continent. While various studies have debunked the claim that homosexuality is an 'alien', 'unAfrican', Western-imposed lifestyle,[81] the forms in which these homosexual

[79] M. Epprecht, *Hungochani: The History of a Dissident Sexuality in Southern Africa* (Quebec: Mcgill-Queen's University Press, 2004) 12.

[80] ibid. See also M. Epprecht, "Good god almighty, what's This!": homosexual crime in early colonial Zimbabwe'. In S. Murray and W. Roscoe, eds. *Boy-wives and Female Husbands: Studies of African Homosexualities* (New York: Palgrave Macmillan, 1998) 197–220.

[81] V. Reddy, 'Homophobia, Human Rights and Gay and Lesbian Equality in Africa' (2001)16(50) Agenda 83-87; C. Summers, *The Gay and Lesbian Literary Heritage: A Reader's Companion to the Writers and their Works, from Antiquity to the Present* (New York: Henry Holt, 1995); B. Dlamini, 'Homosexuality in the African context' (2006) 20(67) Agenda, 128-136; S. Murray, and W. Roscoe, eds. *Boy-wives and Female Husbands: Studies of African Homosexualities* (New York: Palgrave

activities were practised varied widely across various African communities and mostly served functional purposes – as temporal solutions to the absence of their wives amongst the men in coal mines; as spiritual initiations exercises; for concentration purposes amongst some warrior elites; and for socio-economic purposes by women with elevated economic standings in some communities.[82] There was, however, the absence of a distinct identity for people engaged in non-heterosexual activities as presently constituted in the current Lesbian Gay Bi-Sexual, Transgender and Queer (LGBTQ) identity.

Most African communities, therefore, neither pathologised[83] nor personified non-heterosexual activities which mostly existed in a flux state in these communities – neither an integral part of general communal life nor a culturally derided practice. Even though there existed groups of men in some of these communities that were generally categorised as engaging in non-heterosexual activities – the *yan daudu* men in Northern Nigeria; the *Mashogo* men amongst Swahili tribes; the *mukodo dako* in Uganda; the *nkotshane* in Malawi and the *gordjiguene* in Senegal[84]- they were not ascribed fixed homosexual identities and existed on the fringes of these societies' generally accepted communal life which was predicated on heteronormativity.

It is against this background that the present pervasive homophobia across the African continent is analysed in this section of the thesis to explain the shift from tolerance/accommodation of non-heterosexuality to outright, stringent and often violent homophobia in African communities. The impact of colonialism and the crucial role that western-introduced religious practices internalised homophobia within these communities will be examined. Crucially, also, the emergence of a 'gay' identity and personification of persons based on non-heterosexual orientation will be analysed to discover the impact it had on the cultural shift towards homophobia amongst African communities.

Macmillan, 1998); T. Msibi, 'The Lies We Have Been Told: On (Homo) Sexuality in Africa' (2011) 58(1) Africa Today 55-77.

[82] See R. Gaudio, 'Unreal Women and the Men Who Love Them: Gay Gender Roles in Hausa Muslim Society' (1999) 95(2) Socialist Review, 199.

[83] i.e. regard or treat as psychologically abnormal.

[84] See T. Msibi, 'The Lies We Have Been Told: On (Homo) Sexuality in Africa' (2011), (n 79).

The analysis will focus on three aspects of non-heteronormativity in African communities - homosexual acts, homosexual or 'gay' identities and non-heterosexual marriages. These three interrelated subjects are treated differently in African communities and the conflation of their separate perceptions by African communities is evident in various literature on the subject. More important is the discussion of the gap in the literature on the subject – the reconciliation of cultural perceptions to homosexual identities and legal protections for non-heterosexual activities. While literary discussions on the subject treat homophobia in African communities in broad terms – focusing on aversions to non-heterosexual activities - it is worth considering if the real homophobia is towards homosexual activities or homosexual identities.

2.6.1 Studies on Homosexuality in African Communities

Within African societies, the subject of sexuality is often debated in hushed tones, as a form of a taboo subject, and advocates of non-heterosexuality quickly become social and cultural outcasts, for promoting 'deviant', 'unnatural' and 'unspeakable' activities.[85] Despite this aversion to discussing non-heterosexual relations in Africa, empirical studies have shown a prevalence of the practice within the continent from historic times with several cultures in Africa openly recognising such practice as a part of their traditional values. Amadiume[86] posits that the aversion to non-heterosexual relations and rigid gender demarcations amongst many African societies is a recent development as many of these cultures were openly admissive of such practice for centuries and a lot of their traditional rituals/ceremonies were built around same-sex practices as well as recognised gender fluidity amongst its members with males often acting as daughters in families while females often occupied the role of husbands.[87]

[85] D. Amory 'Homosexuality in Africa: Issues and Debates' (1997) 25(1) A Journal of Opinion, Commentaries in African Studies: Essays about African Social Change and the Meaning of Our Professional Work 5-10; Matetoa-Mohapi, Julia M., 'Human rights violations and sodomy laws in Africa: A study of the discriminatory laws and inhumane legislation and its impact on the health and safety of the LGBTI community within the criminal justice cluster', (2021) 77(2) Hervormde Teologiese Studies; Pretoria; Amusan, L., Saka, L., & Muinat, O. A., 'Gay Rights and the Politics of Anti-homosexual Legislation in Africa: Insights from Uganda and Nigeria' (2019) 8(2) *Journal of African Union Studies* 45–66.

[86] I. Amadiume, *Male Daughters, Female Husbands: Gender and Sex in an African Society* (Zed Books, London 2015).

[87] ibid.

Amadiume's assertion of the fluidity of the cultural ascription of gender based on the cultural practices of the Igbo people of eastern Nigeria receives support from several other empirical studies across other societies in Africa. Eskridge, Jr.[88] and Ruth Morgan and Saskia Wieringa[89] both conducted empirical studies across multiple societies in Africa and found a prevalence of non-heteronormative cultural practices that existed in these societies and the fluidity with which gender ascriptions with its associated roles and acceptable sexual relations between the genders were treated.

Various studies have also documented culturally entrenched practices of same-sex relations in various African communities. Foucalt,[90] Epprecht,[91] Achmat[92] and Murray and Roscoe[93] conducted elaborate studies across different communities in Africa and reported widespread evidence of culturally approved homosexuality in the various communities. In response to the often-repeated claims by African leaders that homosexual practices are a western-induced lifestyle, Murray and Roscoe stated that 'African homosexuality is neither random nor incidental—it is a consistent logical feature of African societies and belief systems';[94] while Epprecht asserted that 'homosexual "crime" among African males (indecent assault and sodomy) began too early, was too widespread and was too varied in nature to be dismissed as a result of European intervention'.[95]

While these studies suggest that homosexuality was a widespread practice across African communities, other studies have questioned this conclusion, arguing that the data relied upon is restrictive and cannot be the basis for claiming a 'widespread' finding of homosexuality across the various communities. Also, the cultural acceptability of these practices has also been called into question owing to the lack of preserved traditional evidence from pre-colonial African societies which lacked any form of written tradition and relied essentially on oral genealogy passed down across

[88] W. Eskridge, Jr, 'A History of Same-Sex Marriage' (1993) 79(7) Virginia Law Review 1419-1513.
[89] R. Morgan and S. Wieringa, *Tommy Boys, Lesbian Men, and Ancestral Wives: Female Same-sex Practices in Africa* (Jacana Media (Pty) Ltd, 2005).
[90] M. Foucalt, *The History of Sexuality* (New York: Random house, 1980)
[91] M. Epprecht, "Good god almighty, what's This!": homosexual crime in early colonial Zimbabwe', above, (n 77).
[92] Z. Achmat, "Apostles of Civilised Vice": ''Immoral Practices'' and "Unnatural Vice'' in South African Prisons and compounds' (1993) 19(2) Social Dynamics 92–110.
[93] S. Murray, and W. Roscoe, eds. *Boy-wives and Female Husbands,* (n 78).
[94] ibid, 23.
[95] M. Epprecht, *Hungochani: The History of a Dissident Sexuality in Southern Africa* (n 77), 12.

generations. The leading proponent of this position is Kwame and Saheed[96] arguing in 2009 that it is:

> inaccurate to generalize about the existence of indigenous homosexuality among all African ethnicities, especially in the absence of micro and empirical research. The point we make is that the fact that traces of indigenous same-sex relationships are found among one ethnic group should not be taken to mean that it is prevalent among all African ethnicities, and that more academic and systematic finding focusing on cultural and historical construction of gender, sex and sexuality in specific cultures is needed to ventilate this contentious aspect of African history and culture.[97]

Kwame and Saheed's position exposes the tendency for undue generalisation of practices concerning communities in the African continent. The identification of certain practices in isolated communities within the continent is often relied upon to generalise its practice across the continent, as though Africa comprises of a monolithic ethnic group or cultural practices are similar across the various communities. Dlamini[98] points to the warped perception of the African communities by European researchers as responsible for a lot of the conclusions reached concerning the continent, arguing that the perception of Africa as 'the 'cradle' of humanity, where distinctions between human and animal, civilised and savage, are tentative and easily reversed – continue to cloud Western views of the continent and its people'.[99] Reviewing the evidence from the studies by Foucalt, Epprecht, Achmat, Murray and Roscoe, it is clear that the practice of homosexuality was only observed in somewhat isolated instances in various communities cutting across the length and breadth of the African continent, from Nigeria and Senegal in West Africa to the Nuer people of Sudan in North Africa, to the Baganda people of Uganda in East Africa and Lesotho in Southern Africa. Amusan et al[100] argue that anti-homosexual legislation in African states was informed by the dynamics of national politics, negative societal attitudes to the expression of homosexual activities, and increasing religious conservatism.

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[96] E. Kwame and A. Saheed, 'Cutting the Head of the Roaring Monster": Homosexuality and Repression in Africa' (2009), 30(3) African Study Monographs 121-135.
[97] ibid, 125. See also B. Dlamini, 'Homosexuality in the African context' (2006) 20(67) Agenda 128-136.
[98] ibid, 128.
[99] ibid, 130.
[100] Amusan, L., Saka, L., & Muinat, O. A., n 85.

What emerges from these studies is that while they debunk the often-repeated claim of homosexuality being 'unAfrican' and against the cultural practices of African communities, they do not paint a picture of a pervasive, culturally approved practice of homosexuality in African communities sufficient to claim it was 'widespread' throughout the continent as asserted by Epprecht; or that it was a 'consistent logical feature of African societies and belief systems' as asserted by Murray and Roscoe. Oftentimes, these homosexual practices did not constitute an integral part of the cultural belief systems of the relevant communities, were mostly on the fringes of the societies and mostly served functional, temporary purposes.[101] Kendall,[102] for instance, studied the much referenced homosexual practices amongst coal miners in Lesotho and other Southern African communities and concluded that such practices were mostly temporal, generated by the white colonialists' prevention of miners from bringing their wives along with them to coal settlements. The older miners, therefore, resorted to taking younger/new miners as 'wives' to perform wifely duties and for sexual gratification. She pointed out, however, that such practices did not involve actual anal or oral intercourse, as instead, sexual contact constituted of the rubbing of penis in between the recipient's thighs and achieving sexual climax through such genital frictions. Importantly, the participants returned to their wives in the society after leaving the mining camps and, from all evidence, returned to their normal heterosexual lives.

Kendall's study also focused on the acclaimed 'lesbian' relationship between the women in some Lesotho communities, finding that what is referred to as a lesbian affair is nothing more than a form of grooming amongst the puberty girls in preparation for marriage and wifely duties and, although regarded as some form of sexual intimacy, and treated as such, was not regarded by the communities as a fixed sexual orientation or a distinct sexual practice in contrast to heterosexual intimacies.

Reddy[103] also pointed out that the *yan daudu* men in Northern Nigeria who talked and cross-dressed like women were not culturally recognised as constituting a distinct homosexual class of persons, even though they sometimes engaged in same-sex

[101] E. Chitando and A. Klinken, eds. *Christianity and Controversies over Homosexuality in Contemporary Africa* (London: Routledge, 2016) 6.
[102] K. Kendall, *Lesbian Expression in Lesotho: Homophobia is the White Folk's Disease* (University of Natal: Pietermaritzburg, 1996)12.
[103] V. Reddy, 'Homophobia, Human Rights and Gay and Lesbian Equality in Africa' (n 79) 2.

activities, as they mostly lived heterosexual lives (with wives and children) and practised their same-sex activities on the fringes of societal acceptance (i.e. barely tolerated, but not outrightly condemned). Even the often referenced study on 'female husbands' by Amadiume[104] has been frequently quoted out of context, as Amadiume emphasised in her study that the 'marriage' of wives by influential women did not involve sexual relations between the 'female husband' and the wives. Rather, such 'female husbands' routinely hired males to carry out the procreating task. Dionne, Kim and Boniface[105] also studied the incidences of culturally permissive homosexual practices amongst the Yorubas in South Western Nigeria and found that it did not involve actual sexual intercourse between the women in polygamous marriages who regularly refer to their co-wives as 'Iyawo mi' ('my wife'). Such homes were headed by a male who was the husband to all the women and who alone was culturally permitted to have sexual intercourse with the women. They also studied the homosexual liaison amongst young boys in Dahomey, the present-day Benin Republic in West Africa, and found that although such liaisons included actual homosexual relations amongst the boys, it was usually a temporary resort by the boys to ease their raging libido pending when they are permitted to take wives having come of age. Even though some of such homosexual relations occasionally lasted for a lifetime, it was more of an aberration than a culturally recognised/approved homosexual orientation.

It becomes clear, therefore, that some of the studies referencing homosexual activities as prevalent across African communities have either been an overstatement of the data/findings/evidence or an erroneous contextual interpretation of the evidence gathered, e.g. the constant reference to the 'female husbands' in Eastern Nigeria as proof of culturally accepted homosexual activities in those communities.

Nevertheless, there is no questioning the findings by Foucalt, Epprecht, Achmat and Murray and Roscoe and other studies[106] showing that homosexuality as a sexual practice was neither alien to African communities nor a foreign concept introduced by

[104] I. Amadiume, *Male Daughters, Female Husbands: Gender and Sex in an African Society,* (n 84).
[105]K. Dionne and D. Boniface, 'Attitudes toward Homosexuality in Sub-Saharan Africa' (2013). Available at SSRN: https://ssrn.com/abstract=2250130.
[106] See, for instance, M. Gevisser and E. Cameron, eds., Defiant Desire: Gay and Lesbian Lives in South Africa, (New York: Ravan Press, 1995): E. Evans-Pritchard, *The Azande* (Oxford: Clarendon Press, 1971).

western colonialists. Different communities in Africa had same-sex practices in various forms, for diverse, mostly functional or spiritual purposes and with varying degrees of cultural recognition or acceptance. What is, however, alien to the various African communities is the concept of a 'homosexual or gay identity' i.e. persons seeking recognition of their sexual orientation as a distinct personification of their lifestyle and seeking inclusion, or what Jeffrey Weeks referred to as 'sexual citizenship'.[107] The next section, therefore, focuses on the issue of 'sexual citizenship' and its impact on the prevalent homophobia across the African continent.

2.6.2 Sexual Citizenship, Gay Identity and Homophobia in Africa

The previous section has established that homosexual acts/activities were practised in various degrees in different African communities prior to contacts with Europeans and colonisation. Although there is insufficient evidence to categorise homosexual activities as prevalent throughout the African communities, there is no evidence showing institutionalised homophobia or derision of such acts in communities where it was practised and in communities where it was not culturally recognised, it was largely because it was 'silenced through heteronormativity'.[108]

In respect of same-sex or homosexual marriages, studies have also established their presence and acceptability within different communities in Africa. Eskridge's seminal thesis on the history of same-sex marriage around the globe[109] highlights the various forms of same-sex marriages recognisable and practised within some of the communities in Africa. A significant portion of these homosexual marriages was modelled after the *berdache* tradition of transgenderal same-sex marriage practised by Native Americans.[110] A 'transgederal' marriage is one where one of the parties abandons an original gender identity and adopts the identity of the opposite sex in the marriage. In pre-colonial African communities, usually the younger male 'transitions' into a female and performs 'wifely' duties for the older male that acts as the husband

[107] J. Weeks, 'The Sexual Citizen', in M Featherstone (ed) *Love and Eroticism* (London: Routledge, 1999) 23.
[108] T. Msibi, 'The Lies We Have Been Told: On (Homo) Sexuality in Africa' (2011) (n 79) 2.
[109] W. Eskridge Jr, 'A History of Same-Sex Marriage' (1993) 79(7) Virginia Law Review 1419-1513.
[110] ibid.

in the marriage. Nevertheless, this practice also existed amongst women too, whereby the older woman (usually more successful and economically influential) adopts a male persona and marries 'wives' for herself as evidenced by the 'female husbands' practice amongst the Igbos of Eastern Nigeria in West Africa discussed by Amadiume in her work.[111] Several instances of these homosexual marriages have been documented in studies by Eskridge,[112] Judith Gay ("mummy-baby" marriages),[113] Blacking,[114] Krige,[115] and Evans-Pritchard ("boy wives")[116].

Eskridge rationalises the existence of homosexual marriages amongst these communities on the basis that 'marriage is not a naturally generated institution with certain essential elements. Instead, it is a construction that is linked with other cultural and social institutions, so that the old-fashioned boundaries between the public and private life melt away'.[117] Indeed, marriage for most of these pre-colonial African communities was a cultural and social institution intended to serve societal purposes of procreation and other socio-economic purposes. Therefore, where it suited them, various forms of homosexual marriages were culturally recognised to meet socio-economic needs (e.g. female husbands in Eastern Nigeria married wives to establish their economic dominance and preserve their economic status); grooming purposes (e.g. mummy-baby marriages in Lovedu, Eastern Africa); and concentration purposes (boy-wives amongst the Azande people in Sudan served as wives for warriors to enable them to concentrate on their warrior duties unencumbered by family life and caring for female wives and children).

Despite these recognised homosexual marriages, heterosexual marriages and heteronormativity remained the prevalent form of sexual relations and marriages in most African communities. Again, as with homosexual activities, the existence of these isolated cases of homosexual marriages, while proving that the concept was not alien

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[111] I. Amadiume, *Male Daughters, Female Husbands: Gender and Sex in an African Society* (n 84).
[112] ibid.
[113] See J. Gay, "Mummies and Babies" and Friends and Lovers in Lesotho'. In E. Blackwood, ed, *The Many Faces of Homosexuality: Anthropological Approaches to Homosexual Behavior* (New York : Harrington Park Press, 1986) 165.
[114] J. Blacking, 'Fictitious Kinship amongst Girls of the Venda of the Northern Transvaal', (1959) 59 Man 155.
[115] J. Krige, 'Woman-Marriage, with Special Reference to the Lovedu-Its Significance for the Definition of Marriage' (1974) 44 Afr. 11.
[116] E. Evans-Pritchard, 'Sexual Inversion among the Azande' (1970) 72 Am. Anthropologist 1428-34.
[117] W. Eskridge Jr, 'A History of Same-Sex Marriage' (n 106).

to the communities in Africa, is not pervasive enough to regard homosexual marriages as widespread throughout African communities. On the other hand, there is no evidence that these African communities, including those without institutionalised homosexual marriages, developed any cultural rejection of homosexual marriages.[118] It was either not material enough to warrant any cultural precepts against it or the various African communities were indifferent towards those who entered into 'marriage ties' with people of the same sex. For most communities, elaborate cultural practices and celebrations were only developed for heterosexual marriages, leaving those desirous of homosexual unions to remain in unofficial ties with their same-sex partners.[119]

However, while the literature shows that African communities generally treated homosexual activities and homosexual marriages in an accommodative or indifferent manner, literary studies are unanimous that there was no recognition of a distinct 'homosexual identity' or 'gay identity' in any of the African communities. Macintosh aptly encapsulated this point thus-

> Homosexuality is a concept that does not come out of Africa. The invention of the "homosexual role" developed around the nineteenth century in the West to denote a kind of sickness for those attracted to the same sex: the creation of a specialized, despised, and punished role of the homosexual keeps the bulk of society pure in rather the same way that the similar treatment of some kinds of criminals helps keep the rest of society law-abiding.[120]

As a descriptive term, therefore, homosexuality was a term initially introduced in the West to control social relations, while labelling those engaged in same-sex relations as deviant.[121] It was coined as a pathological derisory reference in the West to persons engaging in same-sex activities as a means of labelling them as socially deviant.[122] Over time, however, it coalesced into an identity reference in a personified form referencing a lifestyle that persons engaged in began seeking social recognition and

[118] R. Gaudio, 'Unreal Women and the Men Who Love Them' (n 80).
[119] K. Wasthon, *Families We Choose: Lesbians, Gays, Kinship (Between Men - Between Women: Lesbian & Gay Studies)* (New York: Columbia University Press, 1997).
[120] M. Mcintosh, 'The homosexual Role' (1968) 16(2) Social Problems 182–192, 184.
[121] T. Msibi, 'The Lies We Have Been Told: On (Homo) Sexuality in Africa' (2011) (n 79) 4.
[122] C. Summers, *The Gay and Lesbian Literary Heritage: A Reader's Companion to the Writers and their Works, from Antiquity to the Present*, (New York: Henry Holt, 1995).

respect for. Msibi[123] argues that being "Gay" is currently a political identity with its origins from Western struggles for civil rights in the 1960s and the Stonewall movement while Gamson calls it a movement for a 'public collective identity' noting that this movement has its own cultural and political institutions, festivals, neighbourhoods, and even its flag.[124] Stein and Plummer referred to the 'Gay Identity' movements as being 'among the most vibrant and well-organized social movements in the United States and Europe'.[125]

Although homosexual practices existed in different communities in Africa, they did not exist in personified forms of specific individuals whose sexual preferences were defined by their homosexual identities. Rather, homosexual activities in the African communities were defined by the purposes which they served and not the individual engaged in such acts. In this regard, there were no fixed individuals whose sexual preferences were immutably linked with the homosexual identity as different members of the communities could engage in homosexual activities for specific purposes or other functional reasons and return to their heterosexual lifestyles. In essence, homosexual activities (and even homosexual marriages) in the African communities that practised them were practical solutions to specific situations. Amory aptly conceptualised this point when she asserted that 'same-sex erotics, practised by many people in many different historical contexts, do not always necessarily lead to the emergence of a '"gay" identity'.[126] D'Emilio asserts that the 'gay identity focuses on an identifiable, visible, individual who engages in same-sex relations. Even in the West, the 'gay' identity has not always existed: instead, it is a product of history and has come to existence in a specific historical era'.[127] In current times, the 'Gay identity' has come to be represented in the form of the LGBTQ network which focuses on people with divergent forms of non-heteronormativity.

[123] T. Msibi, 'The Lies We Have Been Told: On (Homo) Sexuality in Africa' (2011) (n 79) 6.
[124] J. Gamson, 'Must Identity Movements Self-destruct? A Queer Dilemma' (1995) 42(3) Social Problems 390–407.
[125] A. Stein, and K. Plummer, 'I Can't Even Think Straight: "Queer" Theory and the Missing Sexual Revolution in sociology' (1994) Sociological Theory 179.
[126] D. Amory 'Homosexuality in Africa: Issues and Debates' (n 83), 23.
[127] J. D'emilio, 'Capitalism and Gay Identity'. In A. Snitow, C. stansell, and S. Thompson, eds, *Powers of Desire: The Politics of Sexuality* (New York: Monthly Review Press, 1983).

Explaining why the personification of a gay identity poses a problem for African communities, Epprecht asserted that 'the word "homosexuality", notably, suggests a clarity arising from a specific history of scientific enquiry, social relations, and political struggle that did not historically exist in Africa and still does not very accurately describe the majority of men who have sex with men or women who have sex with women in Africa'.[128] Msibi agrees with Epprecht's position, stating that 'it seems to me that Africans have always seen sexuality in highly complex ways, which cannot readily be translated into the predominant Western sexual categories'.[129] He went further to argue that 'issues of same-sex desire in Africa are therefore complex and have not historically been 'personified' in the way they have in the West. The vitriolic responses that we now witness from African leaders have to do largely with the "personification" of the "gay" identity'.[130]

Because homosexual activities within African communities were largely based on functional, temporal or spiritual societal requirements, conditions or situations, the explicit personification of the gay identity as a distinct sexual citizen demanding rights, respect and inclusion of society is not easy to assimilate within African cultural systems where the focus is on communal needs rather than individual rights and interests. Wasthon[131] warned against the ethnographic cataloguing of same-sex desires and practices around the world, arguing instead for the importance of local, community-based studies that highlight the complex constructions of sexuality as informed by race, class, gender, and most importantly, cultural understanding of the rights of individuals. Nevertheless, this is not to argue that non-heterosexual persons are in any way or form responsible for the inhuman and unacceptable treatment they are subjected to within African states. It seeks only to highlight the fundamental causes for the perception of non-heterosexuality in African communities.

Cross-cultural research has demonstrated that there is tremendous variability in the way different groups of people conceive of, talk about, and practice their sexuality

[128] E. Epprecht, *Hetero Sexual Africa? The History of an Idea from the Age of Exploration to the Age of AIDS* (Athens: Ohio University Press, 2008) 15.
[129] T. Msibi, 'The Lies We Have Been Told: On (Homo) Sexuality in Africa' (n 79) 8.
[130] ibid.
[131] K. Wasthon, *Families We Choose: Lesbians, Gays, Kinship (Between Men - Between Women: Lesbian & Gay Studies)* (n 116).

within their unique societal frameworks. As Mburu[132] argues, studies by Western Scholars on homosexuality in Africa have appropriated the 'Gay Identity' from their western contexts and applied it to African lives and politics and the rejection of this 'gay identity' by African communities have formed the basis for the prevalent homophobia across the continent.

Jeffrey Weeks' seminal thesis on 'sexual citizenship'[133] explains the basis for the rejection of the 'gay identity' by African communities. Weeks' analysed the two important moments in gay identities. First, the 'moment of citizenship' - a moment for making claims on society - a claim for recognition, respect, acceptance and inclusion. Second, the 'moment of transgression' – the politicisation of the movement to challenge the status quo and restructure societal conceptualisation and understanding of sexual relations from heteronormativity to sexual freedom flexible enough to include non-heterosexual activities. While, for Weeks, the second moment demarcates the lines of struggle, for African communities, the first moment is equally problematic. This is because cultural systems across African communities are generally premised on family life which is founded on procreation, expansion of the family and extended family life all of which are served by heteronormativity. The moment of 'sexual citizenship' threatens this heteronormative cultural foundation of many African communities and, therefore, meets with strong resistance. Msibi asserts that pervasive homophobia in African communities is 'a rejection of the visible, political, and personified "gay" identity, allowing people to live "out" lives: an identity that troubles the pretence of heteronormativity'.[134] He goes further to argue that 'it appears that "being gay" (personifying, and/or visibly claiming a gay identity) puts oneself at a greater risk of being attacked or harassed. I argue therefore that it is in part this visibility or "personification" that has contributed to the reactionary responses we witness in Africa today'.[135]

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[132] J. Mburu, 'Dreams and Delusions of an Incipient Gay and Lesbian Movement in Kenya'. In Different Rainbows: *Same-sex Sexualities and Popular Struggles in the Third World* (London: Gay Men's Press, 2001).

[133] J. Weeks, 'The Sexual Citizen', in M Featherstone (ed) *Love and Eroticism* (London: Routledge, 1999).

[134] T. Msibi, 'The Lies We Have Been Told: On (Homo) Sexuality in Africa' (2011) (n 79), 12.

[135] ibid.

Msibi's argument regarding the personification of the gay identity as the basis for the virulent opposition to homosexuality in Africa is also strongly connected to sexism, patriarchy and 'anxious masculinities' in African communities. Izubara[136] argues that sexuality and sexual conduct in African societies are socially produced and fed by oppressive patriarchal subjectivities and ideologies that try to instil a sense of what is normal. In this regard, she contends that the gay identity is a threat to the patriarchal organisation of society because it allows for the swapping of roles and the taking up of 'wifely' roles by other men, leading to 'anxious masculinities' by the patriarchal leaderships. Recognising this point, Msibi calls for the recognition of the intersection between homophobia and sexism in African communities, arguing that the rejection of the gay identity serves to entrench patriarchy and heteronormativity as legitimate and fixed in African societies with masculinity being reconstituted because of an array of social changes questioning the patriarchal authority—and supporting the rise of notions of the 'homosexual' as 'personified'.[137] Stein also argues that the wave of human rights claims based on gay identity sweeping across Africa has aggravated the already heightened fear of the 'anxious man' in Africa, fearing the undermining of patriarchal structures in these societies as a result of the opening up of sexual roles between the sexes.[138]

Several studies have shown the linkage between homophobia and sexism based on the rejection of the gay identity in South Africa where homophobia has gendered undertones with women being 'correctively' raped to make them become 'real' and 'proper' women.[139] These women were 'correctively' raped by men as punishment for their rejection of men for sexual intercourse as a result of their gay identity, showing the intersection between sexism and homophobia. These studies reveal that the personification of a 'gay identity' has coalesced the outright rejection of homosexuality

[136] C. Izugbara, 'Patriarchal ideology and discourses of sexuality in Nigeria' Presented at the Understanding Human Sexuality Seminar Series 2, December 2, Lagos, Nigeria. Available at <www.arsrc.org/downloads/uhsss/izugbara.pdf [accessed 01 December 2018> accessed 13 June 2021..

[137] T. Msibi, 'The Lies We Have Been Told: On (Homo) Sexuality in Africa' (n 79), 12.

[138] A. Stein, 'Make Room for daddy: Anxious Masculinity and Emergent Homophobias in Neo-patriarchal Politics' (2005) 19(5) Gender and Society 601–620.

[139] J. Nuel and M. Judge, 'Exploring Homophobic Victimisation in Gauteng, South Africa: Issues, Impacts and Responses (2008) 21 Acta Criminologica 3; T. Msibi, 'Not crossing the line: Masculinities and homophobic Violence in South Africa' (2009) 80 Agenda 50–54.

within African communities. In pre-colonial times when homosexuality was practised in different African communities without an explicit 'Gay Identity', it was not viewed as a threat to the patriarchal cultural systems because these homosexual acts were mostly functional or served spiritual or temporal purposes. The personification of the gay identity in individuals leads to the opening up of sexual roles between the sexes and this threatens the patriarchal systems in many of these communities.

Nevertheless, homophobia in African societies has even much deeper origins than the recent coalescing of gay identities. Many studies have linked homophobia in Africa to colonialism and the introduction of Christianity into various African societies.[140] Murray and Roscoe summarise this finding thus: 'the colonialists did not introduce homosexuality to Africa but rather intolerance of it—and systems of surveillance and regulation for suppressing it'.[141] Aldridge, on his part, asserted that 'the evidence suggests that it was the historical processes of colonization and missionization that consistently altered African sexual practice…virulent homophobia may be the real western perversion at work here'.[142]

Cock[143] posits that African societies at the dawn of the 19th century began to gradually shift towards a more hard-line stance on non-heterosexual activities and more rigid demarcation of gender and acceptable relations between them leading to harsh, and sometimes brutal, suppression of all non-heterosexual activities within these societies and it is this recent perception of aversion to non-heterosexual relations that the current generation has picked up on and is perpetuating as part of African cultures which they seek to perpetuate. Therefore, the assertion that non-heterosexual activities are alien to African cultures is merely a reference to the recently developed cultures in these African societies within the past two or three generations based on the experiences of their ancestors from colonialism, Christianisation and the introduction of European laws and values into African cultural systems.[144]

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[140] K. Ward, 'Same-sex relations in Africa and the debate on homosexuality in East African Anglicanism' (2002) 84(1) Anglican Theological Review 81-111.
[141] S. Murray, and W. Roscoe, eds. *Boy-wives and Female Husbands* (n 78), 25.
[142] R. Aldrich, *Colonialism and Homosexuality* (Routledge, 2003) 15.
[143] Jacklyn Cock, 'Engendering Gay and Lesbian Rights: The Equality Clause in the South African Constitution' (2003) 26(1) Women's Studies International Forum 35-45.
[144] ibid.

Cock's assertion does not identify the reason for the shift towards a hard-line stance on non-heterosexual activities within these African societies from a flexible, accommodative approach that persisted in historic times. Importantly, it does not recognise the impact that colonisation in Africa, the introduction of the Christian religion by the colonizers and the incorporation of laws/statutes from these foreign powers had on this changing attitude in African societies. As Amory[145] argues, the introduction of Christianity into African societies by the foreign (generally Christian) countries of Britain, France, Belgium and Portugal played a large role in entrenching an aversion to same-sex activities in these societies as the cardinal principles of Christianity frowns against same-sex relations.[146] The adoption of these cardinal principles by African societies gradually translated into their cultural practices where homosexuality began to be frowned upon by societies that were hitherto tolerant of them.

Amory's assertion explains the sudden shift in the perception of African societies towards non-heterosexual activities as, in addition to the cardinal principles of Christianity which frowned against such acts, the colonising powers also introduced their existing domestic laws into these societies which contained provisions outlawing non-heterosexual activities, branded 'deviant' or 'unnatural sexual intercourse' or 'sodomy'.[147] By implementing these laws as well as following the guiding principles of Christianity (and Islam), the general attitude in African societies permanently shifted to an intolerant perception of non-heterosexual activities.

Aligning Amory's assertion with Cock's, it is easy to see the link between the change in perception to same-sex activities in African societies from the dawn of the 19th Century and the colonisation, introduction of Christianity/Islam and statutes prejudicial to same-sex activities by the imperial powers in Africa at the dawn of the 19th Century. It becomes apparent that cultural perceptions of non-heterosexual relations are

[145]D. Amory, '"Homosexuality" in Africa: Issues and Debates' (1997) 25(1) African Issues 5-10.

[146] The introduction of Islam into several African societies by the Jihadists and Islamic movements from North Africa and Middle East also played a role in this regard as Islamic tenets also strictly forbid non-heterosexual relations with punishments extending to the death penalty in some countries with strict enforcement of its tenets such as Saudi Arabia. Islam played a major role in this regard in relation to Northern Nigeria and a large part of the Sub-Saharan African countries with large Muslim populations.

[147] Table 1.1 on page 4 shows the adoption of colonial laws by various African states prohibiting non-heterosexual activities. For instance, Section 352 of the Criminal Code Act in Nigeria outlawing same sex relations classed under 'unnatural sexual relations' was incorporated from British laws introduced during colonialism. Several African states, therefore, merely built upon these colonial laws with their recent legislative measures to further entrench the criminalisation of homosexuality.

dynamic and not immutable, as they can change due to internal or external factors which condition the attitude of the people of these societies to such activities. This, in turn, influences the legal treatment of such activities within these African jurisdictions.

2.6.3 Personification of Gay Identities and the Decriminalisation of Non-Heterosexuality in Africa: A Compromise Approach

While the literary studies on homosexual activities in African communities discussed in the preceding section establish the important role that the personification of gay identities played in entrenching virulent homophobia in these African communities, these literary studies overlook the core issue at stake - reconciling cultural perceptions of homosexual identities with legal protection of the human rights of non-heterosexual persons. In essence, how can this personification of gay identities be avoided while protecting persons engaged in non-heterosexual activities from violence and threats of violence?

The focus on the personification of gay identities as the bedrock of homophobia in African communities is because, although the introduction of Christianity played an important role in introducing homophobia, it does not fully explain the current trend of homophobia across the continent. A study conducted by Dionne and Boniface[148] found that there is little support for non-heterosexual rights among educated, urban, and younger Africans, which stands in sharp contrast with developed nations, where these three demographics have become increasingly tolerant of homosexuality over time. The western states that introduced religious homophobia into Africa have since shifted from such an approach but African states are still as homophobic as during colonial times, even amongst the younger generations that are less religious than previous generations.

This is because the major plank for opposing gay rights in Africa has been its 'unAfrican' nature or its threat to the cultural practice of the African communities. But

[148] K. Dionne and D. Boniface, 'Attitudes toward Homosexuality in Sub-Saharan Africa' (n 102).

considering that these cultural systems were not previously homophobic, it raises a strong question whether the recent coalescing of gay identities currently encapsulated in the LGBTQ network is an actual threat to the African culture predicated on heteronormativity, family life, procreation and social bonding amongst extended families. If this is so, is it possible to achieve a legal solution that protects the cultural systems of African communities without entrenching homophobia against homosexual persons? Is it possible for legal instruments to achieve this delicate balance?

Using South Africa as an example, it becomes clear that legal instruments can be used to delicately balance these two positions. South Africa is the only African state with explicit constitutional protection of homosexual activities with section 9 of the South African Constitution prohibiting any form of discrimination on the grounds of sexual orientation. According to Reddy,[149] lobbying by the LGBTQ network for this provision in the South African constitution began early, and especially during, the drafting of the Constitution.

Nevertheless, the incorporation of this provision in the South African constitution has not changed the cultural perception of gay identities in the country, as homophobia and 'corrective rape' of lesbians is still pervasive across the country.[150] However, the constitutional provision means that homosexuality is decriminalised in South Africa and a study by Msibi[151] and Nuel and Judge,[152] show that homophobic violence in South Africa is mostly against self-identified groups of homosexuals and not generally against persons engaging in homosexual acts. It would, therefore, appear that the focus of homophobia in South Africa where it is decriminalised is not on the act itself but the gay identities.

Against this background, and the fact that in 32 of the 54 African states, it is illegal to engage in consensual 'gay' sex,[153] decriminalisation of homosexuality without the explicit recognition of gay identities (as in the South African Constitution and

[149] V. Reddy, 'Homophobia, Human Rights and Gay and Lesbian Equality in Africa' (n 79) 12.
[150] T. Msibi, 'Not crossing the line: Masculinities and homophobic Violence in South Africa' (2009) 80 Agenda 50–54.
[151] ibid.
[152] J. Nuel and M. Judge, 'Exploring Homophobic Victimisation in Gauteng, South Africa: Issues, Impacts and Responses' (n 136).
[153] See Table 1.1 on page 4.

increasingly across the rest of the world) could potentially be an effective first step towards curbing the pervasive homophobia across the African continent. While current literature focuses on the human rights' recognition of gay identities and sexual minorities, the current virulent trend of homophobia across the African continent makes that argument look a far stretch in the nearest future. This thesis explores a more acceptable mid-ground approach that decriminalises homosexuality and frees gay persons from legal threats of imprisonment and violence, but stops short of conferring an explicit human rights' status on gay identities. The *reformed universalism* paradigm proposed in this thesis,[154] therefore, focuses on utilising existing human rights provisions in domestic constitutions and regional instruments to protect the rights of non-heterosexual persons without explicitly conferring a human right on their 'gay identity' which triggers virulent opposition from cultural and religious forces in African communities.

African communities have already shown a capacity to be tolerant of non-heterosexual activities when conducted in private, for functional purposes outside of the core mainstream of societal focus. The mainstreaming of gay identities and its threat to the patriarchal, heteronormativity of African communities and their strongly held religious beliefs will continue to elicit stringent rejection by African communities in the interim. By decriminalising it but not conferring explicit legal recognition on these gay identities (at least not now), the immediate threat to the cultural foundations of many African communities is lifted, creating an avenue for gradual intersectional development of tolerance and acceptance of gay identities over time up till the point where cultural permissiveness has developed significantly to allow for explicit recognition of gay identities by legal instruments.

2.7 Conclusion

This chapter has examined the key areas relating to non-heterosexual rights and the growing debates regarding their human rights status in the global arena. It analysed the position under international law and the stringent opposition by some nations to the legal recognition of non-heteronormative sexual rights on religious and cultural

[154] Reformed universalism is discussed in detail in Chapter 3.6, page 126.

grounds. It also examined the place of non-heteronormative sexual rights under natural law thinking and why natural law thinkers like John Finnis and St Aquinnas generally opposed the recognition of non-heteronormative sexual rights on account of its non-conformity with what is regarded as the natural, biological compatibility of male and female sexual organs.

The major flaw of the natural law opposition to non-heteronormative sexual activities is that it presupposes that the essence of sexual activities in humans is exclusively procreative, ignoring the emotional connection and satisfaction derivable from sexual activities beyond its procreative function. This presumption overlooks the utilisation of sexual activities for expressing emotional and intimate connections between persons beyond just procreation even amongst heterosexual persons.

Notwithstanding the shortcomings of the natural law view of non-heterosexuality, the moral values of a society inevitably influence the legal regulation of permissible sexual activities in states across the globe. As the analysis of incest shows, legal prohibition of specific sexual activities in an overwhelming number of states is largely based on moral justifications linked to the unnaturalness or immorality of the sexual act in question. Therefore, African states are not alone in utilising moral values to reject specific sexual activities as many developed and developing states rely on their moral values to criminalise specified sexual activities they consider unnatural, immoral or a threat to the family unit.

This chapter also discussed the historical development of religious and cultural objections to non-heterosexuality in African states. It reviewed the literature on the practice of non-heterosexuality in African states and demonstrated that while homosexuality has always featured in African societies, it was not pervasive and was mostly for functional purposes and not based on the ‘gay identity’ of the participants. The coalescing of the gay identity in recent decades, the impact of Christianity and colonialism by European powers and the threat to the patriarchal foundations of African societies are the key factors behind the stringent opposition to non-heterosexuality that has developed in African societies within the past three generations. Consequently, shifting the focus away from the gay identities of non-heterosexual persons and concentrating on the protection of their inalienable human rights has the potential to

enshrine the protections of non-heterosexual rights in African societies while avoiding the stringent oppositions at the cultural, religious and political levels.

The next chapter conceptualises this innovative approach to non-heterosexual rights in Africa that promotes the incorporation and protection of these rights from legal instruments indigenous to the African states both at the regional and domestic levels while deemphasising the gay identity, thereby obviating the concerns by African states about the assumed imposition of western norms on them and obviating the threat to the cultural foundations of these African societies.

CHAPTER THREE

Conceptualising A *Reformed Universalism* Approach to Non-Heterosexual Rights in Africa

"We cannot let cultural relativism become the last refuge of repression-[1]

3.1 Introduction

This chapter argues that non-heterosexual rights are protectable under current international human rights instruments as inviolable rights applicable to all humans and not as unique rights specifically for non-heterosexual persons or their sexual orientation. The protection of this right does not relate to the sexual orientation of non-heterosexual persons but stems from two major platforms – 1) belonging to a defined protected characteristic under international human rights instruments – SEX;[2] and 2) the right to privacy of all individuals regarding their life, family choices and other activities recognized under international human rights instruments. The former platform invokes the equality and non-discrimination protections under international human rights instruments while the latter derives from the right to privacy under international human rights instruments.

Considering the widespread acceptance and ratification of the major international human rights instruments,[3] it is argued that the rights of non-heterosexual persons are already an ingrained aspect of international human rights protection and, notwithstanding the reservations by a bloc of states mostly in Africa and the Middle

[1] E Sciolino, 'US. Rejects Notion That Human Rights Vary with Culture', *New York Times* (June 15,1993) 24.

[2] 'Sex' in the context of this chapter refers to the biological state of being 'Male' and 'Female' and not the physical act of sexual intercourse, sexuality or sexual orientation.

[3] The major human rights instruments include the Universal Declaration of Human Rights 1946, The International Covenant on Civil and Political Rights (1966); The International Covenant on Economic, Social and Cultural Rights (1966); and the Convention on the Elimination of All Forms of Discrimination against Women (1979).

East, these rights are inviolable as they are also ingrained in the domestic and regional human rights instruments within these opposing states.

This approach to understanding the legal protection of non-heterosexual rights is termed a *reformed universalism* approach. Although largely predicated on the universalism of human rights, the *reformed universalism* approach argues that there are no special/unique 'sexual rights' of non-heterosexual persons protected under international human rights instruments, and none can be read into them. Thus, the focus of universalism on protecting the 'sexual orientation' of non-heterosexual persons under human rights instruments and pushing for the explicit recognition of these rights (e.g. the Yogyakarta Principles on Sexual Orientation)[4] is a faulty approach and unlikely to succeed. Instead, the reformed universalism approach focuses on the general rights of all humans to equality/non-discrimination/privacy and advances the protection of non-heterosexual rights from this view, not as unique 'sexual rights', but as rights available to both heterosexual and non-heterosexual persons. More importantly, the reformed approach argues that these rights are not only ratified and accepted, but already ingrained and applicable within the domestic *corpus juris* of African states, therefore, nullifying the cultural relativism objection to the application of these rights to non-heterosexual persons within African states.

The chapter first examines the universalism and cultural relativism approaches to human rights and their shortcomings; after which it examines and excludes alternative middle-ground concepts, such as the blended universalism approach and weak cultural relativism. The chapter then conceptualises the *reformed universalism* approach on the two platforms of equality/non-discrimination and privacy rights.

3.2 Universalism of Human Rights

The universality of human rights is founded on the premise that all humans are equal and the rights that they hold on account of being human are the same regardless of

[4] International Commission of Jurists (ICJ), Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007, available at: https://www.refworld.org/docid/48244e602.html [accessed 25 June 2020].

local peculiarities, i.e. the state or culture into which they are born or dwell.[5] As Sweeney puts it: ‘the universality of human rights is founded on the understanding that if all humans are equal, then the rights that they hold as a result of being human are the same regardless of the culture into which the individual happens to be born’.[6]

The concept of human rights under international law is premised on a universalist perspective as encapsulated in the Universal Declaration of Human Rights (UDHR) 1948, the International Covenant on Civil and Political Rights (ICCPR) 1966 and the International Covenant on Economic and Social Rights (ICESR) 1966. The language of these instruments are broadly couched in ways signifying their application to ‘all’, ‘no-one’, and ‘everyone’ across different cultures, religions and social values.

This universality of human rights underpins the major international instruments espousing human rights beginning with the Universal Declaration of Human Rights 1948[7] and was restated in the Vienna Declaration of Human Rights 1993 which emphasised that 'the universal nature of these rights and freedoms is beyond question' and that 'all human rights are universal, indivisible and interdependent and interrelated'.[8] Despite numerous reservations by states for cultural/religious reasons, the almost unanimous adoption of the international human rights instruments by states around the world is also a testament to the relatively uncontroversial, uncontested nature of the universality of human rights, as a general principle.

3.2.1 Origin of the Universalism of Human Rights

A core concept of human rights is that those rights belong to everyone, no matter what status that person holds in society. This notion of universalism underpins human rights. Every individual has a claim to the enjoyment of human rights, wherever the individual

[5] J Shestack, .The philosophical foundations of human rights. in Symonides (ed) *Human Rights: Concepts and Standards* (Ashgate /Dartmouth Aldershot 2000).

[6] James Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the post-Cold War era.', (2005) 54(2) International and Comparative Law Quarterly 460.

[7] UN General Assembly. (1948). "Universal declaration of human rights" (217 [III] A). Paris.

[8] Preamble to the Vienna Declaration and Programme of Action, 'Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, available at https://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf [accessed 25 June 2020].

resides.[9] Before the 19th century, the concept of the universalism of human rights was virtually unknown, as empires, kingdoms and other state entities acted capriciously in line with their idealistic or imperialistic dictates without any reference to a minimum standard for treatment of human beings. Thus, before the First and Second World Wars, despite centuries of flagrant mistreatment of humans in various ways including slavery, racial and ethnic cleansing, genocide etc., there was little attention for the protection of rights deemed universal to all humans.[10] Nevertheless, within several states (particularly Western Europe and the United States), some of these individual rights now constituting universal human rights already received important recognition in their domestic jurisdictions. For instance, the concept of a 'Bill of Rights' was already an established concept under English law dating back to the Magna Carta of 1215; and the Declaration of Independence and the United States Constitution already recognised the principles of liberty, equality and right to dignity of individuals.[11] Thus, while there were concerns for the protection of individual rights within several domestic jurisdictions, the concept of positive human rights law applicable globally as a minimum benchmark for the treatment of individual rights was lacking at the international level.

However, the horrific consequences of World Wars I and II left a legacy that great harm could result in allowing individual states to define and pursue their values. By establishing racial purity laws that called for the extermination of 'lesser' human beings, Adolf Hitler of Germany had shown the world how destructive an individual culture could become without a universal, overriding check. In essence, World War II served as a stark reminder to the world that the reliance on cultural relativism, where one state/culture could solely determine the scope of rights, regardless of human dignity and life, could have horrendous results.[12] This was the wake-up call leading to the drafting of the UDHR in 1948 to provide some basic universal rights of humans which cannot be infringed by states as they are integral to the dignity and integrity of

[9] E Reichert, 'Human Rights: An Examination of Universalism and Cultural Relativism' (2006) *Journal of Comparative Social Welfare* 15.

[10] J Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, 1999) 13.

[11] See the Fifth to Ninth Amendments to the United States Constitution, available at https://www.senate.gov/civics/resources/pdf/US_Constitution-Senate_Publication_103-21.pdf [accessed 27 June 2020].

[12] E Reichert, 'Human Rights: An Examination of Universalism and Cultural Relativism' (n 9) 4.

humans.[13] The UDHR has gained global acceptance amongst virtually all states around the world and has become almost like a global constitution of human rights upon which international, regional and domestic enunciation of human rights policies and frameworks are based. This is evidenced by the fact that despite being a non-binding UN General Assembly Resolution, it has influenced or been adopted in most national constitutions drafted since this date[14] and it also gave rise to the ICCPR and ICESR that have been signed and ratified by over 150 states each.[15]

Even today, the UDHR still maintains its fundamental relevance as there are new areas of human rights violations around the globe that are threatened by the relativist interpretation of human rights and dignity in different states and cultures. For instance, the treatment of non-heterosexual persons as 'lesser humans' or 'perverted humans' to be brutally dealt with through repression and violence as can be seen in several African states regardless of the rights of these persons to dignity and freedom from violence, is reminiscent of the pre-1948 era where states treated people only following their national/cultural values.

Nevertheless, the authentic global scope of the UDHR at the time of its adoption remains a question because while it represented a significant form of international recognition of the inalienable rights of humans all around the world,[16] the origins of the Declaration were rooted in political landmarks in Western history, such as the Magna Carta of England (1215), the French Revolution (1789) and the American Bill of Rights (1791). It was, therefore, a reflection of largely western ideologies which confers preference on individual rights over communal interests.[17] Thus, even though the drafting of the UDHR included notable experts from non-western jurisdictions, the declaration itself largely reflected western ideological framing of rights derived from

[13] J Ife, *Human rights and social work: towards rights based practice*, (Cambridge University Press, 2001) 5.
[14] United Nations Human Rights Commission; Office of the High Commissioner, 'The Core International Human Rights Instruments and their monitoring bodies' (UNHCR, 2018) <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> accessed 12 June 2020.
[15] ibid.
[16] Although there remain questions about the extent to which the UDHR represents global consensus considering the composition and participation of the UN at the time of its drafting. See Robert Churchill, *Human Rights and Global Diversity* (Routledge, 2016) 44, 48.
[17] 'Economist, Globalisation and prosperity: going global', *The Economist* (8–14 December) 67, 69.

western history, giving room to the claim of imperialism often labelled against the Declaration by African and other non-western states.[18] Ignatieff asserts that-

> Human rights doctrine is now so powerful, but also so unthinkingly imperialist in its claim to universality, that it has exposed itself to serious intellectual attack. These challenges have raised important questions about whether human rights norms deserve the authority they have acquired: whether their claims to universality are justified, or whether they are just another cunning exercise in Western moral imperialism.[19]

A major criticism of universalism is that it perpetuates colonialist practices, allowing one group to assume superiority over the other, and bases values, ethics, power on that assumption. This criticism focuses on the interpretation of these universal rights whereby western jurisdictions utilise their interpretations of the contents of these rights and require compliance with such interpretation by other non-western jurisdictions. For instance, the interpretation of the right to equality in the UDHR by western jurisdictions to include the right to equal marriage by non-heterosexual persons is not shared by many countries in Asia, the Middle-East and Africa which consider this interpretation to not be within the contemplation of the drafters of the Declaration.

While the origin and interpretation of the contents of the UDHR may give rise to claims of imperialism, justified or not, it is arguable that the idea of adopting a universalist approach to human rights was not a western imposition but a globally accepted notion from a world still reeling from the devastating consequences of the relativist interpretation and ascription of rights to humans based on individual cultural values which gave rise to the devastation wrought by World War II. This is evidenced by the widespread acceptance of the contents of the UDHR and other international human rights instruments built on it by countries from all continents around the globe (despite some of the reservations on cultural/religious grounds).

[18] M. Ignatieff, 'The attack on human rights'. *Foreign Affairs*, November/December 2001: 102–116.
[19] ibid 114.

3.2.2 Theoretical Basis of Universalism of Human Rights

The universalism of human rights is the understanding that human rights norms are universal 'because they adhere to the human being by virtue of being human, and for no other reason'.[20] Henkin phrased the argument thus-

> human rights are the due of every human being in every human society. They do not differ with geography or history, culture or ideology, political or economic system, or stage of development. They do not depend on gender or race, class or status. To call them "rights" implies that they are claims "as of right"' not merely appeals to grace, or charity, or brotherhood, or love; they need not be earned or deserved. They are more than aspirations, or assertions of "the good," but claims of entitlement and corresponding obligation in some political order under some applicable law.[21]

This approach is predicated on the foundationalist understanding of human rights which 'grounds the nature of human rights in a pre-political substratum of moral thought to which positive legal-political institutions ought to conform'.[22] By utilising the 'human' state as the basis for the accrual of these rights, universalism rejects any limitation or distinction on the scope of these rights based on cultural, political or any other human differentiation. Ensuring equality amongst humans across all race, geography and socio-cultural and political settings is the basic premise of the universalism concept by guaranteeing these rights to 'all' persons and restricting the infringement of some of the basic human freedoms such as life, liberty, dignity and non-discrimination.

The UDHR was drafted in the immediate aftermath of the Second World War in a bid to prevent the repeat of the widespread violation of human rights witnessed during one of the bloodiest conflicts in human history. Thus, its founding premise was the universality of the rights proclaimed therein. In the preamble, the UDHR recognises the 'inherent dignity and equal and inalienable rights of all members of the human family' and extends the rights therein to 'all peoples and all nations'. This is a clear adoption of universality. Other international instruments such as the ICCPR, ICESR

[20] Matt Robbins, 'Powerful States, Customary Law and the Erosion of Human Rights through Regional Enforcement' (2005) 35 *CAL. W INT'L L.*J. 275, 294.
[21] L Henkin, 'Rights: Here and There' (1981) 81 *COLUM. L. REv*. 1582, 1582.
[22] A Sangiuliano, 'Towards a Natural Law Foundationalist Theory of Universal Human Rights' (2014) 5(2) *Transnational Legal Theory* 1.

and Convention on the Eradication of all Forms of Discrimination against Women (CEDAW) followed the UDHR approach and adopted the universalist approach to human rights by phrasing their provisions in a broad, universalist language. For instance, Art. 6 of the ICCPR stipulates that 'Every human being has the inherent right to life' and Art 1 of the ICESR stipulates that 'all peoples have the right of self-determination.

3.2.3 Pushbacks on Universalism of Human Rights

While these international human rights instruments have been adopted by an overwhelming majority of states in the world, the universalist perspective of their application is constantly challenged by a sizeable number of blocs formed around cultural (African countries, Asian countries) or religious (Muslim-Majority countries) ethos.[23]

The pushback on the universalist approach has yielded other multilateral international instruments by these blocs resulting in the African Charter on Human and Peoples' Rights 1989, the Cairo Declaration on Human Rights 1990 and the Bangkok Declaration on Human Rights 1993 by African, Muslim Majority and Asian countries respectively.[24] These instruments instituted relativist interpretations of these human rights values by subjecting them to cultural and socio-economic values of the signatory states.[25] Conversely, regional human rights instruments from in developed/western states have generally stuck to the universalist terms of the international instruments. Thus, the European Convention on Human Rights (ECHR)[26] and the American

[23]C Brown, 'Universal human rights: A critique' (2007) 1(2) The International Journal of Human Rights 2.

[24] J Russell, 'Human Rights: The Universal Declaration vs The Cairo Declaration' (*London School of Economics,* 2004)12 <https://blogs.lse.ac.uk/mec/2012/12/10/1569/> accessed 09 November 2019; M Davis, S Hom and A D'Amato, 'Chinese Perspectives on the Bangkok Declaration and the Development of Human Rights in Asia' Proceedings of the Annual Meeting (American Society of International Law) Vol. 89, Structures Of World Order (April 5-8, 1995) 7; S Corrêa and R Parker, 'Sexuality, Human Rights, and Demographic Thinking: Connections and Disjunctions in a Changing World' (2004) 1(1) Journal of NSRC 3.

[25] For instance, the Preamble to the African Charter on Humans and People's Rights requires that the rights in the Charter should be interpreted subject to the unique historical, cultural and religious values of African states.

[26] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 1950 available at https://www.echr.coe.int/Documents/Convention_ENG.pdf [accessed 21 June 2020].

Convention on Human Rights[27] are couched in broadly universalist language without relativist provisions/contents unlike those in the ACHPR or Bangkok Declarations.[28] This disparity may reflect the imperialist objections of developing states as one of the foundations for enforcing cultural relativist approach to human rights instruments, fearing the imposition of western standards of rights on them.

The Cairo Declaration, for instance, recognizes the universal human rights in the UDHR but subjected their interpretation to their compatibility with Sharia law and Islamic precepts amongst the member states of the Organisation of Islamic Cooperation.[29] For example, article 2 restates the UDHR's guarantee of the right to life for all humans, but adds 'except for a shari'ah prescribed reason'. 'Shari'ah prescribed reason' can include the prescription of the death penalty for gays, lesbians and other non-heteronormative activities as is currently practised in countries like Saudi Arabia, Sudan and Northern Nigeria where homosexuals are stoned to death, beheaded or otherwise executed for their non-heterosexual orientations.[30] Also, other articles in the Cairo Declaration subject fundamental human rights to Shari'ah's precepts, for example, article 22 states that 'everyone shall have the right to express his opinion freely in such manner as would not be contrary to principles of Shari'ah.' Finally, article 24 of the Cairo Declaration stipulates that 'all the rights and freedoms stipulated in the Declaration are subject to the Islamic Shari'ah'.

The African Charter, on its part, while acknowledging the importance of the rights expressed in the UDHR, provides in its preamble that these rights should be understood within the context of the 'virtues of the historical tradition and the values of

[27] American Convention on Human Rights: "Pact of San José, Costa Rica". Signed at San José, Costa Rica, on 22 November 1969, UNTS Vol. 1144. I-I7955.

[28] Although the ECHR permits a 'margin of appreciation' for member states in the interpretation of the convention rights, it has been argued that this does not imply a relativist interpretation of the rights by member states. See James Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the post-Cold War era.', (2005) 54(2) International and comparative law quarterly 459-474. The concept of margin of appreciation is discussed further in Chapter 3.2.4, page 105 of this thesis.

[29] Cairo Declaration on Human Rights in Islam,Aug. 5, 1990, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc.A/CONF.157/PC/62/Add.18 (1993).

[30] Amnesty International UK, 'LGBTI equality', (Amnesty International Report 2019, London) 18.

African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights'.[31]

The Bangkok Declaration offers a more insightful perspective on the regional pushbacks on the universality of the human rights provisions in the UDHR. Preamble 8 of the Declaration attempts to reconcile the universalist and relativist positions on human rights by recognizing that 'while human rights are *universal in nature*, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various *historical, cultural and religious backgrounds*'.[32] The Bangkok Declaration, therefore, espouses a middle-ground approach to the universalism of human rights whereby a universalist view of these rights is used as the foundation of protecting the rights but a relativist approach is adopted in interpreting these rights based on the historical, cultural and religious backgrounds of the specific state involved. This approach is the fulcrum of the weak cultural relativism model discussed later in this chapter under cultural relativism.[33]

3.2.4 Universalism and the Margin of Appreciation

Universality is not the same as uniformity[34] and, as Sweeney argued:

> Human rights are generally universal, but in becoming embedded in society some local particularities affect the substantiation of human rights and result in specific qualifications. It is the interaction of thick and thin concepts of human rights that recognition of a margin of appreciation facilitates rather than the relativist subordination of human rights to local culture.[35]

The recognition of specific local qualifications of universally applicable human rights does not derogate from the universality of these rights but allows some flexibility for

[31] African Charter on Human and Peoples' Rights ("Banjul Charter") CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
[32] Final Declaration Of The Regional Meeting For Asia Of The World Conference on Human Rights 1993 (United Nations Digital Library, 1993) available at https://digitallibrary.un.org/record/170675 [accessed 17 June 2020].
[33] Chapter 3.5, page 123.
[34] J. S Davidson, 'Human Rights, Universality and Cultural Relativity: In Search of a Middle Way' (2001) 6 Human Rights Law and Practice 97.
[35] James Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the post-Cold War era.', (n 6) 471.

states in the implementation of the rights within domestic jurisdictions. This flexibility is referred to as a 'margin of appreciation' and it is a vital aspect of human rights protection systems in international and regional human rights instruments. The application of the margin of appreciation in Europe has been subject to various academic debate by leading scholars in the field. Arai-Takahashi argued that the genealogical development of the doctrine and its *modus operandi* has lent it to several meritorious criticisms regarding its impact and application in interpreting the various rights and obligations of EU member states.[36] Yourow analysed various European cases regarding the application of the margin of appreciation and argued that the doctrine is a useful tool for the European courts to respect national sovereignty while affirming the fundamental values of the EU.[37]

In the European Convention of Human Rights (ECHR),[38] the Preamble states that: 'the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention'. The allowance of a margin of appreciation in the ECHR has raised questions on whether contracting parties are given too much latitude in the way they choose to protect or limit the exercise of human rights. This question extends to whether the margin of appreciation amounts to the incorporation of cultural relativism into the convention since it permits contracting states to subject some aspects of human rights to local circumstances in their implementation. Nevertheless, a critical look at the margin of appreciation in the ECHR reveals that rather than embed relativism, it merely grants contracting parties 'some space in which they can balance for themselves conflicting public goods'.[39]

However, this view of 'margin of appreciation' not embedding relativism bias is mostly due to the unique wording of the ECHR, as other regional instruments have broader

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[36] Y Arai-Takahashi, 'The margin of appreciation doctrine: a theoretical analysis of Strasbourg's variable geometry' in *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, *2*, 62.

[37] Howard C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Kluver Law International, 1996).

[38] Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950.

[39] James Sweeney, 'Margins of Appreciation' (n 6) 462.

expressions of the margin of appreciation that can generally be viewed as embedding relativism in the implementation of human rights. The Bangkok Declaration, for instance, stipulates in its preamble that the universality of human rights must be understood within the context of regional particularities and various historical, cultural and religious backgrounds. The African Charter, similarly, requires that the universal human rights in the Charter should be understood within the context of the 'virtues of the historical tradition and the values of African civilization'.

These provisions can be considered as the incorporation of a margin of appreciation in the instruments, allowing state parties some leeway in implementing these rights based on their historical, cultural and religious peculiarities. Unlike the ECHR, the detailed stipulation of the basis of the margin of appreciation and specific identification of historical, cultural and religious factors as the basis for the margin of appreciation creates a more extensive leeway for state parties to limit the application of human rights on relativist basis. Unsurprisingly, these provisions are found in regional human rights instruments of African and Asian states that are primarily opposed to the unbridled application of universal human rights to their domestic jurisdiction on account of its supposed western bias.

The implication of this broader margin of appreciation in the regional human instruments of African and Asian states is not that it negates the universality of the human rights under the instruments, but it allows a relativist interpretation of the universal rights in accordance with local circumstances and peculiarities. This gives rise to what can be termed a *blended universalism* approach to human rights which incorporates universalism and relativism within a single conceptual framework with the rights expressed in a universalist form but the interpretation of those rights influenced by relativist factors. This approach is discussed further later in this chapter.[40]

3.2.5 Universalism of Non-Heterosexual Rights

In relation to non-heterosexual rights, there is no direct binding human rights instrument promoting these as universal rights. The closest to an international

[40] Chapter 3.4, page 119.

instrument on the subject is the Yogyakarta Principles[41] which is a non-binding declaration of non-heterosexual rights related to sexual orientation and gender identity by a group of experts. Nevertheless, the universalism of human rights in relation to non-heterosexuality can be found in the expressions of some of the basic human rights applicable to non-heterosexuality including the right of privacy, equality, freedom from discrimination, freedom from unlawful arrest, the dignity of persons, freedom of expression, freedom of association and liberty.[42] In this regard, the Yogyakarta Principles carefully avoided declaring positive, affirmative rights uniquely related to sexual orientation issues but rather restricted itself to a restatement of existing international human rights law as applicable to non-heterosexual persons which are regarded as universal. These principles include the right to the universal enjoyment of human rights,[43] the right to equality and non-discrimination,[44] the right to life,[45] the right to privacy,[46] the right to fair trial[47] etc.

These human rights have been interpreted by various regional and international judicial bodies as universal and inviolable. In *Dudgeon v. United Kingdom*,[48] the European Court of Human Rights (ECtHR) invalidated the criminalisation of homosexual acts between consenting adults in the UK as being discriminatory and a breach of privacy. The Inter-American Court of Human Rights applied the same universalism concept of non-discrimination in *Yatama v. Nicaragua*[49] to strike down laws prejudicially affecting non-heterosexuality in Nicaragua. A similar view was reached by the United Nations Human Rights Committee (UNHRC) in *Toonen v. Australia*[50] which resulted in the quasi-judicial body's finding that Australia's anti-sodomy law was discriminatory.

[41] International Commission of Jurists (ICJ), Yogyakarta Principles (n 4).
[42] M O'Flaherty & J Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' (2008) 8 *HUM. RTS. L. REV*. 207, 214-31.
[43] Principle 1.
[44] Principle 2.
[45] Principle 4.
[46] Principle 6.
[47] Principle 8.
[48] (1981) 23 Eur. Ct. H.R. (ser. A) at 45.
[49] Yatama v. Nicaragua, 2005 Inter-Am. Ct. H.R. (ser. C) No. 127, at 375 (June 23, 2005).
[50] (1994) ECOSOC, UNHRC, Comm. No. 488/1992, $ 8.7, U.N. Doc. CCPR/C/50/D/488/1992; See also Young v. Australia, ECOSOC, UNHRC, Comm. No. 941/2000, 10.4, U.N. Doc. CCPRIC/781D/941/2000 (2003).

Consequently, universalism here applies, not specifically to non-heterosexuality as a protected class or characteristics, but to the freedom of non-heterosexual persons to enjoy the basic human rights that heterosexual persons enjoy.[51] This distinction is crucial because, as O'Flaherty & Fisher aptly stated, the experts drafting the Yogyakarta Principles were careful not to include affirmative non-heterosexual rights such as the right to same-sex marriage, adoption of children etc. as these 'rights' have not acquired a consensus of international recognition and including them would have undermined the objectives of the Yogyakarta principles as a restatement of international human rights law on sexual orientation and gender identity.[52] The affirmative non-heterosexual rights can, however, still be attained by utilising the universal human rights of equality of all persons, privacy and, particularly, non-discrimination, for it can be considered discriminatory to deny non-heterosexual persons the right to marry or adopt children that are granted to heterosexual persons.[53] Indeed, the landmark US decision legalising non-heterosexual marriage throughout the US in *Obergefell v. Hodges*[54] was predicated on the equality clause in the US Constitution, similar to the universally accepted provision on equality of all persons as provided under the UDHR and ICCPR. Similarly, the European Court of Human Rights (ECtHR) in *X and Others v. Austria*[55] held Austrian law to be in violation of the universal human right to non-discrimination by prohibiting a lesbian couple from adopting children. Thus, while there are no affirmative universal non-heterosexual human rights, per se, the surrogate reliance on universal human rights in international instruments has been used to protect non-heterosexual rights.

3.2.5 Shortcomings of Universalism in Non-Heterosexual Rights Discourse

The absence of affirmative universal human rights on non-heterosexuality is a telling sign of the lack of a sufficient international level of acceptance of non-heterosexuality. The surrogate reliance on general human rights provisions to protect non-heterosexual

[51] P Tahmindjis, 'Sexuality and International Human Rights Law' (2005) 48 *Journal of Homosexuality* 9.
[52] M O'Flaherty & J Fisher (n 40) 14.
[53] D Brown, 'Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles' (2010) 31 Mich. J. Int'l L. 821.
[54] (2015) 576 U.S.
[55] X and Others v. Austria - 19010/07 Judgment 19.2.2013 [GC].

rights is in direct contrast, for instance, to the institution of specific international instruments to affirmatively and positively protect women's rights by the Convention on the Eradication of All Forms of Discrimination Against Women (CEDAW). Women are human beings just like men, equal under the law and entitled to freedom from discrimination based on sex as well as entitled to privacy, liberty and freedom from infringement on the enjoyment of their basic rights. Addressing issues affecting the violation of women's rights is, therefore, possible through the reliance on the universal human rights principles of equality and non-discrimination under the UDHR and ICCPR. Notwithstanding, CEDAW was still instituted to make specific provisions addressing the unique challenges women face in everyday life.[56] More importantly, articles 2 and 5 of CEDAW emphatically affirm the universalist perspective of the Convention's provisions by mandating all states to modify customary and cultural practices that discriminate against women. The widespread ratification of CEDAW[57] and its implementation has elevated women's human rights to a specific class of universal human rights.

Thus, while CEDAW affirms that women are entitled to all the universal human rights under UDHR and ICCPR, it further provides additional rights to protect women as a class of human beings deserving of special protection under international human rights law taking into account the enshrined violation of women's rights over the centuries. On the other hand, notwithstanding the documented violence, oppression and denial of rights non-heterosexual persons have historically faced (and still face), they are not regarded under international law as a specially protected class deserving of unique international instruments to enshrine their human rights, but the focus in international law is ensuring equality with heterosexual persons.

While there may be validity in arguing that non-heterosexual persons do not require specially framed rights to enable them to achieve protection of their rights in a heteronormative world since the human rights expressed in the UDHR are intended to

[56] UN Human Rights Committee: Office of the High Commissioner, 'Protecting and empowering girls and demanding equality': Joint statement by the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child on the occasion of the International Day of the Girl (11 October 2019) 2, available at https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Statements.aspx [accessed 09 June 2020].

[57] CEDAW has been ratified by 189 states. See United Nations, 'CEDAW: State Parties' <https://www.un.org/womenwatch/daw/cedaw/states.html> accessed 12th January 2022.

apply equally to all persons, this argument overlooks the special hurdles placed in the path of non-heterosexual persons by administrative policies, socio-cultural biases/practices and economic restrictions on account of their sexual orientations which limits and/or adversely affects their opportunity to attain the same level of protection as heteronormative people. Thus, even if the same rights of freedom of expression, movement, dignity and the other UDHR rights apply equally to all persons regardless of sexual orientation, positive actions in terms of specifically designed legal instruments may be required to equalise the opportunity of non-heterosexual persons to the protection of their human rights.

Equality for disadvantaged groups, therefore, sometimes require positive/affirmative actions to be adopted to elevate the disadvantaged group to a place of parity with others. For instance, creating disabled access to buildings is a means of ensuring disabled persons can equally access the building as non-disabled persons and is more effective than simply declaring that everyone has the right of access to the building, knowing that disabled persons will face unique challenges in accessing the building on account of their physical characteristics. This specific action towards disabled access is predicated on the pre-existing right of disabled persons to equality with non-disabled persons but required additional positive steps/actions to actualise.

The problem with applying universalism to non-heterosexual human rights is the many flaws that are inherent in universalism as a basic tenet of international human rights law. First, there is a strong feeling of cultural bias, imperialism and cultural homogenisation inherent in the ascription of universal tags to the human rights provisions under the UDHR and ICCPR.[58] Nhina Lee argues that the UDHR 'reflects western values that put more emphasis on the individual than anything else, unlike non-Western belief and value systems which view the individual as a part of something bigger than himself or herself, such as families and social groups'.[59] Lee cites as an example the predominance of communal ownership of land in many Asian and African societies in contrast to the prevailing individualistic private ownership of land in western

[58] M Thomas, 'Teetering on the Brink of Equality: Sexual Orientation and International Constitutional Protection' (1997) 17 *BC Third World L J* 365.
[59] N Le, 'Are Human Rights Universal or Culturally Relative? (2016) 28(2) *A Journal of Social Justice* 24, 26.

jurisdictions which is reflected in the right to own property under the universal human rights as propagated in the UDHR.

There have been debates regarding the claim that universalism has a cultural bias, favouring Western norms derived from Enlightenment-era philosophy and the existing universalist system forces Western norms upon non-Western states that never underwent the Enlightenment.[60] In Asia, for instance, Confucian tenets emphasize community and social authority: values that trump individual freedoms, unlike Enlightenment philosophy, which focuses on individual rights.[61] In Africa, the emphasis is also on communal values which trump individual rights[62] while the Muslim world derives its values from Islamic precepts and not on the liberalist individual rights systems favoured by the western world.[63] As a result, some of the 'universal' rights in these international instruments do not reflect the value systems of non-western cultures leading to stringent resistance to these rights by mostly non-western states.[64]

While this may not seem a significant challenge on its own - seeing that a majority of countries (including African, Asian and Muslim states) have accepted the UDHR (through membership of the UN) and have ratified the major instruments arising from the UDHR – ICCPR and ICESR, the major challenge in the context of this thesis derives from the reliance on the interpretative extension of these universal rights to cover non-heterosexual issues. This introduces a subjective element to the application of these 'universal rights' to non-heterosexual issues which were not in place at the time of the adoption of the UDHR in 1948 and the associated instruments (ICCPR and ICESR). The significance of this lies in the fact that while these Asian, African and Arab countries were willing to adopt the rights in the UDHR and ICCPR (with some reservations), by subsequently extending their application to emergent rights such as non-heterosexual rights, the conflict with the cultural and traditional norms of these states has escalated, resulting in greater resistance from these states who already had

[60] R Klein, 'Cultural Relativism, Economic Development and International Human Rights in the Asian Context' (2001) 9 Touro Intl L Rev 1, 43.
[61] M Davis, 'Human Rights in Asia: China and the Bangkok Declaration' (1996) 2 Buff J Intl L 215, 215-16.
[62] N Le, 'Are Human Rights Universal or Culturally Relative? (n 57) 26.
[63] A An-Na'im, 'Human Rights in the Muslim World: Socio-political Conditions and Scriptural Imperatives' (1990) 3 *Harv Hum Rts J* 13, 15.
[64] This point is discussed further under the TWAIL prspective in respect to the reformed universalist approach discussed in chapter 3.8, page 134.

cultural/religious reservations to the broad nature of some of the rights. Thus, the UNHRC's decision in *Toonen* invalidating anti-sodomy law on the basis of discrimination, for instance, has been rejected by African and Muslim-majority states as not representing their view of the anti-discrimination provisions in UDHR and ICCPR extending to non-heterosexual issues which were not within contemplation at the time of ratifying the conventions.[65]

More importantly, under universalism of human rights, the interpretative application of these basic human rights to freedom from discrimination, equality and privacy to non-heterosexuals focuses on '*sexual orientation*', a subject that generates sufficient controversy and is open to various culturally relative levels of permissibility. Thus, the right to freedom from discrimination/equality/privacy is interpreted to protect non-heterosexuals from discrimination and grant equality/privacy '*on account of their sexual orientation'.* This is a difficult route to follow for many conservative jurisdictions because the question of permissible sexual conducts/orientation varies according to cultural sensitivities and is difficult to universally prescribe. Thus, while many of these conservative jurisdictions accept the rights of freedom from discrimination/equality/privacy, they are resistant to the application of these rights to '*sexual orientation'* which, on its own, is a culturally subjective issue. As a result, the judiciaries in these jurisdictions resist the extension of discrimination/privacy/equality rights to 'sexual orientation'. In May 2019, the High Court of Kenya in *Eric Gitari v The Hon. Attorney General and Kenya Christian Professionals Forum*[66] upheld a colonial-era law that criminalises non-heterosexual. The decision upheld article 162 of the Kenyan Penal Code[67] which penalizes 'carnal knowledge ... against the order of nature' with up to 14 years in prison, and article 165 which penalises 'indecent practices *between males*' with five years' imprisonment. In addition, many Muslim-majority countries do not extend the universal non-discrimination provisions to non-

[65]Guyora Binder, 'Cultural Relativism and Cultural Imperialism in Human Rights Law' (1999) 5 *Buff Hum Rts L Rev* 211,211.
[66] Eric Gitari v Attorney General & another [2016] EKLR.
[67] Cap 63, Laws of Kenya Revised Edition 2012.

heterosexuals on account of their sexual orientation while African countries generally compete amongst themselves to introduce the strictest anti-sodomy legislation.[68]

It is in this respect that the reformed universalism approach[69] differs from the universalism approach as it argues for the application of the non-discrimination/equality/privacy human rights to non-heterosexuals *not on account of their sexual orientation, but on account of their belonging to a protected characteristic (SEX) for which discrimination is already prohibited under international human rights law and within the domestic legal system of these conservative jurisdictions.* For instance, in *Eric Gitari's case* above, rather than challenge the criminalisation of the sexual orientation of the appellant (which calls for the determination of a culturally subjective issue – sexual orientation), the reformed approach will instead challenge the discriminatory treatment of the appellant on account of him being male and not female (which raises an objective issue of discrimination on grounds of sex which is prohibited in Kenya's Constitution). This is because his sexual activity with the other male is only prohibited because of his sex (male) as it would not be a crime if he was female in this instance. That raises a classic sex discrimination argument, rather than a sexual orientation discrimination argument. The brilliant elucidation of this approach by the United States Supreme Court in its very recent decision in *Bostock V. Clayton County, Georgia*[70] where it interpreted discrimination on grounds of sex as implying sexual orientation under Title VII of the Civil Rights Act of 1964 is a pointer to how this reformed approach threads the fine line between permissible and impermissible discriminatory claims. This distinction is discussed in further detail later in this chapter under the reformed universalist approach.

Another issue with the universalist approach to human rights relating to non-heterosexual issues is the assumption of the absolute nature of these rights. In essence, universalists assume that these human rights are uniform in their contents across all jurisdictions, culture and socio-economic settings.[71] This erroneous

[68] 'Anti-gay laws widespread in Africa, despite gains' *News 24* (21 February 2019) <https://www.news24.com/Africa/News/anti-gay-laws-widespread-in-africa-despite-gains-20190220> accessed 21 April 2019.
[69] Reformed universalism is discussed in chapter 3.6, page 126.
[70] 590 U.S. ___ (2020).
[71] P Alston and R Goodman, *International Human Rights* (OUP 2012) 3.

assumption overlooks the diversity in the contextual structuring of these 'universal rights' across different jurisdictions. As Steiner et al argue, 'the absolute rights are only 'universal' in their general content'[72]and the exact contextual application of these rights vary across cultures. Take the right to a fair trial, for instance. This universal human right only generally mandates that accused persons be given a fair chance to hear the case against them and defend themselves before a fair and impartial umpire. The content of this fair hearing right varies according to the jurisdiction – while some jurisdictions utilise a jury trial to determine guilt, others use only a judge to determine both facts and law; while some civil law countries conduct inquisitorial trial system, others adopt an adversarial trial system. In respect of the right to liberty, for instance, the freedom from arbitrary arrest is a general universal right conditioned by socio-cultural contexts within individual countries; while the law in some states allows an accused to be held for 7days before he must be brought before a Court, others restrict it to 24-48 hours. The right to dignity and the prohibition of forced labour, for instance, is conditioned by the mandatory requirement of military service for all citizens of age in some states, which is lacking in other states.

3.3 Cultural Relativity in Non-Heterosexual Rights

All through human history, one undeniable fact about human societies is the inherent differences in cultural values, standards, belief systems and practices. There is as such no such thing as a universal culture. Just as humans are different in many respects, so are cultural expressions different across geographical, continental and regional divisions. Associated with such cultural difference is the differences in the treatment of subjects by communities. Therefore, the treatment of a subject is relative to the cultural values of the society in question. This is known as cultural relativism which postulates that the cultural system of a society should determine the existence and scope of civil and political rights enjoyed by individuals. Teson defines the concept thus-

> cultural relativism may be defined as the position according to which local cultural traditions (including religious, political, and legal practices) properly

[72] H Steiner, P Alston, R Goodman, *International Human Rights in Context: Law, Politics, Morals-Texts and Materials* (OUP, 3rd Edition: 2008).

> determine the existence and scope of civil and political rights enjoyed by individuals in a given society.[73]

Teson's definition encapsulates the general understanding of the concept with relation to civil and political rights. However, this definition does not explain the relationship between cultural relativism and universal human rights.

Relativists argue that understandings of right and wrong vary along cultural lines, and thus, definitions of human rights should vary accordingly.[74] The main plank of cultural relativists' arguments against the universality of human rights is the belief that the human rights regime's assumption of universalism has a cultural bias, favouring Western norms derived from Enlightenment-era philosophy.[75]

The cultural relativists position in international law has crystallised into formal objections to universalist international instruments by states asserting a relativist position. The Cairo Declaration and Bangkok Declarations, for instance, declared that although recognition of human rights is universal, the definition of such rights should be contextualized for culture.[76] This relativist objection has been extended to formal reservations in ratifying universalist international instruments such as the Convention for the Eradication of All Forms of Discrimination against Women (CEDAW). When signing CEDAW, several Muslim states - including Bangladesh, Egypt, Iraq, and Saudi Arabia - entered reservations to articles they deemed incompatible with Islamic Sharia law, essentially subsuming CEDAW's application to their relativist religious precepts.[77]

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[73] F Teson, 'International Human Rights and Cultural Relativism' (1984) 25 *Va. J. Int'l L*. 869, 871.

[74] A Mayer, 'Universal versus Islamic Human Rights: A Clash of Cultures or a Clash with Construct? (1994) 15 *Mich J Intl L* 307,329-33,360.

[75] R Sloane, 'Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights', (2001) 34 *V and J Transnatl L* 527, 541-42

[76] M Davis, 'Human Rights in Asia: China and the Bangkok Declaration' (1996) 2 *Buff J Intl L* 215, 215-16.

[77] See a list of formal reservations to CEDAW upon ratification at <http://untreaty.un.org/ENGLISH/bible/ englishinternetbible/partl/chapterIV/treatylO.asp> accessed 27 April 2019.

Although numerous states[78] and scholars[79] have argued that those reservations are invalid under Article 18 of the Vienna Convention on the Law of Treaties[80]because these reservations circumvent the main purpose of a treaty, the reservations serve as a platform for the refusal of these states to practically implement the conventions' provisions within their jurisdictions. Article 18 of the Vienna Convention obliges a state to refrain from acts that would defeat the object and purpose of a treaty and the entry of reservations that undermine the fundamental basis of a treaty can be regarded as defeating the object and purpose of the treaty.

Donnelly posits that 'cultural relativity is an undeniable fact: moral rules and social institutions evidence an astonishing cultural and historical variability'.[81] He proceeds to identify two opposing theories that emerge from the relationship between cultural relativism and universalism – radical relativism and radical universalism. While radical cultural relativism is hinged on the belief that culture is the sole source of the validity of a moral right or rule, radical universalism postulates that culture is irrelevant to the validity of moral rights and rules, which are universally valid.

Conceding that these are extreme positions, Donnelly[82] proposes two middle-ground positions which represent the reality on the ground – strong cultural relativism and weak cultural relativism. Under strong cultural relativism, culture as the source of the validity of rights is propagated but a few universal rights are incorporated into culturally sourced rights. This may result in two entirely justifiable sets derived from the cultural practice and universal application applying concurrently and slightly overlapping in some cases. Weak cultural relativism, on the other hand, recognises that culture may

[78]Austria, Denmark, Finland, France, Germany, Ireland, and the Netherlands all filed objections against the reservations by Muslim countries as invalid being in conflict with the main purpose of the convention. See Office of the High Commissioner for Human Rights, 'CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant Adopted at the Fifty-second Session of the Human Rights Committee, on 4 November 1994 CCPR/C/21/Rev.1/Add.6, General Comment No. 24. (General Comments) <https://www.refworld.org/docid/453883fc11.html> accessed March 25, 2019.

[79]J Southard, 'Protection of Women's Human Rights under the Convention on the Elimination of All Forms of Dis- crimination Against Women' (1996) 8 *Pace Intl L Rev* 1, 21; B Clark, 'The Vienna Convention Reservations Regime and the Convention on Discrimination against Women', (1991) 85 Am J Intl L 281-320; B. Carter and P. Trimble, eds, *International Law* (Aspen 3d ed 1999) 134-46.

[80] Done at Vienna on 23 May 1969. Entered into force on 27 January 1980, United Nations, *Treaty Series*, vol. 1155, p. 331

[81] Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 *Hum. Rts. Q*. 400.

[82] ibid.

be an important source of the validity of a moral right or rule but reliance is strongly placed on universal human rights while respecting the relativity of human nature, communities, and using such cultural relativity only as a check on potential excesses of universalism. Weak cultural relativism would recognize a comprehensive set of prima facie universal human rights and allow only relatively rare and strictly limited local variations and exceptions.[83]

The major argument against the application of cultural relativity to human rights precepts is that if human rights are, literally, the rights (every)one has simply because one is a human being, they would seem to be universal by definition and cannot be circumscribed to relativist interpretations in accordance with cultural differences. Galanos[84] argues that 'a cultural relativist account of human rights, however, seems to be guilty of logical contradiction. If human rights are based in human nature, on the simple fact that one is a human being, and if human nature is universal, then how can human rights be relative in any fundamental way?" Donnelly provides the answer to this poser by stating that 'the simple answer is that human nature is itself in some measure culturally relative'.[85] He argued that 'cultural relativity is an undeniable fact; moral rules and social institutions evidence an astonishing cultural and historical variability' and further contended that the impact of culture on the shaping of individuals is systematic and may lead to the predominance of distinctive social types in different cultures. Donnelly, however, conceded that 'if all rights rested solely on culturally determined social rules, as radical cultural relativism holds, then there could be no human rights, no rights one has simply as a human being. This denial of human rights is perfectly coherent'.[86] Based on this concession, he argued in favour of a weak cultural relativism which would recognize a comprehensive set of prima facie universal human rights and allow only relatively rare and strictly limited local variations and exceptions.

[83] ibid.
[84] Christos Galanos, 'Universal Human Rights in the Face of Cultural Relativism and Moral Objectivity: Preaching or Teaching' (2010) 16 UCL Jurisprudence Rev. 29.
[85] J Donnelly, 'Cultural Relativism and Universal Human Rights' (n 79) 412.
[86] J Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights' (1982)76 American Political Science Review 303-316.

Integrating a culturally relative perspective of human rights into mainstream sexual rights, therefore, allows for flexibility in advancing human sexual rights which recognise the variations in levels of cultural tolerability of certain sexual practices and allows for the recognition of such sexual rights to develop in tandem with the changing cultural perceptions regarding such practices.

In this regard, the central tenet of cultural relativity is that no transboundary legal or moral standards exist against which all human rights practices may be judged acceptable or unacceptable.[87] This form of relativity is more effectively deployed in terms of emergent areas of human rights where there is yet no unanimous or consensus acceptance of the status of such rights.

3.3.1 Shortcomings of Cultural Relativity in Non-Heterosexual Rights Discourse

Subjecting human rights to relativist interpretations and applications is inherently fraught with the glaring potential for gross abuse of human rights as the respect for the rights becomes subject to the subjective determination of individual societies. In this sense, cultural relativism contradicts a basic premise of the human rights concept- its innate nature in humans. A glossary of some of the principles that have been justified by cultural relativity will bear out this danger. Several Islamic states, notably Iran and Saudi Arabia have argued for a Muslim conception of women's rights that is permissive of some of the obnoxious treatment of women within these states; several African societies rely on respect for cultural values to justify the continuation of female genital mutilation; while China has defended its treatment of political dissidents by invoking Confucian norms.[88] These actions prove that individual societies cannot be relied upon to determine the extent of enjoyment of human rights available for its members, as there must be an objective, universal standard for determining the rights all humans should enjoy that is innate to them. In this sense, cultural relativism contradicts a basic premise of the human rights concept- its innate nature in humans.

[87] E Swaine, 'Rational Custom' (2002) 52 *Duke L.J.* 559, 622.
[88] See L Holning, 'Sexual Orientation: Testing the Universality of International Human Rights Law' (2004) 71(4) *The University of Chicago Law Review* 1689- 1720.

In relation to non-heterosexual rights, the cultural relativist argument is the foundation for the state-sponsored homophobia that permeates African societies and most of the Muslim world. The argument has always been that non-heterosexual activities are alien to the respective cultures and therefore not acceptable.[89] Although no specific recognisable universal human right exists on non-heterosexuality, the respect of the basic human rights of non-heterosexuals including their right to privacy, equality, freedom from torture, unlawful arrest, dehumanisation and non-discrimination are universal rights that should not be subject to relativist interpretations.

Several other criticisms of cultural relativism can be found in the literature mostly related to the self-refutation or self-contradiction inherent in the relativist position. Renteln argues that relativism is susceptible to the charge of self-refutation because it asserts the absolute prescription that all prescriptions are relative.[90] Tenson writes that 'if it is true that no universal moral principles exist, then the relativist engages in self-contradiction by stating the universality of the relativist principle.[91] Sweeney argues that relativism tends to be equated with a 'conservative view of public international law that affords greater respect to state sovereignty'.[92] While Sweeney's assertion is true, it does not undermine the argument of cultural relativism because greater respect for state sovereignty is a fundamental part of international relations to which states are entitled. This is especially so for the developing states that are generally wary of western influences on human rights and mostly rely on relativism to protect their local history and values from overbearing western influences that could potentially erode these values. The development of relativism can, therefore, be said to have been influenced by the need of developing states to protect their sovereignty by shielding their historical, religious and cultural values from an overbearing western influence.

[89] See UN Human Rights Office of the High Commissioner, 'Sexual and Reproductive Health and Rights' Report A/61/338 Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt < https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/519/97/PDF/N0651997.pdf?OpenElement> accessed 09 January 2021.

[90] A Renteln *International Human Rights.Universalism Versus Relativism* (Sage Publications New York 1990) 72.

[91] F Teson, 'International Human Rights and Cultural Relativism' (1985) 25 Virginia Journal of International Law 869, 888.

[92] J Sweeney, 'Margin of Appreciation' (n 6) 461.

3.4 Blended Universalism Approach to Non-Heterosexual Rights

Considering the apparent shortcomings of the universal and cultural relativism approaches to non-heterosexual rights, a blended universal approach that seeks to balance both conceptual views within a single platform may be considered a compromise solution, a sort of middle-ground approach. This view is predicated on the universalism of human rights, as rights applicable to all persons without distinction, but allows for cultural variances in the interpretation and application of these rights, to the extent it does not violate the core tenets of the rights. A large part of the opposition to the universalism of human rights stems from the misconception of its actual scope and connotation. The universality of human rights is often misconceived as a representation of the uniformity of these rights in their exact context and contents throughout the world. In essence, the universality of human rights is often misconstrued for 'uniformity of human rights' whereby these rights are uniformly applied throughout nations without regards for their unique socio-cultural circumstances.

In this context, the opposition to universalism focuses on its potential to result in the imperialistic imposition of human rights norms by developed western jurisdictions on less developed jurisdictions in the form in which these rights are applied and interpreted within the developed jurisdictions. Viewed from this perspective, the opposition to universalism, especially as it relates to specific human rights issues, such as non-heterosexuality, would appear slightly justifiable, for no two nations have the same socio-cultural context and any uniform application of human rights norms in their exact context across jurisdictions will likely not be suitable.

However, as Tilley stated, universalism does not connote sameness of these rights or conformity to the same standards for these rights.[93] He argued that 'while universalism implies that some moral requirements are the same for everyone, it does not imply that we all have a moral requirement to be the same, or that we have any moral requirement that discourages cultural diversity'.[94] Supporting this view, Goodhart also asserts that

[93] J Tilley, 'Cultural relativism' 22(2) *Human Rights Quarterly* 501.
[94] ibid, 540.

'universality cannot be confused with conformity, as universality promotes diversity by protecting cultural freedom'.[95] In essence, the universalism of human rights does not require an uncritical application of the universal human right norms within domestic jurisdictions without regards for the national peculiarities of these rights and their contexts. Rather, universalism merely institutes a minimum baseline of human rights principles that should guide government policies and decisions.

This approach is evident in the Vienna Declaration of Human Rights 1993[96] which, after declaring the universality of human rights, went on to emphasise that -

> the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. *While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind*, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.[97] [italics added]

The above Declaration is the fulcrum of the blended universalist approach to human rights as a middle-ground approach. This blended approach first recognises the need to treat human rights equally, on the same footing and with the same emphasis within domestic jurisdictions as it is within international law and in other countries i.e. human rights must be regarded equally across all jurisdictions with the same emphasis because humans are all the same regardless of their race, nationality, domicile, religion or cultural affiliations. Second, the approach recognises the need to consider (i.e. bear in mind) national and regional peculiarities, historical, cultural and religious backgrounds in implementing human rights within domestic jurisdictions, as each society has its unique history which cannot be ignored in implementing norms for the protection of human rights. Thirdly, while bearing this cultural/historical/national uniqueness in mind, every government must promote and protect all human rights and fundamental freedoms.

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[95] Michael Goodhart, 'Origins and Universality in the Human Rights Debates: Cultural Essentialism and the Challenge of Globalization', (2002) 25(4) Human Rights Quarterly 940.

[96] Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

[97] Principle 5 of the Vienna Declaration 1993.

The implication of this blended approach to the universalism of human rights is that cultural/historical/national considerations constitute an important part of human rights protection under universalism and should generally be incorporated in the protection of human rights. However, the impact of the third aspect of the reformed approach is that government's overarching duty is to promote and protect human rights regardless of these cultural/historical considerations and thus the duty to protect human rights must triumph over cultural/historical considerations where a conflict exists between these two. Therefore, while universalism promotes diversity by protecting cultural freedom, it places human rights protection at the pinnacle and will enforce these protections at the expense of cultural freedom *only* in the event of a conflict between human rights protection and cultural values i.e. only where it is impossible to respect cultural values while protecting human rights. Thus, the blended approach superimposes universalism over cultural relativism and only permits the application of the latter to the extent it does not conflict/derogate fundamentally from the protection of human rights under the former.

This approach can better represent the real essence of the universalism of human rights as it allows for cultural values to be an integral part of human rights framework while enabling human rights protections to be used to dismantle cultural values that go against natural justice, equity and fairness and are irredeemably inconsistent with human rights protections. For instance, universal human rights principles allow states to design their judicial system within their cultural framework to achieve the universal human right to a fair trial without mandating them to utilise the jury system in criminal trials as utilised in some developed countries. Thus, the basic objective of this right is to achieve a minimum standard of fairness of criminal trials and each state is allowed to structure their criminal justice system within their historical and culturally recognised framework provided it meets the minimum standard of fairness. However, if a state tries to implement a criminal justice system where an accused is not allowed a defence, on the basis that it is the recognised way under their cultural system, then this cultural system is irredeemably inconsistent with the universal human right to a fair trial and the government in such state will be under an obligation to implement the universal human right and abolish such cultural system. Similarly, a state cannot continue to implement female genital mutilation or the denial of access to education for girls on the

basis of their cultural beliefs because such cultural practice irredeemably conflicts with the universal human rights of girls/women as recognised under the UDHR and CEDAW.

Viewed from this perspective, it can be argued that universal human rights, appropriately understood from the blended approach, do not carry any imperialistic connotation, but merely sets a minimum baseline for the fair and equitable treatment of humans, as globally agreed by the comity of nations, neither does it seek to disregard the cultural uniqueness of individual societies, but respects such cultural diversity and allow them to flourish within the universal human rights framework provided they are not irredeemably inconsistent with the universal human rights protections. However, in other areas of universal human rights, there may be an appreciable level of disparity in cultural/national treatment of people which, though prejudicial, will not be considered a breach of universal human rights simply because it differs from the treatment accorded to people in similar situations in other jurisdictions.

The major challenge of implementing the blended approach is its seeming unworkability owing to the preponderance of cultural relativist objections to universal human rights and the resistance of these states to implement any element of universalist principles within their domestic jurisdictions. Many states have exceptions to the universal human rights protections within their domestic jurisdictions, allowing for circumstances that may justify a deviation from these protections in deserving circumstances. The range of factors that will justify such deviations from these protections vary across states and is mostly dependent on the national/cultural values and perceptions in these jurisdictions. In relation to non-heterosexual rights specifically, the blended approach is clearly unworkable because it provides an unsatisfactory solution to the conservative states relying on a cultural relativist view of non-heterosexual rights. Cognisant of the fact that these cultural relativist views are fundamentally inconsistent with the universal rights of non-heterosexual persons, the blended universalist approach is a non-starter for these states. By granting universalism pre-eminence over cultural relativism, it does nothing to address the objection of these conservative states. As a result, a different approach acceptable to the conservative states is required to ensure adequate protection of the human rights

of non-heterosexual persons without undermining the sovereignty and cultural integrity of the conservative states.

3.5 Weak Cultural Relativism Approach to Non-Heterosexual Rights

Considering that a blended universalist approach fails to provide an adequate solution to the objections of conservative states, perhaps an approach derived from the perspective of cultural relativity might be worth considering. In this regard, a weak cultural relativism approach is worth considering as a potential middle-ground solution to the conflict between universalism and cultural relativism.

While cultural relativity appears inimical to the protection and promotion of non-heterosexuality, this depends on how it is viewed and the normative contents of its principles. Cultural relativist positions can be understood from a weak cultural relativist position to simply asserting an empirical fact that the world contains an impressive diversity in views about right and wrong that is linked to the diverse underlying cultures and that the application and implementation of universal values be contextualised within this diversity, allowing for flexibility in the extent of protection afforded to these emerging rights.

On the other hand, a strong relativist position goes beyond this weak relativism and argues that no transcendent or transcultural ideas of right can be found or agreed on, and hence that no culture or state is justified in attempting to impose on other cultures or states what must be understood to be ideas associated particularly with it.[98] Under this approach, human rights should be relatively interpreted without any recourse to the universal nature of such a right. Relativism is, therefore, advocated as the determinant factor for the validity of rights that should otherwise be universal.

Nevertheless, as Steiner et al posited, it is preferable to adopt '…a more complex view that understands some norms as universal, some as relative to context and culture'. This weak cultural relativist perspective is premised on the universality of human rights

[98] Steiner, et al (n 70) 12.

and the non-derogable nature of the basic human rights innate in all humans regardless of their sexuality or sexual orientation. As a result, *weak cultural relativism* ensures the respect for the rights of privacy, equality, non-discrimination and all the associated human rights liberties to which non-heterosexual persons are entitled, but at the same time reflects the cultural contexts within which these non-heterosexual rights are to be implemented, allowing for more culturally adaptive representation of these rights and creating space for cultural tolerance to be built over time towards non-heterosexuality within the community.

The structure of *weak cultural relativism* and its relationship with universalism and cultural relativism is reflected in Figure 3.1 below.

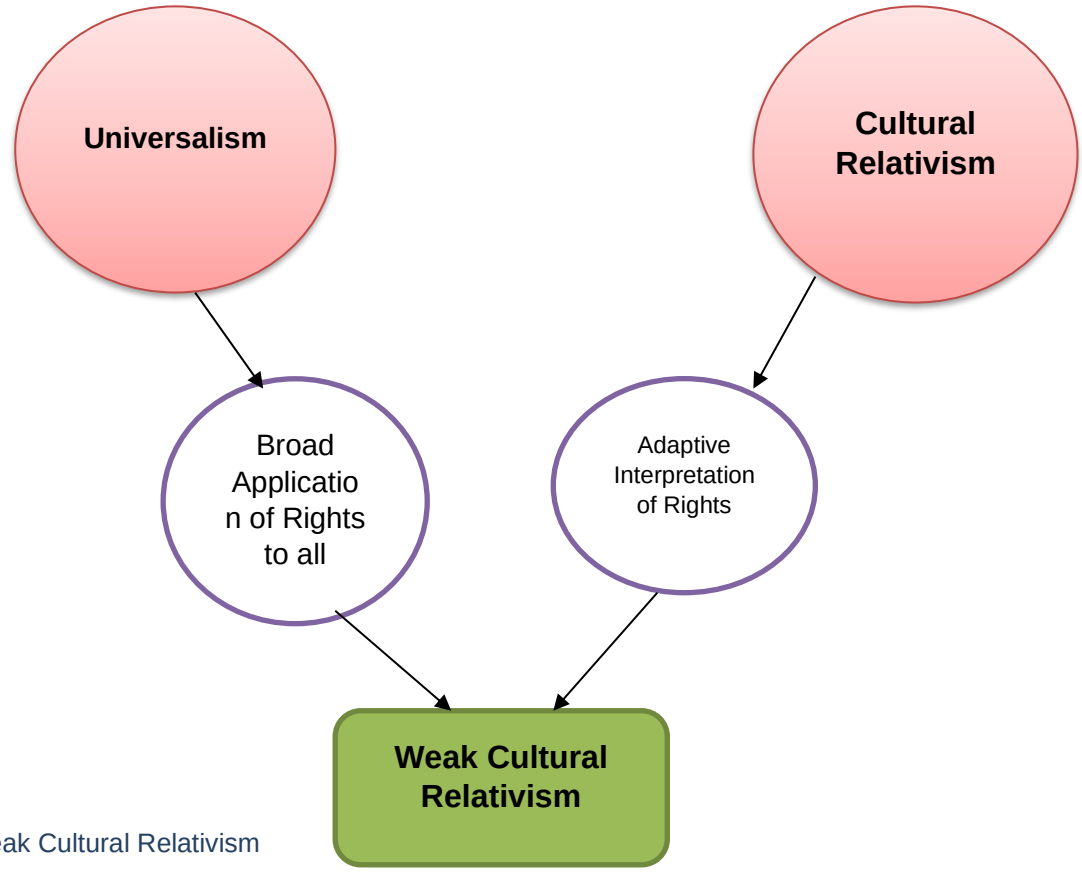

Figure 3.1 Weak Cultural Relativism

Source: Author

The advantage of *weak cultural relativism* is its incorporation of the key components of the opposing concepts of universalism and cultural relativism while rejecting the contentious aspects of these concepts. In essence, it incorporates universalism's

concept of human rights being broadly applicable to all persons without limitation or subjective acceptance based on cultural circumstances. This way, it ensures that all persons, heterosexual and non-heterosexual, are accorded the same protection of the law with equality. Generally, these rights cover all the basic human rights – the right to life, association, privacy, non-discrimination, equality before the law, freedom of movement, dignity etc. Also, these rights will extend to other positive rights specifically attuned to the promotion of non-heterosexual activities e.g. the right to same-sex marriage, the right to adoption by same-sex couples and access to other state benefits e.g. filing of state tax returns. These rights will generally fall under the equality and non-discrimination human right and are, therefore, non-derogable on culturally relativist ground.

However, weak cultural relativism still subjects universal human rights to relativist interpretations and cultural circumstances which still create an avenue for the repression of non-heterosexual persons because it entitles societies to restrict certain protections for non-heterosexual persons on the basis of its incongruence with cultural values. In essence, while it satisfies the yearnings of the conservative states clamouring for a relativist application of rights, it disfavours the universalists arguing for a universal application of equal standards of protection to non-heterosexual persons. In its strict application, weak cultural relativism allows the conservative states to deny protection to non-heterosexual persons on account of a culturally adaptive interpretation of the basic universal rights to equality/non-discrimination and privacy. Regardless of the attempt to promote relativism while respecting universalism of human rights, weak cultural relativism is a significantly weak and tenuous basis for promoting non-heterosexual rights and can promote the repression of these rights under the guise of adaptive interpretation according to cultural circumstances.

It is clear at this stage that conceptualising a suitable approach that reconciles the conflicting interests of the universalism and relativism approaches is a delicate task requiring a novel approach that provides a solution acceptable to both views or at the very least not fundamentally objectionable to either view. The *reformed universalism* approach achieves this objective by ensuring universal protection of the human rights of non-heterosexual persons while utilising already applicable human rights provisions within the domestic jurisdictions of these conservative states, thus staving off the

cultural relativist objection considering these states are obliged to apply their domestic laws. The key to achieving this is by de-emphasising 'sexual orientation' as the basis of the protection but focusing on the membership of a defined, already protected class under human rights law.

3.6 *Reformed Universalism* Approach to Non-Heterosexual Rights

The previous sections have analysed the shortcomings of the universalism and cultural relativism approaches to non-heterosexual rights which result in either opposition by African states (universalism) or have the propensity to be used as an instrument of repression for non-heterosexual persons (cultural relativism). The reformed universalism approach bridges the gap between these approaches by proposing an interpretative approach that upholds the universalism of the human rights of non-heterosexual persons but utilises already existing universal rights applicable within these African states objecting to non-heterosexual rights. The reliance on the domestic versions of these universal rights obviates the cultural relativity objection of these states seeing that the rights already have domestic application and these states are obliged to apply and enforce them.

The reformed universalism approach to non-heterosexual rights argues that the cultural objection of African and other conservative states to non-heterosexual rights is futile because these rights already enjoy protection as universal rights under the various regional and domestic human rights instruments that are binding and operational within these states. To this extent, the approach argues that non-heterosexual persons are protected under two main platforms – a) based on the prohibition of discrimination on grounds of 'sex' under regional instruments and the domestic constitutions of these states; and b) based on the right to private and family life enshrined in regional legal instruments and the domestic constitutions of these states. These two platforms are discussed separately below.

3.6.1 'Sex' as a Protected Characteristic

Amongst the basic universal human rights found in the UDHR and other international human rights instruments is the prohibition of discrimination against individuals on the grounds of sex i.e, the biological state of being male or female. This universal right is largely uncontroversial and has become a generally accepted principle even amongst conservative states with objections to various other aspects of the universal human rights principles. Further, this universal right has become enshrined in regional legal instruments such as the African Charter on Humans and People's Rights and is contained in the bill of rights of the constitution of a majority of countries around the globe. Article 2 of the ACHPR provides that:

> every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, **sex**, language, religion, political or any other opinion, national and social origin, fortune, birth or any status. [emphasis added]

Similarly, within domestic jurisdictions, section 42 of the Constitution of Nigeria 1999 (as amended) for instance, prohibits discrimination on the grounds of ethnic group, place of origin, **sex**, religion or political opinion.[99] Similar provisions exist in the constitutions of many African and other conservative states.[100] What has not been considered by these conservative states is that the protection of non-heterosexual rights is embedded in this non-discrimination provision because any attempt to deny the rights of non-heterosexual persons will be discrimination against them on account of their 'sex', not necessarily their sexual orientation. In this regard, the separate prejudicial treatment meted to non-heterosexual persons or any denial of right is primarily because of the biological sex the individual participant belongs to.

To arrive at this conclusion, we must consider the non-heterosexual person as an individual and the sex they are attracted to as a class. A (male) is engaged in sexual activity or wants to get married to B (Male). The legal prohibition of such sexual activity or marriage is primarily because, from A's perspective, he is Male. If A was female, the sexual conduct or marriage would be permissible by law i.e. he (she) would be allowed to have sex or marry B. Thus, A is being discriminated against primarily because of his

[99] CFRN 1999, available at https://www.constituteproject.org/constitution/Nigeria_1999.pdf [accessed 08 June 2020].
[100] These provisions will be discussed in detail in Chapter 4.4.2, page 160.

biological quality as a Male, a situation that would not be imposed on a Female. This, therefore, amounts to discrimination on grounds of 'sex' which is prohibited under the ACHPR and the Constitutions of these conservative states. The concept of 'sexual orientation' which is used to describe A's sexual proclivity towards B is an unnecessary descriptor in this context, as it introduces a characteristic not protected under any law within these jurisdictions. The focus should be purely on A's membership of a defined characteristic protected by law.

This approach to understanding 'sex' as a protected characteristic was the fulcrum of the recent decision of the United States Supreme Court in *Bostock V. Clayton County, Georgia.*[101] In this case, an employer allegedly fired a long-time employee simply for being homosexual or transgender. Clayton County, Georgia, fired Gerald Bostock for conduct "unbecoming" a county employee shortly after he began participating in a gay recreational softball league. The question before the Court was whether being fired for non-heterosexual or transgender preference was a violation of Title VII of the Civil Rights Right 1964 which prohibits unlawful discrimination on the grounds of several identified characteristics. The problem for the appellant was that the closest characteristic under Title VII applicable to the case was 'sex'. The parties conceded that the term "sex" under Title VII referred to the biological distinctions between male and female. And "the ordinary meaning of 'because of' is 'by reason of' or 'on account of,'. The respondent argued that gay sex or transgender status was an issue of sexual orientation and sexual identity and not 'sex' which is a defined category determined by biology and not individual preferences or proclivities. However, in an erudite elucidation of the issue, Justice Gorsuch, delivering the opinion of the Court, stated that the question relates to the treatment of groups rather than individuals, to see how a policy affects one sex as a whole versus the other as a whole. In his words-

> *it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.* Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is

[101] 590 U.S. ___ (2020).

> attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge.[102]

The jurisprudence on this point espoused by the US Supreme Court is a valuable development in the protection of non-heterosexual rights. In the context of the present discussion, therefore, any legal prohibition of non-heterosexual conduct or marriage is primarily *because of* the 'sex' of the person(s) involved and because this prohibition does not apply to a person(s) of the other 'sex', it is a discriminatory law/action and is, therefore, a violation of the universal right to freedom from discrimination on grounds of sex which is equally recognised within the domestic laws of these conservative states. These conservative states cannot, therefore, decline to recognise the universal right of non-heterosexuals to freedom from discrimination on grounds of sex seeing it is a cardinal human right in their domestic and regional instruments, thus nullifying their cultural relativist objection. The domestic constitutional provisions on this point clearly override any conflicting cultural practice/view/opposition that may be had by the states, a result which international human rights instruments will not achieve.

An illustration of how a reformed universalist approach can be utilised to override cultural objections can be gleaned from the protection of women's right in Nigeria. As a conservative state, Nigeria has made cultural objections to non-heterosexual rights and largely opposes the implementation of several aspects of women's human rights under CEDAW. Despite ratifying CEDAW in 1980, it has failed to domesticate or enforce its provisions within its domestic jurisdiction owing to the staunch opposition within the country by cultural and religious groups arguing that these 'women rights' espoused in CEDAW were contrary to cultural and religious precepts practised in the country. Thus, for a long time, women were discriminated against on several grounds, were restricted from owning properties or inheriting their spouses' properties in various communities in the country.[103]

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[102] ibid at pg 10.

[103] See J Campbell, 'Nigeria's Laws Hold Women Back, and the Economy Suffers' (*Council of Foreign Relations*, 8 March 2019) available at https://www.cfr.org/blog/nigerias-laws-hold-women-back-and-economy-suffers [accessed 08 June 2020].

While women rights groups continued to push for the domestication of CEDAW as the solution, individual plaintiffs challenged these discriminatory practices in Court based on the constitutional prohibition of discrimination on grounds of sex. In the landmark case of *Mojekwu & others v Ejikeme & others*[104]the Nigerian Supreme Court declared that women have the universal human right to freedom from discrimination on account of their sex and this universal right is granted constitutional protection under section 42 of the Nigerian Constitution. Thus, regardless of the non-domestication of CEDAW, the rights embedded in it apply to women in Nigeria by virtue of their universal right to equality with men.

This decision nullified the cultural objections by the political elites and various groups within the country that had withheld the enforceability of women's rights to equality under international human rights instruments such as CEDAW. Importantly, the decision shows the workability of the reformed universalism approach to enshrining universal rights despite cultural objections by linking these universal rights to domestic rights already applicable within the jurisdiction through liberal interpretations by the judiciary, thus circumventing the relativist objections. The judiciary plays an important role in actualising the reformed universalism approach and the feasibility of securing a judicial expansion of the anti-discriminatory human rights to non-heterosexual persons in African states will be discussed in chapter four of this thesis.[105]

Another important way to buttress the preference for the reformed universalism approach is by examining the potential problem with approaching the universal right from the standpoint of 'sexual orientation' in relation to the issue of incest. If we argue that there is a universal human right to non-discrimination on account of sexual orientation, then there is a slippery slope that this argument can be extended to permit incest, on the basis that sexual attraction to persons with blood relationship is a form of 'sexual orientation'[106] as was argued by the appellant in the German case of *Patrick Stübing v Germany*[107] challenging the criminalisation of his sexual relationship with his

[104] (2000) 5 NWLR 402.
[105] See chapter 4.3, page 145.
[106]See Ross Douthat, 'The Case Against Incest' (*The Atlantic,* 17 July 2008) <https://www.theatlantic.com/personal/archive/2008/07/the-case-against-incest/54261/> accessed 09 September 2019
[107] Stübing v Germany (no. 43547/08), 12 April 2012.

sister. In some jurisdictions, such as Argentina, incest is permissible in the sense of not being criminalised so long as it is carried out by consenting adults[108] while in most other jurisdictions around the world, it is criminalised and prohibited. Within the latter group, there is a wide variance relating to the degree of blood relationship for which sexual relationship is prohibited.

Once again, this reveals that the bounds of permissible sexual conduct are largely culturally subjective and it is tenuous to ground a universal human right on 'sexual orientation' as a concept as this deals with individual preferences/subjective feelings/dispositions. Instead, it is safer to ground the protection of the universal human rights of non-heterosexual persons on membership of a defined group or protected characteristic e.g. 'sex' which has objective qualifiers used to ascertain its scope and membership. Thus, a non-discrimination claim cannot be raised to support an incestual relationship because the participants cannot rely on any protected characteristic for which they are being discriminated and cases like *Patrick Stübing* becomes easier to adjudicate and dismiss. Conversely, focusing on a right to non-discrimination on account of sexual orientation raises interpretative questions as to whether incestual preferences are sexual orientations and whether they are worthy of protection like non-heterosexual preferences.

3.6.2 'Right to Privacy' as a Universal Human Right for Non-Heterosexual Persons

Akin to the non-discrimination right, the right to privacy is another focal right that can be utilised within the reformed universalist approach to engrain the protection of the human rights of non-heterosexual persons. It is provided for in article 18 of the ACHPR and also found in the constitutions of most African countries, e.g. in section 37 of the Nigerian Constitution which provides for the right to private and family life.

[108] *Argentina CODIGO PENAL DE LA NACION ARGENTINA LEY 11.179 (T.O. 1984 actualizado)* Crimes against sexual integrity. Argentine Criminal Code". *Art 119.*

Again, under this right, the focus is not on the 'sexual orientation' of non-heterosexual persons but on the entitlement of everyone to carry out their private life without interference from the government. Sexual activities are carried out in private and is entirely within the private concerns of the individuals involved. Thus, the government has no business regulating the private activities of individuals, whether it is heterosexual or homosexual sexual activities and any law/policy that pries into the private activities of individuals is a violation of the individual's fundamental right to privacy. Consequently, the criminalisation of homosexual acts is a flagrant violation of the right to privacy of individuals and these conservative states are violating their domestic constitutional protection of the right to privacy of non-heterosexual persons by doing so and no level of cultural objection to the nature of the activity can justify the violation of this constitutional right.

The privacy aspect of this right applies to the criminalisation of homosexual acts while the 'family life' aspect of this right applies to same-sex marriage, inheritance rights of same-sex couples and even issues like the adoption of children by non-heterosexual persons, as they all relate to the right of an individual to conduct his/her family life matters without interference from the government.

However, the 'private and family life' angle may not be as solid as the non-discrimination angle as, taken to its logical conclusion, it can be extended to other sexual activities ('slippery slope argument') which most societies frown upon even in developed jurisdictions e.g. incest. The privacy argument is equally open to incestuous acts which are also done in private and the family life argument can equally apply to incestuous couples' ability to have a family and adopt children. Nevertheless, this does not derogate from the ability of non-heterosexual persons to rely on this universal right to protect their rights within the domestic laws of conservative states with cultural objections.

3.7 Reformed Universalism and the Margin of Appreciation

The reformed universalism approach fits within the margin of appreciation of African states in the implementation of universal human rights of non-heterosexuals as it enables them to apply these rights with consideration of their historical and local

peculiarities enshrined under the regional and domestic human rights instruments. As discussed earlier,[109] the African Charter reserves a margin of appreciation for state parties in implementing the rights under the Charter to take into consideration the virtues of African historical tradition and values of African civilization and to apply these rights with respect for their historical and cultural peculiarities.

This broad margin of appreciation ensures that African states do not feel compelled to apply what they consider to be a western conception of human rights in protecting the rights of non-heterosexuals within their jurisdictions. At the same time, this margin of appreciation does not allow for the application of cultural relativism in the consideration of non-heterosexual rights because the rights relied upon to protect non-heterosexuals under the reformed universalism approach are binding generic human rights that apply to all persons in these African states under the regional instrument and their domestic constitutions. For instance, by relying on non-discrimination on grounds of sex as generally applicable to all persons, reformed universalism puts non-heterosexual rights within the ambit of general non-discrimination human rights that African states are already obliged to enforce within domestic jurisdictions and the margin of appreciation in enforcing this right will be the same as enforcing the right for everyone regardless of their sexuality. In essence, while these states can exercise a margin of appreciation in deciding how the non-discrimination provision on grounds of sex provision will be enforced and applied, they cannot apply the margin of appreciation to exclude non-heterosexual persons from the enjoyment of this non-discrimination right because it is a right applicable to all persons within their jurisdiction.

Similarly, the right to privacy under the Charter and domestic constitutions is a generally applicable right to all persons within the jurisdiction and while the state, in applying the margin of appreciation, can decide how to implement this right, taking into consideration its local peculiarities, it cannot exclude one set of people (non-heterosexuals) from the enjoyment of this right to privacy guaranteed under the Charter and domestic constitution.

Consequently, reformed universalism ensures that the rights of non-heterosexuals are embedded with the rights of everyone within the jurisdiction without distinction on

[109] Chapter 3.2.4, page 104.

account of sexuality and the state is obliged to protect these rights without any distinction even though they enjoy a margin of appreciation in deciding the implementation measures to be adopted.

3.8 Reformed Universalism from a TWAIL Perspective

The Third World Approach to International Law (TWAIL) primarily views international law as an illegitimate, predatory system that legitimises, reproduces and sustains the plunder and subordination of the Third World by the West.[110] The perspective generally frowns on universalism as an unjust, inequitable and illegitimate form of instituting global governance upon the third world by an imperialistic and expansionist western world intent on continued conquest and domination.[111] As Anghie states, these imperialistic actions by the western world 'applies to all states regardless of their specific cultures, belief systems and political organisations'.[112]

TWAIL is not a recent phenomenon as its roots stretches back to the decolonisation movement that swept the globe after World War II. Its impact has also been felt in many of the resistance from African and other third world states towards global instruments and policies which they generally view with suspicion and scepticism. It is, therefore, apparent that the cultural objections of many African and third world countries towards the universalist application of non-heterosexual rights derive from the resistance to the suspected global domination of the third world by the western world. The UDHR has often been challenged on this basis also, as the main proponents, drafters and states that adopted it in 1948 were not adequately representative of the third world (most of which were still under colonialist rule by the western world at the time).

Consequently, adopting an effective approach towards enshrining the protection of non-heterosexual rights acceptable to African and third world states has to scale the additional hurdle of compatibility with the TWAIL perspective. In essence, the approach must derive legitimacy, not from compliance with a 'universal standard' which is largely

[110] M Mutua and A Anghie, 'What Is TWAIL?' Proceedings of the Annual Meeting (American Society of International Law) Vol. 94 (APRIL 5-8, 2000) (Cambridge University Press, 2000).
[111] A. Anghie, Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law (1999) 40 *Harv. Intl. Law* 1
[112] ibid, 2.

influenced by western ideologies/precepts, but must have a significant home grown feel as deriving from legitimate sources within the African and third world states.

In this respect, the reformed universalist approach fits seamlessly with the TWAIL perspective as it utilises universal rights enshrined in the domestic legal system of the African and third world states to promote the protection of non-heterosexual rights. Even though these universal rights concurrently exist under international instruments, the reformed universalist approach ensures that the focus is placed on the home-grown rights legitimately derived from legal sources which these third world countries have promulgated for themselves or, in the case of the ACHPR, have come together to promulgate, adopt and ratify as applicable to them. This makes the reformed universalist approach more suitable for third world countries and increases its potential effectiveness in providing a solution to the tension between universalism and cultural relativism insisted upon by African and other third world states.

3.9 Conclusion

This chapter analysed the tension between the opposing concepts of universalism and cultural relativism and how this affects the incorporation and promotion of non-heterosexual rights within African and other conservative states. The chapter also discussed alternative approaches to the protection of non-heterosexual rights which can bridge the gap between universalism and relativism. Concepts such as blended universalism and weak cultural relativism attempt to provide a compromise middle-ground solution by prioritizing one approach while accommodating the other to certain extents to enable both to co-exist within a unified framework. However, the shortcomings of these concepts mean that they are unlikely to be workable and were, therefore, excluded as viable solutions to the search for an effective solution.

Having excluded these alternatives, the chapter then focused on the conceptualization of the reformed universalism approach to the protection of non-heterosexual rights which utilizes the universal human rights existing within domestic jurisdictions as the basis for protecting these rights despite the cultural objection of the African states. In so doing, this approach ensures that the cultural relativist objection is circumvented by the state's domestic constitutional provisions which take precedence over the cultural

objections. The two main platforms of the reformed universalist approach – 'sex' as a protected characteristic and privacy and family life protections were critically analysed and applied as potentially effective solutions.

The chapter argued that the reformed universalism approach is preferable and more effective than universalism on two basis – 1) it deemphasizes 'sexual orientation' as the basis for the protection of the rights of non-heterosexual persons, as this is subject to varying levels of cultural permissibility around the globe and constitutes the main plank of the relativist objection to the universal rights of non-heterosexual persons – Africa and other conservative states fear that the western world wants to impose their sexual orientation styles on them. By discarding this unnecessary and provocative descriptor, the reformed universalism approach focuses on the root characteristic defining the rights of non-heterosexuals – i.e. their sex or membership of the protected characteristic of sex. Their rights can be protected on this basis without having regard to the nature of the physical activity or proclivity or sexual preferences related to their relationships, thus staving off the cultural objection platform on which most of the resistance to these rights are based. 2) The reformed universalism approach avoids conflict with the cultural relativist view by not seeking to impose a universal standard on these states holding out for relativist application but using the domestic versions of these universal rights to protect non-heterosexual persons.

As argued in this chapter, the view of non-heterosexual rights as a potential imperial imposition of the cultural and moral values of western states on African states is a strong basis for the opposition to such rights in Africa, still recovering from decades of political colonisation and avoiding any form of neo-colonialism. By avoiding the seeming imposition of universalist standards, it becomes easier for individuals within these states to utilise domestic legal instruments to protect their rights.

Finally, the chapter examined the reformed universalist approach from a TWAIL perspective, arguing that it fits within this perspective based on its avoidance of western-influenced universalist standards which TWAIL frowns upon, but utilizes domestic versions of these universal human rights.

Having conceptualized the reformed universalist approach, the next chapter will critically examine the provisions in the African Charter on Human and Peoples' Right

and the domestic constitutions of African states that can be utilized to protect and promote the universal human rights of non-heterosexual persons. It will also examine the important role of the judiciary in these countries to liberally interpret these rights to protect the universal rights of non-heterosexual persons. Considering the conservative nature of the judiciaries of many African states, it is necessary to examine the general judicial approach to non-heterosexual rights and the extent to which the Courts will be willing to adopt the reformed universalism approach to protect non-heterosexual rights.

CHAPTER FOUR

Implementing *Reformed Universalism* through the African Charter and Domestic Constitutions

4.1 Introduction

This chapter examines the implementation of the reformed universalist approach to non-heterosexual rights within African states, focusing on the regional and domestic legal instruments that can be utilised to enshrine the fundamental protection and promotion of these rights. The chapter focuses on two sets of legal instruments for this purpose - the African Charter on Human and Peoples' Rights (ACHPR) 1981 ratified and binding on almost all African states;[1] and the domestic constitutions of a majority of African states. It argues that there are sufficient binding legal instruments at the regional and domestic levels to enshrine the protection of non-heterosexual rights in African states without recourse to the international human rights instruments and that utilising the provisions of these domestic instruments portend a feasible legal approach to successfully enshrine legal protection for non-heterosexual rights in Africa.

The chapter further examines the critical role that regional judicial forums play in enshrining these protections within domestic jurisdictions, bearing in mind the generally conservative nature of the judiciary in many of these African states. The African Commission on Human and People's Rights ('African Commission') and the African Court on Human and People's Rights ('African Court') are the judicial and quasi-judicial forums established under the ACHPR and the latter has developed over the years to become a progressive, activist judicial forum for compelling compliance by African states with their obligations under the ACHPR.

The chapter examines these issues in three stages. Firstly, it critically examines the general attitude of the judiciary in African states to non-heterosexual rights, analysing

[1] Morocco is the only African country that has not yet officially ratified the ACHPR as of April 2020. See 'African Commission on Human and People's Rights: Ratification' <https://www.achpr.org/hotac> accessed 08 August 2020.

the impediments to judicial recognition of these rights within domestic forums while also highlighting the noticeable progress made by the judiciary in a few of these states towards increased recognition and protection of these rights. Following from this, it critically analyses the potential for utilising the ACHPR and its regional judicial forums for protecting non-heterosexual rights in Africa, examining the relevant provisions of the ACHPR and the recent jurisprudence of the African Court in cases before it which show its progressive approach to human rights under the ACHPR. It then discusses how this progressive judicial forum can be utilised to challenge widespread homophobia by African states bound by the ACHPR, while also acknowledging the significant impediments and shortcomings of the African Court in compelling the protection of these rights by African states. Thirdly, based on the shortcomings of the African Court, the chapter examines the human rights provisions in the domestic constitutions of some African states to analyse how these provisions can be utilised to enshrine the protection of non-heterosexual rights, arguing that the non-discrimination, equality and right to private life provisions contained in these domestic constitutions are capable of being used for this purpose with success. Not only are these non-heterosexual rights protected by the constitutions, but they fall within the category of rights enforceable through the expeditious processes[2] for human rights protection under these constitutions, making it easy for non-heterosexual persons to secure judicial protection of their rights, life, liberty and dignity.

This chapter, therefore, argues that the combined impact of the regional and domestic legal instruments within Africa make the protection of non-heterosexual rights a binding legal obligation on African states for which they can be compelled to adopt legislative and policy measures towards the protection of these rights by domestic or regional judicial bodies.

[2] These expeditious processes are discussed later in this chapter under the domestic constitutions of African states. See Section 4.4 of this Chapter, page 149.

4.2 Judicial Attitude to Non-Heterosexual Rights in African States

The subject of non-heterosexuality does not often receive judicial attention in African states because a large part of the objections to its practice exists at the cultural and societal level and legal prohibitions of non-heterosexual activities are often not enforced by the state. Despite the widely recognised homophobia prevalent in the continent, there are, as yet, very few documented cases of criminal prosecutions of persons engaging in non-heterosexual activities, as there have only been four recorded cases of such prosecutions across the major African states leading the charge against non-heterosexual rights, i.e. Nigeria, Uganda, Kenya and Zimbabwe.[3]

Indeed, the most notable judicial pronouncements on the issue have arisen from civil suits by NGOs seeking to enshrine the fundamental right of non-heterosexual persons to freedom of association and expression without discrimination. For instance, the suit filed by Lesbians, Gays and Bisexuals of Botswana (LEGABIBO) challenging the discriminatory impact of the criminal code's proscription of same-sex activities at the High Court of Botswana led to the decriminalisation of non-heterosexuality in Botswana.[4] Nonetheless, in the cases of judicial intervention, the attitude has been largely mixed, with some decisions in favour of upholding the criminalisation of non-heterosexual activities between consenting individuals[5] and others in favour of upholding the fundamental right of non-heterosexual persons to freely express themselves sexually.[6] However, apart from South Africa and Botswana, the Courts in other African states have largely either leaned in favour of upholding the criminalisation of non-heterosexual activities or only accorded a marginal victory for LGBT activists.[7]

Two recent decisions in Botswana and Kenya in 2019 illustrate this point. In the Kenyan case of *Eric Gitari v The Hon. Attorney General and Kenya Christian Professionals*

[3] Alan Yuhas, 'A Win for Gay Rights in Botswana is a 'Step Against the Current' in Africa' (*New York Times,* 11 June 2019) <https://www.nytimes.com/2019/06/11/world/africa/botswana-gay-homosexuality.html> accessed 09 November 2019.

[4] LEGABIBO v Attorney General of Botswana, MAHGB-000591 16, High Court of Botswana, June 2019.

[5] See, for instance, Eric Gitari's case discussed in chapter 4.5.1, page 165.

[6] See, for instanceLEGABIBO v Attorney General of Botswana (n 4).

[7] These cases are discussed later in chapter 4.5, page 163.

Forum,[8] LGBT activists challenged the constitutionality of Sections 162 and 165 of the Penal Code on the basis that the criminalisation of private consensual relations between adults is a violation of articles 2 (4), and 23 (3) (d) of the Kenyan Constitution of 2010 as it relates to freedom from discrimination and privacy rights. On May 24, 2019, the Kenyan High Court, in this case, upheld the validity of the Penal Code provisions outlawing homosexual activities holding that the law accords with the need to protect family life and uphold public morality, decency and sanctity.

This decision reflects the trend in Africa where the Courts generally stay away from interfering in the criminalisation of homosexuality. Rather, as will be demonstrated later in this chapter, what some LGBT activists have continually celebrated as judicial intervention in favour of non-heterosexual rights have been mostly procedural decisions relating to the rights of non-heterosexual persons to freedom of association and freedom of speech in Botswana and Zambia.

The recent decision of the High Court of Botswana in June 2019 is widely celebrated by LGBT groups as a step forward in Africa as it is amongst the first to formally uphold the fundamental rights of non-heterosexual persons to freely associate and express themselves sexually.[9] In this case, *Lesbians, Gays and Bisexuals of Botswana (LEGABIBO) v Attorney General, Botswana,*[10] LEGABIBO challenged the anti-sodomy laws of Botswana which prescribed up to 7 years imprisonment for consensual homosexual activities. When the case was brought before the Court, a lawyer for the government argued that the law should not be overturned because it reflects the values of Botswana's society, and pressed the challengers to provide evidence that those values had changed. But the three judges voted unanimously to revoke the laws, holding that human dignity is harmed when minority groups are marginalized. The Court further held that sexual orientation is not a fashion statement. It is an important attribute of one's personality and struck down the criminalisation as a violation of the constitutional right to dignity and privacy. Importantly, the Botswana Court of Appeal in

[8] [2016] EKLR.
[9] 'Botswana decriminalises homosexuality in landmark ruling' (BBC, 11 June 2019) <https://www.bbc.com/news/world-africa-48594162> accessed 20 July 2020.
[10] LEGABIBO v Attorney General of Botswana (n. 4).

November 2021 upheld this decision of the High Court and effectively struck out the two provisions of the Penal Code that criminalised same-sex relationships.[11]

Nevertheless, there have been other marginal judicial victories for LGBT activists in Africa stemming from judicial decisions in Zambia and Botswana that give hope for a gradual shifting of the tide in favour of the recognition of non-heterosexual rights. In the 2013 case of *The People v Paul Kasonkomona*,[12] the accused expressed his opinion—on a privately-owned television channel—that the rights of sexual minorities, including LGBT people and sex workers, should be recognized. He was arrested outside the television studio and charged under an obscure and archaic provision of the Penal Code outlawing "soliciting for immoral purposes" in a public place.[13] He was acquitted by the Magistrate Court. On appeal, the Zambian High Court distinguished between soliciting someone to engage in same-sex sexual acts, a criminal offense in Zambia, and advocating for people's rights and held that the Appellant's act was a part of the free speech protections in the Zambian constitution.[14]

In an earlier decision in Botswana,[15] where LEGABIBO had challenged the registrar of NGO's refusal of their registration on the basis that its purpose was immoral, the High Court held that refusal to register the group was a violation of the applicants' rights to equal protection of the law and to freedoms of expression, association and assembly.[16]

Also, in 2014, in *Frank Mugisha & Sexual Minorities, Uganda v Government of Uganda*, the Constitutional Court of Uganda struck down the Anti-Homosexuality Act of 2013 on the technical ground that its passage did not meet the parliamentary quorum required under the Uganda Constitution.[17] This decision is a partial victory for non-heterosexual

[11] 'Botswana appeals court upholds ruling that decriminalised gay sex' *Reuters* (November 29, 2021) <https://www.reuters.com/world/africa/botswana-appeals-court-upholds-ruling-that-decriminalised-gay-sex-2021-11-29/> accessed 09 October 2022.

[12] The People v. Paul Kasonkomona [2015] HPA/53/2014, Zambia, High Court.

[13] Section 178(g) of the Penal Code, Cap. 87 of the Laws of Zambia.

[14] The People v. Paul Kasonkomona (n. 12) p 155.

[15] LEGABIBO v Attorney General of Botswana (n. 4).

[16] Graeme Reid, 'Africa Rulings Move LGBT Rights Forward' (*Human Rights Watch,* 5 August 2015) <https://www.hrw.org/news/2015/08/05/africa-rulings-move-lgbt-rights-forward#> accessed 08 November 2019.

[17] There is no available citation of the actual case due to the dearth of official records in Uganda. The only reference to the case was from newspaper reports of the decision. See Agence France-Pesse 'Uganda anti-gay law challenged in Court' (*The Guardian,* 31 July 2014) < <https://www.theguardian.com/world/2014/jul/31/uganda-anti-gay-law-constitutional-Court> accessed 20 November 2019.

rights as the Court did not pronounce on the substance of the homophobic statute being an infringement of the human rights of non-heterosexual persons, but rather only queried the procedure for its passage, leaving it open for the government to pass the law once again in compliance with parliamentary procedure and render it binding.

As stated, the above 'victories' are procedural decisions not affecting the criminalisation of homosexuality nor in any way enunciating the right of non-heterosexual persons to freely express themselves sexually in these states, except in Botswana where the decision explicitly decriminalised non-heterosexual activities. In other African states, judicial decisions have largely reflected public opinion on the subject. For instance, the Ugandan High Court in July 2014 ruled against four activists who had sued the ethics and integrity minister, Simon Lokodo, for shutting down a February 2012 workshop on advocacy for LGBT rights. The judge ruled that the workshop participants were "promoting" or "inciting" same-sex acts, in a ruling that went so far as to suggest that even distributing condoms to gay and bisexual men would amount to 'direct or indirect promotion of same-sex practices."[18]

It is, therefore, evident that, with notable exceptions, judicial decisions in Africa largely reflects the general societal objections to non-heterosexuality and is only gradually beginning to chip away at these objections with outcomes such as the LEGABIBO cases in Botswana revealing the potential for judicial intervention to chart a way forward for the protection of non-heterosexual rights in Africa. Nonetheless, it is vital to appreciate the fact that the slow progress of judicial intervention to protect non-heterosexual rights in Africa is not a sign of backwardness in the continent but a reflection of the dynamism of societal growth and acceptance of such rights. Afterall, it was only in 2003 that the US Supreme Court finally came around to striking down the criminalisation of homosexuality in *Texas v Lawrence*,[19] several decades after other western states like the UK had decriminalised homosexuality in 1967. It also took another 12 years before the same US Supreme Court would declare equality of marriage for non-heterosexual couples.[20]

[18] Simon Lokodo and Attorney. General, Civil Appeal No. 195 of 2014.
[19] 539 U.S. 558- 2003.
[20] Obergefell v. Hodges (2015) 576 U.S. 644.

What was also clear was that these US judicial decisions almost ran contemporaneously with changing public perceptions in favour of homosexuality in the US as different studies showed that over 53 per cent of Americans were in support of same-sex marriage in 2014,[21] just before the 2015 decision in *Oberfegell v Hodges*.[22] Arguably, judicial decisions which run counter to prevailing public opinion on important social issues are likely to achieve very little in terms of changing public perception on the subject, but, on the contrary, is likely to harden societal opposition to the subject. For instance, the US Supreme Court's decision on abortion rights in *Roe v Wade*[23] in 1973 did little to change public perception towards the subject, but rather hardened the opposition to the issue which remains a contentious social and political debate today and has even prompted drastic legislation restricting abortion access in many states of the US.[24]

Judicial officers are members of society and can face public backlash for adopting positions against deeply held social values. Moreover, such inorganic judicial decisions are unlikely to be enforced or respected by the government, with public support, in a continent where disregard for judicial decisions is more of the norm than the exception.[25] The problem with the unfavourable judicial attitude towards non-heterosexual rights in Africa is, therefore, largely a product of the conservative nature of the judiciary which is, in turn, largely influenced by the conservative nature of the communities in these states. This conservative nature of the judiciary in African states is a significant impediment to the actualisation of legal protection for non-heterosexual rights in these states and it is necessary to understand the import of a conservative

[21] Daniel Cox, Juhem Navarro-Rivera, Robert P. Jones, 'A Shifting Landscape: A Decade of Change in American Attitudes about Same-Sex Marriage and LGBT Issues' (2014) PPPRI Research Executive Summary 12; Samantha Schmidt, 'Americans' views flipped on gay rights. How did minds change so quickly? (*Washington Post,* 9 July 2019) <https://www.washingtonpost.com/local/social-issues/americans-views-flipped-on-gay-rights-how-did-minds-change-so-quickly/2019/06/07/ae256016-8720-11e9-98c1-e945ae5db8fb_story.html> accessed 09 November 2019.

[22] 135 S. Ct. 2071 – 2015.

[23] Roe v. Wade, 410 U.S. 113 (1973).

[24] 'Roe v. Wade and Its Impact' (*US History,* June 2018) < https://www.ushistory.org/us/57d.asp> accessed 30 October 2019.

[25] Hakeem Yusuf, 'The judiciary and political change in Africa: Developing transitional jurisprudence in Nigeria (2009) 7(4) International Journal of Constitutional Law 680.

judiciary in other to fully appreciate why it is a significant hurdle for non-heterosexual rights.

4.3 Judicial Conservatism and Non-Heterosexual Rights in Africa

Judicial conservatism is a subject that spurs academic debate regarding its import and connotations.[26] While there is no standard universally accepted definition of a 'conservative' judiciary, the key tenets of conservatism have been identified in the literature.[27] Generally, the two pillars of judicial conservatism are 'strict constructionism' and 'original intent interpretation'. Barnett expatiates on these pillars, stating that for a classic conservative judiciary –

> judicial authority extends only to judicial enforcement of the law enacted by the requisite majority of duly elected representatives, whether that law is a statute or the Constitution. They argue that because any such enactment represents the authoritative voice of the people, it should be "strictly construed" according to the "original intent" of its framers. Any deviation from the original intent lacks authority and is to be condemned as judicial fiat or "lawmaking"[28]

By 'strictly construing' written legal instruments according to the 'original intent' of its drafters, a conservative judicial resists any attempt to introduce other extraneous considerations bordering on equity, fairness or reasonability of the written clauses of the instruments. For a conservative judiciary, therefore, the law is as determined by the majority as expressed in written instruments. Barnett argues that such a form of conservatism leads to 'majoritarianism', stating that 'judicial conservatism amounts to majoritarianism only weakly fettered by constitutional constraints that are themselves grounded in majoritarianism'.[29] However, Barnett's critique of conservatism on such ground overlooks the wider forms of conservatism not strictly connected with

[26] Randy E. Barnett, 'Judicial Conservatism vs. a Principled Judicial Activism' (1987)10 *Harv. J. L. & Pub. Pol'y* 273.
[27] See David S. Law, 'The Anatomy of a Conservative Court: Judicial Review in Japan' (2009) 87 *Tex. L. Rev*. 1545; Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Activism* (University of Chicago Press, 1992) 3.
[28] Randy E. Barnett, 'Judicial Conservatism vs. a Principled Judicial Activism', (n 26) 275.
[29] ibid.

interpreting plainly written instruments as, for instance, in situations bordering on important political moments in the life of a nation where there are no explicit written rules governing the subject or, in cases where there are conflicting written rules in question, where the Court has to consider wider socio-political factors in deciding which side to lean. For instance, Estreicher argues that the attitude of the US Supreme Court in the 1970s and 1980s relating to several cases bordering on federalism (particularly the interpretation of the 'commerce clause') cannot be strictly categorised as 'conservative' or 'activist' but rather 'judicial self-restraint' based on the desire of the Court to maintain the existing federal structure of the US.[30]

Construing conservatism, therefore, imports more than just analysing the attitude of the Courts in a particular jurisdiction to interpreting written rules. It extends to the general response of the Courts to conflicting rules/laws/precepts and the ideological leanings of the Courts towards protecting and advancing rights whether explicitly entrenched in statutes or derivable from several, sometimes conflicting, written instruments. This is especially in relation to advancing new rights or expanding the frontiers of new rights beyond existing rights or from ambiguous legal instruments.

Heck argues that judicial conservatism can be gleaned from three key attitudes of the Court - an unwillingness to declare constitutional limitations on government, or a relative unwillingness to become involved in heated political questions, or the belief that the power of the Court system relative to other branches of government should be reduced.[31] Law assesses conservatism from the attitude of the Courts to strike down legislation and governmental policies. He argues that the willingness of the Court to strike down several pieces of legislation show its pragmatism and liberalism in protecting the rights of the citizens and thus a conservative judiciary is reflected in the unwillingness of the Court to intervene in reversing legislative provisions and generally deferring to the government's policies on matters affecting the rights of the citizens.[32]

What emerges from these discussions is that judicial conservatism encompasses the totality of judicial attitude to a wide range of adjudicatory issues and is not limited to a

[30]Samuel Estreicher, 'Conserving the Federal Judiciary for a Conservative Agenda?' (1986) 84(5) *Michigan Law Review* 582.
[31]Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Activism*, (n 27) 5.
[32] David S. Law, 'The Anatomy of a Conservative Court: Judicial Review in Japan', (n 27) 12.

single parameter. Therefore, where a Court generally adopts a cautious, restrictive approach to interpreting or advancing new rights or is generally averse to importing legal or constitutional limitations on the powers of the other arms of government in respect of its powers and functions, the Court can be regarded as conservative in nature. One cardinal parameter, however, in assessing judicial conservatism is the adoption of a traditional 'strict constructionism' approach by the Court as this is often the precursor of a cautious and restrictive approach by a judiciary unwilling to proactively advance new rights or actively constitute itself into an important restriction on executive/legislative power in other to avoid a situation of 'juristocracy' i.e. governing through the judiciary.[33]

Judicial conservatism in African states is the result of a combination of three interwoven and interconnected factors. First, the judiciary in many African states are weak, poorly funded and often lack independence from the government.[34]They are, therefore, largely dependent on the executive arm of government and render decisions that will not unnecessarily bring them in conflict with this powerful arm. The dependence arises mostly from the structure of the financing of the judiciary in many African states, whereby the judiciary is funded from revenue sources disbursed by the executive arm. Controlling the purse of the judiciary is the strongest means of keeping the judiciary on a leash. Also, the appointment process for judicial officers in many African states is not insulated from political influence and makes the judicial officials owing allegiance to the executive authorities responsible for their appointment. Secondly, and flowing from the first, the executive arm of government in many African states are eager to preserve what they consider the 'traditional values' of their societies which frown against non-heterosexual rights and often take steps to ensure that social structures are stringently built around heteronormativity and outliers are shamed, ostracised and bullied.[35] Some African states, such as Nigeria, even go as far as statutorily prohibiting LGBT associations and civil societies from advocating for non-heterosexual rights in the country on penalty of imprisonment.[36] Thirdly, and flowing from the second, the harsh

[33] David Chang, 'Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices? (1991) 91(4) *Columbia Law Review* 843.
[34] Hakeem Yusuf, , 'The judiciary and political change in Africa (n 25) 670.
[35] I. Amadiume, *Male Daughters, Female Husbands: Gender and Sex in an African Society* (Zed Books, London 2015) 12.
[36]Anti-Same Sex Marriage Act 2014 of Nigeria, s 14.

social recriminations against non-heterosexuality drive LGBT persons underground and the less visibility of LGBT persons results in fewer or no official arrests or prosecutions before the Court and also deter civil suits by LGBT persons before the Courts, thereby depriving the Court of opportunities to scrutinise the validity and propriety of these homophobic laws and heteronormative social norms. Thus, as stated earlier, despite African states having stringent homophobic laws and attitudes, there are very few recorded instances of official arrests of LGBT persons, and even rarer instances of official prosecutions coming before the Courts and the Courts can only intervene when cases are brought to them either through criminal prosecutions or civil suits. In essence, a large proportion of the homophobic acts in African states are carried out at the informal, social levels outside of the judicial purview thereby reducing the potential for judicial intervention to protect non-heterosexual rights.

Nevertheless, because these informal, social prosecutions of non-heterosexuality are often state-sanctioned through statutory provisions and official government policies, there is an avenue for the judiciary to intervene at the state level to compel the protection of non-heterosexual rights by the government through the repeal of these homophobic laws and official prosecution of all forms of indignity and harassment of non-heterosexual persons. However, when called upon to intervene in this respect, the judiciary in many African states are unable or unwilling to do so, as they often adopt a strict constructionism approach in the interpretation or advancement of new rights, particularly emergent areas of social concern such as non-heterosexuality which appears to go against the grain of public opinion and the absence of any legislative support for these rights creates an easy avenue for the judiciary to abdicate its responsibilities to protect the inalienable rights of citizens. Thus, cases such as the *Eric Gitari* case in Kenya are a result of the strict construction of the Kenyan constitution according to its original intent which, as the High Court indicated, was not intended to cover discrimination on the basis of sexuality or the right to private and family life predicated on a person's sexual orientation.

While this decision strictly construed the Kenyan constitution and would appear to enforce the original intention of the constitution, it is worthy of note that the eventual outcome was perhaps inevitable based on the nature of the Claimant's case and the arguments made. Attempting to persuade a conservative Court to extrapolate the

protection of sexual orientation from the discrimination and private/family life provision in a constitution was always going to be a herculean task with little prospect for success considering the clear wordings of those provisions. Even though this approach was successful in the LEGABIBO case in Botswana, it is an incredibly rare outcome in African states. However, as argued in Chapter Three, the claimants would have stood a better chance arguing that the discrimination was on the basis of sex i.e. his membership of a particular defined class explicitly recognised and protected under the Kenyan Constitution. Article 27(4) & (5) of the Kenyan Constitution provides that-

> 4) 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.
> 5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

If the above provisions were relied upon instead, the question would then have revolved around a determination of whether the claimant suffered discrimination based on his belonging to the male sex which he would not have suffered if he belonged to the female sex (in terms of engaging in criminal activities with a male). In such instance, even the strict constructionism approach of a conservative judiciary would not be a bar to accommodating such claim seeking to ventilate an explicitly protected right under the constitution – the prohibition of discrimination on grounds of sex.[37]

The chances of success of such an approach will be analysed later in this chapter,[38] but suffice to state at this juncture that non-heterosexual claimants before these conservative domestic judiciaries often face significant hurdles to protect their rights before a judiciary that reflects the conservative societal attitude towards non-heterosexuality. In this respect, it becomes necessary to consider the feasibility of resorting to a supra-national legal instrument and judicial bodies not influenced by domestic social conservatism and with binding effect on the state capable of

[37] This point is discussed in full subsequently in Chapter 44.5, page 163.
[38] ibid.

influencing and compelling legislative changes in favour of the protection of these rights.

4.4 The ACHPR and Human Rights Protection in Africa

The African Charter on Human and Peoples' Right (ACHPR or 'African Charter')[39] is a supra-national, regional human rights legal instrument espousing the basic human rights of all Africans. It is a treaty unanimously adopted at a meeting of African heads of state and governments held in Kenya on 27 June 1981. It entered into force on 21 October 1986, after a majority of African states had ratified the Charter. The Charter provides for a wide range of basic human rights that must be respected and protected by African governments in the treatment of their citizens. Although the ACHPR was adopted in Kenya in 1981, the finalisation and adoption of the draft were done in Banjul, Gambia and it is often referred to as the 'Banjul Charter'.

The ACHPR is the African equivalent of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953), the American Convention on Human Rights 1969 and the Asian Human Rights Charter 1998. It espouses human rights provisions which largely reflect the rights in the Universal Declaration of Human Rights (UDHR) though with unique phrasing and clawbacks to reflect 'the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights'.[40]

Other conventions and protocols have been adopted to expand specific rights guaranteed by the ACHPR and they include - the Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights 1998, the African Charter on the Rights and Welfare of the Child 1999, the Convention on Preventing and Combating Corruption 2003, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol) 2005. Together, these instruments form a body of regional human

[39] OAU Doc. CAB/Leg/67/3/Rev.5, reprinted in (1981) 21 ILM 58.
[40] Preamble to the ACHPR, available at <https://www.achpr.org/legalinstruments/detail?id=49#:~:text=The%20African%20Charter%20on%20Human,freedoms%20in%20the%20African%20continent.> [accessed 12 July 2020].

rights laws governing African states and which seek to provide a comprehensive protection system for the human rights of Africans by limiting the sovereignty of African states. Nevertheless, the ACHPR remains the fundamental human rights instruments in Africa that governs the actions and policies of African states.

In terms of its application, the ACHPR has been ratified by 54 out of 55 African states, with South Sudan being the latest African state to ratify the Charter in October 2013 following the creation of the country in 2011.[41] Morocco is the only African state yet to ratify the Charter, which is unsurprising considering the state was only readmitted into the African Union (AU) in 2017. The ACHPR is, therefore, binding on 54 African states which are consequently obliged under article 1 to 'recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them'. Some states like Algeria and Nigeria have gone further to domesticate the provisions of the Charter within their domestic law, i.e. enact the provisions of the Charter as a domestic statute, making it enforceable as a local statute.[42]

Also, there are reporting duties on state parties under article 62 of the Charter which obliges them to submit every two years a report on the legislative or other measures taken, to give effect to the rights and freedoms recognized and guaranteed by the Charter. Further, under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, State Parties are also mandated to indicate in their periodic reports submitted in accordance with article 62 of the Charter, the legislative and other measures undertaken for the full realisation of the rights recognized in the Protocol. Third-party interventions in reporting are also welcomed as institutions, organisations or any interested party wishing to contribute to the examination of a State Party report are also permitted to send their contributions, including shadow reports, to the Secretariat 60 days prior to the examination of the State Party report.[43] This reporting obligation on states operates as a way of managing

[41] 'State Parties to the African Charter' < https://www.achpr.org/statepartiestotheafricanCharter> accessed 24 August 2020.

[42] The bifurcation of African states in terms of a monist or dualist approach to international instruments is discussed in Chapter 5.5, page 234.

[43] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art 2.

and supervising the compliance by African states with the human rights provisions under the Charter and associated protocols and is an indication of the desire to ensure the protection of human rights in a region rife with human rights abuses in various forms.[44]

4.4.1 Impact of the African Charter on Domestic Human Rights in Africa

The ACHPR was intended to harmonise human rights protection within the region and also provide an important space for the articulation of human rights issues that are neglected or silenced domestically. With its broad application to African states, it creates a regional legal obligation on these states to implement its provisions within their domestic jurisdiction and update their laws to align with the Charter's provisions.[45]

4.4.1.1 Impact on Human Rights Protection by Domestic Courts

The Charter's provisions are increasingly gaining influence within the domestic jurisdictions of African states in terms of legislative actions and judicial pronouncements. As stated earlier, states like Nigeria have domestically incorporated the Charter provisions through the enactment of the African Charter on Human and Peoples' Right (Ratification and Enforcement) Act 1990 and the Supreme Court of Nigeria declared in *Fawehinmi v Abacha*[46] that the domesticated Charter had taken precedence over domestic statutes as it is a reflection of Nigeria's international obligation. Consequently, in the event of a conflict between its provisions and any local statute, the former will prevail over the latter. The Court declared that the domesticated Charter was only subject to the country's constitution in terms of the hierarchy of laws. In this case, the appellant sought to enforce the provisions of the Charter's provision on equality which is omitted from the Nigerian Constitution and other domestic statutes. The government argued that although the Charter was binding and had been

[44] The significance of reporting obligation and its impact on compliance with the Charter provisions is discussed in Chapter 5.2.3, page 205.
[45] Frans Viljoen, 'Application of the African Charter on Human and Peoples' Rights by Domestic Courts in Africa' (1999) 43(1) Journal of African Law 2.
[46] (1996) 9 NWLR (Pt. 475).

domesticated, its provisions could not expand the human rights provisions in the Nigerian constitution and should be discountenanced by the Court because the equality right is not contained in the bill of rights under the Nigerian Constitution but is provided under article 3 of the Charter.[47] Rejecting this argument, the Supreme Court held that the human rights enforceable in Nigeria are those under the Constitution as supplemented by the Charter's provisions.

In other African states, national Courts are increasingly influenced by and use the Charter's provisions to assist them in interpreting national law. Prominent examples are the Constitutional Court of Benin, which in numerous cases referred to the African Charter in rendering domestic decisions. In *Ewiye v Registrar of Unions*[48] decided by the Beninois Constitutional Court in 1994, the Court heard an application to have certain appointments to the Communications Authority declared unconstitutional. In deciding the case, the Court referred to the African Charter as an integral part of the Beninoise Constitution and article 10 of the Charter was cited as an interpretative tool, in interpreting the freedom to associate set out in article 25 of the Beninois Constitution.[49] A study conducted by Viljoen found that of the 14 cases adjudicated by the Beninoise Constitutional Court in 1994, seven contain some reference to the African Charter.[50] A more illustrative instance of the influence of the Charter on domestic laws can be found in *Attorney-General of Botswana v Unity Dow*[51] in Botswana where the Court of Appeal relied on article 2 of the Charter ratified by Botswana to inform its conclusion that the omission of the word 'sex' from the list of prohibited grounds for discrimination in the Botswana Constitution does not imply that discrimination on this basis is legal. The Court reasoned that article 2 of the Charter prohibits discrimination on grounds including sex and Botswana is bound by the Charter's provision to outlaw discrimination on sex grounds. The Court stated that:

[47] ibid, 526, Paras A - E
[48] Decision DCC 10-94 of 9 May, 1994.
[49] ibid.
[50] F . Viljoen, 'Application of the African Charter on Human and Peoples' Rights by Domestic Courts, (n 45) 3.
[51] [1992] LRC (Const.) 6.

> Botswana is a signatory to this Charter. Indeed it would appear that Botswana is one of the credible prime movers behind the promotion and supervision of the Charter.[52]

The Court then proceeded to hold that as a major party in the promotion and adoption of the Charter, the state is bound to interpret its domestic legislation in accordance with the Charter provisions and incorporate 'sex' as one of the protected characteristics in the discrimination provision.

In Ghana, the Supreme Court relied on the provisions of the Ghanian Constitution and the African Charter in *New Patriotic Party v. Inspector-General of Police, Accra*[53] to find the provisions of a Public Order Decree by the Inspector General of Police to be a violation of the human rights of individuals to freely assemble under section 21 of the Constitution and article 11 of the Charter. The Court stated that:

> Ghana is a signatory to this African Charter and Member States of the Organisation of African Unity and parties to the Charter are expected to recognize the rights, duties and freedoms enshrined in the Charter and to undertake to adopt legislative and other measures to give effect to the rights and duties. I do not think the fact that Ghana has not passed specific legislation to give effect to the Charter, [means] the Charter cannot be relied upon. On the contrary, Article 21 of our Constitution has recognised the right to assembly mentioned in Article 11 of the African Charter.[54]

Similar judicial pronouncements can be found across different states in Africa. In Namibia, the Namibian High Court declared in *Kauesa v. Minister of Home Affairs*[55] that:

> The Namibian government has, as far as can be established, formally recognized the African Charter in accordance with Article 143 read with Article 63(2)(d) of the Namibian Constitution. The provisions of the Charter have therefore become binding on Namibia and form part of the law of Namibia in accordance with Article 143, read with Article 144 of the Namibian Constitution.[56]

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[52] ibid, pg 656d.
[53] [1993] 1 N.L.P.R. 73, suit 3/93, 30 November, 1993.
[54] ibid, pg 39.
[55] [1995] 1 SA 51 (NmHC); [1994] 2 LRC 263.
[56] At 86 G-H; 303 d.

A critical example of the influence and importance of the Charter in protecting human rights in Africa can be gleaned from the Nigerian case of *Garba v. Lagos State Attorney General.*[57] In this case, the Appellant was convicted under a Military Decree at a time of military governance when the Nigerian Constitution had been suspended by the military government. The appellant's suit alleging a prospective infringement of his right to life under an illegal decree was challenged by the government arguing that the constitutional protection of the right to life was in abeyance because the constitution had been suspended upon the takeover by the military. The Court discountenanced this argument on the basis that even though the constitution was in abeyance, the right to life is protected under the Charter that Nigeria had ratified and domesticated and was thus applicable in the absence of the constitutional right to life. According to the Court-

> The African Charter on Human and Peoples' Rights, of which Nigeria is a signatory, is now made into our law by the African Charter Act, 1983, cited by the learned counsel for the applicants. Even if its aspect in our Constitution is suspended or ousted by any provision of our local law, the international aspect of it cannot unilaterally be abrogated.[58]

As a result, the Court was willing to substitute the human rights provisions in the African Charter for the bill of rights under the Constitution to ensure there's adequate protection of individual's human rights in Nigeria even in the absence of the latter.

Another Nigerian case in which reliance was placed on the African Charter rights during the period of military government and suspension of the constitution was *Agbakoba v. Director State Security Services.*[59] In this case, the passport of the applicant was impounded by a state's security services without any official reasons being given. The High Court held that a passport was the property of the government and could be withdrawn at any time and there was, thus, no infringement of the appellant's right. Allowing an appeal against the judgment, the Court of Appeal found that the seizure of the passport constituted a violation of the appellant's right to freedom of movement which was recognised and guaranteed under article 12 of the Charter. The Court

[57] Suit ID/599M/99, judgment of 31 October, 1999.
[58] Pg 28, para C-D.
[59] [1994] 6 NWLR 475; see also [1996] 1 C.H.R.D.

interpreted the right to freedom of movement under the Charter as including the right not to be refused entry to or exit from one's country. The Court held that in the absence of the constitutional right following the suspension of the constitution, reliance can be placed on the Charter right to protect the appellant's right to freedom of movement.

Nigeria is one of the African states with far-reaching domestication of the Charter's provisions as the judiciary has gone a step further to incorporate the rights under the Charter with the expedited procedure for enforcement of human rights under the constitution i.e. while section 46 of the Nigerian Constitution created an expedited procedure for enforcement of human rights under the Constitution, the Chief Justice of the Federation, under powers granted by section 46, promulgated the Fundamental Rights Enforcement Procedure Rules (FREPR) 2009 which incorporated the Charter rights amongst the constitutional rights which can be enforced under this expedited procedure.[60] Thus, applicants can bring domestic suits to enforce Charter rights under the unique procedure created for enforcing constitutional rights. Considering that this expedited procedure circumvents the cumbersome process for enforcing civil rights by introducing a fast track system, the FREPR 2009 ensures that the Charter's rights have a bigger influence in domestic civil rights litigation in Nigeria, akin to the influence constitutional human rights have in the country.

In South Africa, the Constitutional Court relied on the right to life under article 4 of the Charter in *S. v. Makwanyane*[61] to declare capital punishment in the country illegal and unconstitutional, arguing that the Charter prohibits the arbitrary deprivation of life and this provision can be used to interpret South Africa's Constitution. Also, in *S v Williams,*[62] the Court relied on Article 5 of the Charter to declare juvenile whipping unconstitutional, holding that the stated had a duty to eradicate such punishment 'in accordance with the country's obligations under the African Charter'.[63] The Charter's human rights provision was also relevant in interpreting portions of South Africa's constitution in *Ferreira v. Levi NO,*[64] where the Constitutional Court opted for a broad

[60] Order III FREPR 2009.
[61] [1995] 3 SA 391 (CC).
[62] [1996] 1 SA 984 (CC).
[63] ibid pg 21. See also Case v. Minister of Safety and Security [1996] 3 SA 617 where the Court referred to art. 9 of the African Charter in reaching its decision.
[64][1996] 1 SA 984 (CC).

interpretation of the right to liberty beyond merely detention or other physical constraints as article 6 of the Charter contains provisions which allow for a broad, liberal interpretation of liberty.

All around Africa, domestic Courts have continued to rely on the Charter's provisions in interpreting human rights as can also be found in the decisions of the Courts in Tanzania,[65] Zambia[66] and Zimbabwe.[67] This evinces the widespread acceptance by domestic Courts in Africa of the binding nature and influence of the Charter in interpreting and protecting human rights within the region.

The judiciaries in African states differ in their approach to utilising the African Charter in adjudicating matters before them. While some Courts directly apply the provisions of the African Charter in adjudicating domestic disputes, others merely use the African Charter provisions as aids in interpretation. This point is discussed later in this chapter.[68]

4.4.1.2 Impact on Human Rights Protection by Regional Courts

Another area of impact of the Charter in human rights protection in Africa is through the regional judicial forums established under the Charter. The role of the African Commission, the African Court and the Economic Community of West African States (ECOWAS) Community Court of Justice (ECCJ or 'ECOWAS Court')[69] in human rights protection in African states will be discussed later in this chapter,[70] but suffice to state at this point that these judicial bodies have played crucial roles in protecting human rights in the region by allowing individuals and organisations to bring complaints against African states regarding the rights in the Charter. These bodies intervene to protect the Charter rights by directing the compliance by these states and instituting monitoring and reporting systems to ensure compliance by the states with their directives.

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[65] DPP v. Pet 4 [1991] LRC (Const.) 5.
[66] Longwe v. Intercontinental Hotels [1993] 4 LRC (Const.) 221.
[67] Chirwa v. Registrar-General (1993) (1) ZLR 1.
[68] See chapter 4.4.2, page 160.
[69] The ECOWAS Court was established by the ECOWAS Treaty and it's jurisdiction is restricted to signatory states from West Africa.
[70] Chapter 4.6, page 173.

Three illustrative cases will suffice at this juncture. In *Registered Trustees of the Constitutional Rights Project v. President of Nigeria,*[71] six persons had been convicted and sentenced to death by a "Disturbance Tribunal", which was set up pursuant to the Civil Disturbances (Special Tribunal) Decree 2 of 1987. The state wanted to proceed with their execution. An application was immediately lodged on behalf of the convicts with the African Commission contending that the applicants had not received a fair trial, as required by article 7 of the African Charter. When the Commission finally decided the case (in October, 1994, at its 16th session), it found that articles 7 and 26 of the Charter had been violated and recommended that the complainants should be freed and not executed by Nigeria.[72] The Commission then instituted follow-up monitoring mechanisms to ensure the decision was implemented.[73] As a result of the Commission's intervention, Nigeria did not enforce the death sentences and the appellants were subsequently freed after 3 years of official wrangling between the government and the African Commission. This is a clear example of how the Charter (and the African Commission) has significantly influenced the protection of the human rights of Africans.

An illustrative case dealing with the public human rights aspect of the Charter in Africa is the 2010 case of *Socio-Economic Rights and Accountability Project (SERAP) v Federal Government of Nigeria*[74] where the African Commission pronounced on the applicability of article 24 of the Charter relating to the right to a clean and safe environment in Nigeria, a right absent from the Nigerian Constitution. The complaint was filed before the commission by SERAP on behalf of the people of Awori Community in Abule Egba in Lagos State, Nigeria, against the Federal Republic of Nigeria alleging that a pipeline explosion by the government's oil company had resulted in environmental degradation in their community. The complainant sought reparations (compensation) for the environmental damage and a direction for the Nigerian government to clean up the spill. The commission held that article 24 imposed an obligation on the government to provide a clean and safe environment in the country

[71] Communication 87/93 (Constitutional Rights Project (in respect of Lekwot and six others) v. Nigeria.
[72] ibid.
[73] At its 17th session in 1997, the Commission decided to bring the file to Nigeria for a planned mission 'in order to make sure that the violations have been repaired'.
[74] (Communication No. 338/2007) [2010] ACHPR 109; (24 November 2010).

and despite the absence of an equivalent right in the constitution, it directed the Nigerian government to take urgent steps to repair the damage and pay reparations to the community.[75]

The third case arises from the African Court dealing with the right to freedom from discrimination and equality under the law encapsulated in articles 2 and 3 of the Charter. In the recent case of *Jebra Kambole V. United Republic of Tanzania*[76] decided in July 2019, the African Court held that the Government of Tanzania was in violation of articles 2 and 3 of the Charter by virtue of article 41(7) of the state's constitution which prohibited the applicant from challenging the outcome of the presidential election. The Court declared that this prohibition was discriminatory and directed the government to take urgent steps to amend the constitution to provide for equal access to justice by individuals. The Court further directed that the decision be made publicly available and the government should report compliance steps back to the Court within two years.

This decision is monumental for two reasons – first, the Tanzanian courts had upheld the validity of the constitutional prohibition and the African Court was, in effect, overruling the domestic courts by relying on the Charter which was binding on Tanzania; secondly, it represents the first time that a regional judicial body would utilise the Charter's provision to overrule an African state's constitutional provision. Although well-intended, this decision was perhaps an overreach on the Court's path as it challenged the sovereignty of the state and its constitution and, predictably, the Tanzanian government reacted furiously to the decision by immediately terminating its submission to the Court's jurisdiction effective November 2020.[77] The idea of regional judicial bodies relying on the Charter to override a state's constitution is radical, fraught with problems and potentially counter-productive as it will not only attract reprisals from

[75] A similar decision was reached in the 1996 case of 155/96 : Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Government of Nigeria Communication No 155/96.

[76] Application No. 018/2018 Judgment on Merits and Reparations, 15 July 2019. A Decision of the African Court on Human and Peoples' Rights. Date of Press Release: 15 July 2019.

[77] 'Tanzania: Withdrawal of individual rights to African Court will deepen repression' (Amnesty International, 02 Deceber 2019) < https://www.amnesty.org/en/latest/news/2019/12/tanzania-withdrawal-of-individual-rights-to-african-Court-will-deepen-repression/> accessed 10th August 2020.

the state's executive but also the state judiciary, whose abeyance to the Constitution as the supreme law is threatened.

It is one thing to supplement a state's constitution with the Charter's provisions or utilise the latter to interprete the former, or even incorporate the Charter's provisions where a state's constitution is silent on a given human right. It is an entirely different thing to override the validity of a state's constitutional provision with the Charter's provision. Any state, particularly a conservative state (as most African states are) with strong nationalistic and sovereign protection inclination will react furiously to such decision and terminate their submission to such regional Court and, arguably, a similar situation regarding the European Court of Justice was an influencing factor resulting in the UK's exit from the European Union.[78]

Nevertheless, within measured limits, the decision shows the progressive stance of the regional Courts and their impacts on human rights protection within Africa utilising the provisions of the Charter. When not overreaching their judicial influence, as in *Jebra Kambole's case,* the regional judicial bodies help to extend the Charter's role in enhancing human rights protection within African states.

4.4.2 Mapping the Impact of the Charter in Human Rights Protection in Africa

The study of the Charter's impact on human rights protection in Africa reveals three distinct areas of influence –

Supplementing Domestic Human Rights Protection

This occurs where the human rights provisions in the domestic constitution of African states are insufficient to achieve effective protection of the right in question. Domestic courts in Africa often rely on the Charter's provisions to supplement these rights as was seen in *Ewiye's case* in Benin Republic, *New Patriotic Party's case* in Ghana and *Kauesa's* case in Namibia.

[78] See Raphael Hogarth, 'Brexit and the European Court of Justice' (2017) *Institute for Government* <https://www.instituteforgovernment.org.uk/publications/brexit-and-european-Court-justice?gclid=Cj0KCQjwhvf6BRCkARIsAGl1GGgTMLROgKkSZn030ir6cfEtoHZTE2LkkbACfnARP4W8X95-QhUM5vQaAn5vEALw_wcB> accessed 10th August 2020.

Interpreting Domestic Human Rights Provisions

In this instance, the domestic courts utilise the Charter's provisions to provide clarity or broaden the provisions of domestic human rights instruments. Usually, this is adopted in cases where a restrictive interpretation of the domestic human rights provision will result in injustice or ineffective protection of the human right in question. This was seen in *Ferreira's case* in South Africa where the Court utilised the Charter's provisions to broaden the meaning of the right to liberty beyond physical restraint or incarceration.

Filling a Gap in Human Rights Protection within Domestic System

This is the more common utilisation of the Charter's provisions as both domestic and regional Courts often resort to the Charter's human rights provision to cover loopholes in the domestic system. This loophole can arise from the omission of such right in the domestic constitution as seen in *Fawehinmi* and *Agbakoba's cases* in Nigeria, *Unity Dow's case* in Botswana and *Williams'* and *Makwuayanye's cases* in South Africa. This was also seen in cases decided by regional judicial bodies such as *SERAP's case* against Nigeria. This loophole can also arise in unique circumstances where there is no extant human rights framework in the state, for example, where the state's constitution has been suspended by a military takeover of government, as was seen in the regional cases involving Nigeria during the military regimes – e.g. *Registered Trustees of the Constitutional Rights Project's case;* and as decided by domestic Courts in Nigeria – *Garba's case.* Because regional judicial bodies only interprete the Charter's provisions, their impact is mainly confined to this third category where they utilise the Charter's provision to fill loopholes in domestic human right systems.

There is a potential fourth area of influence in terms of utilising the Charter's provisions to override domestic human rights protection in state constitutions as seen in *Jebra Kambole's case* in Tanzania. But this area of influence is somewhat radical, potentially overreaching, counter-productive and likely to be ineffective. It will, therefore, not be included herein as an area of impact of the Charter. The areas of influence of the Charter in Africa is graphically represented in Figure 4.1 below-

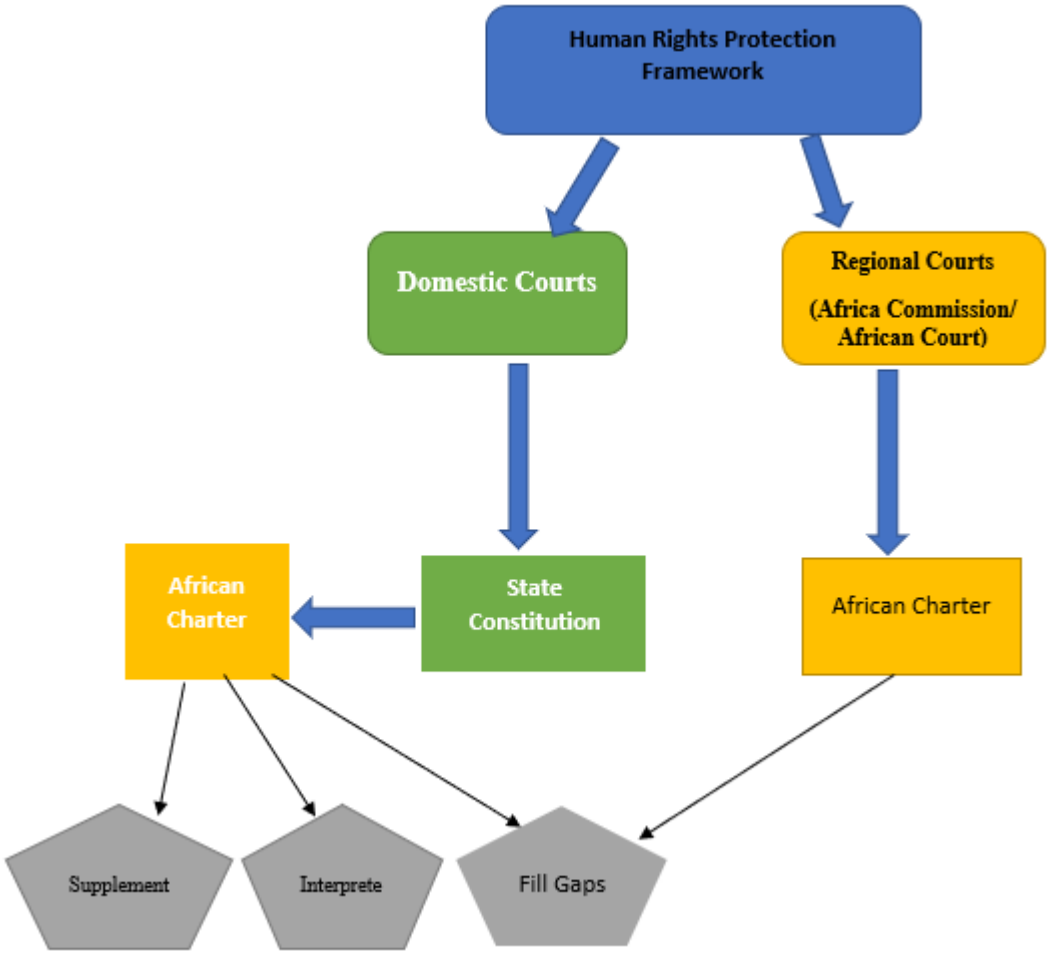

Figure 4.1 Impact of African Charter on Human Rights Protection Framework in Africa

Figure 4.1 indicates that while the African Charter is generally used by domestic Courts in a supplementary role, to interprete domestic human rights provision or fill gaps therein, the Charter is primarily used by the regional judicial bodies to fill gaps in domestic human rights provisions in African states. The combination of these two systems of domestic and regional judicial bodies utilising the African Charter builds a robust human rights system in the continent.

Having explored the positive impacts that the African Charter has on human rights protection in Africa, the next section explores the specific ways that the Charter can be utilised to protect non-heterosexual rights in Africa, focusing on the substantive contents of the Charter that protect these rights. It also discusses how a reformed universalist interpretation of these substantive contents can be advanced before

domestic and regional judicial bodies in Africa to achieve the desired protection for non-heterosexual rights.

4.5 The African Charter, Reformed Universalism and The Protection of Non-Heterosexual Rights in Africa

The African Charter is a progressive human rights instrument[79] with wide-ranging provisions covering different aspects of human rights concerns in Africa. Considering it was adopted as far back as 1981, it is progressive compared to some human rights instruments of its time as it dealt with issues such as the right to a clean environment, the right to self-determination of peoples, right to health, right to education, the right to information, natural resources rights, family rights, asylum rights and right to national and international peace and security.[80]

Notwithstanding its progressive contents, the Charter, unsurprisingly, did not explicitly make provisions relating to sexual orientation or any issues relating to sexuality. Although this was a reflection of its time when sexuality and sexual rights were not issues of concern within human rights scope, it is highly unlikely sexual rights would have been explicitly addressed in the Charter even if it was adopted today. The conservative nature of African states would have meant such content would almost definitely be expunged from the treaty before adoption or a majority of the states would have refused to adopt or ratify it. It is, therefore, inevitable that any attempt to derive human rights protection for non-heterosexuality from the Charter would have to rely on the interpretative derivation of such right from the substantive contents of the Charter.

A cursory review of the substantive provisions in the Charter reveals that three core provisions embed the protection of non-heterosexual rights in Africa and create a binding legal obligation on African states to protect and enforce these rights within their

[79] Centre for Human Rights, 'A Guide to the African Human Rights System: Celebrating 30 years since the entry into force of the African Charter on Human and Peoples' Rights 1986-2016' (Petroria University Law Press, 2016) 2.
[80] See articles 2 – 23 of the ACHPR.

domestic jurisdictions. These three provisions arise from articles 2 and 3 of the Charter, which, for clarity of argument, are reproduced in full below with emphasis highlighting the relevant portions:

> Article 2
>
> ***Every individual*** shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter ***without distinction of any kind*** such as race, ethnic group, colour, **sex**, language, religion, political or any other opinion, national and social origin, fortune, birth **or other status**.
>
> Article 3
>
> 1. Every individual shall be equal before the law.
>
> 2. ***Every individual shall be entitled to equal protection of the law***.

The underlined portions of the articles represent the core provisions relating to the protection of non-heterosexual rights in Africa. As can be gleaned from the above, there are three distinct human rights protection which shall be discussed seriatim. Two relate to the prohibition of discrimination and one arises from the equality provision.

4.5.1 Prohibition of Discrimination on Grounds of 'Sex'

The elucidation of the reformed universalism approach to the interpretation of non-heterosexual rights discussed in chapter three of this thesis shows how this provision protects non-heterosexual persons from discrimination in Africa. As explained in chapter three, the prohibition of discrimination on the grounds of 'sex' connotes that an individual should not be given a different treatment in relation to others merely on the basis of his/her biological sex. Put simply, therefore, if A (Female) is legally permitted to engage in sexual relations with B (Male) but C (Male) is prohibited from engaging in sexual relations with B, then C is treated differently from A **solely** on the grounds of his sex and this glaringly constitutes discrimination on the grounds of SEX.

Looking further into article 2, it can be seen that the article emphasises that an individual shall be entitled to the enjoyment of rights and freedoms ***without distinction of any kind.*** The term 'distinction' means 'a clear difference or contrast especially between people or things that are similar or related'.[81] The only difference between A and C is their membership of different sex and such distinction in the treatment of their permissible sexual relations is discrimination of '***any kind'*** prohibited by article 2.

This situation is markedly different, for instance, from the legal prohibition of incest or paedophilia because the difference/distinction in treatments relates not to the relevant sex of the party, but on either the age of the party or biological relationship. Incest and paedophilia are also not covered by the '*distinction of any kind'* because they don't relate to a classification within which a distinction in treatment will be discriminatory. Thus, while male and female or black, white and Asian fall within the classification of 'sex' or 'race' respectively, age and blood relationship do not fall within any classification. Instead, in the case of age and blood relationship, the same treatments apply to the parties regardless of their sex or their race. Thus, sexual relations with a 13-year-old boy is treated the same way as with a 13-year-old girl; sexual relations between a mother/father and her/his daughter is prohibited the same way as with her/his son. Similarly, a sexual relationship with a 13-year old white boy is treated the same way as with a 13-year-old black boy.

In non-heterosexual matters, however, there is a clear distinction in the treatment of the parties' relationship with others based solely on the 'sex' they belong to. For example, in Nigeria, under the Marriage Act 1971, marriage between a man (Male) and a woman (Female) is legally recognised and protected while under the Anti-Same-Sex Act 2014, marriage between a man (Male) and a man (Male) is legally prohibited and punishable with imprisonment of up to 14 years. This clear distinction in the treatment of marriage dependent on the sex of the parties constitutes discrimination on grounds of sex and a violation of article 2 of the Charter.

As stated earlier, adopting this reformed universalism interpretative approach requires no extrapolation of extraneous considerations into the relevant provision – e.g.

[81] Oxford Learners Dictionaries, Online Edition, <https://www.oxfordlearnersdictionaries.com/definition/american_english/a_1?q=a> accessed 09 September 2020

attempting to infer discrimination on grounds of 'sexual orientation' which is different from 'sex' protected in article 2. 'Sex' is an objective biological condition while 'sexual orientation' is a subjective inclination of individuals. It is easier for a conservative Court to reject such inference but much more difficult to reject the reformed universalism interpretative approach to 'sex'. In the US Supreme Court case of *Bostock v. Clayton County*[82]where this approach was adopted, Justice Neil Gorsuch, one of the staunchest conservative member of the Court, delivered the majority ruling espousing the extension of the Civil Rights Act prohibition of discrimination on grounds of sex to non-heterosexuality, declaring that 'it is impossible to discriminate against a person for being homosexual or transgender without discriminating ... based on sex'.[83]

The claimant in the Kenyan case of *Eric Gitari*[84] who sought to challenge the criminalisation of homosexuality by the Penal Code by arguing that it violates the discrimination provision of Kenya's constitution to discriminate on the basis of 'sexual orientation' was fighting a lost cause in a conservative judiciary, as the claim would have been better advanced by adopting the reformed universalism interpretative approach. Article 2's prohibition of discrimination on grounds of sex may be a potent weapon to utilise in challenging the homophobic laws in African states before the domestic courts and regional judicial bodies. Although the social conservatism of the judiciaries in African states may be averse to accepting such interpretation, this argument falls within a strict constructionism approach to interpreting legal provisions and has a better potential of persuading the conservative judiciaries than the alternative arguments which rely on a liberal/progressive interpretation of the equality provision in the Charter.

Already, the African Court has shown an inclination to interprete this provision very broadly. In *Alfred Agbesi Woyome V. Republic of Ghana*[85], it held that a claimant seeking the enforcement of article 2 and 3 only need to 'demonstrate or substantiate

[82] 590 U.S. No. 17-1618 (2020).
[83] ibid at pg 23.
[84] Eric Gitari v Attorney General of Kenya [2016] EKLR.
[85] Application No. 001/2017 Judgment [Merits And Reparations] 28 June 2019. A Decision Of The African Court On Human And Peoples' Rights Date of Press Release: 28 June 2019 <https://www.african-Court.org/en/images/Cases/Judgment/Judgment_Summary_Alfred_Agbesi_Woyome_V__Republic_Of_Ghana.pdf> [accessed 28th August 2020].

how he has been discriminated against, *treated differently* or unequally, resulting in discrimination or unequal treatment *based on the criteria laid out under Articles 2 and 3 of the Charter*'.[86] It is also possible that domestic courts, faced with this explicitly cogent interpretation, would interprete the provision as protecting non-heterosexuality, notwithstanding their conservative leanings. Although there are challenges to the adoption of this interpretative stance by the conservative African judiciaries, it holds greater prospect than the alternative liberal/progressive argument based on equality provision.

4.5.2 Prohibition of Discrimination on Grounds of 'Other Status'

This provision is admittedly even broader than the sex discrimination prohibition. It is an omnibus provision that caters for other statuses on the basis of which individuals could be discriminated against in the application of laws and government policies. The inclusion of this clause renders the protected categories non-exhaustive and domestic courts and regional bodies are entitled to derive the prohibition of discrimination on any special ground if they feel it would serve the public interest or further the protection of the human rights of the individual concerned.

However, it is arguable that this omnibus clause must not be regarded as a 'catch-all' clause for human rights protection against all forms of discrimination, as that would derogate from the intention of the drafters which would not have been to create open-ended protection. Because the African Charter is an international treaty within the meaning of the Vienna Convention on the Law of Treaty 1969, the Vienna Convention provisions can be referred to in interpreting the provisions of the Charter. Article 32 of the Vienna Convention allows for recourse may be had to supplementary means of interpretation to be adopted in interpreting treaties in order to prevent a result which is manifestly absurd or unreasonable.

Jurists in the field of international law and international tribunals have stated that the *Ejusdem Generis'* rule can be applied in interpreting international treaties. Linderfalk posits that:

[86] ibid at pg 25.

> According to many authors in the literature, a treaty shall be interpreted through theapplication of the principle of *ejusdem generis*. In my judgment, this is sufficient reason for us to conclude that the principle is a valid rule of international law.[87]

Judicial endorsement of this position can also be found in the decision of the Permanent Court of Justice (PCIJ) in *Competence of the ILO for Agriculture*[88] where the PCIJ, in an Advisory Opinion upon request from the League of Nations, held that the *ejusdem generis* rule can be applied in interpreting the competence of the ILO to adopt policies relating to agriculture. Similarly, the Iran- United States Claims Tribunal in *Grimm v. The Government of the Islamic Republic of Iran*[89] held that:

> [U]nder the well-known principle of *ejusdem generis* the words "other measures" in Article II, paragraph 1, ought to be, especially in the context of "debts and contracts", construed as generically similar to "expropriations" and the alleged failure to provide protection is in no way similar to expropriations.[90]

Consequently, although primarily a rule of interpretation applied to statutes, it is safe to apply the *ejusdem generis* rule of interpretation in interpreting the provisions of the African Charter. The *Ejusdem Generis* rule stipulates that where generic words follow specific enumeration in a statute, the general word takes its meaning from the specific words and must be interpreted as limited to the same genus of the specific words preceding it unless there is something in the statute showing a broader sense is intended.[91]

In this context, the clause 'or any other status', applying the *ejusdem generis* rule, must be interpreted, first, as restricted to matters closely related to or belonging in the same 'genus' or category as the specific matters preceding it. Also, the 'other status' should, arguably, be one which is capable of being specifically classified for statutory protection i.e. the status should be one which confers membership of a defined group or category for which legal protection is necessary to enhance the enjoyment of basic human

[87] Ulf Linderfalk, *On The Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer, 2007) 303; See also J. Klingler, Y. Parkhomenko, C. Salonidis [Eds.], *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Wolters Kluwer 2019) 133-160.
[88] Competence of the ILO for Agriculture, Advisory Opinion of 12 August 1922, PCIJ, Ser. B, No. 2–3.
[89] (Case No. 71), Award of 18 February 1983, *ILR*, Vol. 71, pp. 650ff.
[90] ibid, p. 652
[91] See Allen v. Emerson (1944) K.B. 362.

rights. Finally, it is arguable that the status should not be one which endangers the interests of the public.

Based on the preceding criteria, it is arguable that one item that can be derived from the same genus as sex is sexuality and sexual orientation as they are characteristics that derive from the biological classification of sex. In other words, sexual orientation is predicated on the biological division of sex and it defines intimate attraction to particular sex by a member of one sex. Sex, sexuality and sexual orientation are, therefore, intertwined and the protection of sex as a category invites the protection of sexual orientation as a related category under the 'any other status' omnibus provision. Secondly, socio-legal policies and developments have created non-heterosexual persons as a unique group with defined membership deserving legal protection as a result of constant persecution, bullying and harassment on account of their sexuality. Finally, non-heterosexual status does not in any way endanger the interests of the public but people with this status are often victims of unfair societal and legal persecution and deprivation of their human rights in African states, thereby deserving legal protection.

In summary, therefore, sexual orientation can be categorised amongst 'other status' for which distinction in the treatment of any kind is prohibited as unlawful discrimination under article 2 of the African Charter. Amnesty International, in its review of the African Charter, similarly stated that the prohibition of discrimination on the basis of 'other status' in article 2 'would include discrimination based on sexual orientation, age or disability'.[92] Accepting this conclusion would mean that non-heterosexual sexual orientation in Africa are protected under article 2 and African states are obliged to implement laws and policies that protect non-heterosexual sexual orientation, starting with the repeal of statutes criminalising homosexuality.

In a domestic context, the applicable human rights instrument often do not contain a similar omnibus provision as article 2 which allows for the protection of 'other status'. Thus, the applicant in *Eric Gitari's case* that sought to argue for the prohibition of discrimination on grounds of sexual orientation did not have the benefit of a similar

[92] 'A Guide to the African Charter on Human and Peoples' Rights' (*Amnesty International*, *2006*) AI Index: IOR 63/005/2006, pg 16.

provision in Kenya's constitution and was, therefore, unsuccessful in arguing for the extension of such protection to sexual orientation. Currently, only article 2 of the Charter contains the omnibus provision as the constitutions of African states omits such clause in their discrimination protection under the bill of rights, as will be subsequently seen from the review of the constitutions of all African states in Table 4.1.[93] This fact implies that the prohibition of discrimination on grounds of sexual orientation is only available under the African Charter. Applicants seeking to pursue this protection, therefore, have two options – convince the domestic court to supplement the discrimination provision in the constitution with the expanded provision of article 2 of the Charter; or approach the appropriate regional judicial body to enforce article 2 against the state and compel it to implement laws and policies protecting their sexual orientation as 'other status' under article 2.

4.5.3 Right to Equal Protection of the Law

The right to equal protection of the law under article 3 of the Charter is one of those provisions that are applicable in different contexts and can be utilised for different purposes. The provision purports to prohibit any unequal treatment of persons in the application of laws and policies. In some ways, it is synonymous with the discrimination prohibition as any unequal treatment is likely to be a result of discriminatory treatment. For this reason, it is often lumped with the discrimination claims in human rights suits under the Charter. In *Kambole's case* before the African Court where the applicant challenged the validity of article 41(7) of Tanzania's constitution, the claim alleged discrimination on political grounds as well as a violation of the right to equal treatment of the law by his exclusion from challenging the outcome of a presidential election as declared by the electoral body. The Court, in its judgment, also treated both rights as synonymous and intertwined. Similarly, in *Woyome's case,* the applicant claimed for a violation of both rights arising from the same facts and the Court treated both rights as synonymous and intertwined in its judgment.

[93] Page 189.

Nevertheless, it is possible to claim a violation of the equality protection without alleging discrimination, as was done in *Suy Bi Gohore Emile and Others V. Republic Of Côte D'ivoire*[94] where an application was filed at the African Court against the Respondent State challenging the independence and impartiality of the Respondent's electoral commission, arguing that the treatment of the applicant by the electoral body was a violation of the right to equal protection of the law.

Despite their similarity, a crucial difference between a discriminatory claim and an equal protection claim under the Charter is that discriminatory claims are restricted to the protected status under article 2, while equal protection claim is broad and seemingly borderless in the scope of actions that can be redressed under it. Thus, in *Suy Bi Gohore Emile's case,* the applicant alleged that the composition of the electoral body rendered it biased and partial and this was a violation of their right to equal protection of the law, an argument which was upheld by the Court while in *Kambole's case,* the applicant argued that Tanzania constitution's preclusion of any challenge to an election result was a denial of equal protection of the law. Although article 2's inclusion of 'other status' under the protected status seemingly expands the scope of status protected under the discrimination provision, it is still more restrictive than the equal protection provision as the former relates to discrimination by belonging to a class/group/status while equal protection has no such limitation. Nevertheless, having both the discriminatory and equal protection provisions in the Charter provides a comprehensive 'catch-all' net for any forms of unfair, prejudicial and unequal treatment of individuals in Africa.

In this respect, one major area where equal protection right is important is in the protection of non-heterosexual persons in Africa. Because many African states have criminal laws proscribing and penalising non-heterosexual activities while heterosexual activities are permitted, legalised and even incentivised, this provides a classic case of unequal protection of the law in violation of article 3 of the Charter. Undoubtedly, prohibiting same-sex marriages while recognising heterosexual marriages subjects the former to unequal treatment vis-à-vis the latter and non-heterosexual individuals can validly redress such claims under article 3 of the Charter. The same principle applies

[94] Application No. 044/2019, Judgment on Merits and Reparations, 15 July 2020.

to every aspect of the civil rights and privileges of non-heterosexual persons including the right to adopt children (permitted for heterosexual persons but prohibited for non-heterosexuals), inheritance rights (recognised for heterosexuals but prohibited for non-heterosexuals) and filing joint taxes as couples (prohibited for non-heterosexuals while recognised for heterosexuals). In all of such instances, the legal system is structured in a way that violates the equal protection of the law for non-heterosexuals.

Article 3 of the Charter is even more important for this purpose because an overwhelming majority of African states do not have the equal protection clause in the bill of rights of their domestic constitutions (see Table 4.1 below) and non-heterosexual persons do not, therefore, have the option of utilising such provision within domestic jurisdictions but must rely on article 3 of the Charter to achieve equal protection of the law. This is unlike the discrimination provision which exists in the constitution of many African states, although without the 'other status' omnibus clause. (See Table 4.1).

The 'equal protection' clause is a powerful tool for advancing non-heterosexual rights. It was the equal protection clause under the Fourteenth Amendment of the US Constitution that was relied upon by the US Supreme Court in *Oberfegell v Hodges*[95] to legalise same-sex marriages throughout the United States in 2015. Article 3 of the Charter is, therefore, invaluable in enshrining equal treatment of heterosexual and non-heterosexual persons in African states bound by the Charter and the provision can be enforced by domestic and regional judicial bodies.

Importantly, the regional judicial bodies, particularly the African Court, have shown a propensity to liberally and broadly interprete the equal protection clause in favour of applicants. Thus, in *Suy Bi Gohore Emile* and *Kambole's cases* against Cote D'Ivoire and Tanzania respectively, the African Court applied the clause to the political exclusion of the applicants in the electoral process by electoral bodies in circumstances which appear more of political disputes more than anything else. It stands to reason, therefore, that the clause may be applied by the progressive regional judicial bodies to protect the glaring inequality in the treatment of non-heterosexual persons in African

[95] 576 U.S. 644_2015.

states which is more prejudicial, life-threatening and injurious on a wider scale than the complaints in the above cases.

Having enunciated the provisions of the Charter that protect non-heterosexual rights in Africa and create binding obligations on African states to repeal their homophobic laws, policies and socio-legal practices, it is important to analyse the judicial forums for enforcing these Charter rights. Ideally, African states should be implementing these provisions that they have ratified for the benefit of non-heterosexual persons, but seeing the lack of actions and opposition of these states to non-heterosexual rights, judicial actions are required to compel their compliance with the Charter rights.

4.6 Enforcement of Non-Heterosexual Rights under the African Charter

The rights enunciated in articles 2 and 3 of the African Charter are self-executory and require no further legislative actions or steps to become enforceable. As the African Commission stated in *SERAP v Government of Nigeria,*[96] the provisions of the Charter do not require any further legislative steps domestically by ratifying states to become effective within domestic jurisdictions. Thus, even though some states like Algeria and Nigeria has gone further to domesticate the provisions of the Charter, this is not a pre-condition for its enforceability within the ratifying states.

Further, the Charter does not contain a derogation clause, although it is riddled with claw-back clauses that may hinder its enforceability. Therefore the limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies and special circumstances.[97] The only legitimate reasons for limitations to the rights and freedoms of the Charter are found in article 27(2) which stipulates that 'the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'. There is, therefore, no room for any culturally relative interpretation of the Charter rights by African states that have ratified the Charter, nor any ground to refuse enforcement on some of the omnibus clawback

[96] (Communication No. 338/2007) [2010] ACHPR 109; (24 November 2010).
[97] Media Rights Agenda v Nigeria Communication Nos 105/93, 128/94, 130/94 and 152/96, Decision of the AfCmHPR, 24th Ordinary Session.

basis found in the constitutions of many African states, for e.g, preserving public health or promoting social cohesion etc.

Nevertheless, the claw-back provisions provided in the Charter may be a tool available for the African states to refuse implementation of some of the provisions of the Charter they consider onerous. For instance, article 11 of the Charter providing for the right to assemble contains the following clawback provision –

> The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

This clawback can be relied upon by African states to legislate away the right to freedom of assembly on grounds of safety, health, ethics or 'national security'. However, it is within the judicial powers of the Courts to scrutinise the validity of the basis for such legislation and decide if the legislation legitimately achieves this objective. Where the legislation is found to be a smoke-screen for violating these rights, the judiciary can deem it a violation of the Charter provision and refuse to enforce it.

In enforcing the Charter rights, the primary focus will be on the regional judicial bodies because they are primarily charged with interpreting and enforcing the Charter provisions. The shortcomings of these regional adjudicatory institutions engender a resort to domestic judicial institutions which are able to supplement the provisions of domestic constitutions with the Charter rights or utilise the latter to interprete or fill gaps in the former.

4.6.1 Enforcing Non-Heterosexual Charter Rights through Regional Judicial Bodies

Three regional judicial/quasi-judicial bodies enforce the provisions of the African Charter:

- The African Commission on Human and Peoples' Rights ('African Commission')
- The African Court on Human and Peoples' Rights ('African Court'), and
- The Economic Community of West African States Court ('ECOWAS Court')

These bodies have broadly similar functions in terms of interpretation and enforcement of the Charter provisions but have different scopes in terms of the states they apply to and the nature and extent of their judicial powers over these states. They are individually discussed seriatim below.

4.6.1.1 Enforcing Non-Heterosexual Rights at the African Commission

The African Commission on Human and Peoples' Rights is the preeminent judicial body established by the African Charter upon its adoption in 1981. Article 30 of the Charter established the commission to 'promote human and peoples' rights and ensure their protection in Africa'. The Commission was inaugurated on 2 November 1987 in Addis Ababa, Ethiopia. The Commission's Secretariat has subsequently been located in Banjul, The Gambia.

The Commission consists of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience. The members of the Commission serve in their personal capacity, meaning they operate as individuals and not as judicial officers or representatives of their nominating states.[98] In addition to performing any other tasks which may be entrusted to it by the Assembly of Heads of State and Government, the Commission is officially charged with three major functions: protecting human rights, promoting human rights and interpreting the provisions of the Charter.[99]

The critical point to note about the African Commission is that, as the name implies, it is a 'Commission' and does not operate as a judicial body but performs quasi-judicial and administrative functions as an institution of the African Union (AU). In this regard, it does not sit as a judicial body receiving claims from individuals or organisations but only receives complaints from a State Party, an institution of the AU or an African Organisation recognised by the AU (i.e. an organisation with observer status at the

[98] ACHPR, art. 31.
[99] ACHPR, art. 45.

AU).[100] The members of the commission meet to investigate the complaint and then issues a 'Communication' of its position on the complaint, with a direction to the defaulting state to remedy the violation of the Charter complained about, where the complaint is meritorious.

Because it does not operate as a judicial body, strictly speaking, it intervenes in non-judicial issues within the AU, for example, it recently released a 'Statement' condemning the recent coup d'état in Mali in August 2020[101] and also released a 'Communication' expressing deep concern about the recent oil spill in the Indian Ocean, on the reef near Pointe d'Esny on the south-east coast of Mauritius on July 25, 2020.

When complaints are filed before it, it does not sit as a judicial body to hear the case, rather it invites 'communications' from the Respondent State in response to the complaint and then has an 'Extra-Ordinary Session' to deliberate amongst the members whether a breach of the Charter provisions has been established.[102] Crucially, it has no enforcement power on the Respondent state beyond merely directing a remedy of the breach. Its influence on respondent states is more political than judicial, as it sends its decision to the African Union which is then tasked with pressuring the respondent state to comply.

Two important points about the African Commission are that, firstly, its administrative and quasi-judicial scope covers all ratifying states of the African Charter (which is essentially all African states except Morrocco).[103] Secondly, two technical hurdles must be scaled before a complaint can be brought before the Commission – the complainant must have exhausted all local remedies, if any, unless it is obvious that this procedure is unduly prolonged; and the complaint must be brought within a reasonable time after the exhaustion of the local remedy. Regarding the technical hurdles, the African Commission has adopted a liberal interpretation of these requirements and have often sided with the applicant in almost all complaints filed before it. In *SERAP's case*, it entertained the complaint filed by SERAP even though no step had been taken to

[100] ibid.
[101] Press Release from the African Commission on Human and Peoples' Rights on the coup d'état in Mali (African Commission on Human and Peoples' Rights, August 2020).
[102] See the Rules of Procedure of the African Commission on Human and Peoples' Rights 2010.
[103] ACHPR, art. 31.

address the matter at the domestic Court because the applicant argued that such local remedy would have been futile.

The African Commission has been active in enforcing the Charter rights against African states and has readily relied on the Charter rights to direct actions by respondent states even where such rights are absent in domestic jurisdiction. In *SERAP's case,* it declared that the applicants had a right to a clean environment under article 24 and the respondent state was in breach of this right, despite the state's objection that there was no domestic legal right to a safe environment. Even more illustrative, in *Registered Trustees of the Constitutional Rights Project v. President of Nigeria,*[104] it condemned the death penalty imposed by the Nigerian government on convicted persons and directed that they should not be executed but be released by the government – which was effected after political pressure was mounted on the government. This evinces the bold stance of the Commission in protecting and promoting human rights in Africa under the Charter.

In respect of non-heterosexual rights under the Charter, although no complaint has been filed before the commission raising this issue, the commission may be willing to enforce articles 2 and 3 of the Charter in protecting the rights of LGBT persons in a relevant respondent state. The human rights abuses, unequal treatment and discriminatory laws and policies against non-heterosexual persons in African states evidently violates the Charter's protections and a review of the jurisprudence of the Commission's decisions evince a liberal approach to the interpretation of the Charter rights.

Between 1988 and 2017, the Commission has passed several resolutions and communications covering a wide range of themes including the death penalty, indigenous peoples' rights, the protection of women and children's rights, socio-cultural rights (including education, security and health), HIV/AIDS, the electoral process and good governance, prisons, freedom of association, and fair trial.[105] In all these resolutions, the Commission has stood firmly in favour of upholding the Charter's provisions even against the expressed objection of many African states that consider

[104] Communication 87/93 (Constitutional Rights Project (in respect of Lekwot and six others) v. Nigeria.
[105] See 'Adopted Resolutions From 1987 To 2017' (*African Commission on Human and Peoples' Rights, 2018*) <https://www.achpr.org/adoptedresolution> accessed 08 September, 2020.

these rights progressive, aspirational and unsuitable for their local circumstances. And because the Commission is one of the integral institutions of the AU created under the Charter and not simply an optional regional Court, African states cannot simply withdraw their submission to its jurisdiction because of an unfavourable decision. Also, the Commission submits its decisions to the AU directly which then mounts political pressure on the respondent state to comply with the outcome. Thus, a respondent state against whom a decision has been given comes under intense political pressure from the AU thereby increasing the chances of compliance, which explains why the Nigerian Government during a time of military rule (where democratic institutions and the constitution were suspended) was pressured to rescind the death penalty imposed on convicted persons in favour of whom the Commission had ruled and directed their release.

Considering the great influence of the Commission in enforcing Charter rights, a complaint to it asserting the protection of non-heterosexual rights by articles 2 and 3 is not only likely to gain a favourable outcome, but there is the potential for sufficient pressure to be placed on the respondent state by the AU to comply by amending its homophobic laws or taking practical steps to protect the rights of LGBT people within its jurisdiction.

Although the category of complainants before the Commission is restricted to member states or organisations with observer status, this is not an insurmountable barrier as some Non-Governmental Civil Organisations, like SERAP, have been granted observer status at the AU and can validly file such complaints before the commission. The AU in 2006 expanded the criteria for granting observer status to organisations and allowed for all Civil Society Organisations (CSOs) duly registered in member states to obtain observer status. LGBT organisations such as the Coalition of African Lesbians (CAL) was granted observer status in 2015 and this organisation and other human rights NGOs can validly file such complaint to enforce articles 2 and 3 of the Charter by the Commission.

4.6.1.2 Enforcing Non-Heterosexual Rights at the African Court

The African Court on Human and Peoples' Rights ('African Court') is a judicial body in the real sense, established under the African Charter to ensure the protection of human and peoples' rights in Africa. Its judicial function complements and reinforces the quasi-judicial functions of the African Commission on Human and Peoples' Rights. The Court has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter, the Protocols to the Charter and any other relevant human rights instrument ratified by the States concerned.

The Court was established, not directly by the African Charter, but by virtue of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol) which was adopted by Member States of the then Organisation of African Unity (OAU) in June 1998. The Protocol came into force on 25 January 2004 and the Court became operational in 2006.

Seeing the Court is purely a judicial body, its members are called 'judges',[106] they swear to a judicial oath of office before resuming duties,[107] its independence is guaranteed by the Protocol in accordance with international law,[108] the judges are granted judicial immunity in the performance of their official functions[109] and even though appointed by member states, they are required to ensure impartiality by recusing from any case involving their nominating state.[110]

The Court is composed of eleven Judges, nationals of the Member States of the African Union. The Judges of the Court are elected, after nomination by their respective States, in their individual capacities, from among African jurists of proven integrity and of recognised practical, judicial or academic competence and experience in the field of human rights. The Judges are elected for a six-year term, renewable once. The Judges of the Court elect from among themselves, a President and Vice-President of the Court

[106] Protocol to the ACHPR, art. 14.
[107] Protocol to the ACHPR, art. 16.
[108] Protocol to the ACHPR, art. 17(1).
[109] ibid, art. 17(3).
[110] ibid, art. 17(2).

who serves a two-year term. They can be re-elected only once.[111] The quorum of the Court for deciding cases is seven members.[112]

The African Court has two types of jurisdiction under its establishment protocol – jurisdiction to render an advisory opinion at the request of any member of the AU or an organisation with observer status at the AU;[113] and a contentious jurisdiction relating to all other disputed claims filed either by the African Commission (i.e. a disputed claim referred to the Court from the Commission); a member state, an organisation with observer status at the AU, or individuals permitted by the Court to file claims.[114]

Notwithstanding the generality of the foregoing, there are two important limitations on the scope of the Court's jurisdiction – first, it can only entertain claims from or against states that have ratified its establishment Protocol.[115] Currently, only 30 out of the 55 African states have ratified its protocol.[116] Secondly, although it can receive claims from ratifying states, organisations with observer status and individuals, NGOs and individuals can only institute cases directly before the Court where the state against which they are complaining has deposited the article 34(6) declaration recognising the jurisdiction of the Court to accept cases from individuals and NGOs. Thus, the ability of an individual or NGO to file a claim directly before the Court is restricted to the respondent states having submitted a declaration accepting the jurisdiction of the Court to accept individual claims against them. Currently, only nine (9) of the thirty (30) States Parties to the Protocol have made the declaration recognising the competence of the Court to receive cases from NGOs and individuals.[117]

In essence, the Court has a very restrictive judicial scope in terms of states over which it has jurisdiction. Even in terms of requesting an Advisory Opinion, its judicial scope is still restricted in relation to states from which it can entertain a request – only states

[111] ibid, art. 11 – 15.
[112] ibid, art. 23.
[113] ibid, art. 4.
[114] ibid, art. 5.
[115] ibid.
[116] The 30 States which have ratified the Protocol are: Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Côte d'Ivoire, Comoros, Congo, Gabon, The Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda.
[117] The nine (9) States are: Benin, Burkina Faso, Côte d'Ivoire, The Gambia, Ghana, Mali, Malawi , Tanzania and Republic of Tunisia.

that have ratified its Optional Protocol. This severely limits the nature of its influence in the protection and promotion of the Charter rights, in so far as individuals ventilating claims before it. This is because organisations with observer status can still file claims enforcing the Charter rights against any of the 30 states that have ratified the Court's establishment protocol. So, at best, the Court has jurisdiction to enforce the Charter rights against 30 states and at worst, 9 states.

Regarding non-heterosexual rights in the Charter, the African Court is a suitable place to enforce these rights as the Court, over the years, has established a super-progressive and liberal jurisprudence in its interpretation of the Charter rights. In decision after decision, the Court has continued to push the boundaries of liberal interpretation of the Charter rights, adopting contemporary interpretations to the various rights in the Charter to the chagrin of many African states subject to its jurisdiction. Through its various decisions, the Court has continued to produce watershed judgments that expand the frontiers of human rights in Africa. In *Suy Bi Gohore Emile's case,* the Court upheld the right to participate in government, finding that anyone should be able to stand for public office without having to join a political party.[118] It also upheld the right to a fair trial on several occasions and in *Ramadhani Issa Malengo v. United Republic of Tanzania,*[119] it held that the mandatory death penalty in the state's criminal statute is in violation of the right to a fair trial and the right to life. It has further held in *Kalebi Elisamehe v. United Republic of Tanzania*[120] that states have a duty to fully and impartially investigate the murder of its citizens even when those suspected of the murder are at the very top of government. In *Kambole's case,* it upheld the right to freedom of expression in extremely sensitive situations. In *Kambole's case,* it even went as far as invalidating Tanzania's constitutional provision precluding an applicant from challenging the decision of the electoral body and ordering the state to amend its constitution to comply with the Charter's equal protection and non-discrimination clauses. The Court has also gone beyond any other regional human rights Court by considering not only its own regional human rights

[118] Suy Bi Gohore Emile's Case *(*n. 94).
[119] Application Number 030/2015.
[120] App. No. 028/2015.

instrument, the African Charter, but also the ICCPR and other international human rights instruments, contributing to global case law.

Given the progressive, activist jurisprudence of the African Court, it may be a suitable platform for redressing the protection of non-heterosexual rights in the African Charter. Considering the Court has pronounced on many other contemporary areas of human rights protection, non-heterosexual rights is the logical next frontier of human rights to be expanded by the Court upon application to it by a relevant party to enforce articles 2 and 3 of the Charter. The courageous and activist approach of the Court means it may be willing to direct the respondent state to repeal its homophobic laws and institute legal equal and non-discriminatory policies within its domestic jurisdiction.

Notwithstanding the restrictive scope of its judicial powers in terms of the states under its jurisdiction from which individual claims can be filed, there is sufficient scope for legal enforcement of the Charter to protect and promote non-heterosexual rights by organisations with observer status at the AU (CSOs such as SERAP, for instance). Complaints before the Court by these organisations will confer jurisdiction on it over the 30 states that have ratified its establishment protocol. Amongst the 30 states are some of the states with the most homophobic laws in Africa including Nigeria, Ghana, The Gambia, Tanzania, Uganda and Togo. Thus, enforcing the Charter's protection of non-heterosexual rights against these states will be significant progress in advancing LGBT rights in Africa under the auspices of the African Court. And amongst the nine states against whom the Court can entertain individual claims, it can render far-reaching decisions on enforcing the Charter rights to eradicate discriminatory policies against LGBT individuals appearing before the Court, and which decisions can serve as guiding principles to other judicial bodies to influence judicial protection of LGBT rights in Africa.

4.6.1.3 Enforcing Non-Heterosexual Rights through the ECOWAS Court

The Economic Community of West African States (ECOWAS) Court of Justice was created pursuant to the provisions of articles 6 and 15 of the Revised Treaty of the Economic Community of West African States (ECOWAS) 1993. The organisational framework, functioning mechanism, powers, and procedure applicable before the

ECOWAS Court are set out in its establishment protocol and supplementary protocols.[121] It is the judicial organ of ECOWAS and is charged with resolving disputes related to the Community's treaty, protocols and conventions but its jurisdiction is strictly limited to members of ECOWAS.[122]

Although the Court was originally established in 1993 to hear disputes arising from the ECOWAS Treaty, its Supplementary Protocol on Democracy and Good Governance[123] expanded its jurisdiction to entertain cases arising from a violation of the African Charter, thus empowering it to enforce the human rights enshrined in the Charter against members of ECOWAS.

The Court is composed of five (5) independent Judges who are persons of high moral character, appointed by the Authority of Heads of State of Government, from nationals of Member States, for a four-year term of office, upon recommendation of the Community Judicial council.[124]

Similar to the African Court, the ECOWAS Court has dual jurisdiction – advisory opinion upon request by a member state; or contentious jurisdiction upon a claim filed by a member state, an organisation or individuals. In essence, the ECOWAS Court has the competence to hear individual complaints of alleged human rights violations without the requirement of any further step on the part of the respondent state, contrary to the situation with the African Court. Crucially, also, there is no domestic exhaustion of remedies requirement limiting the Court's jurisdiction, meaning individuals do not need to pursue national judicial remedies before bringing a claim to the ECOWAS Court. The only limitations to individual claims before the Court are that the application should not be filed by an anonymous person/organisation and that the matter is not pending before another international Court.[125]

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[121] Protocol A/P1/7/91 of 6 July 1991, Supplementary Protocol A/SP.1/01/05 of 19 January 2005, Supplementary Protocol A/SP.2/06/06 of 14 June 2006, Regulation of 3 June 2002, and Supplementary Regulation C/REG.2/06/06 of 13 June 2006.

[122] ECOWAS comprises 15 West African countries: Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

[123] A/SP1/12/01.

[124] Protocol A/P1/7/91 of 6 July 1991, art. 6.

[125] See Hadijatou Mani Koraou v. Republic of Niger, Judgment No. ECW/CCJ/JUD/06/08, 27 October 2008.

Similar to the African Court, also, the ECOWAS Court has been at the vanguard of rendering progressive decisions elucidating and enforcing the provisions of relevant human rights instruments in Africa. In *SERAP v. Federal Republic of Nigeria,*[126] it held that education is a legal and human right which the government must provide for its citizens under the African Charter. A similar decision was reached in *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission (UBEC).*[127] It has also enforced the due process rights under the African Charter in *Ebrimah Manneh v. Republic of the Gambia*,[128] enforced the rights of women and children under the Charter in *Amouzou Henry v. Republic of Côte d'Ivoire*[129], and enforced the prohibition of modern-day slavery in *Hadijatou Mani Koraou v. Republic of Niger.*[130]

Overall, the ECOWAS Court has been a progressive tool for advancing human rights protection and the extension of its jurisdiction to include enforcing the African Charter has helped to further enshrine the protection of the African Charter rights within West African states. Importantly, the decisions of the Court have a bite to it, as the decisions of the Court are final and binding under its establishment Protocol. Member states and ECOWAS institutions are obliged to take all measures necessary to ensure the execution of the Court's decision. Under article 24 of its 2005 Supplementary Protocol, the execution of a judgment of the Court must be in the form of a Writ of Execution, which is to be submitted to the relevant member state by the Chief Registrar of the Court. The member state is then mandated under the Treaty and the establishment protocol of the Court to execute the judgment through its national Courts in the same way as a judgment of the national Court. The member state must also designate a national authority to execute the Court's judgment and inform the Court of the relevant authority.

Non-heterosexual rights under the African Charter can be enforced through the ECOWAS Court by any individual LGBT member or LGBT organisations seeking to

[126] Judgment No. ECW/CCJ/APP/0808, 27 October 2009.
[127] ECW/CCJ/JUD/07/10.
[128] Judgment No. ECW/CCJ/JUD/03/08, 5 June 2008.
[129] Judgment No. ECW/CCJ/JUG/04/09, 17 December 2009.
[130] Judgment No. ECW/CCJ/JUD/06/08, 27 October 2008. See also Hissein Habré v. Republic of Senegal, Judgment No. ECW/CCJ/JUD/06/10, 18 November 2010,

challenge the homophobic laws and policies in a concerned state and seeking protection under articles 2 and 3 of the African Charter. Considering that, similar to the African Court, the ECOWAS Court has continuously displayed a progressive attitude towards the interpretation of the Charter rights, the Court may potentially be open to enforcing articles 2 and 3 to prohibit homophobic laws within member states by directing the member state to repeal and replace such laws with laws enshrining equality of treatment and non-discrimination.

The impact of such a decision would be monumental as it will represent a seismic shift in judicial intervention in a deeply protected aspect of social conservatism within member states. The impact would be similar to the impact of *Dudgeon v United Kingdom*[131] where the European Court of Justice declared the criminalisation of non-heterosexual activities as discriminatory and an infringement of the applicant's human rights under the EU Convention of Human Rights, leading to the decriminalisation of homosexuality in Northern Ireland. Similarly, the first of such decision by the ECOWAS Court will reverberate around the member states and potentially spark a flurry of cases by non-heterosexual persons in other member states seeking to enforce articles 2 and 3 of the African Charter. This can potentially spur a gradual shift in judicial attitude towards non-heterosexuality within West Africa and the rest of African states.

From the discussions of the regional Courts, it is evident that there are sufficient opportunities and legal basis for non-heterosexual rights to be enforced at the regional level in Africa utilising articles 2 and 3 of the African Charter which provide clear human rights protection for non-heterosexual persons. Although all three regional Courts have their respective shortcomings, the combined impact of their respective jurisdictional scope, progressive/activist jurisprudence and willingness to expand the frontiers of human rights protection in Africa should provide a strong platform upon which to build and enshrine human rights protection for non-heterosexual persons in Africa.

Figure 4.2 below highlights the respective features of the regional Courts and their ability to enforce non-heterosexual rights in Africa.

[131] [1981] 4 EHRR 149.

Regional Court	Jurisdictional Scope	Judicial Attitude	Technical Hurdles	Individual Claims	Prior Non-Heterosexual Claims
African Commission	54 of 55 African States	Progressive	- Exhaustion of Local remedies; - Only member state or Organisation with observer status - Filed within a reasonable time	NO	NO
African Court	30 of 55 African States (9 states – Individual Claims)	Super-Progressive /Activist	- Exhaustion of Local remedies - Restricted access to individual claimants - Filed within a reasonable time	YES, but very restrictive	NO
ECOWAS Court	15 West African States	Progressive	None	YES-Unrestricted	NO

Figure 4.2 Features of African Regional Courts in the Enforcement of Non-Heterosexual Rights

Source: Author

Notwithstanding the great potential inherent in the regional Courts for enforcing non-heterosexual rights, the primary responsibility for enshrining human rights protection for non-heterosexual persons rests with the domestic Courts in the respective African states and the shortcomings of the regional Courts in terms of enforcement of judgments against states makes the role of the domestic Courts even more fundamental.

4.6.2 Enforcing Non-Heterosexual Rights before Domestic Courts in Africa

Domestic Courts are the primary forum where the protection of non-heterosexual rights should be pursued in African states because, firstly, the local level is the *situs* of the extant homophobic laws, policies and socio-legal discriminatory practices and unequal treatments of non-heterosexual persons. The persecution, discrimination and bullying of non-heterosexual persons are not done, sanctioned or encouraged by regional bodies but within domestic jurisdictions, by domestic governments and by fellow citizens within these states. Secondly, domestic Courts are more effective in regulating

the activities of their states, invalidating domestic homophobic laws and voiding discriminatory and unequal treatments of non-heterosexual persons within these jurisdictions.

Within domestic jurisdictions in African states, the courts have shown their willingness to apply the human rights provisions of the African Charter to protect the rights of their citizens. As discussed earlier in this chapter,[132] the Courts utilise the African Charter rights either as supplementing the constitutional rights, interpreting the constitutional rights or filling gaps in the constitutional bill of rights. Consequently, having elucidated the scope of articles 2 and 3 of the African Charter in enshrining non-heterosexual rights, domestic Courts can rely on these provisions to extend human rights protections to non-heterosexual persons within their jurisdiction.

However, cognisant of the expected reluctance of the domestic Courts to intervene in this area of deeply held social conservatism by relying on the African Charter, it is important to critically examine areas of the domestic constitutions that embed the rights in articles 2 and 3 and, therefore, provide a domestically binding obligation on the Courts to protect these rights. In this regard, it must be pointed out that the anti-discrimination provision on grounds of sex in article 2 is a common feature of the majority of the constitutions in African states while the equal protection clause is a rare feature in these constitutions. Consequently, domestic Courts are obliged to enforce the anti-discrimination provision in their domestic constitution to protect non-heterosexual rights within their jurisdiction with articles 2 and 3 of the African Charter merely acting as a supplementary or interpretative guide to the enforcement of these rights by the Court.

Table 4.1 below is an extensive analysis of the provisions of the constitutions of African states on anti-discrimination and equal protection clauses.

[132] Chapter 4.4.1, page 152.

Table 4.1 Analysis of the Constitutional Provisions of African States on Anti-Discrimination & Equal Protection

State	Prohibition of Discrimination on Grounds of 'Sex'	Prohibition of Discrimination on grounds of 'Other Status'	Equal Protection Clause	Clawback or Derogation Clause	Prior Non-Heterosexual Claims
Algeria	✓	-	-	✓	-
Angola	✓	-	-	✓	-
Benin	✓	-	-	✓	-
Botswana	✓	-	-	✓	✓
Burkina Faso	✓	-	-	✓	-
Burundi	✓	-	-	-	-
Cameroon	✓	-	-	✓	✓
Cape Verde	✓	-	-	✓	-
Central African Republic	✓	-	-	✓	-
Chad	-	-	-	✓	-
Comoros	-	-	-	-	-

Congo	✓	-	-	✓	-
Cote D'Ivoire	✓	-	-	-	-
Democratic Republic of the Congo	✓	-	-	✓	-
Djibouti	✓	-	-	-	-
Egypt	-	-	-	✓	-
Equatorial Guinea	✓	-	-	-	-
Eritrea	✓	-	-	✓	-
Ethiopia	✓	-	-	✓	-
Gabon	✓	-	-	✓	-
Gambia	✓	-	-	✓	-
Ghana	✓	-	-	✓	-
Guinea	✓	-	-	✓	-

Guinea-Bissau	✓	-	-	✓	-
Kenya	✓	-	-	-	✓
Lesotho	✓	-	-	✓	-
Liberia	✓	-	-	✓	-
Libya	-	-	-	✓	-
Madagascar	✓	-	-	-	-
Malawi	✓	-	-	✓	-
Mali	✓	-	-	✓	-
Mauritania	✓	-	-	-	-
Mauritius	✓	-	-	✓	-
Morocco	-	-	-	✓	-
Mozambique	✓	-	-	✓	✓
Namibia	✓	-	-	-	-
Niger	✓	-	-	✓	-

Nigeria	✓	-	-	✓	-
Rwanda	✓	-	-	✓	✓
Sahrawi Arab Democratic Republic	-	-	-	-	-
Sao Tome and Principe	✓	-	-	✓	-
Senegal	✓	-	-	✓	-
Seychelles	✓	-	-	-	-
Sierra Leone	✓	-	-	✓	-
Somalia	✓	-	-	✓	-
South Africa	✓	-	✓	✓	✓
South Sudan	✓	-	-	✓	-
Sudan	✓	-	-	✓	-
Tanzania	✓	-	-	✓	-
Togo	✓	-	-	✓	-

Tunisia	-	-	-	✓	-
Uganda	✓	-	-	✓	-
Zambia	✓	-	-	✓	-
Zimbabwe	✓	-	-	✓	-

Source: *Analysis conducted by Author from copies of Constitutions obtained from Constitute Project*[133]

[133] 'Constitute Project' <www.constituteproject.org> [last accessed 17th October 2021]

From the study in Table 4.1 above, it can be seen that an overwhelming majority of the constitutions of African states prohibit discrimination on grounds of sex, while no constitution extends such discrimination to 'other status'. Further, only South Africa's constitution provides the equal protection clause which can be utilised to challenge the unequal treatment of non-heterosexual persons. But then, South Africa's constitution is progressively unique within the African context as it is the only constitution that explicitly prohibits discrimination on grounds of 'sexual orientation', providing explicit constitutional protection of non-heterosexual rights in the state.

Generally, however, the constitutional prohibition of discrimination on grounds of 'sex' is the primary, most reliable form of domestically protecting non-heterosexual rights using the constitutional route in African states. By adopting the reformed universalism interpretative approach to sex discrimination, the domestic courts can enforce a prohibition of discriminatory laws and policies against non-heterosexual persons. In doing so, the domestic courts can supplement the constitutional provision with articles 2 and 3 of the African Charter to provide a broader, more robust protection framework for non-heterosexual rights. Considering that 48 out of 55 African states have this sex discrimination provision in their constitutional bill of rights (Table 4.1), this provides a monumental opportunity for domestic courts in African states to constitutionally enshrine non-heterosexual rights protection throughout the region with the African Charter as a supplementary fortification of this protection framework.

The drawback clause in state constitutions can potentially impede the enforceability of the sex discrimination provision as it permits the encroachment on some constitutional rights on several grounds including public morality, public safety, preservation of cultural and social systems, etc. Many African states would eagerly plead such provision to resist judicial attempts to invalidate homophobic laws for violating the constitutional prohibition of sex discrimination.

Nevertheless, contemporary understanding of non-heterosexual activities conclusively prove that it poses no threat to public morality or socio-cultural way of life[134] and domestic Courts should be able to easily discountenance such objections from states

[134] Anderson Raymond and Holland Elise, 'The legacy of medicalising 'homosexuality': A discussion on the historical effects of non-heterosexual diagnostic classifications (2015) 11(1) Sensoria 4-15.

in favour of enshrining protection for a vulnerable section of the society who are entitled to constitutional rights and freedoms as other members of the society on an equal and non-discriminatory basis. The challenges of the clawback provisions in the Charter and domestic constitutions and how these challenges can be overcome are discussed further in Chapter 5.

Overall, therefore, a combination of regional and domestic judicial forums utilising human rights provisions in the African Charter and domestic constitutions can provide an effective mechanism for protecting and promoting non-heterosexual rights in Africa as shown in Figure 4.3 below-

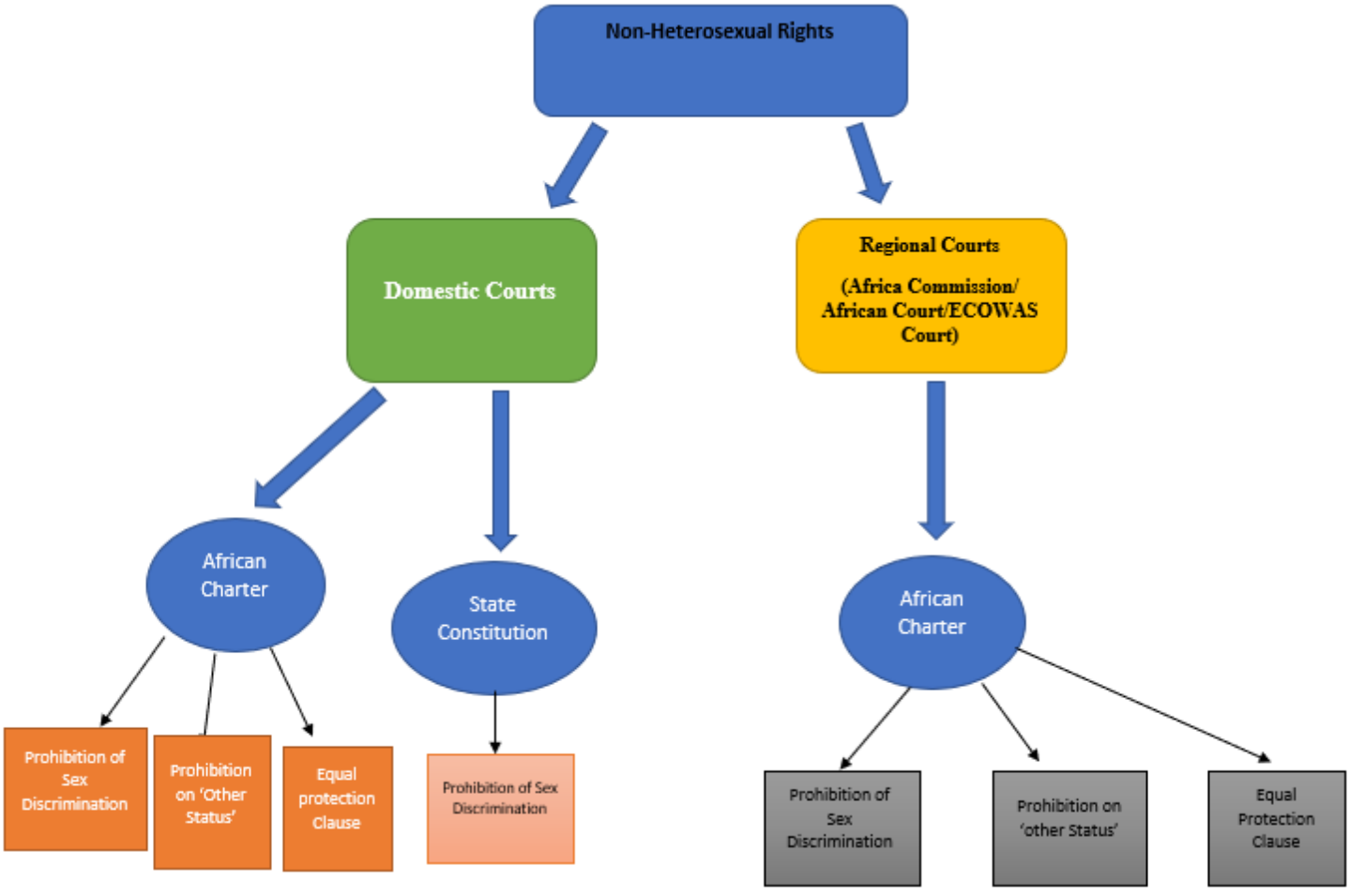

Figure 4.3 Mapping the Protection of Non-Heterosexual Rights in Africa

Source: Author

4.7 Conclusion

This chapter has argued in favour of the potential effectiveness of combining the African Charter and domestic state constitutions in Africa to protect non-heterosexual rights. It mapped out the ways through which regional judicial bodies and domestic Courts can achieve a strong human rights protection framework for non-heterosexual persons by relying on the core provisions of the African Charter and state constitutions which, when progressively interpreted and applied, provides a bulwark against any encroachment into the human rights of non-heterosexual persons by oppressive state laws and socio-legal policies.

The chapter also argued that the combined impact of the regional legal instruments and state constitutions in African states make the protection of non-heterosexual rights a binding legal obligation on these states for which they can be compelled to adopt legislative and policy measures towards the protection of these rights by domestic or regional judicial bodies. The chapter established that regional judicial bodies and domestic courts play an important role in eradicating homophobia within Africa and extending the frontiers of human rights protection to non-heterosexual relations and activities in Africa, and the progressive attitude of the regional judicial bodies signify their ability to champion the contemporary protection of these rights in Africa notwithstanding the deep social conservatism of the African states.

For the domestic courts, however, the conservative attitude of these courts may impede the protection of non-heterosexual rights within domestic jurisdictions. Nevertheless, a reformed universalism interpretation of the sex discrimination prohibition in the domestic constitutions of many African states provides an avenue for the courts to circumvent the resistance of the state governments by declaring the protection and promotion of non-heterosexual rights a binding constitutional obligation on the government.

Having established the human rights framework in African states and how it protects non-heterosexual rights, the next chapter will consider the impediments to the implementation of legal protection of non-heterosexual rights, focusing on cultural, religious and socio-economic impediments and what legal frameworks and institutional mechanisms are necessary to overcome these impediments.

CHAPTER FIVE

Legal and Institutional Mechanisms for Enforcing Non-Heterosexual Rights in Africa

5.1 Introduction

The right of non-heterosexual persons to live freely, engage in private family and personal life and enjoy equality under the law is guaranteed under the African Charter on Human and Peoples' Right 1981 (ACHPR) and also under the domestic constitutions of most African states. The derivation of these rights from the non-discrimination and equality human rights protections in the ACHPR and state constitutions in Africa has been extensively analysed in chapter 4 of this thesis. These rights are non-derogable, and their binding nature means that African states are obliged under domestic, regional and international human rights law to respect, protect and promote these rights.

Nevertheless, the *de jure* applicability of these human rights to non-heterosexual persons is significantly different from the *de facto* protection of these rights in African states and the mere presence of these rights will remain ineffective if the *de facto* condition of non-heterosexual persons in Africa does not experience any reasonable improvements as a result. Establishing the legal rights of non-heterosexual persons in the ACHPR and state constitutions is, therefore, only the first step, albeit a milestone step, towards enshrining a fundamental human rights protection system for non-heterosexual persons in Africa that allows them to enjoy the same basic rights as heterosexual people and freely pursue their happiness without the constraints of heteronormative laws, legal systems and societal values.

The enforcement of these human rights for non-heterosexual persons is the second, and equality vital, step for securing an effective human rights protection system for them. Considering the staunch resistance of African states to same-sex relationships and sexuality, appropriate legal and institutional mechanisms for enforcing these rights

must be developed (or, where existing, utilised effectively), secured and enshrined within the domestic laws and regional human rights instruments in Africa. While the regional African Courts have evinced a willingness to adopt a liberal view of human rights for all Africans, the unwillingness of many African states to even broach any tolerance for non-heterosexuality increases the need for legal and institutional mechanisms that can overcome social and political resistance from states to according basic human rights protection to non-heterosexual persons within their domestic jurisdictions.

This chapter critically analyses the key legal and institutional mechanisms and bodies involved in the enforcement of non-heterosexual rights starting with the persons or bodies that can enforce these rights, the role of NGOs, national human rights institutions and other bodies in enforcing these rights, mechanisms instituted within the African human rights system that can be utilised, and the appropriate judicial forum for enforcing the rights.

The chapter also examines the conflict and battle for supremacy between state constitutions and the ACHPR concerning non-heterosexual rights and examines what this portends for non-heterosexual people in Africa. The decision of the African Court in *Kambole v United Republic of Tanzania*[1] declaring Tanzania's constitutional provision inconsistent with the ACHPR and ordering the state to amend its constitution to align with the ACHPR raises an important question of state sovereignty and the supremacy of state constitutions in domestic matters. This chapter will examine how the Courts in domestic jurisdictions are central in resolving this conflict and aligning state constitutions with regional human rights instruments without undermining state sovereignty and reinforcing the supremacy of the state constitution. The chapter further discusses the implications of African states ignoring their human rights obligations under regional and international human rights instruments and what this means for the protection of non-heterosexual rights. The chapter then rounds up with an analysis of ways through which the social conservatism in non-heterosexual matters in African

[1] Jebra Kambole V. United Republic of Tanzania Application No. 018/2018.

states can be circumvented to create an effective human rights protection system for non-heterosexual persons.

The chapter argues that domestic judicial forums are the most suitable for enforcing non-heterosexual rights in Africa because of the shortcomings of the regional judicial forum and the lack of executory powers of their decisions against states and state bodies. Domestic judicial forums possess enforcement powers against state governments and their agencies and are backed by constitutional provisions to restrain prejudicial actions of the states against non-heterosexual persons within their jurisdictions. Further, these domestic judicial forums can apply the provisions of the state constitutions as well as regional human rights instruments in protecting the rights of non-heterosexual persons. Individuals, NGOs and national human right institutions can, therefore, utilise these judicial forums as the most effective means of protecting non-heterosexual rights.

The regional judicial forums, however, play the vital role of applying political and regional pressures on erring states to accord better treatment to non-heterosexual persons within their jurisdictions. This regional judicial and political pressure can combine with the binding domestic judicial decisions to compel states to improve their laws and policies to recognise and protect the human rights of non-heterosexual persons in their jurisdictions.[2]

5.2 Who Can Enforce These Rights?

Non-heterosexual rights attach to the individuals and are protected as such under domestic constitutions and regional human rights instruments. Thus, these rights are generally enforceable before local Courts by LGBT individuals whose liberty, freedom and dignity are threatened by the prejudicial state actions or policies restricting their rights. However, beyond the individuals, other interested parties are entitled to pursue remedies for non-heterosexual rights within African states owing to the limitations individuals face in enforcing these rights in their personal capacity. These interested

[2] The current judicial attitude towards non-heterosexual rights in Africa has been discussed in Chapter 4.2, page 140.

parties could be surrogates, NGOs - human rights NGOs or general civil rights NGOs (whether local, regional or international NGOs) and other human rights institutions such as the National Human Rights Institutions established in many states.

5.2.1 Non-Heterosexual Individuals

The relevant human rights provisions dealing with non-heterosexual persons under the ACHPR are rights that attach to the individuals. Articles 2 and 3 prohibiting discrimination and guaranteeing equality under the law both commence with the phrase – *"**Every individual** shall be entitled …*" demonstrating that the rights are vested on individuals and can be enforced by individuals. This is in contradistinction to the group rights stipulated under articles 19 – 24 of the Charter which all commence with the phrase – "***All peoples** shall…"* evincing an intention for these rights to be vested in groups/communities as opposed to individuals.[3] Similarly, the relevant human rights dealing with non-heterosexual persons in state constitutions – the non-discrimination and equality protection rights[4] - are phrased in individual terms.

The vesting of these rights on individuals entitles them to pursue the enforcement of the rights in their personal capacity both before domestic and regional judicial forums, seeking personal remedies that apply to them as individuals. For non-heterosexual persons who are often subjected to abuse, discrimination and other discriminatory policies in many African states, these rights provide a legal platform for enjoining and restraining such actions and policies.

The regional judicial forums provide mechanisms for individuals to approach them with personal complaints regarding human rights violation. A study of the claims brought before just one regional forum – the African Commission on Human and Peoples' Right – show that in the period 1987–2017, the Commission received well over 400 communications, nearly all from individuals, organisations or groups alleging violations

[3] Richard Kiwanuka, 'The Meaning of "People" in the African Charter on Human and Peoples' Rights' (1988) 82(1) American Journal of International Law 80-101.
[4] See chapter 4.5, page 165 for a discussion of these rights.

of human rights in the African Charter.[5] Except for one inter-state complaint only, all other complaints before the commission were submitted by individuals and NGOs initiating claims on behalf of individuals. Also, the African Court since its inception in 2006 has mostly received claims from individuals and NGOs seeking to redress individual rights before it, despite the restrictive right of access of individuals and NGOs before the Court.[6] Of the 295 cases filed before the Court as of October 2020, 278 (94.5%) have been filed by individuals, 14 by NGOs ventilating individual claims and 3 from the African Commission referring individual complaints to the Court.[7] There has not been a single inter-state claim before the African Court. The proliferation of individual claims before the regional Courts demonstrates that the regional judicial forums are widely receptive to individual enforcement of these rights and the decisions of these regional forums have had some influence in shaping the protection of individual human rights within Africa.

Similarly, in domestic Courts, individuals are granted direct rights of access to the Courts to enforce the fundamental rights in the constitutions as the primary recipient of the rights against the state and state bodies. In some African states (e.g. Nigeria),[8] the constitutions and legal instruments provide simplified access to the Courts and remove barriers to access including costs, technicalities, locus standi rules and other formal requirements that hinder claimants in fundamental right suits. For instance, the Fundamental Rights Enforcement Protection Rules 2009 (FREPR) of Nigeria provides a simplified process for initiating human rights claims before the Courts.[9] Article 22(3) of Kenya's 2010 Constitution goes further to provide that:

> a) formalities relating to the proceedings, including the commencement of the proceedings, are kept to the minimum, and in particular that the Court shall, if necessary, entertain proceedings on the basis of informal documentation;

[5] These communications are available at the website of the African Commission <http://www.achpr.org/communications/decisions/> and African Human Rights Case Law Analyser <http://caselaw.ihrda.org/body/acmhpr/> accessed 20th October 2020.
[6] See chapter 4.6.1, page 175 for a discussion of this restriction – complaints can only be entertained from states that have opted into the optional protocol permitting individual claims. So far, only 8 African states have opted in, thus severely limiting access of individuals before the African Court.
[7] African Court, 'Contentious Matters' <https://www.african-Court.org/en/index.php/cases/2016-10-17-16-18-21> [accessed 15th November, 2020].
[8] See s. 46 of the 1999 Constitution of Nigeria and the Fundamental Rights Enforcement Procedure Rules 2009.
[9] Order II.

b) no fee may be charged for commencing the proceedings;
c) the Court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities…[10]

A similar provision exists in many state constitutions in Africa[11]with a focus on enhancing individual access to Courts for human rights redress. This simplification of access to human rights claims boosts the ability of individuals (including non-heterosexual people) to challenge prejudicial and discriminatory actions and policies and is the most direct means of achieving judicial protection for non-heterosexual rights in African states.[12]

5.2.2 Surrogates

Due to the social backlash against non-heterosexuality in many African states, individuals are often reluctant to publicly redress their claims before judicial forums for fear of exposure and the consequent ostracisation from social circles by friends, colleagues and general members of the society. Because the judicial system is public access, it can pose a significant risk for non-heterosexual individuals being discovered and possibly subjected to abuse and other forms of retributions within the society. It is, therefore, often necessary for human rights claims by these individuals to be presented by surrogates acting on behalf of the individuals to keep the individuals' identity hidden, e.g. LEGABIBO's case in Botswana was presented on behalf of non-heterosexual individuals whose names and identities were hidden and a surrogate was used to represent the claimants on the official Court filings.

Many state constitutions recognise this need for surrogates in human rights claims and make provisions entitling claims to be filed by surrogates. Article 22 of Kenya's Constitution, section 33 of South Africa's Constitution and section 33 of Ghana's Constitution (amongst many other state constitutions) provide for individual human rights claimants to be represented by:

[10] Constitution of Kenya, 2010 article 22(3).
[11] See, for instance, section 33 of Ghana's Constitution 1992 and section 33 of South Africa's Constitution 1996.
[12] The impediments to obtaining judicial reliefs for individuals before regional and domestic Courts are discussed subsequently in chapter 5.3, page 218.

- a person acting on behalf of another person who cannot act in their own name; and
- a person acting as a member of, or in the interest of, a group or class of persons.

In some other states, the equivalent provision is found in the human rights enforcement procedure rules that govern human rights claims. For instance, a similar provision can be found in Order II of the FREPR 2009 of Nigeria.

These two categories of surrogates provide important coverage for non-heterosexual individuals redressing their human rights claims in African states without risking social backlash, abuse or retribution from a socially conservative public opposed to any public consideration of non-heterosexuality by judicial bodies.

The distinction between the two categories of surrogates is that while the former relates to a surrogate acting for a single or specific non-heterosexual claimant, e.g. where a lesbian is denied public service on account of her sexuality and she wants to approach the Court to obtain access but is wary of the social consequence of her identity being disclosed, she can adopt a surrogate to act on her behalf using anonymised references to the actual claimant. On the other hand, the latter refers to a surrogate acting for a group of non-heterosexual individuals suffering from the same prejudicial action or policy. For instance, in a government ministry where a policy has been introduced or implemented effectively barring non-heterosexual individuals from certain benefits or privileges (e.g. employee benefits only applying to partners in a heterosexual marriage), the affected persons can appoint a surrogate to act on their behalf in seeking judicial redress without disclosing their identities for fear of workplace retribution and victimisation.

Utilising surrogates for non-heterosexual claimants is one of the vital means through which their rights can be protected because the fear of victimisation, retribution and backlash is a major reason preventing such individuals from redressing their claims before the Courts in African states.[13] This is one of the main reasons why non-heterosexual rights have not been sufficiently tested in domestic and regional Courts in Africa despite the availability of human rights provisions in domestic constitutions

[13] Thabo Msibi, 'The Lies We Have Been Told: On (Homo) Sexuality in Africa' (2011) 58 (1) Africa Today 77; Aken'Ova Dorothy, 'State-Sponsored Homophobia: Experiences from Nigeria' (2010) 4 Perspectives, Political Analysis and Commentary from Africa 18.

and regional instruments from which the protection of non-heterosexual rights can be derived,[14] as the lack of awareness of the possibility of using surrogates makes non-heterosexual people to continually conceal their presence and refrain from seeking judicial remedies, thereby depriving the Courts of opportunities to make binding declarations on states and state bodies which protect non-heterosexual rights within domestic jurisdictions.

Seeing the availability of surrogate claims, non-heterosexual individuals can present more claims before the Courts and test judicial response to the protection of their rights relying on domestic constitutions and regional instruments. With an increase in such judicial claims, the jurisprudence within these African states may gradually begin to shift towards greater reception, acceptance and protection of these rights.

Individual redress of non-heterosexual rights before domestic courts in African states face some significant challenges. One major challenge is the financing of the Court processes. Financing is a major obstacle for many individual non-heterosexual claimants because even where the court fees have been subsidised/removed, there are still significant costs associated with obtaining legal representation and other logistic costs which render the process financially burdensome for individuals. This challenge is compounded by the high poverty rates in African states and the fact that many non-heterosexual people are already marginalised, denied jobs and other basic human rights and are, thus, less likely to have the financial ability to fund their lawsuits.

Also, individual claimants risk being exposed in many homophobic societies where they can be subjected to lynchings, maiming and other prejudicial acts, and they must, therefore, run the gauntlet in seeking redress for the violation of their human rights.

Consequently, the most reliable source of non-heterosexual litigation is by Non-Governmental Organisations that often have the financial capital to undertake the litigation and also have some sort of coverage of their individual identities by the semi-corporate nature of their organisations.

[14] Mama Amina, 'Restore, Reform but Do Not Transform: The Gender Politics of Higher Education in Africa' (2003) 1(1) Journal of Higher Education in Africa 125.

5.2.3 Non-Governmental Organisations (NGOs)

Litigation can be challenging for individuals and their surrogates, particularly where it is against states and state bodies, and also in claims before regional judicial bodies. Even with the simplification of access to Courts in terms of costs and technical hurdles, pursuing landmark claims against states and state bodies on issues of entrenched public policy and interests such as non-heterosexual issues require some financial muscle and logistical support. NGOs often possess the capacity (financially, logistically and influence-wise) to sustain claims against states and state bodies both before domestic and regional judicial forums and are, therefore, important vehicles for advancing non-heterosexual rights in Africa.

The relevant domestic and regional human rights instruments recognise the entitlement of NGOs and other civil rights groups to present claims on behalf of individuals and groups of persons. The regional judicial bodies – African Commission, African Court, ECOWAS Court – permit claims to be brought by NGOs on behalf of individuals and groups.[15] Domestically, the constitutions of many African states (or legal instruments made under these constitutions) permit NGOs to file human rights claims on behalf of individuals. The constitutions of Kenya, South Africa, Ghana and Nigeria[16] referenced earlier, for instance, provide for NGOs and other organisations to file claims on behalf of litigants. NGOs are, therefore, a central part of any enforcement of non-heterosexual rights in Africa.

Indeed, some of the most impactful decisions on non-heterosexual rights domestically have been championed by NGOs. For instance, the landmark decision of *Eric Gitari v Non-governmental Organisation Coordination Board and 4 Others*[17]by the High Court of Kenya recognising the rights of non-heterosexual persons to freely gather and form associations without repression was funded and championed by human rights NGOs in Kenya. Similarly, the landmark decision of the Constitutional Court of Uganda voiding the Anti-Homosexuality Act, 2014 (previously called the "Kill the Gays bill" in the western mainstream media due to its imposition of the death penalty for

[15] The structure of these bodies and the filing of claims before them have been discussed in Chapter 4.6.1, page 175.
[16] See also Section 50 of Uganda's 1995 Constitution and section 29 of Tanzania's 1977 Constitution.
[17] Petition 440 of 2013, [2015] eKLR (High Court of Kenya at Nairobi, 24 April 2015.

homosexual acts) was funded and championed by NGOs.[18] Finally, the landmark decision in Botswana recognising LGBT rights as part of human rights was funded and championed by an NGO in Botswana known as the Lesbians, Gays and Bisexuals of Botswana (LeGaBiBo).

While NGOs play more direct roles in championing non-heterosexual rights domestically, their influence in regional judicial bodies is more subtle and indirect, as there has yet to be any direct claim by NGOs seeking to protect non-heterosexual rights before these bodies. Rather, these NGOs promote non-heterosexual rights by utilising their observer status to monitor executive activities before the regional forums and can also utilise this observer status to influence their outcome through shadow reporting,[19] reports of NGO Forums and *amicus curiae* briefs before the regional judicial bodies.

5.2.3.1 Observer Status

Observer status is the formal recognition of an NGO by the regional bodies which entitles the NGO to participate in executive activities of the bodies and also present reports, communique and other executive papers to the bodies. Having NGO observer status is a useful way to advocate before the African Commission and the African Court. Reserved for non-governmental organizations working in the human rights field in Africa, observer status is a formal recognition of an NGO and its authority to participate at the Commission.[20]

In applications to obtain observer status, NGOs must show that their objectives are consistent with the principles of the Constitutive Act of the AU[21] and their work is in the field of human rights in a broad sense including but not limited to general human rights matters as well as specific rights such as labour rights, gender rights, economic rights,

[18] 'Uganda Court annuls anti-homosexuality law' *BBC News* (1st August 2014) <https://www.bbc.co.uk/news/world-africa-28605400> accessed 28th October 2020.
[19] Shadow reporting is the process of NGOs filing alternative reports to the reports filed by African states, highlighting the flaws in the states' reports. This is discussed later in this chapter.
[20] African Commission on Human and Peoples Right (ACommHPR), Rules of Procedure, Rule 68(1).
[21] Constitutive Act of the African Union, adopted in Lome, Togo by the Thirty-Sixth Ordi¬nary Session of the Assembly of Heads.

etc. They must also provide proof of their legal existence, a declaration of financial resources, their last financial statement, and a statement of activities.[22]

An NGO having an observer status has several benefits. NGOs with observer status may make statements and answer questions during the African Commission's public sessions. They may also be invited to attend closed sessions of the African Commission or the Executive Committees of the African Union dealing with issues that are of particular importance to them. Additionally, NGOs with observer status may propose particular items for inclusion in the African Commission's provisional agenda for each session.

Regularly, a large number of NGOs with observer status speak on a variety of human rights issues at the African Commission's public sessions such as the statements made by over 41 NGOs with observer status about the human rights situation in Africa at the 55th Ordinary Session of the African Commission.[23] As of September 2020, there were 500 NGOs holding observer status. While the majority of these NGOs are African human rights organizations, this list also includes several notable NGOs based outside African such as Amnesty International.

The large number of NGOs with observer status increases the influence that NGOs have in policy making and decisions of the regional bodies and judicial forums. Considering that only NGOs with observer status can file claims before the regional bodies, the large number of these NGOs creates the opportunity for several human rights NGOs to pursue non-heterosexual claims before these regional bodies and influence the protection of these rights by the judicial bodies. Therefore, NGOs play a central role in enforcing non-heterosexual rights in Africa, particularly the NGOs that have non-heterosexual rights included in their key objectives such as Amnesty International.

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[22] ACommHPR, Resolution on the Criteria for Granting and Enjoying Observer status to Non-Governmental Organizations Working the field of Human and Peoples' Rights, Resolution No. 33/1999, adopted at the Commission's 25th Ordinary Session, held 26 April – 5 May 1999, available at <http://www.achpr.org/sessions/25th/resolutions/33/> accessed 12 November 2020.

[23] ACommHPR, Final Communiqué of the 55th Ordinary Session of the African Commission on Human and Peoples' Rights (adopted by the Commission at the end of its 55th Ordinary Session, held 28 April – 12 May 2014), 10, <http://www.achpr.org/files/sessions/55th/info/communique55/achpr_fico_2014_eng.pdf.> [accessed 20 November 2020].

5.2.3.2 Shadow Reports

Under the Protocol establishing the African Commission, States parties are obliged to report to the Commission every two years on the steps they have taken to implement the provisions of the African Charter. The Commission considers these reports during its ordinary and extraordinary sessions. After considering the reports, the Commission issues Concluding Observations that contain recommendations for the State to achieve further compliance with the Charter.

The African Commission's Rules of Procedure[24] allow NGOs with observer status to submit shadow reports to the Commission on the human rights situation in their country. These shadow reports supplement the State report, thereby providing NGOs with the opportunity to bring human rights issues to the Commission's attention even where the State has failed to adequately engage or has not engaged at all, with civil society in addressing such pressing human rights issue. In addition to discussing human rights issues omitted from the State report or only superficially addressed by the State, shadow reports also include questions for the Commission to pose to States and possible recommendations.

Shadow reports are, therefore, a viable means for human rights NGOs to raise the dire situation of non-heterosexual persons in many African states before the commission and demand urgent action to be taken by the states concerned and for the African Commission to take intervention measures to ensure compliance by the states with the human rights of non-heterosexual persons within their jurisdictions. For example, in October 2019, during the 66th Ordinary Session of the African Commission on Human and Peoples' Rights (ACHPR), Human Rights Watch (HRW) filed a shadow report to the report filed by the Government of Cameroon wherein it highlighted the structural flaws and misrepresentations in Cameroon's official reports in relation to the protection of human rights within its jurisdiction.[25] This shadow report was considered by the

[24] Arts 29(2) and 31.

[25] Shadow Report to the African Commission on Human and Peoples' Rights in Response to the 6th Periodic Report of Cameroon, October 2019 <https://www.hrw.org/news/2020/03/30/shadow-report-african-commission-human-and-peoples-rights-response-6th-periodic> accessed 20 February 2021.

Commission and recommendations made to Cameroon to address the areas of concerns raised in the report.

5.2.3.3 NGOs Forum

NGOs at the regional bodies can also coalesce around the NGO forum to advocate for improved protection of LGBT rights in Africa. Although not formally a part of the African Commission, an NGO Forum has been established by NGOs with observer status before the regional bodies and has become a key venue for NGO engagement with the African Commission. Held in advance of the Commission's ordinary sessions, the NGO Forum provides a platform for NGOs to discuss the human rights situation in Africa, exchange information, and build their advocacy networks.

5.1.3.4 Amicus Curiae Briefs

Another important role that NGOs play in influencing outcomes at the regional bodies which can be useful for non-heterosexual rights is the submission of amicus curiae briefs before the regional judicial bodies in cases pending before them. 'Amicus curiae' – Latin for 'friend of the Court' – briefs are typically submissions by individuals or organizations that are neither party to the case nor have they been solicited by any of the parties for help, but who offer information or lines of argument nonetheless in order to assist the Court. Rule 99(16) of the African Commission's Rules of Procedure permits the Commission to receive amicus curiae briefs on communications before it. Similarly, Rule 29(2) of the Protocol establishing the African Court empowers the Court to receive amicus curiae briefs from individuals and NGOs in pending cases before it.

Furthermore, the African Commission and African Court may allow the drafter of the amicus curiae brief or it's representative to address them during the hearing of the case for which the brief was filed.[26] Submitting amicus curiae briefs by NGOs to the regional judicial bodies is a way to present new facts and original arguments, as well as to draw attention to the possibly broad legal reach their decision will have. This platform can

[26] See Rule 99(16) of the African Commission's Rules of Procedure and Rule 29(2) of the Protocol establishing the African Court.

be utilised by NGOs to intervene in non-heterosexual cases, using their considerably broader financial strength and global outreach to present research and arguments which could potentially influence the outcome of the cases in favour of non-heterosexual rights. Although the regional judicial bodies are yet to receive any specific claim relating to non-heterosexual rights, it is hopeful that with time, such claims may start flooding these judicial bodies and NGOs will play a vital role in ensuring the success of such suits. NGOs with observer status like Amnesty International have been at the vanguard of campaigns for non-heterosexual rights in Africa[27] and can play a vital role in funding such litigation.

An example of the successful use of amicus briefs by NGOs in claims before the regional judicial bodies can be seen in *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*.[28] In the case, the London-based Minority Rights Group (MRG) collaborated with the Kenyan Centre for Minority Rights Development (CEMIRIDE) to file a communication to the Commission on behalf of the indigenous Endorois community, alleging that Kenya had failed to recognize and protect the Endorois' right to their ancestral lands and had refused to pay adequate compensation or grant restitution of their land, all in violation of the African Charter. The Centre on Housing Rights and Evictions (COHRE) submitted an amicus curiae brief contending that the displacement of the Endorois community was, in essence, a forced eviction, which violated the international human rights to adequate housing and was a violation of article 14 of the African Charter. In its decision, the African Commission referenced COHRE's amicus brief as a vital legal document that influenced the positive outcome of the case in favour of the claimant as the arguments canvassed therein made a strong case in favour of the claimant.[29]

Filing of amicus briefs by NGOs in support of individual non-heterosexual claimants before the regional judicial bodies can, therefore, be a veritable means of influencing positive outcomes for non-heterosexual rights in African states.

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[27] 'Mapping anti-gay laws in Africa' (*Amnesty International*, 31 May 2018) <https://www.amnesty.org.uk/lgbti-lgbt-gay-human-rights-law-africa-uganda-kenya-nigeria-cameroon> accessed 20 November 2020.

[28] African Commission, Communication 276 / 2003.

[29] ibid.

5.2.3.5 Coalition of African Lesbians (CAL)

Despite the significant leverage NGOs possess before the regional forums, they have been unable to influence LGBT-friendly outcomes before the regional judicial bodies in terms of legal claims and amicus briefs largely due to a deliberate effort by the regional bodies to exclude non-heterosexual interests from consideration before the judicial bodies. While the regional bodies cannot exclude non-heterosexual individuals from approaching the judicial forums (and have not attempted to do so), the focus has been on excluding NGOs that promote non-heterosexual interests from the regional bodies' forums. As a result, there has not been any legal claims or official shadow reports by any NGO advocating non-heterosexual protections in Africa despite the proliferation of more than 100 human rights NGOs having observer status.

NGOs like Amnesty International that champion LGBT interests globally have remained silent on the subject before the regional bodies and although no official explanation for this approach has been provided, this may be attributed to the need to avoid exclusion from the regional forums. The only LGBT-focuses NGO that attempted to break through the homophobic wall of the regional body – the Coalition of African Lesbian (CAL) – faced a herculean battle to gain observer status in 2015 and recently lost that status in 2018, thus resulting in the absence of any NGO with LGBT interests currently advocating before the regional bodies.

CAL is a South African based LGBT organisation. It is a feminist, activist and Pan-Africanist network of 14 organisations from 10 countries in sub-Saharan Africa committed to advancing freedom, justice and bodily autonomy for all women on the African continent and beyond. The Coalition's main objective is raising consciousness strengthening activism and leadership of lesbians on sexuality and gender and its intersections with a wide range of lived realities. Its broader objective is the advancement of LGBT rights and interests in the African continent with a focus on lesbian and bisexual women as well as "trans diverse" people on the continent.[30]

Since its founding in 2003, CAL has repeatedly attempted to gain observer status before the regional bodies, making several applications after fulfilling all the

[30] Coalition of African Lesbians, 'Why we Exist' <https://www.cal.org.za/about-us/why-we-exist/> accessed 08 November 2020.

requirements but was repeatedly refused. The refusal by the African Commission based on recommendations from the African Union (AU) Executive Council was predicated on the need to maintain 'African values'[31] and not promote NGOs with objectives that undermine these values. It was also claimed that CAL's objectives did not "promote and protect any of the rights enshrined in the African Charter." [32]

However, after repeated refusals, CAL was finally granted observer status in 2015 by the African Commission based on approval by the AU Executive Council,[33] bowing to pressures from international organisations.[34] Nevertheless, less than three years later, the AU Executive Council reversed course on 8 August 2018 and withdrew the observer status from CAL,[35] citing its previous position that its objectives does not promote any of the objectives of the African Charter and goes against 'African values' and the objectives undermine "fundamental African values, identity and good traditions".[36] This reversal was a result of intense pressures placed on the African Commission and the AU Executive Council by the political organs of the AU representing African states.[37]

The removal of CAL's observer status is unfortunate and seriously undermines the role of NGOs in promoting LGBT rights in Africa. CAL was the only NGO that had openly sought to file shadow reports on discrimination and prejudicial actions and policies of state governments against LGBT persons in Africa and had undertaken empirical research documenting the various ways LGBT persons in Africa were being

[31] See the discussions on cultural objection to LGBT rights in African states on account of protecting 'African Values' in Chapter 1.2.4, page 32.

[32] See ACommHPR, Resolution on the Criteria for Granting and Enjoying Observer status to Non-Governmental Organizations Working the field of Human and Peoples' Rights, Resolution No. 45/2010, adopted at the Commission's 35th Ordinary Session.

[33] Executive Council of the African Union, Decision on the Thirty-Eighth Activity Report of the African Commission on Human and Peoples' Rights Doc.EX.CL/921(XXVII), at EX.CL/Dec.887(XXVII), para. 7, in Executive Council Decisions, EX.CL/Dec.873-897(XXVII), 27th Ordinary Session 7-12 June 2015.

[34] 'Coalition of African Lesbians granted Observer Status by the African Commission on Human and Peoples' Rights' (*Association for Progressive Communications,* 27 April 2015*).*

[35] Executive Council of the African Union, Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR) DOC.EX.CL/1089(XXXIII) I, at EX.CL/Dec.1015(XXXIII), para. 8(vii), in Executive Council Decisions, EX.CL/Dec.1008-1030(XXXIII), 33rd Ordinary Session 28-29 June 2018.

[36] ibid, 2.

[37] 'African Commission Bows to Political Pressure, Withdraws NGO's Observer Status' (*International Justice Research Centre,* August 28 2018*)* available at <https://ijrcenter.org/2018/08/28/achpr-strips-the-coalition-of-african-lesbians-of-its-observer-status/> accessed 21 November 2020.

suppressed, marginalised and their rights violated.[38] The removal of observer status excludes the only LGBT voice from regional judicial forums in Africa and promotes homophobia at the regional forum. For instance, the non-recognition of CAL pre-2015 prevented the African Commission from deliberating on CAL's application for an advisory opinion on the potential violation of the African Charter's provisions by discriminatory state laws.[39] It is, therefore, essential that LGBT-focused NGOs be granted visibility and recognition by the regional bodies to be able to affect outcomes before these bodies.

Nevertheless, there is a ray of hope on the horizon as CAL has continued its campaign to draw international attention to the situation in Africa and the consequent international pressure is beginning to be felt at the African Commission with little progress being made. For instance, the African Commission has adopted its first resolution condemning violence and discrimination on the basis of sexual orientation and gender identity within African states.[40] Resolution 275 reiterated that acts of violence, discrimination and other human rights abuses affecting LGBT persons and human rights defenders in African states violate states' obligations under the ACHPR particularly freedom from discrimination (Article 2), equal protection of the law (Article 3), respect for life and integrity of the person (Article 4), and freedom from torture, cruel, inhuman and degrading treatment (Article 5).[41]

This gradual shift in the Commission's position towards LGBT rights and protection portends hope for LGBT rights in Africa. Resolution 275 was warmly celebrated by NGOs including the International Service for Human Rights (ISHR) and the Human Rights Campaign which lauded it as the "first step towards affirming the equality and dignity of all African people who have been targeted and continue to be treated as second-class citizens because of their real or perceived sexual orientation and gender

[38] 'Making Access Real: Lessons from Southern Africa' (*CAL, June 2017*) <http://www.cal.org.za/2017/12/01/7553/> accessed 09 December 2020.
[39] See AfCHPR, The Centre for Human Rights, University of Pretoria (CHR) & The Coalition of African Lesbians (CAL), App. No. 002/2015, Advisory Opinion of 28 September 2017.
[40] See ACommHPR, Res. 275: Protection Against Violence and other Human Rights Violations Against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity, 55th Session, 28 April-12 May 2014.
[41] ibid.

identity and expression."[42] NGOs and other civil society organisations can use this as a platform to press further towards ensuring greater recognition for LGBT rights in Africa, using their leverage within the regional bodies to influence the outcomes of decisions and official reports towards increased protection for LGBT rights.

5.2.4 National Human Rights Institutions (NHRI)

Asides from NGOs, National Human Rights Institutions (NHRI) established under the laws of many African states constitute bodies that play an important role in protecting and advancing human rights within African states both domestically and within the regional bodies. Although established by statutory instruments they are often independent human rights commissions empowered to investigate and redress human rights injustices that occur within the state. NHRIs are, therefore, important institutions that can enforce human rights protection for non-heterosexual persons within African states. Considering they are often established as autonomous statutory institutions, they are not (or should not be) beholden to the state and its homophobic laws and policies[43] but should, in theory, be independent bodies that can impartially assess the prejudicial impacts of state laws and policies on non-heterosexual persons.

Throughout the past two decades, the international community has greatly increased its focus on establishing national human rights bodies in Africa. Promoting these national institutions has emerged as one of the UN's most important strategies for improving the protection of human rights in the region. To promote these institutions effectively, the United Nations created the Program of Advisory Services and Technical Cooperation in the Field of Human Rights (Program of Advisory Services) as early as 1955.[44]

The central advantage of NHRIs is their inherent cultural sensitivity in dealing with human rights situations within domestic jurisdictions. International human rights organisations often encounter challenges related to cultural relativism when they

[42] 'African Commission adopts landmark resolution on LGBT rights' (*ISHR,* May 2014) <http://www.ishr.ch/news/african-commission-adopts-landmark-resolution-lgbt-rights> accesed 28th September 2020.
[43] Mary Ellen Tsekos, 'Human Rights Institutions in Africa' (2002) 9(2) Human Rights Brief 21.
[44] ibid, 22.

attempt to impose international norms within national jurisdictions, especially in African states.[45] Typically, therefore, the most effective education and information campaigns are those that have been designed and carried out at the national level by domestic institutions and are culturally sensitive.

A 2016 study on NHRIs in Africa conducted by the United Nations Development Programme (UNDP)[46] found that they have immense prospects for promoting human rights protection within African states as many of these institutions have the capacity and sufficient legal framework for independent monitoring and enforcement of human rights within domestic jurisdictions. According to the UNDP study, there are 'precise legal provisions supporting the legal autonomy of all sample NHRIs'.[47]

The study, however, highlighted some shortcomings of these institutions including instances where the legal framework has some substantive deficiencies e.g. executive regulations that curtail the NHRI's independence, ambiguous processes for dismissal of NHRI members (Commissioners), insufficient functional immunity for staff etc.[48] There are also issues with the political environment (e.g. the level of political will, freedom of speech and political stability) which is also a key factor that consistently affects the optimal functioning of NHRIs during both inception phases as well as their continuous operation. [49]

The UNDP study utilised a sample of 9 selected African states – Burundi, Cameroon, Egypt, Ghana, Kenya, Mozambique, Rwanda, Seychelles and Tunisia – and the study found that NHRIs can be a vital tool in human rights protection in African states. African states have gone further to establish a Network of African National Human Rights Institutions (NANHRI) which is one of four regional groupings within the global network, the Global Alliance for National Human Rights Institutions (GANHRI). NANHRI promotes the establishment of national human rights institutions throughout Africa and supports cooperation and training to strengthen and develop the monitoring, promotion, protection and advocacy work of African NHRIs.

[45] Mary Ellen Tsekos, 'Human Rights Institutions in Africa' (n 43) 22.
[46] 'Study on the State of National Human Rights Institutions (NHRIs) in Africa' (*United Nations Development Programme (UNDP),* 2016).
[47] ibid.
[48] ibid, 9.
[49] ibid, 15.

An example of how strong NHRIs can influence human rights protection can be found in Uganda. The Uganda Human Rights Commission (UHRC) has emerged as one of the strongest and most effective official human rights bodies on the continent. Established by the 1995 Ugandan Constitution after decades of gross human rights violations by previous governments, the UHRC's independence and statutory authority - and its willingness to challenge government actions - has been credited for significantly improving the country's human rights record, despite significant challenges it has faced from executive pushbacks.[50]

Unlike many other NHRIs in Africa, the UHRC has quasi-judicial status, with the authority to subpoena any person or document compel testimony, order the release of detainees, order financial restitution or other remedies for victims of human rights violations.[51] Similarly, Sierra Leone's NHRI - the National Commission for Democracy and Human Rights (NCDHR)—was established on December 23, 1996, and is largely credited to stemming the endemic human rights violation that plagued the country during and after its civil war.[52] In Nigeria, the National Human Rights Commission of Nigeria (NHRC) was established by the National Human Rights Commission (Amendment) Act, 1995.[53] The NHRC serves as an extra-judicial mechanism that safeguards the human rights of the Nigerian population and has championed human rights protection in Nigeria.

NHRIs also play a critical role in human rights protection at the regional level. They assist the African Commission in the promotion of human rights at the state level, including encouraging their states to ratify human rights treaties. NHRIs can obtain affiliate status at the African Commission by applying to the Commission. Affiliate status empowers NHRIs to engage with the African Commission. NHRIs affiliated to the Commission are entitled to attend and participate in the Commission's public

[50]Michael Fleshman, 'Human rights move up on Africa's Agenda' July 2014, <https://www.un.org/africarenewal/magazine/july-2004/human-rights-move-africas-agenda> accessed 12 July 2020.
[51] The Uganda Human Rights Commission Act, 1997 (No. 4 of 1997) (Cap. 24).
[52] Mary Ellen Tsekos, 'Human Rights Institutions in Africa' (n 43) 23.
[53] As amended by the NHRC Act, 2010.

sessions. Like NGOs, they are required to submit a report on their activities to the Commission every two years.[54]

NHRIs have the potential to positively influence the protection and promotion of non-heterosexual rights within their respective states. As Peter[55] argues, if established properly and in accordance with the Paris Principles,[56] and if managed by honest and upright persons with integrity, these institutions can make an immense difference in the struggle to promote and protect human rights at state levels. Such human rights will, inevitably include LGBT rights which are amongst the most violated rights prevalent in Africa. Considering the prevalence of NHRIs in African states (see Figure 5.1 below), they can play vital roles in enforcing LGBT rights if they accord their objectives with the Paris Principles and the international recognition of the inviolability of the rights of non-heterosexual persons.

[54] See ACommHPR, Resolution on the Criteria for Granting and Enjoying Observer status to Non-Governmental Organizations Working the field of Human and Peoples' Rights, Resolution No. 33/1999, adopted at the Commission's 25th Ordinary Session, held 26 April – 5 May 1999.

[55] C. M Peter, 'Human Rights Commissions in Africa – Lessons and challenges'. In Bösl, A. & Diescho, J. (eds) *Human Rights in Africa: Legal Perspectives on their Protection and Promotion*. (Windhoek: Macmillan Education Namibia, 2009) 12.

[56] UN Principles relating to the Status and Functioning of National Institution for the Protection and Promotion of Human Rights (Paris Principles).

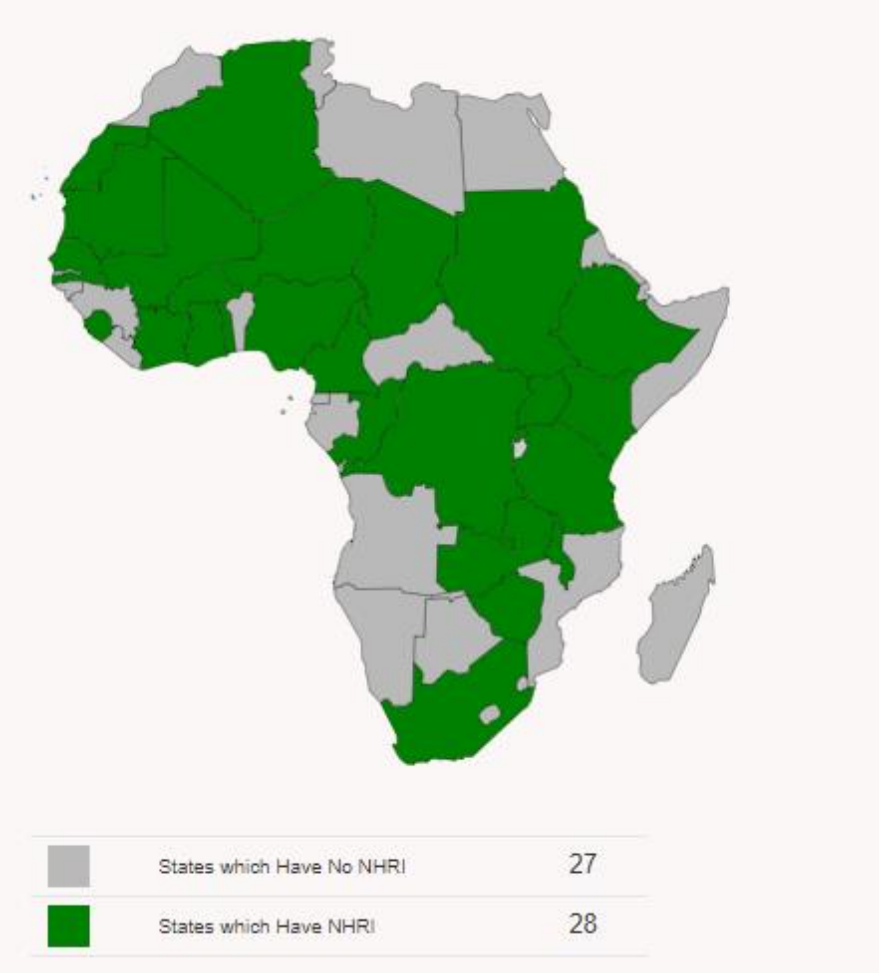

Figure 5.1 Prevalence of NHRIs across the African States

Source: African Commission on Human and People's Rights Report 2019[57]

5.3 Technical Hurdles to Enforcing Non-Heterosexual Rights

The African Charter and many state constitutions recognise the human rights of non-heterosexual persons to equality and freedom from discrimination on account of their sexuality. But technical hurdles exist on the path of enforcing these rights and these hurdles can restrict the ability of litigants – non-heterosexual individuals, surrogates and NGOs – from obtaining adequate relief through judicial mechanisms.

These technical hurdles operate in the way of legal principles which litigants must scale before successfully bringing a suit to enforce human rights at the domestic and regional

[57] 'National Human Rights Institutions' (*African Commission on Human and People's Right,* May 2019) available at <https://www.achpr.org/nhris> accessed 02 November 2020.

forums. They are the *locus standi* principle and the exhaustion of local remedies principle and will be discussed briefly below.

5.3.1 *Locus Standi* Principle

Locus standi refers to the sufficiency and directness of a litigant's interest in proceedings that warrants his or her title to prosecute the claim asserted and is the first thing to be ascertained by a judicial forum before proceeding with the adjudication. If the applicant is not found to have a 'standing' to bring the action, the Court will not hear their complaint The maxim – *locus standi* – literally translates as 'standing to sue' and it refers to the right of a party to appear and be heard before a Court of law or to institute a suit or an action before the Court. For instance, an individual cannot bring a complaint challenging the constitutionality of a law, unless he/she can show that they have been harmed or affected by the law.[58]

In human rights claims, the locus standi principle focuses on the interest of the applicant that is affected by the action or policy complained against. Thus, there is no question about the locus standi of individual non-heterosexual applicants challenging prejudicial laws, actions or policies. However, issues arise with respect to surrogates and NGOs acting on behalf of individuals affected by discriminatory laws or policies. Usually, the latter applicants will be disqualified from presenting claims on behalf of affected persons or group of persons at large because the applicants are not personally affected by the actions complained against.

However, in human rights claims, some state constitutions (e.g. Nigeria, Ghana, Kenya, South Africa) have removed the locus standi hurdle by entitling surrogates, NGOs and all other persons acting in the public interest to bring claims challenging any action or law that infringes on the human rights of non-heterosexual persons even though the applicants are not directly affected. The human rights enforcement provisions referred to earlier in this chapter[59] in the constitutions of Kenya, South

[58] Cornelia Koch, 'Locus Standi of Private Applicants Under the EU Constitution: Preserving Gaps in the Protection of Individuals' Right to an Effective Remedy' (2010) 30 European Law Review 511.
[59] Chapter 4.5, page 165.

Africa, Ghana, Nigeria and a lot of other African states liberalises the locus standi principle as far as human rights complaints are concerned.

Similarly, the procedural rules of the African Commission and African Court entitle surrogates and NGOs to file claims before these bodies on behalf of others or groups without the unnecessary hurdle of the locus standi principle.

Consequently, the *locus standi* principle does not operate as a hurdle to the enforcement of non-heterosexual human rights at the domestic level in African states that have abolished the *locus standi* principle in human rights claims. The concept of standing is intertwined with the right of access to justice and effective access to justice is considered as the most basic requirement of a legal system, which purports to guarantee legal rights. Removing the locus standi principle in human rights enforcement broadens the scope of enforcement of non-heterosexual rights by entitling different actors to redress claims on behalf of non-heterosexual people who are often unwilling, unable or prevented from redressing such claims personally.

5.3.2 Exhaustion of Local Remedies Principle

The exhaustion of local remedies principle applies exclusively to claims before the regional bodies – the African Commission and African Court. The principle requires that before approaching these bodies for redress, the applicant(s) must have utilised and exhausted all available judicial and non-judicial remedies or mechanisms within the domestic legal system of the state. This requirement is based on the principle that post-national norms and institutions are subsidiary to and supplement rather than replace national norms and institutions and national institutions are the primary forums for redressing domestic grievances with post-national forums filling any gap.[60]

The exhaustion of local remedies principle is stringently applied by the African Commission and African Court as it is central to their jurisdiction over any dispute. In

[60]'Advocacy before the African Human Rights System: A Manual for Attorneys and Advocates Preventing and Remedying Human Rights Violations through the International Framework' (*International Justice Resource Center*, November 2016).

relation to the African Commission, article 50 of the ACHPR establishing the Commission explicitly stated that:

> The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.

In relation to the African Cout, article 6(2) of the Protocol establishing the Court conditions the admissibility of cases on article 56 of the African Charter which mandates that claims can only be entertained where they are 'sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged' and 'are submitted within a reasonable period from the time local remedies are exhausted'.[61]

Essentially, therefore, litigants before the regional bodies must first go through the domestic judicial and administrative processes before they can validly approach the regional bodies. The exhaustion of local remedies principle is not restricted to local judicial remedies, but all forms of remedies available domestically including administrative and any statutory mechanism instituted within the domestic legal system.

As rightly stated by the African Court in *Tanganyika Law Society, Legal and Human Rights Centre & Reverend Christopher R. Mtikila v. Tanzania*,[62] -

> exhaustion of domestic remedies is not a matter of choice. It is a legal requirement in international law. This requirement ensures that the State has an opportunity to remedy the alleged violation through its domestic system and prevents the African Court from acting as a Court of first instance.[63]

This principle constitutes a technical hurdle to applicants because of the undue difficulty of pursuing local remedies before domestic forums considering the long delays, significant bureaucracy and lack of independence of many local institutions. Many applicants are thus left with the onerous task of navigating the local remedies even though it is evident that it will be ultimately fruitless because without complying

[61] African Charter, art. 56.
[62] App. Nos. 009/2011 & 011/2011 (joined), Judgment of 14 June 2013.
[63] ibid, para. 82(1).

with this procedure, their claims will not be entertained by the regional judicial forums. Moreover, in cases where the local institutions are not independent of the government, applicants will, in theory, still have to submit to such institution and risk unfavourable outcomes as a pre-condition to bring such claims before regional bodies.

The prejudicial impact of this requirement is even worse for non-heterosexual persons seeing the adverse disposition of the states and many local institutions to such rights which guarantees not only an unfavourable outcome but potential retributions and victimisation of the claimants before they can be entitled to ventilate such claims before the regional bodies. It is apparent, therefore, that the strict application of this principle will cause significant challenges for litigants.

Fortunately, as is standard for international Courts and tribunals, the African Commission and the African Court have adopted a liberal approach to interpreting articles 50 and 56 of the Charter respectively leading to a watering down of its potentially harsh consequences. The African Commission has held that article 50 requires that local remedies must be 'available, effective and sufficient' as well as 'realistic' or 'sufficiently certain' and must be reasonably accessible, capable of providing redress in respect of the complaint with reasonable prospects of success not only in theory but also in practice.[64] Consequently, the Commission held that there is no obligation on a claimant to attempt to use a local remedy that is ineffective or inadequate, for example, if national law shows that a remedy, such as an appeal, has no reasonable chances of success or will be unduly prolonged.[65]

An example of an application of this liberal interpretation by the African Commission can be found in *Sir Dawda K. Jawara v The Gambia*,[66] where the complainant was the former Head of State of the Republic of The Gambia and was overthrown in a military coup in 1994, tried and sentenced to death in absentia. All former Ministers and Members of Parliament of his government were detained by the new military leaders and there was general terror and fear throughout the country. The complainant

[64] Alhassan Abubakar v Ghana, Communication 103/93, 10th Annual Activity Report (2000) AHRLR 124, para 6.
[65] John D. Ouko v Kenya, Communication 232/99, 14th Annual Activity Report, (2000) AHRLR 135, para 19; See also Kazeem Aminu v Nigeria, Communication 205/97, 13th Annual Activity Report, (2000) ahrlr 258, para 13
[66] Communication 147/95 and 149/96, 13th Activity Re-port, (2000) AHRLR 107.

approached the African Commission alleging a violation of several provisions of the African Charter. In considering whether he had exhausted local remedies, the Commission stated that

> 'A remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint'[67]

The Commission considered that in a situation such as the present case where the jurisdiction of the Courts have been ousted by decrees whose validity cannot be challenged or questioned, local remedies are deemed to be both 'unavailable' as well as 'non-existent' and an applicant is not obliged to exhaust a non-existent remedy. The Commission, therefore, entertained the claim even though the applicant had not filed any claim before any domestic judicial forum and was approaching the Commission in the first instance.

The African Court has similarly interpreted article 56 to only apply in cases of reasonably accessible, practical and effective local remedies. According to the Court, in cases where it is obvious that the process of exhausting domestic remedies will be 'unduly prolonged', it is not necessary to wait to exhaust such local remedies before submitting the claim to the Court. In the words of the Court in *Norbert Zongo v. Burkina Faso*:[68]

> the remedies envisaged in Article 6(2) of the Protocol read together with Article 56(5) of the Charter are primarily judicial remedies as they are the ones that meet the criteria of availability, effectiveness and sufficiency that has been elaborated in jurisprudence…to be available, effective, and sufficient, a remedy must be freely accessible to each and every individual; it should not be discretionary or capable of being abandoned without notice.[69]

In the *Zongo case*, the Court held that the applicant is not required to pursue domestic remedies that, pursuant to the national legislation, he has no legal standing to bring. On the other hand, the Court has held in *Peter Chacha v. Tanzania*[70]that the claim was

[67] ibid , para 31.
[68] App. No. 013/11, Judgment of 21 June 2013.
[69] ibid, paras. 107-12.
[70] Peter Joseph Chacha v. Tanzania, App. No. 003/2012, Judgment of 28 March 2014; See also Frank David Omary and Others v. Tanzania, App. No. 001/2012, Judgment of 28 March 2014.

inadmissible as the claimant had failed to exhaust domestic remedies out of his own frustrations and frustration does not excuse an applicant's failure to exhaust domestic remedies.

Although the African Court opined that the principle is restricted to local judicial remedies, the African Commission has not restricted it to judicial remedies and the wordings of the relevant provision do not restrict the principle to judicial remedies.

To take advantage of this liberal approach, however, the claim should clearly state that all domestic remedies were exhausted, or explain why the process of exhausting domestic remedies would have been unduly prolonged.[71] For non-heterosexual applicants and their representatives, therefore, there is no obligation to exhaust local remedies in states where the legal system is intolerant and hostile to non-heterosexual rights, and there is no reasonable prospect of success of such claims. Direct applications can be made to the regional judicial bodies seeking redress and protection of their human rights to equality and freedom from discrimination, although as of January 2021, there has yet to be any such application brought directly by non-heterosexual individuals.

5.4 Appropriate Judicial Forum for Non-Heterosexual Claims

Choosing an appropriate judicial forum for enforcing non-heterosexual rights in Africa is central to developing an effective human rights framework for non-heterosexual rights. While different judicial forums can be approached for enforcement of these rights, the efficacy of these judicial mechanisms vary wildly and the capacity of the various judicial forums to enforce the protection mechanisms for human rights within states is the most important indicator of how appropriate a judicial forum is for non-heterosexual rights.

Thus, the consideration is not the ease of access to the judicial forum (although this is essential), nor the likelihood of obtaining a favourable outcome (although this is also essential), but the power or ability of the judicial forum to enforce its decision on the states and state bodies, restrict prejudicial actions, laws and policies and grant orders

[71] Advocacy before the African Human Rights System: A Manual for Attorneys and Advocates, (n 49) 134.

that will successfully protect non-heterosexual persons from discrimination and unequal treatment. In analysing the judicial forums at the three cadres of human rights protection, therefore, emphasis will be placed on the enforcement capacity of the forum as an indicator of its appropriateness for protecting non-heterosexual rights in Africa.

There are three cadres of judicial forums for enforcing non-heterosexual human rights – international judicial forums, regional judicial forums and domestic judicial forums. The discussions will rank the forums in ascending order from the least appropriate (international judicial forum) to the most appropriate (domestic judicial forums).

5.4.1 International Judicial Forums

The human rights of non-heterosexual persons to equality and non-discrimination are rights protected under international human rights instruments including the Universal Declaration of Human Rights 1948 and the International Covenant for Civil and Political Rights (ICCPR) 1966. Virtually all African states have adopted these instruments and are thus bound by its provisions to respect, protect and promote these rights.[72]

To this end, African states violating the rights of non-heterosexual persons can be brought before the International Court of Justice (ICJ) established by the Statute of the International Court of Justice 1946. However, a major impediment to the efficacy of this judicial forum is that under article 34(1), only state parties can be parties before the ICJ, meaning only states can bring other states before the ICJ. Individuals and NGOs are incapable of utilising this forum to seek redress for the violation of the human rights of non-heterosexual persons by African states.[73]

In the unlikely event that a state party (probably one of the developed, progressive states) brings another African state to the ICJ for such human rights violations, it is likely a favourable outcome will be reached as the ICJ will apply international human rights principles under the UDHR and ICCPR to find any discriminatory actions against

[72] Smith R, 'Human rights in the United Nations (Human Rights, peace and justice in Africa: A Reader. Edited by C. Heyns and K. Stefiszyn. Pretoria University Law Press, 2006) 191: See also Rhona Smith, *Text and materials on International Human Rights* (Routledge-Cavendish, New York, 2007) 5.
[73] Navanethem Pillay, 'Human Rights in United Nations action: Norms institutions and leadership' (2009) European Human Rights Law Review 1.

non-heterosexual persons by the respondent state a gross violation of human rights. In any case, the appropriate forum for such complaints will be the Human Rights Commission which adjudicates violations of the provisions of these international instruments.

However, a major drawback of international law and its judicial forums is the lack of enforcement powers of its principles and decisions against non-compliant states. The lack of enforcement standards of the international human rights law remains the biggest impediment for the even actualization of human rights across the globe.[74] There will be no effective means of enforcing this decision against the African state, except by applying political pressure on the state concerned and hoping that pushes it towards compliance.[75]

The reliance on political pressure for enforcement of decisions protecting the human rights of non-heterosexual persons is tenuous, at best, and ineffective, at its worst, as African states have shown a resolute resistance to any concession towards non-heterosexual rights. Moreover, such a decision will likely be viewed from a neo-colonial perspective as an attempt to foist western values on African states and this will further stiffen the resistance to its implementation.[76] International judicial forums are, consequently, ineffective in protecting non-heterosexual rights in Africa.

5.4.2 Regional Judicial Forums

The role of regional judicial bodies (such as the African Court and ECOWAS Court) and quasi-judicial bodies (such as the African Commission) in protecting and advancing non-heterosexual rights in Africa has been extensively discussed in chapter 4 and this chapter. These bodies interpret and apply the provisions of the African Charter and other human rights instruments that state parties in Africa have ratified and, as discussed in chapter 4,[77] these instruments recognise the human rights of non-

[74] Michael Haas, *International Human Rights: A comprehensive Introduction* (Rourledge, London, 2008) 98.
[75] Chimere Obodo, 'International Human Rights Law Enforcement Challenges in 21st Century Africa' (2014) 32 Journal of Law, Policy and Globalization 6.
[76] ibid, 7.
[77] Chapter 4.5.1, page 165.

heterosexual persons to equality and freedom from discrimination on account of their sex.

Access to these bodies is also easier and more open than international judicial bodies. While individuals and NGOs can freely approach the ECOWAS Court and the African Commission to ventilate human rights claims, access to the African Court is more restrictive owing to the few states that have ratified the protocol granting access to individuals and NGOs. Nevertheless, the African Court can directly entertain claims from individuals and NGOs from the 9 states that have ratified the protocol (so far) and can also entertain individual and NGO claims referred to it by the African Commission from non-ratifying states of the Court's protocol. Thus, access to justice before these bodies by individuals and NGOs to ventilate human rights claims is flexible and the restrictions on access to the African Court may not hinder human rights claims as much as it initially appears.[78]

In terms of its jurisprudence on non-heterosexual rights, although none of these bodies has as yet directly pronounced on non-heterosexual human rights, their liberal approaches to the interpretation of the African Charter and other human rights instruments raises hope that a favourable decision is not far away from these bodies, with such expectation primarily focused on the African Court which has established itself as the bastion of progressive human rights justice in the regional sphere in Africa.

In this regard, the enforcement of the decisions of these bodies becomes the primary area of concern in terms of protecting non-heterosexual rights in Africa. The African Commission only issues recommendations that state parties are enjoined to implement. These recommendations are submitted to the AU Executive Council (the political arm of the African Union) which then applies political pressure on the respondent state to comply, with the potential for sanctions for non-compliance.[79] For instance, the African Commission pressurised the Nigerian government to commute the death sentence of Ken Saro Wiwa and other environmental activists in 1995 after

[78] Joseph Oloka-Onyango, 'Human rights and sustainable development in contemporary Africa: A new dawn, or retreating horizon?' available at <http://hdr.undp.org/en/reports/global/hdr2000/papers/joseph%20oloka-onyango1.pdf> accessed 09 September 2020.

[79] Rachel Murray and Elizabeth Mottershaw, 'Mechanisms for the Implementation of Decisions of the African Commission on Human and Peoples' Rights' (2014) 36(2) Human Rights Quarterly 349-372.

it found that the process of their trial and conviction violated the guaranteed rights under the African Charter.

The African Commission has, however, sought to extract some enforcement powers from its procedural rules in recent times. Despite the absence of a provision in the African Charter on interim or provisional measures, the Commission's Rules of Procedure empowers the Commission to grant provisional measures[80] and states are required to report to the African Commission on measures taken to implement these provisional measures.[81]These provisional measures are utilised where there is an urgent human rights situation requiring immediate intervention by the commission such as arose in *Curtis Francis Doebbler v Sudan*[82] and *Law Offices of Ghazi Suleiman v Sudan*[83] where the Commission requested the government of Sudan to urgently amend its existing laws to provide for *de jure* protection of the human rights to freedom of expression, assembly, association and movement within the country. Other instances where the Commission has granted provisional measures in the form of letters of appeal to the Heads of State urging their intervention pending the outcome of complaints before the Commission include cases when an execution has been imminent, cases of arrest and detention of individuals without trial such as journalists and to prevent irreparable harm being caused to victims of alleged human rights violations (indigenous peoples).[84]

While these interventions are not directly enforceable in the sense that there are no means of executing the directions or recommendations of the Commission against the respondent state, the Commission can do follow-ups with the relevant states and utilise the political mechanisms of the AU (which include sanctions, where appropriate) to push the state towards compliance.

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[80] Rules of Procedure of the African Commission, Rule 111.
[81] Rule 98(4).
[82] Communication 236/2000, 16th Annual Activity Report, (2003) AHRLR 153.
[83] Communication 228/99, 16th Annual Activity Report, (2003) AHRLR 144.
[84] See the following cases - Shereen Said Hamd Bakhet v Arab Republic of Egypt, Communication 658/17; Ahmed Mustafa & 5 Others (Represented by Justice for Human Rights & aman Organisation) v Arab Republic of Egypt, Communication 659/17; Franck Diongo Shamba (represented by All4Rights) v Democratic Republic of Congo, Communication 652/17; Ahmed Abdul Wahab Al Khateeb v Arab Republic of Egypt, Communication 654/17; Anas Ahmed Khalifa v Arab Republic of Egypt, Communication 656/17; Andargachew Tsege and Others (Represented by Reprieve and redress) v The Federal Democratic Republic of Ethiopia, Communication 507/15.

For the African Court, the judgments and orders of the Court in contentious proceedings are legally binding on states and state bodies. Thus, states parties that have ratified the Protocol of the Court are obliged to 'comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution'.[85]

The actual execution of the Court's judgments is monitored by the Executive Council of the AU on behalf of the AU Assembly[86] and the AU Assembly is empowered to impose sanctions or take 'other measures of a political or economic nature' against States that do not comply with the AU 'decisions'.[87] This provides some enforcement bite against non-compliant states and gives a sharp edge to the enforcement abilities of the African Court's decisions.

In addition, similar to the African Commission, the African Court is empowered under article 27(2) of the Protocol establishing the Court to 'adopt such provisional measures as it deems necessary in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons'. An example of such situation arose in *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya*[88] wherein several articles of the African Charter were alleged to have been violated during the Arab Spring and the violent suppression of the uprising in Libya by both forces loyal to Colonel Gaddafi. The African Court, upon a referral of the case to it by the Commission, ordered provisional measures on its accord against the Respondent to immediately refrain from any action that is in breach of the provisions of the Charter or of other international human rights instruments to which it is a party.

The ECOWAS Court, like the African Court, is also empowered by article 20 of the Protocol establishing the Court to take provisional measures to protect human rights in urgent cases. Also, its judgments are binding on member states, institutions, individuals and corporations and member states are obliged under article 22(2) to 'take all necessary measures to ensure execution of the decisions of the Court'. The Court

[85] African Court Protocol, Art 30.
[86] Constitutive Act of the African Union, adopted in Lome, Togo by the Thirty-Sixth Ordi¬nary Session of the Assembly of Heads.
[87] ibid, Arts 29(2) and 31.
[88] Unreported, Decision of the African Court, March 25, 2011.

is required to report all cases of non-compliance to the Authority of Head of States and Government (supreme authority of ECOWAS) for appropriate sanctions.

However, the regional bodies cannot still compel states to protect human rights within their jurisdictions, notwithstanding the bindingness of the decisions of the regional judicial and quasi-judicial bodies, the obligation on member states to implement the judgments and the potential for sanctions as an executory tool by the political institutions of the regional bodies. A lot of the problem boils down to the inherent weakness of the regional human rights framework and the challenges regional institutions in Africa face in carrying out their functions.[89] This is simply reflective of the nature of international law, even at the regional levels, and is not a weakness of the system, per se, as sovereign entities cannot be compelled to take specific steps within their jurisdictions.

Firstly, the regional human rights framework, to some extent, still suffers the same problem of the international human rights framework – the reliance on political pressure and sanctions against non-compliant states. This enforcement tool does little to nudge states towards complying with decisions that they staunchly denounce for going against their fundamental ideology or state actions. The various decisions of the African Court, African Commission and ECOWAS Court against state parties have been largely ignored with threats of repercussions following some of these decisions – e.g. Rwanda and Tanzania withdrawing their ratifications of the Protocol establishing the African Court. Consequently, no amount of political pressure or sanctions will compel an African state to comply with the decision of a regional judicial body that goes against its deeply rooted cultural relativist ideology on non-heterosexual rights. Thus, even when these regional judicial bodies delve into the subject of non-heterosexual rights and issue favourable decisions, they are likely to be ignored by the states concerned.

Secondly, there are administrative and financial challenges facing these regional bodies hindering the effective execution of their responsibilities. In 2017, the African Commission observed that:

[89] Manisuli Ssenyonjo, 'Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987–2018)' (2018) 7 International Human Rights Law Review 1-42.

> The insufficient funding of the Commission from the member state budget also impedes the Commission's capacity to follow-up on implementation as it prevents the Commission from developing effective follow up of its findings during country visits, and recommendations arising from its findings, resulting in the overall weakening of the effectiveness of the Commission.[90]

These challenges reduce the effectiveness of the Court and further weaken their enforcement capacity against errant states, essentially rendering them powerless against state parties in the enforcement of the human rights of non-heterosexual individuals.

5.3.3 Domestic Judicial Forums

Domestic judicial bodies are the primary source of legal redress for human rights violations within state jurisdictions. They are established under domestic constitutions and their judicial powers and functions are derived from domestic laws and statutes. This home-grown element of domestic judicial forums confers them with a form of legitimacy and enforcement ability that is lacking for international and regional judicial bodies.

More importantly, domestic judicial bodies interpret and enforce the domestic constitution and local laws which the state has enacted to govern itself and the citizens. While regional and international bodies only interpret and implement supra-national legal instruments which are external to the state and are, therefore, often resisted by the state when they conflict with domestic ideologies, the same excuse cannot be given to local laws and constitution enacted by the state and its agencies. The establishment of these Courts by the Constitution which is the *grundnorm* and source of validity of all local laws confers on them an enforcement ability that overrides state executive powers. The effect of this is that domestic Courts can implement their decisions in the face of stiff resistance from the state and its agencies. Thus, even the most lawless

[90] 42nd Activity Report of the African Commission on Human and Peoples' Rights, <http:// <www.achpr.org/files/activity-reports/42/42nd_activity_report_eng.pdf>, para 45, accessed 08 October 2020.

state can be effectively restrained by domestic Courts in respect to human rights protection in several ways.

Despite the reluctance of many African states to obey the orders of their domestic Courts, the idea that domestic Courts are hopeless against their state governments overlooks one major fact – while local Courts may not be able to compel the government to take an action e.g. to release a prisoner wrongly detained or institute policies protecting a marginalised group, the Courts can invalidate certain laws through judicial proclamations and those laws will cease to have an effect by virtue of the constitutional powers vested on the Courts. Thus, even for repressive states, the Courts play an important role in validating or invalidating laws within the jurisdiction.

It is in this respect that domestic Courts have the most potential to be effective for the protection of non-heterosexual people in Africa. The Courts can invalidate discriminatory laws and policies that violate the rights of non-heterosexual persons to equality and dignity. Such declarations will have effect irrespective of the state's wishes or ideology and the state's option is to adopt the constitutionally prescribed mechanisms for challenging the judicial proclamation, unlike the proclamation of regional judicial bodies which the state can simply ignore without any consequence. The states cannot easily ignore the domestic court's declaration (at least not as easily as it can ignore the regional Courts' declaration) because these domestic Courts are established by fundamental legal instruments within these jurisdictions and conferred with adjudicatory powers in the constitutions of many of these states.

Three recent examples of this situation from Uganda, Kenya and Botswana which have some of the strictest anti-gay laws will be examined briefly. In Uganda, the Anti-Homosexuality Act, 2014 infamously called the 'Kill the Gay Bill' was invalidated by the Constitutional Court of Uganda despite the staunch objections of the state executive government. The invalidation had the effect of voiding the law and stopping it from being implemented, regardless of how desperate the government was to implement the law. Uganda is one of the states with the harshest anti-gay policies in Africa, but even with its harsh stance, it could not ignore the invalidation of the harsh anti-gay law by the domestic Court. A similar proclamation by the African Commission or African Court would likely have been simply ignored while the law is implemented to violate the rights of non-heterosexual persons in the state.

In Kenya, the High Court, in *Eric Gitari's case,* voided the refusal to register an LGBT organisation as a violation of the right to freedom of association under Kenya's constitution. Kenya is also one of the African states that still criminalise same-sex activities between consenting adults, but the government was restrained from refusing to grant LGBT people a right of association. In Botswana, the High Court, in *LEGABIBO's case* took the firm step of decriminalising same-sex relations, holding it a violation of the right to private and family life and the right to equality, meaning that LGBT persons will no longer be prosecuted for their sexual orientation notwithstanding the desire of the state to continue to prohibit such conducts. The Botswana government was compelled to appeal the judgment and the appeal is currently pending before the appellate Court.

In these cases, a similar judgment by any of the regional judicial bodies would likely have been ignored by the states which could continue with the implementation of the discriminatory law/policy.

A further advantage of domestic courts in the enforcement of non-heterosexual rights in Africa is the fact that they can interpret and implement both the provisions of the local constitutions protecting the human rights of non-heterosexual persons as well as the provisions of the African Charter with similar protections. As discussed in chapter 4, the domestic constitutions of a majority of African states protect non-heterosexual rights in the same vein as the African Charter – i.e. the equality and non-discrimination clauses. Domestic courts can, therefore, use the African Charter rights to supplement, complement and interpret the human rights in the local constitution. This way, litigants before domestic Courts will not lose out on any potential protection that exists under the African Charter, seeing that both instruments can be collaboratively applied before domestic Courts.

Consequently, non-heterosexual persons in Nigeria, for instance, are better off challenging the Anti-Same-Sex Marriage Act 2014 before domestic Courts, relying on the fundamental rights in Chapter III of the Nigerian Constitution as supplemented and completed by the African Charter, than pursuing such claims before the ECOWAS Court, African Court or African Commission. While domestic Courts may be slower and have the potential to adopt a conservative interpretation of these human rights provisions compared to the liberal approach of regional bodies, the former will be more

effective in enforcing these rights where the litigant can convince the Court to recognise the rights. Thus, it is a case of adopting a riskier judicial forum with the potential for realistically effective outcomes rather than a less risky judicial forum which is only effective on paper and only results in a symbolic victory over the respondent state.

Moreover, many domestic judicial forums have relaxed the technical hurdles to human rights enforcement claims by removing the locus standi principle and simplifying the technicalities for litigants while also removing the financial hurdles in many jurisdictions. Besides, the additional hurdle of exhausting local remedies is not a problem before domestic Courts which the litigants, surrogates or NGOs can freely approach to enforce the non-heterosexual rights. Convincing the courts to adopt a liberal interpretation of the human rights of non-heterosexual persons is also not as difficult as it may appear considering the conservative leanings of many judiciaries in African states. The outcome of cases in Uganda, Kenya and Botswana which are some of the repressive states in terms of non-heterosexual rights shows that the domestic courts can also be liberal in interpreting these human rights provisions in favour of protecting the human rights of sexual minorities.

5.5 Domestic Constitutions Vs African Charter: Non-Heterosexual Rights in the Crossroads

One critical area of debate that arises concerning the implementation of the African Charter is the potential conflict between the Charter and domestic constitutions of African states. This conflict has been stirred by certain decisions of the African Commission and African Court where these bodies found provisions of the constitutions of respondent states to be inconsistent with the African Charter and ordered the states to take steps to amend its constitutions to align with the Charter. These decisions/orders attempt to superintend the African Charter over domestic constitutions as the preeminent legal instruments within the states' domestic jurisdictions, raising a battle for supremacy between the Charter and domestic constitutions.

In the leading case on this point, *Kambole v United Republic of Tanzania*,[91] the African Court held that section 41(7) of the respondent's constitution violated articles 2, 3 and 7 of the Charter and consequently the Court ordered the respondent state to take all necessary constitutional and legislative measures, within a reasonable time, to ensure that article 41(7) of its Constitution is amended and aligned with the provisions of the Charter to eliminate, among others, any violation of Articles 2 and 7(1) (a) of the Charter. The Court also ordered the Respondent State to submit a report within twelve (12) months of the judgment, on the measures taken to implement the terms of the judgment and to submit further reports every six (6) months thereafter until the Court is satisfied that there has been a full implementation.[92]

The unique point about this case and the decision was that the applicant was not challenging an act of the respondent state but essentially challenging the validity of the state's constitution before the regional judicial body. The respondent state had acted fully within its constitutional mandate and the claim sought to invalidate such constitutionally valid state action. The problem with this approach is two-fold.

First, a state constitution is the *grundnorm* within the domestic jurisdiction and is the source of validity of all laws, policies and actions within the state. A constitution does not owe its validity to any supra-national instrument, or what Roznai termed 'supra-constitutionality'.[93] In essence, despite the growing influence of supranational law, state practice demonstrates that domestic constitutional law is still generally superior to international law, and even when the normative hierarchical superiority of supranational law is recognized within the domestic legal order, this supremacy derives not from supranational law as a separate legal order, but rather from the constitution itself.[94] The generality of literature on the subject, therefore, agree that a state's constitutional provision cannot be invalidated or voided by a supra-national instrument

[91] Application No. 018/2018.
[92] ibid, page 4 of the Summary of the Court's Judgment.
[93] Yaniv Roznai, The Theory and Practice of 'Supra-Constitutional' Limits on Constitutional Amendments' (2013) 62(3) The International and Comparative Law Quarterly 557.
[94] ibid, 558.

regardless of the recognition and application of such supra-national instruments by the state constitution.[95]

Secondly, the Court's decision can be interpreted as undermining state sovereignty by subjugating the state's constitution to the African Charter. It effectively declares that the constitution is not the preeminent law within the state but must be read as subject to the African Charter. The decision was, therefore, bound to elicit an angry and defiant response from the respondent state desirous of asserting its sovereignty and supremacy of its constitution and Tanzania expectedly responded by withdrawing its ratification of the Protocol to the African Court.

This places non-heterosexual rights in Africa at potential crossroads where the provisions of a state's constitution conflict with the recognition and protection of these rights under the African Charter. At this point, a deeper look at the African Court's decision in *Kambole's case* is warranted revealing that the Court was not declaring the supremacy of the African Charter over Tanzania's constitution but merely declaring that Tanzania's international obligation under the Charter obliges it to take steps to amend the constitution to align with the provisions of the Charter. Thus, the declaration in *Kambole's Case* was not aimed at the validity of the constitution, per se, but at the government of Tanzania, espousing its obligation to ensure its constitutional provisions aligns with the Charter. The effect of this interpretation is that Tanzania's constitution was declared in conflict with the Charter, but not invalidated by this conflict. Rather, the conflict raises an obligation on Tanzania's government to reconcile the two instruments.

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[95] See the following academic discussions on the subject - g RG Wright, 'Could a Constitutional Amendment Be Unconstitutional?' (1990) 22 Loyola University of ChicagoLJ 741; R O'Connell, 'Guardians of the Constitution:
Unconstitutional Constitutional Norms' (1999) 4 JCL 74; VA Da Silva, 'A Fossilised Constitution?' (2004) 17(4) Ratio Juris 454; J Mazzone, 'Unamendments' (2005) 90 IowaLRev 1747; GJ Jacobsohn, 'An Unconstitutional Constitution? A Comparative Perspective' (2006) 4(3) IntlJConstL 460; VJ Samar, 'Can a Constitutional Amendment Be Unconstitutional?' (2008) 33 OklaCityULRev 667; R Albert, 'Nonconstitutional Amendments' (2009) 22(1) CanJL&Jur 5; S Weintal, 'The Challenge of Reconciling Constitutional Eternity Clauses with Popular Sovereignty: Toward Three-Track Democracy in Israel as a Universal Holistic Constitutional System and Theory' (201 1) 44 IsLR 449; A Barak, 'Unconstitutional Constitutional Amendments' (201 1) 44 IsLR 321; O Pfersmann, 'Unconstitutional Constitutional Amendments: A Normativist Approach' (2012) 67 ZÖR 81; Y Roznai and S Yolcu, 'An Unconstitutional Constitutional Amendment - The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision' (2012) 10(1) IntlJConstL 175; G Halmai, 'Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?' (2012) 19(2) Constellations 182.

Further, as extensively discussed in chapter 4, the constitutions of many African states align with the Charter's protection of non-heterosexual rights in terms of the non-discrimination clauses present in both instruments with similar contents.[96] Thus, no potential conflict will exist in reality between state constitutions and the African Charter concerning non-heterosexual rights, except, perhaps to the extent state constitutions permit derogations from the bill of rights which may be interpreted as violating the inviolability of these rights under the Charter.

Overall, however, it is not likely that such conflict will arise in the implementation of constitutional provisions on the bill of rights as they apply to non-heterosexual rights. Rather, the major area that conflict exists is between state legislation (not the constitution) and the Charter's provisions. Many African states still have legislation in their statute books that criminalises same-sex activities and promote discriminatory policies towards non-heterosexual people.

Determining the extent to which the Charter's provisions will impact these state laws will depend on the nature of incorporation of international law instruments into the domestic legal system. In this respect, a distinction exists between states that adopt monism and those that adopt dualism.

5.5.1 Monism and Its Impact on Non-Heterosexual Rights in Africa

In a monist legal system, international law is considered joined with and part of the internal legal order of a state. For states that practice monism, international law serves not merely as a legal framework to guide state-to-state relations in the international sphere, but as a source of law integrated into and superior to domestic law. As such, a properly ratified or accepted treaty forms part of the national legal regime.[97] The main significance of this approach is that international law may be applied and enforced directly in domestic Courts without the necessity of domestic implementation of the instrument. This framework thus creates a single and unitary legal system, with international law at the top of the legal order and local, municipal laws subordinate to

[96] See Table 4.1, page 190.
[97] Caroline Dubay, 'General Principles of International Law: Monism and Dualism' (2014) International Judicial Monitor 1.

it. The monist view is attributed most often to the work of Austrian legal scholar Hans Kelsen, who advocated in the 1920s for the primacy of international law as a derivative of natural law, rather than as merely an expression of the individual decisions of states to be bound by certain norms through customary practice.[98]

For monist states, therefore, state laws must align with international instruments as 'there is a prima facie presumption that the legislature does not intend to act in breach of international law, including treaty provisions as interpreted by relevant bodies'.[99] In the event of a conflict with international instruments, the latter prevails over the former which must be interpreted to comply with the latter. A classic illustration of this situation is found in the decision of the Constitutional Court of Benin in 2016 which invalidated the death penalty under the state's Criminal Procedure on account of the ICCPR Optional Protocol 2 which the state has ratified and which prohibits the application of the death penalty in the criminal justice systems of member states.[100] The Court held that the conflict between the state's Criminal Procedure Act and the ICCPR Optional Protocol 2 means that the domestic legislation must give way to the latter as provided under article 147 of the Constitution granting ratified treaties pre-eminence over domestic statutes.

The African Charter will, therefore, constitute a part of the domestic legal system in African states operating a monist system and can be directly enforced by the domestic Courts as every other domestic statute.

Kenya is another African state that operates a monist legal system. Article 2(6) of Kenya's 2010 Constitution provides that 'any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution'. For monist African states, the Charter's protection of non-heterosexual rights will be directly enforceable to invalidate discriminatory laws that are prejudicial to non-heterosexual persons.

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[98] Torben Spaak, 'Kelsen on Monism and Dualism' in Marko Novakovic, ed., *Basic Concepts of Public International Law: Monism & Dualism*, 322-343. Belgrade: Alter DOO and Faculty of Law, University of Belgrade, Institute of Comparative Law., available at SSRN: <https://ssrn.com/abstract=2231530> [accessed 09 November 2020].

[99] Molefi Ts'epe v The Independent Electoral Commission and Others, Civ No 11/05, (2005) AHRLR 136 (Court of Appeal of Lesotho, 30 June 2005, para 16.

[100] Benin Constitutional Court Decision DCC 16-020, (21 January 2016), <http://www.cour-constitutionnelle-benin.org/doss_decisions/DCC%2016-020.pdf> accessed 20 November 2020.

5.5.2 Dualism and Its Impact on Non-Heterosexual Rights in Africa

In a dualist legal system, international law stands apart from national law, and to have any effect on rights and obligations at the national level, international law must be domesticated through the legislative process. Under a dualist model, a clear dichotomy exists between international legal obligations that states as sovereigns have agreed to recognize in their foreign relations, through ratification, and domestic legal rules that are created by the states and binding in internal relationships between the state and its citizens or subjects.

Accordingly, for states with dualist legal orders, international law can only have binding legal force at the domestic level if it is domesticated – i.e. implemented at the national or local level by the domestic parliament. A notable proponent of this theory was Heinrich Triepel, a German jurist and legal philosopher, who argued that international law was a manifestation of the "common will" of sovereign states and as such, there was a complete separation between international law and state law.[101] Under dualism, international law is not supreme to domestic law, and the relevance of international law in the domestic legal regime is determined by the local legislative processes. Consequently, under this legal order, a treaty takes effect and is binding in international relations once it is executed by the state. However, to be binding at the domestic level, and enforceable in a domestic Court, the treaty must be specifically implemented through appropriate legislation, a process known as ‘domestication’.

A classic example of a dualist state is Nigeria where section 12 of its 1999 constitution explicitly provides that no treaty ratified by the state shall have any force of law within the state unless and until it has been passed into law as a statute by parliament. As a result, the Nigerian Supreme Court has rejected any attempt to rely on a ratified treaty that has not been domesticated by parliament.[102] Nevertheless, once a treaty has been domesticated, the treaty (now local statute) takes precedence over domestic statutes based on the presumption that the legislature does not intend to act in breach of international law.[103] In Nigeria, for instance, the African Charter treaty has been domesticated as the African Charter on Human and Peoples’ Rights (Ratification and

[101] Caroline Dubay, ‘General Principles of International Law’ (n 97) 2.
[102] General Sanni Abacha & Ors V Chief Gani Fawehinmi (S.C. 45/1997)[2000] NGSC 17.
[103] ibid.

Enforcement) Act 1990 and it, thus, takes precedence over other local statutes in the state. Other dualist African states include South Africa, Ghana, Tanzania and Uganda.

For dualist African states, the provisions of the African Charter does not form part of their domestic legal system until it is ratified, even though the states' obligation under the international instrument is still intact and any acts by the state contrary to those obligations will constitute a violation of international law. Consequently, the Charter provisions cannot be directly applied by the domestic Courts to invalidate discriminatory laws against non-heterosexual persons until the Charter is domesticated by parliament. This is unlikely to have any prejudicial impact on non-heterosexual rights in African states with constitutional provisions similar to the Charter's rights as these constitutional rights can be utilised to invalidate the discriminatory laws. However, for the few African states without constitutional provisions similar to the African Charter's provisions, the operation of duality will create a significant hurdle in advancing the protection of non-heterosexual rights under the domestic legal system.

5.6 Overcoming Social Conservatism in Non-Heterosexual Discourse in Africa

The final consideration in the protection of non-heterosexual rights in Africa relates to the means of overcoming social conservatism in African states which permeates every sector of the society across the executive, legislative and judicial branches of government. Even the most progressive laws and policies can be ineffective if subjected to an overwhelmingly conservative legal system.

Devising means of overcoming the deep conservatism in many African states is, therefore, a pivotal point that determines the extent to which non-heterosexual rights will be protected and promoted within these states. However, there is no inorganic way of shifting societies' ideological or cultural values from conservative to progressive views. Societies develop in organic ways with societal moral views/ideologies and perceptions changing over time and the role of law and legal instruments are to act as a means of social engineering, gradually conditioning the society to accept certain progressive values by advancing legal protection of interests/rights previously existing

in the fringes of society's value systems. With time, and as societies continue to grow, these hitherto fringe values will continually come into the mainstream of society's value system up until the point where they become tolerated, if not yet outrightly accepted.

With the western jurisdictions that are presently bastions of non-heterosexual rights and protections, they were also previously deeply rooted in homophobic laws and policies (in fact, the British Empire exported some of the homophobic laws many African states currently have in their statute books). The change in public morality in these western countries was a result of the organic growth and advancement of these societies to accept people with different sexualities. While it is not expected that African states will take as long as these western states took to accept non-heterosexual rights, any attempt to impose and coerce the societal change may be counter-productive by further entrenching the resistance to sexual minorities.

African societies are constantly changing, and globalisation is playing a major role in fast-tracking changes in the perception of African societies to western values. The youths in Africa are the major drivers of this change and as more African youths travel around the globe and mix with other cultures, the value systems of these western jurisdictions may be transposed back home with the consequent opening up of African societies to increased recognition and acceptance of non-heterosexual rights.

Nevertheless, the African Charter and state constitutions play a vital role in overcoming this social conservatism in African states and ushering in a new wave of progressive human rights. These instruments can go some way to protecting non-heterosexual persons from discriminatory policies and treatments within African states and preventing the deprivation of their human rights by societies still grappling with accepting people with different sexualities. In essence, the Charter and constitutional provisions ensure that even if these societies do not accept non-heterosexual rights, they are not allowed to discriminate against non-heterosexual people or deprive them of their basic human rights, as non-heterosexual people must be allowed to enjoy human rights protection on the basis of equality.

This is a first step towards bringing non-heterosexual rights gradually within the mainstream of sexual rights in African societies and then enshrining further protection frameworks for advancing these rights and remedying previous wrongs meted to

people in this group, possibly through affirmative action policies etc. This gradual move towards protecting non-heterosexual rights in African states is reflected in Figure 5.1 below:

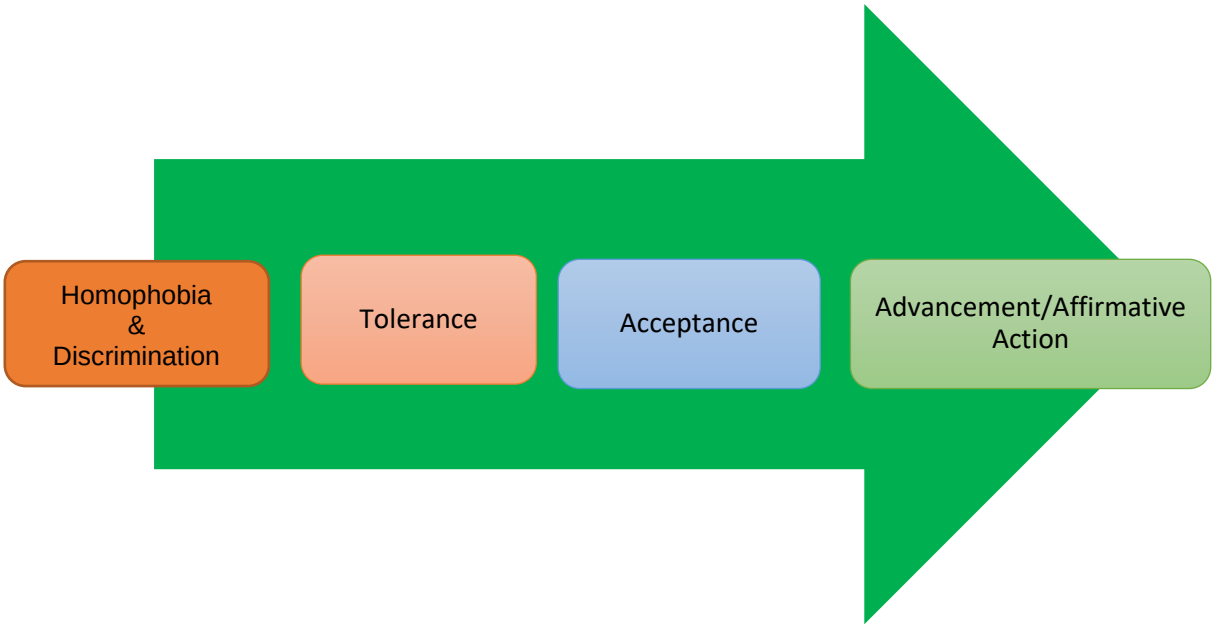

Figure 5.2 Overcoming Social Conservatism through the African Charter/Domestic Constitutions

Source: Author

The Charter and state constitutions' role is, therefore, to move the needle gradually from homophobia and discrimination against non-heterosexual people towards tolerance of them on account of their different sexualities. From that point, the needle can be moved towards increased acceptance of non-heterosexual persons and then the advancement of non-heterosexual rights through policies to redress past wrongs i.e. affirmative actions.

5.7 Conclusion

This chapter has examined the enforcement challenges and hurdles that will be encountered in seeking to develop an effective human rights protection system for non-heterosexual persons in African states. It examined the persons who can enforce these rights, the institutions that play central roles in enforcing the rights and the technical hurdles that are often encountered in enforcing the rights.

The chapter also discussed the most appropriate forum for enforcing these rights with a better chance of success. Finally, the chapter attempted to resolve potential conflicts between state constitutions and the African Charter provisions, concluding that while the Charter cannot override state constitutions, there is less likelihood of any conflict between the two in terms of non-heterosexual rights as they both contain similar provisions that can be utilised for protecting these rights. However, there is the recognition that despite the absence of a formal conflict in their substantive provisions, there could be conflict in practice particularly due to the attitude of states in rejecting the application of the Charter to domestic issues. Also, domestic courts may prefer domestic legislation over the provisions of the Charter where the two conflict, except on issues where the state's constitution is silent, e.g. with respect to the right to equality which is absent from the domestic constitutions of a majority of African states.[104] In such cases of conflict, whether or not the domestic court will invalidate the domestic legislation on the basis of the Charter's provision will depend on whether the state adopts a monist or dualist approach to the incorporation of international law instruments within its domestic legal system.

While the difficulty in securing enforcement of the decisions of regional judicial bodies constitutes its major shortcoming, a positive ruling in favour of non-heterosexual rights by these bodies can serve to raise awareness and enlightenment on the plight of non-heterosexual persons in Africa and the need for increased protection and promotion of their basic human rights. Following such positive ruling, the political pressure by the executive organs of the regional bodies can play an important role in reminding these African states of their obligations to protect and respect non-heterosexual people within their jurisdiction, even if it does not compel them to act.

Ultimately, however, the effective protection and promotion of non-heterosexual rights rest mostly with the domestic judicial forums where the Courts can make binding and enforceable judicial declarations invalidating prejudicial laws and policies and their decisions determine the structure of the legal framework for the protection of non-heterosexual rights within the jurisdiction. Strengthening domestic judicial forums is,

[104] See Table 4.1, page 190.

therefore, the most effective means of enshrining a robust and reliable framework for the protection of non-heterosexual rights in African states.

CHAPTER SIX

Conclusion

6.1 Legislative Vs Judicial Approach to Enshrining Legal Protection of Non-Heterosexual Rights

Most African states have largely remained outliers in the global trend towards the recognition, protection and promotion of non-heterosexual rights. This trend has seen over 100 states globally decriminalise homosexuality and grant expanded rights to non-heterosexual people including the right to marry, adoption and equality in all spheres of life. In many of these countries, explicit statutory instruments are enacted promoting non-heterosexual rights e.g. the Equality Act 2010 of the UK enshrines sexual orientation as one of the protected characteristics for which discrimination (direct or indirect), harassment and victimisation are explicitly prohibited.[1] In some other jurisdictions, the movement towards the protection of non-heterosexual rights has been largely the function of the judiciary deriving these rights from extant legal instruments which were enacted in prior centuries before the movement towards non-heterosexual rights became a globally recognised movement. The United States is the classic illustration of this judiciary-led protection of non-heterosexual rights with landmark cases such as *Texas v Lawrence* (decriminalisation of homosexual acts), *Obergefell v. Hodges* (legalisation of same-sex marriages) and *Bostock v. Clayton County* (extending non-discrimination in the Civil Rights Act 1964 to transgender identity) serving to enshrine these protections in the legal system of the US.

In African states, however, neither the legislative nor judicial approach to the protection of non-heterosexual rights has gained any foothold in the continent. South Africa is the outlier in Africa as it has equality and non-discrimination on grounds of sexual orientation enshrined in its constitution. However, 32 out of the 54 states in Africa have explicit laws criminalising homosexual activities while two states (Malawi and

[1] See Section 12 and Chapter 2 of the Equality Act 2010.

Botswana) have achieved some form of judiciary-led protection of non-heterosexual rights. The other 19 states are legislatively neutral on the subject, but widespread homophobia remains pervasive in these jurisdictions.

6.2 Innovative Contributions to Knowledge

Considering the importance of legal protection for non-heterosexual people to their well-being and dignity, there is undoubtedly a pressing need to address the situation in Africa which has been tagged 'African homophobia'[2] and manifests in gruesome acts of violence, maiming and other acts of prejudice and discrimination. This thesis explored innovative approaches to enshrining the legal protection of non-heterosexual people in African states and develops a concept that can be adopted to overcome the resistance of African states to the universal push towards the protection of non-heterosexual orientation.

This thesis tackles the fundamental legal problem restricting the ability of non-heterosexual people to obtain redress in the domestic and regional Courts of African states – the absence of legal instruments to rely on in championing their case. Given the staunch resistance of African states towards tolerance and protection of non-heterosexual rights, it is unlikely that a legislative approach will be feasible in achieving the protection of non-heterosexual people from prejudice and discrimination in African states. Rather, a judiciary-led approach appears more suitable and feasible for this purpose. However, the absence of explicit legal instruments protecting non-heterosexual rights at the international and regional levels means that there has always been a struggle to find a solid legal footing to ground non-heterosexual claims in African states. Moreover, African states staunchly resist any move towards adopting an international or regional instrument on the subject and will be unlikely to accept or adopt any such instrument even if it were to be passed.

To address this problem, this thesis proposed and developed the *reformed universalism* paradigm which focuses on indigenous legal instruments at the domestic and regional levels which can be utilised by domestic and regional Courts to enshrine

[2] Siri Gloppen and Lise Rakner, 'LGBT rights in Africa' In Chris Ashford and Alexander Maine (eds.) *Research Handbook on Gender, Sexuality and the Law* (Edward Elgar Publishing, 2020) 5.

legal protection for non-heterosexual people in African states. The reformed universalism paradigm avoids the pitfalls of universalism and cultural relativism concepts by incorporating elements of both concepts into a single paradigm. Reformed universalism is founded on the universalism of the right to equality and discrimination of non-heterosexual people but derives these norms not from international law but domestic and regional instruments indigenous to African states. This way, it incorporates some elements of cultural relativism which argues for respect for cultural and indigenous values. The derivation of these rights from domestic and regional legal instruments means that they are reflective of the cultural and indigenous values of these African states and defeats any objections to non-heterosexual rights on the ground of cultural relativism.

The thesis goes beyond proposing legal paradigms and analyses the judicial forums where this reformed universalism approach can be adopted in Africa. The judicial approach protends a more feasible approach for African states than the legislative approach (which is more likely to move in the opposite direction – towards more oppressive rules - as evident from recent legislative activities in Nigeria, Uganda, Gambia and other African states). The thesis, therefore, focused on discussing the structure and ideological disposition of the regional and domestic judiciaries in African states and how these Courts can become engines of change in African states.

6.3 Arguments of the Thesis

The thesis developed three interconnecting arguments to support the main hypothesis. Firstly, it argues in chapter two that non-heterosexual rights are basic human rights that are inviolable and should be protected by all states regardless of their relativist view of the morality of non-heterosexual activities. It further argued in chapter two that despite the views of natural law theorists regarding the ‘naturalness’ or otherwise of non-heterosexual activities, sexual expressions are innate expressions in humans and protectable in the same vein as the right to liberty, opinion and dignity and it is not within the legislative competence of states to implement legislative prohibitions of innate human expressions under the guise of legal positivism.

Secondly, the thesis argued in chapter three that the opposing concepts of universalism and cultural relativism are extreme approaches to human rights and have significant shortcomings rendering them unsuitable for non-heterosexual rights discourse. Instead, the thesis proposed the *reformed universalism* paradigm that incorporates elements of both opposing concepts into a single model wherein non-heterosexual rights can be protected as universal rights but utilising domestic and indigenous legal instruments, thereby satisfying the relativist criteria.

Thirdly, building on the above argument, the thesis further argues in chapters four and five that reformed universalism as a legal paradigm is workable within the domestic and regional legal systems in African states based on the provisions of the African Charter on Human and People's Rights 1981 and the domestic constitutions of many African states. The thesis highlighted the key provisions in these legal instruments on which the derivative rights of non-heterosexual people can be founded. The thesis argued that the prohibition of discrimination on the grounds of 'sex' and the equality provisions in the African Charter and the domestic constitutions of many African states are potential sources of derivative rights for non-heterosexual persons through the purposive interpretations of these provisions.

The thesis then addressed the implementation issues that can constitute potential hurdles to the effective protection of non-heterosexual rights through the reformed universalism approach (Chapter Five). It analysed issues of persons who can present legal actions to invoke the Court's powers to protect non-heterosexual persons by pronouncing on their rights, technical hurdles (e.g. *locus standi* and exhaustion of domestic remedies rule) and how they can be overcome and how to resolve the conflict between domestic legal systems and the African Charter through the monism and dualism discourse.

Finally, in chapter five, the thesis addressed a crucial issue underlying the hypothesis – whether judicial pronouncements in favour of non-heterosexual rights can influence/change public attitude towards non-heterosexual people or public perception of non-heterosexual rights has to first change positively before judicial decisions can be granted in their favour. Although there is no definitive answer to this tricky sociological issue, this thesis argues that the totality of research on the subject

suggests that judicial declaration in favour of non-heterosexual rights can positively influence non-heterosexual rights and move public perception in favour of non-heterosexual people. This argument buttresses the hypothesis of the thesis that reformed universalism, if properly implemented by the Courts through positive pronouncements on LGBT rights, can address the pervasive issue of homophobia in Africa and move public perception in favour of increased tolerance and protection of the rights of non-heterosexual persons.

The structure of the arguments in this thesis is developed on the basis of four premises and a deduction as shown below –

Premise 1 - Non-heterosexual rights are inviolable human rights that should be protected regardless of a state's subjective perception of the morality of non-heterosexual activities.

Premise 2 - *Reformed Universalism* is a legal paradigm that incorporates elements of universalism and cultural relativism into a single paradigm and allows for the protection of the universal human rights of non-heterosexual persons utilising relativist legal instruments of African states. (*Answer to Research question 1*)

Premise 3 - The provisions of the African Charter and domestic constitutions of African states are receptive to the reformed universalism paradigm and can be utilised by the regional and domestic Courts to derive legal protection frameworks for non-heterosexual rights in African states. (*Answer to Research question 2*)

Premise 4 - These derivative rights can be enforced by LGBT individuals (personally or through surrogates), NGOs and National Human Rights Institutions (NHRIs) and the technical hurdles have either been abolished in many African states or are easily surmountable in appropriate cases (*Answer to Research question 3*)

Deduction - Non-heterosexual rights can be protected within African states without resorting to international legal instruments and 'African Homophobia' can be gradually erased from the continent through judicial action as is being

done in the US and other states where the Courts have played a vanguard role in advancing non-heterosexual protections.

6.4 Research Questions and Answers

This thesis raised three research questions:

1. Is the *reformed universalism* paradigm a suitable approach to enshrining the protection of non-heterosexual rights in African states?

2. Can the human rights provisions in the African Charter and domestic constitutions of African states be sufficiently utilised to protect non-heterosexual rights?

3. What are the regulatory and institutional mechanisms for translating these legal provisions into practical significance for the dignity and protection of non-heterosexual people in African states?

In addressing these research questions, chapter three answers question 1 by demonstrating that reformed universalism is a suitable approach to enshrining the protection of non-heterosexual rights in African states by combining elements of universalism and relativism.

Research question 2 is answered in chapter four which demonstrates how the provisions of the African Charter and domestic constitutions can be utilised to derive legal protections for non-heterosexual rights in African states.

Chapter five answers research question 3 by showing how regulatory and policy tools can be structured to enshrine an effective protection framework for non-heterosexual rights in African states.

6. 5 Future Research Agenda

While this research has focused on tackling African homophobia through regional and domestic legal instruments, it has not examined other sociological factors that have made homophobia deeply enshrined in African states and how these may affect the

effectiveness of a judicial-led approach to enshrining protection of non-heterosexual rights in African states.

As a result, future research projects will be required to examine the sociological factors responsible for the deep entrenchment of homophobia in African states and the necessary tools to eradicate this phenomenon outside of legal mechanisms.

Also, African states are not the only objectors to non-heterosexual rights on the global stage as states in the middle east are also staunch in their objection to non-heterosexual rights, although for predominantly religious reasons. In many of these states, religious precepts (Sharia law) constitute a significant part of their legal systems and there is an absence of a binding regional instrument similar to the African Charter. Thus, enshrining non-heterosexual rights in this region appears harder than in African states and future research is needed to examine ways to improve tolerance for non-heterosexual rights in Africa.

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