

**A CONSTITUTIONAL APPROACH TO THE DECRIMINALISATION OF
HOMOSEXUALITY IN AFRICA: A COMPARISON OF KENYA, SOUTH
AFRICA AND UGANDA**

By

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**SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR THE
DEGREE OF DOCTORATE OF LAWS (LLD)**

**IN THE FACULTY OF LAW
UNIVERSITY OF PRETORIA**

JUNE 2016

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DECLARATION

I declare that this thesis, which I hereby submit for the degree of Doctor of Laws (LLD), at the University of Pretoria, is my own work and has not previously been submitted by me for a degree at another university. Where secondary material is used, this has been carefully acknowledged and referenced in accordance with University requirements. I am aware of University policy and implications regarding plagiarism.

Seth Muchuma Wekesa

Signature.....

Date.....

DEDICATION

This thesis is dedicated to my family. Your prayers and support keep me going. I also dedicate this thesis to all the gays and lesbians in Africa who have suffered discrimination over the years.

ACKNOWLEDGMENT

The preparation of this thesis would not have been possible without the help of a number of people. The most important contribution came from my two supervisors, Professor Charles Fombad and Professor Anton Kok who patiently guided me from the preparation of the proposal to the completion of this thesis. They tirelessly read each chapter of this thesis numerous times and provided me with insightful comments. Their sense of thoroughness, enthusiasm and friendliness were beyond depiction.

My sincere gratitude goes to Professor Frans Viljoen who helped me in so many ways. He provided me with the opportunity to work on this thesis. He has also been ready to read and comment on my work, to discuss issues relevant to my work, and to provide me with his comments. I am greatly indebted to him. I am also grateful to Pierre Brouard for all his assistance. Thank you so much. I am indebted to Norman Taku for the love, support and encouragement.

I am grateful to the ICLA and CHR which not only assisted me financially but also provided me with an environment which was ideal for research. I am especially grateful to Professor Erika De Wet for the scholarship and day fees and Ms. Pumeza Matwa for assistance which made my stay in Pretoria pleasant and memorable. Thank you for arranging literally everything I needed.

This thesis would not have been possible if it was not for the prayer, love and encouragement that I abundantly received from my mother Mary Musee, my father Andrew Musee, my daughter Cindy, my brothers Jack and Chemuku, my sister Norah and my nephew Brai. Thank you all so much.

I would like to thank Professor Patricia Kameri-Mbote and Professor Winnie Kamau for their assistance and encouragement. I would also like to thank Dr. Linda Musumba for her assistance and encouragement. I am indebted to you who not only have been a great friend but also a great inspiration. Your comments, questions and suggestions have helped immensely in making this thesis a better work.

To my family, friends and colleagues, whom I could not mention due to constraint of space, I am truly grateful.

Lastly, I would love to praise the name of God for making this possible and for his so many blessings.

ACRONYMS AND ABBREVIATIONS

ACDP	African Christian Democratic Party
ACHPR	African Charter on Human and Peoples' Rights
UDHR	Universal Declaration of Human Rights
ACHR	American Convention on Human rights
ANC	African National Congress
APA	American Psychological Association
CAL	Coalition of African Lesbians
CAT	Committee on the Convention against Torture
CEDAW	International Convention on the Elimination of all forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CoE	Committee of Experts
CRC	International Convention on the Rights of the Child
CSCHRCL	Civil Society Coalition on Human Rights and Constitutional Law
CSOs	Civil Society Organisations

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GASA	Gay Association of South Africa
GLOW	Gay and Lesbian Organization of the Witwatersrand
HRC	Human Rights Committee
IACHR	Inter-American Court on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all forms of Racial Discrimination
ICESCR	International Covenant for Economic, Social and Cultural Rights
IGLHRC	International Gay and Lesbian Human Rights Commission
INGOs	International Non-Governmental Organisations
LGBT	Lesbian, Gay, Bisexual and Transgender
MSM	Men who have Sex with Men
NCGLE	National Coalition for Gay and Lesbian Equality
NGLHRC	National Gay and Lesbian Human Rights Commission
NGOs	Non-Governmental Organisations
NHRIs	National Human Rights Institutions

OHCHR Office of the High Commissioner for Human Rights

TASO The AIDS Support Organisation

UDF United Democratic Front

UN United Nations

UPR Universal Periodic Review

SUMMARY OF THE THESIS

Most African states have criminalised homosexual acts between consenting adults on the basis that it amounts to a threat to the traditional heterosexual family. They believe that sexual orientation is a matter of personal choice and view the act as unnatural and un-African. Religious groups oppose same-sex sexual acts due to sodomy being viewed as a sin which should be prohibited by the law. Kenya and Uganda have criminalised same-sex sexual acts in their Penal Codes. This thesis identifies that the existence of sodomy laws in Kenya and Uganda have served as a justification for the discrimination, harassment, violence and marginalisation of gays and lesbians. Despite the existence of a robust Bill of Rights in the Kenyan and Uganda Constitutions, gays and lesbians have not been able to realise and enjoy their rights.

This thesis critically examines how the rights to equality, human dignity and privacy guaranteed in the Kenyan and Ugandan Constitutions can be used to construct a constitutional argument for the decriminalisation of same-sex sexual conduct in both countries. South Africa was used to provide a comparative approach to the study as it has decriminalised same-sex sexual acts after the Constitutional Court declared sodomy laws unconstitutional. It also provides for the protection of the rights of gays and lesbians in its Constitution by expressly including sexual orientation on the list of prohibited grounds of discrimination. It could therefore provide some lessons for Kenya and Uganda.

This thesis argues that the equality clauses in the Kenyan and Ugandan Constitutions form a strong case for the decriminalisation of same-sex sexual conduct. It is submitted that the equality

clause in the Kenyan Constitution adopts an open list approach which could be interpreted in a progressive and creative manner to include sexual orientation as a prohibited ground of discrimination under ‘other status’ category. It is also submitted that although the equality clause in the Ugandan Constitution adopts a closed list approach, it has listed sex as a prohibited ground of discrimination. For gays and lesbians to rely on this ‘sex’ category, the equality clause would require a progressive and creative interpretation by including and reading ‘sexual orientation’ within the ‘sex’ category. As regards the right to human dignity, it argues that gays and lesbians are human beings that deserve protection by the law. Humanity is enough reason for homosexuals to be treated like other human beings (heterosexuals) and to be able to benefit from the same rights. Therefore the right to human dignity should be used as a tool for inclusion of their rights.

It further argues that the courts are in a better position to play a critical role in the realisation and protection of the rights of gays and lesbians in Kenya and Uganda because they have been mandated to interpret the Constitution. It is submitted that for judges to interpret the constitutional provisions on the rights to equality, human dignity and privacy in a progressive and creative manner, they should embrace the notion of judicial activism. They should interpret the Constitution in a manner that upholds constitutional values such as human dignity and equality and avoid relying on public opinion as a determining factor in resolving constitutional human rights issues, especially with respect to those socially controversial ones such as homosexuality.

It concludes that judicial activism should be accompanied by social activism since the views

against homosexuality are still heavily embedded in the minds of the majority of Kenyans and Ugandans. This thesis therefore recommends that an expansive public awareness campaigns and sensitisation programs to be developed to promote the idea that gays and lesbians are human beings that deserve not only respect and dignity but also equal rights and treatment.

LIST OF KEY TERMS

South African Constitution

Kenyan Constitution

Ugandan Constitution

Gays and lesbians

Homosexuals

Decriminalisation of homosexuality

Courts

International and regional law

Sodomy laws

Sexual orientation

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CHAPTER ONE

INTRODUCTION TO THE THESIS

1.1 Background and problem statement

Gays and lesbians have been in the news in Africa in recent times due to their sexual orientation.¹ They have been the topic of public controversy and political discussions, as well as decisions in courts.² Reports from Kenya, Namibia, Zimbabwe and Uganda have shown that political leaders in these countries have condemned gays and lesbians in extremely strong terms.³ They have harshly criticised their lifestyle and their conduct.⁴ They have called for their arrest, deportation, imprisonment and even their elimination.⁵ There have been recent attacks on gays and lesbians in Zimbabwe. It has been reported that President Mugabe referred to gays and lesbians as being ‘worse than dogs and pigs’.⁶ He urged members of his political party to tie up homosexuals and bring them to the police to be arrested.⁷ During the Zimbabwean international book fair in August 1995, President Mugabe also stated that:

¹ E Cameron ‘Constitutional protection of sexual orientation and African concepts of humanity’ (2001) 118 *South African Law Journal* 642. The word homosexual would be used interchangeable with the words gays and lesbians.

² EY Ako *The debate on sexual minority rights in Africa: A comparative analysis of the situation in South Africa, Uganda, Malawi and Botswana* (LLM thesis University of Pretoria 2010) 1.

³ ‘Nujoma in anti-gay tirade’ *The Namibian* 26 June 2000 <http://www.namibia.com.na/Netstories/2000/june/news/008B8E983A.html> (accessed 29 March 2013). The President of Namibia was reported to have called gays and lesbians ‘idiots’ who should be condemned and who ‘are destroying the nation’; ‘Round up gays, urges Nujoma’ *The Namibian* 2 April 2001 <<http://www.namibian.com.na/2001/March/news/01E0AD10FA.html> (accessed 29 March 2013); ‘Madness “on the loose” says Nujoma’ *The Namibian* 23 April 2001 <http://www.namibian.com.na/2001/April/news/01E89E8649.html> (accessed 7 April 2013) The President of Namibia was reported to have said that globalization and homosexuality are part of a new imperialist plot to undermine Namibia; ‘Gays troubled by a hostility in a country that was once their oasis’ *Sunday Independent* 20 May 2001.

⁴ Cameron (n 1 above) 643.

⁵ Human Rights Watch ‘Zimbabwe: end attacks on LGBTI people’ <http://www.hrw.org/news/2012/08/27/zimbabwe-end-attacks-lgbt-people> > (accessed 4 April 2013). The US based human rights organisations condemned the Zimbabwean government for prosecuting members of LGBTI community. It urged the police to stop the attacks, arbitrary arrests, intimidation and beatings of gays and lesbians in the country.

⁶ This was hideous choice of words by the president. The well-known association of pigs with animalistic dirtiness, particularly in religious traditions such as Judaism and Islamism where pork is generally part of dietary restrictions.

⁷ ‘Gay Zimbabweans win fight for book-fair booth’ *NY Times* A4 2 August 1996 <http://www.gay.com/news/election/article.html> (accessed 11 March 2013).

I find it extremely outrageous and repugnant to my human conscience that such immoral and repulsive organisations, like those of homosexuals who offend both against the law of nature and the morals of religious beliefs espoused by our society, should have any advocates in our midst and even elsewhere in the world.⁸

Gays and lesbians in Kenya and Uganda have not been spared either. The former Kenyan President Daniel Arap Moi and his Ugandan counterpart Yoweri Museveni have expressed similar views regarding homosexuals. In 1999, President Museveni ordered the arrest of suspected homosexuals.⁹ President Daniel Arap Moi condemned homosexuality as against Christianity and African culture.¹⁰

Homosexuals in most African countries have been treated as a criminal class.¹¹ According to a Human Rights Watch report, Kenya and Uganda are among 38 African countries that have criminalised consensual same-sex sexual activity between adults.¹² These laws are derived from European models.¹³ The sodomy laws are used as a powerful tool for prosecuting individuals

⁸ Robert Mugabe, Zimbabwe International Book Fair, 1 August 1995, quoted in Dunton & Palmberg *Human rights and homosexuality in Southern Africa* (1996) 12.

⁹ 'Ugandan president orders arrest of gays' *Reuters* 28 September 1999 http://www.mask.org.za/SECrIONS/AfricaPerCountry/ABC/uganda/uganda_6.htm (accessed 23 February 2013).

¹⁰ 'Kenya's Moi joins attack on gays in Africa' *Reuters* 30 September 1999 <http://www.glapn.org/sodomylaws/world/kenya/kenews001.htm> (accessed 12 April 2013). Speaking at an Agricultural show in Nairobi 14 years ago, President Moi joined a growing list of African leaders to attack gays saying homosexuality is 'scourge' that goes against Christian teachings and African traditions. He added that it is not right for a man to have sex with another man. This is because it is against biblical teachings and African tradition. He warned Kenyans against the dangers of homosexuality.

¹¹ In Botswana, the debate was triggered by the case of *Kanane v the State* (2003) (2) BLR 64 (CA); in Malawi, the debate was sparked by the trial of *Republic v Steven Monjeza Soko and Tiwonge Chimbalanga Kachepe*, case number 359 of 2009 <http://www.saflii.org> (accessed 27 February 2013); in Uganda, the debate which started in 2003; see also S Tamale 'Out of the closet: unveiling sexuality discourses in Uganda' (2003) 2 *Feminist Africa changing cultures* 1 <http://www.feministafrica.org/index.php/out-of-the-closet> (accessed 27 February 2013); in Uganda, this discussion was rekindled by the Anti-homosexuality Bill 2009.

¹² Human Rights Watch 'This alien legacy, the origin of sodomy laws in British colonialism' (2008) 4.

¹³ Long 'before the law: criminalizing sexual conduct in colonial and post-colonial southern African societies' <http://www.hrw.org/reports/2003/safrica/safriglhr0303-07.htm> (accessed 28 February 2013).

based on actual or perceived sexual orientation.¹⁴ The law serves as a reason for action against sexual minorities.¹⁵ The consequences of sodomy laws stretch beyond their direct application in the criminal justice system.¹⁶ Their existence in statute books gives legitimacy to anti-homosexuality campaigns that African political leaders have launched in the past, thus encouraging violence and discrimination against sexual minorities perpetrated by both government officials and private individuals such as community and family members.¹⁷

Anti-homosexuality laws have had severe direct consequences on the rights of homosexuals in Africa.¹⁸ They have been subjected to hate speech, physically assaulted, harassed by police and civilians, in some instances remanded in prison for indefinite periods, convicted or even murdered.¹⁹ It is worth noting that even in countries that do not have anti-sodomy laws in their statute books; the rights of sexual minorities are not guaranteed. In South Africa, for instance, lesbians are still subject to so called ‘corrective’ rape and other forms of sexual violence as a 2011 Human Rights Watch report has indicated.²⁰ However, the existence of these laws codify and legitimize a general attitude of homophobia thereby leading to routine human rights violations against the LGBTI community in Africa.²¹

¹⁴ D Ottoson ‘State-sponsored homophobia a world survey of laws prohibiting same sex activity between consenting adults’ (2008) 45. The Penal Code Act of Uganda punishes homosexuality with a maximum sentence of life imprisonment; see also the Penal Code, Chapter 08:01 of Botswana which punishes homosexuality with a maximum sentence of 7 years; see also the Penal Code, Chapter 7:01 of the laws of Malawi which punishes homosexuality with a maximum sentence of 14 years imprisonment.

¹⁵ Ottoson (n 14 above) 47.

¹⁶ E Cameroon ‘Sexual orientation and the Constitution: A test case for human rights (1993) 110 *South African Law Journal* 450.

¹⁷ Tamale (n 11 above) 2

¹⁸ Cameron (n 1 above) 642.

¹⁹ ‘Teen beaten to death for being a lesbian’ *Sunday Times* 6 February 2006.

²⁰ Human Rights Watch ‘we’ll show you you’re a woman’: violence and discrimination against black lesbians and transgender men in South Africa’ <http://www.hrw.org/sites/default/file/reports/southafrica1211.pdf> (accessed 3 April 2013).

²¹ M Machera ‘Opening a can of worms: a debate on female sexuality in the lecture theatre’ in Signe (ed) *Rethinking sexuality in Africa* (2004) 157.

These laws serve as justification for the discrimination, harassment, stigmatisation and marginalisation suffered by homosexuals.²² Social services providers such as The AIDS Support Organisation (TASO) use these laws to explain why they do not provide services to gays and lesbians.²³ Governments also use them to administer punishment to those who attempt to support the LGBTI community.²⁴ More often than not government officials and leaders of non-governmental organisations (NGOs) have incorrectly believed that being homosexual is in itself a crime, despite the fact that only the act of sodomy is what amounts to a criminal offence.²⁵

The discrimination and marginalisation of homosexuals in Africa have resulted in questions regarding homosexuality reaching courts for determination. Judges in different countries have taken different approaches to the question of constitutional and legal protection for homosexuals. These approaches are partly determined by relevant provisions of the particular national constitution. Section 9(3) of the South African Constitution prohibits discrimination on the basis of sexual orientation. This has guided the Constitutional Court in stating that gays and lesbians have a right to equality, privacy and human dignity.²⁶ In Uganda, by contrast, the Constitutional Court held that criminal penalties against consensual same-sex sexual acts do not constitute discrimination under the Ugandan Constitution.²⁷ This could be because the Ugandan

²² BONELA report 'The violations of the rights of lesbian, gay, bisexual and transgender persons in Botswana' (2008) 5 http://www.globalrights.org/site/DocServer/Shadow_Report_Botswana.pdf (accessed 20 February 2013).

²³ E K Quansah 'Same sex relationship in Botswana: current perspectives and future prospects' (2004) 4 *African Human Rights Law Journal* 200.

²⁴ World Bank report 'Sexual minorities, violence and AIDS in Africa' (2005) 7 <http://www.worldbank.org/afr/wps/wp84.pdf> (accessed 20 February 2013).

²⁵ Quansah (n 23 above) 201.

²⁶ The Constitutional Court of South Africa has developed a substantial jurisprudence on rights of gays and lesbians including *National Coalition for Gay and lesbian Equality v The Minister of Justice* (1998) 12 BCLR 1517 (CC) where the Court declared the continued criminalisation of sodomy as unconstitutional.

²⁷ *Victor Juliet Mukasa and Another v AG* (2008) AHRLR 248 (UGHC 2008) 18.

Constitution does not list sexual orientation as a ground upon which discrimination is prohibited. In Kenya, the courts have not yet had a chance to hand down a decision on whether sodomy laws amount to discrimination on one of the prohibited grounds under article 27(4) of the Kenyan Constitution.²⁸

The controversy about the place of homosexuality in African society and whether the law should protect gays and lesbians against unfair discrimination raises real and important questions for us as Africans. Who are we as a people, and what kind of society do we wish to live in? To whom, and to which groups, does our concept of African humanity extend? Is the attitude of Africans accommodative of the gay and lesbian community? Is African society large and generous enough to include variant minority groups like gays and lesbians within it, as it should be? In terms of the place of homosexuals in Kenya and Uganda, the public and legal debate in both countries raises fundamental questions about the role of the law including the Constitution in social transformation, and what grounds of differentiation and discrimination between people should be considered legitimate and constitutional.

This thesis does not try to resolve these debates but it will explore the question of a constitutional approach to decriminalisation of same-sex sexual conduct. The scope of the study is limited to an

²⁸ The High Court of Kenya has made a decision in a case involving an intersex, Richard Muasya. However, this decision was reached before enactment of the New Constitution 2010. In this case Richard was born with both female and male genitalia. Due to this ambiguous gender, he was unable to secure a birth certificate, identity card or any travel documents. Without these documents, he lapsed into a life of crime and was convicted of the offence of robbery with violence. He sought a declaration from court that his status should be recognised under the Registration of Birth and Death Act, that he suffered discrimination in fact and that his conviction was as a result of his status. The High Court awarded Kshs. 500,000 to Richard for inhuman and degrading treatment he experienced at Kamiti Maximum Prison. The Court, however, rejected his request to have a third gender introduced in Kenya's books of statute. It is worth noting that if the case was decided under the new Constitution, the outcome may have been different. This is because the Constitution 2010 under article 28 provides that every person has inherent right to dignity and the right to have that dignity respected and protected. In my view such dignity includes a form of legal recognition.

examination of the relevant constitutional provisions in Kenya, Uganda and South Africa that can be used in constructing a constitutional argument for the decriminalisation of same-sex sexual conduct. The study discusses the constitutional framework in these three countries, particularly through the lens of equality clauses and how the rights to equality, privacy and human dignity are protected in their Constitutions. It also looks at the potential inclusion of sexual orientation as an analogous ground to the list of prohibited grounds of discrimination in the equality clauses in the Kenyan and Ugandan Constitutions and how that inclusion can form a case for the decriminalisation of same-sex sexual acts in both countries. It also assesses the extent to which the rights to privacy and human dignity can offer protection to gays and lesbians in Kenya and Uganda. It analyses judicial decisions relating to discrimination based on sexual orientation in the three countries. It also examines the role of the Kenyan and Ugandan judiciaries in interpreting the constitutional provisions on equality and rights to privacy and human dignity in a progressive and creative manner to decriminalise same-sex sexual acts between two consenting adults.

1.2 Objective of the study and research questions

The objective of the study is to compare and explore the constitutional approaches to the decriminalisation of same-sex sexual conduct in Kenya, South Africa and Uganda.

To achieve this objective, the study endeavours to answer the following research question: What is the constitutional approach to the decriminalisation of same-sex sexual conduct in Kenya, South Africa and Uganda?

A number of other questions were addressed in an effort to develop an answer to the main research question:

- What are the justifications given for the criminalisation of same-sex sexual conduct in Africa?
- What is the international and regional position on the decriminalisation of same-sex sexual conduct?
- To what extent can the Constitution of Kenya be interpreted and applied to advance a case for the decriminalisation of same-sex sexual conduct in Kenya?
- To what extent can the Constitution of Uganda be interpreted and applied to advance a case for the decriminalisation of same-sex sexual conduct in Uganda?
- To what extent does the Constitution of South Africa offer protection to the rights of homosexuals?
- What potential do the Constitutions of Kenya and Uganda have based on the rights to equality, privacy and human dignity in the fight against the criminalisation of same-sex sexual conduct?
- What is the role of courts, parliament, political and legal culture and civil society organisations in the protection of the rights of homosexuals in South Africa, Kenya and Uganda?
- What lessons can the Kenya and Uganda draw from the South African experience?

1.3 Significance of the study

This thesis focuses on the constitutional approach to the decriminalisation of same-sex sexual conduct in Africa. Using three cases, Kenya, South Africa and Uganda, it sets to examine how the rights to equality, privacy and human dignity guaranteed in the three Constitutions can be used to construct a constitutional argument for the decriminalisation of same-sex sexual conduct. The issues this study investigates are not only contemporary to gays and lesbians in Kenya,

Uganda and South Africa but constitute problems to which, gays and lesbians in many African States, for example Nigeria, Zambia, Namibia and Zimbabwe are struggling to find solutions. In this regard, the thesis may assist lawyers in Kenya, Uganda and other African countries that have criminalised same-sex sexual conduct in constructing a constitutional argument for the decriminalisation of sodomy laws.

In addition, the study will make a valuable contribution to the body of knowledge especially the linkages between the right to privacy, equality-dignity arguments and non-discrimination perspectives that could help legal scholars and members of the judiciary in determining cases on discrimination on the basis of sexual orientation.

1.4 Research methodology

A large part of this thesis is based on desktop research. Research was conducted in Kenya, Uganda, at Abo Academi, Finland and at the University of Pretoria, South Africa. While analysing the Kenyan, Ugandan and South African situations, their Constitutions, statutes, government policies, regional and international treaties and conventions were closely examined. Relevant decisions of Kenyan, South African and Ugandan courts were explored. Existing scholarship, mainly journal articles and books were thoroughly examined. Scholarly work was selected primarily based on its relevance to answering the research questions this thesis raised.

The study adopted a comparative approach. Kenya, Uganda and South Africa were selected as the focus of this study. The constitutional-textual difference between Kenya and Uganda, on the one hand, and South Africa on the other hand, is the express provision on the right to equality and non-discrimination. The South African Constitution lists sexual orientation as prohibited

ground of discrimination.²⁹ The case is different for Kenya and Uganda. Both the Kenyan and Ugandan Constitutions have not listed sexual orientation in the prohibited grounds of discrimination.³⁰ This significant difference in the equality clauses shall be identified, examined and analysed in light of the political and historical context as well as the legal evolution towards the inclusion of sexual orientation as a prohibited ground of discrimination in the South African Constitution.³¹

Apart from the inclusion of sexual orientation as a prohibited ground of discrimination in the equality clause, the South African Constitutional Court's approach to the question of decriminalisation of same-sex sexual conduct is progressive. The Court in *National Coalition* relied on the rights to equality, human dignity and privacy in striking down sodomy laws. It adopted a detailed analysis of the rights to human dignity and equality that is considered progressive in protecting the rights of homosexuals within an African context. Although progressive constitutional provisions and jurisprudence have certainly changed the 'minds and hearts' of some South Africans, there are still incidents of violence against lesbians.³² That notwithstanding, South Africa remains a good point of comparison to Kenya and Uganda for drawing some lessons in a legal context. In this regard, the study sets out to draw some lessons for Kenya and Uganda from the South African experience, acknowledging the differences in historical and political contexts as well as the legal culture that exists in the three countries.

²⁹ Section 9(3) of the South African Constitution.

³⁰ Article 27 (4) of the Kenyan Constitution and section 21(2) of the Ugandan Constitution.

³¹ Section 9(3) of the South African Constitution.

³² 'The ugly side of South Africa's attitude to gays' *Pink News* 3 September 2009 <http://www.pinknews.co.uk/2009/09/03/the-ugly-side-of-south-africas-attitude-to-gays/> (accessed 20 February 2013). It is reported that 'corrective' gang rape has become terrifying threat to lesbian in south Africa, as they are attacked because of their sexuality. Homophobic hate crimes are rife in the country, but these gang rapes supposedly perpetrated in order to correct, or more likely punish lesbians for their orientation have created a new climate of fear for LGBTI community. Some human rights activists have claimed that victims of such hate based crimes are not adequately supported by the South African legal system.

Apart from being East African countries, Kenya and Uganda have a common political history. They also have a common legacy of sodomy laws inherited from the British colonial masters. They have had unique and country-specific forms of oppression, discrimination and humiliation of gays and lesbians, influenced strongly by religious, cultural and political views. Apart from having had attempts to further criminalise same-sex sexual conduct, Kenyan and Ugandan courts have had a chance to deal with the question of discrimination against homosexuals on the basis of their sexual orientation due to the fact that sodomy laws prohibit same-sex sexual conduct. However, Kenya seems to be taking a more liberal approach than Uganda.³³

Kenya adopted a new Constitution in 2010. The Constitution sought to establish a society based on human dignity, equality, social justice, inclusiveness, human rights, non-discrimination and the protection of minorities and marginalised groups. The Kenyan Constitution also provides for a Bill of Rights that guarantees to all Kenyans fundamental rights and freedoms; among others the rights to equality and freedom from discrimination, human dignity, privacy and freedom of expression.³⁴ It also incorporates general rules of international law and treaties ratified by Kenya into the domestic laws of Kenya.³⁵ Kenyan courts have invoked sodomy laws in a number of judicial decisions.

Uganda, on the other hand, has made attempts to further criminalise homosexual activities that have attracted some amount of debate.³⁶ This includes the recent enactment of the Anti-

³³ J Oloka-Onyango 'Debating love, human rights and identity politics in East Africa: The case of Uganda and Kenya' (2015) 15 *African Human Rights Law Journal* 28.

³⁴ Articles 27, 28, 31 & 33 of the Kenyan Constitution.

³⁵ Articles 2 (5) & (6) of the Kenyan Constitution.

³⁶ Section 145 of Penal Code of Uganda criminalizes same-sex acts between consenting adults in private. It punishes persons who engage in such acts with a maximum penalty of life imprisonment. It seemed they were not satisfied

Homosexuality Act 2014, which was subsequently invalidated by the court but still reflective of certain kind of prejudicial discourse. Ugandan courts have also invoked their sodomy laws in cases before them.³⁷

Therefore Kenya and Uganda offer an important insight into the issue of the decriminalisation of same-sex sexual conduct , not only on account of the recent developments in legislative frameworks and judicial decisions but also because of other kinds of struggles taking place alongside the battle over sexual expression.

To further strengthen the work, and hopefully extend its relevance to other African countries beyond Kenya, South Africa and Uganda, the thesis employed a general comparative approach. Since the best examples on each issue may not come from one or two countries, the study drew from a number of countries on relevant thematic issues. With a view to demonstrating the potential role of the judiciary in the decriminalisation of same-sex sexual acts, the thesis analysed case law from Canada, the United States, India Botswana and Zimbabwe. The decisions of the courts in these countries were chosen with a view to demonstrating the extent of judicial protection of the rights of homosexuals in those countries. The cases selected involve court decisions where sodomy laws were declared either unconstitutional or constitutional. It is important to note that while reliance on case law from Canada, United States and India will serve

with this provision. Mr. David Bahati, a Member of Parliament introduced the Anti-homosexuality Bill in Parliament in 2009. The Bill had envisaged a punishment of the death sentence for ‘aggravated homosexuality’. The reasons for the introduction of the Bill among others are for the preservation of the morals, culture and family unit of Uganda. Fortunately, the Bill was withdrawn after international community expressed concerns. However, there are plans to have it re-introduced.

³⁷ The Ugandan judiciary had to deal with the case of *Victor Juliet Mukasa*. The brief facts of the case are that two alleged lesbians were arrested and molested by the police on suspicion of being lesbians and showing affection for each other in public based on a report by their neighbours to the police. The court held, among others that their right to freedom, dignity and property had been violated and awarded compensation.

this thesis well, reliance shall be fully contextualised and more carefully considered for their comparability and applicability. This is because the legal frameworks could be similar but the legal, political and broader societal cultures may be different.

The researcher also participated in meetings, discussions, conferences, workshops and seminars on the rights of homosexuals to gather further information and views on the subject. In addition, some informal interviews with different stakeholders in Kenya, South Africa and Uganda such as the gay and lesbian community, civil society organisations, judges and human rights scholars were conducted to obtain relevant information, particularly to explore why constitutional protection of the rights of sexual minorities is important.³⁸ These stakeholders were selected with a view to incorporating qualitative data based on perspectives from members of the gay community as well as state officials.

The study acknowledges the importance of using a multi-disciplinary approach and attempts to follow it. The question of gay rights has relation to other disciplines such as politics, anthropology and psychology, all of which contribute ideas to the research problem.

Although, it is predominantly a study in law, it drew from the findings developed by political scientists, anthropologists and psychologists on a number of issues. For instance, the study

³⁸ Three individuals were interviewed. Interview with Dr. Agnes Meroka, Lecturer of Law, University of Nairobi Kenya on 12 July 2015; interview with MJ Kimani Legal Secretary, Justice and Constitutional Affairs, Office of the Attorney General and Department of Justice, Nairobi Kenya on 23 September 2015; interview with Vincent Robi, former Legal Office Committee of Experts Nairobi Kenya on 23 September 2015.

consulted resources from political science in discussing the role of public opinion in court decisions as well as the impact of political culture on judicial activism. On the question of sexual orientation, a psychological perspective was relevant. Anthropologists were relevant in acknowledging the existence of same-sex sexual practices in Africa during the pre-colonial period.

1.5 Literature review

The rights of homosexuals have generated much controversy in Africa. Numerous papers on the rights of gays and lesbians in South Africa have been published.³⁹ This is attributed to the fact that South Africa is globally known for being in the vanguard of the rights of homosexuals by being the first country to include sexual orientation in its national Constitution.⁴⁰ De Vos has produced a number of publications on the rights of homosexuals in South Africa. His articles argue strongly for the legal protection of the rights of gays and lesbians.⁴¹ He identifies the law as a tool that can be employed by gays and lesbians to attain legal equality.⁴² This thesis agrees with such an approach. De Vos, however, does not look at other countries in Africa except South Africa. He also does not specifically focus on the question of the decriminalisation of same-sex sexual conduct. This study is intended to explore the constitutional approach to the

³⁹ E Cameron 'Constitutional protection of sexual orientation and African concepts of humanity' (2001) 118 *South African Law Journal* 642; E Cameroon 'sexual orientation and the Constitution: A test case for human rights (1993) 110 *South African Law Journal* 450; E Bonthuys 'Irrational accommodation: conscience, religion and same-sex marriages in South Africa' (2008) 125 *South African Law Journal* 473; P De Vos & Barnard 'Same-sex marriage, civil unions and domestic partnerships in South Africa: a critical reflection on an ongoing saga' (2009) 4 *South African Law Journal* 795; J Cock 'Engendering gay and lesbian rights: the equality clause in the South African Constitution' (2003) 26 *Women Studies International Forum* 35.

⁴⁰ Section 9 of South African Constitution; P De Vos 'The inevitability of same sex marriage in South Africa's post-apartheid state' (2007) 23 *South African Journal on Human Rights* 432 – 465.

⁴¹ P De Vos 'On the legal construction of gay and lesbian identity and South Africa's transitional Constitution (1996) 322 *South African Journal on Human Rights* 265.

⁴² De Vos (n 41 above) 266.

decriminalisation of same-sex sexual conduct beyond South Africa to also explore the situation in Kenya and Uganda.

The existing literature on the rights of gays and lesbians in Uganda has focussed on the impacts of the Anti-homosexuality Bill 2009.⁴³ To my knowledge, no work has attempted to examine the constitutional approach to the decriminalisation of same-sex sexual conduct in Uganda. There is no work that addresses the role of the judiciary through a progressive and creative interpretation of the Constitution of Uganda to decriminalise same-sex sexual conduct in the country. The primary focus of existing work has been on the constitutionality of the death penalty for aggravated homosexuality in the Bill. This thesis takes the discussion further to examine the provisions in the Ugandan Constitution that could be explored to decriminalise same-sex sexual conduct.

One dissertation has considered the potential role of the judiciary in the protection of homosexuals in Kenya in light of the Kenyan Constitution.⁴⁴ After assessing the provisions of the Penal Code that criminalises consensual same sex sexual acts, Nyaran'go focused on the decriminalisation of same-sex sexual conduct in Kenya as a strategy for legal and policy reform. She concluded that judges have an important role to play in ensuring that homosexuality is

⁴³ T F Lebron 'Death to gays Uganda's one step forward, one step back: approach to human rights' (2011) *Buffalo human rights review* 174 -206. He examines the history, purpose and effects of Ugandan anti-homosexuality bill 2009. He assessed the illegality of death penalty provision for aggravated homosexuality in the Bill; X B L Persad 'Homosexuality and death: a legal analysis of Ugandan proposed anti-homosexuality bill' (2011) 6 *Florida A & M University law review* 136 -162. He examined the legality of the anti-homosexuality bill in light of the Ugandan Constitution; M Hollander 'Gay rights in Uganda: Seeking to overturn Uganda's anti-sodomy laws' (2009) 1 *Virginia Journal of International Law Association* 1. He contended that there is need to develop an international consensus that persecution of LGBTI individuals in Uganda amounts to a grave violation of their human rights.

⁴⁴ IIK Nyarang'o *The role of judiciary in the protection of sexual minorities in Kenya* (LLM thesis University of Pretoria 2011) 1.

decriminalised.⁴⁵ She recommended that a strong and reformed judiciary should give the Kenyan Constitution a progressive interpretation with the aim of protecting the rights of sexual minorities in Kenya.⁴⁶ Nevertheless, her dissertation does not assess the constitutional rights to equality, human dignity and privacy guaranteed in the Constitution as an avenue to be explored in the decriminalisation of same-sex sexual conduct in Kenya. Neither does she address the experiences that the Kenyan judiciary can borrow from other foreign jurisdictions. This thesis, however, will assess how sexual orientation can be read into the list of prohibited grounds under article 27(4) of the Kenyan Constitution. It goes further to examine experiences from South Africa, Canada, the United States and India that are relevant in protecting the rights of homosexuals in Kenya.

.Oloka-Onyango⁴⁷ has examined the current situation of the legal struggles surrounding the situation of sexual minorities in the East African countries of Kenya and Uganda. He has investigated the use of law and legal interventions in addressing discrimination on the basis of sexual orientation and gender identity. He examined some of the conceptual dimensions that influence the legal frameworks in Kenya and Uganda. He went on to analyse the legal framework including court decisions with regards to intersex and transgender people.

His article does not analyse how a constitutional argument can be constructed in favour of decriminalisation of same-sex sexual conduct based on the rights of equality, human dignity and privacy guaranteed in both Kenyan and Ugandan Constitutions. The article also does not focus on the role of courts, parliament and CSOs in the decriminalisation of same-sex sexual conduct

⁴⁵ Nyarang'o (n 44 above) 35.

⁴⁶ Nyarang'o (n 44 above) 36.

⁴⁷ Oloka-Onyango (n 33 above) 28.

in Kenya and Uganda. Moreover, the article does not look at South Africa as a case study where some lessons can be drawn for Kenya and Uganda. This study however focuses on the construction of a constitutional argument for the decriminalisation of same-sex sexual conduct in Kenya and Uganda. The study uses South Africa to provide a comparative approach as it relied on the rights to equality, human dignity and privacy to decriminalise same-sex sexual acts. The study further examines the role of courts, the legislature and civil society in the decriminalisation of same-sex sexual acts in the three countries.

Rudman in his article explores two issues.⁴⁸ First, he discusses how the rights to dignity, equality and non-discrimination should generally be interpreted and applied under the regional African human rights system when related to sexual orientation. In this regard he draws on the interpretation of these rights under international human rights law as well as the jurisprudence of the European Court of Human Rights and its Inter-American counterpart. Second, he analyses the procedural or other hurdles that may stand in the way of bringing a claim of discrimination based on sexual orientation to the African Commission on Human and Peoples' Rights or the African Court on Human and Peoples' Rights. In this regard, he specifically consider the general restrictions placed on individuals and NGOs in bringing complaints to the Court and the real potential of the Commission to act as a conduit to the Court in cases involving rights related to sexual orientation, bearing in mind its inconsistent approach to same-sex sexuality.

The article addresses these questions by analysing some key developments by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The

⁴⁸ A Rudman 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 1.

main objective is to utilise the approach of these institutions to explore both the legal avenues under the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights and the rights and obligations under the African Charter available to anyone who would want to challenge any domestic law criminalising same-sex consensual sexual acts and/or any of the other related prohibitions.

His work focuses on the regional human rights system. However, this study focuses on national Constitutions and how they can be used in constructing a constitutional argument for the decriminalisation of same-sex sexual conduct based on the rights of equality, human dignity and privacy guaranteed in both Kenyan and Ugandan Constitutions. The study further examines the role of courts, the legislature and civil society in the decriminalisation of same-sex sexual conduct in the three countries.

All in all, the purpose of this thesis is to uncover the provisions in the Kenyan, South African and Ugandan Constitutions that can be explored in constructing a constitutional argument for the decriminalisation of same-sex sexual acts. It is intended to focus not only on actual provisions of the Constitutions, but also how such provisions can be interpreted in favour of the decriminalisation of same-sex sexual acts. For instance, the protection of the right to human dignity might be a common constitutional phrase, but how has it been interpreted by courts of law to strike down sodomy laws? It is the most comprehensive and original study on the use of constitutional rights of equality, human dignity and privacy to construct a constitutional argument for the decriminalisation of homosexual acts in Kenya and Uganda. The study utilises the approach taken by the South African Constitutional Court in constructing a constitutional

argument to extend the protection to the rights of gays and lesbians by relying on constitutional rights of human dignity, equality and privacy.

1.6 Limitations of the study

The researcher admits that the scope of the thesis is limited. The research focuses exclusively on relevant constitutional provisions that could be used in the construction of a constitutional argument for the decriminalisation of same-sex sexual conduct in Kenya and Uganda. The research will not analyse statutes that criminalise consensual same-sex sexual acts in Kenya and Uganda. However, where they are considered, the aim is to look at their constitutionality. Moreover, the issue of prohibition or legalisation of same-sex marriage in all the three countries will not be discussed in the thesis because it falls outside the scope of the thesis. It is an issue that requires a separate study to be conducted in future.

The term homosexuality speaks to sexual identity, and is a much broader concept than same-sex sexual conduct. This study will focus on the narrow aspect of same-sex sexual conduct as opposed to the broader question of sexual identity. This is because it is same-sex sexual acts that are criminalised by most African countries including Kenya and Uganda, thus making it easier to compare and construct a constitutional argument for the decriminalisation of these acts in Kenya and Uganda. However, where the broader understanding of the term homosexuality is considered, the aim is to provide a clear distinction between homosexuality as an identity and as a sexual conduct. This distinction is discussed in chapter two.

Resources also limited the scope of the research since it is mainly based on library study, archival research and views exchanged with experts and stakeholders on the subject through

conducting informal interviews.⁴⁹ A possible field study entails a sizable amount of financial resources which was not available.

1.7 Structure

The study is divided into eight chapters. **Chapter one** is an introduction to the thesis and sets out the content and structure of the research. It identifies the research problem, research objectives, research questions and significance of the study. It sets out the focus of the thesis, literature review and methodology adopted in the research.

Chapter two examines the African understanding of homosexuality as a concept and an identity and a sexual conduct. It focuses on the religious, cultural and political debates on homosexuality in Africa. It commences the discussion by analysing the interplay between African culture and religion and anti-homosexuality laws in Africa. It analyses the justifications provided for the continued criminalisation of same-sex sexual conduct in Africa. This is followed by a discussion on the influence of colonialism on sodomy laws in Africa. The chapter seeks to determine whether the perception of same-sex sexual acts as ‘un-African’ and against religious beliefs has been used to justify the on-going and increased criminalisation of same-sex sexual acts in Africa.

Chapter three discusses the international and regional position on the decriminalisation of same-sex sexual conduct. This will be achieved by analysing international and regional human rights instruments, relevant standard setting institutions and emanating jurisprudence. It

⁴⁹ Three individuals were interviewed. Interview with Dr. Agnes Meroka, Lecturer of Law, University of Nairobi Kenya on 12 July 2015; interview with MJ Kimani Legal Secretary, Justice and Constitutional Affairs, Office of the Attorney General and Department of Justice, Nairobi Kenya on 23 September 2015; interview with Vincent Robi, former Legal Office Committee of Experts Nairobi Kenya on 23 September 2015.

commences the discussion by providing a brief background on the sources of international law used to advocate for the decriminalisation of same-sex sexual conduct. It does this in the context of international and regional human rights law. This is followed by a discussion on the current legal mechanisms available at both regional and international level and how they can be helpful in advocating for the decriminalisation of same-sex sexual conduct at the national level.

Chapter four focuses on decriminalising of same-sex sexual conduct in South Africa. First, it discusses the history of sodomy laws in South Africa. Second, it briefly presents the South African post-apartheid political context and its influence on the constitution making process. Such a discussion leads to a better understanding of the inclusion of sexual orientation in the list of prohibited grounds of discrimination in the South African Constitution (section 9(3) in the Final Constitution and section 8(3) in the 1993 Constitution). A dignity-based approach to the decriminalisation of same-sex sexual conduct is critically examined through the lens of one case, where the Constitutional Court declared sodomy laws unconstitutional. Lastly the inadequacy of the inclusion of the sexual orientation clause and the Constitutional Court decision in protecting homosexuals is analysed.

Chapter five deals with the Kenyan case study. It focuses on the potential decriminalisation of same-sex sexual conduct in Kenya. The chapter examines how the provisions of the Constitution of Kenya could be interpreted progressively and creatively to decriminalise same-sex sexual conduct in Kenya. The chapter starts with a discussion on the history of sodomy laws in Kenya. Then the current status of same-sex sexual acts in Kenya is examined. This is followed by a

critical analysis of the relevant constitutional provisions to advance arguments for potential decriminalisation of same-sex sexual conduct in Kenya.

Chapter six follows a similar pattern with reference to Uganda. It focuses on the potential decriminalisation of same-sex sexual conduct in Uganda. The chapter examines how the relevant provisions of the Constitution of Uganda could be interpreted progressively and broadly to decriminalise same-sex sexual conduct in Uganda. The chapter starts with a discussion of the history of sodomy laws in Uganda. Then the current legal status of same-sex sexual acts and predicament of homosexuals in Uganda is examined. This is followed by a discussion on the incremental approach that has been taken by gay rights advocates to push for the decriminalisation of same-sex sexual conduct in Uganda. Finally, a critical analysis of the relevant constitutional provisions to advance arguments for the potential decriminalisation of same-sex sexual conduct is provided.

Chapter seven provides a comparative legal analysis of the decriminalisation of same-sex sexual conduct in Kenya, Uganda and South Africa. It analyses variations and similarities among the three Constitutions regarding the equality clauses and the rights to privacy and human dignity and to the extent to which they can form the basis for the decriminalisation of same-sex sexual conduct. The first section of the chapter provides an analysis on how to use open list approach and sex discrimination arguments in advancing a case for decriminalisation of same-sex sexual conduct in Kenya and Uganda. The second section assesses the extent at which the rights to privacy and human dignity can be applied to make a case for the decriminalisation of same-sex sexual conduct in Kenya and Uganda. The third section examines the place of international human rights instruments and decisions in advocating for the decriminalisation of same-sex

sexual acts in Kenya and Uganda. The last section provides a detailed discussion on the role of courts, political and legal culture, Parliament and CSOs in furthering the fight against the criminalisation of same-sex sexual conduct in South Africa, Kenya and Uganda.

Chapter eight concludes the journey of this thesis by doing three major things. First, it restates the major findings of this study. Second, it provides some lessons Kenya and Uganda can draw from the South African experience. Lastly, it provides specific recommendations aimed at enhancing the protection of the rights of gays and lesbians in Kenya and Uganda.

CHAPTER TWO

UNDERSTANDING OF HOMOSEXUALITY IN AFRICA

2.1 Introduction

One of the aims of this thesis is to understand justifications for the criminalisation of same-sex sexual conduct in Africa. This chapter therefore, examines the African understanding of homosexuality as both a concept and a sexual conduct. To this effect, it focuses on the religious, cultural and political debates on homosexuality in Africa. Accordingly, the objective of the chapter is two-fold. Firstly, the interplay between African culture and religion and sodomy laws in Africa including the reasons given to justify the criminalisation of same-sex sexual conduct in Africa will be analysed. Law has often been understood as largely influenced by the religious and cultural beliefs and values of a particular society. Politicians, religious leaders, scholars and the public have asserted that homosexuality is a ‘western perversion’ imposed upon Africans and that it is thus un-African.

Secondly, the chapter analyses the influence of colonialism on sodomy laws in Africa. The two questions the chapter seeks to address are: Is same-sex sexual acts ‘un-African’ and a western concept and why are same-sex sexual acts criminalised in most African states? The chapter, therefore, seeks to determine whether the perception of same-sex sexual acts as ‘un-African’ and against religious beliefs has been used to justify the on-going and increased criminalisation of same-sex sexual acts in Africa.

The chapter begins with definitions of sexual orientation, sexual minorities, criminalisation, decriminalisation and sodomy. It goes further to define the terms lesbian, gay, bisexual and transgender. It is important to define these terms because they feature extensively in the entire thesis. It is also necessary to define these terms in order to understand why these groups of individuals should be constitutionally protected. Thereafter, it examines the term homosexuality as a concept, an identity and as sexual conduct. This is followed by an examination of the reasons given for the criminalisation of same-sex sexual conduct in most African states. Finally, the chapter assesses the impact of colonialism on sodomy laws in Africa.

2.2 Terminologies

Terms such as sodomy, sexual minorities, sexual orientation, gay, lesbian and bisexual are used throughout this thesis. However, the terms sexual minorities and sexual orientation do not have generally accepted definitions. Their usage differs from one author to another. It is important to acknowledge contestation regarding definition of these terms because the question of same-sex sexual conduct is controversial on the African continent. The source of controversy is the morals and social norms which are in many ways the basis for attempting to ‘eliminate’ same-sex sexual conduct through legal means. An attempt to define sexuality in the African context is further complicated by the fact that sexuality is a political and socially constructed concept. What follows will be an attempt to define key terms and concepts which will provide the basis for an exploration of how same-sex sexual conduct has been understood in Africa.

2.2.1 Sexual orientation

According to Justice Cameron, sexual orientation refers to erotic attraction.¹ He adds further that in the case of heterosexuals, sexual orientation means an erotic attraction to members of the opposite sex, while for gays and lesbians; it is to members of the same sex.² This means that a homosexual person can be anyone who is erotically attracted to members of his or her own sex.³ This meaning is restricted to orientation that is motivated by attraction. Amnesty International defines sexual orientation as referring to a person's emotional, sexual, romantic or affectional attraction.⁴

Robert Wintemute adds to this definition by introducing an element of the application of one's mind to one's sexual preference. In his opinion, sexual orientation refers to a decision regarding whom to engage with in emotional sexual behaviour.⁵ From a psychological perspective, the American Psychological Association (APA) defines sexual orientation in terms of relationships with others.⁶ It notes that people express their sexual orientation through behaviours with others.⁷ Such behaviours include simple actions such as holding hands or kissing.⁸ The APA, therefore,

¹ E Cameroon 'sexual orientation and the Constitution: A test case for human rights (1993) 118 *South African Law Journal* 450.; See also in the case of *The National Coalition for Gay and Lesbian Equality v The Minister of Justice* CCT11/98 (1998) ZACC 15. At page 20 of this decision the term sexual orientation is defined as sexual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex.

²Cameron (n 1 above) 452.

³Cameron (n 1 above) 452.

⁴ Amnesty International, USA: Stonewalled – still demanding respect. Police abuses against lesbian, gay, bisexual, and transgender people in the USA (2006) 9 available at <http://www.amnesty.org/library/Index/ENGAMR510012006?open&of=ENG-347> (accessed 18 March 2014).

⁵ R Wintemute *Sexual orientation and human rights: United Nations Constitution, the European Convention* (1995) 7. Emotional sexual behaviour is considered to an activity or relationship involving two or more persons that has or could be perceived as having both an emotional and sexual aspect and purely sexual aspect including private sexual activity, public displays of affection and the formation of couple relationships.

⁶ <http://www.apa.org/topics/lgbt/orientation.aspx?item=2> (accessed 18 March 2014).

⁷ <http://www.apa.org/topics/lgbt/orientation.aspx?item=2> (accessed 18 March 2014).

⁸ <http://www.apa.org/topics/lgbt/orientation.aspx?item=2> (accessed 18 March 2014).

argues that sexual orientation is closely tied to the intimate personal relationships that meet deeply-felt needs for love, attachment and intimacy.⁹ In addition to sexual behaviour, bonds such as non-sexual physical attraction, shared goals and values, mutual support and on-going commitment are components of sexual orientation.¹⁰ It, therefore, concludes that sexual orientation goes beyond a personal characteristic to include the group of people with whom one is likely to find satisfying and fulfilling romantic relationships that are for many people an essential element of personal identity.¹¹

This thesis uses the term sexual orientation broadly to refer to both sexual and emotional attraction. It views sexual orientation as different from sexual behaviour in that it refers to feelings and self-concept, and not only to the manner in which one's feelings are expressed. This can be further illustrated by the example of sexual acts between males, which connote sexual conduct but which cannot *prima facie* be considered homosexual. For example, some sexual acts between men in prison that happen as a result of coercion or through the deprivation of female sexual partners could involve men who do not have a sexual preference for members of the same sex.¹² Therefore a man should only be referred to as a homosexual when he has an emotional and sexual attraction to another man.¹³

⁹ American Psychological Association <http://www.apa.org/helpcenter/sexual-orientation.aspx> (accessed 1 February 2014).

¹⁰ American Psychological Association <http://www.apa.org/helpcenter/sexual-orientation.aspx> (accessed 1 February 2014).

¹¹ American Psychological Association <http://www.apa.org/helpcenter/sexual-orientation.aspx> (accessed 1 February 2014).

¹² Wintemute (n 5 above) 6.

¹³ Wintemute (n 5 above) 6.

2.2.2 Sexual minorities

According to the report submitted to Sir Nigel Rodley, UN Special Rapporteur on Torture, by the International Gay and Lesbian Human Rights Commission (IGLHRC), sexual minorities comprise people whose rights are violated, based on their real or perceived sexual practices with consenting adults.¹⁴ It further states that sexual minorities include a group of individuals whose rights are violated based on their sexual expression, and where this does not conform to their gender identity.¹⁵ The report adds that sexual minorities include lesbian, gay, bisexual and transgender (LGBT) people facing discrimination and stigma in most societies around the world.¹⁶

James Wilets describes sexual minorities as including all individuals who have traditionally been distinguished by societies because of their sexual orientation, inclination, behaviour or gender identity.¹⁷ Donnelly defined sexual minorities as those:

...despised and targeted by 'mainstream' society because of their sexuality, victims of systematic denials of rights because of their sexuality (and in most cases, for transgressing gender roles). Like victims of racism, sexism and religious persecution, they are human beings who have been identified by the dominant social group as somehow less than fully human, and thus not entitled to the same rights as 'normal' people.¹⁸

¹⁴ <http://iglhrc.org/content/united-nations-sexual-minorities-and-work-united-nations-special-rapporteur-torture> (accessed 6 June 2014). This report addresses the world wide situation of sexual minorities, including gays, lesbians, bisexual and transgender (LGBTI) people, with a view to the mandate of the UN Special Rapporteur on Torture.

¹⁵ IGLHRC 'Sexual minorities and the work of the United Nations Special Rapporteur on Torture' (2001) 1 A paper submitted by the International Gay and Lesbian Human Rights Commission to Sir Nigel Rodley, Special Rapporteur http://www.idhc.org/esp/documents/Identidad/Informes/U.N/UN_torturereport.pdf (accessed 1st February 2014).

¹⁶ IGLHRC (n 15 above) 1.

¹⁷ James D Wilets 'Final HRC Report on Sexual Minorities' www.ohchr.org/english/bodies/hrc/docs/ngos/iusli.pdf. (accessed 18 March 2014)

¹⁸ J Donnelly *Universal Human Rights in Theory and Practice* (2003) 229.

Heinze argues that discrimination against sexual minorities exist because this particular group is viewed as having derogated from the dominant normative heterosexual paradigm.¹⁹ This is based on the idea that the structure of any society is based on the structure of a ‘normal’ family.²⁰ A ‘normal’ family is defined as a basic unit comprising of a man as the head of the family, a woman and children, i.e. the Western nuclear family. This kind of a family structure only fits into a Western heterosexual context, thus ignoring the existence of other natural sexual preferences and family structures.²¹

Based on the above discussion many scholars maintain that sexual minorities include gender minorities. This study takes the view that sexual minorities should be distinguished from gender minorities. It therefore adopts the definition of sexual minorities as a group of people who are discriminated against on the basis of their sexual orientation and sexual practices. These comprise gay, lesbian and bisexual people. Gender minorities, in contrast, refer to people who are discriminated against on the basis of their adopted non-conformist gender identity. These are transgender and some intersex people.

2.2.3 Gay, lesbian, bisexual and transgender

According to the IGLHRC report sexual minorities include LGBT people facing discrimination and stigma in most societies around the world.²² Justice Cameron defines gays and lesbians expressly as those persons erotically attracted to members of their own sex.²³ Lesbian refers to women attracted to other women while gay refers to men attracted to other men.²⁴

¹⁹ E Heinze *Sexual Orientation: A Human Right* (1995) 37.

²⁰ Heinze (n 19 above) 34.

²¹ Heinze (n 19 above) 34.

²² IGLHRC (n 15 above).

²³ Cameron (n 1 above) 452.

²⁴ Cameron (n 1 above) 452.

Transgender is an umbrella term used to broadly describe persons who do not conform to the gender role expectations of their biological sex.²⁵ The group includes individuals who sometimes take hormones and seek sex reassignment that involves medical surgery in order to bring their physical characteristics into conformity with their gender identity.²⁶ They are sometimes more narrowly referred to as transsexual people. It is important to point out that for transsexual and intersex people, sexual orientation may be separate from their biological sex and gender identity, suggesting both the independence of sex, gender and orientation phenomena, as well as the complexities of their interaction.²⁷

2.2.4 Criminalisation and decriminalisation

Decriminalisation as a term is essential to this research because the study is concerned with contesting the labelling of homosexuality as a criminal offence within the ambit of the relevant statutory provisions in the three countries under study. It is thus imperative that a clear understanding of the term is provided.

Decriminalisation is the act of making sound within law or in line with law that which was once illegal.²⁸ It involves the act of legislating to make legal that which was illegal.²⁹ It could also mean removing the illegality of something, while not necessarily making it legal.³⁰ This could include for example, situations where provisions in a statute which are regarded as having prohibited a particular act are struck down. The effect of this is for the law not to prosecute, yet

²⁵ C Paisley, RM. Juang & S Minter. *Transgender rights* (2006) 3.

²⁶ Paisley (n 25 above) 3.

²⁷ Paisley (n 25 above) 3.

²⁸ V Reddy 'Decriminalization of homosexuality in post-apartheid South Africa: A brief legal case history review from sodomy to marriage' (2006) 67 *Agenda: Empowering women for gender equity* 146.

²⁹ Reddy (n 28 above) 146.

³⁰ Reddy (n 28 above) 146.

rights may not flow from the decriminalisation of certain acts.³¹ Decriminalisation can be undertaken by courts of law which declare a provision in legislation unconstitutional. A good example was when the South African Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice* declared the common law offence of sodomy unconstitutional, thus decriminalising male-to-male sexual conduct in South Africa.³²

This research advocates for the former, where the illegality is removed from the statute without necessarily making the act legal. It is interested in ensuring that relevant provisions prohibiting same-sex sexual acts between consenting adults in private in the Kenyan and Ugandan Penal Codes are removed without necessarily inserting a provision stating that it is legal for two people of the same sex to engage in sexual activities.

Criminalisation, on the contrary, denotes the active role of the law in making illegal an act or an omission.³³ It, therefore, involves enacting legislation that makes something illegal.³⁴ The legislation provides for the act or omission that is considered illegal and for punishment to be administered.³⁵ For example, the Sexual Offences Act was legislation that declared male-to-male sexual conduct illegal in South Africa.³⁶

³¹ Reddy (n 28 above) 146.

³² Section 20A of Sexual Offences Act No. 23 of 1957.

³³ Reddy (n 28 above) 146.

³⁴ Reddy (n 28 above) 146.

³⁵ Reddy (n 28 above) 146.

³⁶ Sexual Offences Act No. 23 of 1957.

2.2.5 Sodomy

Sodomy means anal or oral intercourse between human beings or any sexual relations between a human being and an animal, the act of which may be punishable as a criminal offence.³⁷

The term sodomy has acquired different meanings over time. Under the English system, sodomy consisted of anal intercourse.³⁸ Statutes and courts refer to it as a ‘crime against nature or as copulation against order of nature.’³⁹ In the USA, the word sodomy consisted of oral and anal sex and the crime was considered as a felony.⁴⁰ However, it is no longer a crime.

In South Africa sodomy was historically a legal label given to all manner of unnatural sexual offences including masturbation, oral sex and anal intercourse between people of the same sex or opposite sexes and sexual intercourse with animals.⁴¹ Gradually, the broader understanding of sodomy fell away and the prohibited activities were split into three separate crimes in South Africa: sodomy bestiality and a residual category of unnatural sexual offences.⁴² Before the common law crime of sodomy unconstitutional in *National Coalition* by the Constitutional Court, sodomy criminalised only sexual contact between males.⁴³

Since same-sex sexual activity involves anal and oral sex, gay men were the main target of sodomy laws. Historically and culturally, same-sex sexual acts were seen as perverse or unnatural. This is because the term sodomy refers to the same-sex sexual acts of men in the story

³⁷ <http://legal-dictionary.thefreedictionary.com/sodom> (accessed on 5 February 2016).

³⁸ <http://legal-dictionary.thefreedictionary.com/sodom> (accessed on 5 February 2016).

³⁹ <http://legal-dictionary.thefreedictionary.com/sodom> (accessed on 5 February 2016).

⁴⁰ <http://legal-dictionary.thefreedictionary.com/sodom> (accessed on 5 February 2016).

⁴¹ Why the law on sodomy should be repealed 2000 <http://www.lac.org.za/news/inthenews/pdf/sodomy.pdf> (accessed on 17 May 2016).

⁴² <http://www.lac.org.za/news/inthenews/pdf/sodomy.pdf> (accessed on 17 May 2016)

⁴³ *National Coalition for Gay and Lesbian Equality v Minister of Justice*, CC 1998, 3 LRC 648.

of the city of Sodom in the Bible.⁴⁴ The destruction of Sodom and Gomorrah because of the immoral activities of the residents formed a central part of western attitudes towards forms of non-procreative sexual activity and same-sex sexual relations.

Sodomy laws for purpose of this study are penal provisions that prohibit same-sex sexual acts which are termed ‘crimes against the order of nature’ in both the Kenyan and the Ugandan Penal Codes.⁴⁵ In essence, sodomy laws criminalise same-sex sexual conduct and not homosexual identity.

2.3 Homosexuality as a concept, an identity and a sexual conduct

As discussed in chapter one homosexuality as a concept speaks to both identity and conduct. The distinction between homosexuality as an identity and a sexual conduct is critical in establishing conceptually the link between sodomy laws, men who have sex with men (MSM), who do not adopt a gay identity but engage in same-sex sexual acts, and an increased risk of HIV transmission in Africa. Homosexuality is defined as the orientation of sexual need, desire or responsiveness towards other persons of the same sex.⁴⁶ A person need not have sexual relations in order to fit the definition, the mere longing to have a sexual association with a person of the same-sex is sufficient to be established in this definition.⁴⁷

⁴⁴ Genesis chapter 9 The Holy Bible, King James Version.

⁴⁵ Section 162 of Kenyan Penal Code states that any person who has carnal knowledge of any person against the order of nature or permits a male person to have carnal knowledge of him or her against order of nature is guilty of a felony and is liable to imprisonment for 14 years; Section 145 of Ugandan Penal Code provides that ‘any person who has carnal knowledge of any person against the order of nature or permits a male person to have carnal knowledge with him or her against the order of nature commits an offence and is liable to imprisonment for life.

⁴⁶ M Masango ‘Homosexuality: a challenge to African churches’ (2002) 58 *HTS Theological Studies* 958.

⁴⁷ Masango (n 46 above) 958.

It is therefore important to examine and distinguish homosexuality as an identity and as a sexual conduct. Although the South African Constitutional Court in *National Coalition* pointed out that homosexual conduct is an expression of homosexual identity and the two are closely linked because one's sexuality is linked to one's identity, the distinction is still important because it is the homosexual conduct that has been criminalised in Kenya and Uganda and this study focuses on constructing a constitutional argument that can be relied on in challenging the criminalisation of same-sex sexual conduct, not homosexual identity.

This section starts with a description of the history and evolution of homosexuality as a concept. Thereafter it distinguishes between homosexual identity and same-sex sexual conduct and what is referred to in the penal provisions that criminalise same-sex sexual conduct in a number of African countries.

2.3.1 Evolution of homosexuality as a concept

The term 'homosexuality' was coined in the late nineteenth century by a Hungarian writer, Karoly Maria Kertbeny.⁴⁸ It is however impossible to talk about a single homosexual identity for all people who experience same-sex desire and who take part in same-sex activity.⁴⁹ While sexual identity has become a fundamental aspect for many gay men and lesbians all around the world, offering a sense of personal harmony, social location and even at times a political

⁴⁸ B Pickett "Homosexuality", *The Stanford Encyclopedia of Philosophy 2011* 50 <http://plato.stanford.edu/archives/spr2011/entries/homosexuality/> (Accessed 24th May 2014).

⁴⁹ P De Vos, 'On the Legal Construction of Gay and Lesbian Identity and South Africa's Transitional Constitution' (1996) 12 *South African journal on human rights* 265.

commitment, it would be impossible to isolate a single homosexual identity and say exactly how it is constituted.⁵⁰

Up to the end of the eighteenth century, three major explicit codes governed sexual practices: canonical law, Christian pastoral law and civil law. There was no clear distinction between violations of the rules of marriage and sexual activity taking place outside the context of marriage.⁵¹ Although sexual desire and physical sexual conduct with members of the same sex are believed to have always existed, the characterisation of certain individuals as homosexuals only began with the dramatic economic and social shifts which took place in Western culture in the late nineteenth century when homosexuality was constructed as a ‘psychological, psychiatric, medical category’.⁵² Sexual identity has since struck at the core of the homosexual being, which was a new idea that a person could be a homosexual; it implied a pervasive quality that could be disclosed as clearly by non-sexual behaviour as by particular sexual acts.⁵³

According to Foucault⁵⁴, even the deepest-lying sexual categories are social constructs.⁵⁵ This idea of Foucault has generated a cascade of work in the last few years on the social history of ancient times, most notably from David Halperin⁵⁶, Froma Zeitlin⁵⁷, and the late John J. Winkler.⁵⁸ Michael Foucault’s claim, later reiterated by David Halperin⁵⁹, is that the category ‘homosexual’ is a social construct which is scarcely more than a hundred years old, and that

⁵⁰ J Weeks ‘Questions of Identity’ in P Caplan (ed) *The Cultural Construction of Sexuality* (1987) 30. See also J Thorp ‘The Social Construction of Homosexuality’ (1992) 46 *Phoenix* 54-61.

⁵¹ M Foucault *The History of Sexuality: An introduction* (1978) 37-38.

⁵² Foucault (n 51 above) 43.

⁵³ A B Goldstein *Reasoning about Homosexuality: A commentary on Janet Halley’s “Reasoning about Sodomy: Act and Identity in and after Bowers v Hardwick* (1789) 34.

⁵⁴ Foucault (n 51 above) 43.

⁵⁵ Thorp (n 50 above) 54.

⁵⁶ D Halperin, *One Hundred Years of Homosexuality: And Other Essays on Greek Love* (1990) 20.

⁵⁷ F Zeitlin *Before Sexuality: The Construction of Erotic Experience in the Ancient Greek World* (1990) 56.

⁵⁸ J Winkler, *The Constraints of Desire: The Anthropology of Sex and Gender in Ancient Greece* (1990) 79.

⁵⁹ Halperin (n 56 above) 20.

homosexuality is not a natural category, but rather a social category.⁶⁰ Over time, it has been reasonable to portray males' desire for males as physically deep and whatever may or may not have been the case about universal initiation rite pederasty, there clearly was taken to be a class of males who had a life-long predilection for males. Moreover it was considered a less approved, class whose predilection did not respect the age asymmetry that is part of pederasty.

The most widely recognised evolutionary theory of homosexuality is that of E. O. Wilson (1975, 1978), which holds that homosexual individuals in early human societies may have helped close family members, either directly or indirectly, to reproduce more successfully and thus, genes for homosexuality would have been passed on indirectly through relatives.⁶¹ This theory has, however, been widely rejected because it does not posit any direct or indirect adaptive value for homosexuality itself and the consensus within the field of evolutionary psychology is that homosexual behaviour does not have adaptive value and consequently would not have survived.⁶² A scientific perspective of homosexuality as a sexual practice posits that a number of scientific results suggest a biological basis for sexual orientation, but these results do not point to one simple biological or genetic explanation.⁶³

There has been, through a historical emergence, a category referred to as MSM.⁶⁴ This once-obscure category plays an increasingly influential, and sometimes disturbing, role in global HIV/AIDS discourse, displacing terms such as homosexual and gay.⁶⁵ The development of the term MSM arose from the need in the 1980s in HIV/AIDS prevention to find an inclusive term

⁶⁰ Thorp (n 50 above) 45.

⁶¹ F Muscarella *The Evolution of Homoerotic Behavior in Humans, Journal of Homosexuality* (2000) 52.

⁶² Muscarella (n 61 above) 52.

⁶³ W Byne, Biology and Sexual Minority Status in I H. Meyer, and M E. Northridge (Eds) *The health of sexual minorities* (2000) 65-90.

⁶⁴ T Boellstorff, Cultural Anthropology BUT DO NOT IDENTIFY AS GAY: A Proleptic Genealogy of the MSM Category 287.

⁶⁵ Boellstorff (n 64 above) 45.

for men who have sex with men but who do not necessarily identify as gay or who see themselves as members of the gay community, and who have no wish to participate in gay community life.⁶⁶ This allowed HIV prevention programmes to focus on behaviours not identities, regarded as an approach having a wider reach and not limited to people who self-identified as gay.⁶⁷ An unintended consequence of this behaviour-oriented term, MSM, has left many same-sex practising people with no sexual identity. They are neither homosexual nor heterosexual.

In a similar way, same-sex sexual relations have also existed between women, such as the ‘mummy-baby’ relationships between women living in Lesotho, where women who live in an economically depressed area which the men have been forced to leave as migrant labourers, rely upon each other for support in living and raising their children.⁶⁸ Older and younger women are said to form homoerotic relationships which help younger partners to learn about sex and child care. The women often form life-long bonds, and share food and provide assistance to each other.⁶⁹

In Africa, there is evidence that men who have sexual relations with men existed before the advent of colonialism.⁷⁰ For example, the Negro population in Zanzibar engaged in both active and passive pederasty⁷¹, while younger men functioned as temporary wives in the Azande Kingdom of Northern Congo.⁷² Among the Bantu-speaking Pouhain community in present-day

⁶⁶ D Gary ‘Reaching Men Who Have Sex with Men in Australia. An Overview of AIDS Education: Community Intervention and Community Attachment Strategies; (2003) 25 *Australian Journal of Social Issues* 3

⁶⁷ Muscarella (n 61 above) 68.

⁶⁸ Muscarella (n 61 above) 66.

⁶⁹ Muscarella (n 61 above) 66.

⁷⁰ M Epprecht *Sexuality and social justice in Africa: rethinking homophobia and forging resistance* (2013)

⁷¹ S Murray & W Roscoe, *Boy Wives and Female Husbands* 63.

⁷² Sexual Minorities Uganda, ‘Expanded Criminalisation of Homosexuality in Uganda: A Flawed Narrative’ <http://sexualminoritiesuganda.com/images/expanded%20criminalisation%20of%20homosexuality%20in%20uganda-%20january%202014.pdf> P. 9 (accessed 26 May 2014).

Gabon and Cameroon, a medicine for wealth was transmitted through sexual activity between men,⁷³ while among the Cape Bantu, lesbianism was ascribed to women who were in the process of becoming chief diviners known as *isanuses*.⁷⁴

In 1970s the term ‘gay’ emerged as an alternative word to describe same-sex attractions and homosexual lifestyles.⁷⁵ It was owned by homosexual people as a destigmatised and acceptable self-definition (describing both homosexual men and women, although with time the word gay has come to be understood as describing homosexual men, with the term lesbian distinguishing homosexual women, particularly as the rise of feminism encouraged women to come out of the shadow of patriarchy and male influence).⁷⁶

2.3.2 Legal construction of homosexuality

Law has been significant in bringing the ‘species’ of the homosexual into being as part of a nexus of cultural prescriptions of deviance, normality and illness which have cumulatively resulted in the production of the homosexual personage.⁷⁷

The law has not been concerned, at least formally, with individuals who identify themselves as homosexual.⁷⁸ What it has been concerned with, rather, is the denial of the legitimacy of same sex sexual relations as viable alternatives to the heterosexual norm.⁷⁹ The law does this through

⁷³ Stephen Murray, ‘Homosexuality in ‘Traditional’ Sub Saharan Africa and Contemporary South Africa’, http://semgai.free.fr/doc_et_pdf/africa_A4.pdf p. 9 (Accessed 26 May 2014).

⁷⁴ Colin Stewart, ‘21 Varieties of Traditional African Homosexuality’ <http://76crimes.com/2014/01/30/21-varieties-of-traditional-african-homosexuality/> (accessed 26 May 2014).

⁷⁵ T H Sutton ‘The emergence of a male global gay identity: a contentious and contemporary movement’ (2011) 15 *Totem: The University of Western Ontario Journal of Anthropology* 7

⁷⁶ Sutton (n 75 above) 8.

⁷⁷ R Collier *Masculinity, Law and the family* (1995) 106.

⁷⁸ Collier (n 77 above) 91.

⁷⁹ Collier (n 77 above) 91.

the criminalisation of same-sex sexual conduct.⁸⁰ It creates a distinction between marital procreative heterosexual sex and any form of so-called ‘unnatural’ sex (which could include heterosexual sex outside marriage, marital sex using contraception, anal sex and same-sex sexual activities).⁸¹ The law grants heterosexual conduct legitimacy while denying so-called ‘unnatural’ same sex sexual conducts the same status.⁸² It is through this negation that the law plays a major role in constructing homosexual identity.⁸³

Sodomy laws introduced by the colonial masters in Africa targeted same-sex sexual acts because the penal provisions require penetration for the offence of sodomy to be committed.⁸⁴ Later the penal provisions were extended to encompass indecent assault and crimes against the order of nature.⁸⁵ These two additions criminalised other acts that did not amount to penetration. This extension criminalised aspects of homosexual identity.

The Ugandan Anti-Homosexuality Act 2014 and the Nigerian Same Sex Marriage (Prohibition) Act 2013 attempted to criminalise both same-sex sexual conduct and homosexual identity. For instance, the Ugandan Anti-Homosexuality Act had criminalised acts beyond same-sex sexual conduct. The Act had prohibited the promotion of homosexuality in Uganda.⁸⁶ Similarly, the

⁸⁰ Faucault (n 51 above) 43.

⁸¹ Collier (n 77 above) 91.

⁸² Faucault (n 51 above) 43.

⁸³ Collier (n 77 above) 91.

⁸⁴ For instance section 162 of Kenyan Penal Code states that any person who has carnal knowledge of any person against the order of nature or permits a male person to have carnal knowledge of him or her against order of nature is guilty of a felony and is liable to imprisonment for 14 years; Section 145 of Ugandan Penal Code provides that ‘any person who has carnal knowledge of any person against the order of nature or permits a male person to have carnal knowledge with him or her against the order of nature commits an offence and is liable to imprisonment for life.

⁸⁵ For instance section 163 of the Penal Code provides that any person who attempts to commit any of the offences in section 162 is guilty of a felony and is liable to imprisonment for seven years. Section 165 of the Penal Code outlaws committing, encouraging or attempting ‘acts of gross indecency’ between males and imposes a penalty of up to five years’ imprisonment

⁸⁶ Section 13 of the Ugandan Anti-homosexuality Act 2014 person provides that who:

(a) participates in production, procuring, marketing, broadcasting, disseminating, publishing of pornographic materials for purposes of promoting homosexuality;

Nigerian Same Sex Marriage (Prohibition) Act criminalises any act of registering, operating or taking part in gay organisations as well as a public show of same-sex relations.⁸⁷ The Act also criminalised any involvement in gay marriage ceremonies. These offences are punishable by up to ten years imprisonment.⁸⁸

The Nigerian legislation criminalises homosexual identity that is being gay or lesbian, as opposed to prohibiting same-sex sexual acts. First, section 4 prohibits a public show or display of same-sex sexual relationships. Second, the legislation has silenced the voice and activities of gay organisations by prohibiting the registration of gay clubs, societies and organisations. It has also prohibited the gay community from meeting or conducting processions. Thirdly, the legislation has extended the prohibition beyond the gay community by punishing anyone who supports registration and operations of gay clubs, societies and organisations. The Same Sex Marriage (Prohibition) Act 2013 not only criminalises same-sex marriages and same-sex sexual acts but also being gay and being pro-gay.

Arguably, penal provisions in the Kenyan and Uganda Penal Codes do not indicate that they criminalise homosexuality as an identity, or the state of being homosexual, but only certain sexual acts between persons of the same-sex. An individual's sexual orientation is not

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- (b) funds or sponsors homosexuality or other related activities;
 - (c) offers premises and other related fixed or movable assets for purposes of homosexuality or promoting homosexuality;
 - (d) uses electronic devices which include internet, films, mobile phones for purposes of homosexuality or promoting homosexuality; or
 - e) Who acts as an accomplice or attempts to promote or in any way abets homosexuality and related practices: commits an offence and is liable on conviction, to a fine of five thousand currency points or imprisonment of a minimum of five years and a maximum of seven years or both fine and imprisonment.

⁸⁷ Section 4 of the Same-Sex Marriage (Prohibition) Act 2013 states that the registration of gay clubs, societies and organization, their sustenance, processions and meetings is prohibited. Section 4(2) provides that public show of same sex relations directly or indirectly is prohibited.

⁸⁸ Section 5 (3) of Same Sex Marriage (Prohibition) Act provides any person or group of persons that witnesses, abet, screens, shields and aids solemnization of same-sex marriage contract or civil union or supports the registration of gay clubs, societies and organizations, processions or meeting in Nigeria commits an offence and liable on conviction to term of 10 years of imprisonments.

criminalised by the Penal Codes. However, there have been instances in Kenya and Uganda where individuals have been discriminated against or prosecuted for being gay or lesbian, rather than on the basis of having committed same-sex sexual acts as prescribed by the Penal Code.⁸⁹

Clearly, the law is not capable of changing the homosexual identity of a person because from a psychological understanding, homosexual identity is considered to be an intrinsic part of a person's psycho-sexual make up.⁹⁰ Scientific research suggests that people can't change their sexual orientation even if they want to, and that trying to change can cause mental anguish.⁹¹ Some studies suggest that being gay may have a genetic or biological basis. But the aspect of sexual conduct and behaviour of people of all types in any given society including gays and lesbians do fall within the purview of the law.⁹² The law accomplishes this primarily through the threats of sanctions if people disobey legal rules. Thus, in my view sodomy laws aim to control same-sex sexual conduct rather than homosexual identity.

2.4 The justifications for the criminalisation of homosexuality in Africa

In the previous sections, the word homosexuality was discussed and a distinction was drawn between a homosexual identity and homosexual conduct. The history and evolution of homosexuality as a concept, an identity and sexual conduct was examined. This section will discuss the justifications given for the criminalisation of same-sex sexual conduct among most

⁸⁹ 'Gay Ugandans flee fearing for their lives' *BBC News* 16 February 2012 <http://www.bbc.com/news/world-africa-17058692> (accessed on 5 February 2016); Human Rights Watch Report 'The issue is violence: Attacks on LGBT on Kenya's Coast' (2015) <https://www.hrw.org/report/2015/09/28/issue-violence/attacks-lgbt-people-kenyas-coast> (accessed on 5 February 2016).

⁹⁰ <http://www.livescience.com/50058-being-gay-not-a-choice.html> (accessed on 5 February 2016); American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation. (2009) Report of the Task force on Appropriate Therapeutic Responses to Sexual Orientation. Washington, DC: American Psychological Association.

⁹¹ Special issue: sexual differentiation of sexual behavior and its orientation (2011) *frontiers in neuroendocrinology* 32

⁹² Special Issue (n 91 above) 32.

African states. Three reasons have been given for the continued criminalisation of same-sex sexual conduct in Africa. Firstly, it is claimed that same-sex sexual act is un-African since it is against the cultural values of African societies. Secondly, it has been argued that same-sex sexual act is contrary to religious beliefs, and is thus immoral and an abomination. Thirdly, same-sex sexual act is described as a personal choice.

2.4.1 Homosexuality as a personal choice

The main argument raised by the Ugandan president Yoweri Museveni in 2014 when signing into law the Anti-homosexuality Bill was that homosexuals in Uganda had chosen their same-sex sexual behaviour.⁹³ He further claimed that scientific evidence has not been able to show that homosexuals are naturally born that way.⁹⁴ The Ugandan president is one among many who have maintained claims that same-sex sexual conduct is a way of life that some individuals have chosen to adopt.⁹⁵

This argument has been used to justify continued criminalisation of same-sex sexual conduct in a number of African states,⁹⁶ and is sometimes linked to state-sponsored homophobia and negative

⁹³ 'Ugandan President signs Antigay Bill' *New York Times* 24 February 2014 http://www.nytimes.com/2014/02/25/world/africa/ugandan-president-to-sign-antigay-law.html?_r=0 (accessed 6 June 2014).

⁹⁴ 'Ugandan President signs Antigay Bill defying the west' *Reuters* 24 February 2014 <http://www.reuters.com/article/2014/02/24/us-uganda-gaybill-idUSBREA1N05S20140224> (accessed 6 June 2014).

⁹⁵ 'Ugandan President signs Antigay Bill' *New York Times* 24 February 2014 http://www.nytimes.com/2014/02/25/world/africa/ugandan-president-to-sign-antigay-law.html?_r=0 (accessed 6 June 2014).

⁹⁶ 'Ugandan President signs Antigay Bill' *New York Times* 24 February 2014 http://www.nytimes.com/2014/02/25/world/africa/ugandan-president-to-sign-antigay-law.html?_r=0 (accessed 6 June 2014). Uganda president signed a law imposing harsh penalties for homosexuality on Monday, defying protests from rights groups, criticism from Western donors and a U.S. warning that it will complicate relations. The new bill strengthened existing punishments for anyone caught having gay sex, imposing jail terms of up to life for "aggravated homosexuality" - including sex with a minor or while HIV-positive. It criminalized lesbianism for the first time and made it a crime to help individuals engage in homosexual acts. Gay rights activists in Uganda said

public attitudes towards homosexuals. Several leaders, including those of Kenya, Zimbabwe and Namibia, have been quoted in the recent past as publicly making homophobic remarks.⁹⁷ They have, for example, equated same-sex sexual act with bestiality. This has increased public hatred of homosexuals. These leaders have maintained that homosexuals can exercise a choice to engage in heterosexual sexual acts, but that they decide against heterosexuality.⁹⁸

However, there is scientific evidence that suggests that being a homosexual is not something that most people choose to become, but that rather may be a result of their biological make-up.⁹⁹ A number of scientific studies have suggested a biological basis for sexual orientation, but they do not point to one simple biological or genetic explanation.¹⁰⁰ Perhaps the best and most recent reviews of such scientific research are found in a special issue of the journal *Frontiers of Neuroendocrinology*.¹⁰¹ This is an official journal of the International Neuroendocrine Federation and the American Neuroendocrine Society that was published in 2011.¹⁰² According to a paper in this special issue, there is substantial evidence for a biological basis for an individual preferring a particular sex partner.¹⁰³

they planned a legal challenge. Ugandan officials broke into loud applause as President Yoweri Museveni put his signature to the document in front of foreign journalists at his State House outside the capital. They claimed there is now an attempt at social imperialism, to impose social values. They felt sorry for the west because of the way they live.

⁹⁷ S Tamale 'Out of the closet: unveiling sexuality discourses in Uganda, available at <http://www.feministafrica.org/index.php/out-of-the-closet> (accessed 6 June 2014).

⁹⁸ Rukweza 'Is homosexuality really un-African' <http://www.pambazuka.org/en/category/comment/32974> (accessed 6 June 2014).

⁹⁹ J Gloucester *Homosexual relationships* (1979) 13.

¹⁰⁰ W Byne 'Biology and sexual minority status in H Meyer & ME Northridge (eds) *The health of sexual minorities* (2007) 67.

¹⁰¹ Special issue: sexual differentiation of sexual behavior and its orientation (2011) *frontiers in neuroendocrinology* 32.

¹⁰² Special issue (n 101 above) 32.

¹⁰³ Special issue (n 101 above) 32.

In addition, there is psychological evidence that homosexuals have no choice about their sexual orientation.¹⁰⁴ Some groups and individuals have offered clinical interventions that purport to change individuals' sexual orientation from homosexual to heterosexual¹⁰⁵, but scientific research has not shown such interventions to be effective.¹⁰⁶ A review of the scientific literature by an American Psychological Association task force concluded that efforts to change sexual orientation are unlikely to succeed and can, indeed, be harmful to an individual's mental health.¹⁰⁷

2.4.2 Homosexuality as immoral and going against religious values

Many Christian and Muslim leaders have condemned same-sex sexual conduct in the strongest possible terms and have rejected calls to respect sexual orientation as a God-given attribute or to view engaging in sex with a person of the same sex as a human right.¹⁰⁸ Their claims have supported continued criminalisation or further criminalisation of same-sex sexual conduct.¹⁰⁹ Christians have regarded same-sex sexual acts as sinful, unbiblical and an abomination.¹¹⁰

¹⁰⁴ Dr. Gregory M. Herek, a tenured professor on the psychology faculty of the University of California, Davis, surveyed a U.S. national probability sample of 662 self-identified lesbian, gay, and bisexual adults. Dr. Herek found that 88% of gay men and 68% of lesbians reported they had no choice at all about their sexual orientation, while another 7% of gay men and 15% of lesbians reported only a small amount of choice. Only 5% of gay men and 16% of lesbians felt they had a fair amount or a great deal of choice.

¹⁰⁵ Special issue (n 101 above) 32.

¹⁰⁶ Special issue (n 101 above) 32.

¹⁰⁷ American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation. (2009) Report of the Task force on Appropriate Therapeutic Responses to Sexual Orientation. Washington, DC: American Psychological Association.

<http://www.apa.org/pi/lgbt/resources/sexual-orientation.aspx> (accessed 6 June 2014).

¹⁰⁸ IIK Nyarang'o *The role of judiciary in the protection of sexual minorities in Kenya* (LLM thesis University of Pretoria 2011) 28; See also Pew forum on religion and public life 'Islam and Christianity in sub-Saharan Africa' (2010) www.pewforum.org/uploadfiles/topic/bilies_and_practice/subsaharanafricafullreportpdf (accessed 5 May 2014).

¹⁰⁹ Pew forum on religion and public life (n 89 above) 3.

¹¹⁰ E Tibebe *The evangelical movement in Ethiopia: resistance and resilience* (2009) 13; M Hassett *Anglican communion in crisis: How episcopal dissidents and their African allies are reshaping anglicanism* (2007) 10

The Bible has mentioned homosexual behaviour six times:¹¹¹ three times in the Old Testament and three times in the New Testament.¹¹² Leviticus 18:22, which states that ‘thou shall not lie with mankind as with womankind: it is an abomination’, is the scriptural passage that is often quoted in defence of this position.¹¹³

In Leviticus 20:13 the death penalty is prescribed in Israel for such an act, along with adultery, incest, and bestiality.¹¹⁴ This particular verse has sometime been used by gay rights advocates to make light of these prohibitions by comparing them to prohibitions in the Old Testament against having contact with unclean animals like pigs. Just as Christians today don’t obey all of the Old Testament ceremonial laws, so, they say, we don’t have to obey the prohibitions of same-sex sexual actions. The third place where same-sex sexual acts are mentioned in the Old Testament is the horrifying story in Genesis 19 of the attempted gang rape of Lot’s visitors by the men of Sodom, from which our word sodomy derives. God destroyed the city of Sodom because of their wickedness.¹¹⁵

The New Testament also addresses same-sex sexual behaviour. In I Corinthians 6: 9-10 Paul writes, ‘Do you not know that the unrighteous will not inherit the Kingdom of God? Do not be deceived: neither the sexually immoral, nor idolaters, nor adulterers, nor men who practice homosexuality, nor thieves, nor the greedy, nor drunkards, nor revilers, nor swindlers will inherit the Kingdom of God.’¹¹⁶ The words in the list translated as ‘men who practice homosexuality’ refer in Greek literature to the passive and the active partners in male same-sex sexual

¹¹¹ W L Graig ‘A christian perspective on homosexuality’ <http://www.reasonablefaith.org/a-christian-perspective-on-homosexuality> (accessed on 4 February 2016)

¹¹² Interview with Dr. Agnes Meroka, Lecturer of Law, University of Nairobi Kenya on 12 July 2015.

¹¹³ Leviticus 18:22 The Holy Bible, King James Version.

¹¹⁴ Leviticus 18:13 The Holy Bible, King James Version.

¹¹⁵ Genesis 9 The Holy Bible, King James Version.

¹¹⁶ 1 Corinthians 6: 9-10 The Holy Bible, King James Version.

intercourse. The second of these two words is also listed in I Timothy 1:10 together with fornicators, slave traders, liars, and murderers as ‘contrary to the sound teaching of the Gospel.’¹¹⁷ The lengthy treatment of same-sex sexual activity comes in Romans 1: 24-28 where Paul talks about how people have turned away from the Creator God and begun to worship instead false gods of their own making.¹¹⁸

Sloan suggests that the early Christian church believed same-sex sexual acts to be abnormal, and thus subject to harsh punishment.¹¹⁹ He further argues that the medieval Christian church believed that homosexuals should be put to death by burning or hanging.¹²⁰ The same position is still held by many Christians today.¹²¹ Uganda’s clergy, comprised of Seventh Day Adventists, the Pentecostal churches, the Orthodox Church and the mufti, expressed their support for the Ugandan Anti-homosexuality Bill that was signed into law early in 2014.¹²² They argued that same-sex sexual act is an evil and is ungodly.¹²³

However, it is curious that the Gospels of Jesus Christ, on whose teachings the Christian church is grounded, say nothing directly about homosexuality.¹²⁴ Jesus Christ also performed acts seemingly in violation of what is stated in the book of Leviticus, for example, in the story

¹¹⁷ 1 Timothy 1:10 The Holy Bible, King James Version.

¹¹⁸ Romans 1: 24-28 The Holy Bible, King James Version.

¹¹⁹ I J Sloan *Homosexual conduct and the law* (1987) 2.

¹²⁰ Sloan (n 119 above) 2.

¹²¹ EY Ako *The debate on sexual minority rights in Africa: A comparative analysis of the situation in South Africa, Uganda, Malawi and Botswana* (LLM thesis University of Pretoria 2010) 32.

¹²² Clergy: ‘Jail gays, don’t hang them’ *The Daily Monitor*, 29 October 2009 1.

¹²³ Clergy: ‘Jail gays, don’t hang them’ *The Daily Monitor*, 29 October 2009 1.

¹²⁴ Nyarang’o (n 108 above) 29.

recorded in the Gospels about a woman caught committing adultery.¹²⁵ Here he seemingly violated the Leviticus directive to stone her to death.¹²⁶

Leviticus calls homosexuality an ‘abomination’ in the same way that it does eating lobster, shrimp or pork, wearing clothes made from more than one fibre, or sowing two seeds in one field.¹²⁷ The question is whether the millions of persons who commit these acts commit an ‘abomination’ and should be shunned.¹²⁸ Christianity, in as far as it is a religion that preaches love for others as for oneself, calls for acceptance and not condemnation. As South African Archbishop Desmond Tutu stated that:

Churches say that the expression of love in a heterosexual monogamous relationship includes the physical, the touching, embracing, kissing, the genital act – the totality of our love makes each of us grow to become increasingly God-like and compassionate. If this is so for the heterosexual, what earthly reasons have we to say that it is not the case with the homosexual?¹²⁹

In the context of Islam, all sexual conduct between unmarried men and women is forbidden.¹³⁰ Sexual conduct that does not involve vaginal intercourse is punishable by the judge’s discretion.¹³¹ Based on the Quran, vaginal intercourse between an unmarried couple is punishable with 100 lashes.¹³²

¹²⁵ John 8:1-11 Holy Bible King James version.

¹²⁶ Leviticus 20:10 Holy Bible King James version .

¹²⁷ Chapter 11:7 Holy Bible King James version.

¹²⁸ Chapter 11:11. Holy Bible King James version .

¹²⁹ ‘Archbishop Tutu supports LGBTI rights full acceptance and inclusion’

<http://leonardoricardosanto.blogspot.com/2011/08/no-gay-rights-in-kenya-human-rights-is.html> (accessed 6 June 2014).

¹³⁰ J Brown ‘How Islam really views homosexuality’ <http://variety.com/2015/voices/opinion/islam-gay-marriage-beliefs-muslim-religion-1201531047/> (accessed on 4 February 2016)

¹³¹ Brown (n 130 above) 2.

¹³² Brown (n 130 above) 2.

The Quran deals expressly with Sodomy also known as *Liwat*.¹³³ The holy book recounts the story of Sodom several times, condemning its people's overall immorality, and specifically criticizing its men for 'going to men out of desire instead of to women.' Sodomy, understood as anal sex, was thus prohibited by the consensus of Muslim scholars since Muhammad's condemnation of anal sex with wives added heterosexual anal sex to this as well.¹³⁴ Muslim scholars set the punishment for anal sex between men as anywhere from a relatively light one at the judge's discretion since Sodomy could not result in illegitimate children, to the same punishment as fornication based on analogy to heterosexual sex, to execution based on a command from Muhammad of disputed authenticity.¹³⁵

Because sexual conduct between women does not involve penetration with a penis, it never received the same legal categorisation as sodomy. Instead, it was known as *Sihaq* meaning grinding. It was prohibited under the general rule against sexual acts outside marriage.

Christianity and Islam have relied on textual analysis to condemn same-sex sexual acts.¹³⁶ The texts were written many years ago and have been left open to different interpretations. For instance, there have been two interpretations given to the events that lead to the destruction of Sodom. One interpretation holds that the moral of the Sodom story is that homosexuality is a sin. The other interpretation insists that the sin punished was that of inhospitality to strangers not same-sex sexual acts. According to this interpretation, the homosexual rape was the means through which the inhabitants of Sodom violated the norm of hospitality. Michaelson argued that to interpret the Sodom story in the book of Genesis as being about homosexuality is like reading

¹³³ Sodomy referred to as *liwat*, named after Lot and his people.

¹³⁴ Brown (n 130 above) 2.

¹³⁵ Brown (n 130 above) 2.

¹³⁶ Interview with Vincent Robi, former Legal Office Committee of Experts Nairobi Kenya on 23 September 2015.

a report of an axe murder as being about an axe.¹³⁷ Nevertheless, the events in Sodom had very little to do with homosexual identity as it is understood in the present day and hardly set any form of precedent in regards to same-sex sexual conduct between consenting adults.

It should be accepted that vast majority of religious leaders agree that homosexuality is sinful. However, it should be noted that there is at least some disagreement among African religious scholars about the meaning of the texts in the Bible and Quran and the correct position from a religious perspective.

In addition, not all Christians are of the view that homosexuality is ungodly.¹³⁸ Some clergy maintain that the African attack on homosexuality is an extension of American culture wars in which Africa is a proxy motivated by funding.¹³⁹ Kaoma, an Anglican pastor from Zambia, has asserted that the rights of homosexuals should be respected and that African churches should avoid fighting American evangelical proxy wars and spreading homophobia in Africa, because of the funding they receive.¹⁴⁰ In 1998 Anglican bishops at a meeting in Canterbury, England issued a resolution in which they stated that while they considered homosexuality incompatible with scripture, they recognised that there are persons who experience homosexual orientation and that the church should minister sensitively to all and denounce unreasonable fear of homosexuals.¹⁴¹ Similarly, the synod of Anglican bishops of Southern Africa has stated that the

¹³⁷ J Michaelson *God vs gay? The religious case for equality* (2011) 68

¹³⁸ Nyarang'o (n 108 above) 29.

¹³⁹ K Kaoma 'Globalising the culture wars, US conservatives, African churches, & homophobia' (2009) 4.

¹⁴⁰ Kaoma (n 139 above) 4.

¹⁴¹ M Dyer 'The official report of the Lambeth Conference' (1999) 381.

rights of homosexuals should be protected because it is contrary to scripture to support or permit discrimination and oppression based on sexual orientation.¹⁴²

Most African countries have constitutions that recognise constitutional supremacy and subscribe to secularism and not ‘religious supremacy’. These constitutions have made a clear distinction between State and religion.¹⁴³ Kenya, South Africa and Uganda have constitutions that proclaim that the people are the source of power.¹⁴⁴ The three Constitutions also guarantee the right to freedom of conscience, religion and belief.¹⁴⁵ In an interpretation of the Constitution, the South African Constitutional Court in *Minister of Home Affairs & Anor v Fourie* stated that:

It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others.¹⁴⁶

This argument is based on the fact that there is no agreement about which religious views and opinions should be followed not only because of a plurality of religions but also that there may be differences between those adhering to the same religion.

¹⁴² Statement from the Synod of Anglican bishops on homophobia, 8-11 February 2010 <http://constitutionallyspeaking.co.za/statement-from-the-synod-of-anglican-bishops-on-homophobia/> (accessed 6 June 2014).

¹⁴³ Article 8 of Kenyan Constitution provides for the separation of state from religion. Article 9 of Ugandan Constitution provides that Uganda shall not adopt a state religion.

¹⁴⁴ Article 1 of the Kenyan Constitution provides that all sovereign power belongs to the people of Kenya. Article 1 of Ugandan Constitution provides for the same.

¹⁴⁵ Article 32 of Kenyan Constitution; article 29 of the Ugandan Constitution; section 15 of the South African Constitution.

¹⁴⁶ *Minister of Home Affairs & Anor v Fourie & Others* 2006(1) SA 524 (CC) para 38 (*Fourie* case).

2.4.3 Homosexuality as a threat to African culture

Political leaders and some members of the public have maintained that homosexuality is an unnatural perversion borrowed from the West, and is hence a threat to African society.¹⁴⁷ They have argued that homosexuality is a foreign concept that threatens the African family and African culture, and is thus ‘un-African’.¹⁴⁸ However there are two counter-arguments to these claims: the first is that there is evidence to contradict the assertion of ‘un-African-ness’ of homosexuality and secondly, that African culture is itself diverse, recognises diversity and embraces inclusiveness.

The other understanding of the claim that homosexuality is un-African can be drawn from an argument that homosexuality does not exist in Africa today. This argument suggests that there are no homosexuals on African soil. It is very easy to counter this argument without any reliance on anthropological studies. This position is aimed at denying gays and lesbians the right to speak as Africans. The question remains: who get to decide who is an African and un-African in Africa? Who defines the debate and gets to speak? It is obvious that homosexuals exist on the African continent and given an opportunity they can share stories of an African identity that includes the fact that they are homosexual. It is rarely possible for any African to claim that he or she does not know or see gays and lesbians around them or within their community. There are openly homosexual Africans. Three people come into mind. Simon Nkoli (a South African gay

¹⁴⁷ ‘Gays are vermin, says Gambia president Yahya Jammeh’ *Euronews* 19 February 2014 <http://www.euronews.com/2014/02/19/gays-are-vermin-says-gambia-president-yahya-jammeh/> (accessed 2 May 2014). President Yahya Jammeh of the Gambia warned that he would cut off the head of homosexuals who fail to leave the country in twenty hours.

¹⁴⁸ Rukweza ‘Is homosexuality really un-African’ <http://www.pambazuka.org/en/category/comment/32974> (accessed 6 June 2014).

activist), Fanny Ann Eddy (a lesbian activist from Sierra Leone who was murdered in 2004) and David Kato (a Ugandan teacher and gay activist who was murdered in 2011).¹⁴⁹

The other proof of the existence of homosexuals in Africa is the number of LGBTI organisations that exists across the continent, including countries that have criminalised same-sex sexual acts, such as Kenya and Uganda. These organisations are formed to advance the protection of the rights of homosexuals. For instance, there is a National Gay and Lesbian Human Rights Commission in Kenya and a Civil Society Coalition on Human Rights and Constitutional Law in Uganda.¹⁵⁰

In addition, the homophobic reaction of religious and political leaders in Africa calling for the denial of rights to gays and lesbians and encouraging further criminalisation of same-sex sexual conduct within their countries paradoxically recognises the presence and existence of homosexuals in the continent. Evidence from court convictions also confirms the fact that homosexuals exist in the continent. For instance, Canaan Banana was convicted with 11 counts of sodomy and indecent assault by a Zimbabwean Court in 1997.¹⁵¹

Scholars have argued against the proposition that homosexuality is a western concept brought to Africa by white colonial masters or Arab slave traders.¹⁵² Murray has given various accounts of

¹⁴⁹ <http://lgbthistorymonth.com/simon-nkoli?tab=biography> (accessed on 17 May 2016); BBC News 'Sierra Leone Gay activist killed' 5 October 2004 <http://news.bbc.co.uk/2/hi/africa/3716768.stm> (accessed on 17 May 2016); The New York Times 'Ugandan who spoke up for gays is beaten to death' 28 January 2011 http://www.nytimes.com/2011/01/28/world/africa/28uganda.html?_r=0 (accessed on 17 May 2016).

¹⁵⁰ <https://76crimes.com/tag/national-gay-and-lesbian-human-rights-commission/> (accessed on 17 May 2016); <https://76crimes.com/tag/civil-society-coalition-on-human-rights-and-constitutional-law/> (accessed on 17 May 2016).

¹⁵¹ *Kanane v The State* (2000) 4 LRC 621.

¹⁵² Nyarang'o (n 108 above) 27.

cultural practices throughout Africa showing that same-sex conduct took place before colonialism.¹⁵³ Other studies show that sexual relations between men may not have been institutionalised in all instances, but they were certainly practised and largely tolerated.¹⁵⁴ For instance, among the Buganda, Iteso, Langi and Banyoro of East Africa, homosexuality was generally practised; certain males were considered female and could marry other males.¹⁵⁵ Similarly, there are reports of a number of instances of same-sex sexual conduct among the Swahili speakers of the Kenyan coast.¹⁵⁶

The argument appears to be that even if homosexuality existed or exists, it should not exist and tolerated in Africa. The portrayal of homosexuality as un-African and foreign is, therefore, quite incorrect and ignores important historical facts.¹⁵⁷ In addition, it has been argued that there is no such thing as a unitary 'African culture'. Africa is not homogenous and within it are various

¹⁵³ S O Murray 'Homosexuality in traditional Sub-Saharan Africa and contemporary South Africa' in SO Murray & W Roscoe (eds) *Boy-wives and female husbands: Studies on African homosexuality* (1998) 1-18.

¹⁵⁴ EE Evans-Pitchard 'Sexual inversion among the Azande' (1970) 72 *American Anthropologist* 1428-1434; M Roscoe 'The Mamlukes' in SO Murray (ed) *Cultural diversity and homosexuality* (1997) 213-219.

¹⁵⁵ Tamale (n 78 above) 10; J Lawrence *The Iteso: Fifty years of change in Nilo- Hermitic tribe of Uganda* (1957) 24; J Driberg *The Lango: A Nilotic tribe of Uganda* (1923) 46; Muchanga 'The Nkole of South western Uganda' in A Molnos (ed) *Cultural source materials for planning in East Africa* (1973) 87; R Needlam *Right and left in Nyoro symbolic classification* (1973) 67. Other examples include: Among the Shona community girls were allowed to engage in mutual sex play, a practice that involved stretching their labia majora through constant pulling. In the same community same sex sexual conduct by men served a number of purposes, including medicinal. (Sex between men was seen as a cure for impotence.) It also was said to improve soil fertility as well as advance political and economic ambitions among the Shona community. Among the Pangwe of present-day Cameroon male-male sexual intercourse was a practice that was well known as being 'wealth medicine'. Among Yoruba and Ovimbundu communities anal penetration by a cult priest was a form of initiation, as well as a transfer of knowledge and power. In such cases the initiates had no option but submit to the demand as it was a rite of passage.

¹⁵⁶ S O Murray 'Homosexuality in traditional Sub-Saharan Africa and contemporary South Africa' in SO Murray & W Roscoe (eds) *Boy-wives and female husbands: Studies on African homosexuality* (1998) 80; see also D Kuria *Understanding homosexual people in pre-colonial Kenya* (2005)108-109; N Sussman 'Sex and sexuality in history' in BJ Sadock et al *The sexual experience* (1976) 7.

¹⁵⁷ Nyarang'o (n 108 above) 28.

cultures and practices. In addition, culture is not static but changes over time in response to developments within society.¹⁵⁸

It is important to explore aspects of African culture that accommodate the idea of homosexuality.¹⁵⁹ Hence instead of dismissing views against homosexuality as backward and insular, it would be more productive to identify values within African culture that promote inclusiveness.¹⁶⁰ Since there is no homogeneous ‘African culture’ as such, one can point to the duty to respect and protect diversity, dignity and equality as values in diverse and constantly changing societies.¹⁶¹ As suggested by Oloka-Onyango, the claim that criminalising same-sex sexual act protects African identity can be challenged by promoting the understanding of ‘culture’ from a broader perspective.¹⁶² This would accommodate various cultures in acknowledgement of diversity in gender, race and other identities which, taken together, constitute the African cultural identity.¹⁶³

2.5 Impact of colonialism on homosexuality in Africa

When the first missionaries and colonialists set foot on African soil, same-sex sexual practices had been in existence within African societies.¹⁶⁴ Colonialism brought with it homophobia, the fear and hatred of homosexuality expressed through enforced colonial laws that sought to punish ‘unnatural’ sexual activities and through missionaries who came to propagate the Christian

¹⁵⁸ CI Nyamu ‘How should human rights and development respond to cultural legitimisation of gender hierarchy in developing countries?’ (2000) 41 *Harvard International Law Journal* 381.

¹⁵⁹ Nyarang’o (n 108 above) 28.

¹⁶⁰ Nyarang’o (n 108 above) 29.

¹⁶¹ IR Gunning ‘Arrogant perception world travelling and multi-cultural feminism: The case of female genital surgeries’ (1992) 23 *Columbia Human Rights Law Review* 203.

¹⁶² Oloka-Onyango ‘Who is watching big brother? Globalisation and the protection of cultural rights in present day Africa’ (2005) 27 *Human Rights Quarterly* 1248.

¹⁶³ Oloka-Onyango (n 162 above) 1250.

¹⁶⁴ M Epprecht *Male-male sexuality in Lesotho: two conversations* (2002) 13.

gospel.¹⁶⁵ However, it has been argued that homosexuality remained entrenched in African societies, even with the legislation penalising same-sex relations.¹⁶⁶ This section considers the impact of the colonialism on homosexuality in Africa.

The entry of Europeans into Africa was at the onset motivated by the desire to expand economically.¹⁶⁷ European colonialists were aggressively interested in the colonies' natural and human resources.¹⁶⁸ They wanted to exploit economic resources but do so more cost effectively by keeping costs down through not compensating the African labourers fully for the cost of production.¹⁶⁹ Ironically the entrenchment of the colonial masters was very much aided and assisted by African allies.¹⁷⁰ In the mid to late nineteenth century, a great division of Africa into various colonial empires ensued.¹⁷¹ This was abetted by African collaborators who helped keep the colonial system afloat.¹⁷² African traditional elites from the pre-colonial times were incorporated into the colonial systems.¹⁷³ In the long term, this influenced the permissible gender roles and sexual practices of African people.¹⁷⁴

After creating colonial boundaries, a further step of the colonisers was to ban customs and practices that were deemed offensive to European sensibilities and to the European way of life.¹⁷⁵ Taxes were then implemented which drove people to become labourers employed in the

¹⁶⁵ M Epprecht *Heterosexual Africa? The history of an idea from the age of exploration to the age of AIDS* (2008) 45.

¹⁶⁶ Murray (n 153 above) 82.

¹⁶⁷ Epprecht (n 165 above) 122.

¹⁶⁸ Epprecht (n 165 above) 147.

¹⁶⁹ Epprecht (n 165 above) 122.

¹⁷⁰ The Arabs of Sudan played a big role in the entry of the British into continental Africa.

¹⁷¹ J Iliffe *Africans 'the history of a continent* (1996) 36.

¹⁷² Iliffe (n 171 above) 36.

¹⁷³ Iliffe (n 171 above) 36.

¹⁷⁴ Iliffe (n 171 above) 36.

¹⁷⁵ Witchcraft and child marriage, were the key notable practices that were actively curtailed.

cash economy in order to earn sufficient income to pay the requisite taxes.¹⁷⁶ Patriarchal tribal authorities were reinforced to provide a cultural buffer between Africans and the colonial authorities.¹⁷⁷ The requirement to pay taxes drove African men to sign up for employment in labour camps.¹⁷⁸ This in turn led to the responsibility of taking care of the home and of children shifting entirely to women, who were neither allowed in the labour camps, nor into other areas of employment that were far away from their homes.¹⁷⁹

The colonial era was a time when the colonial masters became involved in policing Africans' sexuality.¹⁸⁰ They tried to keep African women out of urban centers.¹⁸¹ They also kept migrant African men away from local African women.¹⁸² They tried to destroy possible meeting places where men and women could meet to imbibe alcohol or to engage in sex.¹⁸³ These new strategies for controlling the movement and social behaviour of Africans gave birth to new forms of outlawed behaviour among the urban population. One of the behaviours that emerged was male-male relationships.¹⁸⁴ For example, sexual relationships developed between older and younger men in the mining compounds of Johannesburg in South Africa in the late nineteenth and early twentieth centuries. These were commonly referred to as 'mine marriages'.¹⁸⁵ Some migrant men who were away from their families for months and possibly years took young men as servants and 'wives' for the time that they worked in the mines.¹⁸⁶ This strategy was a way of avoiding engaging in sex with commercial sex workers in the city, fraught with the risks of sexually

¹⁷⁶ Epprecht (n 165 above) 122.

¹⁷⁷ Epprecht (n 165 above) 122.

¹⁷⁸ Epprecht (n 165 above) 123.

¹⁷⁹ Epprecht (n 165 above) 123.

¹⁸⁰ R Chigweshe *Homosexuality: A Zimbabwean religious perspective* (1996) 45

¹⁸¹ Chigweshe (n 180 above) 46.

¹⁸² Chigweshe (n 180 above) 47.

¹⁸³ Epprecht (n 165 above) 123.

¹⁸⁴ M Van Zyl 'Are same-sex marriages un-African? Same-sex relationships and belonging in post-apartheid South Africa' (2011) 67 *Journal of social issues* 339.

¹⁸⁵ Van Zyl (n 184 above) 342.

¹⁸⁶ Murray & Roscoe (n 156 above) 123.

transmitted infections (STIs). Such migrant workers also wanted to return home healthy and free of STIs.¹⁸⁷

Colonial masters were compelled to find additional ways of controlling these new forms of sexual behaviour. The colonial authorities imported means and legislation to catch and punish men who engaged in same-sex sexual behaviour in the labour camps. Hence anti-sodomy legislation was imported into the African continent. For example, the British adapted their original legislation from colonial India that had criminalised acts of penetration that were ‘against the order of nature with the addition of new terms such as indecent assault, soliciting, gross indecency, and *crimen injuria* so as to punish consenting, private and non-penetrative activities’ that the administration did not approve of¹⁸⁸. This saw the birth of anti-homosexuality laws on the African continent.¹⁸⁹

During the colonial period the practice of homosexuality was to some extent influenced by the presence of the colonialists and the conditions created by the colonial administrations.¹⁹⁰ However, much same-sex sexual behaviour continued to be practised just as it had been prior to colonialism.¹⁹¹ Alongside such behaviour, legislation penalising same-sex sexual activities was enforced and homophobic attitudes persisted among political and religious leaders as well as members of the public.¹⁹² Same-sex sexuality was seldom a serious topic of conversation

¹⁸⁷ Van Zyl (n 184 above) 342.

¹⁸⁸ Epprecht (n 165 above) 128.

¹⁸⁹ These laws criminalised acts like penetration against the order of nature. Over time and after the laws experiences Africa, terms like indecent assault, gross indecency were developed into the criminal law of most African colonies. This demonstrates a direct link between colonization and homophobia in the continent.

¹⁹⁰ D Smith ‘Why Africa is the Most Homophobic Continent’ <http://www.theguardian.com/world/2014/feb/23/africa-homophobia-uganda-anti-gay-law> (Accessed 6 April 2014).

¹⁹¹ D Smith (n 190 above) 2.

¹⁹² D Smith (n 190 above) 2.

between Africans.¹⁹³ The absence of discussion of homosexuality is attributed to various reasons but predominantly it reflected traditional taboos or silences and, even more so, colonial and Christian missionary intolerance of same-sex sexuality.¹⁹⁴ From colonial times to the present day, the colonial narratives of same-sex discrimination and homophobia have been very closely intertwined.¹⁹⁵ It is one of the great ironies of Africa that so many Africans have internalised the homophobia of this colonial oppression, and now proclaim it as their own authentic African tradition.¹⁹⁶

At the peak of colonialism in the late nineteenth and early twentieth centuries, the continuous stream of European settlers and missionaries meant that homophobia premised upon scientific, religious and cultural justifications in Europe spilled over into Africa.¹⁹⁷ Apart from negative religious, cultural and scientific connotations, homosexuality was also equated with weakness and effeminacy in men.¹⁹⁸ Effeminacy was particularly frowned upon by the colonialists because they required African subjects with an aggressive masculinity and machismo to fight off the enemies of their empires.¹⁹⁹ European settlers also expressed their disapproval of lesbianism harshly and justified this through their perception of women's roles as being primarily as mothers required to raise the next generation.²⁰⁰ This perception stemmed from the prevalent

¹⁹³ K. Ward 'Same sex relations in Africa and the debate on homosexuality in east African Anglicanism' (2002) 83 *Anglican theological review* 81.

¹⁹⁴ K. Ward 'Eating and sharing: Church and the state in Uganda' (2005) 3 *Journal of Anglican studies* 99.

¹⁹⁵ J Mudavanhu 'The attitude of the Methodist church in Zimbabwe to homosexuality: towards a socio-theological investigation' (PhD thesis university of Birmingham) 2010 68.

¹⁹⁶ D Smith (n 190 above) 2.

¹⁹⁷ Epprecht (n 165 above) 128.

¹⁹⁸ Epprecht (n 165 above) 126.

¹⁹⁹ Epprecht (n 165 above) 125.

²⁰⁰ 'Gender, Race, and Class in the Colonial Era' http://www.pearsonhighered.com/assets/hip/us/hip_us_pearsonhighered/samplechapter/0205743153.pdf (Accessed 6 April 2014).

sentiments at the time in Europe, which were that women were needed to bring up the future generation of patriots and colonialists to take on the ‘wild’ African frontier.²⁰¹

Colonialism did not introduce homosexuality to Africa. It did introduce a vicious intolerance of homosexuality, together with laws that sought to punish any sexual activity that was against ‘the order of nature’.²⁰² Such attitudes were fostered by growing homophobia and legislation that opposed male same-sex behavior in Europe in the late nineteenth and early twentieth centuries.²⁰³ Despite such legislation being introduced into African colonies, homosexuality was still rife in African societies, in some cases being accepted by members of the colonised society but widely frowned upon by the colonial administrations.²⁰⁴ It also needs to be pointed out that there is no evidence that most African societies had any form of judicial punishment for same-sex sexual activities during the pre-colonial and colonial periods.²⁰⁵

As most African colonies attained independence, colonial legislation that had been introduced against homosexual behaviour was retained by post-colonial governments. In fact, over time, in some cases harsher laws against same-sex sexual conduct have been introduced in some independent African countries.²⁰⁶ Hence today, we see more punitive laws penalising same-sex sexual behaviour in countries such as Uganda and Nigeria. In fact, legislation criminalises same-sex sexual activities in almost all African countries.²⁰⁷

²⁰¹ Hassett (n 110 above) 10.

²⁰² J W Chacko ‘The masculine subject of colonialism: Egyptian loss of Sudan’ in L Ouzgane & R Morrell (eds) *African masculinities: men in Africa from the late nineteenth century to the present* (2005) 154.

²⁰³ C Stewart, ‘21 Varieties of Traditional African Homosexuality’ <http://76crimes.com/2014/01/30/21-varieties-of-traditional-african-homosexuality/> (accessed 11 June 2014).

²⁰⁴ A Jjuuko, *The incremental approach: Uganda’s struggle for the decriminalization of homosexuality* (2012) 382.

²⁰⁵ Chacko (n 202 above) 154.

²⁰⁶ Jjuuko (n 204 above) 382.

²⁰⁷ Jjuuko (n 204 above) 382.

2.6 Conclusion

This chapter has discussed various arguments for and against the criminalisation of same-sex sexual conduct in Africa. It has described how most African states and leaders believe that homosexuality did not exist on the continent until the colonial authorities imported it. This has been given as one of the justifications for the continued criminalisation of same-sex sexual conduct on the continent. Most religious leaders have treated homosexuals as sinners and regarded same-sex sexual practices as sinful and demonic, resulting in increased homophobia among practising Christians. However, this chapter has also provided evidence that throughout history human beings in Africa have explored same-sex sexuality. Therefore, it is homophobia and anti-homosexuality laws and not homosexuality itself that was imported into Africa during colonial times.

The next chapter critically examines the role of international law norms in the decriminalisation of same-sex sexual conduct. It provides an analysis of international and regional human rights instruments, relevant standard setting institutions and emanating jurisprudence from international and regional tribunals. The role of international law mechanisms is critical in pushing for the decriminalisation of same-sex sexual conduct at the national level.

CHAPTER THREE

INTERNATIONAL LAW POSITION ON DECRIMINALISATION OF HOMOSEXUALITY

3.1 Introduction

Chapter two discussed justifications given by states for the criminalisation of same-sex sexual acts in Africa. The prohibition by criminal law of same-sex sexual acts between consenting adults amounts to an interference with enjoyments of the rights of homosexuals.¹ This chapter aims to find out whether sodomy laws constitutes a violation of the right to non-discrimination and the right to privacy as guaranteed in international and regional human rights instruments. The questions the chapter seeks to address are: (i) Whether criminalisation of same-sex sexual conduct amounts to a violation of the right to non-discrimination and the right to privacy as guaranteed under international and regional human rights instruments and (ii) What rationales justify the extension of human rights protection to homosexuals by international and regional human rights bodies?

The chapter is divided into two main sections. The first section discusses international practice in interpreting and applying the right to non-discrimination based on sexual orientation and the right to privacy of homosexuals. There is some progress that has been made in the recognition of such rights by international and regional human rights treaty bodies with an aim of protecting homosexuals. However, such recognition varies from one region to another. These rights will be discussed separately for purposes of clarity and easy understanding of the different approaches

¹J Donnelly, 'Non-Discrimination and Sexual Orientation: Making a Place for Sexual Minorities in the Global Human Rights Regime' in Baehr et al. (eds), *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights* (1999) 13.

taken in interpreting and applying these rights by the international human rights bodies. The right to non-discrimination will be discussed first. This will be followed by a discussion on the right to privacy. The rights to non-discrimination and privacy will be examined under the United Nations (UN) system and regional (European, American and African) human rights systems.

The second section of the chapter critically analyse the rationales given by international and regional human right bodies to justify the extension of human rights protection to homosexuals. In this section the chapter will examine two justifications and the extent of their compatibility: (i) The international and regional bodies have treated homosexuals as a sexual minority group that is in need of special protection by international human rights law. Under this approach, the right to non-discrimination and the right to privacy are extended to homosexuals and their sexual activities on the basis of the perception of these groups as particularly disadvantaged and socially and politically underrepresented. (ii) There should be substantive limitations to state regulation of same-sex sexual activity between consenting adults in private. This is because such sexual preferences and practices do not show any tangible harm to identifiable persons. This approach is based on ‘the harm principle’ to invalidate state interference in or discrimination against homosexuals.

The following section discusses the international practice in interpreting and applying the right to non-discrimination and the right to privacy to attack the penal laws that criminalise same-sex sexual conduct. It starts with the right to non-discrimination.

3.2 International practice: interpretation and application

3.2.1 Non-discrimination

The principles of non-discrimination and equality are present in all international and regional human rights instruments.² The twin principles are considered as basic and fundamental for protection of human rights for all.³ Equal protection is the principles that all individuals have the right to have the laws of a specific jurisdiction apply to them in the same manner as those laws are applied to other similarly situated individuals.⁴ Non-discrimination is the principle that instruments of the state or private parties shall not discriminate among individuals based upon arbitrary criteria.⁵ Discrimination on grounds of sexual orientation is a particularly malicious denial of dignity and equality since it strikes at sexual intimacy, the very core of an individual's identity and wellbeing.⁶ It involves the basic right to the free development of one's personality.⁷

There are three bases upon which to establish that the rights of homosexuals to equal protection and non-discrimination have been violated.⁸ Firstly, it is when a state makes certain acts between members of the same sex illegal while permitting the same acts between heterosexuals.⁹ Secondly, it is when a state discriminates against homosexuals in its application of a law, which looks neutral on its face in terms of its application to heterosexuals or homosexuals.¹⁰ Lastly, it is when rights are either given or denied to individuals on the basis of their sexual

²P Craig *Discrimination law* (2011) 88.

³Donnelly (n 1 above) 17.

⁴E Heinze *Sexual Orientation: A Human Right* (1995) 47.

⁵Heinze (n 4 above) 47.

⁶J Donnelly 'The relative universality of human rights' (1996) 9 *Human Rights Quarterly* 61.

⁷Craig (n 2 above) 87.

⁸Donnelly (n 6 above) 60.

⁹S Fredman *Discrimination law* (2011) 89.

¹⁰Fredman (n 9 above) 89.

orientation.¹¹ This thesis focuses on the first base, where same-sex sexual activity is criminalised while sexual activity between persons of opposite sex is permitted.

The push for decriminalisation of same-sex sexual conduct rests on the argument that the distinction between persons of homosexual orientation and heterosexual orientation by unjustified criminal prohibitions goes against the principle of non-discrimination and equality as stated in international human rights law.¹²

All international human rights instruments contain provisions on non-discrimination and equality.¹³ Article 2 of the International Covenant on Civil and Political Rights (ICCPR) provides for equality and non-discrimination as follows:

All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁴

Articles 2 and 3 of the International Covenant for Economic, Social and Cultural Rights (ICESCR) provide for the right to equality and non-discrimination to all.¹⁵ Article 2 of International Convention on the Rights of the Child (CRC) guarantees equal rights to all children

¹¹ B Anne 'The principle of non-discrimination in international law' (1990) 19 *Human Rights Quarterly* 234. An example of this might be discrimination in employment where an individual is fired from employment solely because of his homosexuality.

¹² J Donnelly *Universal human rights in theory and practice* (2003) 238.

¹³ Article 2 of ICESCR, article 2 of CRC; article 1 of CAT; article 1 of the convention on the protection of the rights of all migrants' workers and members of their families (CMW); article 14 of ECHR; article 2 and 3 of the ACHPR; and article 1 and 24 of ACHR.

¹⁴ Articles 2(1) and 3 of ICCPR.

¹⁵ Article 2 and 3 of ICESCR.

without discrimination of any kind.¹⁶ The International Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and International Convention on the Elimination of all forms of Racial Discrimination (ICERD) equally contain provisions on equality and non-discrimination.¹⁷ However these two human rights instruments focus on the particular issues of women and racial discrimination respectively.

Regional human rights instruments also guarantee the right to equality and non-discrimination. Article 14 of the European Convention on Human Rights (ECHR) provides for the enjoyment of the rights in the Convention ‘without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’¹⁸ The principles of equality and non-discrimination are provided for in articles 1(1) and 24 of the American Convention on Human rights (ACHR).¹⁹ In the African Charter on Human and Peoples’ Rights (ACHPR), articles 2 and 3 guarantee equal rights without discrimination.²⁰

The legal basis for the principle of non-discrimination is clearly provided in human rights treaties, though they do not provide a definition for it. What does the notion of non-discrimination mean in international human rights law? The theoretical basis for the idea of equality and non-discrimination is captured by Aristotelian philosophy which states ‘things (and persons) that are alike should be treated alike, while things (and persons) that are unlike should be treated unlike in proportion of their unlikeness’.²¹ This concept requires individuals in the

¹⁶Article 2 of CRC.

¹⁷Article 1 of CEDAW, article 1 of ICERD.

¹⁸Article 14 of ECHR.

¹⁹Articles 1(1) and 24 of ACHR.

²⁰Articles 2 and 3 of ACHPR.

²¹R Wintemute & M Andenaes *Legal recognition of same-sex partnerships* (2001) 113.

same situation to be treated alike, regardless of the broader context within which the treatment may occur.²²

The Universal Declaration of Human Rights (UDHR) provides that ‘all human beings are born free and equal in dignity’ and ‘everyone is entitled to the rights and freedoms provided in the declaration without distinction of any kind such as race, colour, sex, language, national and social origin, religion, political or other opinion, property, birth and other status’.²³ Article 7 provides further that everyone is equal before the law and is entitled to equal protection of the law without discrimination.²⁴ These provisions are merely statements of principle and offer no clear meaning for the principle of equality and non-discrimination.²⁵

The UN Sub-Commission on the Prevention of Discrimination and Protection of Human Rights failed to define the principles of equality and non-discrimination.²⁶ The Sub-Commission only described the prevention of discrimination as any action that denies to individuals or group of

²² Fredman (n 9 above) 86.

²³ Article 2 of UDHR. UDHR is a declaration adopted by the UN General Assembly. Under international law, declarations are not treaties and therefore are generally not binding. However, the UDHR provides a definition of the human rights provisions of the UN Charter. As such, its provisions are arguably binding on UN members for two reasons. The first reason is because it provides the substantive human rights content to the UN Charter, which is a binding treaty. Secondly, its provisions have become so accepted by nations, courts and organisations that at least some of the UDHR provisions have risen to the status of customary international law that binds all nations, whether members of the UN or not. The UDHR is very clear on applicability of its provisions to all people. It has a general equality and non-discrimination provision: Article 2 provides that ‘everyone is entitled to all rights and freedoms set forth in this Declaration without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. In addition, virtually every positive right begins with the word ‘everyone’ while negative rights begin with the word ‘no one’. This means the provisions confer positive rights to all and at the same time prohibit negative rights to all.

²⁴ Article 7 of UDHR.

²⁵ K R Tatah *‘Between protection and prosecution: exploring international human rights laws for the decriminalisation of homosexual conduct between consenting adults’* LLM Thesis Institute for Human Rights Abo Akademi University 2014 10.

²⁶ The commission, which before 1999 was known as the sub-commission on the prevention of discrimination and protection of minorities, was formed in 1947 under the auspices of the economics and social council. The commission had a responsibility, particularly in the light of universal declaration of human rights and to make recommendations to the commission concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and protection of racial, national, religious and linguistic minorities. It was a think tank of the UN Commission on human rights. The sub-commission was replaced in 2006 with the advisory committee of the UN Human Rights Council.

individuals the equality of treatment they may desire.²⁷ UDHR lays out the principles of equality and non-discrimination under articles 2 and 7. Article 2 provides ‘everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’²⁸ Article 7 provides ‘all are equal before the law and are entitled without any discrimination to equal protection of the law.’²⁹ Although the declaration is a non-binding legal instrument, its soft law nature has been established and principles outlined in the declaration are said to be part of international customary law.³⁰

Articles 1 of both ICERD and CEDAW define the principle of non-discrimination. These treaties in similar terms state that discrimination:

(...) shall mean any distinction, exclusion or preference based on a number of grounds including race, colour, sex, religion, political opinion, national extraction or social origin with the effect of nullifying or impairing equality of opportunity or treatment.³¹

It follows that the term discrimination is a distinction or differentiation, exclusion or a preference in treatment that is based on certain social attributes or characteristics and its effect is to nullify or impair equality of treatment. This definition support Aristotle’s concept of equality that requires individuals in the same situation be treated alike.

²⁷Tatah (n 25 above) 11.

²⁸Article 2 of UDHR.

²⁹Article 7 of UDHR.

³⁰H Waldock *Human rights in contemporary international law and significance of the European convention* (1983) 274. It has been argued that the UDHR provides a definition of the human rights provisions of the UN Charter. As such, its provisions are arguably binding on UN members for two reasons. The first reason is because it provides the substantive human rights content to the UN Charter, which is a binding treaty.³⁰ Secondly, its provisions have become so accepted by nations, courts and organisations that at least some of the UDHR provisions have risen to the status of customary international law that binds all nations, whether members of the UN or not

³¹Article 1 of CEDAW, article 1 of CERD.

Article 1 of ICERD and article 1 of CEDAW differ from provisions on discrimination in other human rights treaties, in the sense that other treaties use the term discrimination without stating its meaning. In addition, they focus on the grounds upon which treatment would amount to discrimination for purposes of the treaty in question.³² The definition and scope of the principle is provided by the human rights treaty bodies that are responsible for monitoring the implementation of the rights guaranteed in the various human rights instruments.

Though ICERD and CEDAW are human rights treaties dealing with discrimination against a specific issue of race and women respectively, the definition of discrimination provided by these treaties has been regarded as very valuable in providing the meaning of the principle adopted by other human rights treaty bodies. For instance, the UN Human Rights Committee (HRC) that is responsible for monitoring the ICCPR, in issuing General Comment No. 18 on non-discrimination, stated that:³³

While these conventions (ICERD and CEDAW) deal only with cases of discrimination on specific grounds, the Committee believes the term ‘discrimination’ as used in the covenant is understood to imply any distinction, exclusion, restriction or preference which is used on any ground such as race, colour, sex, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise by all persons, on an equal footing of all rights and freedoms.

³² HRC in General Comment No. 18 in para 6 admitted the absence of the definition of the term discrimination in the ICCPR. HRC stated that the Committee notes that the Covenant neither defines the term discrimination nor indicates what constitutes discrimination.

³³HRC General Comment No. 18 on non-discrimination para 7 (thirty-seventh session, 1989), compilation of general comments and general recommendations adopted by human rights treaty bodies, U.N. Doc HRI/GEN/1/Rev 1 at 26 (1994).

Thus, it can be construed from the above discussion that discrimination comprises of a difference in treatment based on certain grounds. This differential treatment has certain negative impacts on the enjoyment of human rights. In the context of criminalisation of same-sex sexual conduct, it can be argued that criminal laws that target same-sex sexual activities and homosexual individuals only (excluding heterosexual sexual activities) amounts to differential treatment, hence this treatment is discriminatory. For example, in determining the existence of a difference in treatment that is discriminatory, the Hong Kong Court of Appeal in *Secretary of Justice v Yau Yuk Lung Zigo* stated that section 118F(1) of the Crime Ordinance criminalising homosexual buggery and not heterosexual buggery amounted to differential treatment that required justification.³⁴

The question to be considered at this point is whether sexual orientation is a prohibited ground of discrimination, thus impacting on the enjoyment of the rights and freedoms guaranteed in the various international and regional human rights instruments. Since these treaties do not list sexual orientation as a prohibited ground of discrimination, the focus now turns to the jurisprudence adopted by international human rights treaty bodies.

3.2.2 Sexual orientation as a prohibited ground

There is a growing jurisprudence that identifies a significant application of sexual orientation as a prohibited ground of discrimination under international human rights law, as well as regional human rights instruments. This section will analyse the different approaches taken by human rights treaty bodies in establishing their jurisprudence at both UN and regional levels. It will also look at resolutions and special mechanisms employed by the UN to protect the rights of homosexuals.

³⁴*Secretary of Justice v Yau Yuk Lung Zigo* final appeal of the Hong Kong Special Administrative Region No. 12 of 2006.

Recently, human rights treaty bodies have been referring to discrimination on grounds of sexual orientation. It is a concept which they have incorporated in their course of interpreting the rights guaranteed in the treaties for the enjoyment of all human beings. There are a number of approaches taken by different human rights treaty bodies to incorporate sexual orientation as a prohibited ground. First, some bodies have relied on the listed prohibited grounds of discrimination and argued that the list is not exhaustive since treaty provision use terms such as ‘ground such as’, ‘including’ or ‘other status’.³⁵ They have argued that these are open-ended clauses that could cover other circumstances that may arise that are not included in the law.³⁶ This argument gives the judges the discretion to extend the list to grounds that are not covered, such as sexual orientation. This approach is supported by Donnelly who argued that:

If the text cannot be changed directly and explicitly, we need to rely instead on interpretation. Sexual orientation is on the face an obvious case of an ‘other status’ by which human beings are singled out for invidious discrimination. The idea would be to emphasize that the list of explicitly prohibited grounds in article 2 is illustrative, not exhaustive, and that there remain a number of other status that are still widely used to justify invidious public discrimination.³⁷

Those bodies that have adopted this approach are the Committee on Economic, Social and Cultural Rights (CESCR), the European Court of Human Rights (ECtHR) and the Inter-American Court on Human Rights (IACHR).

Secondly, other bodies, such as the HRC, in interpreting the ICCPR have taken a totally different approach to the question of sexual orientation as a prohibited ground of discrimination. They have relied on the concept of ‘sex’ rather than ‘other status’ as the legal basis for the

³⁵ M Thomas ‘Teetering on the blink of equality: sexual orientation and international constitutional protection’ (1997) 366 *Boston College Third World Journal* 380.

³⁶ Thomas (n 35 above) 380.

³⁷ Donnelly (n 6 above) 238.

incorporation of sexual orientation as a prohibited ground for discrimination.³⁸ Lastly, some human rights treaty bodies have condemned discrimination on the basis of sexual orientation without providing the legal premise upon which they make their conclusions or by simply not indicating the particular ground of discrimination in the treaty under which the concept of sexual orientation falls.³⁹ This has been expressed through general comments and concluding observations to state reports issued by the Committee on the CRC, the Committee on the Convention against Torture (CAT) and the Committee on CEDAW.

3.2.3 Sexual orientation at the UN level: Decisions and General Comments

The question of decriminalisation of same-sex sexual conduct has received the most extensive attention in the work of the HRC, a monitoring body under the ICCPR.⁴⁰ In the individual communication, *Toonen v Australia* in 1994, it considered that word ‘sex’ in articles 2(1) and 26 has to be interpreted as including sexual orientation.⁴¹ The HRC thus decided that sexual orientation-related discrimination is a suspect category in terms of enjoyment of the rights outlined in articles 2 and 6 of the Covenant.⁴² However the Committee was very categorical that discrimination on the basis of sexual orientation, as is the case for all other grounds for non-discrimination listed in articles 2 and 26, is legitimate if it is based on reasonable and objective grounds.⁴³

The same position was reaffirmed in 2002 in a subsequent case of *Joslin v New Zealand* where the Committee categorically stated that the prohibition against discrimination on the basis of sex

³⁸E Mittelstaedt ‘Safeguarding the rights of sexual minorities: The incremental and legal approaches to enforcing international human rights obligations’ (2008) 9 *Chicago Journal of International Law* 364.

³⁹Thomas (n 35 above) 386.

⁴⁰Mittelstaedt (n 38 above) 367.

⁴¹*Toonen v Australia* communication no 488/1992, UN Human Rights Committee (31 March 1994) UN Doc No CCPR/C50/D/488/1992, IIRR 97 para 8.5.

⁴²*Toonen* para 8.7.

⁴³*Toonen* para 8.9.

provided for in article 26 includes discrimination on the basis of sexual orientation.⁴⁴ The European Court of Justice in *Grant v South West Trains Ltd* has criticised the reliance on the sex category, on the basis that matters of sexual orientation are substantively different from binary men/women issues which the category of sex is supposed to address.⁴⁵ However in support of the Committee's approach, it has been argued that much discrimination on the basis of sexual orientation is directed against those who violate social or cultural conceptions of gender.⁴⁶ Moreover, it has been argued that sexual discrimination has been given a higher status in the ICCPR based on the fact that article 3 of the ICCPR address equality between men and women in its application. Thus the reliance on the 'sex' category appears to elevate the sexual orientation-related discrimination. This could be the reason why Donnelly has described the HRC's approach as radical and provocative.⁴⁷ This particular approach has avoided the reliance on 'other status' in the absence of a clearly listed prohibited ground of discrimination on the basis of sexual orientation.

The cases of *Young v Australia* and *X v Colombia* further illustrate the application of the HRC's approach to non-discrimination.⁴⁸ In both cases, the HRC has questioned the distinction in law between same-sex partners who were excluded from pension benefits and unmarried heterosexual partners who enjoyed such benefits. It held that such distinction amounted to discrimination on the basis of sexual orientation which is prohibited under the ICCPR.

⁴⁴ *Joslin v New Zealand* UN Doc CCPR/C/75/D/002/1999 Communication no. 902/1999 (2003); 10 IHRR 40 (2003)

⁴⁵ *Grant v South West Trains Ltd* Co 249/96 (1998) ECR I – 621 (1998) 1 CMLR 993. In this case the European Court of Justice criticised HRC's decision in *Toonen* as one that did not reflect the generally accepted interpretation of discrimination based on sex under international human rights instruments.

⁴⁶ M O'Flaherty & J Fisher 'Sexual orientation, gender identity and international human rights law: contextualising the Yogyakarta principles' Human Rights Law Review 2008 8 217.

⁴⁷ Donnelly (n 1 above) 78.

⁴⁸ *Young v Australia* UN Doc. CCPR/C/78/D/94/2000 Communication No. 1361/2005; *X v Colombia* CCPR/C/89/D/1361/2005 14 May 2007.

In reviewing state reports, the HRC has repeatedly raised the issue of discrimination on the basis of sexual orientation. In its review of these reports in the last 10 years the HRC has constantly criticised the criminalisation of same-sex sexual conduct between consenting adults in private and called on States to decriminalise same-sex sexual conduct through reviewing their statutory provisions that provide for sodomy laws.⁴⁹

The CESCR has dealt with the matter in its General Comments, the interpretive texts it issues to explicate the full meaning of the provisions of the covenant.⁵⁰ In its General Comments it has stated that sexual orientation is a prohibited ground of discrimination under the Covenant.⁵¹ It has argued that article 2(2) of the Covenant contain ‘other status’ as a prohibited ground of discrimination, which is an open ended clause to be interpreted to include sexual orientation. In General Comment No. 20 of 2009 on non-discrimination the Committee stated that the term ‘other status’ as recognised in article 2(2) includes sexual orientation and called on state parties to ensure that an individual’s sexual orientation does not act as a barrier to the realisation of rights outlined in the Covenant.⁵² The same position was taken by the Committee when it issued General Comments Nos 18 of 2005, 15 of 2002 and 14 of 2000.⁵³ Based on the Committee’s General Comments, sexual orientation is a prohibited ground of discrimination in the covenant

⁴⁹For example, concluding observations of HRC regarding Egypt on 28 November 2002 CCPR/CO/76/EGY at para 9; concluding observations of HRC regarding Kenya, CCPR/CO/83/KEN ON 29 April 2005 at para 27; concluding observation of the HRC regarding united states of America on 18 December 2006, CCPR/C/USA/CO/3 at para 25

⁵⁰General Comments are authoritative interpretations of individual human rights or of the legal nature of human rights obligations. General Comments provide orientation for the practical implementation of human rights and form a set of criteria for evaluating the progress of states in their implementation of these rights. The highly authoritative character of the General Comments can also be justified by the fact that they are the result of a comprehensive participatory process including interest groups of different regional, cultural, and religious context as well as non-governmental organizations.

⁵¹ UN Doc E7c.1272000/4 General Comment No. 14 of 2000 on the right to highest attainable standard of health para 18; E/c:12/2002/11 General Comment No. 15 of 2002 on the right to water para 13.

⁵²UN Doc. E7C.12/GC/20 (2009), non-discrimination in economic, social and cultural rights (article 2 of ICESCR) para 32.

⁵³ UN Doc E7c.1272000/4 General Comment No. 14 of 2000 on the right to highest attainable standard of health para 18; E/c:12/2002/11 General Comment No. 15 of 2002 on the right to water para 13.

under the scope of ‘other status’. However, General Comments are not legally binding and the Committee is yet to entertain individual communications under the Optional Protocol to the Convention.⁵⁴

The Committee on CRC has also dealt with the issue in General Comments. In General Comment No. 4 of 2003, it stated that state parties have obligations to ensure that all human beings below 18 enjoy all the rights provided in the Covenant without discrimination as outlined in article 2 with regard to race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth and other status.⁵⁵ The Committee further stated that these grounds include sexual orientation.⁵⁶ It stated that states are required to ensure children enjoy the rights guaranteed in the Convention without discrimination based on the child’s homosexuality or his or her parent’s sexual orientation.⁵⁷ The CRC Committee appears to adopt the approach taken by the CESCR in locating sexual orientation within the category of ‘other status’.

Similarly, the Committee on CEDAW has incorporated the notion of sexual orientation as a prohibited ground of discrimination without providing any legal foundation for its inclusion. Unlike the HRC and the CESCR, the Committee on CEDAW does not rely on either the

⁵⁴ CESCR concluding observations on Hong Kong para 7.3.

<http://sim.law.uu.nl/SIM/CaseLaw/uncom.nsf/fe005fcb50d8277cc12569d5003e4aaa/5a06df97c9943f86c125700700299fc7?OpenDocument> (accessed 25 November 2014).

⁵⁵ UN Doc.HRI/GEN/1/Rev.7 General Comment No. 4 of 2003 on adolescent health and development in the context of the convention on the rights of the child para 2. The same position was stated in General Comment No. 3 of 2003 on HIV/AIDS and the rights of the child para 6.

⁵⁶ UN Doc.HRI/GEN/1/Rev.7 General Comment No. 4 of 2003 on adolescent health and development in the context of the convention on the rights of the child para 2. The same position was stated in General Comment No. 3 of 2003 on HIV/AIDS and the rights of the child para 6.

⁵⁷ Tатаh (n 25 above) 45.

category of ‘sex’ or ‘other status’.⁵⁸ Rather the Committee in General Recommendation 28 stated that discrimination against women based on their sex and gender is inseparably linked with other factors affecting women, such as sexual orientation.⁵⁹ Thus state parties must legally recognise such intersecting forms of discrimination and their compounded negative effects on women and prohibit them.⁶⁰⁶¹

The CAT Committee has taken a very interesting approach in incorporating sexual orientation as a prohibited ground of discrimination. Even though CAT does not have a provision on equality and non-discrimination, the Committee recognised the fact that certain individuals by virtue of their marginalisation or minority are at risk of torture.⁶² As a result, the Committee issued General Comment No. 2 that place an obligations on states to ensure their laws against torture are applied to all persons regardless of their sexual orientation.⁶³ The Committee also expressed concerns at cases of sexual and physical abuse against persons on the basis of their sexual orientation and the intolerance, manifestation and incitement of hatred against lesbians and gays.⁶⁴

⁵⁸ *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28 <http://www.refworld.org/docid/4d467ea72.html> (accessed 25 November 2014).

⁵⁹ *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28 <http://www.refworld.org/docid/4d467ea72.html> (accessed 25 November 2014).

⁶⁰ General Recommendation No. 28 of CEDAW Committee.

⁶¹ <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-UGA-CO-7.pdf> (accessed 25 November 2014)

⁶² http://www1.umn.edu/humanrts/cat/general_comments/cat-gencom2.html (accessed 25 November 2014)

⁶³ Committee Against Torture, General Comment 2, Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007) para 21 http://www1.umn.edu/humanrts/cat/general_comments/cat-gencom2.html (accessed 25 November 2014).

⁶⁴ General Comment No. 2 of Committee against Torture.

3.2.4 Sexual orientation at the UN level: State Reporting and Concluding observations

The requirement for State reporting⁶⁵ under the ICCPR is a feature of the UN which is aimed at ensuring that member states of the UN fulfil their human rights obligations in order to advance global human rights.⁶⁶ Article 40 of ICCPR requires state parties to submit initial reports within one year of the country becoming a state party to the ICCPR and subsequently to submit periodic reports as specified by the HRC for each party.⁶⁷ The HRC examines the State reports and issues concluding observations.

Concluding observations are remarks and recommendations issued by a human rights treaty body after consideration of a State party's report.⁶⁸ Concluding observations refer both to positive aspects of a State's implementation of the treaty and areas where the treaty body recommends that further action needs to be taken by the State. The human rights treaty bodies are committed to issuing concluding observations which are concrete, focused and implementable and pay attention to measures to ensure effective follow-up to their concluding observations.

State reporting is a useful tool of ensuring the observance of human rights at the international level as well as ensuring a government's accountability to its own people and the international community.⁶⁹ However, it has been rendered ineffective since some state parties do not submit their reports as expected of them under the treaty. Therefore, the 'inspection' of a state's human rights record is not achieved. Further, since there is no sanction applied for not reporting, state parties are at liberty not to report or delay in reporting. It would be better if the HRC become

⁶⁵ All the core international treaties have a reporting system that requires state parties to submit periodic reports in compliance with their obligations under the treaty. For instance article 40(1) of ICCPR; article 16-23 of ICESCR; article 44 of the CRC; article 19 of the Convention against Torture (CAT) etc.

⁶⁶ UN resolution E/Res/624 B (XXII) of 1 August 1956 required UN member states to submit periodic reports on advancement of human rights, a feature which has subsequently been adopted by the treaty bodies.

⁶⁷ Article 40(1)(a),(b) ICCPR.

⁶⁸ <http://www2.ohchr.org/english/bodies/treaty/glossary.htm> (accessed on 5 February 2016).

⁶⁹ K Quashigah 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism' (2002) 2 *African Human Rights Law Journal* 261.

proactive and constantly reminded state parties whose reporting times are due and require them to provide convincing reasons for not reporting at all or for not reporting on time.⁷⁰

In addition, reporting guidelines should contain a specific provision that specifically requires State parties to report on the measures taken to protect the rights of gays and lesbians. This would be important for most African states whose Penal Code still criminalises same-sex sexual acts and yet their State report may not mention the current status of the rights of gays and lesbians in their country.

Apart from the UPR recommendations⁷¹, it is the concluding observations that mostly engage the issue of criminalisation of same-sex sexual acts. It provides an opportunity to human rights treaty bodies such as the HRC to examine the measures the State parties have taken to ensure compliance with the provisions of the treaty as all State parties are obliged to report.

In many occasions the HRC has issued concluding observations after examining State reports submitted by African countries. In April 2005 the HRC examined a State report submitted by Kenya and issued concluding observations calling on the Kenyan government to decriminalise same-sex sexual acts by amending the provisions of the Penal Code to remove laws prohibiting same-sex sexual acts.⁷² Similar concluding observations were issued to Zambia in August 2007.⁷³ In April 2008 the HRC issued concluding observations to Botswana calling for the decriminalisation of same-sex sexual conduct.⁷⁴ The HRC called on Botswana to repeal the penal provisions because they amount to violation of the rights guaranteed in the ICCPR. In 2012 the

⁷⁰ F Viljoen *International human rights law in Africa* (2007) 37.

⁷¹ The Universal Periodic Review (UPR) is a mechanism of the UN Human Rights Council.⁷¹ Under the UPR, the human rights records of all 193 UN member states are systematically reviewed by the Council on an on-going regular basis and recommendations are made to the State under review.

⁷² UN Doc CCPR/CO/83/KEN, 29 April 2005.

⁷³ UN Doc CCPR/C/ZMB/CO/3, 9 August 2007.

⁷⁴ UN Doc CCPR/C/BWA/CO/1, 24 April 2008

HRC examined a state report submitted by the Malawian government and issued concluding observations calling for the decriminalisation of same-sex sexual acts and called on government officials to stop using homophobic language to create hatred towards gays and lesbians.⁷⁵

The CESCR has also made concluding observations regarding the protection of homosexuals. For instance in 2005 the CESCR raised issues about Hong Kong's anti-discrimination legislation that failed to address sexual orientation-related discrimination even after raising the same concern in 2000 regarding their Penal Code that had classified lesbianism as a sexual offence.⁷⁶

The CRC has raised issues of sexual orientation-related discrimination in concluding observations they have adopted based on the periodic reports submitted by States to them.⁷⁷ The Committee on the CRC reiterated its position regarding sexual orientation as a prohibited ground of discrimination under the Convention in its concluding observations to a report submitted by the Government of Chile.⁷⁸ The Committee observed, among other issues, that same-sex sexual relations including those of persons under 18 years old continue to be criminalised.⁷⁹ This was an indication of continued discrimination on the basis of sexual orientation. However, the

⁷⁵ 'Concluding observations of the Human Rights Committee: Malawi', United Nations Human Rights Committee, 103rd Session, CCPR/C/MWI/CO/1, paragraph 7, page 3, 18 June 2012

⁷⁶ CESCR concluding observations on Hong Kong para 7.3.
<http://sim.law.uu.nl/SIM/CaseLaw/uncom.nsf/fe005fcb50d8277cc12569d5003e4aaa/5a06df97c9943f86c125700700299fc7?OpenDocument> (accessed 25 November 2014).

⁷⁷ https://www.iom.int/jahia/webdav/shared/shared/mainsite/policy_and_research/un/63/A_63_41.pdf (accessed 25 November 2014).

⁷⁸ https://www.iom.int/jahia/webdav/shared/shared/mainsite/policy_and_research/un/63/A_63_41.pdf (accessed 25 November 2014).

⁷⁹ https://www.iom.int/jahia/webdav/shared/shared/mainsite/policy_and_research/un/63/A_63_41.pdf (accessed 25 November 2014).

Committee did not provide the basis for incorporating sexual orientation as a prohibited ground of discrimination.⁸⁰

In its concluding observations, while reviewing a report submitted by the Government of Uganda in 2010, the Committee on CEDAW criticised the Government of Uganda for allowing harassment, hatred and violence against homosexual women.⁸¹

General Comments, General Recommendations and concluding observations, although described as soft law, form part of the mechanisms employed by UN treaty bodies to ensure States comply with their obligations under the treaties. Although they clarify and expound on the content and scope of the provisions of the treaties, they are not legally binding on States. Therefore they do not need ratification by State parties to the treaty.

Soft law can also direct the future development of customary international law. Considerable soft law has been produced within the UN structure; arguably enough to justify the classification of sexual orientation as a suspect prohibited ground of discrimination.

3.2.5 Sexual orientation at the UN level: Communications to HRC

The HRC was set up by article 28 of the ICCPR and it is made up of a committee of 18 persons who are individuals of high moral character with some competence in the field of human rights and legal experience, drawn from countries that are State parties to the ICCPR.⁸²

For a communication to be admissible, the individual must be a victim of a violation of any of the rights under the ICCPR and should be against a State party to the ICCPR and the Optional

⁸⁰ https://www.iom.int/jahia/webdav/shared/shared/mainsite/policy_and_research/un/63/A_63_41.pdf (accessed 25 November 2014).

⁸¹ <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-UGA-CO-7.pdf> (accessed 25 November 2014)

⁸² Article 28 ICCPR.

Protocol (OP) to the ICCPR.⁸³ Pursuant to this mandate, the HRC has received and considered communications on a broad range of issues including matters relating to the decriminalisation of same-sex sexual acts. Kenya and Uganda are not State parties to the OP to the ICCPR. Thus they do not fall under the HRC's mandate as far as communications are concerned. An individual from Kenya and Uganda cannot file an application to HRC claiming that penal provisions that prohibit same-sex sexual acts violate rights under the ICCPR.

The HRC has not yet considered any communication in respect of any African country in relation to decriminalisation of same-sex sexual acts, but useful lessons could be drawn from its concluding observations on matters affecting other countries, especially in relation to the rights of gays and lesbians. In its consideration of the case of *Toonen v Australia*,⁸⁴ the HRC made a definitive pronouncement on article 2 and 26 of the ICCPR, stating that non-discrimination on the grounds of sex includes sexual orientation and prohibition of same-sex sexual acts amounted to a violation of the right to privacy guaranteed in the ICCPR.

It is arguable that the communications procedure of the HRC, though a useful procedure, has rarely been used by African countries. No communication has been brought against any African state, and it is less likely that this procedure may be invoked by victims of human rights violations in Africa. It takes several years for a communication to be received and considered and this might impose time and resource constraints on potential users from Africa, especially when the process is far away from them. Another impediment is that domestic remedies must be exhausted before the procedure could be accessed.⁸⁵ Also the fact that a state party must have

⁸³ Article 1 Optional Protocol to the ICCPR.

⁸⁴ Communication 488/92, Human Rights Committee, U.N Doc. CCPR/C/50/D/488/1992(Mar. 1994).

⁸⁵ Article 2 OP to the ICCPR.

ratified the Optional Protocol before a communication could be brought against it, makes it impossible, for instance, for a person in Kenya and Uganda whose rights under the Covenant are violated to bring a communication against them because they have not ratified the OP to the ICCPR. Thus, though a useful mechanism, access to the HRC through communications is far removed from Africans.

Having analysed the decisions and General Comments and concluding observations as well as communication of UN human rights treaty bodies, the focus now turns to other mechanisms at the UN level employed to protect the rights of homosexuals. The next section analyses these mechanisms and the role they have played in advocating for decriminalisation.

3.2.6 Sexual orientation at the UN level: Resolutions and special mechanisms

These are avenues, other than human rights treaties and bodies, used to promote and protect human rights. At the UN level, they include resolutions and use of special rapporteurs. This section will discuss the role played by universal periodic reviews, resolutions and the Yogyakarta Principles in promoting decriminalisation of same-sex sexual conduct.

3.2.6.1 Universal Periodic Review

The Universal Periodic Review (UPR) is a mechanism of the UN Human Rights Council.⁸⁶ Under the UPR, the human rights records of all 193 UN member states are systematically reviewed by the Council on an on-going regular basis.⁸⁷ It is the only process where states are reviewed by other states in a universal manner. It was set up as part of the reform of the UN

⁸⁶EY Ako *The debate on sexual minority rights in Africa: A comparative analysis of the situation in South Africa, Uganda, Malawi and Botswana* (LLM thesis University of Pretoria 2010) 24.

⁸⁷IJK Nyarang'o *The role of judiciary in the protection of sexual minorities in Kenya* (LLM thesis University of Pretoria 2011) 16.

human rights system.⁸⁸ As a result, the UPR is aimed at ensuring that the human rights records of all 193 member states are regularly reviewed on a four and half year cycle. This means that 42 states will be reviewed per year, 14 at each of three sessions annually.⁸⁹ During the review, states give recommendations that are either accepted or rejected by the state concerned.⁹⁰ The idea is that the review will give states practical feedback on how to improve their human rights situation.⁹¹ In the long run, this should contribute to a convergence around universally accepted human rights norms and standards⁹².

The UPR is a valuable tool for challenging and encouraging member states to do more to protect the rights of gays and lesbians.⁹³ It also provides an avenue for engagement on the rights of sexual minorities through the review of state reports at intervals.⁹⁴ Various states have been questioned on the rights of homosexuals as part of the review process. These states have been urged to consider decriminalisation of same-sex sexual conduct between adults. At its initial review in 2008, Botswana was requested to repeal its sodomy laws.⁹⁵

In reviewing the State report from Kenya in 2010, the panel requested Kenya to repeal its sodomy laws by recommending that Kenya decriminalise same-sex sexual acts and put an end to social stigmatisation of homosexuality. Kenya refused to decriminalise same-sex sexual acts and

⁸⁸ICJ briefing paper ‘international human rights law and the criminalization of same-sex sexual conduct’ *International Commission of Jurists* (2010) 7.

⁸⁹ICJ briefing paper (n 88 above) 8.

⁹⁰ P Narayan ‘Somewhere over the rainbow: International human rights protections for sexual minorities in the new millennium’ (2006) 24 *Boston University International Law Review* 367.

⁹¹ICJ briefing paper (n 88 above) 8.

⁹²Nyarang’o (n 87 above) 16.

⁹³Nyarang’o (n 87 above) 16.

⁹⁴Nyarang’o (n 87 above) 16.

⁹⁵Draft Report of the Working Group on UPR,

http://lib.ohchr.org/HRBodies/UPR/Documents/Session8/KE/A_HRC_WG.6_8_L.7_Kenya.pdf (accessed 24 June 2014).

to take active measures to provide protection to gays and lesbians.⁹⁶ In 2015, Kenya was once again urged to decriminalise same-sex sexual conduct.⁹⁷ Chile, Poland, Denmark and France recommended that Kenya decriminalize same-sex sexual acts in order to end the violence and discrimination against gays and lesbians. Kenya rejected the recommendation. However, Kenya supported the recommendation made by Sweden, which advocated for Kenya to adopt a comprehensive anti-discrimination law affording protection to all individuals irrespective of their sexual orientation.

In reviewing the report from Uganda in 2011, Brazil, United States, Belgium, Argentina, Spain, Austria and Switzerland recommended to Uganda that it decriminalise same-sex sexual acts in order to end the violence and discrimination against gays and lesbians.⁹⁸ Uganda rejected the recommendation.

In my view, the rejection of the recommendations to decriminalise same-sex sexual acts by Kenya and Uganda reinforces the perception held by most African countries that homosexuality is a foreign and western phenomenon that goes against African culture, thus it should not be accepted and tolerated in Africa.

⁹⁶ See e.g. statement introduced by Argentina, at General Assembly, on 18 December 2008, with 66 states in support. Kenya was not among the six African countries in support.; UNHRC Report of the working group on the Universal Periodic Review (17 June 2010) UN Doc/A/HRC/15/8

⁹⁷ http://www.humandignitytrust.org/uploaded/Map/Country_Reports/Kenya.pdf (accessed on 5 February 2015); France, Slovenia, Chile, Denmark and Poland - See: UNHRC, *Report of the Working Group on the Universal Periodic Review*, 26 March 2015, UN Doc A/HRC/29/10

⁹⁸ <http://www.upr-epu.com/ENG/country.php?id=252> 9 (accessed on 17 February 2016)

3.2.6.2 Resolutions

A number of resolutions aimed at protecting the rights of homosexuals have been passed by the Human Rights Council.⁹⁹ In 2011 the Council passed a resolution on human rights, sexual orientation and gender equality.¹⁰⁰ The resolution expressed grave concern at acts of violence and discrimination in all regions of the world committed against individuals because of their sexual orientation and gender identity and urged the Office of the High Commissioner for Human Rights (OHCHR) to conduct a study on violations of the rights of sexual minorities world-wide, with a view to initiating remedial measures.¹⁰¹ .¹⁰² It is important to note that most African States resisted the adoption of this resolution on the grounds that it was not in line with African culture. This imposes a challenge on the UN in achieving its goal of attaining a ‘universal’ acceptance of sexual orientation as a prohibited ground of discrimination.

Pursuant to resolution 6/29 of the HRC, the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable physical and mental health, submitted a report at the HRC’s 14th session in 2010.¹⁰³ The report considered the right to health in light of the criminalisation of certain forms of sexual conduct, including consensual same-sex sexual conduct.¹⁰⁴ It observed that criminalising same-sex sexual conduct contributes to lack of access

⁹⁹The Human Rights Council is an inter-governmental body within the United Nations system responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and make recommendations on them. It has the ability to discuss all thematic human rights issues and situations that require its attention throughout the year. It meets at the UN Office at Geneva. The Council is made up of 47 United Nations Member States which are elected by the UN General Assembly. The Human Rights Council replaced the former UN Commission on Human Rights.

¹⁰⁰ UN Doc A/HRC/17/L.19/Rev.1 (15 June 2011).

¹⁰¹ Human Rights Council Res 17/19 17th sess 15 June 2011, Supp No. A/HRC/17/L.9

¹⁰² Human Rights Council Res 17/19 17th sess 15 June 2011, Supp No. A/HRC/17/L.9

¹⁰³ A/HRC/14/20 <http://www2.ohchr.org/english/issues/health/right/annual.html> (accessed 24 June 2014).

¹⁰⁴ UN Doc A/HRC/17/L.19/Rev.1 (15 June 2011).

to health care services, hence affecting the attainment of the right to health.¹⁰⁵ The report recommended the repeal of laws that criminalise same-sex sexual conduct, in order to create an environment favourable to the attainment of the right to health for all.¹⁰⁶

3.2.6.3 Yogyakarta Principles

Ms Louise Arbour, the High Commissioner for Human Rights, in her address during an International Conference on Lesbian, Gay, Bisexual and Transgender rights held in Montreal on 26 July 2007, expressed concern about the inconsistency of approach in law and practice with regards to the protection of the rights of sexual minorities globally.¹⁰⁷ She suggested that though the principles of universality and non-discrimination apply to protect these rights, there is a need for a more comprehensive articulation of these rights in international law.¹⁰⁸ Commentators have also argued that international practice might benefit from the application of more consistent terminology to address issues of sexual orientation and gender identity.¹⁰⁹ While some states, treaty bodies and special procedures speak of ‘sexual orientation’ or ‘gender identity’, others speak of ‘lesbians’, ‘gays’, ‘transgender’, and ‘transsexual’ people.¹¹⁰ Others talk of ‘sexual preference’ or ‘sexual minorities’.¹¹¹ Furthermore, there is little understanding of the issue of

¹⁰⁵ UN Doc A/HRC/17/L.19/Rev.1 (15 June 2011).

¹⁰⁶ UN Doc A/HRC/17/L.19/Rev.1 (15 June 2011).

¹⁰⁷ Presentation of the United Nations High Commissioner for Human Rights Ms. Louise Arbour to the International Conference on Lesbian, Gay, Bisexual and Transgender Rights Montreal on 26th July 2006 available at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01B91AE52651D33F0DC12571BE002F172> (accessed 3 September 2014).

¹⁰⁸ Presentation of the United Nations High Commissioner for Human Rights Ms Louise Arbour to the International Conference on Lesbian, Gay, Bisexual, and Transgender Rights, Montreal, 26 July 2006, available at: <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/> (accessed 26 August 2014).

¹⁰⁹ ARC International ‘A place at the table: Global advocacy on sexual minorities and gender identity and the international response. A paper presented on 6 November 2006 12.

¹¹⁰ ARC International ‘Out of the UN: Advancing human rights based on sexual orientation and gender identity at the 61st session of the UN Commission on Human Rights presented in April 2006 available at <http://www.rightsustralia.org.au/data/ARC%20CHR%20Report%202005pdf> (accessed 3 September 2014).

¹¹¹ ARC International (n 109 above) 12.

gender identity; with some states referring to transsexuality as a sexual orientation while others honestly admitting that they do not understand the term at all.¹¹²

It is in this context of varied approaches, gaps and inconsistency that the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (the Yogyakarta Principles) were conceived.¹¹³ The proposal to develop the principles came from a coalition of human rights NGOs in 2005. Subsequently, the proposal was facilitated by the International Service for Human Rights and the International Commission of Jurists. The principles were to serve three functions. Firstly, they should constitute a comprehensive account of the experiences of human rights violations experienced by people of different sexual orientations and gender identities. This exercise should be as inclusive and wide ranging as possible.¹¹⁴ It should take into account the distinctive ways in which human rights violations may be experienced in different places of the world. Secondly, they should look at the application of international human rights law to such experiences in a clear and precise manner.¹¹⁵ Lastly, the principles should spell out the nature of obligations on states for effective implementation of its human rights obligations.¹¹⁶

Twenty-nine experts from 25 countries were invited to undertake the drafting of the principles. They included one former UN High Commissioner for Human Rights, Mary Robinson, 13 current or former UN human rights special mechanism office holders or treaty body members,

¹¹² ARC International (n 110 above) 13.

¹¹³ International Commission of Jurists, 'Sexual Orientation and Gender Identity in Human Rights Law, References to Jurisprudence and Doctrine of the Inter-American System', July 2007 http://www.icj.org/IMG/Inter-American_References.pdf (accessed 3 September 2014); International Commission of Jurists, 'Sexual Orientation and Gender Identity in Human Rights Law, Jurisprudential, Legislative and Doctrinal References from the Council of Europe and the European Union', October 2007, available at: http://www.icj.org/IMG/European_Compilation-web.pdf (accessed September 2014).

¹¹⁴ Flaherty & Fisher (n 46 above) 233.

¹¹⁵ Flaherty & Fisher (n 46 above) 233.

¹¹⁶ Flaherty & Fisher (n 46 above) 233.

two serving judges of national courts and a number of academics and human rights activists.¹¹⁷ Seventeen of the experts were women.¹¹⁸ The drafting process took a period of over one year. Even though much of the drafting was done by means of electronic communication, many of the experts attended the international seminar that took place in Yogyakarta, Indonesia at Gadjah Mada University from 6 to 9 November 2006 to review and finalise the document.¹¹⁹ The entire text was agreed upon by consensus.¹²⁰

There are 29 principles. Each of these principles comprises a statement of international human rights law, its application to a given situation and an indication of the nature of the state's duty to implement the legal obligation.¹²¹

The Yogyakarta Principles have been considered as a milestone in the protection of rights of homosexuals.¹²² These principles represent a statement of intent by bringing into one document

¹¹⁷ Flaherty & Fisher (n 46 above) 233

¹¹⁸ Among the experts who adopted the principles, only three came from two African countries. Two members were from South Africa and one from Kenya. African continent was not well represented in the process

¹¹⁹ ARC 'Report on the launch of Yogyakarta principles' <http://arc-international.net/strengthening-capacity/yogyakarta-principles/report-yp-launch> (accessed 3 September 2014).

¹²⁰ ARC Report (n 99 above).

¹²¹ Each of these comprises a statement of international human rights law, its application to a given situation and an indication of the nature of the State's duty to implement the legal obligation. There is some order to the Principles. Principles 1 to 3 set out the principles of the universality of human rights and their application to all persons without discrimination, as well as the right of all people to recognition before the law. The experts placed these elements at the beginning of the text in order to recall the primordial significance of the universality of human rights and the scale and extent of discrimination targeted against people of diverse sexual orientations and gender identities, as well as the manner in which they are commonly rendered invisible within a society and its legal structures. Principles 4 to 11 address fundamental rights to life, freedom from violence and torture, privacy, access to justice and freedom from arbitrary detention. Principles 12 to 18 set out the importance of non-discrimination in the enjoyment of economic, social and cultural rights, including employment, accommodation, social security, education and health. Principles 19 to 21 emphasize the importance of the freedom to express oneself, one's identity and one's sexuality, without State interference based on sexual orientation or gender identity, including the rights to participate peaceably in public assemblies and events and otherwise associate in community with others. Principles 22 and 23 highlight the rights of persons to seek asylum from persecution based on sexual orientation or gender identity. Principles 24 to 26 address the rights of persons to participate in family life, public affairs and the cultural life of their community, without discrimination based on sexual orientation or gender identity. Principle 27 recognizes the right to defend and promote human rights without discrimination based on sexual orientation and gender identity, and the obligation of States to ensure the protection of human rights defenders working in these areas. Principles 28 and 29 affirm the importance of holding rights violators accountable, and ensuring appropriate redress for those who face rights violations <http://arc-international.net/strengthening-capacity/yogyakarta-principles/report-yp-launch> (accessed 3 September 2014).

the provisions of international human rights instruments which offer protection to homosexuals.¹²³ They were also intended as a coherent and comprehensive identification of obligations of states to protect, respect and fulfil the human rights of all persons, regardless of their sexual orientation or gender identity.¹²⁴

The principles require states to decriminalise same-sex sexual conduct on the basis of equality and non-discrimination and to ensure the protection of the private realm for all.¹²⁵ The principles also require that religion should not be invoked to defeat the right to equal protection before the law for homosexuals.¹²⁶

Although described as soft law and not binding, the Yogyakarta Principles are important because they are simply a restatement of existing law and not an attempt to formulate a new doctrine or, to put it differently, they are a combination of 'modest demands', 'stable foundations' and 'strategic deployment.'¹²⁷ The Principles provided a useful guide for assessing or measuring whether there is progress or regression in individual countries. It is important to note that both Ugandan and Kenyan governments have been persistent objectors to the application of the Principles.¹²⁸ This could be because there is a difference between relative weights attached generally by states to the soft law generated by treaty bodies compared to soft law generated by non-state actors such as the Yogyakarta Principles. Thus they may feel they are not obliged to

¹²² Yogyakarta principles: A milestone for lesbian, gay, bisexual and transgender rights", http://hrw.org/english/docs/2007/03/26/global15546_txt.htm (accessed 23 June 2014).

¹²³ Yogyakarta Principles <http://www.yogyakartaprinciples.org/index.php?item=25> (accessed 23 June 2014).

¹²⁴ Flahert & Fisher (n 46 above) 235.

¹²⁵ Principles nos. 2, 6.

¹²⁶ Principle no. 21.

¹²⁷ RR Thoreson 'Queering human rights: The Yogyakarta Principles and the norm that dare not speak its name' (2009) 8 *Journal of Human Rights* 323-339.

¹²⁸ A recent exception was registered at the African Commission on Human and Peoples' Rights concerning whether or not to grant observer status to the Coalition of African Lesbians (CAL). Rather than voting against the decision, as would have been expected, the delegate from Uganda abstained.

apply them because they have not made any undertaking to be bound by such Principles. Second, it may be because they were formulated by representatives of LGBT NGOs of which the majority came from Western countries, thus the contribution and input from the African representatives was minimal. The application of such Principles would amount to accepting the Western understanding of the concepts of sexual orientation and gender identity, something which most African states, especially those that have criminalised same-sex sexual conduct, would be reluctant to accept.

3.3 Sexual orientation at regional level

The question of decriminalisation has become a prominent subject of discussion not only at the global level, but also at a regional level. Legal strides in the protection of homosexuals have been made in Europe and America. Africa, on the other hand, has seen a countervailing trend. This section discusses the relevant provisions in the various regional human rights treaties and approaches taken by the regional human rights bodies in addressing the issue of sexual orientation as a prohibited ground of discrimination. This discussion is important in illustrating the convergence of the UN human rights system and human rights norms applied at regional level as well as those areas in which UN system diverges from the norms applied at regional level with regards to the protection of the rights of homosexuals.

3.3.1 Sexual orientation: the European system

Although the current jurisprudence of ECtHR on gays and lesbians may contrast sharply with that of the African Commission, because the African Commission has not found a favourable decision on discrimination on the ground of sexual orientation, the early history of the European

human rights system mirrors the current position in Africa.¹²⁹ Same-sex sexual acts were criminalised in Europe. In 1955 in *W.B v Federal Republic of Germany*,¹³⁰ the applicant filed a complaint before the European Commission on Human Rights (ECmHR) against his two convictions for engaging in same-sex sexual activities. ECmHR dismissed the complaint stating that the government of Germany didn't breach any provisions of the ECHR in punishing same-sex sexual acts. It also established a principle that any legal measure taken by the state to regulate same-sex sexual conduct would not be regarded as a violation of any substantive rights in the convention.¹³¹

Between 1955 and 1980 individuals from Germany, United Kingdom and Austria continued to file complaints against national laws that criminalised same-sex sexual acts unsuccessfully. It was in 1981 when the first successful complaint against criminalisation of same-sex sexual acts reached ECtHR. The unhappiness felt by gays and lesbians in Africa about the manner in which African Commission handles cases on sexual orientation must be similar to that felt by homosexuals in Europe for 25 years when ECmHR rejected all claims that criminalisation of same-sex sexual acts violated any rights guaranteed in the ECHR.¹³²

Since 1981 the ECtHR has had a chance to address issues of discrimination on the basis of sexual orientation. The ECtHR has categorically stated that unlike article 26 of the ICCPR, the ECHR does not provide for an independent provision on non-discrimination, but rather it only provides for one that can be applied in conjunction with a substantive provision of the

¹²⁹ P Johnson 'Homosexuality and the African Charter on Human and People's Rights: what can be learned from the history of the European Convention on Human Rights (2013) 40 *Journal of Law and Society* 249.

¹³⁰ *W.B v Federal Republic of Germany* (104/55, 17 December 1955).

¹³¹ Johnson (n 129 above) 149.

¹³² Johnson (n 129 above) 149.

Convention.¹³³ The ECtHR has also consistently stated that discrimination on the grounds of sex or sexual orientation must be justified with legitimate reasons.¹³⁴ Unlike the HRC, the ECtHR has not concerned itself in including discrimination on the basis of sexual orientation in the ‘sex’ category. Instead it adopted the approach of locating sexual orientation in ‘other status’ as provided for under article 14 of the Convention. Article 14 of the Convention prohibits discrimination on a number of grounds including other status.¹³⁵ .

For instance, in *Salgueiro da Silva Mouta v Portugal*, the ECtHR held that the court’s denial of child custody to a homosexual father on the grounds of his sexual orientation amounted to a violation of article 14 of the convention.¹³⁶ The Court stated that sexual orientation is a concept that is undoubtedly covered by article 14. It further stated that the list of grounds stated in article 14 were merely illustrative and not exhaustive as shown by the words ‘any grounds such as’. The Court went on to state that article 14 offers protection of rights outlined in the Convention against differential treatment without an objective and reasonable justification. The Court rejected the justification given by the Portuguese government as not reasonable to justify denial of child custody. The government of Portugal had argued that the custody was denied on the basis that the child should live in a family environment, a traditional Portuguese family which comprises of a man and a woman and not the ‘abnormal’ type of relationship the father had entered into. The Court reiterated its view in *Alekseyev v Russia* by stating that sexual orientation is a concept covered in article 14 of the convention.¹³⁷ In the case of *H.G and G.B v Austria* the ECtHR held that the Austrian Criminal Code criminalising same-sex sexual conduct between

¹³³*Case relating to certain aspects of the laws on the use of languages in education in Belgium (Belgian Linguistics case)* (No. 2) A 6 (1968); (1979^80) 1 EHRR 252 at para. 9.

¹³⁴*Karner v Austria* 2003-IX 199; (2003) 38 EHRR 24.

¹³⁵*Sutherland v United Kingdom* Application No. 25186/94, Report of 1 July 1997 at para. 50.

¹³⁶*Salgueiro da Silva Mouta v Portugal* 1999-IX 309; (1999) 31 EHRR 1055.

¹³⁷*Alekseyev v Russia*, ECtHR Application No. 4916/07, 25924/08 and 14599/09. The final judgement was delivered on 11 april 2011, para 108.

consenting adults is in violation of article 14 of the convention. The Court further stated that the government of Austria offered no convincing reasons to justify the maintenance in force of such a statutory provision.¹³⁸

In *Karner v Austria* the ECtHR stated that failure of the Austrian government to permit a homosexual man to continue occupying his deceased partner's flat was discriminatory since this right was only enjoyed by heterosexual partners.¹³⁹ On the argument raised by the Austrian government that exclusion of homosexuals was aimed at protecting the family unit in the traditional sense, the Court held that the government had failed to demonstrate how the exclusion was necessary to achieve that aim.

In *L. and V v Austria and S.L v Austria* the ECtHR held that the differences in the age of consent for heterosexual and homosexual relationships was discriminatory and the reasons given by the government could not amount to sufficient justification for the differential treatment other than portraying negative attitudes towards those of a different sexual orientation.¹⁴⁰ In *E.B v France*, the Court found that the government of France violated article 14 for refusing to authorise E.B's application to adopt the child, based on adoptive parent's sexual orientation.¹⁴¹ The Court stated that this kind of distinction is not accepted under the convention.

According to the European Court, the concept of sexual orientation is an example of a social condition that constitutes 'other status' relating to characteristics, which are inborn or inherent to a person, the same as the ground listed in article 14.¹⁴² It follows that the provision of article 14, by implication, includes sexual orientation as a prohibited ground of discrimination under the

¹³⁸*H.G and G.B v Austria* ECtHR Application No. 11084/02 and 15306/02. Decision given on 2 June 2005.

¹³⁹*Karner v Austria* 2003-IX 199; (2003) 38 EHRR 39.

¹⁴⁰*L. and V. v Austria* 2003-I 29; (2003) 36 EHRR 55; *S.L. v Austria* 2003-I 71; (2003) 37 EHRR 39.

¹⁴¹*E.B. v France* Application No. 43546/02, Judgment of 22 January 2008 at para. 96.

¹⁴²*Cliff v UK*, ECtHR Application No 7205/07. Final judgement was delivered on 22 November 2010.

European human rights system. Nevertheless, according to the jurisprudence of the ECtHR, states are allowed to formulate a defence to justify their discrimination. For it to be justified, the state is required to show that the difference in treatment is objective, reasonable and satisfies the proportionality test.¹⁴³

To strengthen the protection of the rights of homosexuals in Europe, the Council of Europe made the decriminalisation of same-sex sexual conduct a condition for membership to the Council.¹⁴⁴ By August 2003, Europe had become free of laws criminalising same-sex sexual conduct between consenting adults.¹⁴⁵ This achievement was attributed to the influence of the Council of Europe's Parliamentary Assembly and increasingly progressive interpretation of the rights in the Convention by the ECtHR.¹⁴⁶ In 1994 the European Parliament expressly called for the decriminalisation of same-sex sexual conduct in all European Union member states.¹⁴⁷ This was followed by the Council of Europe's Parliamentary Assembly announcement of the policy of accepting for membership only those states that have amended their penal laws to remove criminal prohibitions on same-sex sexual conduct in 2000.¹⁴⁸ However, Europe's policies are not yet representative of the global attitude towards same-sex sexual conduct. Most African and Asian countries still subject homosexuals to criminal penalties.¹⁴⁹

¹⁴³*Frette v France* 2002-I 345; (2004) 38 EHRR 21. The proportionality tests involves the treatment of class of persons differently to fulfill a pressing need in a democratic society to achieve a legitimate state purpose.

¹⁴⁴F Viljoen *International human rights law in Africa* (2013) 233.

¹⁴⁵D Sanders 'Human rights and sexual orientation in international law, International lesbian and Gay association July 17 2005 http://www.ilga.org/news_results.asp (Accessed 1 November 2014).

¹⁴⁶D Ottosson 'international lesbian and Gay Association report state sponsored homophobia: a world survey of laws prohibiting same-sex activity between consenting adult' http://www.ilga.org/statehomophobia/ILGA_07.pdf. (Accessed 1 November 2014).

¹⁴⁷European Parliament resolution A3-0028/94 (8 February 1994).

¹⁴⁸ Council of Europe Parliamentary Assembly: situation of lesbians and gays in the council of Europe member states, draft recommendation explanatory member doc No. 8755 of 2000.

¹⁴⁹Sanders (n 121 above) 19; Ottosson (n 122 above) 12.

3.3.2 Sexual orientation: the Inter-American system

The IACHR has taken a similar approach to that of the ECtHR. It has stated that the obligation of states to protect and respect the rights and freedoms in the Convention within the jurisdiction pursuant to articles 1 and 24 for reasons including ‘any other social status’ covers the concept of sexual orientation. Both article 1 and 24 do not expressly mention sexual orientation as a prohibited ground of discrimination. However, basing their argument on the jurisprudence of HRC and ECtHR, the IACHR in *Karen Atala and Daughters v Chile* held that:

Bearing in mind the general obligations to respect and guarantee the rights established in article 1(1) of the American convention, the inter-American court establishes that sexual orientation of persons is a category protected by the convention. Therefore, any regulation, act or practice considered discriminatory based on a person’s sexual orientation is prohibited. Consequently, no domestic regulation, decision, or practice, whether by state authorities or individuals may diminish or restrict, in any way whatsoever, the rights of a person based on his or her sexual orientation.¹⁵⁰

The IACHR has also played a role in recognising the rights of homosexuals in the Latin America. This was clearly demonstrated when the Commission agreed to mediate between the Government of Colombia and a lesbian prisoner who sought conjugal visitation rights in 1999.¹⁵¹ Although this could be seen as a small step in the protection and recognition of the rights of homosexuals in prison, it has the potential of influencing how national courts in the region deals

¹⁵⁰*Karen Atala and Daughters v Chile* case 1271-04 Report No. 42/08, Inter-AMCHR, OEA/Ser.L/II.130 Doc. 22 Rev.1 (2008), Judgement on 24 February 2012 para 83.

¹⁵¹International Gay and Lesbian Human Rights Commission (IGLHRC) ‘Discrimination in Prison must end’ (10 June 2002) <http://iglhrc.org/content/colombia-discrimination-prisons-must-end> (accessed 1 November 2014).

with homosexuals.¹⁵² Two years after the involvement of the Commission in this matter, the Supreme Court of Colombia granted conjugal rights to another lesbian who was in prison.¹⁵³

3.3.3 Sexual orientation: the African human rights system

On the African continent, the African Charter on Human and Peoples' Rights (the African Charter) has increasingly been given a dynamic interpretation by the African Commission on Human and Peoples' Rights (The African Commission), the monitoring body for the African Charter.¹⁵⁴ The African Charter was adopted in 1981 and it has received ratification by all members of the African Union.¹⁵⁵ The African Charter provides for civil and political rights; economic, social and cultural rights, as well as group rights. However, it does not mention terms such as gay, lesbian or sexual orientation.¹⁵⁶ This could be attributed to the social-cultural context of the late 1970s when the Charter was drafted.¹⁵⁷ The drafters of the African Charter also borrowed much of its content from international human rights treaties such as ICCPR, the American Convention on Human Rights and the European Convention on Human Rights, where sexual orientation is not mentioned.¹⁵⁸

In spite of the lack of mention of sexual orientation, the HRC, the ECtHR and the IACHR have found that the ICCPR, the European Convention and the Inter-American Convention respectively

¹⁵²IGLHRC (n 151 above).

¹⁵³IGLHRC (n 151 above).

¹⁵⁴ R Murray & F Viljoen 'Towards non-discrimination on the basis of sexual orientation: the normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) *Human Rights Quarterly* 86.

¹⁵⁵ African Union is the continental body under whose political authority the African commission functions. The commission is provided for under article 30 of the charter. The first commissioners were inaugurated on 2 November 1987 when its first session took place in Addis Ababa Ethiopia.

¹⁵⁶Murray & Viljoen (n 154 above) 89.

¹⁵⁷Murray & Viljoen (n 154 above) 89.

¹⁵⁸M 'Baye draft African Charter (prepared for the Meeting of Experts, held 28 Sept. to 8 Dec. 1979, in Dakar, Senegal, OAU Doc. CAB/LEG/67/1, Introduction: The draft is largely drawn from provisions of the UN International Covenant on Economic, Social and Cultural Rights and the American Convention on Human Rights.

offer protection to homosexuals.¹⁵⁹ Before analysing how the rights guaranteed in the African Charter could be used to build legal arguments for the decriminalisation of same-sex sexual conduct on the African continent, the next section will examine three primary areas of the African Commission's mandate. These are working closely with human rights institutions, hearing communications and examining state reports.

Cooperation with other African and international human rights institutions is one of the promotional mandates of the African Commission.¹⁶⁰ The African Charter recognises the role of national human rights institutions and NGOs in assisting the African Commission to deliver on their promotional mandate.¹⁶¹ The African Commission has formalised its relationships with human rights institutions by granting them affiliated status and granting observer status to NGOs.¹⁶² Observer NGOs have an important role to play in proposing agenda items that can be discussed by the African Commission at its sessions.¹⁶³ This can be done before the session, at the session's NGO forum or during actual discussions at the session.¹⁶⁴ In the past, observer NGOs have raised and discussed a number of issues ranging from the rights of women to the rights of persons with disabilities.¹⁶⁵

¹⁵⁹ *Toonen* case; See also *Young v. Australia*, Communication 941/2000, Human Rights Committee, U.N. Doc. CCPR/C/78/D/941/2000 (Aug. 2003); In *Dudgeon v. UK*, 45 Eur. Ct. H.R. (ser. A)(1981), *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1991) and *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A)(1993).

¹⁶⁰ Article 45 (1) (c) of African charter.

¹⁶¹ S Magure 'The human rights of sexual minorities in Africa ((2004) 35 *California Western International Law Journal* 41.

¹⁶² Resolution on the criteria for granting and enjoying observer status to non-governmental organizations working in the field of human rights with the African commission on human and people's rights (5 May 1999).

¹⁶³ Magure (n 161 above) 42.

¹⁶⁴ Magure (n 161 above) 42.

¹⁶⁵ F Viljoen 'Equal right in a time of homophobia: an argument for equal protection of sexual minorities in Africa' (2013) 11.

No NGO specifically dealing with the rights of gays and lesbians enjoyed observer status until April 2015 when Coalition of African Lesbians (CAL) was granted such status. This clearly indicated that the African Commission was reluctant to consider issues around the rights of homosexuals.¹⁶⁶ This was illustrated in the manner in which the Commission handled an application for observer status by CAL in 2010. The African Commission rejected the application then citing two reasons.¹⁶⁷

Firstly, it argued that CAL's objectives were not consonant with the AU Constitutive Act and African Charter.¹⁶⁸ Secondly, the Charter does not explicitly recognise the rights to non-discrimination on grounds of sexual orientation.¹⁶⁹ However, human rights scholars such as Viljoen have argued that these reasons were not convincing enough to warrant such a rejection.

Viljoen has argued that CAL's objectives meet the criterion of having objectives and activities 'in consonance with the fundamental principles and objectives in the African Union's Constitutive Act and the African Charter'.¹⁷⁰ They aimed at the advancement of gender equality and social justice, and the protection of the rights of particularly vulnerable individuals.¹⁷¹

As for the lack of explicit 'recognition' of sexual minorities, Viljoen has argued that the African Charter has generally been interpreted as a living instrument, and not as a captive of the original textual strictures.¹⁷² For example, even though the Charter does not mention the concept

¹⁶⁶ Viljoen (n 165 above) 11.

¹⁶⁷ Viljoen (n 144 above) 266-7.

¹⁶⁸ Viljoen (n 144 above) 267.

¹⁶⁹ Viljoen (n 144 above) 267.

¹⁷⁰ Viljoen (n 165 above) 42.

¹⁷¹ Viljoen (n 165 above) 42.

¹⁷² Viljoen (n 165 above) 7.

‘indigenous persons’, the African Commission recognised this concept in the absence of any reference to the word or concept ‘indigenous’ in the Charter.¹⁷³ This stands as a clear illustration of the fact that the protection of the Charter is not denied to groups merely because the Charter does not explicitly recognise that group by name.¹⁷⁴

A further argument against the African Commission’s reasons for refusal of the CAL application can be found in the Commission’s own practice of allowing ‘mainstream’ International Non-Governmental Organisations (INGOs) with observer status to raise issues pertaining to the protection of the rights of homosexuals during public sessions.¹⁷⁵ The mere fact that they are allowed to speak on these issues implies that the Commission has accepted that the protection of sexual minority rights is part and parcel of its mandate under the African Charter. Noticeably, the Commission in 2009 granted observer status to Alternatives-Cameroun, an NGO that has an explicit mandate to work on the right to health and other rights of men who have sex with men and other sexual minorities.¹⁷⁶ Therefore rejecting CAL’s application for observer status was inconsistent with the African Commission’s own practice.¹⁷⁷

The very rationale of a regional human rights system is to provide a level of protection that is difficult or impossible to attain at the national level.¹⁷⁸ The regional system should provide a safety net, normative guidance towards a common consensus, and a forum to articulate concerns especially when no such space exists at the national level, which was the case for CAL.

¹⁷³ Viljoen (n 165 above) 8.

¹⁷⁴ Viljoen (n 165 above) 8.

¹⁷⁵ Viljoen (n 165 above) 267.

¹⁷⁶ Viljoen (n 165 above) 42.

¹⁷⁷ Viljoen (n 165 above) 42.

¹⁷⁸ Viljoen (n 165 above) 42.

The opinion expressed by a majority of commissioners in the CAL matter in 2010 arguably left very little room for any complaint of discrimination based on sexual orientation to be considered by the Commission. The course of the Commission, however, changed during its 56th session, where CAL was finally granted observer status.¹⁷⁹ The 2015 CAL decision has possibly returned the African Commission to its obiter opinion expressed in *Zimbabwe Human Rights Forum*.¹⁸⁰

In 2014, the African Commission focused in particular on violence against gays and lesbians and referred directly to articles 2, 3, 4 and 5 of the African Charter. The Commission strongly urged states to endorse and effectively apply

appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims :¹⁸¹

This shows that the Commission has accepted that violence on the basis of sexual orientation amounts to discrimination and violates the rights to equality and human dignity guaranteed in the African Charter. This, however, does not mean that the Commission has accepted sexual orientation as a prohibited ground of discrimination in the African Charter. It is furthermore important to note that the Commission, in the Resolution, refers to ‘the creation of an enabling

¹⁷⁹ See the 56th Activity Report of the African Commission, <http://www.achpr.org/sessions/56th/info/communique56/> (accessed 29 May 2015), see also AU Doc.EX.CL/856(XXV) (accessed on 4 February 2016)

¹⁸⁰ In this decision, the African Commission stated that ‘the aim of [equality and non-discrimination] is to ensure equality of treatment for individuals irrespective of ... sexual orientation

¹⁸¹ Resolution 275 ‘On Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity’, African Commission on Human and Peoples’ Rights, meeting at its 55th ordinary session held in Luanda, Angola, from 28 April to 12 May 2014, <http://www.achpr.org/sessions/55th/resolutions/275/> (accessed 3 February 2016)(Resolution 275) para 4

environment that is free of stigma, reprisals or criminal prosecution.’¹⁸² This could be understood as indicating a broader undertaking by State parties targeting other forms of discrimination based on sexual outside the ambit of violent crimes as well as a further understanding of the effects of laws that discriminate on the basis of sexual orientation. This, however, needs further clarification from the Commission. In light of these statements, there appears to have been a drastic change of approach of the Commission, as confirmed by the 2015 CAL decision. It, however, remains unclear how the Commission would approach an individual complaint of discrimination based on sexual orientation under the African Charter.

In addition to its promotional mandate, the African Commission has a protective mandate which focuses on hearing communication from states and other groups.¹⁸³ Almost all communications that have been admitted by the African commission were brought by individuals against the state.¹⁸⁴ Before deciding a communication on merit, the African commission makes a decision on its admissibility.¹⁸⁵ The communication must allege the state party has violated a right guaranteed in the African charter.¹⁸⁶ The African Commission then considers whether all local remedies, if they are available, have been exhausted. If the conditions on admissibility are fulfilled, the African Commission takes a decision on merit, but only after first trying to reach an amicable settlement.¹⁸⁷ The Commission can then issue its findings and make recommendations on the matter.¹⁸⁸ The communication procedure is very important since it allows the Commission

¹⁸² Resolution 275 para 3

¹⁸³ Articles 49 and 55(1) of the African Charter.

¹⁸⁴ Magure (n 161 above) 43.

¹⁸⁵ Magure (n 161 above) 42.

¹⁸⁶ Article 4 of African Charter.

¹⁸⁷ Article 50 of African Charter.

¹⁸⁸ Article 53 of African Charter.

to address concrete human rights problems while articulating the meaning of the rights guaranteed in the charter from an African perspective.¹⁸⁹

The African Commission has the mandate of reviewing reports of state parties.¹⁹⁰ One of the unusual discussions on the rights of homosexuals took place during the African Commission's review of the report submitted by Namibia.¹⁹¹ The African Commission questioned the government of Namibia's policy of arresting and detaining gay men and lesbians. It termed Namibia's actions as an incitement to ordinary citizens to harass and victimise people on the basis of their sexual orientation. The African Commission's critical review of state reports is valuable especially to LGBT NGOs in some African countries who possibly face retaliation when they question the violations of the rights of gays and lesbians by government officials.

The focus now turns on how to build legal arguments based on the rights guaranteed in the African Charter. The next section will examine the arguments raised as the basis for the decriminalisation of same-sex sexual conduct on the African continent. These arguments are based on the right to non-discrimination and the right to privacy as guaranteed in the African Charter.

The right to non-discrimination can be invoked as a basis for the decriminalisation of same-sex sexual conduct under the African human rights system. Although, articles 2 and 3 of the African Charter address the question of equality and non-discrimination, like other human rights

¹⁸⁹ Magure (n 161 above) 43.

¹⁹⁰ Article 62 of the African Charter.

¹⁹¹ https://www.google.com/?gws_rd=ssl#q=african+commision+reviewing+namibia (accessed 1 November 2014).

instruments they do not include sexual orientation as a prohibited ground of discrimination.¹⁹² Article 2 provides that individuals are entitled to the rights under the Charter ‘without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status’.¹⁹³ Article 3 provides that ‘everyone shall be equal before the law’.¹⁹⁴ It can be argued that the use of the terms ‘other status’ and ‘such as’ shows that the list upon which discrimination is prohibited under the Charter is not exhaustive. This language suggests that the drafters of the Charter foresaw the need to leave the list open to expansion to other grounds that are not on the list. The words ‘other status’ are used in the Charter as an expansive and open ended concept to ensure full realisation and enjoyment of rights outlined in the Charter by everyone.¹⁹⁵ This would make the Charter a living document that cannot be overtaken by time and whose growth cannot be limited. With this argument it is clear that sexual orientation should be included as a ground on which discrimination is prohibited. It follows that article 2 and 3 of the Charter prohibit discrimination on the basis of sexual orientation. This argument is supported by the General Comment issued by the CESCR that considers sexual orientation as a ground upon which discrimination is prohibited under the Covenant, though this does not expressly appear on the list under article 2 of the Covenant.¹⁹⁶

In the alternative, it could be argued that ‘sex,’ one of the prohibited grounds under article 2 of the African Charter, should be understood to include ‘sexual orientation’ for the reason that the

¹⁹²Murray & Viljoen (n 154 above) 91.

¹⁹³Article 2 of the African Charter.

¹⁹⁴Article 3 of the African Charter.

¹⁹⁵Murray & Viljoen (n 154 above) 92.

¹⁹⁶General Comment No. 14 of 2000 on non-discrimination.

adoption of the Charter predates the use of phrases such as gender and sexual orientation.¹⁹⁷ Gender and sexual orientation are concepts that are related to sex (in the sense of sexuality), therefore their late emergence may justify their inclusion within the term ‘sex’.¹⁹⁸ This is supported by the fact that there exists no record indicating any particular rejection of the inclusion of sexual orientation as a ground upon which discrimination is prohibited during the process of drafting the Charter. The argument that sex includes sexual orientation is further strengthened by jurisprudence from the HRC. The HRC, in the *Toonen v Australia*, made it clear that the meaning of the term ‘sex’ in the listed grounds for non-discrimination under article 2 of ICCPR includes sexual orientation.¹⁹⁹ However, it ought to be acknowledged such an expansive definition could militate against the more common understanding of the word ‘sex’. The significance of the interpretative inclusion of sexual orientation in article 2 is that it would enable homosexuals to fall within the protective scope of the Charter as a whole.

The African Commission was urged to consider the rights of homosexuals in the case of *William Courson v Zimbabwe*.²⁰⁰ The complainant argued that criminalisation of same-sex sexual conduct in Zimbabwe and the utterances of senior political officials amounted to a violation of the African Charter. The Commission did not make a finding on the matter since the case was withdrawn. However, in *Zimbabwe Human Rights NGO Forum v Zimbabwe*, the Commission stated that non-discrimination under article 2 aims to ensure equality of treatment for individuals on various grounds including sexual orientation.²⁰¹ The position of the Commission reflects an

¹⁹⁷Murray & Viljoen (n 154 above) 92.

¹⁹⁸Murray & Viljoen (n 154 above) 93.

¹⁹⁹*Toonen* para 8.3.

²⁰⁰*William Courson v Zimbabwe*, Communication 136/94, *Eighth Annual Activity Report*, Annex VI at 21 (1995); 2000 African Human Rights Law Reports (1995).

²⁰¹*Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) 169. The observation was obiter dicta since the case did not directly concern the question of sexual orientation.

interpretation given by the HRC to the non-discrimination provision in the ICCPR in the cases of *Toonen* and *Young*.²⁰² It anticipated that should a matter concerning rights of gays and lesbians be presented, the African Commission will consider international jurisprudence on the same since articles 60 and 61 of the African Charter, requires them to consider international human rights norms when interpreting the Charter. The focus now turns to the right to privacy and how this right can be used to attack the justifications for the criminalisation of same-sex sexual conduct.

3.4 Right to privacy

There are various types of privacy rights.²⁰³ This may include spatial areas where government is prohibited from intruding into places such as homes, the bedroom or an individual's body.²⁰⁴ The right to privacy may also include intangibles with which the government or other people are prohibited from interfering, for example one's reputation or right to marry and found a family.²⁰⁵ Finally, the right to privacy may include certain protected activities such as oral communication or sexual activities.²⁰⁶

In the context of sexual orientation, the right to privacy has been associated mainly with the right to engage in consensual same-sex sexual conduct without state interference.²⁰⁷ The right to privacy discussed in this thesis is the right of homosexuals to be free from surveillance by the

²⁰²Nyarang'o (n 70 above) 20.

²⁰³ICJ briefing paper (n 71 above) 9.

²⁰⁴ In United States jurisprudence, for example, the right to be secure in one's home was not traditionally defined as a "privacy" right, but was subsumed within the Fourth Amendment's procedural right of "the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" This procedural right was later recognized by the Supreme Court as an indication of the Constitution's implicit recognition of the substantive right to privacy in *Griswold v. Connecticut*, 381 U.S. 479 (1965). In most other constitutions, as we will discuss below, this kind of privacy right (along with prohibitions against illegal searches and seizures generally) is subsumed under the right to privacy.

²⁰⁵ Magure (n 161 above) 18.

²⁰⁶ICJ briefing paper (n 88 above) 7.

²⁰⁷ ICJ briefing paper (n 88 above) 7.

government, which continues to exist in many countries even where homosexuality is decriminalised.²⁰⁸

Though in most cases the right to privacy is the right invoked to decriminalise consensual private same-sex sexual relations, anti-homosexuality laws operates to deprive homosexuals of much more than their privacy.²⁰⁹ The existence of sodomy laws are invoked to argue against a wide range of other human rights for lesbians and gays such as freedom of freedom of speech and expression, the right to family life and parenthood.²¹⁰ Homosexuals are not able to meet and advocate for their rights freely since they are regarded as advocating for a criminal activity.²¹¹ The limitations of the right to privacy as a tool to advocate for the rights of homosexuals lies in the right to privacy's attribute as a 'negative' right.²¹² This is because it only gives homosexuals the right to be left in the privacy of their homes or bedrooms.²¹³ It in no way recognises the full expression of homosexual identity.²¹⁴

The right to privacy is protected in a number of international and regional human rights instruments.²¹⁵ The African Charter contains no provision on the right to privacy. Under article 17 of the ICCPR 'no one shall be subjected to arbitrary or unlawful interference with his privacy, family life, home or correspondence, or to unlawful attacks on his honour and reputation'.²¹⁶

²⁰⁸ Magure (n 161 above) 19.

²⁰⁹ DJ Wilets 'International human rights law and sexual orientation' (1995) 1 *Hastings International and comparative law review* 63.

²¹⁰ Magure (n 161 above) 19.

²¹¹ ICJ briefing paper (n 88 above) 7.

²¹² Magure (n 161 above) 20.

²¹³ ICJ briefing paper (n 88 above) 8.

²¹⁴ ICJ briefing paper (n 88 above) 8.

²¹⁵ Article 12 of UDHR, article 17 of the ICCPR, article 11 of the ECHR and article 11 of ACHR.

²¹⁶ Article 17 of ICCPR.

The provisions of human rights treaties do not define what amounts to privacy. Nevertheless, the decisions of various human rights bodies highlight certain elements of the concept of privacy.²¹⁷ It includes personal intimacy, identity, name, gender, dignity, appearance and feelings; and extends to the home and correspondences.²¹⁸ There are different components of the right. Thus the determination of the right depends on the circumstance of each case. However, ‘sexual’ privacy is considered an integral part of an individual’s privacy and integrity. In the case of *Pretty v UK*, the ECtHR stated that when it comes to matters of sexual privacy, the state’s margin of appreciation to interfere with the intimate area of an individual’s sexual life is narrower.²¹⁹ Therefore there must be compelling pressing reasons to justify an interference of that kind.²²⁰

In *Coeriel and Aurik v The Netherlands*, the HRC stated that ‘the notion of privacy refers to the sphere of a person’s life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone’²²¹. The ECtHR agreed with this description in the case of *Niemitz v Germany*, where it stated that the concept of private life includes a right to develop relationships with others.²²² The ECtHR considered it unnecessary to offer an exhaustive definition of private life but stated further that:

It would be too restrictive to limit the notion to an ‘inner’ circle in which the individual may live his own personal life as he chooses and to exclude them from entirely the outside world not

²¹⁷Tatah (n 25 above) 55.

²¹⁸Tatah (n 25 above) 55.

²¹⁹*Pretty v UK* ECtHR Application No. 2346/02 judgement delivered on 29 April 2002.

²²⁰*Pretty* para 34.

²²¹*Coeriel and Aurik v the Netherlands*, Communication No. 453/1991.

²²²*Niemitz v Germany* ECtHR Application No. 137/88 judgement delivered on 16 December 1992.

encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relations with other human beings.²²³

The question of privacy has also been raised at the national level. The Supreme Court of United Kingdom, in the case of *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department*, stated that compelling a person to pretend or suppress his or her sexuality or the behaviour by which the sexuality manifest itself amounts to denying that person his or her fundamental right to be who he or she is.²²⁴ The case concerned an application for asylum by two homosexual men. One was from Cameroon while the other was from Iran. Both Cameroon and Iran have criminalised same-sex sexual activities between adults. The question before the court was whether the men were expected to hide their sexual orientation in order to avoid persecution should they be deported back to their countries of origin. The court's approach supports the position held by both the HRC and the ECtHR.

3.4.1 Right to privacy at the UN level

The expression of sexuality has been considered an integral aspect of private life by the HRC in the case of *Toonen*.²²⁵ In its ruling the Committee stated that the concept of privacy covers consensual sexual activity. The case concerned Toonen, an Australian national who challenged sections 122 (8a)(c) and 123 of the Tasmanian criminal code that criminalised same-sex sexual conduct between consenting adults, before the HRC. He argued that these two sections violated his rights to privacy as provided for under article 17 of the ICCPR. The HRC found that the continued existence of sections 122 and 123 of the criminal code was an unreasonable

²²³Niemitz para. 23 .

²²⁴*HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* Supreme Court of the United Kingdom 7 July 2010 (2010) UKSC 31.

²²⁵*Toonen* para 6.7.

interference with Toonen's privacy.²²⁶ The fact that the statutory provisions were unenforced was irrelevant.

In deciding whether Tasmania's law prohibiting consensual same-sex conduct was justified, the HRC adopted a two-pronged reasonableness test in which the privacy interference must be 'proportional to the end sought and be necessary in the circumstances of any given case'.²²⁷ Under this analysis, the Committee rejected Tasmania's justifications that its law helped prevent the spread of HIV/AIDS and protected morals. With respect to article 17(2)'s prohibition of arbitrary and unlawful interference, the Committee noted that the introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the ICCPR.²²⁸ In addition, General Comment No.16 on the right to privacy issued by the HRC defines unlawful as meaning 'that no interference can take place except in cases envisaged by the law'.²²⁹

The HRC has not had a chance since, in its consideration of individual cases, to address other applications of the right to privacy in the context of sexual orientation. However, it has addressed the matter through the periodic reports submitted by state parties to the Covenant. It has addressed the right to privacy in the context of the criminalisation of same-sex sexual activity. In considering reports submitted by Kenya in 2005, the HRC reiterated that the criminalisation of same-sex sexual conduct constitutes discrimination on the basis of sexual orientation and a

²²⁶*Toonen*, para 6.6.

²²⁷*Toonen* para 8.2.

²²⁸*Toonen*, para 8.3.

²²⁹General Comment 16.

violation of article 17 of the Covenant that provides for the right to privacy.²³⁰ It urged the government of Kenya to repeal their penal code to do away with the sodomy laws.²³¹

3.5 Right to privacy at the regional level

The question of whether criminalisation interferes with the right to privacy has been considered in the regional human right systems. This section discusses the relevant provisions in the various regional human rights treaties and approaches taken by the regional human rights bodies on deciding whether the privacy of homosexuals is denied by state interference through penal laws.

3.5.1 Right to privacy in the European human rights system

The HRC approach was taken by the ECtHR on matters concerning the privacy of same-sex sexual relations. Article 8 of the ECHR provides for the right to privacy. In *Dudgeon v United Kingdom* the ECtHR found that criminalisation of same-sex sexual practices between consenting adults was deemed a violation of privacy as provided for under article 8 of the convention.²³² The Court stated that ‘although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved’. The same decision was reached in the case of *Norris v Ireland* where the court held that criminalisation of same-sex sexual acts violated article 8 of the Convention.²³³ Similarly in *Modinos v Cyprus* the ECtHR held that a penal provision criminalising same-sex sexual acts between consenting adults violated the right to privacy.²³⁴ The court went further to

²³⁰Flaherty & Fisher (n 46 above) 222.

²³¹Flaherty & Fisher (n 46 above) 222.

²³²*Dudgeon v UK* A 45 (1981); (1982) 4 EHRR 149.

²³³*Norris v Ireland* A 142 (1988); (1988) 13 EHRR 186.

²³⁴*Modinos v Cyprus* A 259 (1994); (1993) 16 EHRR 485.

state that ‘a consistent policy of not bringing prosecutions under the penal law was no substitute for full repeal’.

3.5.2 Right to privacy in the Inter-American human rights system

The Inter-American human rights system has not established whether criminalisation of same-sex sexual conduct constitutes a violation to the right to privacy as guaranteed in article 11 of the American Convention on Human Rights.²³⁵ However, IACHR could adopt the approach taken by the HRC when faced with a communication challenging penal laws that criminalise same-sex sexual conduct in a member state. This could be the case because article 11 of the ACHR is quite similar to provision of article 17 of the ICCPR. Even though IACHR has not given an interpretation of article 11 to protect homosexuals, gays and lesbians are already protected under the provisions on the right to non-discrimination and equal protection before the law.²³⁶ Nevertheless, a stronger protection would be achieved if such an interpretation was taken in future.

3.5.3 Right to privacy in the African human rights system

In the African context, the African Charter provides for civil and political rights, economic, social and cultural rights as well as group rights. Although the African charter does not explicitly provide for the right to privacy unlike the ICCPR and the European Convention, it can be argued that such a right can be implied. Such an argument could be based on the position taken by the African Commission in the *SERAC* case where the Commission implied the rights to food and

²³⁵ Article 11 of ACHR provides that everyone has the right to have his honour respected and his dignity recognised. It further says no one may be the object of arbitrary or abusive interference with private life, his family, his home or his correspondence of unlawful attacks on his honour or reputation.

²³⁶ Article 1(1) and 24 of ACHR; *Karen Atala and Daughters v Chile* case 1271-04 Report No. 42/08, Inter-AMCHR, OEA/Ser.L/II.130 Doc. 22 Rev.1 (2008), Judgement on 24 February 2012 para 83.

shelter though these rights were not expressly provided in the charter.²³⁷ In the same breath it could be argued that the right to privacy stems from three other rights outlined in the charter.²³⁸ The right to respect for his life and integrity of his person, the right to respect of the dignity inherent in a human being and the right to liberty and security of his person.²³⁹ Once it is acknowledged that human beings regard sexual attraction to persons of the same sex as integral to their personality, it would follow that an intrusion of that element of their person amounts to a violation of their integrity as a person and their inherent human dignity.²⁴⁰ Therefore for this integrity and dignity to be respected, the person should be left free of state interference in the most intimate domain of sexual choice, hence implying the right to privacy.

This argument is also supported by the guidelines for national periodic reports that require state parties to the Charter to report on all civil and political rights outlined in the Charter, including the right to privacy.²⁴¹ This is even strengthened further by the fact that the subsequent human rights instrument in the region, the African Charter on the Rights and Welfare of the Child that was adopted by the OAU, explicitly provides for the right to privacy.²⁴²

²³⁷*Social and Economic Rights Action Center for Economic and Social Rights (SERAC) v. Nigeria*, Communication No. 155/96, African Commission on Human and People's Rights, ¶ 68 (May 2002). "International law and human rights must be responsive to African circumstances.

²³⁸The right to food, for example, is derived from the right to life, to health and the right to economic, social and cultural development; and is 'inseparably linked to the dignity of human beings and is therefore essential in the enjoyment and fulfillment of such other rights as health, education, work and political participation.'

²³⁹Articles 4, 5 and 6 of the African Charter.

²⁴⁰Murray & Viljoen (n 154 above) 90.

²⁴¹Article 62 of the African Charter requires states to submit a report every two years indicating the legislature and other measures they have adopted to implement the Charter.

²⁴²Article 10 of the African Charter on the Rights and Welfare of the Child. It provides that no child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attack.

The level of protection that could be granted to homosexuals by the Charter can be limited by the same Charter. Article 27(2) of the Charter provides that the rights must be exercised with due regard to the rights of others, collective security, morality and common interest.²⁴³ This provision has been invoked by the African Commission as a general limitation provision to limit the enjoyment of rights guaranteed in the Charter. It is on the basis of article 27(2) of the Charter that rights are to be tested. In previous cases, the African Commission has a two-phased approach to the interpretation of the Charter. In the first phase, the complainant must establish the violation of the right under the Charter. If this has been established, the state is allowed to invoke the limitation or restriction by showing that the limitation raised is justifiable. The African Commission has applied a proportionality test when analysis the limitation of the right raised by state parties. According to this test, 'the limitation raised by the state must be strictly proportionate with and absolute necessary for the advantages that are to be obtained and may not erode a right such as the right itself becomes illusory',²⁴⁴

From the arguments raised above, criminalisation of private consensual same-sex sexual conduct amounts to a violation of the rights to non-discrimination and to privacy as provided in the African Charter. However African states may defend the criminalisation of sexual conduct by raising grounds of justification such as African culture, religion and HIV prevention. The analysis in chapter two established that these grounds should be rejected.

²⁴³Article 27(2) of the African Charter. It provides 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.

²⁴⁴*Media Rights Agenda and Another v. Nigeria*, Communication 105/93, 128/94, 130/94 and 152/96, at 69–70 (1998).

3.5.4 Is the right to privacy limited?

From the decisions of the HRC and the ECtHR, it is clear that not all interference constitutes a violation of the right to privacy as per article 8 of the ECHR and article 17 of the ICCPR. The HRC, in deciding the *Toonen* case, did not state any circumstances under which interference by penal provisions for same-sex sexual acts would not violate the right to privacy guaranteed in the Covenant. However, the ECtHR has stated in its jurisprudence circumstances under which criminal prohibition of same-sex sexual acts are justified interference of an individual's privacy in a democratic society. First, where the criminal laws aim to provide sufficient safeguards against exploitation and corruption of others, especially those who are vulnerable because they are young, weak in body or mind, inexperienced or in a state of special physical, official or economic dependence.²⁴⁵ This means that criminalisation of same-sex sexual conduct is justified where it aims to protect minors and vulnerable groups in the society. States that criminalise same-sex sexual activities to protect minors, and where consent is absent, do not violate international human rights law. However, those that outlaw homosexual acts between consenting adults violate international human rights law unless they are able to provide a serious reason before an interference can be legitimate for purposes of article 8 of the ECHR and article 17 of the ICCPR.

Furthermore, an interference with privacy under article 8 of the ECHR by criminal prohibition of same-sex sexual activities between consenting adults could be justified or necessary where the interference seeks to protect the public from bodily harm.²⁴⁶ States that have criminalised same-sex sexual conduct have failed to give an explanation or evidence to justify the criminal prohibition on the basis of protecting the public from bodily injuries. The cases that have tried in

²⁴⁵*Dudgeon* para 49.

²⁴⁶*Laskey, Jaggard and Brown v UK* ECtHR Application Nos. 21627/93, 21826/93, 21974/93. The judgement was delivered on 19 February 1997.

courts have been unable to demonstrate any bodily harm to the public. As Sachs J stated ‘if, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy’.²⁴⁷

International human rights law protects the right to privacy of homosexuals. However, in certain circumstances this right is limited and can be interfered with. The interference with intimate sexual life would be justified provided it is not arbitrarily exercised, clearly provided by law, in order to achieve a particular aim and the limitation is appropriate to the aim to be achieved. The next section examines rationales offered by international human rights tribunals for extending protection to homosexuals.

3.6 International human rights bodies: Rationales for protecting homosexuals

This section critically analyses the rationales given by international and regional human rights bodies to justify the extension of human rights protection to homosexuals. The section will examine two justifications and the extent of their compatibility: Firstly, the international and regional bodies have treated homosexuals as a sexual minority group that is in need of special protection by international human rights law.²⁴⁸ Under this approach, the right to non-discrimination and the right to privacy are extended to homosexuals and their sexual activities on the basis of the perception of these groups as particularly disadvantaged and socially and politically underrepresented.²⁴⁹ Secondly, there should be substantive limitations to state

²⁴⁷ *National Coalition for Gay and Lesbian Equality v Minister of Justice*, CC 1998, 3 LRC 648 (National Coalition case).

²⁴⁸ M Grigolo ‘sexualities and the ECHR: Introducing the universal sexual legal subject (2003) 14 *European Journal of International Law* 1023.

²⁴⁹ Grigolo (n 248 above) 1023.

regulation of same-sex sexual activity between consenting adults in private.²⁵⁰ This is because such sexual preferences and practices do not show any tangible harm to identifiable persons. This approach is based on ‘the harm principle’ to invalidate state interference in or discrimination against homosexuals.²⁵¹ Although both rationales sometimes have been pointed out in the same case, they are conceptually distinct and in some ways may be contradictory.²⁵² The following section analyses the argument that homosexuals are minority group that requires protection from international human rights norms.

3.6.1 Homosexuals as a special minority class

International and regional human rights bodies and tribunals have viewed homosexuals as a clearly defined minority group that required protection from oppressive majoritarian legislation.²⁵³ Grigolo has stated that the trend of the ECtHR’s jurisprudence is toward the granting of human rights to homosexuals on the basis of their perceived homogenous group.²⁵⁴ Sometimes both the HRC and the ECtHR have expressed views consistent with Grigolo interpretation. In the case of *Dudgeon v United Kingdom* the HRC found that penal laws that prohibit same-sex sexual activity affected Dudgeon who was a self-identified homosexual applicant as a member of ‘a particular class of persons whose conduct is thus legally restricted’.²⁵⁵ The HRC seemed to identify gays and lesbians as a disfavoured class that is entitled to legal protection by international human rights law.²⁵⁶

²⁵⁰ AAX Fellmeth ‘State regulation of sexuality in international human rights law and theory’ (2009) 50 *Wm & Mary Law Review* 876.

²⁵¹ Fellmeth (n 250 above) 877.

²⁵² Fellmeth (n 250 above) 877.

²⁵³ Grigolo (n 248 above) 1024.

²⁵⁴ Grigolo (n 248 above) 1024.

²⁵⁵ *Dudgeon* para 49.

²⁵⁶ *Dudgeon* para 49.

The ECtHR has taken a similar approach in two cases. In *Lustig-Prean & Beckett v United Kingdom* and *Smith & Grady v United Kingdom* the Court implicitly analogized homophobia to racism.

To the extent that (the service regulations prohibiting homosexual enlistment in the military) represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification....any more than similar negative attitudes towards those of different race, origin or colour.²⁵⁷

In both cases the applicants were homosexuals who were dismissed from the military service on the basis of their sexual orientation.²⁵⁸

What is the risk of both the HRC and the ECtHR relying exclusively on the position of homosexuals as a minority group without clearly stating whether discrimination is not allowed because of the status of homosexuals as disfavoured class or because the state has no legitimate interest in regulating harmless homosexual activity happening in private? The courts would be limiting themselves when they exclusively view homosexuals as a minority class worthy of international human rights protection.²⁵⁹ The logical but unacceptable scenario to support this line of thinking is where a self-identified heterosexual may be a subject of criminal prohibitions and other discrimination to which a self-identified homosexual would not be legally subjected to.²⁶⁰ This is because heterosexuals do not fall within the category of minority class thus the protection will not be extended to them.²⁶¹ It would be important for the HRC and the ECtHR to

²⁵⁷ *Lustig-Prean & Beckett v United Kingdom* 29 ECtHR 90; and *Smith & Grady v United Kingdom* 29 ECtHR 90.

²⁵⁸ *Lustig-Prean & Beckett v United Kingdom* 29 ECtHR 90; and *Smith & Grady v United Kingdom* 29 ECtHR 90.

²⁵⁹ Fellmeth (n 250 above) 870.

²⁶⁰ Fellmeth (n 250 above) 870.

²⁶¹ Fellmeth (n 250 above) 870.

appreciate the fact that heterosexuals should have the same rights as homosexuals to engage in sexual intercourse with someone of the same sex if they so choose.²⁶² This is particularly crucial in light of the evidence showing that a relatively high number of self-identified heterosexuals have had sexual fantasies about or actual intercourse with persons of the same sex at one time or another.²⁶³ Evidence of these considerations may be gathered from the Court's decisions in *Dudgeon*, *Lustig-Prean & Beckett*, *Smith & Grady* to rely on article 8 on the right to privacy to strike down state interference rather than article 14 of the Convention on the right to non-discrimination. This reasoning fails to protect heterosexuals who choose to have sexual intercourse with individuals of the same sex.

A similar reasoning of relying on the right to privacy to protect homosexuals as a special group would preclude a claim by homosexuals based on discrimination where the criminal laws penalises oral or anal penetration in heterosexual and homosexual intercourse equally unless one argues that heterosexuals do not have the same right as homosexuals to explore their sexuality. The counterargument is that such laws are virtually never enforced against heterosexual who engages in oral or anal sexual intercourse. They are often limited in their scope and application to same-sex intercourse. It could be argued that the intention of the legislature is to strike at the homosexual's identity through the only conduct by which they can express their identities as gays and lesbians.

Unlike sex and race discrimination which are determined by observable characteristics, homosexuals are characterised by personality traits of intimate attraction to members of the same-sex which are typically expressed and observed by the resulting intimate sexual conduct,

²⁶² Fellmeth (n 250 above) 870.

²⁶³ Fellmeth (n 250 above) 870.

which heterosexuals can engage as well.²⁶⁴ If conduct is considered a legitimate basis for classifying a person, then we are likely to find ourselves in an elusive search for a distinction between identity-typing conduct and non-identity typing conduct.²⁶⁵ This begs the question of how much attraction to or sexual conduct with persons of the same-sex moves a person from the ‘heterosexual’ category to the ‘homosexual’ category. More importantly, classifying human beings based on personality characteristics for purposes of protection is inherently problematic. The treatment of homosexuals as members of a minority group forces a dichotomisation of a full spectrum of human sexual preferences and practices.²⁶⁶ Many men and women have had homosexual encounters without necessarily labelling themselves as homosexuals.²⁶⁷ Therefore forcing the complexities of sexuality into two categories is unhelpful to understanding the conduct and whether state interference is necessary.

This is not to say that minority class analysis is never a helpful approach to understanding how international human rights law relates to sexuality. It merely shows that this approach has its limitations. The relevance of categorising homosexuals as a ‘class’ remain critical to the theory of non-discrimination as applied both to the homosexuals themselves and their sexual conduct.²⁶⁸

A self-identified heterosexual who is prohibited from engaging in one-time or periodic sexual intercourse with a person of the same sex suffers less than does a homosexual, because although both experience an interference with their rights to liberty and privacy, the prohibition specifically targets and affects the homosexual’s primary way for sexual expression and attachment to another.

²⁶⁴ Thomas (n 35 above) 380.

²⁶⁵ Thomas (n 35 above) 380.

²⁶⁶ Thomas (n 35 above) 380.

²⁶⁷ Thomas (n 35 above) 380.

²⁶⁸ Mittelstaedt (n 38 above) 364.

3.6.2 Homosexuals as a harmless group in society

International human rights treaties require states to preserve human dignity and autonomy.²⁶⁹

Autonomy denotes a basic condition of freedom from state interference and adverse discrimination while dignity is human worthiness.²⁷⁰ The legal protection of privacy and freedom of intimate association plays a key role in preserving both dignity and autonomy by limiting the state interference with individual's chosen path towards self-actualisation through inter-personal relationships.²⁷¹ Tribe has noted that 'virtually every intrusion upon association works a displacement of human personality.'²⁷² International human rights norms allow such intrusion only upon showing of sufficient state interest.²⁷³ The question is when state interference of same-sex sexual conduct between consenting adults in private can be justified as consistent with international human rights law?

International human rights law places a burden of justification on the state seeking to discriminate against disfavoured class or individual that falls within the scope of defined privacy.²⁷⁴ This burden is increased when the state seeks to regulate or discriminate based on same-sex sexual conduct between consenting adults in private. The state regulation must be based on a legitimate state interest. This is because any interference must be proportional and necessary in a democratic society or reasonable and objectively necessary to accomplish a legitimate state purpose. In this regard, state authorities have been notably unsuccessful in justifying discrimination against same-sex sexual conduct as necessary or helpful to preventing some social harm or promoting some public benefit. The realm of intimate association between

²⁶⁹ The right to human dignity is guaranteed in all international and regional human rights instruments including ICCPR, ICESCR.

²⁷⁰ Fellmeth (n 250 above) 894.

²⁷¹ Fellmeth (n 250 above) 894.

²⁷² L H Tribe *American constitutional law* (1988) 562.

²⁷³ Tribe (n 273 above) 563.

²⁷⁴ ICJ briefing paper (n 88 above) 7.

consenting adults is considered the most fundamental form of privacy interest. The European Commission on Human Rights has insisted that ‘a person’s sexual life is an important aspect of his private life’ protected by the European Convention.²⁷⁵ Equally, the European Parliament has maintained that each individual is entitled to have his privacy respected and to self-determination in sexual matters.²⁷⁶

Protection of morality has been raised as a justification by state for their regulation of sexual conduct between persons of the same sex.²⁷⁷ International human rights tribunals have viewed moral justifications for regulation of same-sex sexual conduct much suspicion.²⁷⁸ They have sought to apply a theory that can express and protect the rights of homosexuals while balancing the state’s interests in regulating conduct to achieve their legitimate goals.²⁷⁹ They have turned to political philosophy to help them conceptualise a general theory of human rights. They have applied libertarianism theory in analysis the justification of state interference in intimate association. This theory, in its most extreme form rejects all state regulation not necessary to prevent concrete harm to identifiable individuals.²⁸⁰

According to Mill, a proponent of libertarian philosophy, ‘the only purpose for which power can be rightfully exercised over any member of a civilised community against his will is to prevent harm to others’.²⁸¹ He further notes that ‘the only part of the conduct of any one, for which is amenable to society is that which concerns others.’²⁸² He argues that matters which merely

²⁷⁵ *X v Germany* app. No. 5935/72 3 Eur Comm H.R (1976) 46.

²⁷⁶ European Parliamentary resolution 812 of 1983.

²⁷⁷ *Toonen* para 8.9.

²⁷⁸ *Fellmeth* (n 250 above) 892.

²⁷⁹ *Wilets* (n 209 above) 46.

²⁸⁰ *J S Mill on liberty* (1859) 15.

²⁸¹ *Mill* (n 280 above) 15.

²⁸² *Mill* (n 280 above) 15.

concern a person and his independence are, of right, absolute.²⁸³ He further argues that an individual is sovereign when it comes to anything over his body and mind so long as his action does not harm others or attempt to deprive them of what is theirs.²⁸⁴ Mill objected to the state regulation of personal conduct purely on moral grounds unless necessary to prevent identifiable harm.²⁸⁵

International human rights bodies have increasingly invoked this libertarian theory to support limitation on state interference to the right to privacy homosexuals. They have argued that state regulation of same-sex sexual conduct could not be justified.²⁸⁶ It is not, in my view, the function of the law to intervene in the private life of citizens or to seek to enforce any particular pattern of behaviour.²⁸⁷ There must remain a realm of private morality or immorality which is not the law's business.²⁸⁸ It is not proper for the law to concern itself with what a man does in private unless it can be shown to be so contrary to the public good that the law ought to intervene in its function as the guardian of that public good.²⁸⁹

The HRC has adopted libertarian theory arguments to defeat discrimination against same-sex sexual conduct. In the *Toonen* case the HRC rejected Tasmania's justification for its laws criminalising same-sex sexual conduct as necessary for the protection of morals.²⁹⁰ It stated that promoting state morality cannot justify state interference of right of privacy of homosexuals.²⁹¹

The ECtHR has also adopted the harm principle in dealing with legislation criminalising same-

²⁸³ Mill (n 280 above) 15.

²⁸⁴ Mill (n 280 above) 15.

²⁸⁵ Mill (n 280 above) 15.

²⁸⁶ Wolfenden Report: Report of the committee on homosexual offences and prostitution (1963) 16.

²⁸⁷ Wolfenden Report (n 286 above) 61.

²⁸⁸ Wolfenden Report (n 286 above) 62.

²⁸⁹ Wolfenden Report (n 286 above) 62.

²⁹⁰ *Toonen* para 9.2.

²⁹¹ *Toonen* para 9.2.

sex sexual conduct.²⁹² It requires such legislation to be ‘legitimate’ or ‘necessary’ in a democratic society.²⁹³

In *S.L v Austria*, the ECtHR stated that discrimination on the basis of sexual orientation must pursue a legitimate aim and have an objective and reasonable justification.²⁹⁴ It further stated that the state must provide serious reasons by way of justification because of the private, consensual and harmless nature of same-sex sexual activity.²⁹⁵ It follows then that an objective showing harm could render same-sex sexual activity illegal, as the ECtHR has in fact held.²⁹⁶ In *Laskey, Jggard & Brown v United Kingdom*, the applicants had been convicted of engaging in sadomasochistic sex.²⁹⁷ The ECtHR held that the activity involved was not protected by article 8 on the right to privacy due to the extreme nature of the practices and the risk of harm involved.²⁹⁸

Nevertheless, the ECtHR has developed its jurisprudence in a legal environment in which the ‘protection of morals’ is a textually valid basis for state regulation of private conduct having to justify whether the regulation is to prevent harm. In developing its margin of appreciation jurisprudence though defining what kinds of regulation are proportional and necessary in a democratic society to meet a pressing social need, the ECtHR looks at several factors including the moral climate of the state at issue, public demands for regulation and its enforcement and the trends in the Council of Europe member states.²⁹⁹ And in so doing, the Court has left open the door to arguments in favour of discriminating against harmless same-sex sexual conduct.

²⁹² *L & V v Austria* (2003) 36.

²⁹³ Article 8(2) of the ECHR.

²⁹⁴ *S.L v Austria* ECtHR (2003) 39.

²⁹⁵ *S.L v Austria* para 34.

²⁹⁶ *Laskey, Jggard & Brown v United Kingdom app No. 42758/99*.

²⁹⁷ *Laskey, Jggard & Brown v United Kingdom*.

²⁹⁸ *Laskey, Jggard & Brown v United Kingdom*.

²⁹⁹ *Dudgeon* para 47.

From a jurisprudential perspective the factors adopted by the court could be problematic because of their extra-legal nature. The first two relates to the view of same-sex sexual conduct from the standpoint of public morality in the regulating state, which merely justifies the court in deferring to the state whenever it undertakes an invasion of privacy for popular reasons such as public demand for stricter enforcement of the law.³⁰⁰ This would make the right to privacy lose its meaning if its interference is sanctioned whenever private conduct is socially unpopular.

Though some judicial decisions have adopted the harm principle, it cannot be interpreted to reflect an international consensus on how conflicts between sexual privacy of homosexuals and state interference should be resolved. Both states and international bodies are not willing to countenance the extreme proposition that international human rights law prohibits them to regulate harmless sexual conduct based solely on majority moral repugnance toward the conduct.

3.7 Conclusion

This chapter has analysed the interpretation and application given by international and regional treaty-bodies to the right to non-discrimination and the right to privacy to attack the laws that criminalise same-sex sexual conduct. It has also examined the rationales offered by international human rights bodies for the protection of homosexuals. It is clear from the chapter that the very nature of international human rights law requires states to accept the international community's interests in protecting the same-sex sexual conduct from some form of state interference or discrimination. There is no paradox in international law peeking into the boudoir to ensure that the state refrains from doing so.

³⁰⁰ *Norris* para 12.

Decisions from international human rights bodies indicate that domestic laws criminalising same-sex sexual conduct between consenting adults in private violate the right to privacy. This is an established international human right principle. However the principle is resisted primarily by those states that object to international human rights norms generally.

Despite the non-existence of an international instrument specifically providing for the protection of the rights of homosexuals and non-existence of sexual orientation as a prohibited ground of discrimination, International human rights bodies and some regional bodies have recognised the right to non-discrimination on the basis of sexual orientation through their interpretation of the provisions on non-discrimination and equality before the law. This innovative and holistic interpretation and application has extended protection to homosexuals.

It is also clear from this chapter that mechanisms available at international and regional levels have not been effectively utilised. For example, the HRC recommendations are seldom implemented and most states, especially in Asia and Africa, continue to criminalise same-sex sexual conduct within their jurisdictions. Criminalisation of same-sex sexual conduct continues to happen despite the existence of the HR Committee's landmark decision against Australia regarding sodomy laws, amounting to a violation of the right to privacy and non-discrimination.

The next chapter focuses on the decriminalisation of same-sex sexual conduct in South Africa

CHAPTER FOUR

DECRIMINALISING HOMOSEXUALITY IN SOUTH AFRICA

4.1 Introduction

This chapter focuses on the decriminalisation of same-sex sexual conduct in South Africa. It argues, first, that the South African Constitutional Court is expressly obliged by the Constitution to apply a dignity-based approach to the protection of the rights of homosexuals, considering the expressed provision of the Constitution regarding judicial interpretation of the Bill of Rights. Secondly, it argues that the South African Constitutional Court applies the concept of human dignity as a value mainstreamed in its equality jurisprudence in order to determine what laws harm the self-worth of gays and lesbians. Lastly, it argues that it is not adequate to include a sexual orientation clause in the Constitution to ensure the protection of gays and lesbians but also the creation of public awareness on the importance of protecting the rights of homosexuals is crucial in the attainment of full equality between homosexuals and heterosexuals.

The chapter is structured as follows. First, it discusses the history of sodomy laws in South Africa. Second, it presents briefly the South African political context post-apartheid and its influence on the constitution-making process. Such a discussion leads to a better understanding of the inclusion of sexual orientation in the list of prohibited grounds against discrimination in the South African Constitution (section 9(3) in the Final Constitution and section 8(3) in the 1993 Interim Constitution). A dignity-based approach to decriminalisation of same-sex sexual conduct is critically examined through the lens of one case, where the Constitutional Court

declared sodomy laws unconstitutional. Lastly, the adequacy of the inclusion of the sexual orientation clause and the Constitutional Court decision in protecting homosexuals is assessed.

4.2 History of sodomy laws in South Africa

The Dutch introduced Roman Dutch common law to South Africa in the seventeenth century.¹ The common law criminalised a number of sexual acts between adults – whether between a man and a woman, between women or between men, if not meant for procreation.² Any form of gratification of sexual acts in a manner contrary to the order of nature was a crime.³ These criminal offences contrary to the order of nature included sexual conduct between men, sexual conduct between women, bestiality, masturbation and heterosexual sodomy.⁴ They were all considered as crimes of sodomy and were punishable by death.⁵ Heterosexual intercourse between Christians and Jews was also considered as ‘a crime against nature’ punishable by death.⁶

These sexual acts were punishable by law because they were considered a misuse of the organs of creation and against the order of nature because such acts defeated the possibility of procreation of children.⁷ Kersteman noted that ‘these unnatural acts were also punishable because they were considered as so repugnant to decency that they should be punished by the

¹ P De Vos ‘On the legal construction of gay and lesbian identity and South Africa’s transitional Constitution’ (1996) 12 *South Africa Journal on Human Rights* 274.

² E Cameron ‘unapprehended felons’: gay and lesbians and the law in south Africa’ in M Gevisser & E Cameron *Defiant desire: gay and lesbian lives in south Africa* (1994) 89 -98

³ E Cameron ‘sexual orientation and constitution: a test case for human rights’ (1993) 110 *South Africa Law Journal* 450; *R v Gough & Narroway* (1926) CPD 159 161.

⁴ De Vos (n 1 above) 274.

⁵ *R v Gough & Narroway* (1926) CPD 159 161.

⁶ De Vos (n 1 above) 275.

⁷ *R v Gough & Narroway* (1926) CPD 159 161.

state?⁸ Under the Roman Dutch common law, all sexual acts outside the procreative heterosexual matrimonial sphere were punishable by law.⁹ However, by the end of the nineteenth century most common law ‘unnatural’ offences had become outdated.¹⁰ For example oral sex between a man and a woman and sodomy between a man and a woman no longer constituted a criminal offence punishable by law.¹¹ However, male-male sexual acts, sexual gratification obtained by friction between legs of another person, mutual masturbation and other unspecified sexual activities between men remained criminal offences punishable by law.¹²

After being under Dutch rule for nearly 200 years, South Africa was occupied by the British in 1806.¹³ In addition to what the Dutch had already introduced, the British introduced laws that criminalized various forms of same-sex sexual conduct between men.¹⁴ The law was not concerned with female same-sex sexual acts at this point, as this only came later.¹⁵ A number of people were taken to court for contravening these sodomy laws. In the case of *R v Gough and Narroway*¹⁶ the Court held that gross acts of indecency between men, even when committed in private, were contrary to section 5 of the Transvaal Act 16 of 1908 which stated that ‘any male person who in public or private aids or is a party to the commission by any male person of any act of gross indecency with another male shall be guilty of an offence’ and section 10 of the Natal Act 22 of 1908 which declared that ‘any male person who in public or in private commits

⁸ *R v Gough & Narroway* (1926) CPD 159 162.

⁹ De Vos (n 1 above) 275.

¹⁰ De Vos (n 1 above) 275.

¹¹ *R v K & F* 1932 EDL 71; *S v Matsemela* 1988 (2) 254 (T) para 258.

¹² De Vos (n 1 above) 275.

¹³ H Guiliomee & B Mbenga ‘New history of South Africa’ (2007) 12.

¹⁴ Section 5 of Transvaal Act 16 of 1908; section 21 of Immorality Ordinance 46 of 1903; section 10 of the Natal Act 22 of 1908; section 121 of Transkei Penal Code.

¹⁵ Guiliomee & Mbenga (n 13 above) 13.

¹⁶ *R v Gough & Narroway* (1926) CPD 159 161.

or is a party to the commission of or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person shall be guilty of a crime.¹⁷

The court could also have relied on section 121 of the Transkei Penal Code for support of its position.¹⁸ The section prohibited carnal intercourse ‘against the order of nature’ with any man or woman or animal and provided for imprisonment.¹⁹ The offence was complete upon penetration.²⁰ The application of the law depended on where the offence was committed. For instance, the Transkei Code only applied in the Transkei while the Transvaal Act applied in Transvaal.

The courts continued to interpret and apply penal provisions against same-sex sexual conduct.²¹ In this process the courts proved to be a powerful tool in the branding of same-sex male conduct as unacceptable and an abomination of human nature, and hence as immoral and wicked.²² For instance in *R v Gough and Narroway* the court described same-sex sexual acts as ‘abhorrent’ and grossly indecent.²³ In the case of *R v Baxter* Solomon CJ found acts of indecency between consenting male ‘as so disgusting in nature that I refrain from repeating them’.²⁴ While convicting the accused persons, the court struggled in describing the same-sex sexual acts that

¹⁷ *R v Gough & Narroway* (1926) CPD 159 161; Section 5 of Transvaal Act 16 of 1908; section 21 of Immorality; Ordinance 46 of 1903; section 10 of the Natal Act 22 of 1908; section 121 of Transkei Penal Code. The statutory provisions were silent on women.

¹⁸ Section 121 of the Transkei Penal Code Act 24 of 1886.

¹⁹ section 121 of Transkei Penal Code.

²⁰ *S v M* 1977 (2) SA 357 (TK) where the court stated that section 121 only prohibited against penetration but not against the placing of male organ between the legs of another male.

²¹ De Vos (n 1 above) 277.

²² De Vos (n 1 above) 277.

²³ *R v Gough & Narroway* (1926) CPD 159 161.

²⁴ *R v Baxter* 1928 AD 40 at 431.

formed the basis for conviction.²⁵ In the case of *R v L*²⁶ the court borrowed a quote from Lord Summers' judgment in *Thompson v The King*²⁷ to relay its disgust with same-sex sexual conduct and stated that:

Persons who commit the offences now under consideration seek the habitual gratification of a particular perverted lust, which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hall-mark of a specialized and extraordinary class as much as if they carried on their bodies some physical peculiarity.²⁸

The above quote indicates how courts viewed homosexual men as a 'specialized and extraordinary group'.²⁹

In the early 1990s the courts came to take a slightly more enlightened view of same-sex sexual conduct.³⁰ They viewed same-sex sexual conduct as a disease and disorder based on medical science reports that suggested it as such.³¹ The judges used this approach as a justification for issuance of a more lenient sentence to homosexual men found guilty of committing same-sex sexual acts.³² This was illustrated in the case of *Baptie v S*³³ where the court stated that:

²⁵ *R v Baxter* 1928 AD 40 at 431.

²⁶ *R v L* 1951 (4) SA 614 (A).

²⁷ *Thompson v The King* 1948 (4) SA 614 (A).

²⁸ *R v L* 1951 (4) SA 614 (A).

²⁹ *R v L* 1951 (4) SA 614 (A).

³⁰ C F Stychin 'Constituting sexuality: The struggle for sexual orientation in South African Bill of Rights (1996) 23 *Journal of Law and Society* 456.

³¹ L Bersani *Homos* (1995) 10.

³² Stychin (n 30 above) 458.

³³ *Baptie v S* 1963 (1) PH H96 (N).

It is now well understood as a result of recent advances in medical knowledge that offences of this kind, involving perversity, are offences which have a background in the disordered mental condition of perpetrators and that they can usually be cured by psychiatric treatment.³⁴

A more liberal and accommodative approach as well as more lenient punishment was seen in the case of *S v M* where the court considered the sentence of six months imprisonment imposed on accused men for committing sodomy.³⁵ In delivering the judgment the court stated that:

The majority of people, who have normal heterosexual relationships, may find acts of sodomy unacceptable and reprehensible. We cannot close our eyes, however, to the fact that society accepts that there are individuals who have homosexual tendencies and who form intimate relationships with those of their own sex. It has to be taken into account that homosexuality is more openly discussed and written about. It is common knowledge that so called gay clubs are formed, where homosexuals meet and have social intercourse.³⁶

The court replaced the sentence of imprisonment with a fine and questioned whether homosexuality should continue to be a criminal offence.³⁷ However, the court still viewed homosexuality as an abnormal, unacceptable and reprehensible conduct in the society.³⁸

It was not only the courts that continued with the stigmatisation of homosexuals.³⁹ With the aim of reinforcing the existing laws that prohibited same-sex sexual acts, Parliament, under National

³⁴ *Baptie v S* 1963 (1) PH H96 (N).

³⁵ *S v M* 1990 (2) SACR 509 (E).

³⁶ *S v M* 1990 (2) SACR 509 (E) 514.

³⁷ As above

³⁸ As above; *Van Rooyen v Van Rooyen* (1994) (2) SA 325 (WLD) where similar views were expressed by the court.

³⁹ *Stychin* (n 30 above) 458.

Party rule, enacted more legislation to extend prohibitions on same-sex conduct to areas that were not covered by the existing legislation.⁴⁰ In 1957 Parliament passed the Immorality Act (later renamed the Sexual Offences Act).⁴¹ The purpose of the legislation was to stamp out ‘immorality’.⁴² The Act criminalised various forms of sexual conduct in an attempt to discourage the public from straying from their moral ways.⁴³ Homosexuality was considered as one way of straying from morality.⁴⁴ Section 14 of the Act prohibited immoral or indecent acts committed by a man older than nineteen with a man younger than nineteen.⁴⁵ The Immorality Amendment Act⁴⁶ extended this provision to cover immoral or indecent acts between women and girls under nineteen and criminalized same-sex sexual acts between women.⁴⁷

In 1966 the apartheid regime raided a private party organised and attended by white gay men only.⁴⁸ This resulted in the enactment of section 20A of the Sexual Offences Act which prohibited ‘any male person from committing with another male person at a party any act which is calculated to stimulate sexual passion or to give sexual gratification’.⁴⁹ Section 2 defined a party as ‘any occasion where more than two persons were present.’⁵⁰

⁴⁰ De Vos (n 1 above) 278.

⁴¹ Immorality Act 23 of 1957. The change of name was effected by the Immorality Amendment Act 2 of 1988.

⁴² Section 1 of the Immorality Act.

⁴³ Stychin (n 30 above) 458.

⁴⁴ De Vos (n 1 above) 278.

⁴⁵ Section 14 (1) (b) of Immorality Act.

⁴⁶ Immorality Amendment Act No. 2 of 1998.

⁴⁷ Immorality Amendment Act No. 2 of 1998.

⁴⁸ The parliament was moved by the activities that were going on in the party. Men were dancing, kissing and cuddling other men. They also paired off and made love in the garden and inside cars. Parliament considered all these acts indecent and unimaginable that called for a legal framework to regulate such.

⁴⁹ Section 20A of Sexual Offences Act 23 of 1957.

⁵⁰ Section 2 of Sexual Offences Act 23 of 1957.

The existing legislation and case laws focused only on male to male sexual conduct.⁵¹ The courts never had a chance to decide on whether sexual acts committed between women were punishable under the sodomy law in South Africa.⁵² In the case of *S v Matsemela*⁵³ the court doubted whether sexual acts between women amounted to criminal offences.⁵⁴ However, in *Van Rooyen v Van Rooyen*,⁵⁵ where the court was called upon to determine the right of a lesbian mother to access her two children who were in the custody of their father, it stated that homosexuality and lesbianism were immoral, wrong and damaging to the children.⁵⁶ The judge further stated that what the mother did in the privacy of her bedroom was not the business of the court.⁵⁷ Nevertheless, the court stated that for the best interest of the child, the conduct and lifestyle of the mother were relevant in determining whether the access order should be issued.⁵⁸ It showed that the courts also frowned upon female to female sexual conduct.

The courts sometimes considered the race or age of the parties involved when deciding on the severity of the punishment.⁵⁹ The law tended to treat individuals based on their social formations of race, sex, class and gender.⁶⁰ At the same time sodomy laws treated male to male sexual conduct quite differently from female to female sexual conduct.⁶¹ It is evident that as early as the twentieth century the South African legal system treated homosexuals differently and that has

⁵¹ De Vos (n 1 above) 279.

⁵² De Vos (n 1 above) 279.

⁵³ *S v Matsemela* 1988 (2) SA 254 (T) 258.

⁵⁴ *S v Matsemela* 1988 (2) SA 254 (T) 258.

⁵⁵ *Van Rooyen v Van Rooyen* (1994) (2) SA 325 (WLD).

⁵⁶ *Van Rooyen v Van Rooyen* (1994) (2) SA 325 (WLD).

⁵⁷ *Van Rooyen v Van Rooyen* (1994) (2) SA 325 (WLD).

⁵⁸ *Van Rooyen v Van Rooyen* (1994) (2) SA 325 (WLD).

⁵⁹ *S v K* 1973 (1) SA 87 (RA) where the accused was a African domestic servant aged 21 years.

⁶⁰ De Vos (n 1 above) 280.

⁶¹ De Vos (n 1 above) 281.

been a source of stigmatisation of gays and lesbians⁶². This continued to be the position until 1993 when the sexual orientation clause was included in the 1993 interim constitution. In the next section, I examine the origin of the inclusion of sexual orientation in the list of prohibited grounds against discrimination in the Constitution.

4.3 Origin of the sexual orientation provision

South Africa was the first country in the world to expressly include sexual orientation in the list of prohibited grounds against discrimination in its Constitution.⁶³ The inclusion of such a provision in the Constitution is deep-rooted in the rebellious climate of South Africa in the early 1990s.⁶⁴ The idea of sexual rights in South Africa was promoted by a powerful women's movement and western ideals of human rights.⁶⁵ In addition, the discussion on diversity, celebration of difference, and especially the right to freedom of sexual orientation were defended as part of the challenge of building a diverse, pluralistic society.⁶⁶ The 'rainbow' concept emerged and remained a strong collectivist and inclusive symbol defining unity among the diverse peoples of South Africa and a source of national pride.⁶⁷

The gay rights movement was very strategic and effective in mobilising discourse around the issue of sexual orientation.⁶⁸ Connections were made with the anti-apartheid movements particularly, the African National Congress (ANC) in exile in Lusaka and London.⁶⁹ It also made contacts with key actors in the political negotiations in South Africa and was able to participate

⁶² De Vos (n 1 above) 281.

⁶³ Section 9(3) of Final Constitution.

⁶⁴ G G Santos 'Decriminalizing homosexuality in Africa: lessons from the South Africa experience' (2011) 40

⁶⁵ J Cock 'Engendering gay and lesbian rights: the equality clause in the South African constitution' (2003) 26 *Women's Studies International Forum* 35.

⁶⁶ M Massound 'The evolution of gay rights in south Africa' (2003) 10 *Peace Review: A journal of Social Studies* 301.

⁶⁷ P Tatchell 'ANC rejects gay rights' (1987) 49 *Labour Briefing* 15.

⁶⁸ J Cock *Colonels and cadres: war and gender in South Africa* (1991) 10.

⁶⁹ Cock (n 65 above) 11.

actively in the lobbying process, which produced the final Constitution.⁷⁰ Graeme Reid noted that ‘the gay rights movement managed to make gay rights part of a much broader political project that argued for social justice and opposed all forms of discrimination’.⁷¹

Between 1987 and 1990 the gay rights movement expanded and was able to place gay issues on the agenda of the anti-apartheid struggle both in South Africa and abroad.⁷² This was achieved through targeting leading organizations in the struggle, the ANC in exile and the United Democratic Front (UDF) inside the country.⁷³ Peter Tatchell in London and Simon Nkoli in South Africa remained relentless in pushing for gay rights.⁷⁴ They spearheaded the connection between gay rights and the anti-apartheid struggle through mobilising an expanded conception of liberation. Before 1987 the ANC had no policy on sexual orientation and its senior officials dismissed gay issues as irrelevant. Ruth Mompati, a member of the National Executive Committee of the ANC said that:

I cannot even begin to understand why people want lesbian and gay rights. The gays have no problems. They have nice homes and plenty to eat. I don’t see them suffering. No one is persecuting them. We haven’t heard about this problem in South Africa until recently. It seems to be fashionable in the west.⁷⁵

She viewed the gay issue as distracting attention from the main struggle against apartheid.⁷⁶ She even justified the ANC’s lack of policy on gay and lesbian rights by stating ‘we don’t have a

⁷⁰ Cock (n 65 above) 11.

⁷¹ M Gevisser & E Cameron *Different fight for freedom* (1994) 40.

⁷² Cock (n 65 above) 11.

⁷³ Cock (n 65 above) 11.

⁷⁴ Cock (n 65 above) 11.

⁷⁵ Tatchell (n 67 above) 12.

⁷⁶ Tatchell (n 67 above) 12.

policy on flower sellers either.’⁷⁷ She was of the view that gays and lesbians were not normal, for example stating that ‘if everyone was like gays and lesbians, the human race would come to an end.’⁷⁸ Her statement was publicised by Peter Tatchell who went ahead to petition the then ANC Director of Information, Thabo Mbeki.⁷⁹ At its policy conference in 1992, the ANC officially recognized gay rights.⁸⁰

Ruth Mompati’s dismissive statement acted as a catalyst in forging a strategic alliance between the gay rights movement inside South Africa and in exile.⁸¹ This alliance was driven by Peter Tatchell.⁸² Similarly, the detention of Simon Nkoli acted as a catalyst in forging an alliance between the gay rights movement and the anti-apartheid struggle within South Africa.⁸³ This was led by the UDF. Simon Nkoli, a black member of the Gay Association of South Africa (GASA), was arrested, charged and detained in 1987 for three years for organizing and participating in mass protests that took place in the Vaal region, southwest of Johannesburg in 1983 and 1984.⁸⁴ The mass action challenged that political situation and police patrols and attacks on businesses and houses in the townships.⁸⁵

After his acquittal after three years of detention, Simon Nkoli became the chairperson of the Gay and Lesbian Organization of the Witwatersrand (GLOW).⁸⁶ His organisation was seen as part of

⁷⁷ Tatchell (n 67 above) 12.

⁷⁸ Tatchell (n 67 above) 12.

⁷⁹ Tatchell (n 67 above) 12.

⁸⁰ Santos (n 67 above) 37.

⁸¹ Cock (n 68 above) 45.

⁸² Tatchell (n 70 above) 12.

⁸³ Tatchell (n 70 above) 12.

⁸⁴ Tatchell (n 70 above) 12.

⁸⁵ Tatchell (n 70 above) 12.

⁸⁶ Santos (n 64 above) 37.

the broad movement against apartheid.⁸⁷ He emphasised that the fight against homophobia and racism were inseparable and stated that:

I am fighting for the abolition of apartheid, and I am fighting for the right of freedom of sexual orientation. These are inextricably linked with each other. I cannot be free as a black man if I am not free as a gay man.⁸⁸

This assertion of a linkage shifted the attitude of key political leaders.⁸⁹ Graeme Reid noted that ‘Simon Nkoli’s detention was a watershed in gay politics here. He represented that engagement between the gay movement and the broader liberation struggle’.⁹⁰

Sexual orientation as a prohibited ground for discrimination was included in the equality provision of the interim Constitution of 1993. Section 8 (2) of the Interim Constitution stated that:

No person shall be unfairly discriminated against directly or indirectly and without derogating from the generality of the provision on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.⁹¹

This provision provided protection against discrimination for lesbians and gays, making South Africa the first country in the world to explicitly prohibit discrimination on the basis of sexual orientation.⁹² This provision came to be commonly known as the ‘gay rights clause’.⁹³ The clause emerged from the complex negotiations that marked South Africa’s transition to

⁸⁷ Santos (n 64 above) 37.

⁸⁸ B Luirink *Moffies gay life in southern Africa* (1998) 67.

⁸⁹ Santos (n 64 above) 37.

⁹⁰ Santos (n 64 above) 37.

⁹¹ Section 8(2) of interim constitution 1993.

⁹² De Vos (n 1 above) 281.

⁹³ Massound (n 66 above) 301.

democracy during the period between 1990 and 1994.⁹⁴ Prolonged multi-party negotiations led to the Interim Constitution and the first democratic elections.⁹⁵ Although the Constitution was drafted in technical committees by experts, members of the public were requested to send their views and contributions to the technical committee.⁹⁶ Even though public views were submitted, they did not make their way into the Constitution.⁹⁷ The debate over inclusion of the sexual orientation clause in the final Constitution featured prominently in public participation forums.⁹⁸ It was regarded as a ‘hot topic’ early in the process.⁹⁹ It was mentioned in over 800 of the individual public comments and in petitions bearing over 24, 000 signatures that were submitted to the Constitutional Assembly.¹⁰⁰ A simple majority supported its inclusion.¹⁰¹ This could have been as a result of the efforts of gay rights movement.¹⁰² However, petitions submitted by conservative churches pushed for the exclusion of the sexual orientation clause.¹⁰³ They cited biblical values and fundamentalist Christian notions of morality.¹⁰⁴ The public participation forums provided a crucial political space for the gay rights movement to mobilise and lobby for the retention of the gay rights clause in the final Constitution.¹⁰⁵

In order for the gay rights movement to achieve this goal, they formed the National Coalition for Gay and Lesbian Equality (NCGLE) in 1994.¹⁰⁶ The NCGLE was formed specifically to

⁹⁴ Massound (n 66 above) 301.

⁹⁵ Massound (n 66 above) 307.

⁹⁶ Santos (n 64 above) 38.

⁹⁷ Santos (n 64 above) 38.

⁹⁸ Santos (n 64 above) 38..

⁹⁹ Constitutional Assembly annual report 1995-1996 <http://www.constitution.org.za> (accessed 11 February 2015)

¹⁰⁰ Constitutional Assembly annual report (n 99 above) .

¹⁰¹ Constitutional Assembly annual report (n 99 above).

¹⁰² Constitutional Assembly annual report (n 99 above).

¹⁰³ Constitutional Assembly annual report (n 99 above).

¹⁰⁴ Constitutional Assembly annual report (n 99 above).

¹⁰⁵ Constitutional Assembly annual report (n 99 above).

¹⁰⁶ National Coalition for Gay and Lesbian Equality *Submission to the Constitutional Assembly* (1995) 8

coordinate the lobbying efforts to retain the sexual orientation in the final constitution.¹⁰⁷ It represented 65 member organizations and was successful in ensuring the sexual orientation clause was retained in the Final Constitution of 1996.¹⁰⁸ Its success was attributed to two reasons. It focused on a single issue,¹⁰⁹ and it adopted an accommodative approach.¹¹⁰ According to Graham Reid, ‘it was important that the NCGLE wouldn’t speak about gay rights, only about equality’.¹¹¹

The notion of equality was equated to non-discrimination.¹¹² According to Botha and Cameron, ‘this had a strong appeal’.¹¹³ They argued that:

The constitutional protection of gays is no doubt the product of peculiar history, where institutionalized discrimination of people on the ground of race was perfected through the legal system. The racial legacy has given majority of South Africans a repugnance for the use of legal processes for irrational discrimination.¹¹⁴

The NCGLE made very convincing submissions to the Constitutional Assembly. The submissions were on two themes: (i) equality and (ii) the uniformity of all forms of discrimination. On the first theme they submitted that:¹¹⁵

Equality and non-discrimination are the fundamental and overriding principles of the interim constitution. Discrimination against gays and lesbians display the same basic feature as discrimination on the grounds of race and gender.

¹⁰⁷ Santos (n 64 above) 38.

¹⁰⁸ National Coalition for Gay and Lesbian Equality (n 106 above) 8.

¹⁰⁹ National Coalition for Gay and Lesbian Equality (n 106 above) 8.

¹¹⁰ National Coalition for Gay and Lesbian Equality (n 106 above) 8.

¹¹¹ Santos (n 64 above) 38.

¹¹² K Botha & E Cameron South Africa (1997) in W Donald & G Richard *Social-legal control of homosexuality: A multi-national comparison* (1997) 37.

¹¹³ Botha & Cameron (n 112 above) 37.

¹¹⁴ Botha & Cameron (n 112 above) 37.

¹¹⁵ National Coalition for Gay and Lesbian Equality (n 106 above) 8.

On the second theme they argued that:

Sexual orientation is fixed, immutable and therefore part of the natural order. Sexual orientation is immutable in that the individual cannot change it. This is supported by scientific evidence. Thus sexual orientation is an ineradicable part of human identity. Compelling historical, scientific and medical evidence show that homosexual is a natural phenomenon.¹¹⁶

Part of the success of these submissions was the accommodative attitude at the time, which was reformist rather than revolutionary.¹¹⁷ This did not present considerable threat to the inclusion of the rights of gays and lesbians in the final draft.¹¹⁸

While the equality and non-discrimination arguments were powerful and influential, there were opposing views based on African tradition, Christianity and normalcy.¹¹⁹ These views were put forward by the African Christian Democratic Party (ACDP).¹²⁰ Based on these views, the ACDP lobbied for the removal of the sexual orientation clause in the final constitution.¹²¹ They argued that the inclusion of the clause was ‘undemocratic’.¹²² They urged Christians to choose between the Bible and the Constitution since the latter was written by communists under the name of democracy.¹²³ They further argued that homosexuality was un-African and abnormal and thus should not be protected in the final Constitution.¹²⁴ However, they lost in opposing the inclusion of the clause.¹²⁵ The overriding idea of democracy was deeply rooted in the notion of rights

¹¹⁶ National Coalition for Gay and Lesbian Equality (n 106 above) 8.

¹¹⁷ National Coalition for Gay and Lesbian Equality (n 106 above) 8.

¹¹⁸ Botha & Cameron (n 112 above) 39.

¹¹⁹ Botha & Cameron (n 112 above) 39.

¹²⁰ Santos (n 64 above) 38.

¹²¹ Santos (n 64 above) 38.

¹²² C Charney ‘*Between ignorance and tolerance: South African public attitude on issues concerning gays, lesbians and aids*’ unpublished report (1995) 7.

¹²³ Cock (n 65 above) 29.

¹²⁴ Cock (n 65 above) 29.

¹²⁵ Charney (n 122 above) 7.

rather than simple majoritarianism.¹²⁶ This was the context in which inclusion of the sexual orientation clause was achieved in South Africa.

The Constitution, including the sexual orientation clause, was adopted in 1996 by Parliament.¹²⁷ The adoption of the final Constitution forced the NCGLE to shift focus to the implementation of the gay rights in the constitution.¹²⁸ In the next section, I analyse the factors that led to sexual orientation being included in the equality clause of the Constitution.

4.4 Factors that led to the inclusion of the sexual orientation provision

Why did South Africa, a deeply religious and conservative southern African country become the first nation to offer constitutional protection to gays and lesbians? The answer to this question lies in a number of factors occurring at the time apartheid was ending in South Africa.¹²⁹ These factors include ideological, historical and procedural elements unique to South Africa in the 1990s.¹³⁰

4.4.1 Historical reasons

There are three historical factors that shaped the inclusion of sexual orientation clause.¹³¹ The historical maturation of the ANC and the growing of the gay rights movement in South Africa; and the newly formed linkages between the two distinct liberation movements were the historical factors that led to the legal transformation of the status of homosexuals in South Africa.¹³² After years of limited political space, the gay rights movement started achieving its own kind of

¹²⁶ Santos (n 64 above) 38.

¹²⁷ Botha & Cameron (n 116 above) 39.

¹²⁸ National Coalition for Gay and Lesbian Equality (n 106 above) 8.

¹²⁹ A Sachs 'South Africa's unconstitutional constitution' (1997) 1255.

¹³⁰ E Christiansen 'Ending the apartheid of the closet' (2000) 32 *New York University Journal of International Law* 997.

¹³¹ Christiansen (n 130 above) 998.

¹³² Christiansen (n 130 above) 998.

legitimacy in the late 1980s and early 1990s.¹³³ This was attributed to the formation of new groups of politically active gays and lesbians.¹³⁴ The gay rights movement identified itself with the liberation movement and recognised the importance of multi-racial organisation as a means of achieving its goals.¹³⁵ In addition, other reasons brought gay rights activists and ANC together in the final years of apartheid.¹³⁶ For instance, a conflict over anti-gay remarks by Ruth Mompati, a member of the National Executive Committee of the ANC and the response from anti-apartheid groups abroad highlighted the involvement of the gay rights movement in the broader anti-apartheid movement.¹³⁷ This reinforced the idea that discrimination on the basis of sexual orientation was directly analogous to racial discrimination and called upon the ANC to make its initial statements regarding the issues of sexual orientation and human rights.¹³⁸

4.4.2 International legal precedent

Outside South Africa, changes in the legal status of homosexuals were being recognized by international human rights treaty bodies for the first time.¹³⁹ The bodies issued decisions based on the provisions in the international human rights instruments. These decisions recognised and offered protection to the rights of homosexuals.¹⁴⁰ In 1981 the European human rights Court reached a decision in the case of *Dudgeon v United Kingdom* to offer protection to the rights of gays and lesbians.¹⁴¹ This was affirmed in the case of *Norris v Ireland* in 1991 and in *Modinos v*

¹³³ Sachs (n 129 above) 1257.

¹³⁴ Sachs (n 129 above) 1257.

¹³⁵ Sachs (n 129 above) 1257.

¹³⁶ Christiansen (n 130 above) 998.

¹³⁷ Christiansen (n 130 above) 998.

¹³⁸ Christiansen (n 130 above) 998.

¹³⁹ Christiansen (n 130 above) 998.

¹⁴⁰ The decisions were arrived at based on the provisions of the right to privacy and the right to non-discrimination as guaranteed in ICCPR and European Convention on Human Rights .

¹⁴¹ *Dudgeon v United Kingdom* 4 Eur H.R (1981) 160.

Cyprus in 1993.¹⁴² A year later, HRC relied on the right to privacy and non-discrimination provided in the ICCPR to strike down the criminalization of same-sex sexual acts between men in the province of Tasmania in Australia.¹⁴³ These last two pro-gay decisions were handed down during the constitutional drafting period.

4.4.3 Ideological factors

The 1955 Freedom Charter of the ANC stated that its goal was to achieve a non-discriminatory South Africa.¹⁴⁴ The goal focused on a state that was founded on the principles of equality, multi-racial democracy and opportunity for all.¹⁴⁵ These principles were the opposite of apartheid and they continued to be the focus throughout the years of exile.¹⁴⁶ The underpinnings of the Constitution both in form and spirit were meant to recognise these principles as well as destroy apartheid legal norms.¹⁴⁷

ANC regarded non-racialism and non-discrimination as fundamental human right principles towards the entrenchment of equality.¹⁴⁸ According to ANC, the notion of non-racialism was described as both a philosophy and a tool.¹⁴⁹ As a philosophy it championed for the end of all forms of discrimination and the inviolability of human rights by the state.¹⁵⁰ It also acted as a tool for ending apartheid, creating democratic governance and healing the nation.¹⁵¹ The push for the inclusion of gays and lesbians as a class of citizens to benefit from ending discrimination

¹⁴² *Norris v Ireland* 13 Eur H.R (1991) 201 and *Modinos v Cyprus* 16 Eur H.R (1993) 485.

¹⁴³ *Toonen* para 8.7.

¹⁴⁴ Sachs (n 129 above) 1257.

¹⁴⁵ Sachs (n 129 above) 1257.

¹⁴⁶ Sachs (n 129 above) 1257.

¹⁴⁷ Sachs (n 129 above) 1257.

¹⁴⁸ Sachs (n 129 above) 1257.

¹⁴⁹ Sachs (n 129 above) 1257.

¹⁵⁰ Sachs (n 129 above) 1257.

¹⁵¹ Sachs (n 129 above) 1257.

combined with the centrality of non-racialism in the ANC discussion strongly supported the development of anti-discrimination policies that could include the protection of homosexuals.¹⁵²

4.4.4 Constrained constitutional drafting process

The fourth factor that contributed to the inclusion of the sexual orientation clause was the particular method of drafting the Constitution.¹⁵³ The final draft of the Constitution was as a result of sequential process that moved from one draft to another under tight timelines and strong political pressures.¹⁵⁴ The earliest decisions were made when the Interim Constitution was drafted and most weighty decisions throughout the drafting process were made by party-based negotiating committees behind closed doors.¹⁵⁵ In addition, small groups directed most of the textual decisions.¹⁵⁶ There was the theme committee of experts for the interim text and the technical committees for the final drafting process.¹⁵⁷ The party based committee members approved most of the final decisions before the final draft was put to a vote.¹⁵⁸ The vote was taken along party lines.¹⁵⁹ The consequence of this controlled, sequential process and the limited number of drafters involved led to a rather autocratic result.¹⁶⁰ The gay rights advocates benefited from this process because of the specific historical moment of its occurrence, the congruence of their concerns with the dominant ideology of the process and the pro-gay attitudes of some important constitutional actors.¹⁶¹

¹⁵² Sachs (n 129 above) 1257.

¹⁵³ A Sachs 'Constitutional developments in South Africa (1996) 28 *NYU Journal of International Law* 695

¹⁵⁴ Sachs (n 153 above) 695.

¹⁵⁵ African National Congress 'Constitutional Guidelines for a new South Africa' (1989) 21 *Columbia Human Rights Law Review* 256.

¹⁵⁶ African National Congress (n 155 above) 256.

¹⁵⁷ African National Congress (n 155 above) 256.

¹⁵⁸ African National Congress (n 155 above) 256.

¹⁵⁹ African National Congress (n 155 above) 256.

¹⁶⁰ Sachs (n 153 above) 695.

¹⁶¹ Sachs (n 153 above) 695.

Having secured the inclusion of sexual orientation in the list of prohibited grounds against discrimination, hopes were high for gays and lesbians in South Africa. The Constitutional Court rose to the challenge presented by the unprecedented legal protection of homosexuals in South Africa. The first challenge to the constitutional protection of the rights of gays and lesbians was to evaluate the criminalisation of same-sex sexual activity by the common law offence of sodomy. In the next section, I analyse the arguments advanced for the declaration of sodomy laws unconstitutional.

4.5 Declaring sodomy laws unconstitutional

By the time the final Constitution was approved in 1996, South Africa still had legislation that criminalised same-sex sexual conduct between consenting men.¹⁶²

The question of the decriminalisation of homosexuality was first brought to court in the case of *S v Kamper*.¹⁶³ The case involved a male prisoner in Western Cape Province who was charged with crime of sodomy and was sentenced to 12 months in prison. The decision was appealed on the ground that sodomy laws were inconsistent with the provisions of the Interim Constitution of 1993. The High Court allowed the appeal and stated that the common law offence of sodomy was unconstitutional because it violated sections 8(1) and 13 of the Interim Constitution which prohibited discrimination on the basis of sexual orientation. The Court further stated that sentences for the crime of sodomy were a clear example of sexual discrimination against gays and lesbians since consensual sexual acts between male and female in private were not considered a criminal offence.¹⁶⁴

¹⁶² Section 20A of Sexual Offences Act 23 of 1957.

¹⁶³ *S v Kamper* HC Case No. 232/1997.

¹⁶⁴ *Kamper* para. 10.

The Court stated that:

The legislators clearly indicated when the term sexual orientation was included in the constitution, to expand the basis of tolerance and consideration in away such that consensual sex between adult males should not be criminalized. The Court's understanding was that to recognize sexual orientation as an inadmissible ground for discrimination would be to confirm lesbian and gay people as having the same rights as heterosexual people. The new constitution should consider sexual orientation as a moral rather than a criminal question and irrelevant, as indicated by the equality clause.¹⁶⁵

Based on the above arguments the High Court set aside the conviction and sentence of Kamper without striking down the common law offence of sodomy of the Sexual Offences Act 1957.¹⁶⁶

In 1998 the NCGLE challenged the constitutionality of the statutory and common law offences criminalising same-sex sexual conduct between consenting adult men in private.¹⁶⁷ The case of *National Coalition for Gay and Lesbian Equality v Minister of Justice* was filed at the High Court.¹⁶⁸ The High Court decided that the common law offence of sodomy was unconstitutional and invalid. The Constitutional Court was requested to review the order of the High Court. It reviewed it and handed down a landmark decision. The question for determination by the court was: whether the common law crime of sodomy criminalising sexual activity between consenting adult men violated the Constitution. In declaring the sodomy laws unconstitutional, the Constitutional Court advanced three arguments: the right to human dignity; the right to equality; and the right to privacy, which we now examine.

¹⁶⁵ *Kamper* para. 10.

¹⁶⁶ *Kamper* para. 11.

¹⁶⁷ Section 20A of Sexual Offences Act 23 of 1957; sections of Criminal Procedure Act 52 of 1977; sections of Security Officers Act 92 of 1987. These Acts of parliament prohibited sexual conduct between men in certain circumstances.

¹⁶⁸ *National Coalition for Gay and Lesbian Equality v Minister of Justice*, CC 1998, 3 LRC 648 (*National Coalition* case).

4.5.1 The dignity-equality argument

The judgement in favour of the NCGLE, which achieved decriminalisation of same-sex sexual conduct between consenting adult men in South Africa, was delivered by Justice Ackermann. He held that the common law and statutory offences of sodomy violate the right to equality¹⁶⁹, human dignity¹⁷⁰ and privacy¹⁷¹ contained in the Constitution.

In handing down its decision, the Constitutional Court used human dignity as a method of interpreting the equality clause. Human dignity was placed at the centre of the equality jurisprudence. The Court adopted an individualised analysis of the impact of discrimination on homosexuals.¹⁷² The Court asked itself who the sodomy laws targeted: whether it was the act or the person.¹⁷³ It concluded that it was the person. Such an individualised approach was taken by Justice Sachs who argued that the rights to human dignity, equality and privacy cannot be separated.¹⁷⁴ According to him sodomy laws violated equal respect for difference, which is vital to equality. Besides, restricting different forms of sexuality within the private sphere leads to a basic violation of equal treatment.¹⁷⁵ According to Justice Ackermann, ‘the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as

¹⁶⁹ Section 9(3) of the Constitution provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

¹⁷⁰ Section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected.

¹⁷¹ . Section 14 of the Constitution states that everyone has the right to privacy, which includes the right not to have their person or home searched, their property searched, their possessions seized or the privacy of their communication infringed.

¹⁷² *National Coalition* case para. 19.

¹⁷³ *National Coalition* Case para 22.

¹⁷⁴ *National Coalition* Case para 21.

¹⁷⁵ *National Coalition* Case para 112.

members of our society'.¹⁷⁶ It is argued that self-worth is the key element, and therefore individuals should have the right to equality in order to be considered fully members of society.

Justice Sachs in his concurring opinion stated that dignity is the link between equality, liberty and privacy and underscored two points in the development of a constitutional jurisprudence regarding the protection of the rights of gays and lesbians. First, he highlighted the role of human dignity in remedying discrimination against homosexuals as well as tackling the heteronormative nature of the legal system.¹⁷⁷ Second, he pointed out that there is an important role for dignity in providing a solid basis for equality jurisprudence in order to overcome tensions between equality and liberty.¹⁷⁸

The Court emphasised the intrinsic value of each member of society and therefore made it clear that declaring sodomy laws unconstitutional was not a case about who may penetrate whom and where but was rather a dispute about equal respect.¹⁷⁹ The criminalisation of same-sex sexual conduct between men amounted to punishing sexual behaviour that was identified by society as a practice related to homosexuals.¹⁸⁰ The crime of sodomy stigmatised all homosexuals by treating them as sex offenders.¹⁸¹ Homosexuals were at risk of arrest, prosecution and conviction for engaging in sexual conduct which was part of their experience of being human.¹⁸² The court found that punishing sexual expression degraded and devalued homosexuals in society. As such it was a palpable invasion of their dignity and a violation of section 10 of the Constitution.¹⁸³

¹⁷⁶ *National Coalition Case* para 28.

¹⁷⁷ *National Coalition Case* para 113.

¹⁷⁸ *National Coalition Case* para 113.

¹⁷⁹ *National Coalition Case* para 107.

¹⁸⁰ *National Coalition Case* para 107.

¹⁸¹ *National Coalition Case* para 108.

¹⁸² *National Coalition Case* para 108.

¹⁸³ *National Coalition Case* para 108.

In addition, the Constitutional Court used dignity as a method of constitutional interpretation.¹⁸⁴ The purposive interpretation was prominently used in the case of *S v Makwanyane* where the Court stated that human dignity is part of the values of the South African Constitution as provided for in section 39(1)(a).¹⁸⁵ According to the Court, the Constitution should be interpreted in a generous and purposive manner.¹⁸⁶ As such, human dignity is a valuable tool in the realisation of the rights guaranteed in the Constitution, and therefore any interpretation of the Bill of Rights illustrates the role of human dignity as a value that transcends the right to human dignity as provided in section 10 of the Constitution, where it is established as a right on its own, and reaches the level of a larger constitutional object or reference for other rights.¹⁸⁷

Dignity, as an interpretative tool, is linked to equality. Equality, as a right, is provided for in section 9 of the Constitution, as protection against unfair discrimination, while it is also an interpretative tool determined by the Constitution itself in section 39 which states ‘when interpreting the Bill of Rights, the court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom’.¹⁸⁸ This means that the courts have a constitutional obligation to take into account equality and dignity in constitutional interpretation. Justice Sachs viewed equality and dignity as complementary principles saying that:

The manner in which discrimination is experienced on grounds of race, sex, religion or disability varies considerably. The commonality that unites them all is the injury to dignity imposed upon people as a consequence of their belonging to certain groups. Dignity in the context of equality

¹⁸⁴ W Stu & H Botha *Limitations: Shared Constitutional interpretation, an appropriate normative framework and hard choices* (2008) 149.

¹⁸⁵ *S v Makwanyane* 1995 (3) SA 391 (CC) para 9.

¹⁸⁶ *Makwanyane* para 9.

¹⁸⁷ *Makwanyane* para 9.

¹⁸⁸ Section 39 of Constitution.

has to be understood in this light. The sodomy laws by denying full moral citizenship in society because you are what you are impinge on the dignity and self-worth of the group. At the heart of equality jurisprudence is the rescuing of people from caste-like status and putting an end to their being treated as lesser human beings because they belong to a particular group.¹⁸⁹

Section 9 of the Constitution is regarded as the equality clause that protects against unfair discrimination. The general framework that guides the Court in determining whether unfair discrimination was established was set out in *Harksen v Lane NO and others*.¹⁹⁰ In this case the Constitutional Court outlined a three-fold framework. First, the Court must check whether there is a differentiation.¹⁹¹ If it is established, it should apply a rationality test. Under this test the Court asks itself whether such differentiation is rationally related to a legitimate government aim, in order to verify whether section 8 (1) of the Constitution, regarding the applicability of the Bill of Rights to all three branches, has been violated. Second, the Court must check whether the differentiation amounts to unfair discrimination in the meaning of section 9.¹⁹² Third, the Court must establish whether the unfair discrimination is justified.¹⁹³

The first inquiry merely requires the parties to identify the challenged differential treatment under law and highlight whether similarly situated persons or classes of people are treated differently. It will be the case of discrimination if the differential treatment is based on the list of prohibited grounds. The discrimination would be regarded as unfair if the court is able to establish that the measure taken has the potential to impair the fundamental human dignity of

¹⁸⁹ *National Coalition Case* para 21.

¹⁹⁰ *Harksen v lane NO and others CCT9/1997* para 53.

¹⁹¹ *Harksen* para 53.

¹⁹² *Harksen* para 53.

¹⁹³ *Harksen* para 53.

persons as human beings or to affect them adversely in a comparably serious manner.¹⁹⁴ This can be established based on a number of factors such as the extent of the violation, the position of the individual, the nature of the provision and the impact of the measure.¹⁹⁵

Based on the above analysis, the Court combined the first and second inquiries and found that sodomy laws constituted unfair discrimination because they target only same-sex sexual activity thus unfair discrimination based on sexual orientation.¹⁹⁶ The laws were found to be a severe limitation to a gay man's right to equality in relation to sexual orientation because it hits at one of the ways in which gays express their sexual desire.¹⁹⁷ The criminalisation of same-sex sexual conduct also prejudiced and deepened its negative effects in the everyday life of homosexuals.¹⁹⁸ Sodomy laws caused psychological damage that affected the confidence and self-esteem of gays and lesbians.¹⁹⁹ The vulnerability of homosexuals was exacerbated by the fact that they were a minority and thus not politically empowered to guarantee legislation that could promote and protect their interests.²⁰⁰ Therefore homosexuals depended on the Constitution and courts to protect their rights.²⁰¹

In the final stage of the inquiry, justification exists where the differentiation, although unfair, satisfies the requirements of the limitation clause in the Constitution. The Court considered whether the limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as guaranteed in section 36(1) of the Constitution.²⁰² The

¹⁹⁴ *Harksen* para 53.

¹⁹⁵ *Harksen* para 53 .

¹⁹⁶ *National Coalition Case* para 19.

¹⁹⁷ *National Coalition Case* para 19.

¹⁹⁸ *National Coalition Case* para 37.

¹⁹⁹ *National Coalition Case* para 19.

²⁰⁰ *National Coalition Case* para 25.

²⁰¹ *National Coalition Case* para 25.

²⁰² Section 36(1) of the Constitution .

Court found that the rights involved were very important and the limitation represented a severe infringement.²⁰³ The Court stated that the enforcement of private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate purpose.²⁰⁴ It is morality that is based on the constitutional values that are central to the character and functioning of the state that could qualify as a limitation. This type of morality can only be found in the text and spirit of the Constitution.

The unfair discrimination that fails to be justified under the limitation clause is a violation of the Constitution and must be declared unconstitutional and remedied. The Court held that sodomy laws were not justified by the limitation clause analysis.²⁰⁵ There was nothing that could be placed on the other balance of the scale.²⁰⁶ The conclusion was that the discrimination in question was unfair and therefore in breach of the equality clause.

4.5.2 The privacy argument

Section 14 of the Constitution provides for the right to privacy.²⁰⁷ However, the NCGLE avoided the privacy arguments in its challenge to sodomy provisions.²⁰⁸ Its reluctance to rely on section 14 was based on the fact that such reliance could reinforce the stigmatisation of homosexuals by strengthening the proverbial closet doors.²⁰⁹ In his concurring judgement, Justice Sachs agreed with this position and stated that the privacy argument was a limited way of protecting and promoting the rights of homosexuals as homosexuality would be protected only in private places,

²⁰³ *National Coalition Case* para 27.

²⁰⁴ *National Coalition Case* para 110.

²⁰⁵ *National Coalition Case* para 110.

²⁰⁶ *National Coalition Case* para 11.

²⁰⁷ Section 14 of the Constitution states that everyone has the right to privacy, which includes the right not to have their person or home searched, their property searched, their possessions seized or the privacy of their communication infringed.

²⁰⁸ S Magure 'The human rights of sexual minorities in Africa ((2004) 35 *California Western International Law Journal* 25.

²⁰⁹ Magure (n 208 above) 25.

which would reinforce the notion that homosexuality, was something people should be embarrassed about.²¹⁰ Instead he reinforced the connection between the right to equality and privacy.²¹¹ He argued that human rights should be taken as a whole, centred on people whose context should be taken into account.²¹²

An argument based on the right to privacy needs to be advanced together with the equality argument. The Court defined privacy as physical space but also a ‘sphere of private intimacy and autonomy’ in which human relationships are nurtured without external interference, where individuals can express their sexuality and build relationships free from any constraints.²¹³ Furthermore, the sodomy laws failed the harm principle under which conduct was only criminalized if it caused harm. In the case of homosexuality, however, the perceived deviance is punished simply because it is perceived as deviant. Therefore, sodomy laws were clear examples of breaches to the right to privacy guaranteed in section 14 of the Constitution

4.5.3 The decisions from foreign jurisdictions

Section 39(1) of the Constitution requires courts to consider international and foreign law when interpreting the Bill of Rights.²¹⁴ It is a constitutional requirement to consider international law when interpreting the rights contained in the Constitution.²¹⁵ However, the Constitution makes it optional to consider foreign laws in the interpretation of the rights.²¹⁶ In *Makwanyane*, the Constitutional Court stated that both binding and non-binding public international law may be

²¹⁰ *National Coalition Case* para 28.

²¹¹ *National Coalition Case* para 37.

²¹² *National Coalition Case* para 37 .

²¹³ *National Coalition Case* para 37

²¹⁴ Section 39(1)(b) provides that when interpreting the Bill of Rights the court must consider international law. Section 39(1)(c) provides that when interpreting the Bill of Rights the court may consider foreign law.

²¹⁵ Section 39(1)(b) provides that when interpreting the Bill of Rights the court must consider international law.

²¹⁶ Section 39(1)(c) provides that when interpreting the Bill of Rights the court may consider foreign law.

used as tools of interpretation.²¹⁷ It further stated that comparative human rights jurisprudence would be of great importance while an indigenous jurisprudence is being developed.²¹⁸ In order to support its position on decriminalising same-sex sexual conduct, the Court cited decisions from several foreign jurisdictions. It cited decisions from domestic legal systems in Europe, Australia, New Zealand and Canada as well as decisions from the ECtHR, which courts have found sodomy laws as being contrary to the provisions of their constitutions and conventions.²¹⁹ Justice Ackermann pointed out that there was a certain trend towards the decriminalisation of same-sex sexual conduct in other open and democratic societies and stated that:

A number of open and democratic societies have turned their backs on the criminalization of sodomy in private between adult consenting males, despite the fact that sexual orientation is not expressly protected in the equality provisions of their constitutions. Their reasons for doing so fortify the conclusion which I have reached that the limitation in question in our law regarding such criminalization cannot be justified under the Constitution.²²⁰

The Court's reliance on foreign case law was a clear indication that the social-cultural perceptions of homosexuality are not a purely South African but rather transnational phenomenon. There is a growing disfavour of sodomy laws in other jurisdictions. The reliance on the decisions of the ECtHR and other foreign courts can also be understood as providing empirical evidence that these courts are embracing social change and revising their stance towards the rights of homosexuals. The next section looks at an assessment of the Constitutional Court decision on the protection of the rights of gays and lesbians in South Africa.

²¹⁷ *Makwanyane* para 12.

²¹⁸ *Makwanyane* para 12.

²¹⁹ The Court was referring to cases such as *Dudgeon v United Kingdom* 4 Eur H.R (1981) 160; *Norris v Ireland* 13. Eur H.R (1991) 201 and *Modinos v Cyprus* 16 Eur H.R (1993) 485.

²²⁰ *National Coalition Case* para 39.

4.6 Critical assessment of the Constitutional Court decision

The Constitutional Court decision decriminalised consensual same-sex sexual activity between adults. This made same-sex sexual conduct between consenting adults to be legal in South Africa. The decision has the benefit of ‘de-gaying’ sodomy as the sexual act defining homosexuals in the eyes of a world that demands compulsory heterosexuality.

Before discussing the negative facets of the decision, there were a number of positive aspects that could be inferred from the judgement. First, there was a robust engagement and meaningful application of the prohibition of discrimination on the basis of sexual orientation. The judges did not shy away from striking down the sodomy provisions that were viewed as discriminatory on the basis of sexual orientation. They also did not shy away from the controversy associated with their socially unpopular views on the rights of homosexuals. They stated ‘although the Constitution itself cannot destroy homophobic prejudice it can require the elimination of the public institutions which are based on and perpetuate such prejudice’.²²¹ The decision was unanimous. This clearly indicates that the Court had embraced its responsibility to advance human dignity and equality as both constitutional values and rights guaranteed in the Constitution.

The second positive aspect from the judgement was the Court’s commitment to understand that protecting the rights guaranteed in the Constitution requires it to consider existing discrimination and the context of the rights. Context was very important for the Court in assessing the impact of sodomy laws on homosexuals. The Court was able to identify the deeper dimensions of the law. It stated that ‘only in the most technical sense is this case about who may penetrate whom and where. At the practical and symbolical level, it is about the status, moral citizenship and sense of

²²¹ *National Coalition Case* para 129.

self-worth of a significant section of the community'.²²² From a contextual point of view the Court agreed that sodomy laws were used as a tool of oppression and expression of social disapproval, which was unacceptable under the Constitution and probably a modern democratic society built on a new vision for the respect of fundamental human rights for all.

The last positive aspect of the decision was the commitment of the Court to the transformative nature of the South African Constitution and society determined to eliminate the legacy of apartheid. The Court was committed to substantive equality rather than formal equality. It was committed to expansive notions of equality. This was reflected in its approach in interpreting the rights in the Constitution. In assessing the rights guaranteed under the Constitution, the Court stated that 'the crucial determinant will always be whether human dignity is enhanced or diminished and the achievement of equality is promoted or undermined by the measure concerned'.²²³ Moreover, the Court emphasised that the case was not just about homosexuals, but about the values of a nation.²²⁴ The Court viewed itself as a very important institution in transforming South African society contemplated as being open, democratic and pluralistic.

The decisions of the Court are very important but limited in their impact. The decisions could have an impact in prohibiting state-sponsored discrimination and changing the legal rules, which could have an effect on the laws and government institutions. However, the impact of the decision on the lived reality of homosexuals is much more difficult as discussed below.

²²² *National Coalition Case* para 107.

²²³ *National Coalition Case* para 107.

²²⁴ *National Coalition Case* para 107.

The inclusion of the sexual orientation clause in the Constitution and the landmark case handed down by the Constitutional Court in 1999 did not reflect the attitudes of most South Africans.²²⁵

This created a gap between the laws supporting homosexuality and the conservative social attitudes of many of its citizens.²²⁶ Religious and traditional groups have not stopped condemning homosexuality as a foreign concept that goes against African culture.²²⁷ Opposing groups describe homosexuality as un-African and unbiblical and have advocated for an amendment to the Constitution to remove the sexual orientation clause and to re-criminalise same-sex sexual conduct.²²⁸

Studies show disparities between social attitudes and legal protections of gays and lesbians. The attitude seems to be changing gradually. In a study conducted in 2008 on the attitudes on decriminalisation of same-sex sexual conduct, 83.6% of South Africans said it was not right.²²⁹ These are social attitudes toward an activity declared constitutional by the Constitutional Court ten years earlier. A more recent study conducted in 2013 showed that 61% of South Africans felt that society should not accept homosexuality.²³⁰ The attitudes of South Africans seem to be changing gradually. These studies still show a disparity between social attitudes and legal protections of gays and lesbians.

Gays and lesbians are viewed with disfavour. This has resulted in discrimination and violent attacks being perpetrated against homosexuals informed by a heteropatriarchal system of male

²²⁵ V Reddy 'Decriminalization of homosexuality in post-apartheid South Africa: A brief legal case history review from sodomy to marriage' (2006) *Agenda: Empowering women for gender equity* 156.

²²⁶ Reddy (n 225 above) 156.

²²⁷ Reddy (n 225 above) 156.

²²⁸ P De vos 'The 'inevitability' of same sex marriage in south Africa's post-apartheid state' (2007) 23 *South African Journal on Human Rights* 446.

²²⁹ T Smith 'Cross-national differences in attitudes towards homosexuality (2011) 10

<http://williamsinstitute.law.ucla.edu/research/international/cross-national-differences-in-attitudes-towards-homosexuality/> (accessed 11 February 2015).

²³⁰ Pew Research 'the global divide on homosexuality: greater acceptance in more secular and affluent countries (2013) <http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/> (accessed 11 February 2015)

power to assert a particular gender and sexual order. The recent attacks in 2014 and March 2015 on gays in townships and the disseminated practice of ‘corrective rape’ against lesbians show the challenges being faced in the implementation of progressive legislation on the rights of homosexuals, as well as the limits of the law to change social attitudes in the short term.²³¹ Corrective rape is the practice of sexual assault against lesbians for the claimed purpose of ‘curing’ them of their homosexuality.²³² Many gays and lesbians continue to live in fear of unfair treatment and even violence regardless of constitutional and statutory protections.²³³

Courts cannot achieve a socially just society on their own. The litigation strategy adopted by gay rights advocates has been to secure pro-gay decisions and migrating lofty constitutional promises into practical legal rules. The strategy needs to change to ensure gays and lesbians benefit from these promises and legal rules. This is particularly crucial when the court’s decisions are so different from popular public opinion. It is reasonable to expect only limited contributions from the courts but not complete change. Fundamental change of social attitudes must be achieved through extra-judicial means such as government institutions working closely with civil society to create public awareness on the legal protection of homosexuals and to challenge fear and

²³¹ ‘Crisis in South Africa: The shocking practice of ‘corrective rape’ aimed at ‘curing’ lesbians’ *The Independent* 26 March 2014 <http://www.independent.co.uk/news/world/africa/crisis-in-south-africa-the-shocking-practice-of-corrective-rape--aimed-at-curing-lesbians-9033224.html> (Accessed 26 March 2015); LOL News Radebe Launches LGBTI violence programme (2014) <http://www.iol.co.za/news/crime-courts/radebe-launches-lgbti-violence-programme-1.1681563#.VNsJhyxZh6I> (Accessed 11 February 2015). Corrective rape is a hate crime wielded to convert lesbians to heterosexuality – an attempt to ‘cure’ them of being gay. The term was coined in South Africa in the early 2000s when charity workers first noticed an influx of such attacks. But despite recognition and international coverage, corrective rape in the region is escalating in severity, according to Clare Carter, the photographer behind these images. This is amid a backdrop of parts of the country “becoming more homophobic”, as one recent victim asserts.

²³² Action Aid ‘corrective rape’ (2011) <http://www.actionaid.org.uk/news-and-views/hate-crimes-the-rise-of-corrective-rape-in-south-africa> (Accessed 11 February 2015).

²³³ Lee Middleton ‘corrective rape’: fighting a south African scourge (2011) <http://content.time.com/time/world/article/0,8599,2057744,00.html> (Accessed on 11 February 2015) for instance on 4th January 2015 Mvuleni Fana was walking down a quiet alleyway in Springs – 30 miles east of Johannesburg – on her way home from football practice one evening when four men surrounded her and dragged her back to the football stadium. She recognised her attackers. One by one, the men raped her, beating her unconscious and leaving her for dead. <http://www.independent.co.uk/news/world/africa/crisis-in-south-africa-the-shocking-practice-of-corrective-rape--aimed-at-curing-lesbians-9033224.html> (Accessed 26 March 2015).

discrimination. Although the Court may not have been able to ensure the full realisation of the rights of gays and lesbians in South Africa, its contributions were certainly necessary and important.

4.7 Conclusion

The chapter examined the historical background of sodomy laws and the constitutional drafting history that led to the inclusion of sexual orientation in the list of prohibited grounds of discrimination in the equality clause in the South African Constitution. It also analysed the Constitutional Court decision to declare sodomy laws unconstitutional on the ground that they violated the rights to equality, human dignity and privacy as guaranteed in the Constitution. It critically assessed the significance of the inclusion of the sexual orientation clause in the Constitution and the progressive constitutional jurisprudence in protecting the rights of gays and lesbians.

The journey to attaining legal protection for homosexuals in South Africa was characterised by a number of factors. It involved a well-negotiated political process supported by the commitment of the main political leaders to human rights protection that worked closely with a well organised gay rights movement to attain the inclusion of a sexual orientation clause in the final Constitution. Within a favourable political environment, gay and lesbians activists elaborated a detailed advocacy strategy

The creation of a clear link between racism and homophobia was significant in the success in the legal protection of the rights of homosexuals in South Africa. Racism is a very sensitive issue in Africa and an approach that emphasises commonalities between discrimination on the grounds of

sexual orientation, gender and race can be a way to mobilise support from other groups in civil society, such as anti-racist activists and feminist groups. However, the success of this approach would very much depend on the degree of mobilisation and organisation of conservative groups and whether they support the ruling party.

Court decisions that were favourable to the gay and lesbian community formed the basis for other decisions dealing with the sexual rights of homosexuals. In this sense, the judiciary in general and the Constitutional Court in particular played a role in protecting the rights of gays and lesbians.

Three critical elements contributed to the success in the decriminalisation of same-sex sexual conduct in South Africa: A constitutional text prohibiting discrimination on the basis of sexual orientation, a willing and supportive judiciary and an effective litigation strategy. However, the challenge homosexuals are facing is transforming legal victories into social equality and inclusion. Twenty years after the inclusion of sexual orientation in the list of prohibited grounds against discrimination, the practical effect of the provision has been insufficient to achieve the safety and social equality of homosexuals in South Africa. Even with the progressive jurisprudence from the Constitutional Court, the lived reality of homosexuals, particularly from poor communities is disapproval, discrimination and homophobic violence.

Change through judicial decisions without popular public support is ineffective, insecure and more symbolic in protecting gays and lesbians. Without changes in public opinion, steady legal gains of the last twenty years are threatened by a potential constitutional amendment. The legal protections of homosexuals require a powerful court, a stable political sphere and a strong and popular public confidence in South African's transformative constitutional values.

The next chapter focuses on the potential decriminalisation of same-sex sexual conduct in Kenya

CHAPTER FIVE

DECRIMINALISATION OF HOMOSEXUALITY IN KENYA: THE PROSPECTS AND CHALLENGES

5.1 Introduction

This chapter focuses on the potential decriminalisation of same-sex sexual conduct in Kenya. The chapter examines the potential of interpreting the provisions of the Constitution of Kenya in a progressive and creative manner to decriminalise same-sex sexual conduct. It advances five arguments based on:- (a) the constitutional duty of the state; (b) the right to equality and non-discrimination; (c) human dignity; (d) the right to privacy and (e) the incorporation of international law into Kenya's domestic law.

The chapter starts with a discussion on the history of sodomy laws in Kenya. Then the current status of homosexuality in Kenya is examined. This is followed by a critical analysis of the relevant constitutional provisions to advance arguments for the potential decriminalisation of same-sex sexual conduct in Kenya.

Kenyan remain unwavering in their resistance to homosexuality in the country.¹ The perception that same-sex sexual conduct is abnormal and foreign to African culture is still deeply rooted in the minds of most Kenyans.² This makes the fight for the decriminalisation of same-sex sexual conduct harder.³ Mutua has argued that much of the homophobia being experienced by lesbians

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

² Kenya Human Rights Commission Report *'The outlawed amongst us: A study of the LGBTI community's search for equality and non-discrimination in Kenya* (2011) 10.

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

and gays is not ‘homegrown’⁴. In Kenya a lot of the resistance to homosexuality can be traced to its colonial past.⁵ The next section looks at the history of sodomy laws in Kenya.

5.2 History of section 162 of the Penal Code

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

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

⁵ Mutua (n 4 above) 89.

⁶ C E Finerty ‘Being gay in Kenya: the implications of Kenya’s new Constitution for its sodomy laws’ (2012) 45 *Cornell international law journal* 432.

⁷ J R Velles ‘out in Kenya: encountering friends like us’ (2009) 16 *The gay and lesbian worldwide* 45

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

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

¹⁰ IIK Nyarang’o *The role of judiciary in the protection of sexual minorities in Kenya* (LLM thesis University of Pretoria 2011) 3.

¹¹ Nyarang’o (n 10 above) 3.

¹² Nyarang’o (n 10 above) 3.

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

In 1930, the British replaced the Indian Penal Code with the colonial office model code, which was based on the Queensland Code of 1899.¹⁶ The Kenyan Penal Code today is still largely similar to the Queensland Code.¹⁷

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

¹³ M Ndulo African customary law and women's rights (2011) 18 *international journal global legal studies* 99.

¹⁴ J B Ojwang *constitutional development in Kenya: institutional adaption and social change* (1990) 23.

¹⁵ E Cotran the development and reform of the law in Kenya (1983) 27 *Journal of African Law* 42. By the east Africa Order in council 1897 (later repealed in the 1921 Order and applied to the protectorate), the jurisdiction of the supreme court and subordinates courts of Kenya was to be exercised 'so far as circumstances admit...in conformity with the civil procedure and the penal code of India and the other Indian Acts which are in force in the colony

¹⁶ H F Morris A history of the adoption of codes of criminal and procedure in British colonial Africa (1974) 18 *Journal of African Law* 17.

¹⁷ Sections 162, 163 & 165 of the Penal Code.

¹⁸ Cotran (n 15 above) 43.

¹⁹ Ndulo (n 13 above) 95.

²⁰ Ndulo (n 13 above) 95.

²¹ Cotran (n 15 above) 45.

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

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

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

²² Cotran (n 15 above) 45.

²³ Cotran (n 15 above) 45.

²⁴ Cotran (n 15 above) 45.

²⁵ Cotran (n 15 above) 45.

²⁶ Cotran (n 15 above) 45.

²⁷ Cotran (n 15 above) 45.

²⁸ Ndulo (n 13 above) 47.

²⁹ Ndulo (n 13 above) 47.

³⁰ Ndulo (n 13 above) 47.

³¹ Ndulo (n 13 above) 47.

³² Finerty (n 6 above) 438.

preventing homosexuals in Kenya from attaining legal protection.³³ The next section discusses the current status of homosexuality in Kenya.

5.3 Current status of homosexuality in Kenya

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

Section 162 of the Penal Codes provides:

Any person who has carnal knowledge of any person against the order of nature or permits a male person to have carnal knowledge of him or her against order of nature is guilty of a felony and is liable to imprisonment for 14 years.³⁷

Section 163 of the Penal Code provides that any person who attempts to commit any of the offences in section 162 is guilty of a felony and is liable to imprisonment for seven years.³⁸

Section 165 of the Penal Code outlaws committing, encouraging or attempting ‘acts of gross indecency’ between males and imposes a penalty of up to five years’ imprisonment.³⁹

³³ Finerty (n 6 above) 438.

³⁴ Nyarang’o (n 10 above) 36.

³⁵ Nyarang’o (n 10 above) 36.

³⁶ Nyarang’o (n 10 above) 37.

³⁷ Section 162 of the Penal Code.

³⁸ Sections 162 & 163 of the Penal Code.

³⁹ Section 165 of the Penal Code

These provisions criminalise same-sex sexual conduct in Kenya which it characterises as an unnatural offence.⁴⁰ The provisions act as a ban on homosexual individuals whose consensual same-sex sexual conduct is criminalised, thus undermining their rights as provided for in the Constitution, as discussed below.⁴¹ Britain, where the anti-sodomy laws were imported from, repealed its own sodomy laws in 1967, following the recommendations of the Wolfenden Committee Report of 1956 which concluded that same-sex sexual acts between consenting adults in private implicates private morality outside the realm of law, and hence should not be criminalised.⁴² Britain has also called on its former colonies to repeal their anti-sodomy laws and decriminalise same-sex sexual conduct.⁴³ However, Kenya has continued to keep these provisions on its statutory books.⁴⁴

Although the provisions do not explicitly criminalise same-sex sexual conduct, carnal knowledge has been taken by courts to include anal and oral sex and in some cases other non-procreative sexual acts such as mutual masturbation.⁴⁵ Although heterosexual couples also partake in these acts, the weight of the penal provisions over time has fallen on homosexual sex.⁴⁶ Due to the difficulty in proving carnal knowledge having taken place in private, the law has not been commonly applied in court judgements.⁴⁷ Achieving prosecution requires catching two individuals carrying out the sexual act, which usually takes place in private.⁴⁸ Nonetheless, the courts have in a few instances convicted persons for same-sex sexual conduct. In *Francis Odingi*

⁴⁰ L Mute 'Rethinking contested rights: critical perspective on minority rights in Kenya' (2011) 14.

⁴¹ Mute (n 40 above) 14.

⁴² Report of the departmental on homosexual offences and prostitution <http://hansard.millbanksystems.com/commons/1958/nov/26/homosexual-offences-and-prostitution> (accessed 18 November 2014).

⁴³ Human Rights Watch 'This alien legacy' : The origins of sodomy laws in British colonialism' (2008) 1.

⁴⁴ Sections 162, 163 & 165 of penal code.

⁴⁵ G Misra 'Decriminalizing homosexuality in India' (2009) 17 *Reproductive Health Matters* 21.

⁴⁶ Misra (n 45 above) 22.

⁴⁷ Misra (n 45 above) 22.

⁴⁸ Nyarang'o (n 10 above) 38.

v Republic,⁴⁹ the accused was in 2006 sentenced to six years imprisonment for engaging in same-sex sexual activity.⁵⁰ Similarly, in *Julius Waweru Pleuster v Republic*,⁵¹ the Court of Appeal upheld a trial court's conviction of the accused for committing the offence of sodomy.⁵²

In March 2014 statistics from the National Police Service tabled before the National Assembly indicated that 595 cases of homosexuality had been handled by the police since 2010.⁵³ It is unclear if these 595 cases were actual prosecuted cases or included cases of police arrests with no charges being laid. The existence of the penal sanctions legitimises violence, discrimination and stigmatisation in the enjoyment of rights and access to services.⁵⁴ A 2011 report by the Kenya Human Rights Commission documents the incidences of violence, discrimination and stigmatisation faced by homosexual persons.⁵⁵

The Government position in regard to (de)criminalisation of homosexuality is that homosexuality is culturally unacceptable in Kenya.⁵⁶ This position can be countered since the Constitution subordinates all cultures to itself.⁵⁷ Nevertheless, the position is reinforced by statements by influential Government officials and its actions. In November 2010, the then Prime Minister ordered the arrest and incarceration of all gay persons.⁵⁸ In March 2014, the Leader of

⁴⁹ *Francis Odingi v Republic* (2011)eKLR.

⁵⁰ *Francis Odingi* para 12.

⁵¹ *Julius Waweru Pleuster v Republic* Criminal Appeal no. 177 of 2006.

⁵² *Julius Waweru Pleuster* para 16.

⁵³ Parliament of Kenya, National Assembly official records, Hansard, 26 March 2014, <http://www.parliament.go.ke/plone/national-assembly/business/hansard/wednesday-26th-march-2014-1/view> (accessed 12 February 2015). The regional breakdown of the cases was Central 85, Coast 63, Rift Valley 204, Nairobi 40, Nyanza 33, North Eastern 9, Garissa 3, Eastern 161, Kitui 16, Meru 103, Western 25 and Murang'a 27.

⁵⁴ Kenya Human Rights Commission (n 2 above) 23.

⁵⁵ Kenya Human Rights Commission (n 2 above) 23.

⁵⁶ Kenya Human Rights Commission (n 2 above) 23.

⁵⁷ Constitution, 2010 article 2 (4): 'Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid'.

⁵⁸ 'Arrest gays, Kenyan Prime Minister orders' *Capital News* 28 November 2010 <http://www.capitalfm.co.ke/news/2010/11/arrest-gays-kenyan-pm-orders/> (Accessed 12 February 2015).

the Majority in the National Assembly, while responding to questions on the failure of the Kenyan government to enforce criminal sanctions against homosexuality equated homosexuality to terrorism.⁵⁹

In addition, executive action further illustrates the government's position. In October 2013, the Non-Governmental Organisations Coordinating Board, a government agency, was sued for failure to register a non-governmental organisation, the National Gay and Lesbian Human Rights Commission, which seeks to champion the rights of sexual minorities.⁶⁰ The Board declined to register the National Gay and Lesbian Human Rights Commission on the basis that the use of the terms 'gay' and 'lesbian' was culturally and morally unacceptable.⁶¹ The High Court in July 2014 certified the petition as raising a substantial issue of law and a three judge bench was appointed to hear the petition.⁶²

Instructively, certain government agencies and national human rights institution have urged the Government to reconsider the continued the criminalisation of same-sex sexual conduct. The Kenya National Commission on Human Rights in its 2011 report on sexuality and reproductive rights in Kenya, while noting the lack of protection of the rights of homosexuals, recommended the decriminalisation of same-sex sexual conduct.⁶³ The Kenya National AIDS strategic plan 2009-2013 noted that the criminalisation of same-sex sexual conduct hindered gay men from accessing health rights in relation to HIV services and urged the State to align its policies with

⁵⁹ Parliament of Kenya, National Assembly, official records, Hansard, 26 March 2014, <http://www.parliament.go.ke/plone/national-assembly/business/hansard/wednesday-26th-march-2014-1/view> (Accessed 12 February 2015)).

⁶⁰ *Eric Gitari v Attorney General & another* Petition 440 of 2013 (unreported).

⁶¹ *Eric Gitari*

⁶² *Eric Gitari*

⁶³ Kenya National Commission on Human Rights 'Realising sexual and reproductive health rights in Kenya: a myth or reality' April 2012, 104, http://www.knchr.org/Portals/0/Reports/Reproductive_health_report.pdf (accessed 14 November 2014).

the Constitution.⁶⁴ Equally, in February 2014 the Cabinet Secretary in charge of health in February 2014, at the height of a national debate on homosexuality adopted a sympathetic approach to homosexuality in relation to access to HIV services.⁶⁵

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

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

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

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

⁶⁷ Pew Research (n 66 above) 12.

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

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

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

In August 2014, Parliament made attempts to enact legislation that provides harsher and stricter penalties to those found engaging in same-sex sexual conduct. The Anti-Homosexuality Bill of 2014 was introduced to the National Assembly by Edward Onwong'a Nyakeriga, Legal Secretary of the Republican Liberty Party.⁷¹ According to him, 'the Bill aims at providing a comprehensive and enhanced legislation to protect the cherished culture of Kenyans' legal, religious and traditional family values against the attempts of sexual rights activists seeking to impose their values of sexual promiscuity on Kenyans.'⁷² He further argues that 'there is need to protect children and youth who are vulnerable to sexual abuse and deviation as a result of cultural changes, uncensored information technology, parentless child developmental settings and increasing attempts by homosexuals to raise children in same-sex sexual relationships through adoption, foster care or otherwise'.⁷³

The Bill was modelled on the Ugandan Anti-Homosexuality Bill of 2009 that was signed into law in 2014.⁷⁴ Many clauses are taken from the Ugandan Bill nearly word for word.⁷⁵ The Bill provided for the offence of sodomy which would punish Kenyan offenders with life imprisonment while foreigners would be stoned to death in public.⁷⁶ Those found guilty of 'aggravated homosexuality' would also be stoned to death in public.⁷⁷ It defined 'aggravated homosexuality' as including committing same-sex sexual acts with a person under the age of 18 years; if the offender is a person living with HIV; if the person committing the act is in authority

⁷¹ Pink News 'Kenya: New stone the gays law proposed by the MPs' <http://www.pinknews.co.uk/2014/08/11/kenya-new-stone-the-gays-law-proposed-by-mps/> (accessed 19 November 2014).

⁷² Preamble of the Bill.

⁷³ Preamble of the Bill.

⁷⁴ News 'Kenya: New stone the gays law proposed by the MPs' <http://www.pinknews.co.uk/2014/08/11/kenya-new-stone-the-gays-law-proposed-by-mps/> (accessed 19 November 2014).

⁷⁵ News 'Kenya: New stone the gays law proposed by the MPs' <http://www.pinknews.co.uk/2014/08/11/kenya-new-stone-the-gays-law-proposed-by-mps/> (accessed 19 November 2014).

⁷⁶ Section 2(1)(k) of Bill.

⁷⁷ Section 3(1) of Bill.

over the other person; being a serial offender; and where a person with disability is involved.⁷⁸ It also prohibits ratification of any international conventions and treaties which are contrary to its provisions.⁷⁹

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

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

⁷⁸ Section 3(1) (a-f) of Bill.

⁷⁹ Preamble of the Bill.

⁸⁰ Report: Kenya stone the gays bill is rejected <http://www.pinknews.co.uk/2014/08/11/kenya-new-stone-the-gays-law-proposed-by-mps/> (accessed 19 November 2014).

⁸¹ Report: Kenya stone the gays bill is rejected <http://www.pinknews.co.uk/2014/08/11/kenya-new-stone-the-gays-law-proposed-by-mps/> (accessed 19 November 2014).

5.4 The Constitution of Kenya, 2010

Before the enactment of the Constitution of 2010, Kenya was governed by the Independence Constitution, which was a British-made document that came into force in 1963.⁸² One of the main reasons Kenyans were not satisfied with the Independence Constitution was the powerful and unaccountable office of the presidency.⁸³ Due to these shortcomings, the Constitution of Kenya Review Commission (Constitution Review Commission) was created in 2000 to comprehensively spearhead the review of the current Constitution by the people of Kenya.⁸⁴ In 2005 a very detailed report was released by the Constitution Review Commission on the shortcomings of the Constitution.⁸⁵ One of the issues that were discussed in the report was the deficiency of the Bill of Rights.⁸⁶ The report stated that the Bill of Rights was deficient because its rights could be easily limited or suspended.⁸⁷ It also did not only fail to protect socio-economic rights but also failed to recognise the principle of gender equality. In addition, it lacked mechanisms to enforce the rights that were provided.⁸⁸

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

⁸² R M Nixon 'Kenya's Independence Constitution' (2011) 19; The Constitution of Kenya Review Commission, the final report of the Constitution of Kenya Review Commission (2005) 21.

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

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

⁸⁵ The Constitution of Kenya Review Commission (n 82 above)34.

⁸⁶ The constitution of Kenya Review Commission (n 82 above)34.

⁸⁷ The constitution of Kenya Review Commission (n 82 above)34.

⁸⁸ The constitution of Kenya Review Commission (n 82 above)34.

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

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

Committee on the constitutional review in January 2010.⁹¹ After the Parliamentary Select Committee made their comments, the draft Constitution was returned to the CoE who incorporated the comments and revised and published the proposed Constitution on 23 February 2010.⁹² Sixty seven of Kenyans voted in favour of the proposed Constitution in August 2010 and it was signed into law by President Kibaki on 27 August 2010.⁹³

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

⁹¹ The committee of experts on the constitutional review ‘the report of the committee of experts on the constitutional review issues on the submission of the reviewed harmonized draft constitution to the parliamentary select committee on constitutional review on 8 January 2010 (2010).

⁹² The committee of experts on the constitutional review ‘the report of the committee of experts on the constitutional review (2010) 13.

⁹³ The committee of experts on the constitutional review ‘the report of the committee of experts on the constitutional review (2010) 14.

⁹⁴ Constitution of Kenya Review Commission ‘National Constitutional Conference verbatim report of the technical working committee B (TWC B) chapter 4 and 5 on citizenship and the bill of rights held in tent no. 2 at Bomas of Kenya on 19 September 2003’ 37-39 (accessed from the Kenya National Archives on 14 October 2014).

⁹⁵ Constitution of Kenya Review Commission (n 94 above).

⁹⁶ Committee of Experts verbatim record of the Mombasa retreat of 16 April 2009 (n 6 above) 38.

⁹⁷ Kenya Human Rights Commission ‘Wanjiku’s journey: tracing Kenya’s quest for a new constitution and reporting on the 2010 national referendum’ November 2010, 25.

While the efforts to constitutionally allow the inclusion of sexual orientation as a prohibited ground against discrimination under section 27 of the Constitution failed, the Constitution of Kenya 2010 incorporates three changes that have significant implications for the legality of anti-homosexuality laws in Kenya.⁹⁸ First, it contains an expansive Bill of Rights and places a duty on the state to observe, respect, promote, protect and fulfil the rights provided in the Bill of Rights.⁹⁹ Second, it incorporates international law into the domestic laws of Kenya.¹⁰⁰ Lastly, it states under article 2(4) that ‘any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid’.¹⁰¹ The Constitution’s stronger protection of the rights and fundamental freedoms of individuals, coupled with the increased recognition that discrimination based on sexual orientation violates international human rights law, provides a stronger legal framework for arguing that section 162 of the Kenyan Penal Code is currently unconstitutional.¹⁰²

5.5 Constitutional potential for decriminalisation of same-sex sexual conduct

The Constitution has excluded sexual orientation as a prohibited ground of discrimination and has expressly provided for marriage between persons of opposite sex.¹⁰³ It could be argued that the Constitution has impliedly prohibited same sex marriages. However, there are other rights that potentially found an argument in favour of the decriminalisation of same-sex sexual conduct.

⁹⁸ Article 45 of the Constitution defines marriage as being between a man and a woman. It says every person has the right to marry a person of the opposite sex based on the free consent of the parties.

⁹⁹ Article 21(1) of Constitution.

¹⁰⁰ Articles 2(5-6) of Constitution.

¹⁰¹ Article 2(4) of Constitution.

¹⁰² Finerty (n 6 above) 449.

¹⁰³ Article 45 (2) of the Constitution provides that every person has a right to marry a person of opposite sex based on the free consent of the parties.

The Constitution provides for the rights to equality and non-discrimination,¹⁰⁴ the right to dignity¹⁰⁵ and the right to privacy.¹⁰⁶ In addition, the Constitution, places a fundamental constitutional duty on the state to observe, promote, fulfil, respect and protect individual rights and fundamental freedoms in the Bill of Rights.¹⁰⁷ It also recognises treaties and conventions ratified by Kenya as being part of the Kenyan law.¹⁰⁸ It is based on the above provisions of the Constitution that I advance five arguments in favour of the decriminalisation of same-sex sexual conduct in Kenya.

5.5.1 The constitutional duty of the state to respect the rights of the vulnerable and marginalised

Gays and lesbians in Kenya experience violence, exclusion and discrimination.¹⁰⁹ They are harassed, abused and discriminated against on the basis of their sexual orientation.¹¹⁰ They are physically abused and killed; they are expelled from school and targeted for hate speech.¹¹¹ This abuse and discrimination is perpetuated by society at large, including public officials.¹¹² As a result homosexuals are deprived of a number of rights, including the right to life, the right to privacy, the right to education, the right to non-discrimination, the right to health, the right to

¹⁰⁴ Article 27(2) of the Constitution states that equality includes the full and equal enjoyment of all rights and fundamental freedoms. Article 27 (4) of the Constitution provides that the state shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress language or birth.

¹⁰⁵ Article 28 of the Constitution states that every person has inherent dignity and the right to have that dignity respected and protected.

¹⁰⁶ Articles 31 of the Constitution provides that every person has the right to privacy which includes the right not to have their person, home or property searched; their possession seized; information relating to their family or private affairs unnecessarily required or revealed; and the privacy of their communication infringed.

¹⁰⁷ Article 21(1) of constitution states that it s a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.

¹⁰⁸ Article 2(6) of the Constitution provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution.

¹⁰⁹ Kenya Human Rights Commission (n 2 above) 18.

¹¹⁰ Kenya Human Rights Commission (n 2 above) 18.

¹¹¹ Kenya Human Rights Commission (n 2 above) 18.

¹¹² Kenya Human Rights Commission (n 2 above) 18.

access justice and the right to dignity.¹¹³ Provisions in the Penal Code criminalising same-sex sexual conduct play a crucial role in these violations and create an environment that makes it easier for the violence to take place.¹¹⁴

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

Those supporting anti-homosexuality laws could counter this claim by arguing that the rights of homosexuals are limited and there are a number of factors to be considered in limiting their rights.¹¹⁹ They would argue that African culture and morality justify limiting the practice of

¹¹³ Kenya Human Rights Commission (n 2 above) 18.

¹¹⁴ Kenya Human Rights Commission (n 2 above) 18.

¹¹⁵ Article 21(1) of Constitution; S. Wekesa 'The rights of sexual minorities in Kenya: The value of the Constitution of Kenya 2010' a paper presented at Centre for Human Rights, University of Pretoria, South Africa on 10th December 2014 10.

¹¹⁶ Finerty (n 6 above) 451.

¹¹⁷ *Social and Economic Rights Action Centre v Nigeria*, African Commission on Human and People's Rights communication number 155/96 (2001) 46.

¹¹⁸ Finerty (n 6 above) 451.

¹¹⁹ Article 25 of Constitution .

homosexuality in Kenya, which in turn legitimise the penal provisions.¹²⁰ Such an argument cannot be sustained based on constitutional provisions. First, some rights, such as freedom from torture and cruel, inhuman and degrading treatment, cannot be limited.¹²¹ Second, any limitation on a right or fundamental freedom must be ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’.¹²² The continued existence and application of section 162 goes against the principles of equality, freedom and human dignity and must therefore ultimately fail the constitutional test.¹²³ The arguments on how section 162 Of the Penal Code violates the right to human dignity and equality are advanced later.

Even if African values and morality were grounds for limiting the application of the Bill of Rights to gays and lesbians, they certainly would not outweigh the effects of murder, false imprisonment, police brutality and discrimination that are fuelled by section 162.¹²⁴ Given the requirements for limiting rights in the Constitution, the arguments that the Bill of Rights does not offer any protection to homosexuals and that the anti-homosexuality laws are justified by African culture and morality, are no longer constitutionally viable.¹²⁵ Majority morality, as distinct from a ‘constitutional morality’ which is derived from constitutional values, is based on shifting and subjective notions of right or wrong as viewed by the society. If there is any type of morality that can pass the test of the Constitution, it must be a ‘constitutional morality’¹²⁶ and not majority

¹²⁰ Finerty (n 6 above) 451.

¹²¹ Article 25 of Constitution states that despite any other provision in this constitution, the following rights and fundamental freedoms shall not be limited; freedom from torture and cruel, inhuman and degrading treatment or punishment.

¹²² Article 25 of Constitution.

¹²³ Finerty (n 6 above) 451.

¹²⁴ Finerty (n 6 above) 452.

¹²⁵ Finerty (n 6 above) 452.

¹²⁶ Constitutional morality entails looking at the nature of society, its value system, morality, well-being, inclusiveness and peacefulness as contemplated by the Constitution. It involves recognizing and appreciating the values in the constitution when interpreting its Bill of Rights. In Kenya, the constitutional values are provided for in article 10 of the Constitution. They include human dignity, equality, inclusiveness, social justice and non-discrimination.

morality. The Constitution recognises, protects and celebrates human dignity, equality, inclusiveness and freedom.¹²⁷ Therefore to criminalise or stigmatise homosexuals only on account of their sexual orientation would be against the ‘constitutional morality.’

Article 21(3) of the Constitution of Kenya further clarifies that ‘all state organs and all public officers have a duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority and marginalised communities and members of particular ethnic, religious or cultural communities.’¹²⁸ Taking the literal interpretation of the term ‘vulnerable’ as used in article 21(3), linked with the current status of homosexuality in Kenya, gays and lesbians could be viewed as a vulnerable and marginalised group in the country that require constitutional protection. Their vulnerability and marginality is based on their sexual orientation.

Although, the Constitution of Kenya does not provide a definition for the term minority, international law has traditionally granted minority status on the basis of race, language, religion, ethnicity and culture. These groups have a shared characteristic. In order to extend the list to include sexual orientation, an argument based on the nature of the shared characteristics and rationale for minority protection has to be advanced. Gays and lesbians are affected negatively by the existence of sodomy laws. Such laws could be viewed as affecting them as ‘a group’. Provided such laws exist, the enjoyment of full citizenship is reduced and gays and lesbians are discriminated against and stigmatised as a group. In the case of *L and V v Austria*¹²⁹ the ECtHR

¹²⁷ Article 10 of Constitution.

¹²⁸ Article 21(3) of Constitution states that all State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.

¹²⁹ *L and V v Austria* application Nos 39392/98 and 39829/98.

held that ‘the bias on the part of a heterosexual majority against a homosexual minority was similar to the negative attitudes towards those of different race, origin or colour.’ The Court recognised the fact that individual sexual orientation is shared by a distinct group and its members thus constitute a protected minority group.

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

The Court stated that it is undisputed that the Board is, as provided in Article 21(1), under a constitutional duty to observe, respect, protect, promote and fulfil the rights and fundamental freedoms guaranteed in the Bill of Rights, and in particular, to uphold and address the needs of vulnerable groups as stated in Article 21(3).¹³⁰ The constitutional duty on the Board, as a State entity, is to uphold the Constitution, which involves protecting, among other rights, the right of freedom of association of ‘every person,’ which includes the right to form an ‘association of any kind’. To rely on its own moral conviction as a basis for rejecting an application is outside the Board’s mandate and a negation of its constitutional obligations.¹³¹

¹³⁰ *Eric Gitari* para 127.

¹³¹ *Eric Gitari* para 127.

5.5.2 Human dignity

Article 28 of the Constitution provides for every person's inherent right to dignity and requires this to be respected and protected.¹³² According to a basic intuitive understanding, human dignity constitutes an expression of the respect and value to be attributed to each human being on the account of his or her humanity.¹³³ It mandates the respect of the person *qua* person, and symbolises the most basic form of respect the state owes to individuals.¹³⁴

The concept of human dignity can be used as a tool of inclusion of the rights of gays and lesbians in Kenya. The concept of human dignity as a determinative tool identifies subjects of human rights.¹³⁵ The criterion justifying the bestowment of rights is the quality of being human.¹³⁶ There is a connection between equal citizenship and human dignity.¹³⁷ This connection is crucial because it underlines that human beings should be respected *qua* human beings irrespective of their sexual orientation. This means that it is their humanity that demands for them to be treated like other humans and be able to benefit from the same rights.¹³⁸

Cameron illustrated that in South Africa, 'dignity fostered the notion of an inclusive moral citizenship in gay rights judgements'.¹³⁹ The function of the concept was to 'repair indignity, to renounce humiliation and degradation and to vest full moral citizenship in those who were

¹³² Article 28 of the Constitution states that every person has inherent dignity and the right to have that dignity respected and protected.

¹³³ E Lorraine Human 'Dignity as a rights-protecting principle' (2004) 17 *National Journal of Constitutional Law* 325.

¹³⁴ C Jackson *Constitutional dialogue and human rights: States and transnational constitutional discourse* (2004) 27.

¹³⁵ A Jeffrey 'Dignity, legal pluralism and same-sex marriage' (2010) 75 *Brooklyn Law Review* 794

¹³⁶ Jeffrey (n 135 above) 795.

¹³⁷ Jeffrey (n 135 above) 795.

¹³⁸ Jackson (n 134 above) 29.

¹³⁹ E Cameron *Dignity and disgrace: Moral Citizenship and constitutional protection* (2013) 473.

denied it in the past'.¹⁴⁰ Indeed, the right to dignity was used as a tool of inclusion in South Africa to allow previously excluded gays and lesbians to enjoy the full benefits of citizenship.¹⁴¹

The High Court of Kenya in the case of *Republic v. Kenya National Examination Council and the Attorney General ex parte Audrey Mbugua Ithibu*¹⁴² stated that both articles 10 and 28 of the Kenyan Constitution, provided for the protection of human dignity. Human dignity was that intangible element that made a human being complete. It went to the heart of human identity. It further stated that every human had a value. Human dignity could be violated through humiliation, degradation or dehumanization. Human dignity was the cornerstone of other rights enshrined in the Constitution.

Similarly in *Eric Gitari* the Court stated that both the Board and the Court itself are constitutionally mandated, when applying the Constitution, to give effect to the non-discrimination provisions in Article 27 and the national values and principles set out in Article 10, which include, at Article 10(2), 'human dignity, equity, social justice, inclusiveness, equality,

¹⁴⁰ Cameron (n 139 above) 473.

¹⁴¹ Cameron (n 139 above) 473.

¹⁴² *Republic v. Kenya National Examination Council and the Attorney General ex parte Audrey Mbugua Ithibu* eKLR Judicial Review 147 of 2013; High Court at Nairobi. The case involved Audrey, a transgender woman who was the holder of a Kenya Certificate of Secondary Education (KCSE) awarded to her by the Kenya National Examination Council – KNEC in 2001. Sometimes in 2008 she was diagnosed and treated for gender identity disorder (G.I.D) and depression at Mathare Hospital and was still undergoing treatment for the two conditions. The applicant then changed her name from Andrew Mbugua Ithibu to Audrey Mbugua Ithibu. Thereafter she embarked on changing the particulars on her national identity card, passport and academic papers so as to reflect her gender from male to female. Specifically in the instant matter, the applicant sought the removal of the gender mark from her KCSE certificate so that the certificate did not have any gender mark. The court held that the respondents failed to provide legitimate reasons for denying the applicant's request for the removal of the gender mark in the KCSE certificate. Records of any changes made could always be kept by KNEC and it could always verify the information when asked to do so. Criminals never clothed their nefarious activities with a semblance of legality by approaching the courts like the applicant had done. The Court further stated that the imposition of a candidate's gender mark was not a requirement of the law under Rule 9 of the Kenya National Examinations Council (Kenya Certificate of Secondary Education Examinations) Rules 2009. It could have been done as a tradition to assist in the proper identification of a candidate, but it was not a tradition backed by any rules. An order of Mandamus was issued to compel KNEC to recall the applicant's KCSE certificate issued in the name of Ithibu Andrew Mbugua and replace it with one in the name Audrey Mbugua Ithibu. The replacement certificate had to be without a gender mark.

human rights, non-discrimination and protection of the marginalised.’¹⁴³ An interpretation of non-discrimination which excludes people based on their sexual orientation would be in conflict with the principles of human dignity, inclusiveness, equality, human rights and non-discrimination. To put it another way, to allow discrimination based on sexual orientation would be counter to these constitutional principles. The Court further stated that article 259(2) provides that the Constitution shall be interpreted in a manner that advances human rights and fundamental freedoms in the Bill of Rights.¹⁴⁴ The rights to equality and dignity would not be advanced if people were denied the right not to be discriminated against based on their sexual orientation.¹⁴⁵

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

Furthermore, the wording of article 28 of the Constitution of Kenya, which provides for the right to human dignity, is similar to section 10 of the South African Constitution which provides for the same right.¹⁴⁶ Similarly, both the Kenyan Constitution and the South African Constitution recognise human dignity as a constitutional values as well as an interpretative tool of the Bill of Rights. Thus, the Kenyan judiciary just like their South African counterparts could interpret the right to human dignity purposely and creatively with an aim of advancing it in order to extent it

¹⁴³ *Eric Gitari* para 137.

¹⁴⁴ *Eric Gitari* para 138.

¹⁴⁵ *Eric Gitari* para 138.

¹⁴⁶ Article 28 of Kenyan Constitution; section 10 of South African Constitution. They both provide that every person has inherent dignity and the right to have that dignity respected and protected.

to the protection of the rights of homosexuals. The Constitutional Court of South Africa in the case of *National Coalition*¹⁴⁷ held that the criminalisation of same-sex sexual conduct infringed the right to human dignity enshrined in section 10 of the South African Constitution. The Court further stated that the existence of a law which criminalises a form of sexual expression for gay men degraded and devalued them in the broader society and constituted a violation of their dignity thus infringing section 10 of the Constitution.

Reference to human dignity in progressive gay rights decisions extend far beyond South Africa. In the United States of America the Supreme Court in the case of *Lawrence v Texas*¹⁴⁸ found that sodomy laws violated the right to human dignity and declared them unconstitutional notwithstanding the fact that the American Constitution does not contain the right to human dignity. The US Supreme Court stated that the laws were unconstitutional since they were aimed at the exclusion of homosexuals and such exclusion could not be tolerated as it would demean the dignity of homosexuals as human beings.

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

¹⁴⁷ *National Coalition* case.

¹⁴⁸ *Lawrence v Texas* 539 US 558 (2003).

¹⁴⁹ *Naz Foundation v Government of NCT of New Delhi* WP (C) NO. 7455/2001 277

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

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

Though the decision of the High Court of Delhi in *Naz foundation*¹⁵¹ was reversed by the Supreme Court of India, the Court had an opportunity to examine the constitutionality of sodomy laws in India in light of the rights to equality, human dignity, privacy and health as guaranteed in the Indian Constitution. The court also cited numerous foreign judgments as well as international and regional human rights instruments to support their decision. The Court analysed the purpose of the penal provisions in the Indian Penal Code and the interests of the State as weighted against

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

¹⁵¹ *Naz Foundation* 278.

the rights of gays and lesbians. It found that there was no legitimate State interest in upholding sodomy laws and found criminalisation of same-sex sexual acts to be in violation of the Indian constitution. Further, in light of the evolution of foreign and international jurisprudence regarding the rights to privacy, equality, human dignity and health, the Court found penal provisions to be unconstitutional infringement on the rights of homosexuals. The Court made a critical linkage between non-discrimination and access to healthcare services for homosexuals and how stigma and marginalisation can impede access to social economic rights.

5.5.3 Equality and non-discrimination

The Constitution explicitly provides for the right to equality and non-discrimination.¹⁵² It prohibits discrimination on any ground including race, sex, pregnancy, marital status, health status, ethnic and social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.¹⁵³ Though the Constitution does not list sexual orientation as a prohibited ground of discrimination, the listed grounds are not exhaustive; the list is indicative with the operating words ‘on any ground including’. This allows persons suffering discrimination on grounds other than those indicated to mount a challenge.¹⁵⁴ This is strengthened by article 259(4) (b) which provides that the word ‘includes’ means ‘includes but is not limited to’.¹⁵⁵

This approach was adopted by the ECtHR, which relied on the listed prohibited grounds of discrimination in article 14 of the European Convention. The ECtHR adopted the approach of

¹⁵² Article 27 of constitution. Article 27(1) state that every person is equal before the law and has the right to equal protection and equal benefit of the law. Article 27(2) provides that equality includes the full and equal enjoyment of all rights and fundamental freedoms. Article 27(4) provides that the state shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, belief, culture, language or birth.

¹⁵³ Article 27(4) of the Constitution provides that the state shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, belief, culture, language or birth.

¹⁵⁴ J Fitzgerald ‘the road to equality? The right to equality in Kenya’s new Constitution’ (2010) 58.

¹⁵⁵ Article 259(4)(b) of Constitution

locating sexual orientation in ‘other status’ as provided for under article 14 of the Convention. Article 14 of the Convention prohibits discrimination on a number of grounds including other status.¹⁵⁶ It argued that the list is not exhaustive since treaty provision use terms such as ‘ground such as’, ‘including’ or ‘other status’.¹⁵⁷ Thus these are open-ended clauses that could cover other circumstances that may arise that are not included in the law.¹⁵⁸

Arguably, article 27(4) could be interpreted in the light of the decision of the ECtHR, where the State is precluded from discriminating against any person on the basis of any other ground, including sexual orientation.¹⁵⁹ In *Eric Gitari* the Court stated that Article 27(4), while it does not explicitly state that sexual orientation is a prohibited ground of discrimination, prohibits discrimination both directly and indirectly against any person on any ground. The grounds that are listed are not exhaustive. This is evident from the use of ‘including’ which is defined in article 259(4)(b) of the Constitution as meaning ‘includes, but is not limited to.’¹⁶⁰ This approach gives judges in Kenya the discretion to extend the list to grounds that are not covered in section 27(4), such as sexual orientation, particularly given the kind of discrimination and violence homosexuals experience in Kenya.

The other argument that could be advanced is to include sexual orientation within the category ‘sex’ as a prohibited ground of discrimination in article 27(4) of the Constitution. The State is precluded from discrimination on the basis of ‘sex’, which arguably includes ‘sexual orientation.’ Alternatively, the argument as to ‘sex’ as encompassing sexual orientation can also be linked to the term ‘marginalised group’ as defined in article 260 of the Constitution. Article

¹⁵⁶ *Sutherland v United Kingdom* Application No. 25186/94, Report of 1 July 1997 at para. 50.

¹⁵⁷ M Thomas ‘Teetering on the blink of equality: sexual orientation and international constitutional protection’ (1997) 366 *Boston College Third World Journal* 380.

¹⁵⁸ Thomas (157 above) 380.

¹⁵⁹ *Eric Gitari* case para 131.

¹⁶⁰ *Eric Gitari* case para 131.

260 of the Constitution defines marginalized group as a group of people who, because of laws or practices before, on or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in article 27(4) (namely sex, race, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth).¹⁶¹ Gays and lesbians have been discriminated against before and are still facing discrimination on the basis of their sexual orientation. Sodomy laws have been used as a tool to perpetuate discrimination and promote violence. They have been subjected to hate speech, physically assaulted, harassed by the police and civilians, in some cases remanded in prison for indefinite periods of time. Some have not been able to access health services in fear of discrimination. In my view this makes them qualify as a marginalised group in Kenya that requires constitutional protection.

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

One could also argue that section 162 of the Penal Code does not criminalise sexual activity between two women but only between two men. Thus the law discriminates based on sex. This argument was used by the Supreme Court of Hawaii in *Baehr v Lewin* where the Court declared

¹⁶¹ Article 260 of the Constitution.

the law that denied marriage licenses to couples because they were of the same sex unconstitutional.¹⁶²

5.5.4 Right to privacy

Article 31 of the Constitution provides for the right to privacy.¹⁶³ Decisions from the US Supreme Court have recognised that every person is entitled to a realm of private intimacy where relationships can be established without a justifiable interference from the state. As Blackmun J stated in the case of *Bowers v Hardwick*¹⁶⁴, ‘the right of an individual to conduct intimate relationships in the intimacy of his or her home seems to me to be at the heart of the constitution’s protection of privacy’. A similar opinion was held by the US Supreme Court in the case of *Griswold v State of Connecticut* and *Lawrence v Texas*,¹⁶⁵ where it stated that privacy goes beyond protection for physical spaces.¹⁶⁶ It is a right that allows every person to establish and nurture human relationships without interference from the outside world.¹⁶⁷ Similarly, in South Africa, in the case of *National Coalition for Gay and Lesbian Equality v Minister for Justice*¹⁶⁸ the Constitutional Court observed that expressing one’s sexuality and forming sexual relationships were at the core of this area of private intimacy.¹⁶⁹

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

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

¹⁶⁴ *Bowers v Hardwick* 478 (1986) 208.

¹⁶⁵ *Lawrence* para 41.

¹⁶⁶ *Lawrence* para 41.

¹⁶⁷ *Lawrence* para 41.

¹⁶⁸ *National Coalition* case.

¹⁶⁹ *National Coalition* case.

State interference with privacy is justifiable when protecting its citizens from harm, in as much as such interference is proportionate to the harm posed.¹⁷⁰ However, interference with consensual same-sex sexual conduct in private does not protect any citizen from any harm; it represents perceived symbolism and reinforces prejudice.¹⁷¹ Therefore an argument founded on the right to privacy establishes that imposing criminal penalties on individuals involved in private consensual same-sex sexual conduct is unfair particularly where private consensual heterosexual conduct is not punishable. The mere recognition of the right to privacy of homosexuals only lays the basis for the equal application of the law to homosexuals and heterosexuals.¹⁷² This means that for the privacy argument to succeed it has to be considered together with the equality argument. The two arguments should not be separated since sodomy laws give rise to overlapping and mutually reinforcing violations of both the rights to equality and privacy.

A privacy argument alone would have damaging effects on the efforts to create a society that is non-stigmatising as far as sexual orientation is concerned. A privacy argument suggests that discrimination against homosexuals is confined to prohibiting conduct between adults of the same sex in the privacy of their bedroom. This is not enough because the right to privacy is not just about the bedroom; it is about the right to make fundamental decisions about intimate relationships without being punished.¹⁷³ The other weakness of the privacy argument would be that it might reinforce the idea that same-sex sexual conduct is shameful and improper, which can only be tolerated when confined to the bedroom and its implications should not be approved

¹⁷⁰ Commonwealth human rights initiative 'the impact of criminalizing same-sex sexual conduct in common wealth' (2011) 60.

¹⁷¹ Commonwealth human rights initiative (n 170 above) 61.

¹⁷² D Kane 'Homosexuality and the European Convention on Human Rights: what rights (1998) 11 *Hastings Comparative and International law Review* 447.

¹⁷³ E Cameron 'Sexual orientation and the Constitution: A test case for human rights' (1993) 110 *African Law Journal* 464.

outside the bedroom. Therefore, the privacy argument for the constitutional protection of gays and lesbians on its own is not enough as a standalone argument due to its own weaknesses.

5.5.5 Incorporation of international law

Articles 2(5) and 2(6) incorporate international law into domestic law. Article 2(5) provides that ‘general rules of international law shall form part of the law in Kenya’.¹⁷⁴ Article 2(6) states that ‘any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution’.¹⁷⁵ The Constitution further provides that the state must enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.¹⁷⁶ Ndulo has noted that these provisions imply that international human rights norms that prohibit discrimination are applicable in Kenya.¹⁷⁷

Given that the Constitution provides that general rules of international law and treaties or conventions ratified by Kenya are part of Kenya’s domestic law, and that laws that are inconsistent with the Constitution are invalid, Kenya has a constitutional obligation to repeal section 162 if it is not in line with international human rights law.¹⁷⁸

The international community’s stance on the rights of gays and lesbians is that anti-sodomy laws violate international human rights law and they violate the rights of homosexuals to non-discrimination and privacy as guaranteed in the international human rights instruments.¹⁷⁹

Besides, the binding international treaties to which Kenya is a party requires states to take positive measures to meet their international obligations, and the Constitution requires state

¹⁷⁴ Article 2(5) of Constitution.

¹⁷⁵ Article 2(6) of Constitution.

¹⁷⁶ Article 21(4) Constitution.

¹⁷⁷ Ndulo (n 13 above) 99.

¹⁷⁸ Article 2(6) of Constitution.

¹⁷⁹ *Toonen* para 8.7.

organs to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.¹⁸⁰ Instead, anti-sodomy laws fuel an overall atmosphere of stigmatisation that promotes discrimination and human rights abuses against homosexuals. The inevitable conclusion from these provisions is that the anti-sodomy laws not only violate the Constitution but also violate international human rights law.

The HRC in *Toonen*¹⁸¹ held that anti-sodomy laws violate the right to privacy of homosexuals as guaranteed under ICCPR, regardless of whether the laws are enforced.¹⁸² Gays and lesbians in Kenya face invasions of their privacy. Police officers invade their homes; and harass and abuse them.¹⁸³ As such, proponents of anti-sodomy laws cannot argue that sodomy laws do not have the same ramifications in the Kenyan context. Since Kenya is a party to the ICCPR, whose provisions are part of the domestic laws of Kenya pursuant to article 2(6) of the Constitution, it has an international obligation to comply with the provisions of the ICCPR. For that reason, anti-sodomy laws constitute a direct violation of the ICCPR, and by extension the Constitution.

In addition to violating the ICCPR, the anti-sodomy laws in Kenya contravene general principles of universality of human rights, equality and non-discrimination under international human rights law.¹⁸⁴ As noted in the UN High Commissioner's report on LGBT Human rights, article 1 of the UDHR states that 'all human beings are born free and equal in dignity and rights' and non-discrimination is a core human rights principle in the UN Charter and other human rights instruments.¹⁸⁵ In criminalising same-sex sexual conduct between consenting adults in private,

¹⁸⁰ Article 21(4) of Constitution.

¹⁸¹ *Toonen* para 8.7.

¹⁸² *Toonen* para 8.7.

¹⁸³ Kenya Human Rights Commission (n 2 above) 18.

¹⁸⁴ Finerty (n 6 above) 433.

¹⁸⁵ UN High Commissioner for Human Rights, *discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity* (2011) 19.

anti-sodomy laws discriminate against homosexuals and render them unequal to heterosexual individuals in the society.¹⁸⁶ Even if the laws did not contribute to stigmatisation and abuse, in preventing homosexuals from legally entering into relationships of their choice, anti-sodomy laws deprive them of one of the most fundamental aspects of being human.¹⁸⁷

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

5.6 Limitation of the rights analysis

Constitutional rights and fundamental freedoms are not absolute. They have boundaries set by the rights of others and by important social concerns such as public health, public safety, public order and democratic values. The fact that gays and lesbians are entitled to equal protection of the law does not detract from the fact that their rights, like the rights of everyone else, may under certain conditions be limited.

In the Kenyan Constitution, a general limitation in article 24 sets out specific criteria for the justifications of restrictions of the rights in the Bill of rights.¹⁸⁸ Limitation of a right means a

¹⁸⁶ Finerty (n 6 above) 455.

¹⁸⁷ Finerty (n 6 above) 455.

¹⁸⁸ Article 24(1) of the Constitution of Kenya provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including:

- a) The nature of the right or fundamental freedom;
- b) The importance of the purpose of the limitation;

violation of the right is permitted by law. The infringement would not amount to unconstitutionality if it takes place for a reason that is accepted as a justification for infringing rights in an open and democratic society based on human dignity, equality and freedom. In other words, not all infringements of constitutional rights are unconstitutional. Where an infringement can be justified in accordance with article 24 of the Constitution it will be constitutionally valid.

According to article 24(3) the State must justify a particular limitation by demonstrating to the Court that the requirements of article 24(1) have been satisfied. Article 24 of the Kenyan Constitution is modelled on section 36 of the South African Constitution. Thus in determining whether a right has been infringed, the court adopts a two-stage approach. First, the court identifies a prima-facie infringement of a right guaranteed in the Constitution. If that has been established, the inquiry proceeds to assess the reasons given to justify the infringement. This assessment takes the form of a proportionality test, in which the value attached to the right, the extent of infringement and its effect on the right guaranteed are weighted against the constitutional importance and the effectiveness of the limitation in achieving its stated objective.¹⁸⁹

The constitutional arguments advanced above can only be complete after the State has been allowed to give clear, convincing and specific reasons to justify the retention of sodomy laws.¹⁹⁰ Once that is given the court would assess the constitutional validity of the limitation with the aim of ensuring that the limitation does not diminish the essence of the right guaranteed.

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- c) The nature and extent of the limitation;
 - d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamentals of others and;
 - e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

¹⁸⁹ I Currie & J De Waal *The bill of rights handbook* (2005) 230.

¹⁹⁰ Curries & De Waal (n 189 above) 230.

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

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

In *Karua vs. Radio Africa Limited T/A Kiss Fm Station and Others Nairobi* the High Court stated that:

On the question of what is justifiable in an open and democratic society, the questions which fall to be considered are the needs or objectives of a democratic society in relation to the right or freedom concerned. Without a notion of such needs, the limitations essential to support them cannot be evaluated...The aim is to have a realistic, open, tolerant society and this necessarily involves a delicate balance between wishes of the individual and the utilitarian “greater good of the majority”. But democratic societies approach the problem from the standpoint of the

importance of the individual, and the undesirability of restricting his or her freedom. However in striking the balance certain controls on the individual's freedoms of expressions may in appropriate circumstances be acceptable in order to respect the sensibilities of others... The limitation of constitutional rights for a purpose that it is necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on the proportionality...[T]he fact that different implications for democracy, and where "an open and democratic society based on freedom and equality" means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established but the application of these principles with particular circumstances can only be done on a case-by-case basis and this is inherent in the requirement of proportionality, which calls for the balancing of different interests.¹⁹¹

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

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom...¹⁹²

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

The standard against which every limitation on the enjoyment of fundamental rights and freedoms... is an objective one. The provision... clearly presupposes the existence of universal

¹⁹¹ *Karua vs. Radio Africa Limited T/A Kiss Fm Station and Others Nairobi* Hccc No. 288 Of 2004 (2006) 2 EA 117; (2006) 2 KLR 375

¹⁹² Article 24 of Kenyan Constitution.

democratic values and principles, to which every democratic society adheres. It also underscores the fact that by her Constitution, Uganda is a democratic state committed to adhere to those principles and values, and therefore, to that standard. While there may be variations in applications, the democratic values remain the same...[D]emocratic values and principles are the criteria on which any limitation on the enjoyment of rights and freedoms guaranteed by the Constitution has to be justified. The Court must be guided by the values and principles essential to a free and democratic society. The following is a summary of the criteria for justification of law imposing limitation on guaranteed rights: (1) the legislative objective which the limitation is designed to promote must be sufficiently important to warrant overriding a fundamental right; (2) the measures designed to meet the objective must be rationally connected to it and not arbitrary, unfair or based on irrational considerations; and (3) the means used to impair the right of freedom must be more than necessary to accomplish the objective.¹⁹³

Article 24(2) requires the justification given in limiting the right to be clear and specific about the right to be limited and the nature and extent of the limitation. For the State to justify the limitation of the right, it must demonstrate that there is a legislation that allows limitation of the right. It is clear that sections 162, 163 and 165 of the Penal Code which criminalise same-sex sexual acts limit the enjoyment of the right to equal protection of the law of gays and lesbians.

As argued in chapter two, the Penal Code does not criminalise same-sex sexual conduct as an identity, or the state of being gay or lesbian, but only certain sexual acts ‘against the order of nature.’ Therefore the State should not set out to prosecute people who identify themselves as gay or lesbian. Clearly, the penal provisions do not criminalise someone’s sexual orientation.¹⁹⁴

¹⁹³ *Kivumbi vs. Attorney General* Constitutional Court Const. Petition No. 9 of 2005 - 5/27/2008.

¹⁹⁴ *Eric Gitari* para 128.

The government could also rely on article 27(4) of the Constitution which does not list sexual orientation as a prohibited ground of discrimination and argue that gays and lesbians are not protected by that provision. Thus article 27(4) allows the State to discriminate against people on the basis of their sexual orientation. This argument would be flawed for two reasons. First, the absence of sexual orientation as one of the prohibited grounds in Article 27(4) does not give the State freedom to discriminate against people. The word used in the Article is ‘including’ the grounds listed in article 27(4). The prohibited list of grounds of discrimination in Article 27(4) is open ended; and is subject to interpretation to include such grounds as the context and circumstances demonstrate are a ground of discrimination. The grounds that are listed are not exhaustive. The word ‘including’ is defined in article 259(4) (b) of the Constitution as ‘includes, but is not limited to.’¹⁹⁵

In addition, even where Article 27(4) is not phrased in the broad language that prohibits discrimination against any person on any ground, the Court would have to look at the Constitution holistically, and would find that the principles of equality, dignity and non-discrimination run throughout the Constitution like a golden thread. Moreover, Article 259(2) provides that the Constitution shall be interpreted in a manner that advances human rights and fundamental freedoms in the Bill of Rights¹⁹⁶. The rights to equality and dignity would not be advanced if people were denied the right not to be discriminated against based on their sexual orientation.

Secondly, once a limitation is demonstrated, the burden is on the State to justify its conduct with reference to the law that allows it to infringe or limit the right. Homosexuals are not under any

¹⁹⁵ Article 259(4) (b) of the Kenyan Constitution.

¹⁹⁶ Article 259 (2) of the Kenyan Constitution

obligation, once they demonstrate a violation of their rights, to show that there is no justification for limiting their rights. The obligation to show that there is a law that justifies such limitation lies squarely on the State.¹⁹⁷

In my view it would be difficult for the State to discharge that burden. The State would rely on the moral convictions of most Kenyans. They would also rely on a number of verses from the Bible and Quran as well as various studies conducted regarding homosexuality in the country. However, no matter how strongly held moral and religious beliefs may be, they cannot be a basis for limiting rights; they are not laws as contemplated by the Constitution. Thus, neither moral and cultural values, nor the religious beliefs that the State cites, would meet the constitutional test for limitation of rights.

The State's reference to religious beliefs as a basis for imposing limitations on rights and freedoms of gays and lesbians would go against the provisions of article 32 of the Constitution.¹⁹⁸ Freedom to profess religious beliefs also encompasses freedom not to do so. To put it in a different way, freedom of religion encompasses the right not to subscribe to any religious beliefs, and not to have the religious beliefs of others imposed on one.

The Kenyan Constitution is the supreme law of the land, and it requires conduct to be justified in terms of laws that meet the constitutional standard. The State has to act within the confines of the law and cannot rely on religious texts or its views of what the moral and religious convictions of

¹⁹⁷ *Lyomoki and Others vs. Attorney General* (2005) 2 EA 127.

¹⁹⁸ Article 32 of the Kenyan Constitution states that every person has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.

(3) A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person's belief or religion.

(4) A person may not be compelled to act, or engage in any act, that is contrary to the person's belief or religion.

Kenyans are to justify the limitation of a right. The State may or may not be right about the moral and religious views of Kenyans, but the Constitution does not recognise limitation of rights on these grounds. The Constitution also protects those with unpopular views, and minorities, marginalised and vulnerable groups regardless of a majority's views. The role of a constitutional court in any jurisdiction is to uphold the Constitution, not popular views or the views of a majority.

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

This case has generated substantial public interest. The public and politicians have their own perceptions of when the election date should be. We must, however, emphasise that public opinion is not the basis for making our decision. Article 159 of the Constitution is clear that the people of Kenya have vested judicial authority in the courts and tribunals to do justice according to the law. Our responsibility and the oath we have taken require that we interpret the Constitution and uphold its provisions without fear or favour and without regard to popular opinion... our undertaking is not to write or rewrite the Constitution to suit popular opinion. Our responsibility is to interpret the Constitution in a manner that remains faithful to its letter and spirit and give effect to its objectives.¹⁹⁹

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

¹⁹⁹ *John Harun Mwau & 3 Others v Attorney General & 2 Others* Petition No 65 of 2011 (Consolidated with Petitions No's 123 of 2011 and 185 of 2011(2012))

5.7 Conclusion

This chapter discussed the history of sodomy laws as well as the current legal status of homosexuality in Kenya. It advanced five arguments for the potential decriminalisation of same-sex sexual conduct based on the relevant constitutional provisions.

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

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

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

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

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

The next chapter focuses on the potential decriminalisation of same-sex sexual conduct in Uganda.

CHAPTER SIX

DECRIMINALISATION OF HOMOSEXUALITY IN UGANDA: WHAT IS THE PRESENT POSITION?

6.1 Introduction

This chapter focuses on the potential decriminalisation of same-sex sexual conduct in Uganda. The chapter examines how the relevant provisions of the Constitution of Uganda could be interpreted progressively and broadly to decriminalise same-sex sexual conduct in Uganda. It advances four arguments based on:- (a) the right to equality and non-discrimination; (b) the right to human dignity; (c) the right to privacy and (d) the right to culture.

The chapter starts with a discussion of the history of sodomy laws in Uganda. Then the current legal status of homosexuality and predicament of homosexuals in Uganda is examined. This is followed by a discussion on the incremental approach that has been taken by gay rights advocates to push for the decriminalisation of same-sex sexual conduct in Uganda. Finally, a critical analysis of the relevant constitutional provisions to advance the four arguments for the potential decriminalisation of same-sex sexual conduct is provided.

6.2 History of sodomy laws in Uganda

Uganda, as a country did not exist during the pre-colonial period.¹ What existed then were kingdoms and chiefdoms.² Studies show that same-sex sexual practices were institutionalised

¹ S Tamale *Homosexuality: perspectives from Uganda* (2007) 29.

² M Epprecht *Heterosexual Africa? The history of an idea from the age of exploration to the age of AIDS* (2008) 65.

and accepted in some communities during the pre-colonial times.³ Faupel noted that homosexuality was practised in the Buganda kingdom without any criminal penalties.⁴ The King himself was involved in homosexuality with his pages.⁵ Kabaka Mwanga killed Uganda martyrs for declining his requests for sexual intercourse with them.⁶ Similarly, Epprecht has argued that same-sex sexual relations existed among different African societies before the coming of the colonial powers.⁷ Murray and Roscoe have concluded that colonial masters did not introduce homosexuality in Africa but rather the anti-homosexuality laws and intolerance to it through establishing mechanisms of surveillance and regulation to suppress it.⁸

Uganda did not have criminal provisions on same-sex sexual acts before colonial rule.⁹ Sodomy laws were introduced in Uganda by the British during the colonial period, and these laws are still in force in Uganda.¹⁰ The British adopted the Penal Code on 15 June 1950, which was developed based on both the Indian Penal Code and Australian Penal Code.¹¹ The Penal Code contained unnatural offences provision as it is today.¹² The British have however, repealed their sodomy laws to decriminalise same-sex sexual conduct following the recommendations of the Wolfenden report of 1957.¹³

³ M Epprecht *Hungochani: the history of a dissident sexuality in southern Africa* (2004) 40. For example same sex relations were accepted among the Iteso, Bahima, Banyoro and Langi communities in Uganda.

⁴ J F Faupel *Uganda Holocaust* (1921) 9.

⁵ Faupel (n 4 above) 10.

⁶ Faupel (n 4 above) 10.

⁷ Epprecht (n 2 above) 23.

⁸ S O Murray *Homosexualities* (2000) 16.

⁹ Tamale (n 1 above) 60.

¹⁰ Tamale (n 1 above) 60.

¹¹ Tamale (n 1 above) 60.

¹² Tamale (n 1 above) 60.

¹³ The report recommended that homosexual acts between adults in private should not be regarded as a criminal offence. It further stated that the law's function is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others. But it is not the function of the law to intervene in the private life of citizens, or to seek to enforce any particular pattern of behaviour.

Apart from amending section 145 of the Penal Code Act¹⁴ to increase the punishment for carnal knowledge against the order of nature to life imprisonment, Uganda did not amend an unnatural offences provision in the Penal Code Act after attaining its independence in 1962.¹⁵ The rest of the wording of the provision remains exactly as it was in 1950.¹⁶ The next section examines the current legal status of homosexuality in Uganda.

6.3 Current legal status of homosexuality in Uganda

Most Ugandans claim that homosexuality is a foreign concept and un-African.¹⁷ Article 31(2) of the Constitution of Uganda outlaws same-sex marriages.¹⁸ This provision was not originally in the Constitution and was introduced during the 2005 amendment of the Constitution.¹⁹ Statutorily, section 145 of the Penal Code Act criminalises unnatural offences punishable by life imprisonment.²⁰ Attempted sodomy is punishable by up to seven years of imprisonment under section 146 and 148 of the Penal Code Act.²¹ These provisions criminalise same-sex sexual conduct in Uganda.

¹⁴ According to the laws of Uganda, their criminal provisions are contained in the Penal Code Act Cap 120 Law of Uganda as opposed to just Penal Code as it is commonly known as in other countries.

¹⁵ A Jjuuko, *The incremental approach: Uganda's struggle for the decriminalization of homosexuality* (2012) 386. The amendment was done in 2003.

¹⁶ Jjuuko (n 15 above) 386.

¹⁷ Timale (n 1 above) 60.

¹⁸ Article 31(2) of the Constitution provides that marriage between persons of the same sex is prohibited.

¹⁹ Jjuuko (n 15 above) 386.

²⁰ Section 145 provides that 'any person who has carnal knowledge of any person against the order of nature or permits a male person to have carnal knowledge with him or her against the order of nature commits an offence and is liable to imprisonment for life.

²¹ Section 146 provides 'any person who attempts to commit any of the offences specified in section 145 commits a felony and is liable to imprisonment for seven years'. Section 148 provides 'any person whether in private or public commits any acts of indecency with another person or procures another person to commit any act of indecency with him or her or attempts to procure the commission of any such acts by any person with himself or herself with another person whether in public or private commits an offence and is liable to imprisonment for seven years'.

With the above provisions still existing in the statutory books, there were attempts to further criminalise same-sex sexual conduct in Uganda.²² On 13 October 2009, David Bahati, a Member of Parliament, introduced the Anti-homosexuality Bill in Parliament.²³ The Bill sought to create an offence called homosexuality and intensify already existing punishments for same-sex sexual acts. The term homosexuality was defined widely in the Bill as penetration of the anus or mouth with a penis or any other sexual contraption or the use of any object to penetrate or stimulate the sexual organ of a person of the same sex or the touching of another person with the intention of committing the act of homosexuality.²⁴ These were punishable by life sentence.²⁵

The Bill also provided for the death penalty for ‘aggravated homosexuality’.²⁶ It further prohibited same-sex marriages as well as the promotion of homosexuality.²⁷ Failure to disclose the offence of homosexuality was also criminalised in the Bill.²⁸ Furthermore, the Bill provided for extra territorial jurisdiction and extradition of offenders back to Uganda for prosecution.²⁹ It

²² Jjuuko (n 15 above) 389.

²³ Jjuuko (n 15 above) 389. The preamble of the Bill sated its objectives. The objectives of the Bill were to strengthen the nation’s capacity to deal with emerging internal and external threats to the traditional heterosexuality family; to protect the legal and religious values of Ugandans and to protect the children from being raised by parents in homosexual relationships. It also stated that it was meant to complement and supplement section 145 of the existing Penal Code by expressly criminalising same-sex sexual conducts and other acts linked to homosexuality.

²⁴ Section 2 of the Bill.

²⁵ Section 2(2) of the Bill.

²⁶ The Bill defined aggravated homosexuality as homosexuality with a minor or where the offender is a person with HIV or where the offender is a parent or guardian of the person whom the offence is committed or where the offender is a person in authority over the person against whom the offence is committed or where the victim of the offence is a person with disability or where the offender is a serial offender or where the offender uses drugs or other substances to stupefy or overpower the victim so as to have same-sex sexual intercourse with him.

²⁷ Sections 12 & 13 of the Bill. Section 12 provided that any purported to contract a same sex marriage will be punishable by imprisonment for life. Section 13 criminalized the procuring, production, reproduction of pornographic materials, funding, or sponsoring activities to promote homosexuality, offering premises, uses of technological devises or acting as an accomplice to promote or abet homosexuality.

²⁸ Section 14 of the Bill which requires a person in authority to report within 24 hours of getting information about an offence under the Bill being committed.

²⁹ Sections 16 & 17 of the Bill. Section 16 prohibited the commission of the offence outside Uganda by Ugandan citizens or permanent resident or where the offence was committed partly in and partly outside Uganda. Section 17 makes homosexuality an offence that is extraditable. It elevated homosexuality to the same status as offence such as treason.

also sought to invalidate all international legal instruments that ‘promote’ homosexuality.³⁰ This implied that all international human rights instruments that provide for equality and discrimination would not apply to homosexuals in Uganda.

The Anti-homosexuality Bill underwent several amendments before it was finally signed into law by President Yoweri Museveni on the 24 of February 2014.³¹ A majority of Ugandans praised the president for signing it into law arguing that homosexuality is un-African and unbiblical and should not be tolerated in Uganda.³² Some argued that Uganda is a conservative and religious nation that should not condone homosexuality.³³ It was the responsibility of the society and the state to do something to discourage the trend.³⁴ David Bahati, the sponsor of the Bill stated that ‘homosexuality was a behaviour that can be learned and can be unlearned.

³⁰ Section 18 of the Bill provided that the Bill nullifies any international legal instrument whose provisions were contradictory to the spirit and provisions of the Bill.

³¹ ‘Ugandan President Yoweri Museveni signs anti-gay bill’ *BBC News Africa* 24 February 2014 <http://www.bbc.com/news/world-africa-26320102> (accessed on 21 February 2015). Human rights activists have termed the Anti-homosexuality Act as controversial. The Bill was assented to in public something that rarely happened in Uganda. The media both local and international were invited to witness the signing of the Bill into law. The signing of the Bill also attracted international criticism. The US government described the legislation as more than an affront and danger to the gay community in Uganda. It also described it as a step backwards for all Ugandans.³¹ The UN High Commissioner for Human Rights, Ms Navi Pillay equally condemned the signing of the Bill stating that disapproval of homosexuality by some can never justify the violation of the fundamental rights of homosexuals in Uganda. She further stated that the law will institutionalise discrimination and is likely to encourage harassment and violence against gays and lesbians. Her views were echoed by the British Foreign Secretary William Hague who warned that the new law would increase persecution and discrimination of homosexuals in Uganda. Furthermore, the US government warned that the signing of the Bill into law could complicate its relations with Uganda including suspension or redirection of financial aid away from government. Similarly, European countries such as Denmark, The Netherlands, Sweden and Norway withdrew their financial aid to Ugandan government. The British foreign secretary William Hague said that the signing of the Bill is going to damage the reputation of Uganda internationally. In response to these criticisms, President Museveni stated that the help of the US government to work with Ugandan scientists to conduct a study to establish whether homosexuals are born that way was welcome. Once the research establishes that it is inborn, the law would be reviewed.³¹ He added that African countries do not impose their views on western countries thus the west should not put pressure on his government to reject the Bill.

³² ‘Ugandan President Yoweri Museveni signs anti-gay bill’ *BBC News Africa* 24 February 2014 <http://www.bbc.com/news/world-africa-26320102> (accessed 21 February 2015).

³³ ‘Ugandan President Yoweri Museveni signs anti-gay bill’ *BBC News Africa* 24 February 2014 <http://www.bbc.com/news/world-africa-26320102> (accessed 21 February 2015).

³⁴ ‘Uganda’s President signs Anti-gay Bill’ *The New York Times* 24 February 2015 <http://www.nytimes.com/2014/02/25/world/africa/ugandan-president-to-sign-antigay-law.html? r=0> (accessed 21 February 2015).

Homosexuality is just a bad behaviour that should not be allowed in our society'.³⁵ He further stated that the law was aimed at strengthening the nation's capacity to deal with emerging internal and external threats to the traditional heterosexual family.³⁶

The Anti-homosexuality Act of 2014 further criminalised same-sex sexual conduct by providing harsher and tougher penalties for those found guilty of engaging in same-sex sexual activities. It was the first time for same-sex sexual conduct between female adults to be criminalised in Uganda.³⁷ The Act reduced the penalty for aggravated homosexuality to life imprisonment.³⁸ The promotion of homosexuality by gay rights activists who encourage others homosexuals to come out was also criminalised in the Act as well as same-sex marriages.³⁹ The provision that made it a crime not to report homosexuals to the authorities was removed.⁴⁰

On 1 August 2014 the Constitutional Court of Uganda made a ruling nullifying the Anti-homosexuality Act of 2014.⁴¹ The Court found that the law was illegal because it was passed without the required quorum in December 2013.⁴² However, the Court did not deal with the

³⁵ Uganda's President signs Anti-gay Bill' *The New York Times* 24 February 2015 <http://www.nytimes.com/2014/02/25/world/africa/ugandan-president-to-sign-antigay-law.html? r=0> (accessed 21 February 2015).

³⁶ Uganda's President signs Anti-gay Bill' *The New York Times* 24 February 2015 <http://www.nytimes.com/2014/02/25/world/africa/ugandan-president-to-sign-antigay-law.html? r=0> (accessed 21 February 2015).

³⁷ Section 2 of the Act defines homosexuality to include female-female sexual act. It provides that he or she uses an object to penetrate the sexual organ of another person of the same sex commits the offence of homosexuality.

³⁸ Section 3 of the Act provides for life imprisonment for those engaged in the act of aggravated homosexuality. This was a reduction of the sentence from death penalty which was provided in the Bill.

³⁹ Section 12 of the Act provides that any person who purports to contract a marriage with another person of the same sex commits the offence of homosexuality and is liable for life imprisonment

⁴⁰ It was finally removed before the Bill was signed onto law.

⁴¹ *Oloka-Onyango & 9 others v AG* Const. Petition No. 8 of 2014.

⁴² According to the Court the law was passed in parliament without quorum in the house which was inconsistent with and in contravention of article 2(1) and (2) and 88 of the constitution and Rule 23 of the parliamentary rules of procedure and this null and void. The invalidation of the Act by the Court promoted scenes of jubilation by members of the gay community and their supporters.⁴² They praised the judges for nullifying the law they termed as draconian and unconstitutional. The Court's decision was also welcomed by the US government, which described it as an important step in the right direction for LGBTI rights in Uganda.⁴² Similarly, the UN Secretary General Ban Ki-

substantive element of the law that violates the rights of homosexuals.⁴³ The lack of quorum was brought to the attention of the speaker at the time but the speaker ignored the objection and went ahead to ensure that the Bill was passed.⁴⁴ It could be argued that a number of Members of Parliament would have decided to stay away on the day the Bill was due to be passed. This was because the Bill was very popular and therefore it is possible some of them sought to avoid the wrath of their constituents by not being seen to block it from passing and by implication being seen to support what members of the public consider to be immorality.⁴⁵

Even with the Court ruling invalidating the Anti-homosexuality Act, same-sex sexual conduct remains criminalised and punishable by life imprisonment under section 145 of the Penal Code Act. This has had implications for the protection of the rights of gays and lesbians in Uganda. The next section looks at the current predicament of homosexuals in Uganda.

6.4 Current predicament of homosexuals in Uganda

The lack of knowledge on sexual orientation, religious attitudes and beliefs and cultural beliefs has been regarded as a major cause of harassment of gays and lesbians in Uganda.⁴⁶ This is reflected in actions that take place in the country.⁴⁷ Homosexuals are harassed by the community,

moon commended the Court's ruling describing the decision as a step forward and a victory for the rule of law. In the meantime the ruling provoked anger among anti-gays groups and individuals who regards homosexuality as an abomination and a threat to the family and society in general.⁴² This anger has led to renewed campaign by the anti-gay groups to have the law tabled before parliament again and passed within the laws governing the operations of parliament.

⁴³ The issue that was raised by petitioners that required the determination of the court was whether the Anti-homosexuality Bill passed in accordance with the law.

⁴⁴ The court stated that at least three members of parliament expressed concern about the issue of lack of quorum, which was ignored by the speaker.

⁴⁵ F G Mutebi 'why was Uganda's anti-homosexuality law struck down' (2014) <http://www.aljazeera.com/indepth/opinion/2014/08/why-was-uganda-anti-homosexuali-201481194426136709.html> (accessed 21 February 2015).

⁴⁶ Human Rights Watch Report 'Uganda: Anti-homosexuality Bill threatens liberties and human rights defenders (2009) 10 <http://www.hrw.org/news/2009/10/15/uganda-anti-homosexuality-bill-threatens-liberties-and-human-rights-defenders> (accessed 21 February 2015).

⁴⁷ Human Rights Watch Report (n 46 above) 11.

government officials and non-governmental organisations. They are harassed on the streets, in clubs, churches, restaurants and schools. They are discriminated against at the work place and service distribution.⁴⁸ Openly gay and lesbian people have been excommunicated by their churches, abandoned by their families, terminated from employment and ejected from school and rented houses. Most gays and lesbians are forced to keep their sexual orientation secret to avoid being killed or maimed. Some of them are forced into heterosexual relationships and marriages to give the impression of being heterosexual to the public.⁴⁹

The sodomy laws, though rarely enforced, serve as justification for the harassment, marginalisation and discrimination of homosexuals.⁵⁰ Most social service providers use these laws to justify why they do not provide services to gays and lesbians.⁵¹ The government uses the same laws to punish the service providers who attempt to provide services or support the gay community.⁵² Government officials and non-governmental organisations have defended their refusal to provide necessary services and support by arguing that homosexuality is illegal in Uganda.⁵³

The government has gone to the extent of punishing some organisations working with the LGBT community. It has fined and suspended radio broadcasters for hosting shows that discussed problems faced by homosexuals. In 2004, the Ugandan Broadcasting Council (UBC) fined Radio

⁴⁸ For example Lawrence Mulindwa, the president of the Federation of Uganda Football Association (FUFA) publically stated that gay officials would be banned.

⁴⁹ Human Rights Watch Report (n 46 above) 11.

⁵⁰ Human Rights Watch Report (n 46 above) 11.

⁵¹ Human Rights Watch Report (n 46 above) 11.

⁵² Human Rights Watch Report (n 46 above) 11.

⁵³ For purposes of clarification, it is not illegal to be a homosexual or is it illegal for men to kiss, live together or take any action short of intercourse. Only anal sex has been criminalized under section 145 of the Penal Code Act. However, members of the public throughout the country seem to have taken the view that it is illegal merely to be a homosexual.

Simba more than one thousand dollars for airing a programme on lesbianism.⁵⁴ This was considered to be contrary to public morality. In 2007 the UBC suspended Gaetano Kaggwa, a radio presenter on Capital FM Radio for interviewing a lesbian, Victor Mukasa on air where the government argued that Mukasa used unacceptable language.⁵⁵ However, Mukasa only explained abuses she received at the hands of the police.⁵⁶

The gay rights movement in Uganda has become more and more visible and vocal despite the resistance from both members of the public and government authorities. Gays and lesbians have been able to organise though they have been met with resistance from government security forces and the public. They have been able to hold workshops and press conferences on human rights and awareness campaigns. In 2009 a three-day workshop was organised to discuss the rights of homosexuals and the public resistance to same-sex sexual acts in the country.⁵⁷ Press conferences have been conducted by persons with masks over their heads to conceal their identity for their own safety and security.⁵⁸ They have also attempted to lobby the Speaker of Parliament and the President urging them to support the gay rights campaign.⁵⁹ The striking down of the Anti-homosexuality Act of 2014 and the murder of gay rights activist David Kato has further increased the visibility of the gay rights movement in the country.

⁵⁴ 'Fine for Ugandan radio gay show BBC NEWS 3 October 2004 <http://news.bbc.co.uk/2/hi/africa/3712266.stm> (accessed 21 February 2015).

⁵⁵ Human Rights Watch Report 'Uganda: Raising homophobia threatens HIV prevention' (2007) 55 <http://www.hrw.org/news/2007/08/21/uganda-state-homophobia-threatens-health-and-human-right> (accessed 21 February 2015).

⁵⁶ Human Rights Watch Report (n 55 above) 56.

⁵⁷ 'Uganda under fire over homos' protest New vision 25 August 2007 <http://www.newvision.co.ug/D/8/12/583101> <http://www.newvision.co.ug/PA/8/13/588382> (accessed 2 March 2015).

⁵⁸ 'Uganda under fire over homos' protest New vision 25 August 2007 <http://www.newvision.co.ug/D/8/12/583101> <http://www.newvision.co.ug/PA/8/13/588382> (accessed 2 March 2015).

⁵⁹ A representative from Freedom and Roam Uganda wrote to the president and the speaker requesting them to support their campaign on the rights of gays and lesbians. M Karugaba 'Gay activists write to the president' New Vision 24 September 2007 <http://www.newvision.co.ug/PA/8/13/588382> (accessed 2 March 2015).

6.5 Views of the Ugandan society on homosexuality

Most Ugandans view homosexuality as a western concept and ‘un-African’. A survey conducted by Steadman Associates showed that 95 percent of Ugandans consider homosexuality repugnant and absolutely unacceptable to African culture.⁶⁰ According to another survey conducted by Pew Forum on Religion and Public life, 79 percent of Ugandans believe that homosexual conduct is morally unacceptable or morally wrong.⁶¹ This explains why gays and lesbians are harassed and discriminated by the society. The killing of gay rights activist David Kato in 2011 was a clear case of societal harassment and discrimination against homosexuals. Even though the police arrested his alleged murderers and claimed that his killing was not related to his sexual orientation, Kato lived in fear of his life because of his gay rights activism.⁶²

Similarly, Sheila Migisha, a gay rights activist was targeted after the Anti-homosexuality Bill was introduced in Parliament. She was attacked by boys from the neighbourhood who threw stones at her and called her ‘homo’. Although she managed to escape from the boys, she stayed locked in her house for several days.⁶³ Equally, Jacqueline Kasha reported that a lesbian in City of Lira had gasoline poured over her and would have been set on fire had community leaders not intervened.⁶⁴

Societal harassment and discrimination against gays and lesbians also takes place in schools. In 2010, the management of Mbalala Senior Secondary School dismissed student John Mulumba

⁶⁰ A Wasike ‘Anti-gay group hits back at rights activist’ <http://www.spiegel.de/international/world/gays-and-lesbians-in-uganda-under-pressure-after-new-law-a-964632.html> (accessed 2 March 2015)

⁶¹ Pew Forum Religion and Public life ‘Tolerance and tension: Islam and Christianity in sub-Saharan Africa’ <http://www.pewforum.org/2010/04/15/executive-summary-islam-and-christianity-in-sub-saharan-africa> (accessed 2 March 2015).

⁶² M Delaney & G Olukya ‘David Kato, Ugandan Gay activist brutally slain’ Huffington Post 27 January 2011 http://www.huffingtonpost.com/2011/01/27/david-kato-uganda-gay-act_n_814775.html (accessed on 2 March 2015)

⁶³ S Raghavan ‘Gays in Africa face growing persecution’ human rights activists say’ Wash post 11 December 2011 <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/11/AR2010121103045.html> (accessed 2 March 2015).

⁶⁴ Raghavan (n 63 above).

after he disclosed that he was a homosexual.⁶⁵ In March 2010, the Uganda Joint Christian Council and the Family Life Network launched a campaign to curb same-sex sexual conduct in higher learning institutions.⁶⁶

Members of the public demonstrated against homosexuals on the streets of Kampala and Jinja. They demanded the government to look into reports regarding homosexuality in Uganda. The media have engaged in hate speech and smear campaigns against homosexuals. For instance, the Rolling Stone tabloid named and printed names and photographs of those they alleged to be homosexuals.

The majority of religious leaders are opposed to homosexuality and they support stricter penalties against same-sex sexual acts, though they do not support extreme punishments for those found guilty of same-sex sexual acts. As archbishop Jonah Lwanga stated:

We support the need for a law that prohibits homosexual practices including same sex marriage which we are aware, it is prohibited under our constitution. However, we do not, as a matter of principle, support death penalty or other forms of extreme punishment such as life imprisonment as proposed in the Bill.⁶⁷

The Catholic Church did not support the Anti-homosexuality Bill because it considered it as going against core values of Christianity. Muslim leaders were opposed to homosexuality too. The Tabliq, a sect of the Muslim religion proposed an ‘anti-gay squad’ that would seek out and expose homosexuals. Traditional leaders also do not support homosexuality. Traditional leaders

⁶⁵ J Burroway ‘State department issues annual human rights report, highlights Uganda’ *Box Turtle Bull* 12 March 2010 <http://www.boxturtlebulletin.com/slouching-toward-kampala3> (accessed 2 March 2015).

⁶⁶ Human Rights Practices: Uganda (2010) <http://www.state.gov/j/drl/rls/hrrpt/2010/af/154375.htm> (accessed 2 March 2015).

⁶⁷ J Tugume ‘Gay bill OK but remove death penalty – clergy, *Daily Monitor* 24 December 2009. <http://old.nanenews.net/main.asp?ID=3374&PageID=257> (accessed 2 March 2015). Similarly, the church of Uganda was in favour of the Anti-homosexuality Bill minus the death penalty.

came out in support of the Anti-homosexuality Bill. For instance, Rwenzururu King asked fellow tribesmen to vote in favour of the Bill.⁶⁸ They viewed homosexuality as a western phenomenon that should not be allowed to erode African culture and values.

Despite societal harassment, discrimination, humiliation and difficulties involved in the push for decriminalisation, gay rights advocates have continued in their fight against the criminalisation of same-sex sexual conduct. They have adopted a step-by-step approach to decriminalisation. They have preferred to move to court on a number of incidents that have amounted to violations of some rights of homosexuals before challenging the constitutionality of sodomy laws. The next section analyses this incremental approach taken by gay rights groups.

6.6 Step-by-step approach to decriminalisation

The push for the decriminalisation of same-sex sexual conduct in Uganda has taken an incremental approach. Although no case has been taken to court to challenge section 145 of the Penal Code Act, gay rights advocates are slowly making progress towards that by challenging violations of some rights of gays and lesbians in court. In the case of *Victor Juliet Mukasa and Yvonne Oyo v Attorney General*⁶⁹ where the petitioners who were lesbians moved to the High Court claiming a violation of their rights to privacy, property and freedom from torture, inhuman and degrading treatment by the police and local council. The police forcefully entered and abducted the second petitioner. They also undressed her at the police station as well as denying her the use of toilet facilities. The first petitioner's house was ransacked. The High Court ruled the petitioner's right to privacy was violated. The Court also recognised the petitioners as

⁶⁸ C Tusiime 'Vote out pro-gay MPs says Mumbere' Daily Monitor 28 December 2009 <http://www.state.gov/j/drl/rls/hrrpt/2010/af/154375.htm> (accessed 2 March 2015).

⁶⁹ *Victor Juliet Mukasa and Yvonne Oyo v Attorney General* Misc Cause No. 247 of 2006.

persons who are not different from any other group and therefore their rights should be protected by the state without discrimination.

In *Kasha Jacqueline, David Kato and Onziema Patience v Rollingstone Publications Limited & Giles Muhame*⁷⁰, the Civil Society Coalition on Human Rights and Constitutional Law in Uganda filed an application for an injunction against Rollingstone Publication at the High Court. Rollingstone tabloid had in its 2 October 2010 edition carried on its front page the headline ‘100 pictures of Uganda’s top homos leak’. The publication contained the names, pictures and places of residence of the alleged homosexuals. The court issued a permanent injunction against Rolling Stone publication and its managing director from any further publications of the identities of the persons and homes of petitioners and homosexuals generally. The Court also awarded Ushs 1,500,000 to each of the petitioners as compensation.

In its ruling the court affirmed that gays and lesbians are entitled to the same rights like everyone else and their sexual orientation cannot be a basis for their discrimination. The ruling not only provided a broad protection of homosexuals in Uganda, but also it set a precedent should any other media attempts to publish similar information. The ruling also clearly indicated that both state and non-state actors have the responsibility to uphold the rights of homosexuals.

The above two court decisions were regarded as a big step in the move towards the decriminalisation of same-sex sexual conduct in Uganda. Although they did not invalidate section 145 of the Penal Code Act, to some extent they offered protection to homosexuals. They confirmed that homosexuals should be accorded the same treated by both government authorities

⁷⁰ *Kasha Jacqueline, David Kato and Onziema Patience v Rollingstone Publications Limited & Giles Muhame* Misc Appl No. 163 of 2010.

and private entities. The next section analyses the potential of using relevant constitutional provisions to nullify section 145 of the Penal Code Act.

6.7 Constitutional potential to invalidate sodomy laws in Uganda

The courts in Uganda have the potential using the Ugandan Constitution to declare sodomy laws unconstitutional through a progressive and purposive interpretation of certain constitutional provisions. The Constitution contains provisions that prohibit discrimination, and guarantees the right to dignity, the right to privacy and the right to culture.⁷¹ Article 2 of the Constitution provides that it is the supreme law of the land; any law contrary to it is void.⁷² This means that if anyone is able to demonstrate to the Constitutional Court that the sodomy laws are inconsistent with the Constitution, the laws will either be declared unconstitutional or will be interpreted in a way that does not violate the Constitution.

Four constitutional provisions could be used to push for the decriminalisation of same-sex sexual conduct in Uganda. These are: article 21 on the freedom from discrimination, article 24 on the respect for human dignity, article 27 on the right to privacy and article 37 on the right to maintain and practice a culture. Although the provisions have not been used before to push for the decriminalisation, their plain language speaks to the fact that they are relevant in this context. In addition, decisions from foreign jurisdictions have suggested that the language of some of these provisions could be used as a basis to protect the rights of homosexuals.⁷³

⁷¹ Articles 21, 24, 27, 29 and 37 of Constitution.

⁷² Article 2 of constitution states that ‘this constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda. If any law is inconsistent with this constitution, the constitution shall prevail, and that other law or custom shall to the extent of the inconsistency be void.

⁷³ Decisions from both domestic such as South Africa, Canada, India and international tribunals such as HRC have indicated that the right to equality protects homosexuals.

The Court of Appeal, sitting as a Constitutional Court has been mandated by the Constitution to interpret the provisions of the Constitution.⁷⁴ A petition to challenge the constitutionality of the sodomy laws has to be filed directly to the Constitutional Court. Even though the Court of Appeal does not have original jurisdiction in such matters, it may exercise such jurisdiction as a Constitutional Court. However, the petitioner must establish standing before the Constitutional Court.

6.7.1 *Locus standi* before the Constitutional Court

On standing, article 137(3) of the Constitution allows any individual to bring such a case alleging that an Act of Parliament or any other law is inconsistent with the Constitution of Uganda.⁷⁵ This provision does not require that an individual should be directly affected to have standing before the constitutional court. It would be easy to imagine, however, that the Constitutional Court would attempt to insist that the petitioner must be an individual directly affected by the application of sodomy laws. A homosexual person would have the best chance of establishing standing in such a case. The court is likely to insist on such a standing because sodomy laws are rarely enforced, thus the court would be quick to deny standing to nearly anyone since scarcely anyone is directly affected by these laws.

It is only homosexuals who are directly affected by the sodomy laws. They could argue that, though sodomy laws are not directly enforced, their existence in statutory books threatens the privacy and security of any homosexual since the law may be enforced at any time. They could also argue that the mere existence of the laws and derogatory statements made by government

⁷⁴ Article 137(1) of the Constitution provides that any question as to the interpretation of this constitution shall be determined by the court of appeal sitting as the Constitutional Court.

⁷⁵ Article 137(3) of Constitution provides that a person who alleges that an Act of Parliament or any other law in or done under the authority of any law or act or omission by any person or authority is inconsistent with or in contravention of a provision of this constitution may petition the constitutional court for a declaration to that effect and for redress where appropriate.

officials has led to widespread discrimination and harassment of homosexuals thus making it impossible for gays and lesbians to contact government authorities such as the police for assistance.⁷⁶ The laws have impacted negatively on homosexuals even if they are not formally enforced, thus providing a basis for standing to any homosexual.

Once standing is established, four arguments could be advanced for the declaration of sodomy laws unconstitutional. The arguments could be based on: the freedom from discrimination; the right to dignity; the right to privacy and the right to protect culture. It could be argued that the sodomy laws appear to violate the above constitutional provisions. The next section advances arguments that sodomy laws violate four provisions of the Constitution, thus should be declared null and void.

6.7.2 Equality and non-discrimination

Article 21 of the Constitution provides for the right to equality and freedom from discrimination.⁷⁷ Although the provision has not been applied with regards to sodomy laws, the Constitutional Court has employed it in a number of occasions. In the case of *Law Advocacy for Women in Uganda v Attorney General*,⁷⁸ Law Advocacy challenged a number of provisions in both the Penal Code Act and the Succession Act that contain different privileges and penalties. Section 154 of the Penal Code Act provided that a married woman committed adultery if she had sexual intercourse with any man that was not her husband, a married man committed adultery

⁷⁶ For instance Dr. James Buturo, the minister for ethics and integrity said that homosexuality is a strange, unhealthy, unnatural and immoral way of life. <http://allafrica.com/stories/200710090044.html> (accessed 21 February 2015).

⁷⁷ Article 21(1) state that ‘all persons are equal before and under the law in all spheres of political economic, social and cultural life and in every other aspect and shall enjoy equal protection of the law. Article 21(2) provides that ‘without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability. Article 21(3) states ‘for the purposes of this article ‘discriminate’ means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

⁷⁸ *Law Advocacy for Women in Uganda v Attorney General* Constitutional petition No. 13/05 (2007) UGCC.

only if he had sexual intercourse with a married woman who was not his wife.⁷⁹ There were a number of provisions in the Succession Act that Favoured men over women in interstate succession matters. The Constitutional Court found that the provisions in both Acts were inconsistent with article 21 of the Constitution since they discriminated the parties involved on the basis of their sexes.⁸⁰

In the case of *Darlington Sakwa & Another v Electoral Commission & 44 others*,⁸¹ the petitioner challenged the constitutionality of an electoral law that required all candidates for parliamentary positions who held a government position to resign from their positions ninety days before an election unless they were existing members of parliament. The petitioner argued that the law discriminated between members of parliament and government employees who were not members of parliament. The petitioner asked the Court to declare the law null and void because it violated article 21 of the Constitution. In a majority decision, the Court held that the law did not violate the constitution, but did so without evaluating the law under article 21.

However, justice Amos Twinomujuni disagreed with the manner in which the case was handled and went ahead to evaluate constitutionality of the law under article 21. He found that the law was unconstitutional since it violated the provisions of article 21 because it allowed members of parliament to retain their positions and continue to use public resources for their campaign, whereas other government officials running for the same position were forced to resign.⁸² Hence article 21 was violated not all persons were treated equally under the law.

⁷⁹ Section 154 of Penal Code Act.

⁸⁰ *Law Advocacy for Women in Uganda v Attorney General* Constitutional petition No. 13/05 (2007) UGCC 10 -11.

⁸¹ *Darlington Sakwa & Another v Electoral Commission & 44 others* Constitution Petition No . 8 of 2006 (2006) UGCC.

⁸² *Darlington Sakwa* para 35 -40.

On the one hand the, *Law Advocacy* case presents a very straightforward application of article 21 to find the law unconstitutional on the basis that it discriminated the parties on the basis of their sex. On the other hand, Justice Twinomujuni's position in *Sakwa* case presents a more expansive version of applying article 21, where he found that the law violated article 21, even when it did not make a distinction based on one of the listed prohibited grounds for discrimination.

Sodomy laws make a clear distinction between homosexuals and heterosexuals in its application. Even though the letter of section 145 of the Penal Code Act applies to both homosexuals and heterosexual, in reality only homosexuals are harassed because only homosexuals are presumed to engage in same-sex sexual activity. Proceeding on this assumption, sodomy is only criminalised when it occurs between homosexuals, but it is permissible when it occurs between heterosexuals. Following the expansive position of article 21 taken by Justice Twinomujuni in *Sakwa*, such a law clearly violates article 21 of the Constitution because it does not apply equally to homosexuals and heterosexuals.

In addition, just like article 27(4) of the Kenyan Constitution, article 21(2) of the Ugandan Constitution which prohibits discrimination on the basis of sex could be interpreted in light of the HRC's decision in *Toonen* under the ICCPR. In the *Toonen* case, the Committee found that the use of the word 'sex' in article 2(1) and 26 of the ICCPR refers to both gender and sexual orientation.⁸³ The text of article 21(1) of the Constitution is quite similar to article 26 of the ICCPR. Both articles prohibit discrimination on the basis of sex. Since Uganda is a signatory to the ICCPR, it would be reasonable to interpret the constitution in light of decisions on a similar measure. However, decisions reached by international and regional human rights bodies such as

⁸³ *Toonen* para 8.7.

the HRC and ECtHR on decriminalisation of same-sex sexual conduct are not binding on Uganda, they only have persuasive value. The HRC has neither received a communication challenging the Uganda's sodomy laws nor issued a decision declaring Uganda's sodomy laws in violation of the provisions of the ICCPR. It would be until that decision against Uganda is issued that Uganda would be bound.

If sexual orientation is included within the category 'sex' as a prohibited ground of discrimination in article 21(2), section 145 of the Penal Code Act would be clearly in violation of the Constitution. If the court reject this argument that the word 'sex' includes sexual orientation, one could advance an argument that sodomy laws discriminate on the basis of sex alone because the criminality of the sexual act committed by a man turns on the gender of his partner. In other words, if a sexual act committed by a man is de facto legal when committed with a woman, but illegal when committed with a man, the law itself discriminates based on the sex of the sexual partner.

6.7.3 The right to privacy

Article 27 of the Constitution provides for the right to privacy.⁸⁴ Although the provision has not been applied with regards to sodomy laws, the High Court has applied it to protect homosexuals in one occasion. In *Victor Juliet Mukasa*⁸⁵ the High Court ruled the petitioner's right to privacy was violated. The Court also recognised the petitioners as persons who are not different from any other group and therefore their rights should be protected by the state without discrimination.

⁸⁴ Article 27 of the constitution provides that no person shall be subjected to unlawful search of person, home or property of that person or unlawful entry by others of the premises of that person or no person shall be subjected to interference of that person's home, correspondence, communication or other property.

⁸⁵ *Victor Juliet Mukasa*.

As discussed in chapter five, the right to privacy has also been applied in other jurisdictions to protect homosexuals. In the United States, Justice Blackmun stated in the case of *Bowers v Hardwick*⁸⁶, ‘the right of an individual to conduct intimate relationships in the intimacy of his or her home seems to me to be at the heart of the constitution’s protection of privacy’. A similar opinion was held by the US Supreme Court in the cases of *Griswold v State of Connecticut* and *Lawrence*,⁸⁷ where it stated that privacy goes beyond protection for physical spaces.⁸⁸ It is a right that allows every person to establish and nurture human relationships without interference from the outside world.⁸⁹ Similarly, in South Africa, in the case of *National Coalition*⁹⁰ the Constitutional Court observed that expressing one’s sexuality and forming sexual relationships were at the core of this area of private intimacy.⁹¹

The same arguments raised in relation to the right to privacy in the Kenyan Constitutions apply to Uganda because the wording of the provisions is similar. The same privacy denied to homosexuals in Kenya is denied to homosexuals in Uganda.

6.7.4 The right to human dignity

Article 24 of the Constitution provides for respect for dignity.⁹² Although the Constitution expects every individual’s dignity to be protected and respected, section 145 of the Penal Code Act is more concerned with the criminal prohibitions and punishment of the homosexuals than the protection of their dignity. Justice Sachs in the case of *National Coalition* stated that

⁸⁶ *Bowers v Hardwick* 478 (1986) 208.

⁸⁷ *Lawrence*.

⁸⁸ *Lawrence*.

⁸⁹ *Lawrence*.

⁹⁰ *National Coalition* case.

⁹¹ *National Coalition* case para127-129.

⁹² Article 24 provides that no person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment.

‘punishing people for a part of their identity leads to a profound loss of their identity and self-worth.’⁹³

The sentence of life imprisonment prescribed in section 145 of the Penal Code for those found guilty of unnatural offences is very harsh.⁹⁴ Arguably, the punishment is disproportionate and could amount to cruel, inhuman and degrading punishment to the offender. It could also violate the right to human dignity guaranteed in the Constitution. The human dignity argument is universal. The same loss of dignity of homosexuals that occurred in South Africa and Kenya occurs in Uganda because of the criminalisation of same-sex sexual conduct between consenting adults in private, which is contrary to the right to respect for dignity.

6.7.5 Right to culture

Article 37 of the Constitution provides for the right to culture.⁹⁵ It could be argued that homosexuality is a culture or tradition protected by the Constitution. Thus section 145 of the Penal Code Act has denied homosexuals their right to maintain their culture by penalising same-sex sexual conduct. However, the government may provide a counter-argument that criminalising homosexuality does not deny any individual the right to be a homosexual and associate with other homosexuals.

This counter-argument could raise two concerns. Firstly, though sexual act does not define a group as homosexual or heterosexual, it is a significant part of expressing one’s self as part of the group. Therefore, denying gays and lesbians the right to sexual intercourse with the partners of their choice amounts to denying them an essential aspect of their culture. Secondly, even though

⁹³ *National Coalition* case paras 127-129.

⁹⁴ Section 145 of the Penal Code.

⁹⁵ Article 37 provides that every person has a right to belong to, enjoy, practice, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others.

section 145 may only prohibit one aspect of their homosexuality, the kind of discrimination, humiliation and violence that emanates from the existence of sodomy laws denies gay and lesbians to live their lives in peace. This should be considered as inappropriate under article 37.

The previous section has identified and analysed four constitutional pillars that could be advanced in constructing a constitutional argument for the decriminalisation of same-sex sexual acts in Uganda. The next section analyses the justifications that could be advanced by the State to keep sodomy laws. These justifications have to be weighed against the constitutional standards on limitation of rights. This limitation of rights analysis is based on article 43 of the Constitution which provides for the limitation of rights.

6.7.6 Limitations of the rights analysis

Article 43 of the Ugandan Constitution allows for the limitation of a right where a person's enjoyment of the rights and freedoms prejudices the rights and freedoms of others or public interest.⁹⁶ The Article further limits the latter ground of limitation by providing that:

Public interest under this article shall not permit ... any limitation that is beyond what is acceptable and demonstrably justifiable in a free/democratic society, or what is provided in this Constitution.⁹⁷

⁹⁶ Article 43 of the Ugandan Constitution states that (1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.

(2) Public interest under this article shall not permit-

(a) political persecution;

(b) detention without trial;

(c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.

⁹⁷ Article 43(2) of the Ugandan Constitution

In the *Kasha* case, Freedom and Roam Uganda (FARUG) organised a workshop at the Imperial Resort Beach Hotel Entebbe.⁹⁸ The workshop was meant to train and equip participants with project planning, advocacy, human rights, leadership and business skills. Rev. Simon Likodo, the Minister of Ethics and Integrity, ordered the cessation of the workshop on the basis that it was an illegal gathering of homosexuals that was contravening section 145 of the Penal Code that criminalises same-sex sexual acts.

The organiser, Jacqueline Kasha and three participants challenged the Minister's actions on several bases, one of which was that the Minister's actions violated their constitutional rights to freedom of expression, political participation, freedom of association and assembly, and equality before the law.

In rejecting this challenge, the High Court relied almost exclusively on the basis that the claimed rights could be validly restricted in the interest of the wider public as long as the restriction does not amount to political persecution and is justifiable, acceptable in a free and democratic society.⁹⁹

The problem with the court decision lies in its lack of definition of the term 'public interest'. The decision seems to take the public's interest as a homogenous obvious entity. The Court did not interrogate the source of this public interest. The decision raises two concerns.

First, the Court did not attempt to find a balance between the competing interests presented by the case. The Court did not attempt to balance the claimed rights against their restriction by government in the name of 'public interest'. It failed to interrogate the competing interests.

⁹⁸ *Kasha* case.

⁹⁹ *Kasha* para 12.

Difficult questions such as: what are the boundaries of the claimed rights; how are courts to balance the murky ground between human rights claims and the State's power to limit those rights were not answered. In short, the Court did not address the underlying ideological questions: How much can government restrict a citizen's rights in the name of the 'public's interest' and how do courts balance these competing interests?

Second, the decision did not explore the second part of the limitation clause contained in Article 43(2) (c) of the Ugandan Constitution, which provides:

'Public interest under this article shall not permit ... any limitation that is beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.'¹⁰⁰

The second part of this limitation, in my view, requires a court to enquire into the permissibility of the rights limiting a particular conduct or action. In *Charles Onyango Obbo and another v Attorney General*¹⁰¹ the Supreme Court of Uganda noted that when considering limitations of any right, one should note that the primary objective of the Constitution is to protect the rights guaranteed in the Constitution. Limitation of rights is a secondary objective that is given rise to by exceptional circumstances. Mulenga J pointed out that the grounds of limitation should present circumstances where actual mischief or danger to the rights of others or to public interest is present. The Court stated that:

The clause does not expressly or implicitly extend to a third scenario, where the enjoyment of one's right is likely to cause prejudice. The danger in such circumstances

¹⁰⁰ Article 43(2) of the Ugandan Constitution.

¹⁰¹ *Charles Onyango Obbo and another v Attorney General* (Constitutional Petition No. 15 of 1997) (2000) UGCC 4 (21 July 2000).

is proximate to the act of the expression, and therefore the exercise of the right ‘prejudices’ the public interest.

The Supreme Court went further to explore the meaning of the ‘objective standard’ set out in clause 2(c) of Article 43 that states ‘every limitation must be acceptable and demonstrably justifiable in a free and democratic society’.¹⁰² The Court found that the clause clearly presupposes the existence of universal democratic values and principles, to which every democratic society must adhere to. Thus, laws or state actions which seek to limit constitutional rights are not valid under the Constitution, unless they are in accordance with these universal democratic values and principles.

Agreeing with a dictum of the Supreme Court of Zimbabwe set out in *Mark Gova & Another v Minister-of Home Affairs & Another*¹⁰³, the Court held that for a limitation to be justifiable in a democratic society, it must pass the following tests: the legislative objective which the limitation is designed to promote must be sufficiently important to warrant overriding a fundamental right; the measures designed to meet the objective must be rationally connected to it and not arbitrary, unfair or based on irrational considerations; and the means used to impair the right or freedom must be not more than necessary to accomplish the objective

The criteria above are directed towards protecting individuals from arbitrary and overarching limitations justified on the basis of ‘public interest’. From this, one can argue that under the Ugandan Constitution, limitations of rights should not erode the right being limited so as to render the right obsolete; the means of limitation must follow due process; and the State actor

¹⁰² Article 43 (2)(c) of the Constitution.

¹⁰³ *Mark Gova & Another v Minister-of Home Affairs & Another* S.C 36/2000: Civil application No. 156/99).

enforcing the limitation must be acting within the confines of the law i.e. they must have the power to enforce the limitation.

From the above assessment, the Minister was not empowered by the Penal Code, on which he sought to rely, to order the cessation of the workshop. Also, he did not assert that he was indeed empowered by the Penal Code. In simple terms, he was acting beyond the scope of his powers or *ultra vires*. Further, his actions did not follow due process: he neither had a warrant nor any other basis on which to order the cessation of the workshop, nor did he adduce evidence that the workshop posed an actual danger to the public interest.

The most problematic aspect of the High Court's decision was its equivocation of 'morality' with 'public interest' without providing definition for both terms. From the Supreme Court decision it is clear that the limitation of a right on the basis of public interest is much narrower than what the High Court assumes. The person seeking to uphold a limitation must demonstrate that the limitation is based on actual mischief or danger. Such danger is not derived from vague assumptions about the morality of the applicants. Further, the Ugandan Constitution, as interpreted by the Supreme Court, requires adherence to democratic principles such as due process and the rule of law in order for a limitation to be permissible.

In addition, the public morality argument advanced by the State for retention of sodomy laws could fail on the basis that sodomy laws have little to do with the protection of the public but more to do with majority opinion against homosexual conduct. Sodomy laws are aimed at punishing consenting adults engaging in a private act, and have nothing to do with public welfare.

However, the strongest argument that could be advanced by the government in support of keeping sodomy laws would be based on the provision of article 31(2) read together with article 21(5) of the Constitution.¹⁰⁴ Although article 31(2) is limited to marriages, it could be used by the government to defend the constitutionality of sodomy laws. Article 31(2) prohibits same-sex marriages in Uganda. This implies that the article allows discrimination against same-sex couples. That particular discrimination would be regarded as being in line with the Constitution in accordance with article 21(5) of the Constitution. Since it is only homosexuals who can contract a same-sex marriage, article 21(5) could be cited as an example of discrimination against homosexuals being allowed under the Constitution.

6.8 Conclusion

This chapter has discussed the history of sodomy laws in Uganda. The sodomy laws were introduced by the British during the colonial period. It also discussed the current legal status of homosexuality including the rise and fall of the Anti-homosexuality Act of 2014, as well as the current predicament of homosexuals themselves in Uganda. It has analysed the steps that have been taken by gay rights groups to push for the decriminalisation of same-sex sexual conduct. These steps show that the gay rights movement has come a long way in the push for decriminalisation. Finally, it has examined the potential of using the existing constitutional provisions on the right to equality and non-discrimination, the right to human dignity, the right to privacy and the right to culture to challenge the constitutionality of section 145 of the Penal Code Act.

¹⁰⁴ Article 21(5) provides that nothing shall be taken to be inconsistent with this article which is allowed to be done under any provision of the Constitution. Article 31(2) prohibits same sex marriages.

The fight for decriminalisation in Uganda is likely to be a very protracted battle. Even if the constitutional challenge of sodomy laws succeeds, the situation of homosexuals is unlikely to change for the better. The society is unlikely to suddenly accept a practice they consider immoral, unbiblical and un-African just because the court has ruled so. Thus the fight to declare section 145 of the Penal Code Act unconstitutional must be regarded as just a small step in the push for full recognition of the rights of homosexuals. Gay rights advocates should not only target the sodomy laws but also educate the public that gays and lesbians are just normal people and they should be treated as one would treat anyone else. This public awareness should be taken to among others, churches because that is where a lot of opposition comes from.

The success in declaring sodomy laws unconstitutional could come with its own challenges. A legal victory in striking down the sodomy laws may lead to a constitutional amendment to include the criminal prohibitions in the Constitution or expressly deny equal rights protection on the basis of sexual orientation. The potential for such a backlash, however, should not act as a barrier that prevents activism; instead it should be seen as yet another challenge for the gay rights movement to overcome.

The next chapter provides a comparative legal analysis of all the arguments advanced for the decriminalisation of same-sex sexual conduct in the previous three chapters.

CHAPTER SEVEN

DECRIMINALISATION OF HOMOSEXUALITY: COMPARING KENYA, SOUTH AFRICA AND UGANDA

7.1 Introduction

This chapter provides a comparative legal analysis of the decriminalisation of same-sex sexual conduct in Kenya, Uganda and South Africa. It analyses variations and similarities among the three Constitutions regarding the equality clauses and the rights to privacy and human dignity and to the extent to which they can form the basis for the decriminalisation of same-sex sexual conduct. The analysis focuses on international practice as well as domestic jurisprudence from South Africa, the United States, Canada and India that could be used to argue that courts in Kenya and Uganda should strike down statutes that criminalise same-sex sexual acts on the basis of the rights to equality, human dignity and privacy.

The chapter also examines the place of international law in the fight against the criminalisation of same-sex sexual conduct and how international law instruments and decisions could be relied on to advocate for the decriminalisation of same-sex sexual conduct in Kenya and Uganda. It also analyses the role of courts, political and legal culture, Parliament and CSOs in furthering equal rights for gays and lesbians in the three countries.

The analysis is structured as follows: The first section provides an analysis of the notion of equality and how to use an open list approach and sex discrimination arguments in advancing a case for the decriminalisation of same-sex sexual conduct in Kenya and Uganda. The second

section assesses the extent to which the rights to privacy and human dignity can be applied to make a case for the decriminalisation of same-sex sexual conduct in Kenya and Uganda. The third section examines the place of international human rights instruments and decisions in advocating for the decriminalisation of same-sex sexual acts in Kenya and Uganda. The last section provides a detailed discussion on the role of courts, political and legal culture, Parliament and CSOs in furthering the fight against the criminalisation of same-sex sexual conduct in South Africa, Kenya and Uganda.

7.2 Equality clauses as a tool for the decriminalisation of homosexuality

The discussion in this section commences with an exposition of the concept of equality and how equality provisions have been interpreted and applied in foreign domestic jurisdictions to construct a constitutional argument for the decriminalisation of same-sex sexual conduct and how that can be borrowed and be advanced to decriminalise it in Kenya and Uganda. While reliance on the case law from foreign jurisdictions will be helpful in analysis the equality clauses, this section has fully contextualised and more carefully considered their comparability and applicability in the Kenyan and Ugandan context. This is because the equality clause could be similar but the legal, political and broader societal cultures may differ.

The Supreme Court of India in *Suresh Kumar Koushal and another v. Naz Foundation* clearly pointed out that:

In its anxiety to protect the so-called rights of LGBT persons and to declare that Section 377 IPC violates the right to privacy, autonomy and dignity, the High Court has extensively relied upon the judgments of other jurisdictions. Though these judgments shed considerable light on various

aspects of this right and are informative in relation to the plight of sexual minorities, we feel that they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature.¹

Unlike the High Court of Delhi, the Supreme Court relied less on international precedent for its decision. It considered the unique characteristics of Indian society and their own Constitution in reaching the final decision. There is need to exercise caution in transplanting western experience in Africa. The social and political culture is different. There is need for the courts to balance various arguments before reaching a decision. Arguments that could be valid in America, Europe and Canada may not hold well in respect of Kenya and Uganda.

This section argues that the open list approach in the equality clause in the Kenyan Constitution provides a strong basis for the advancement of an argument for the decriminalisation of same-sex sexual conduct. It further argues that although Uganda has adopted a closed list approach in its equality clause, discrimination on the basis of sex (commonly known as the sex discrimination argument) could form a good case for the decriminalisation of same-sex sexual conduct in Uganda. Lastly, it provides reasons why sexual orientation was excluded from the list of prohibited grounds of discrimination in the equality clauses of the Kenyan and Ugandan Constitutions. These reasons provide a clear understanding and attempt to make a strong case as to why a purposive and progressive interpretation of the equality clauses in the Constitutions is necessary in the push for the decriminalisation of same-sex sexual conduct. The exclusion of

¹ *Suresh Kumar Koushal v Naz Foundation* Civil Appeal No.10972 of 2013 para 93-95.

sexual orientation from the prohibited list of discrimination means the arguments to be made in favour of the decriminalisation of same-sex sexual conduct should be based on other prohibited grounds of discrimination listed in the equality clauses.

7.3 Application of the right to equality in other jurisdictions

The concept of equality is a deeply debatable socio-legal notion. Equality is not simply a question of similarity.² It is equally a question of difference.³ The formal conception of equality essentially means that people who are similarly situated in relevant ways should be treated alike.⁴ The law must treat individuals in like circumstances alike.⁵ Substantive equality requires the law to ensure equality of outcomes and it is prepared to tolerate disparity of treatment to achieve this goal.⁶ Formal equality does not take into account the social and economic disparities between groups and individuals. Substantive equality, on the other hand, requires an assessment of the actual social and economic situation of groups and individuals in order to determine whether the Constitution's commitment to equality is achieved. In substantive equality the impact or effect of a particular legal provision is highlighted rather than its mere form.⁷

² I Currie & J De Waal *The bill of rights handbook* (2005) 230.

³ Currie & De Waal (n 2 above) 231.

⁴ Currie & De Waal (n 2 above) 231.

⁵ Currie & De Waal (n 2 above) 231

⁶ For instance a formal conception of equality would be achieved if all children are educated according to the same school curriculum. Substantive equality on the other hand would require equality of outcome. If deaf children undergo the same curriculum as other children they may end up receiving an education that is inadequate for their special needs. In order to realize their right to equality of such children it may therefore be necessary to treat them differently to everyone else; T Loenen 'The equality clause in the South African Constitution: Some remarks from a comparative perspective' (1997) 12 *SAJHR* 405.

⁷ Currie & De Waal (n 1 above) 233.

Substantive equality requires a distinction to be made between individuals and groups in order to accommodate their different needs and interests.⁸ In the Canadian case of *Vriend v Alberta* Cory and Lacobucci JJ of the Canadian Supreme Court pointed out that:

It is easy to say that everyone who is just like ‘us’ is entitled to equality. Everyone finds it more difficult to say that those who are ‘different’ from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of society is demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy.⁹

In the South African Constitutional Court, Sachs J, has articulately stated within the context of homosexuality in *Minister of Home Affairs & Anor v Fourie & Others* that:

Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society.¹⁰

In examining both approaches in the context of the decriminalisation of same-sex sexual acts between consenting adults in private, it is obvious that a formal understanding of equality risks

⁸ This is known as substantive equality which requires the law to ensure equality of outcome and it prepared to tolerate disparity of treatment to achieve a particular goal; T Loenen ‘The equality clause in the South Africa Constitutions: Some remarks from a comparative Perspective (1997) 12 *SAJHR* 410; Currie & De Waal (n 1 above) 231.

⁹ *Vriend v Alberta* DLR (1998) 156.

¹⁰ *Fourie* case para 38

neglecting the social conditions of gays and lesbians who have faced discrimination, humiliation and marginalisation by society on the basis of their sexual orientation. A substantive understanding of equality, on the other hand, supports the protection of the rights of gays and lesbians because it expects the law to extend its protection to them regardless of their sexual orientation. It also expects the law to treat them differently based on their circumstances.

In order to realise equality for gays and lesbians it is necessary for the law to treat them differently according to their different circumstances to enable them assert their equal worth and enhance their capabilities to participate in society as equals. Consequently, a purposive approach to constitutional interpretation of the equality clauses in the Kenyan and Ugandan Constitutions should be read as grounded on a substantive conception of equality if full and equal enjoyment of rights for gays and lesbians are to be achieved in Kenya and Uganda.

The question of equality for gays and lesbians has formed the basis for the declaration of sodomy laws unconstitutional in a number of jurisdictions. Domestic courts in Canada, South Africa, USA and India have interpreted and applied the right to equality and non-discrimination in their respective Constitutions to decriminalise same-sex sexual acts between consenting adults. These cases constitute the best practice examples of how the equality clauses in the Kenyan and Ugandan Constitutions could be interpreted and applied to decriminalise same-sex sexual conduct. For instance, section 15(1) of the Canadian Charter of Rights and Freedoms which does not expressly prohibit discrimination on the basis of sexual orientation¹¹ has been interpreted as also prohibiting discrimination on the basis of sexual orientation in the case of *Egan v Canada*¹².

¹¹ Section 15(1) of the Canadian Charter of Rights and Freedom states that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and in

The Canadian Supreme Court adopted a purposive interpretation approach to section 15(1) of the Canadian Charter. The Supreme Court unanimously held that sexual orientation was a prohibited ground of discrimination. Three years later, in the case of *Vriend v Alberta*,¹³ the Supreme Court of Canada held that sexual orientation was analogous to other grounds stated in section 15(1) of the Canadian Charter and invoked the disadvantages suffered by homosexuals as a justification for this position. The court stated that:

In *Egan*, it was held, on the basis of historical, social, political and economic disadvantages suffered by homosexuals and the emerging consensus among legislatures as well as previous judicial decisions, that sexual orientation is a ground analogous to those listed in section 15(1).¹⁴

It was on the basis of this approach that Canadian jurisprudence established the common feature that runs across all grounds of discrimination in the case of *Corbierre v Canada*.¹⁵ In this case the Supreme Court of Canada stated that what prohibited grounds of discrimination have in common is the fact that they often serve as a basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristics that are immutable or changeable only at unacceptable cost to personal identity.¹⁶

particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

¹² *Egan v Canada* (1995) 2 S.C.R. 513.

¹³ *Vriend v Alberta* (1998) 1 S.C.R. 493 .

¹⁴ *Vriend v Alberta* para 90.

¹⁵ *Corbierre v Canada* (1999) 2 S.C.R 203 para 13

¹⁶ D Petrova ‘The use of equality and non-discrimination in advancing LGBTI rights’ in C Lennox & M Waites *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: Struggles for decriminalisation and change* (2013) 485.

In South Africa, in *National Coalition*¹⁷, the Constitutional Court struck down sodomy laws holding that their existence violated the right to equality guaranteed in section 9 of the Constitution.¹⁸ The Court acknowledged the negative impact of sodomy laws on gay men.

Justice Ackerman stated:

Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact is severe, affecting the dignity, personhood and identity of gay men at a deep level. It occurs at many levels and in many ways and it is often difficult to eradicate.¹⁹

The Court further pointed out that differential treatment of different cases is at the core of equality. Sachs J said:

Equality should not be confused with uniformity; in fact uniformity can be the enemy of equality. Equality means equal concern and respect across differences. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment. At best, it celebrates the vitality that difference rings to any society.²⁰

The Constitutional Court also ruled that discrimination on the basis of sexual orientation violates and degrades the dignity of gay men in an intolerable way in contravention of section 10 of the South African Constitution. It stated that:

¹⁷ *National Coalition* case para 25

¹⁸ Section 9(3) provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

¹⁹ *National coalition* case para 25

²⁰ *National coalition* case para 15.

Just like apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is palpable of their dignity and a breach of section 10 of the constitution.²¹

By drawing parallels with other vulnerable groups and other grounds of discrimination, the South African Constitutional Court made it clear that although homosexuals are a vulnerable and marginalised group in South Africa, it is the purpose of the right to equality and human dignity to address such vulnerability and marginalisation.²² In other words, the Court was saying that the purpose of the right to equality is to end various forms of discrimination, marginalisation and oppression suffered by socially vulnerable groups during colonialism and apartheid in South Africa.

In the United States, the Supreme Court has relied on the constitutional protection of the right to equality to strike down sodomy laws. In *Lawrence*,²³ the US Supreme Court relied on the right to equality and dignity in holding sodomy laws unconstitutional because they restricted individual liberty.²⁴ The Supreme Court held that sodomy laws in Texas violated the Fourteenth Amendment of the Constitution that guaranteed equal protection of law. The law should treat homosexuals in the same manner as any other citizen by allowing them to freely decide whom to engage in intimate relations with. The fact that heterosexuals were allowed to choose their intimate partners while homosexuals were denied same freedom by the law violated their right to equality as guaranteed in the American Constitution. Laws prohibiting same-sex sexual acts also

²¹ *National coalition* case para 30.

²² Petrova (n 16 above) 487.

²³ *Lawrence* para 34

²⁴ *Lawrence* para 35

lowered their dignity as free persons.²⁵ Human beings, by virtue of their equal dignity, must be able to rely on the same rights.²⁶ This decision emphasises the spirit of equality between various forms of intimate association.

In June 2009 the Delhi High Court, drawing lessons from the South African and Canadian jurisprudence, struck down section 377 of the Indian Penal Code which provided for the criminalisation of ‘unnatural offences’.²⁷ In *Naz Foundation v Government of NCT of Delhi and others*, the Delhi High Court held that section 377 of the Penal Code discriminated against homosexuals. The Court found that discrimination caused by section 377 was in breach of articles 14 (right to equality) and 15 (right to non-discrimination) of the Indian Constitution.²⁸ The Court concluded that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation was not permitted by article 15 of the Constitution of India.²⁹

The above cases show how courts have relied on equality and non-discrimination provisions in the constitutions in striking down sodomy laws. Courts have handed down decisions finding sodomy laws in violation of the constitutional right to equality. Borrowing from the above jurisprudence, the focus in the next section now turns to equality principles and its role as a conceptual basis for advocating for the decriminalisation of same-sex sexual acts in Kenya and Uganda. The section looks at the equality clauses in the Kenyan and Ugandan Constitutions while keeping in mind their specificities. The discussion focuses on the specific approaches to

²⁵ *Lawrence* para 35

²⁶ *Lawrence* para 35

²⁷ *Naz Foundation v Government of NCT of Delhi* 160 Delhi Law times 277 para 102 (*Naz Foundation*)

²⁸ *Naz Foundation* para 104; Article 14 of the Indian Constitution provides that ‘the state shall not deny to any person equality before the law of the equal protection of laws within the territory of India. Article 15(1) of Indian Constitution provides ‘the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

²⁹ *Naz Foundation* para 104.

the question of prohibited grounds of discrimination as listed in the equality clauses in article 27(4) of the Kenyan Constitution and article 21(2) of the Ugandan Constitution.

7.3.1 Prohibited grounds of discrimination: open list versus closed list approach

Countries have adopted either a closed list or an open list approach to prohibited grounds of discrimination in their equality clauses, which set the scope for the prohibition of discrimination.³⁰ The closed list approach narrowly interprets the right to equality to apply to a limited range of protected grounds or classes and particular personal characteristics such as race, sex or disability that are expressly set out in a codified list.³¹ The basis for this is that these characteristics have in the past resulted in discrimination and marginalisation against individuals who possess them. It can be argued that a closed list approach is seen to guarantee the scope of protection from discrimination without it being inflated. It also ensures that the right to equality is not misused by preventing illegitimate distinctions from being made or by allowing fake claims of discrimination. Though the closed list approach permits greater legal certainty, it is too restrictive and rigid in its application. The fact that it is impossible to offer protection from discrimination based on an emerging or new ground undermines the objective and purpose of the constitutional guarantees of equality and non-discrimination. As a result, many legitimate claims of discrimination would fail for the reason that they cannot be argued in reference to an explicitly prohibited ground.

The open list approach expressly lists grounds of discrimination but in addition opens up the list through terms like ‘such as’, ‘other status’, or ‘any other ground including’, which enables new

³⁰ The equality clause in article 27 (4) of the Kenyan constitution has adopted an open list approach by using the words ‘on any ground including’. The Equality clause in section 9(3) of the South African Constitution has equally taken the open list approach by using the words ‘one or more grounds including’. The equality clause in article 21(2) of the Ugandan Constitution adopted the closed list approach to grounds of discrimination by using the word ‘only’ which has restricted the list of prohibited grounds.

³¹ Petrova (n 16 above) 494.

or emerging grounds of discrimination to be prohibited by law.³² It can be argued that an open list approach acknowledges the fact that the grounds on which discrimination manifests itself are subject to historical and societal change and that individuals are often victims of discrimination on new and emerging grounds. It therefore allows courts to expand the list of prohibited grounds of discrimination to analogous cases in which persons can experience similar unfair discrimination. International human rights instruments such as the UDHR, ICCPR and ICESCR have adopted an open list approach in their equality and non-discrimination provisions.³³ They have used the words ‘other status’ to open up the list of prohibited grounds of discrimination. The HRC has concluded that discrimination on the basis of sexual orientation is covered by article 2 of the ICCPR because it is analogous to the expressly prohibited grounds for discrimination. However, it can be argued that an open list approach allows an overly broad and flexible interpretation of the right to equality and non-discrimination in which potentially any differential treatment, regardless of its insignificance may possibly become the basis of a claim of discrimination.

How should courts ensure that the open list approach remains flexible and inclusive to accommodate new and emerging grounds such as sexual orientation as a prohibited ground but at the same time does not extent protection against discrimination to fake and illegitimate claims?

Section 1 of the South African Promotion of Equality and Prevention of Unfair Discrimination

³² Equality clauses in the Kenyan and South African Constitutions are good examples of open list approach.

³³ Article 2 of UDHR states that everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; article 2(1) of ICCPR provides that each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and; article 2(2) of ICESCR states that The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Act and Principle 5 of the Declaration of Principles of Equality has set out three independent criteria to be used to determine whether sexual orientation constitute a prohibited ground of discrimination.³⁴ One has to show that either discrimination on the basis of sexual orientation perpetuates systematic disadvantage or discrimination on the basis of sexual orientation undermines human dignity or discrimination on the basis of sexual orientation adversely affects the equal enjoyment of a person's rights and freedom in a serious manner that is comparable to discrimination on the prohibited ground.³⁵ Only one of these criteria needs to be satisfied in order for a new ground to receive protection against discrimination. These criteria seeks to advance and level up the exercise of equal rights for those groups that are considered weak and minority in society such as homosexuals and thus require protection in international and national human rights systems.

The principles in the Declaration have formed the basis for a number of court decisions. In 2009, the Declaration formed part of the decision of the Delhi High Court in the case of *Naz Foundation* which decriminalised same-sex sexual conduct. The Court relied on the legal definition of equality in the Declaration describing it as the current international understanding of principles of equality which reflects a moral and professional consensus among human rights

³⁴ The Declaration of Principles on Equality is a document that addresses the complex and complementary relationship between different types of discrimination. It was drafted by 128 human rights and equality experts in 2008. The document represents step forward to a unified approach to equality. It has a persuasive value to judges when interpreting the right to equality; section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000 also defines prohibited grounds to include any other ground where discrimination based on that other ground causes or perpetrates systemic disadvantage; undermines human dignity or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the listed grounds.

³⁵ Principle 5 of the Declaration of Principles of Equality https://www.google.com/?gws_rd=ssl#q=Principle+5+of+the+Declaration+of+Principles+of+Equality+http:%2F%2Fwww.equalrightstrust.org%2Fertdocumentbank%2FPages%2520from%2520Declaration%2520perfect%2520principle.pdf (Accessed 11 June 2015); section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000.

and equality experts.³⁶ The discussion now turns to how the open list and closed list approaches can be invoked in the Kenyan and Ugandan context in order to push for the decriminalisation of same-sex sexual conduct in both countries.

7.3.2 Invoking the equality provisions in Kenya and Uganda

The texts protecting the right to equality in Kenya, South Africa and Uganda are worded differently in their Constitutions. This is a reflective of the different historical backgrounds of the countries and their different jurisprudential and philosophical understanding of equality. The interpretation of each of the equality clauses must therefore be based on the wording of the right within the constitutional context and cognisance must be given to the history of the three countries. These factors must be borne in mind prior to having recourse to the extensive foreign jurisprudence on equality.

The equality clause in the South African Constitution explicitly lists sexual orientation as a prohibited ground of discrimination.³⁷ The inclusion of sexual orientation as a prohibited ground in the equality clause in the South African Constitution was a way of guaranteeing protection to gays and lesbians from discrimination. One of the outcomes of sexual orientation as a prohibited ground was the decriminalisation of same-sex sexual conduct in South Africa in the case of *National Coalition*.³⁸

³⁶ *Naz Foundation* para 83.

³⁷ Section 9(3) of South African Constitution provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

³⁸ *National coalition* case where sexual orientation formed the basis for the invalidation of the common law offence of sodomy by the Constitutional Court of South Africa. The court pointed out clearly that the inclusion of sexual orientation provision in the equality clause was aimed at protecting gays and lesbians who have experienced humiliation, discrimination, stigmatisation and prejudice in the past.

Although the equality clauses in both the Kenyan and Ugandan Constitutions do not list sexual orientation as a prohibited ground, the two are not worded in like manner. The drafters of the Kenyan Constitution adopted an open list approach while the Ugandan Constitution used a closed list approach.³⁹ Since Kenya has an open list of prohibited grounds of discrimination, the fight against criminalisation of same-sex sexual conduct through equality should focus on challenging the sodomy laws in the Penal Code on the basis that they violate article 27 of the Constitution which guarantees the right to equality and non-discrimination. Article 27(4) of the Kenyan Constitution uses the phrase ‘on any ground including’ in its equality clause. This could permit the reading of sexual orientation into the equality provision. This approach has been adopted by the ECtHR in a number of cases discussed in chapter three.⁴⁰

This was precisely the approach taken recently by the High Court of Kenya in the case of *Baby A (suing through her mother E.A) & Another v Attorney General*.⁴¹ In this case the High Court of Kenya held that article 27(4) of the Constitution must be read in its context. The Court stated that article 27(4) categorically states that there shall be no discrimination ‘on any ground including’.⁴² The Court found that the words ‘on any ground including’ makes the provision inclusive and that the prohibited grounds of discrimination explicitly listed are not exhaustive. The case involved a baby who was born with both male and female genitalia. The mother

³⁹ While the equality clause in article 27 (4) of the Kenyan constitution has adopted an open list approach by using the words ‘on any ground including’, the equality clause in article 21(2) of the Ugandan Constitution adopted the closed list approach to grounds of discrimination by using the word ‘only’ which has restricted the list of prohibited grounds.

⁴⁰ This approach was adopted by the European Human Rights Court in the case of *Sutherland v United Kingdom*, which relied on the listed prohibited grounds of discrimination in article 14 of the European Convention. The ECtHR adopted the approach of locating sexual orientation in ‘other status’ as provided for under article 14 of the Convention. Article 14 of the Convention prohibits discrimination on a number of grounds including other status. It argued that the list is not exhaustive since treaty provision use terms such as ‘ground such as’, ‘including’ or ‘other status’. Thus these are open-ended clauses that could cover other circumstances that may arise that are not included in the law.

⁴¹ *Baby A (suing through her mother E.A) & Another v Attorney General & 6 others* (2014) eKLR (*Baby A case*).

⁴² *Baby A case*.

petitioned the High Court on the ground that section 7 of the Registration of Births and Deaths Act was in conflict with article 27(4) of the Constitution because it did not recognise a child as intersex and does not contain details for an intersex to be filled in forms used during registration of birth. The petitioner submitted that this lack of recognition violated the child's right to equality and non-discrimination guaranteed in article 27(4). The decision in this case clearly shows that it is possible to locate sexual orientation in 'on any ground including' as a prohibited ground for discrimination within the article 27(4) of the Kenyan Constitution since the equality clause in the Kenyan Constitution is open to accommodate any characteristic or attribute that has the potential to impair the human dignity of persons.⁴³ The Court emphasised that since the relevant statute did not recognise intersex persons, their right to dignity was undermined and disrespected, which is contrary to article 28 of the Kenyan Constitution.

From the decision of the High Court of Kenya in this case, it appears the test adopted for the recognition of additional grounds of discrimination is whether the differential treatment by a statute undermines the human dignity of an individual.⁴⁴ In applying the same test to discrimination against homosexuals, sodomy laws are aimed at excluding homosexuals from the freedom to choose their sexual partners. This exclusion amounts to discrimination against gays and lesbians on the basis of their sexual orientation because they are denied the freedom to choose intimate partners when heterosexuals are allowed to choose. This in turn affects their human dignity as free persons.

⁴³ *Baby A* case para 23.

⁴⁴ *Baby A* case para 23.

7.3.3 The sex discrimination argument

As mentioned above, the drafters of the equality clause of the Ugandan Constitution have taken the closed list approach. This means that no argument can be advanced based on any additional grounds to those listed in article 21(2) of the Constitution as being prohibited grounds of discrimination. The argument can only be restricted to those grounds enumerated in the equality clause. Sex is one of the prohibited grounds of discrimination listed in article 21(2) of the Ugandan Constitution.⁴⁵ Thus, the gains in the decriminalisation of same-sex sexual conduct can be made through arguing that discrimination on grounds of ‘sex’ includes ‘sexual orientation’. This approach is commonly known as ‘the sex discrimination argument’. Since article 27(4) of the Kenyan Constitution prohibits discrimination on the basis of sex, this argument is also relevant to Kenya.⁴⁶ This approach was adopted by the HRC in *Toonen* discussed in chapter three.

The basic idea of the sex discrimination argument is that any law that discriminates on the basis of sexual orientation will also necessarily discriminate on the basis of sex.⁴⁷ The argument is very straightforward and simple. If a person’s sexual orientation is a dispositional property that concerns the sex of a person to whom he or she is attracted, then to determine a person’s sexual orientation, one needs to know the person’s sex and sex of the person to whom he or she is sexually attracted.⁴⁸ By way of example, if X is sexually attracted exclusively to men, then X is heterosexual only if X is a woman, and X is a homosexual only if X is a man. By virtue of what a

⁴⁵ Article 21(2) of Ugandan Constitution states ‘for the purposes of this article ‘discriminate’ means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability

⁴⁶ Article 27(4) provides that the state shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, belief, culture, language or birth.

⁴⁷ E Stein *The mismeasure of desire: the science theory and ethics of sexual orientation* (1999) 304.

⁴⁸ Stein (n 47 above) 304.

sexual orientation is, it appears that any law that discriminates on the basis of sexual orientation necessarily discriminates on the basis of sex.

Consider Kenyan and Ugandan sodomy laws that prohibit same-sex sexual activities between consenting adults. According to the sex discrimination argument, these laws discriminate on the basis of sex because they allow a man to have sex with a woman while prohibiting a man from having sex with another man. This example illustrates how sodomy laws that discriminate on the basis of sexual orientation can be seen through the lens of sex discrimination.

However, submitting in court that sodomy laws discriminate on the basis of sexual orientation and thereby discriminate on the basis of sex may not be enough to convince the judges to strike down sodomy laws in Kenya and Uganda. The sex discrimination argument has its own weaknesses. One can deny that laws that discriminate on the basis of sexual orientation also discriminate on the basis of sex because laws that discriminate on the basis of sexual orientation apply to both sexes equally. The unnatural offences in the Kenyan and Ugandan Penal Codes apply to both men and women equally. Both men and women are prohibited from engaging in sexual intercourse with people of same sex; and both are permitted to engage in sexual intercourse with people of opposite sex. This is exactly how the Missouri Supreme Court ruled when the sex discrimination argument was advanced to challenge the state's sodomy law in *State v Walsh*.⁴⁹ It held that sodomy laws did not discriminate on the basis of sex because it prohibited both men and women from having sex with a person of the same sex and permitted both men and women to have sex with a person of the opposite sex.

⁴⁹ *State v Walsh* 713 S.W 2d 508.

The bigger challenge facing the sex discrimination argument is that statutes that prohibit same-sex sexual acts can be interpreted in two ways: they can be interpreted as treating men and women equally or they can be interpreted as treating men and women differently. The Kenyan and Ugandan sodomy laws for example can be seen as prohibiting women from engaging in certain sexual acts that men are allowed to engage in or it can be construed as prohibiting both men and women from engaging in certain sexual activities with people of the same sex. Deciding whether a statute that discriminates on the basis of sexual orientation also discriminates on the basis of sex appears, in light of this challenge, like deciding whether a glass is half full or half empty. The outcome would depend on the perspective of the presiding judge.

How does one change a judge's perspective so that he or she is convinced by the sex discrimination argument? For the judge to be convinced, one needs to show the Court that the mere application of a statute that makes use of a classification such as race or sex as a prohibited ground of discrimination is not enough for the statute to come under the equality clause. In the American case of *Loving v Virginia*⁵⁰ the US Supreme Court considered a law in Virginia that prohibited interracial marriages. The State of Virginia defended its law by arguing that the law applied equally to all individuals regardless of their race. Both whites and non-whites were prohibited from marrying someone of a different race. The Supreme Court rejected this argument holding that even if the law prohibiting interracial marriages applied equally to whites and non-whites, it was unconstitutional because it made use of racial classification that could not be given a compelling justification. Since the State of Virginia failed to provide a strong justification for the use of racial classification, the law violated the equal protection clause in the US Constitution.

⁵⁰ *Loving v Virginia* 388 U.S 1 (1967).

Advocates for the sex discrimination argument can make use of this principle from *Loving*. They can argue that the submission that a statute makes use of sex classification applies equally to men and women is not enough to establish that sodomy laws are constitutional under the equality clauses in the Kenyan and Ugandan Constitutions. The mere equal application of the law is not enough to satisfy the equality provision without the State providing a strong justification in an open and democratic society. This reasoning could provide an answer to the weaknesses of the sex discrimination argument. The justifications that have been given for enacting laws that discriminate against gays and lesbians are based on religious and cultural values. This is because society expects men and women to play different roles. But the argument being advanced is that any law that involves sexual orientation necessarily involves sex because a person's sexual orientation is indexed to a person's sex and the sex of a person to whom he or she is sexually attracted.

Despite the reasoning in *Loving*, the sex discrimination argument should be made in conjunction with other arguments that could be advanced in favour of the decriminalisation of same-sex sexual conduct to mitigate some of its challenges. It cannot, however be argued that the sex discrimination argument should not be made because some judges may be persuaded by it to the point of striking down sodomy laws. Likewise, the sex discrimination argument might provide a welcome alternative to some judges who are sympathetic to homosexuals but who are hesitant to break new doctrinal ground.

The discussion on how to use the open list approach or sex discrimination arguments to make a case for the decriminalisation of same-sex sexual acts would not have arisen if the Kenyan and Ugandan Constitutions listed sexual orientation as a prohibited ground of discrimination. The discussion now turns to providing reasons why sexual orientation was excluded from in the

equality clauses of the Kenyan and Ugandan Constitutions and its implications on the decriminalisation debate.

7.3.4 The exclusion of sexual orientation from the Kenyan and Ugandan Constitutions

It is clear that unlike section 9(3) of the South African Constitution that lists sexual orientation as a prohibited ground of discrimination, the equality provisions in article 21(2) and article 27(4) of the Ugandan and Kenyan Constitutions respectively do not explicitly prohibit discrimination on the ground of sexual orientation.⁵¹ The exclusion of sexual orientation from the list of prohibited grounds of discrimination in article 27(4) of the Kenyan Constitution was deliberate, while its exclusion in the equality clause in the Ugandan Constitution was due to the fact that the issue was not raised at the time of drafting the Constitution.⁵²

The members of the Constitutional Review Commission of Kenya were keen in excluding sexual orientation on the list of prohibited grounds of discrimination in article 27(4) of the Constitution despite the issue being raised by some delegates during the constitutional making process.⁵³ The Committee of Experts, which was in charge of spearheading the review process, argued that the inclusion of sexual orientation as a prohibited ground for discrimination could weaken public support for the draft which could result in a defeat in the 2010 national referendum because

⁵¹ Article 21(2) of Ugandan Constitution provides that ‘without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability. Article 27(4) of Kenyan Constitution provides that the state shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, belief, culture, language or birth.

⁵² J Fitzgerald ‘the road to equality? The right to equality in Kenya’s new constitution’ (2010) 58; D Englander ‘Protecting the human rights of LGBT people in Uganda in the wake of Uganda’s Anti-homosexuality Bill 2009’ (2011) 25 *Emory International Law Review* 1267.

⁵³ Committee of Experts verbatim record of the Mombasa retreat of 16 April 2009 38.

homosexuality was termed as ‘unacceptable’ conduct by the majority of Kenyans on the basis of moral and religious views.⁵⁴

In Uganda, the draft Constitution that was tabled by the Ugandan Constitutional Commission before the Constituent Assembly for discussion and adoption did not include sexual orientation as one of the grounds upon which a person may not be discriminated against.⁵⁵ The Constituent Assembly proceedings show that not even a single delegate raised the question as to why sexual orientation was not included as one of the prohibited grounds for discrimination.⁵⁶ The delegates were concerned about the exclusion of ‘birth’ and ‘disability’ as prohibited grounds for discrimination in the draft Constitution.⁵⁷ These two grounds were later included after deliberations.⁵⁸ When the 1995 Ugandan Constitution was adopted and promulgated, the equality clause in article 21(2) had excluded sexual orientation.

It can be argued that the reason why both the Ugandan Constitutional Commission and Constituent Assembly did not even think of including sexual orientation as a prohibited ground in the equality clause was that it was not an issue that was raised by Ugandans when the members of the Constitutional Commission went around the country for consultation. In addition, none of the NGOs and civil society raised the issue with the Constitutional Commission in their submissions.⁵⁹ Assuming it was raised, it is contended that it was very unlikely that the Constituent Assembly would have included sexual orientation as a prohibited ground. This is because the discussion around the clause on marriage clearly indicated that the vast majority of

⁵⁴ Committee of Experts verbatim record of the Mombasa retreat of 16 April 2009 38.

⁵⁵ Proceedings of the Constituent Assembly (official report content) 1 September 1994.

⁵⁶ Proceedings of the Constituent Assembly (official report content) 8 September 1994.

⁵⁷ Proceedings of the Constituent Assembly (official report content) 8 September 1994.

⁵⁸ Proceedings of the Constituent Assembly (official report content) 8 September 1994.

⁵⁹ Proceedings of the Constituent Assembly (official report content) 8 September 1994.

delegates were against the idea of same-sex marriage which has been expressly prohibited in the Constitution.⁶⁰

The exclusion of sexual orientation from the list of prohibited grounds of discrimination in both Constitutions makes the fight against criminalisation of same-sex sexual conduct in Kenya and Uganda a challenging task. Advocates of gay rights have to rely on other arguments such as privacy and the sex discrimination arguments, which, in my view, can be considered as weak arguments which need to be made in conjunction with other arguments in order to convince the court to invalidate sodomy laws. The inclusion of sexual orientation as a prohibited ground of discrimination would have provided a strong and more direct argument for the decriminalisation of same-sex sexual conduct. There are risks to making weak arguments, even arguments that might sometimes succeed.

In addition to arguments based on equality clauses (open list approach and sex discrimination arguments) discussed above, one can advance an argument in favour of the decriminalisation of same-sex sexual conduct based on the right to privacy. But how far can gays and lesbians in Kenya and Uganda enjoy the right to privacy in their personal relationships? The right to privacy is guaranteed in both Kenyan and Uganda Constitutions.⁶¹ The next section analyses the extent to which the right to privacy can be used as a tool for the decriminalisation of same-sex sexual conduct in Kenya and Uganda.

⁶⁰ Article 31(2a) of Ugandan Constitution.

⁶¹ Article 27 of the Ugandan Constitution provides that no person shall be subjected to unlawful search of person, home or property of that person or unlawful entry by others of the premises of that person or no person shall be subjected to interference of that person's home, correspondence, communication or other property; Articles 31 of the Kenyan Constitution provides that every person has the right to privacy which includes the right not to have their person, home or property searched; their possession seized; information relating to their family or private affairs unnecessarily required or revealed; and the privacy of their communication infringed.

7.4 The right to privacy

The right to privacy has been a subject of litigation in several jurisdictions. In *Bernstein and others v Bester and others NNO*⁶² the South African Constitutional Court stated that the English common law recognises the right to privacy as an independent personality right that the courts consider to be an aspect of ‘dignitas’. In *Griswold v Connecticut*⁶³ the US Supreme Court referred to the right to privacy as the ‘the right to be let alone’.⁶⁴

According to English common law, violation of the right to privacy may assume two forms: (i) an unlawful intrusion on the personal privacy of another or (ii) the unlawful publication of private facts about a person.⁶⁵ The intrusion of personal privacy is the concern of this section. In determining whether there has been a violation of the right to privacy, Dingake J in the case of *Sarah Diau v Botswana Building Society*⁶⁶ adopted a two-stage inquiry: first, one must address the question whether the act complained of amounts to a violation. Second, if the answer to (a) is in the affirmative, whether the violation is reasonably justifiable in a democratic society.⁶⁷

Several decisions of the US Supreme Court such as *Lawrence* and *Romer v Evans*⁶⁸ illustrate the idea that decisions about intimate relationships are personal and private and should be left up to the individual to determine his or her sexual destiny.⁶⁹ In *Lawrence*, the US Supreme Court observed that intimate relationships belong to the ‘realm of personal liberty which the government may not enter’.⁷⁰ It is not permissible for governments to regulate or legislate on

⁶² *Bernstein and others v Bester and others NNO* BCLR 1996 (2) 751 para 68.

⁶³ *Griswold v Connecticut* US 1965 381 para 10.

⁶⁴ *Griswold* para 11.

⁶⁵ *Bernstein* para 69.

⁶⁶ *Sarah Diau v Botswana Building Society* (2003) 2 BLR 334.

⁶⁷ *Sarah Diau* para 334.

⁶⁸ *Lawrence* para 22 and *Romer v Evans* (US, 1996: 620).

⁶⁹ *Lawrence* para 22.

⁷⁰ *Lawrence* para 22.

matters of sex between two consenting adults.⁷¹ In *National Coalition*, in reiterating the US Supreme Court position above, the South African Constitutional Court found that the criminalisation of private conduct between consenting adults which causes no harm to anyone else is not allowed. It argued that this intrusion on the ‘innermost sphere of human life violates the constitutional right to privacy’.⁷² Interweaving the gay rights to equality, dignity and freedom, the court pointed out that:

The criminalisation of sodomy in private between consenting males is a severe limitation of a gay man’s right to equality in relation to sexual orientation, because it hits at one of the ways in which gays give expression to their sexual orientation. It is at the same time a severe limitation of the gay man’s rights to privacy, dignity and freedom. The harm caused by the provision can, and often does, affect his ability to achieve self-identification and self-fulfilment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays.⁷³

Regional human rights bodies have also relied on the right to privacy to strike down sodomy laws. In *Dudgeon v the United Kingdom* the ECtHR held that criminalisation of same-sex sexual conduct constituted an unjustified interference with one’s right to respect for his private life that statutes that prohibit same sex sexual relations between two consenting adults in private violate rights to privacy and to non-discrimination.⁷⁴ In the *Toonen* case, the HRC rejected the argument that criminalisation of same-sex sexual conduct may be considered as ‘justified and reasonable’

⁷¹ *Lawrence* para 22.

⁷² *National coalition* case para 36.

⁷³ *National coalition* case para 36.

⁷⁴ *Dudgeon* para 45.

on grounds of protection of public health or morals, noting that the use of criminal law in such circumstances is neither necessary nor proportionate and amounted to a breach of the right to privacy guaranteed in the ICCPR.⁷⁵

It has become a common statement of law to say that privacy protects people, not places.⁷⁶ This was emphasised by Blackmun J in his powerful dissenting opinion in *Bowers & Attorney General of Georgia v Hardwick*⁷⁷ when he stated that the much-quoted ‘right to be let alone’ should be seen not simply as a negative right to occupy a private space free from government intrusion, but as a right to get on with one’s life, express one’s personality and make fundamental decisions about one’s intimate relationships without punishment.⁷⁸

In *Bernstein and Others v Bester and Others NNO* above, Ackermann J reasoned that the scope of the right to privacy is intimately connected to the concept of identity and that ‘rights, like the right to privacy, are not based on a notion of the unencumbered self, but on the notion of what is necessary to have one’s autonomous identity. In the context of privacy this means that it is the inner sanctum of the person such as his/her family life, sexual preference and home environment which is shielded from erosion by conflicting rights of the community’.⁷⁹

⁷⁵ *Toonen* paras 8.3–8.7.

⁷⁶ The phrase was first used by Stewart J in *Katz v United States* 389 US 347, 351 (1967).

⁷⁷ *Bowers & Attorney General of Georgia v Hardwick* US, 1985: 186 para 204–214.

⁷⁸ *Bowers* para 204–214.

⁷⁹ *Bernstein* para 65-67. The learned judge went proceeded to state that: ‘[T]his implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities . . . the scope of personal space shrinks accordingly.’

As discussed in chapter four, in *National Coalition*, the NCGLE avoided advancing an argument based on the right to privacy in challenging the sodomy laws in South Africa. Their concerns were that an argument based on the right to privacy would suggest that discrimination against gays and lesbians was restricted to prohibiting same-sex sexual conduct between adults in the privacy of their bedrooms.⁸⁰ In addition, the privacy argument had the potential of reinforcing the idea that same-sex sexual intimacy was shameful and improper.⁸¹

Despite these concerns, the Constitutional Court included a privacy approach in its analysis. Justice Sachs observed that privacy must be regarded as ‘suggesting at least some responsibility on the State to promote conditions in which personal self-realisation can take place. That is not to say that people should be allowed to do anything they like in private; states are obliged to act to prevent harm’.⁸² The prohibition of certain sexual relations on the basis of sexual orientation is a violation of equality. This is because the expressing of sexuality requires a partner, real or imagined. It is not for the State to choose or to arrange the choice of partner but for the individuals to choose themselves and decide how to conduct their private lives with the partner they have chosen.

Sodomy laws in Kenya and Uganda allow government authorities to invade the private premises of individuals alleged to be involved in consensual same-sex sexual relations.⁸³ The question is what is the justification and scope of the role of the State in regulating sexuality in public and private life? Those in support of the decriminalisation of same-sex sexual conduct argue that such laws violate the right to privacy because they are examples of ‘victimless crimes’ that

⁸⁰ E Cameron ‘sexual orientation and constitution: a test case for human rights’ (1993) 110 *South Africa Law Journal* 450; *R v Gough & Narroway* (1926) CPD 441.

⁸¹ Cameron (n 80 above) 442.

⁸² *National coalition* case para 68.

⁸³ Amnesty International *Love hate and the law: decriminalizing homosexuality* (2008) 8.

should not be criminalised.⁸⁴ They also argue that even when such laws are not enforced, they harm gays and lesbians in many unjustifiable ways.⁸⁵

The boundaries of the right to privacy have proven extremely variable. It is possible for privacy to co-exist with moral disapproval or mere tolerance as long as it is confined to the private sphere of the closet.⁸⁶ Fellmeth observes that ‘the right to privacy is not merely as the freedom to maintain secrecy, but as freedom of intimate conduct, association and expression without fear of arbitrary state interference’.⁸⁷ The central question is: if the objective of criminal law is to protect society, what harm does an act that happens behind closed doors between consenting adults have to do with society? Does the criminalisation of same sex sexual acts then amounts to an unjustifiable intrusion of privacy?

Although a number of cases in the United States and international and regional human rights bodies such as HRC and ECtHR⁸⁸ have relied on the right to privacy in striking down sodomy laws, the case may be different for Kenya and Uganda despite the recognition of the right to privacy in their Constitutions.⁸⁹ This is because there is lack of clear jurisprudence defining the boundaries of the right to privacy in both countries. The right to privacy in Kenyan and Ugandan

⁸⁴ E Stein ‘Evaluating the sex discrimination argument for lesbian and gay rights’ (2001) 49 *UCLA* 475.

⁸⁵ Stein (n 84 above) 475.

⁸⁶ I Saiz ‘bracketing sexuality: human rights and sexual orientation – a decade of development and denial at the UN’ Sexual Policy Watch working papers No. 2 (2005) 12.

⁸⁷ A X Fellmeth *State regulation of sexuality in international human rights law and theory* (2008) 802.

⁸⁸ *Dudgeon v United Kingdom* app. No. 7525/76 4 Eur H.R Rep 149 (1982); *Norris v Ireland* app. No. 10581/83 (1998) 186 and *Modinos v Cyprus* App. 15070/89 (1993) 445. In *Dudgeon v United Kingdom* the ECtHR found that criminalisation of homosexual acts committed in private between consenting adults infringed on their right to privacy. The reasoning of the Court was that even though those who find homosexual acts immoral may be shocked, offended or disturbed by the commission of the homosexual acts in private, that on its own cannot warrant interference with their privacy when they had consented to the acts. Similarly, in *Norris v Ireland* and *Modinos v Cyprus*, ECtHR held in both cases that sodomy laws violated the right to privacy in article 8 of the ECHR.

⁸⁹ Articles 31 of the Kenyan Constitution provides that every person has the right to privacy which includes the right not to have their person, home or property searched; their possession seized; information relating to their family or private affairs unnecessarily required or revealed; and the privacy of their communication infringed. Article 27 of the Ugandan constitution provides that no person shall be subjected to unlawful search of person, home or property of that person or unlawful entry by others of the premises of that person or no person shall be subjected to interference of that person’s home, correspondence, communication or other property.

Constitutions tend to focus on the state's intrusion into the home.⁹⁰ This approach indicates nothing about the right of individuals to private personal or sexual relationships. In other words, the right to privacy often focuses on familial and zonal aspects of the right i.e. protecting the sanctity of the home and familial structure leaving out the protection of the privacy in personal or sexual relations. In general, privacy rights might have a different meaning in Constitutions of most African countries such as Kenyan and Ugandan Constitutions than they do in Europe and United States.⁹¹

In addition, privacy rights are likely to have a different impact on gays and lesbians depending on one's economic conditions and social regulations that shape the boundaries of privacy in a particular community in Africa. A rich and highly educated gay man or lesbian would have his or her privacy more protected than a poor and marginalised gay man or lesbian in Kenya. This is because a rich gay man will be able to afford a house in a rich suburb where his privacy is guaranteed while a poor gay man will have to share a small room with his family or friend thus denying him his privacy.

Moreover, social regulations in Africa generally would see gay men enjoying their privacy more than lesbians. The society expects men to move more easily between the private and public spheres than women. While men can more readily retreat from oppressive conditions at home

⁹⁰ The Courts in Kenya have focused on the right to privacy as being an intrusion to the home of a person in the case of *A.n.n v Attorney General* (2013) Eklr when it held that the right to privacy is limited to searches of person and homes and such right is limited under article 24 of the Constitution. Though the case involved the petitioner being undressed by male and female in a police station, the court did not expand the right to privacy to include personal privacy of the petitioner. Similar ruling was held in a Ugandan case of *Victor Mukasa & Yvonne Oyo v Attorney General* where the High Court of Uganda found that searching the house of petitioner without a search warrant breached the right to privacy guaranteed in article 27 of the Ugandan Constitution. This case also involved the applicant being undressed in a police station.

⁹¹ In the American case of *Griswold v Connecticut* 381 U.S 479 (1965) the court held that a State statute prohibiting the distribution of contraceptives to married couples violated the implicit right to privacy as guaranteed in the US Constitution. This shows the court has expanded the right to privacy to include the issues of personal and sexual relationships between couples in the US.

and venture out into social places where they can enjoy their privacy, women may not enjoy the same level of mobility. Thus the right to privacy would protect gay men more than lesbians in the African context.

In *Victor Juliet Mukasa*⁹² the High Court of Uganda held that this was a violation of article 27 of the Constitution and ordered the government to pay damages to Mukasa. In reaching this decision the Court relied heavily on article 1 of the Universal Declaration of human Rights which provides that ‘all human beings are born free and equal in dignity and rights’.

Similarly, in the *Rolling Stone* case, the Court stated:

With regard to the right of privacy of the home and person under article 27 of the Constitution, court has no doubt, again using the objective test, that the exposure of the identities of the persons and homes of the applicants for the purposes of fighting gayism and the activities of gays, as can easily be seen from the general public outlook of the impugned publication, threaten the rights of applicants to privacy of the person and their homes. They are entitled to that right.⁹³

Analysing the effect of these two court decisions by the Ugandan High Court presents some challenges. On the one hand, it can be argued that by applying the constitutional guarantee of privacy, the Court was in effect communicating that constitutional protections of the right to privacy apply equally to individuals regardless of their sexual orientation. This is obviously an interpretation that is more favourable to gays and lesbians because it clearly shows a link between the right to privacy and equality of gays and lesbians in Uganda. On the other hand, it can be argued that the decision in this case is restricted to the specific facts without broader

⁹² *Victor Juliet Mukasa* para 12.

⁹³ *Rolling Stone* para 9.

implications, and merely represents an affirmation of the right to privacy of someone's home as provided in the Ugandan Constitution.

If the former interpretation of the judgement is correct, a number of questions regarding the Court's application of this interpretation on the sodomy laws remain unresolved. Are sodomy laws an infringement of the right to privacy as guaranteed in article 27 of the Ugandan Constitution? Assuming the former interpretation stands for the position that the rights guaranteed by the Ugandan Constitution applies equally to homosexuals and heterosexuals, it is still left up to speculation whether the acceptance of such a position demands an invalidation of sodomy laws in Uganda.

The question of whether the right to privacy extends to sexual intimacy has not been decided by courts in Kenya and Uganda. For the constitution to be interpreted as protecting the right to privacy, which in turn entails the right to sexual intimacy including for homosexuals, the courts would have to turn to comparative constitutional law. It was the American decisions that extended the right to privacy to encompass sexual intimacy.⁹⁴ Judicial decisions from the American jurisdiction established propositions for what privacy means and its scope. These propositions were borrowed and applied by the Delhi High Court and South African Constitutional Court in the cases of *Naz Foundation* and *National Coalition* respectively. Judges in Kenya and Uganda should apply those propositions in interpreting the right to privacy bearing in mind that those decisions emerge from a foreign constitutional system and were used to interpret a different Bill of Rights and thus they must justify the use of comparative constitutional law in the interpretation of the right to privacy.

⁹⁴ *Lawrence; Goodridge v Department of Health* US (2003).

In order for the courts to interpret and apply the right to privacy with an aim of decriminalising same-sex sexual acts, they must be willing and able to rise above moral and political values as well as the majority views of Kenyans and Ugandans on the subject of homosexuality. The right should not be interpreted in the societal context to avoid the views of the majority influencing their decisions. Instead, courts should interpret the right with an aim to promote constitutional values of human dignity and equality for homosexuals. These values have been enshrined in the Constitution to guide courts in interpreting the Bill of Rights. Such an interpretation is likely to bring into question the constitutionality of sections 162 and 145 of the Kenyan and Ugandan Penal Codes respectively on the basis that the sections violate the right to privacy guaranteed in both Constitutions.

There is no doubt that criminal prohibitions of same-sex sexual acts not only have a direct bearing to the right to privacy but also to the right to dignity of homosexuals. The next section analyses how the right to dignity can be used as a tool for the inclusion of the rights of gays and lesbians in Kenya and Uganda.

7.5 The right to dignity

The phrase ‘human dignity’ is multifaceted and not capable of a fixed definition. Schachter correctly observes that:

We do not find an explicit definition of the expression ‘dignity of the human person’ in international instruments or (as far as I know) in national law. Its intrinsic meaning has been left to intuitive understanding, conditioned in large measure by cultural factors. When it has been

invoked in concrete situations, it has been generally assumed that a violation of human dignity can be recognized even if the abstract term cannot be defined.⁹⁵

Despite the above remark, the English philosopher Thomas Hobbes has made an attempt at defining this concept. In his treatise, *Leviathan*, he remarks that ‘human dignity is the public worth of a man [or woman] which is the value set on him [or her] by the Commonwealth’.⁹⁶ Though it should be readily acknowledged that defining dignity is no easy task, one fact must be accepted, however: that its protection under various municipal laws and international instruments ‘requires us to acknowledge the value and worth of all individuals as members of society’.⁹⁷ The genesis of the concept of human dignity can be traced to Kantian moral philosophy, in which human dignity is considered to be what gives a person their intrinsic worth.⁹⁸ In *S v Makwanyane*,⁹⁹ the Constitutional Court of South Africa, per O’Reagan J, observed that ‘recognising the right to dignity is an acknowledgement of the intrinsic worth of human beings [T]his right therefore, is the foundation of [all] other rights’.¹⁰⁰

Human dignity is basic and irreducible. At its bare minimum, it is the basis upon which all other human rights such as the rights to liberty, privacy, equality and non-discrimination are embedded.¹⁰¹ Discrimination, marginalisation, victimisation and persecution of homosexuals undermine their dignity. Describing the assault that the persecution of homosexuals’ occasions to their dignity, Cameron J stated in *Fourie* that:

⁹⁵ O Schachter Human dignity as a normative concept (1983) *American Journal of International Law* 849.

⁹⁶ T Hobbes *Leviathan* (1999) 104.

⁹⁷ *National Coalition* para. 29.

⁹⁸ Currie & De Waal (n 2 above) 272.

⁹⁹ *Makwanyane* para 328.

¹⁰⁰ *Makwanyane* para 328.

¹⁰¹ Currie & de Waal (n 1 above) 272.

The sting of . . . continuing discrimination against both gays and lesbians lies in the message it conveys, namely that, viewed as individuals or in their same-sex relationships, they ‘do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity namely that ‘all persons have the same inherent worth and dignity’, whatever their other differences may be.¹⁰²

Some courts around the world have relied on the concept of human dignity to advance the rights of homosexuals. In *Lawrence* the US Supreme Court relied on human dignity in striking down sodomy laws in the State of Texas.¹⁰³ In *Vriend* the Canadian Supreme Court found that homosexuals must be protected from discrimination on the basis of sexual orientation by the law because such discrimination means that all persons are equal in dignity and rights except homosexuals.¹⁰⁴ In *National Coalition*, the South African Constitutional Court established that the criminalisation of homosexual acts degraded and devalued gay men and undermined their dignity.¹⁰⁵ The Court also considered the question of human dignity in the case of *Fourie* where the Court stated that the exclusion of same-sex couples from the marriage institution affects their dignity as members of the society.¹⁰⁶

Courts in US, Canada and South Africa appear to share the view that, as they possess dignity, gays and lesbians should be included in the category of full citizens who are able to rely on all the protections and benefits of the law.

¹⁰² *Fourie* para 17.

¹⁰³ *Lawrence* para 34.

¹⁰⁴ *Vriend* para 497.

¹⁰⁵ *National Coalition* para 28.

¹⁰⁶ *Fourie* para 114.

Homosexuals are human beings and have an inherent dignity that deserves respect from laws and social institutions.¹⁰⁷ This means that humanity is enough for homosexuals to be treated like other humans (heterosexuals) and be able to benefit from the same rights. Excluding them from the benefits of equal rights should be deemed unacceptable and harms their human dignity in a manner that can be considered cruel and degrading. The function of the right to human dignity as a tool of inclusion of gay rights would be to repair indignity, to renounce humiliation and degradation and to enable homosexuals to enjoy the full benefits of citizenship.

From the application of the concept of human dignity to protect homosexuals by a number of jurisdictions, it can be looked at as a legal doctrine that is transnational. It denotes similar things across different legal systems and thus it can travel through a range of jurisdictions. This doctrine has been applied in other jurisdictions as a tool of inclusion of homosexuals who were previously excluded from enjoying equal rights. Kenya and Uganda should not be an exception to the appreciation and application of the doctrine in protecting the rights of homosexuals as the right to human dignity is expressly guaranteed in both the Kenyan and Ugandan Constitutions.¹⁰⁸

In view of the above discussion, there can be no doubt that prejudicial practices against gays and lesbians in Kenya and Uganda undermine their human dignity. It should be appreciated that the right to dignity is the matrix of all rights including the rights to equality and privacy discussed

¹⁰⁷ M Nussbaum *Sex and Social Justice* (1999) 13.

¹⁰⁸ Article 24 of Ugandan Constitution provides that no person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment. Article 28 of Kenyan constitution states that every person has inherent dignity and the right to have that dignity respected and protected.

above. Therefore courts should extend the right to dignity to the protection of gays and lesbians in Kenya and Uganda.

The focus now turns to the possible impact of international human rights instruments and decisions as well as foreign law in the fight against the criminalisation of same-sex sexual conduct. It is settled that sodomy laws amount to a violation of international human rights law.¹⁰⁹

So what is the value of international and foreign law in advocating for the decriminalisation of same-sex sexual conduct at the domestic levels? Can the international human rights instruments and/or decisions from international tribunals; and decisions from foreign jurisdictions be relied on in the fight against the criminalisation of same-sex sexual conduct in Kenya and Uganda? This will depend on the nature of reception and status of international and foreign law in South Africa, Kenya and Uganda.

7.6 The influence of international and foreign law

Article 2(5) of the Kenyan Constitution provides that ‘general rules of international law shall form part of the law of Kenya’¹¹⁰ while article 2(6) states that ‘any treaty or convention ratified by Kenya shall form part of the law of Kenya’.¹¹¹ The incorporation of international law into Kenyan domestic laws has caused confusion in terms of its effect in the Kenyan legal system. From the judicial decisions so far, it is clear that determining the correct place of international law in Kenya is a challenging task. Courts have reached different positions. While some judges

¹⁰⁹ P Narayan ‘Somewhere over the rainbow: International human rights protections for sexual minorities in the new millennium’ (2006) 24 *Boston University International Law Review* 369.

¹¹⁰ Article 2(6) of Kenyan Constitution states that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

¹¹¹ Article 2(6) of Kenyan Constitution states that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

have contemplated a crucial role for international law, others have held that its status is not different from that of local legislation.

Some judges have held that international law overrules conflicting local statutes. In *Re The Matter of Zipporah Wambui Mathara*¹¹² Koome J stated that the provisions of Civil Procedures Rules were inferior to international law provisions outline in article 11 of the ICCPR. The Court here was arguing that international law applicable in Kenya had a higher normative value than the local statute, and where there is a conflict between the two, international law should prevail. In this case the ICCPR was given a higher status than the local statute.

Other judges have viewed international law as not being above local statute. They have argued that none is above the other because they are both law under the Constitution. International law and local statutes are given same status, of which in case of a conflict, it should be resolved through ordinary rules of interpretation. In the case of *Beatrice Wanjiku and Another v Attorney General* Justice Majanja stated that:

A determination of the import of article 2(5) and 2(6) of the Constitution required a purposive interpretation and not merely a decision on which of the two systems of law was superior in the hierarchy of norms. Those provisions should not be taken as creating a hierarchy of laws but instead must be seen in the light of the historical application of international law in Kenya where there was reluctance by the courts to rely on international instruments even those that Kenya had ratified in order to enrich and enhance human rights.¹¹³

¹¹² *Re The Matter of Zipporah Wambui Mathara* (2010) Eklr para 9.

¹¹³ *Beatrice Wanjiku & Another V Attorney General & others* petition no. 190 of 2011 para 20. In this case the court determined the extent of the applicability of international law in the enforcement of human rights in Kenya. It further observed that the provisions of a treaty would not trump those of a conflicting legislation because international law does not enjoy any special status under the constitution.

This approach involves a determination of the extent of applicability of either international law or local statute and an interpretation that best suit the enforcement of human rights and fundamental freedoms. According to Majanja J, the question of superiority between the two should not arise at all.

It would be imperative, under the Kenyan Constitution, for the courts to interpret local statutes in a way that where it appears to conflict with international law it allows international law to prevail, unless the local statute expressly states to the contrary. This approach would make it necessary for judges to avoid considering international human rights law in interpreting the Bill of Rights in the Constitution and as a tool for developing domestic jurisprudence on human rights in Kenya. This approach would also favour the protection of the rights of gays and lesbians in Kenya since international human rights law recognises the rights of gays and lesbians and any interpretation that allows it to prevail over local statutory provisions supports equal rights for homosexuals and heterosexuals.

The Kenyan Constitution does not mention the importance of foreign law in interpreting the Bill of Rights. However, judges have relied on foreign case law from South Africa and India in interpreting socio-economic rights guaranteed in the Constitution.¹¹⁴ The reliance on the decisions of foreign courts in interpreting and applying other rights in the Constitution could be understood that they might rely on some foreign judicial decisions when adjudicating on a question of rights of homosexuals in the country. This is because comparative constitutionalism is important in giving guidance, inspiration, reassurance and perspective to courts in determining

¹¹⁴ *Satrose Ayuma and 11 others v Registered Trustees of the Kenya Railways Staff Retirement Scheme & 2 others* (2011) Eklr petition No. 65 of 2010 the High Court at Nairobi cited the *Soobramoney* and the *Grootboom* cases in handing down a decision in favour of the applicant where the court stated that the government has a constitutional obligation to ensure people of Kenya realise their right to housing.

similar issues and giving a benchmark against which decisions can be evaluated.¹¹⁵ However, the application of foreign law should be done cautiously for two reasons. For one thing, the context may not be similar to permit fruitful comparison of judicial authority from other jurisdictions and, for another, it is often observed that judges invoke judicial decisions from other countries only when it is supportive of the reasoning they prefer and readily distinguish it, if it is at odds with the conclusion they make.¹¹⁶

Unlike the Kenyan Constitution, the South African Constitution does not expressly incorporate international law into domestic law. It only imports international standards at interpretive level. It provides that ‘when interpreting the Bill of Rights a court must consider international law and may consider foreign law’.¹¹⁷ This provision clearly turns international law into a mandatory canon of constitutional interpretation. It places an obligation on the courts, when giving meaning and scope to a right, to consider international law. Furthermore, it is important that every court bears a similar interpretive duty when it interprets any legislation. Section 233 of the South African Constitution provides that ‘when interpreting any legislation every court must prefer any reasonable interpretation that is consistent with international law over another interpretation that is inconsistent with international law’.¹¹⁸

In addition, section 39(1)(b) of the South African Constitution recognises the differences between international and foreign law.¹¹⁹ While it admits the beneficial role of comparative law, courts are only obliged to consider, but not follow foreign law. Thus, the mandatory obligation to

¹¹⁵ VC Jackson ‘Narratives of federalism’ (2001) 51 *Duke Law Journal* 263.

¹¹⁶ D Landau ‘Political Institutions and judicial role in comparative constitutional law’ (2010) 51 *Summer Harvard International Law Journal* 320.

¹¹⁷ Section 39(1)(b) and (c) of South African Constitution.

¹¹⁸ Section 233 of South African Constitution.

¹¹⁹ Section 39(1)(b) of South African Constitution provides that when interpreting the Bill of Rights a court must consider international law and may consider foreign law.

consider international law does not extend to foreign law. In *Makwanyane*,¹²⁰ the Constitutional Court made it clear that comparative human rights jurisprudence would provide the necessary guidance while an indigenous jurisprudence was being developed. However, the Constitutional Court was quick to point out that those foreign judicial decisions would not necessarily provide a safe guide to the interpretation of the Bill of Rights. This is because the judges should be alive to the fact that the context is not the same.

Even so, decisions made by international human rights tribunals and foreign courts had a significant impact on gay rights jurisprudence in South Africa. The Constitutional Court has not avoided relying on foreign case law in support of their reasoning and conclusion when interpreting the Bill of Rights to protect rights of homosexuals. The Constitutional Court cited decisions from human rights treaty bodies and foreign jurisdictions to protect the equality of gays and lesbians as well as affirm their fundamental rights to equality and human dignity.¹²¹

International law is not expressly recognised as a source of law in Uganda. The Ugandan Constitution has no provision that mandates the court to apply international law in interpreting the Bill of rights. For it to apply a treaty must be ratified in accordance with the Ratification of Treaties Act and then domesticated by an Act of Parliament.¹²² As stated above, although there is no express stipulation in the Ugandan Constitution for the application of international law in litigation before the courts, there have been instances where the judges have relied on international human rights instruments in determining cases. They have referred to international human rights principles when determining whether the right to privacy was violated. In *Victor*

¹²⁰ *Makwanyane* para 23.

¹²¹ *Lawrence; Toonen*.

¹²² B Kabumba 'The application of international law in the Ugandan judicial system: A critical analysis in M Killander *International law and domestic human rights litigation in Africa* (2010) 83.

*Mukasa*¹²³ the court held that the applicants' rights to privacy and freedom from torture, inhuman and degrading treatment guaranteed in article 24 and 27 of the Ugandan Constitution respectively were violated. In his judgement, Justice Arach Amoko made reference to article 1 of the UDHR on equality of all persons in dignity and rights. The judge also referred to article 3 of the CEDAW on the entitlement of women to the equal enjoyment and protection of all human rights.

The Court applied both the UDHR and the CEDAW despite the fact that the two treaties are not domesticated by a Ugandan Act of Parliament. This reveals the court's preparedness to go beyond the use of undomesticated treaties as aids to interpretation of the Bill of Rights. The Courts appear to suggest that undomesticated treaties may create enforceable rights in national law.

The courts, Parliament and civil society play a crucial role in the realisation of the rights of gays and lesbians in any country. Each of them has a role to play when it comes to the advancement of the arguments discussed above. The courts can interpret the Bill of Rights creatively and progressively in favour of the decriminalisation of same-sex sexual acts. Parliament can amend the Penal Code to remove the unnatural offences provisions while civil society can challenge the constitutionality of sodomy laws in court through public interest litigation. Thus, the next section provides a detailed analysis of the role of each one of them in furthering the fight against the criminalisation of same-sex sexual conduct in the three countries.

¹²³ *Victor Juliet Mukasa* case.

7.7 The role of courts in the fight against criminalisation

The judiciary in South Africa, Kenya and Uganda, as an arm of government, has the constitutional duty to safeguard the integrity of democracy, particularly, through protecting rights and fundamental freedoms, promoting constitutionalism and respect for the rule of law.¹²⁴

In a constitutional democracy, the functions of the court are clearly set out in the Constitution. The Constitution also establishes and states the functions of a Constitutional Court. The Constitutional Courts interpret the Constitutions and make decisions on the constitutionality of legislation. Beyond pronouncing on the validity of legislation and executive conduct, Constitutional Courts have a role to play in guarding constitutional values as well as protecting the rights enshrined in the Constitution.¹²⁵ They are expected to build a constitutional jurisprudence and human rights culture and protect the weak members of the society from abuse of power and infringement on their rights.¹²⁶

An independent judiciary with constitutional powers to undertake judicial review on its own is not adequate to protect the rights of homosexuals in Kenya and Uganda.¹²⁷ Gay rights can only be realised and protected with courts that are ready to use their powers to hand down judgement that are going to deal with continuous discrimination and marginalisation of gays and lesbians in society.¹²⁸ This requires judges with a judicial attitude that can adopt a broader and more progressive approach to the interpretation of the Bill of Rights in the Constitution. This is because judges are the ultimate arbiter in constitutional rights and thus need to take an activist

¹²⁴ BK Twinomugisha 'The role of the judiciary in the promotion of democracy in Uganda (2001) 9 *African Human Rights Law Journal* 3.

¹²⁵ Twinomugisha (n 124 above) 7.

¹²⁶ IIK Nyarang'o *The role of judiciary in the protection of sexual minorities in Kenya* (LLM thesis University of Pretoria 2011) 49.

¹²⁷ Nyarang'o (n 126 above) 50.

¹²⁸ C E Finerty 'Being gay in Kenya: the implications of Kenya's new Constitution for its sodomy laws' (2012) 45 *Cornell international law journal* 432.

role in adjudication.¹²⁹ In addition, there is need for courts to take a broader and progressive interpretation when interpreting the constitutional provisions because a constitution is regarded as a living document which is enacted to serve both the current and future generations.¹³⁰ The Constitution also embodies and reflects the desires, hopes aspirations and fears of the people.¹³¹ Therefore, as judges, they have a duty to infuse the values and principles of the Constitution into the governance process.

As correctly observed by Lord Bingham in *Reyes v The Queen*:

The court must begin its task of constitutional interpretation by carefully considering the language used in the constitution. But it does not treat the language of the Constitution as if it were found in a will or deed or charterparty. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the constitution, but it is required to consider the substance of the fundamental rights at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society...¹³²

The notion of judicial activism has played a crucial role in the realisation of the rights of homosexuals in Canada, India and America. Judges interpreted the constitutions creatively to reflect modern-day social situations and values in those countries.

Judicial activism has contributed immensely in the realisation of rights of homosexuals in South Africa. Judges of the Constitutional Court of South Africa have through bold and progressive interpretive approaches to its Constitution extended its protection to gays and lesbians. On the

¹²⁹ Twinomugisha (n 124 above) 7.

¹³⁰ M W McConnell 'Textualism and the dead hand of the past' (1998) 66 *Geo. Wash Law Review* 1127.

¹³¹ McConnell (n 130 above) 1128.

¹³² *Reyes v The Queen* (2002) AC 235.

account of the history of South Africa and the discrimination against homosexuals, judges felt less restraint and more innovative and progressive in dealing with the rights of gays and lesbians. The Constitutional Court has established a progressive jurisprudence in the protection of the rights of gays and lesbians. The Court has put much emphasis on the transformative constitutional values of equality and dignity that prohibit the State from denying homosexuals from full and equal citizenship based on their sexual orientation.

The Constitutional Court has handed down socially unpopular decisions on the equal protection of the rights of gays and lesbians.¹³³ In *National Coalition*, they declared the common law offence of sodomy unconstitutional for breaching the rights to equality, dignity and privacy, which discriminated against homosexuals on the basis of their sexual orientation. In *Fourie*, two women in a long stable domestic relationship sought to be married and because this was prohibited, they petitioned the court for an order of mandamus requiring the Minister of Home Affairs to recognise their union and a declaration that the common law definition of marriage was unconstitutional. Even though some of the judges in the Supreme Court of Appeal agreed that the definition was no longer tenable, they felt it was parliament that had the mandate to change the law. When the matter went to the Constitutional Court, it declared the common law definition of marriage and relevant section of the Marriage Act unconstitutional. In reaching this decision, Justice Sachs, while acknowledging the importance of religion in society, found that it would be improper to use the religious sentiments of some as a guide to the enjoyment of rights.¹³⁴

¹³³ The constitutional Court decision in the *National Coalition* and *Fourie* cases.

¹³⁴ *Fourie* para 88.

In Kenya and Uganda, the Constitutions task the courts to interpret the provisions of the Constitution in order to promote a just, free and democratic society.¹³⁵ According to the Ugandan Constitution, any question as to the interpretation of the Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court.¹³⁶ The Kenyan Constitution mandates the High Court powers to interpret the provisions of the Constitution.¹³⁷

For gays and lesbians in Kenya and Uganda to realise and enjoy their rights, just like their South African counterparts, judges in Kenya and Uganda would have to embrace the concept of judicial activism. They should be willing and ready to depart from strict adherence to precedent in favour of progressive and new social policies that reflect the contemporary social reality. Through judicial activism judges would be able to creatively and purposely interpret the equality provisions and the rights to human dignity and privacy in order to strike down the sodomy laws in the Penal Code. Judges should play their role as law makers and influence the direction of the law. This can only occur where their interpretation of equality clause, the rights to privacy and human dignity goes beyond mere words and matters mentioned in the relevant constitutional provisions. Judges are mandated to uphold the values and principles enshrined in the Constitution in order to enhance the promotion of human rights and fundamental freedoms.

There are instances in which courts in Uganda have creatively and progressively interpreted the Constitution and other legal provisions to protect human rights. The Constitutional Court has progressively and creatively interpreted the right to freedom from cruel, inhuman and degrading

¹³⁵ Nyarang'o (n 126 above) 50; Twinomugisha (n 125 above) 6.

¹³⁶ Article 137(1) of the constitution provides that any question as to the interpretation of this constitution shall be determined by the court of appeal sitting as the constitutional court.

¹³⁷ Article 165 (3) (b) provides that the High Court shall have the jurisdiction to determine the question whether a right or a fundamental freedom in the bill of rights has been denied, violated or infringed.

treatment. In *Simon Kyamanywa v Uganda*¹³⁸ the Constitutional Court declared corporal punishment unconstitutional on the basis that it violated the right to freedom from cruel, inhuman and degrading treatment. Similarly, courts in Uganda have embraced a more independent role when it comes to handing down decisions that protect the rights of gays and lesbians even though the decisions were not about the constitutionality of sodomy laws. The High Court of Uganda ruled in favour of homosexuals in the *Victor Juliet Mukasa* and *Rolling Stone* cases. Both cases were about the protection of the right to privacy of gays and lesbians, and the Court held that homosexuals are entitled to enjoy the right to privacy as guaranteed in the Constitution.

However, in other instances, the courts have interpreted the Constitution of Uganda narrowly and restrictively. For instance in *Susan Kigula and 416 others v Attorney General*¹³⁹ the petitioners challenged the constitutionality of death penalty on the grounds that it violated the right to life and subjected them to cruel, inhuman and degrading treatment. The Constitutional Court held that the death penalty was an exception to the right to life under the Constitution and thus constitutional. The Supreme Court confirmed the ruling of the Constitutional Court and held that it was not the mandate of judiciary, but the Ugandan Parliament which enacts laws to impose a method of execution other than hanging. The Supreme Court wasted the opportunity to progressively and creatively interpret the relevant constitutional provisions and declare the death penalty unconstitutional.

Judges in Kenya have not had a chance so far to pronounce themselves on a matter challenging rights to equality, human dignity or privacy of gays and lesbians. However, in 2015, the High

¹³⁸ *Simon Kyamanywa v Uganda* Const. Ref 10 of 2000.

¹³⁹ *Susan Kigula and 416 others v Attorney General* Const. Petition 6/2003 (CC).

Court of Kenya in *Eric Gitari v Non-Governmental Coordination Board*¹⁴⁰ held that members of the gay and lesbians group could formally register their organisation. The High Court decision was issued in response to a petition filed by the National Gay and Lesbian Human Rights Commission (NGLHRC) to register under the Non-Governmental Organizations (NGO) Coordination Board Act. The NGO Coordination Board, a government body, rejected the group's request to register in March 2013. In denying the application, the board said that the name of the organization was 'unacceptable,' and that it could not register it because Kenya's Penal Code 'criminalizes gay and lesbian liaisons'.

In its decision to reverse the ruling of the NGO board, the High Court ruled that the NGO board's decision violated article 36 of Kenyan Constitution, which states that 'Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.'¹⁴¹ The judges further ruled that conceptions of morality cannot serve as a justification to limit fundamental rights. Although section 162 of Penal Code provides 'carnal knowledge against the order of nature,' commonly understood to mean same-sex sexual intercourse, but no provision forbids people to be lesbian, gay or transgender or to associate in pursuit of common interests. Though the decision has been appealed to the Court of Appeal by the Attorney General, it would have gone a long way in creating free association and speech among the gay community thus making it easier for them to have a voice and advance their rights through advocacy and public awareness.

Judges should not attach determinative value to public opinion in determining the constitutionality of sodomy laws in Kenya and Uganda as that contradicts their duty to uphold

¹⁴⁰ *Eric Gitari v Non-Governmental Coordination Board* (2015) Eklr.

¹⁴¹ Article 36 of Kenyan Constitution.

the constitutional values of human dignity and equality and to protect those unable to influence the democratic process. In *Makwanyane*¹⁴² the South African Constitutional Court had to determine the constitutionality of the death penalty. The Court held that the death penalty violated the right to life. One of the justifications given by the government for retaining death penalty was that the majority of South Africans favoured it in extreme cases. The Court brushed the issue of public opinion aside and stated that the question before the Court was not whether the majority of South Africans believe that death sentence is the proper punishment for murder but rather whether the Constitution allows the sentence. The Court did not consider public opinion irrelevant but it did hold that public opinion must not prevail over the duty of the courts to adjudicate constitutional issues. The Court should not be diverted from its duty to interpret the constitution by making choices based on the views of majority in society.

Homosexuality is a socially controversial issue in Kenya and Uganda and homosexuals are minorities in society. The decision regarding their rights should not be left to majority views in society. The Botswana High Court in the case of *Kanane v The State*¹⁴³ and Zimbabwean High Court in *S v Banana*¹⁴⁴ held that same-sex sexual conduct was not unconstitutional since the views of the majority have not changed to support same-sex sexual relations. In both cases the Court found that because society was conservative and thus outraged by same-sex sexual acts, criminalisation of sodomy was not unconstitutional. In *Kanane* Mwaikasu J, in a long and detailed judgment held, that the sections of the Penal Code that prohibit same-sex sexual acts did not violate any of the provisions of the Constitution. The learned judge was of the view that the

¹⁴² *Makwanyane* para 3.

¹⁴³ *Kanane v The State* HCC NO 9 of 2003 (unreported).

¹⁴⁴ *S v Banana* (2000) (2) SACR 1 (ZSC).

application essentially concerns the place and extent of public morality or moral values in the criminal law of a given society. In his view, the criminal law has as its basis the public morality or moral values or norms as cherished by members of the society concerned, and is influenced by the culture of the moment of such society. Such moral values regulate the conduct of individual members of society for the good of society and provide a conducive environment for the exercise and enjoyment of the individual rights and freedoms of members of such society. He added that the conduct of any person that is seen to threaten the fabric of a given society is what will be proscribed under the criminal law of the society concerned. In this regard, the identification of any such moral values or norms as being of importance to the welfare of society as a whole and for the promotion of the dignity, rights and freedoms of its members, is the preserve of the society concerned.¹⁴⁵

The important question that called for the determination of the Court was whether, at the present time and circumstances, same-sex sexual acts between consenting adult males should be decriminalised in Botswana. In trying to answer this question, Tebbutt JP noted the conclusion reached in the High Court by Mwaikasu J that Botswana society did not at the present time require the decriminalisation of same-sex sexual acts between consenting adults because such practices were generally uncommon among indigenous African societies. It cannot be said that public opinion has so changed and developed in Botswana that the courts must yield to that new perception and declare sodomy laws unconstitutional. However, he added that, although the courts may not be dictated to by public opinion, the courts would be loathe to fly in the face of

¹⁴⁵ *Banana* para 13.

public opinion especially if expressed through legislation passed by those elected by the public to represent them in the legislature.¹⁴⁶

These decisions are significant to this study for two reasons. First the courts were presented with an opportunity to make an authoritative ruling on the rights of homosexuals in Botswana and Zimbabwe. The court had a chance to determine the constitutionality of sodomy laws in both countries. The court was able to examine and lay down the scope of the right to equality and non-discrimination as guaranteed in their constitutions by drawing from foreign jurisprudence in interpreting the right. Second, the courts demonstrated the weight that can be placed on public opinion in deciding a question on the rights of gays and lesbians in Africa, considering that fact that homosexuality is viewed as being un-African. It demonstrated that significant value was attached to public opinion in gay rights cases. In both cases, the determinative factor of the court decision was the opinion of the majority of Botswana and Zimbabwean people. The Court was essentially saying that the answer to constitutional rights over sensitive issues such as gay rights is to be found in public opinion, unreliable and changing as it is. Although it is clear from *Banana* and *Kanane* that the High Court of Zimbabwe and Botswana respectively relied significantly and largely on public opinion as a determinative factor in reaching its decisions, this study argues that since Kenya and Uganda are governed by constitutional democracy, a judge should, when dealing with sodomy as a crime, not be guided by the values and views of the society, but by the values and principles enshrined in the Constitution. The courts have the role of upholding the Constitution as a societal compact, which by virtue of the equality clause includes the protection of individual rights unless such protection is limited on the basis of articles 24 and 43 of the Kenyan and Ugandan Constitutions respectively.

¹⁴⁶ *Reyes v R* (2002)2 LRC 606 607.

Opinion of the majority can and do often treat minorities outside the mainstream harshly as illustrated by the South African case of *Hoffmann v South African Airways*¹⁴⁷ where Ngcobo J acknowledged, '[p]eople living with HIV constitute a minority. Society has responded to their plight with intense prejudice.'¹⁴⁸ It is imperative for the Court to declare as unconstitutional such an instance of societal prejudice, namely, the refusal by South African Airways to employ a person living with HIV as steward.¹⁴⁹

The same approach was adopted by the South African Constitutional Court in the *Fourie* and *National Coalition* cases. Although the Court did not explicitly address the relevance of public opinion, there were several indications in both cases that the Court considered itself obligated to protect minorities both socially and politically.¹⁵⁰ The Court has made it clear that it exists primarily to protect the rights of (permanent) losers in the political game.¹⁵¹ Thus the value attached to public opinion or rather public prejudice by the Court was less significant in gay rights cases. However, this position should be subjected to some level of scrutiny before it can be adopted as a proposed strategy in making a case for the decriminalisation of same-sex sexual conduct in Kenya and Uganda. The question that needs to be considered is: if some important aspects of the Constitution are incompatible with fundamental views held by the citizenry, how would the popular legitimacy of other aspects of the Constitution be maintained and nurtured?

¹⁴⁷ *Hoffmann v South African Airways* 2000 (2) SA 628; 2001 (10) BHRC 571; (2000) 3 CHRLD 146. para 35

¹⁴⁸ *Hoffmann* para 25.

¹⁴⁹ *Hoffmann* para 25.

¹⁵⁰ *National Coalition* paras 26 & 137

¹⁵¹ *Fourie* para 94.

In the case of *Obergefell v Hodges*¹⁵² the US Supreme Court ruled that the American Constitution guarantees the right to same-sex marriage. The Supreme Court willingness to entertain the question of same-sex marriage was as a result of growing public support of the gay community in America as well as changing attitudes towards same-sex marriages.¹⁵³ Studies conducted over the past two years indicated that more than a half of Americans support gay marriage.¹⁵⁴ This is in contrast to ten years ago when only a third supported the union.¹⁵⁵ Moreover, President Barrack Obama was the first sitting president to support gay marriage. In my view these two factors had a positive impact on the direction the decision of the Supreme Court took. The Court appreciated the fact that changes in public opinion among Americans were crucial in the enforcement of their decision.¹⁵⁶

The biggest challenge an ‘activist’ role of the courts in matters concerning homosexuality is likely to suffer is the ‘backlash narrative.’¹⁵⁷ This narrative warns against turning to court to vindicate rights because such court decisions are often counter-productive. Court decisions that are not in line with majority views are difficult to enforce and are likely to face societal resistance. Moreover, it is argued that by making binding pronouncements, court decisions restrain legitimate debate around the issue, thus closing the political space for democratic deliberation.¹⁵⁸

In South Africa, the Constitution prohibits unfair discrimination on the basis of sexual orientation. This led to the Constitutional Court to decriminalise same-sex sexual acts in

¹⁵² *Obergefell v Hodges* 576 US (2015).

¹⁵³ <http://www.pewresearch.org/topics/gay-marriage-and-homosexuality/pages/2/> (accessed on 16 february 2016)

¹⁵⁴ <http://www.pewresearch.org/topics/gay-marriage-and-homosexuality/pages/2/> (accessed on 16 february 2016)

¹⁵⁵ <http://www.pewresearch.org/topics/gay-marriage-and-homosexuality/pages/2/> (accessed on 16 february 2016)

¹⁵⁶ *Obergefell v Hodges* 576 US (2015) 19.

¹⁵⁷ F Viljoen ‘Equal right in a time of homophobia: an argument for equal protection of sexual minorities in Africa’ (2013) 11

¹⁵⁸ Viljoen (n 157 above) 11.

National Coalition as well as legalise same-sex marriage in *Fourie*. In addition, the South African government has promoting the rights of gay people in the international community. In 2011, South Africa was the main sponsor of the UN Human Rights Council resolution that for the first time in the UN's history, recognised rights of sexual minorities and called for the end of sexual violence and discrimination against gays and lesbians.

Unfortunately, however, the South African legal framework that offers protection to gays and lesbians often contradicts public opinion about same-sex sexual acts. While the legal framework has changed hearts and minds of some South Africans, the gay community still faces opposition from several quarters of society, particularly in the rural areas.¹⁵⁹ In 2011, the National House of Traditional Leaders asked Parliament to remove sexual orientation from the list of prohibited grounds of discrimination in the equality clause in the Constitution.¹⁶⁰ Gays and lesbians have experienced assault and sexual violence caused by homophobic views.¹⁶¹

The country has experienced a rise in so-called 'corrective' rape cases where lesbians are raped by men in their community supposedly to punish and 'cure' them of their homosexual sexual orientation. Studies indicate that about 500 women are subjected to this form of rape every year in South Africa and that black lesbians in the lower socio-economic levels are overwhelmingly the most at risk.¹⁶² These cases are linked to the majority views and beliefs that homosexuality is abnormal, a choice and a western import. In addition, lesbians represent a challenge to patriarchal norms and entitlements. The challenge facing South Africa is how to reduce acts of homophobia and shift the opinions of a significant number of South Africans to be more consonant with the constitutional value of equality.

¹⁵⁹ Viljoen (n 157 above) 12.

¹⁶⁰ Viljoen (n 157 above) 12.

¹⁶¹ Viljoen (n 157 above) 12.

¹⁶² Viljoen (n 157 above) 12

There can be little argument that the equality clause, including progressive court decisions in South Africa, has been an effective tool in promoting and gaining social acceptance of same-sex sexual acts even though its equality laws, which are progressive in comparison with Kenya and Uganda, establish a moral framework for the values citizens are expected to hold.

Progressive court decisions alone cannot force people to change their opinions in the direction of tolerance and acceptance of gays and lesbians. Dialogue and understanding is required. Only through public engagement will critics of gay rights understand the impact of their views and come to appreciate that equality will not materially affect their own rights and interests, and can contribute to national conversations about inclusive and diverse citizenship. The government should provide effective forums for discussions of gay rights issues. The State's obligation to educate its citizens on gay rights and promote a more cohesive society is both an ethical and a constitutional duty. Arguably, the South African government has failed to some extent to promote social acceptance of the gay community.

The judicial decision in the American case of *Brown v Board of Education*,¹⁶³ which effectively de-segregated American schools, were met with immediate resistance from southern racists and experienced problems of implementation then, and have since been eroded.¹⁶⁴ In addition, the case also illustrates the importance of government intervention in protecting the rights of minorities. This was a federal intervention to protect the rights of a minority group against discrimination from the majority.

¹⁶³ *Brown v Board of education* 347 US 483 (1954).

¹⁶⁴ Viljoen (n 157 above) 13.

Similarly, the decision in *Roe v Wade*¹⁶⁵ did not enjoy support from the majority. It was undermined and it is still resisted by many Americans today.¹⁶⁶ However, it is equally clear that without this decision the situation would have been different with many States in the US denying women their right to abortion.

Sometimes, courts have to take a leading role even in the face of opposition, particularly in support of upholding constitutional values and principles that are aimed at protecting the rights of minority groups in society. In addition, the government has a constitutional duty to promote all rights including the rights not to be discriminated against and persecuted on the basis of sexual orientation.¹⁶⁷ The governments of Kenya and Uganda should take active and effective steps in bridging the divide between public opinion and constitutional values.

7.8 The role of political and legal culture in decriminalisation of homosexuality

Judicial activism plays a crucial role in protecting the rights of gays and lesbians in countries like Kenya and Uganda where the existing legal framework is not responsive to the protection of their rights. However, the extent of judicial activism depends on the prevailing political and legal culture in the country since courts operate within a certain political and societal context. Constitutional texts and legal frameworks may be similar but the legal and broader societal cultures are different. Moreover, a positive outcome of a campaign towards decriminalisation of same-sex sexual acts cannot only depend on the constitutional text. So the question is: to what extent do the differences in political and legal culture account for the differing prospects of law

¹⁶⁵ *Roe v Wade* 410 US 113 (1973).

¹⁶⁶ Viljoen (n 157 above) 13.

¹⁶⁷ Interview with MJ Kimani Legal Secretary, Justice and Constitutional Affairs, Office of the Attorney General and Department of Justice, Nairobi Kenya on 23 September 2015.

reforms in Kenya and Uganda? This section discusses the role of political and legal culture in the decriminalisation of same-sex sexual conduct in Kenya and Uganda.

Arguably, the political and legal culture in Uganda does not favour the decriminalisation of same-sex sexual acts. The legal developments in the last 10 years were aimed at denying gays and lesbians their rights. In 2005 the Constitution of Uganda was amended to prohibit same-sex marriages making Uganda the first county in African to have such a provision in the supreme law. Two years later the Equal Opportunities Commission Act was amended to prevent the Equal Opportunities Commission from investigating matters viewed as immoral or socially unacceptable in the Ugandan society. In 2009 an Anti-Homosexuality Bill was introduced into Parliament which was signed into law in 2014. The legislation increased penalties against same-sex sexual acts including punishment for the ‘promotion’ of homosexuality and giving the Ugandan government an option to opt out of any international treaty that went against the spirit of the law. There was no doubt that this particular legislation targeted homosexuals.

In terms of judicial decisions on the rights of gays and lesbians in Uganda, the political influence is undeniable. In *Oloka-Onyango* decision the Court did not address the substance of the legislation and its compatibility with the Constitution. Instead, they struck down the legislation on the basis that it was enacted in violation of legislative procedure. In *Kasha* , the High Court dismissed the application that the workshop could offer an opportunity for people to engage in same-sex sexual behaviour which was a criminal offence under article 145 of the Penal code.

It was clear from the decision of the Court that the judge was reading much more into a case that was essentially concerned with freedom of expression and assembly and the arbitrary exercise of State power by an errant government official. Indeed, his decision was all about homosexuality.

He also approached the case with a thinly-disguised homophobia, a fact which is evident from the following passage taken from the judgment:¹⁶⁸

In my ruling I have endeavoured to come to conclusions that while the applicants enjoyed the rights they cited, they had an obligation to exercise them in accordance with the law. I have also concluded that in exercising their rights they participated in promoting homosexual practices which are offences against morality. This perpetuation of illegality was unlawful and prejudicial to public interest. The limitation on the applicants' rights was thus effected in the public interest specifically to protect moral values. The limitation fitted well within the scope of valid restrictions under article 43 of the Constitution. Since the applicants did not on a balance of probabilities prove any unlawful infringement of their rights, they are not entitled to any compensation. They cannot benefit from an illegality

Equally, in the *Rolling Stone* case the court held that the publication of photos, names and addresses of homosexuals constituted a violation of the affected person's dignity and privacy guaranteed in the Ugandan Constitution. In its judgement the Court stressed that the case was not about 'homosexuality per se' but rather about 'fundamental rights and freedoms.' In my view, Ugandan courts have developed a legal culture that avoids pronouncing judgements on rights of gays and lesbians as so. They have found a way of dealing with the case from a different angle even where it is clear that the matter is directly about the rights of gays and lesbians.

From legislation and court decisions, there is no doubt that the case of Uganda clearly represents a political and legal culture that is extremely disinterested in granting gays and lesbians equal enjoyment of their rights and fundamental freedoms guaranteed in the Constitution of Uganda. In my view, it will take a considerable period of time for the political and legal environment to

¹⁶⁸ *Kasha* para 23.

change for the better to enable courts to comfortably address the question of the constitutionality of sodomy laws in Uganda.

How have legislation and courts of law in Kenya treated questions on the protection of the rights of gays and lesbians? The question of same-sex sexual conduct became a serious concern during the constitutional making process. The question at that time was whether to include sexual orientation on the list of prohibited grounds of discrimination in article 27(4) of the Kenyan Constitution 2010.¹⁶⁹ The recommendation to include sexual orientation was rejected after extensive public debate. Some political and religious leaders threatened to vote it out if the draft Constitution retained sexual orientation as a prohibited ground.

The issue arose again during the interview of Chief Justice Willy Mutunga as the first Chief Justice and President of the Supreme Court of Kenya under the new constitutional dispensation.¹⁷⁰ He was forced to address the issue of his sexual orientation because some religious leaders had objected to the ear stud that he wore which put into question his morality and sexual orientation.¹⁷¹ His response was that he wore the ear stud for religious purposes. He categorically stated that he is not gay but he does not discriminate against gay people. That reply closed the debate.¹⁷²

In 2014 members of the Parliamentary Committee on Justice and Legal Affairs rejected the introduction of a Bill similar to the Anti-Homosexuality Bill in Uganda. The Bill would have

¹⁶⁹ CE Finerty 'Being gay in Kenya: The implications of Kenya's new Constitution for its anti-sodomy laws' (2012) 45 *Cornell International Law Journal* 436-438.

¹⁷⁰ As one commentator sarcastically stated, 'Kenyan justice is a sex thing, and orientation is at the centre of it.'; K Makokha 'Elephant in the room during approval hearings for judicial jobs nominees' *Saturday Nation* 11 June 2011 12.

¹⁷¹ 'FIDA Uganda 'Gay rights are human rights!'- Dr Willy Mutunga, 31 January 2012, <http://www.youtube.com/watch?v=PPffwXNuOg> (accessed 30 April 2015).

¹⁷² R Njioka "'I am not gay", CJ nominee Mutunga says' *Standard Digital* 7 June 2011, <http://www.standardmedia.co.ke/business/article/2000036698/i-am-not-gay-cj-nominee-mutunga-says> (accessed 30 April 2015).

imposed harsher penalties for same-sex sexual acts. The Bill was rejected because the proposal was unconstitutional, improperly introduced to parliament and in violation of Kenya's international obligations.

The *Eric Gitari* decision that found the denial of the NGO Board to register a gay organisation amounted to a violation of their rights to freedom of expression and association. This decision can be attributed to the transformative nature of the Kenyan Constitution 2010. Though the decision represents a major boost in the protection of the rights of gays and lesbians as well as providing a more tolerant environment for the operation of the gay community, the community still faces a range of violations familiar in Uganda such as harassment by state authorities, physical violence, blackmail and extortion, death threats and rejection by family and society.

In sum, the Kenyan Courts have adopted a more liberal approach than Uganda in dealing with issues of gay rights. Moreover, there have been very few developments in the legal frameworks targeting discrimination against gays and lesbians in Kenya compared to Uganda. This can be arguably attributed to Kenya having a more tolerant political and legal culture than Uganda

7.9 The role of Parliament in the fight against criminalisation

Apart from the courts, Parliament can also play an important role in the decriminalisation of same-sex sexual conduct. The Constitution gives Parliament legislative powers.¹⁷³ They have the powers to make, amend and repeal laws. Parliament can amend or repeal the relevant provisions in the Penal Code to remove sodomy laws without a judicial decision, thus decriminalising same-sex sexual conduct. There are examples of decriminalisation of same-sex sexual conduct through

¹⁷³ Section 44 of the South African Constitution vests its legislative power in Parliament; article 94 of the Kenyan Constitution vests its legislative power in Parliament; article 79 of the Ugandan Constitution vests its legislative power in Parliament.

a purely legislative process in the African continent and beyond. The South African Parliament is the only parliament in Africa that approved a Constitution which recognised sexual orientation as a prohibited ground of discrimination. The Constitutional Court was aided by this provision to deliver a judgement that declared sodomy laws unconstitutional and invalidated them. The NCGLE used litigation as a strategy to decriminalise same-sex sexual conduct, where they challenged the constitutionality of the common law offence of sodomy. The Constitutional Court held that the common law offence of sodomy violated the rights to equality, dignity and privacy, and were thus unconstitutional. Parliament's role was to repeal the relevant provisions in the Sexual Offences Act, 1957, that were considered unconstitutional in accordance with the decision of the Court, thereby decriminalising same-sex sexual conduct in South Africa. The South African Parliament amended the law by giving effect to the ruling of the Constitutional Court.

There are examples outside the continent where same-sex sexual conduct was decriminalised through a legislative process. For example, in Fiji a new Penal Code was adopted in February 2010 that included a repeal of the sodomy laws.¹⁷⁴ Canada passed an omnibus Bill in 1969 to change its criminal laws which included a repeal of provisions criminalising same-sex sexual conduct between consenting adults.¹⁷⁵ Scandinavian countries such as Finland, Sweden and Norway also decriminalised same-sex sexual conduct via legislative change between 1933 and 1944.¹⁷⁶

¹⁷⁴ Same sex law in Fiji decriminalized, UNAIDS <http://www.unaids.org/en/resources/presscentre/featurestories/2010/march/20100304fiji> (Accessed 8 May 2015)

¹⁷⁵ Trudeau's Omnibus Bill: challenging Canadian taboos Les Archive De Radio Canada http://archives.radio-canada.ca/pour_les_profes/642/ (Accessed 8 May 2015).

¹⁷⁶ J Ryndstrom *introduction to criminality queer: homosexuality and criminal law in Scandinavian* (1999) 32.

The decriminalisation of same-sex sexual conduct through Parliament in Kenya and Uganda is not impossible. There are two ways which Kenyan and Ugandan Parliaments could use to decriminalise same-sex sexual conduct. The first approach would require Parliament of their own volition to introduce and pass an amendment Bill to the relevant provisions in the Penal Code aimed at repealing section 162 and 145 of the Kenyan and Uganda Penal Codes respectively, which criminalises same-sex sexual conduct. This could be made possible if Members of Parliament are able to ignore the opinion of the majority of Kenyans and Ugandans on the subject. This approach was adopted by Canada and Fiji to decriminalise same-sex sexual conduct.

The second approach would require Parliament to give effect to a judicial decision. Kenyan and Ugandan Constitutions recognise a judicial role to review legislation for its consistency with the provisions of the Constitution.¹⁷⁷ Courts have been given powers to interpret the Constitution and other laws and where they find legislation inconsistent with the Constitution, such legislation should be invalidated.¹⁷⁸ Article 165(3) of the Kenyan Constitution has given powers to the High Court to determine questions relating to the violation of rights and fundamental freedoms guaranteed in the Constitution.¹⁷⁹ Article 137 of the Ugandan Constitution has given powers to Court of Appeal to interpret the Constitution.¹⁸⁰ Although judges are unelected, they derive their judicial power to review legislation from the people who were part and parcel of the process of

¹⁷⁷ Both Kenya and Uganda are guided by the principle of constitutional supremacy. Constitutional supremacy refers to the system of government in which the law-making freedom of parliamentary supremacy cedes to the requirements of a Constitution.

¹⁷⁸ Article 2 (4) of Kenyan Constitution provides for supremacy of the constitution and any law that is inconsistency shall be declared void to the extent of its inconsistency. Article 2 of Ugandan constitution provides for supremacy of the Constitution and any law inconsistent with the Constitution shall be void.

¹⁷⁹ Article 165 (3) of Kenyan Constitution provides that the High Court has jurisdiction to determine the question whether the right or fundamental freedom in the Bill of Rights have been denied, violated, infringed or threatened.

¹⁸⁰ Article 137 of the Ugandan Constitution gives powers to the Court of Appeal sitting as the Constitutional Court to interpret the Constitution.

making the Constitution.¹⁸¹ Therefore their interpretations of the rights to human dignity privacy and equality to protect gays and lesbians should be respected and enforced. Where the courts invalidate sodomy laws in the Penal Code on the basis that they violate the rights to human dignity, privacy and equality, parliament would have to amend the Penal Code in an attempt to satisfy judicial concerns. In that case Parliament would be giving effect to the court decision. For the approach to apply, a person has to successfully challenge the constitutionality of sodomy laws in court. This approach is dependent on a judicial decision and was used in South Africa to decriminalise same-sex sexual conduct.

7.10 The role of civil society in the fight against criminalisation

CSOs play a vital role in the promotion, implementation and enforcement of human rights. They also contribute significantly to standard setting of human rights norms.¹⁸² They hold the State to account to ensure it realises the rights of its citizens as provided in the Constitution, at the same time empowering citizens to demand their rights.¹⁸³ They serve as a voice for the voiceless, vulnerable and marginalised in society.¹⁸⁴ In order to attain these objectives, they use different mechanisms ranging from strategic litigation to promotional work through human rights education and human rights advocacy.¹⁸⁵ This section discusses the contribution of civil society in South Africa, Uganda and Kenya in the fight against the criminalisation of same-sex sexual conduct.

¹⁸¹ Article 159 (1) of Kenyan Constitution provides that judicial authority is derived from the people and vests in the courts and tribunals established under this constitution. Article 126 (1) of the Ugandan constitution provides that judicial power is derived from the people and shall be exercised by the courts.

¹⁸² HJ Steiner & P Alston *International human rights in context: law politics morals* (2000) 10.

¹⁸³ L Wiseberg 'protecting human rights activists and NGOs' (1991) 13 *Human Rights Quarterly* 529.

¹⁸⁴ Steiner (n 182 above) 11.

¹⁸⁵ Steiner (n 182 above) 11.

As discussed in chapter four, civil society, particularly the NCGLE played a big role in the achievement of the rights of gays and lesbians in South Africa. Despite opposition, they successfully lobbied for the inclusion of sexual orientation in the list of prohibited grounds of discrimination in the equality clause.¹⁸⁶ Their strategy was to create a link between the struggle for the protection of gay and lesbian rights and the fight against apartheid. This gave them an opportunity to work closely with ANC officials as well as ensuring that the gay rights agenda formed part of the entire political agenda of ANC.¹⁸⁷ In their official submission to the Constitutional Assembly, the NCGLE argued that equality and non-discrimination are the fundamental and overriding principles of the South African Constitution.

They further submitted that discrimination against gays and lesbians displays the same basic feature as discrimination on the grounds of race and gender.¹⁸⁸ They created a link between racism and homophobia.¹⁸⁹ This approach emphasised the commonalities between discrimination on the basis of sexual orientation and race and gender thus gathering support from other groups from civil society, such as anti-racist and feminist groups.¹⁹⁰ They also argued that sexual orientation is fixed, immutable and therefore part of the natural order and human identity. Just like heterosexuality, homosexuality was a legitimate expression of human sexuality; and since the Constitution was committed to promote human rights, it should recognise and protect the rights of homosexuals, as a minority group, from oppression and discrimination in society.¹⁹¹ These submissions saw the inclusion of sexual orientation in the interim Constitution and its

¹⁸⁶ H de Ru 'A historical perspective on the recognition of same-sex unions in South Africa' (2013) 19 *A Journal of Legal History* 229.

¹⁸⁷ de Ru (n 186 above) 229.

¹⁸⁸ E Christiansen 'Ending the apartheid of the closet' (2000) 32 *New York University Journal of International Law* 12.

¹⁸⁹ de Ru (n 186 above) 229.

¹⁹⁰ de Ru (n 186 above) 229.

¹⁹¹ Christiansen (n 188 above) 12.

retention in the final Constitution despite their efforts being met with significant stigma and opposition.¹⁹²

Their contribution did not end at the inclusion of sexual orientation in the Constitution. After the promulgation of the Constitution, the NCGLE engaged in strategic litigation to secure pro-gay court decisions in order to realise equal rights for homosexuals.¹⁹³ The strategy consisted of identifying the concerns of gays and lesbians and then ranking them according to their viability.¹⁹⁴ They began to petition the courts on issues they considered easier, such as equal age of consent. This was followed by litigation on issues considered more controversial, such as striking down sodomy laws, and laws around adoption and same-sex marriage.¹⁹⁵ The idea was to adopt an incremental approach to litigation. They used favourable decisions as a basis for other decisions in future.

For instance, in 1998 in *National Coalition*, they petitioned the Constitutional Court to declare the common law offence of sodomy unconstitutional for violating the rights to equality, dignity and privacy.¹⁹⁶ They succeeded in their petition where the Court actually agreed with them and declared the sodomy laws unconstitutional, thus decriminalising same-sex sexual conduct between consenting adults.¹⁹⁷ This particular decision formed a basis for the declaration of the common law definition of marriage unconstitutional in the case of *Fourie*.¹⁹⁸

Even though the NCGLE went to much effort to educate society on the importance of protecting the rights of homosexuals through public awareness campaigns, their main challenge was to

¹⁹² Christiansen (n 188 above) 12.

¹⁹³ Christiansen (n 188 above) 14.

¹⁹⁴ de Ru (n 186 above) 230.

¹⁹⁵ de Ru (n 186 above) 230.

¹⁹⁶ G G Santos 'Decriminalizing homosexuality in Africa: lessons from the South Africa experience' (2011) 44; *National Coalition* case.

¹⁹⁷ *National Coalition* case.

¹⁹⁸ *Fourie* case.

change social attitudes of South Africans regarding homosexuality.¹⁹⁹ Negative attitudes have seen gays and lesbians experiencing homophobic violence, including corrective rape and other hate crimes, notwithstanding the progressive equality clause in the Constitution and Constitutional Court decisions.

The civil society movement in Uganda has been increasingly visible and vocal, particularly after the introduction of the Anti-homosexuality Bill into Parliament in 2009.²⁰⁰ Despite facing resistance and opposition from broader society and government, they have employed innovative ways to fight against criminalisation of same-sex sexual conduct in Uganda. They have formed an umbrella body with the sole purpose of advocating for the rights of homosexuals. They have used incremental approach to petition the courts to interpret the provisions of the Constitution in favour of homosexuals.

The Civil Society Coalition on Human Rights and Constitutional Law (CSCRCL) was formed after the Bill was tabled in Parliament.²⁰¹ It brought together the gay and lesbian movement in Uganda. It was formed to provide a legal response to the Bill as well as the relevant provisions in the Penal Code on same sex sexual conduct.²⁰² The Coalition conducted public awareness campaigns to ensure that sodomy laws were known by the people of Uganda.²⁰³ This was done through press releases, media statements, presentations at conferences and publication of materials on the Bill.²⁰⁴ Further, there were efforts to engage members of Parliament and

¹⁹⁹ Christiansen (n 188 above) 19.

²⁰⁰ A Wasike 'Anti-gay group hits back at rights activist' <http://www.spiegel.de/international/world/gays-and-lesbians-in-uganda-under-pressure-after-new-law-a-964632.html> (accessed 2 March 2015).

²⁰¹ A Jjuuko & F Tumwesige 'The implications of the Anti-homosexuality Bill 2009 on Uganda's legal system' (2013) 15.

²⁰² Jjuuko & Tumwesige (n 201 above) 16.

²⁰³ Jjuuko & Tumwesige (n 201 above) 16.

²⁰⁴ Jjuuko & Tumwesige (n 201 above) 16.

sensitise them on the legal and social impacts of sodomy laws.²⁰⁵ They also prepared a memorandum on the unconstitutionality of sodomy laws in Uganda which was submitted to the chair of the legal and parliamentary affairs committee and clerk to Parliament to lobby and advocate against the Bill, as well as repeal of relevant provisions in the Penal Code.²⁰⁶

Civil society has also adopted an approach similar to the NCGLE in South Africa by challenging laws and actions of government authorities that violate the rights of gays and lesbians in court. There are a number of cases that were decided in favour of the Coalition. The cases of *Victor Juliet Mukasa* and *Rolling Stone* are examples of cases taken to court on the basis that the rights to dignity and privacy of the petitioners were violated.²⁰⁷ In addition, in August 2014 the Coalition successfully petitioned the Constitutional Court to declare the Anti-Homosexuality Act 2014 unconstitutional for having been passed without the necessary quorum required by law.²⁰⁸ The Coalition however has not petitioned the Court to challenge the constitutionality of sodomy laws in the Penal Code.

Although civil society in Uganda has managed to organise themselves to identify strategies to decriminalise same-sex sexual conduct, the environment has not been conducive to allow them carry out their advocacy work.²⁰⁹ Unlike the NCGLE in South Africa, that received political support in fighting against the criminalisation of same-sex sexual conduct, their Ugandan counterparts have not been supported politically.²¹⁰ Politicians have used the existence of

²⁰⁵ Jjuuko & Tumwesige (n 201 above) 16.

²⁰⁶ Jjuuko & Tumwesige (n 201 above) 16.

²⁰⁷ *Victor Juliet Mukasa* case; *Rolling Stone* case.

²⁰⁸ *Oloka-Onyango & 9 others v AG* Const. Petition No. 8 of 2014; F G Mutebi 'why was Uganda's anti-homosexuality law struck down' (2014) <http://www.aljazeera.com/indepth/opinion/2014/08/why-was-uganda-anti-homosexuali-201481194426136709.html> (accessed 21 February 2015).

²⁰⁹ A Kretz 'From kill the gays to kill the gay rights movement: the future of homosexuality legislation in Africa' (2013) 11 *Northwestern Journal of International Human Rights* 208.

²¹⁰ A Kretz (n 209 above) 209.

sodomy laws to discourage the formation of a gay rights movement in Uganda.²¹¹ Those who are registered have found it nearly impossible to operate without administrative interference from the public officials in their work. Sometimes they have held press conferences with masks over their heads to protect their identity for security and safety reasons.²¹²

There is little that civil society can contribute to the protection of the rights of gays and lesbians in Kenya at the moment because the government declined to register the National Gay and Lesbian Human Rights Commission (NGLHRC).²¹³ As discussed above, the application to register was denied in 2013 because the NGO Coordination Board, which has the mandate to register civil societies in the country, argued that the group's name was 'unacceptable' because of two reasons. First, the board argued that the Penal Code of Kenya criminalises same-sex sexual conduct and thus registering them will perpetuate criminalised conduct. Second, the board argued that religious and moral values of the people of Kenya do not allow the existence of such organisation in the society and the proposed organisation sought to advocate for the rights of people who are not socially accepted.²¹⁴

Two counterarguments could be advanced. First, the Constitution of Kenya allows recognition and protection of the rights of every person including minority groups such as gays and lesbians. Although, the Board may or may not be correct about the moral and religious views of Kenyans, the Constitution does not recognise the limitation of rights based on moral and religious grounds. The Constitution protects people with unpopular views and minorities regardless of the views of the majority. Therefore any court interpreting the Bill of Rights in the Constitution should

²¹¹ A Kretz (n 209 above) 209.

²¹² Englander (n 52 above) 1270.

²¹³ <http://www.gaystarnews.com/article/why-gays-are-suing-kenyas-government291013> (accessed 8 May 2015).

²¹⁴ <http://www.gaystarnews.com/article/why-gays-are-suing-kenyas-government291013> (accessed 8 May 2015).

uphold the law and not popular views or views of the majority. Second, the Kenyan Penal Code criminalises same-sex sexual conduct between two consenting adults but has no provision prohibiting people from being gay or lesbian or to associate in pursuit of common interests. The organisation was aimed at advocating for the protection of people whose sexual orientation is either gay or lesbian but not perpetuating same-sex sexual conduct. Thus, they are entitled to their constitutional guarantee of freedom to associate.

The decision to deny them registration has made it impossible for the NGLHRC to serve gays and lesbians in Kenya through advocacy, education and public interest litigation. The aim of NGLHRC was to advance full participation, equality and inclusion of homosexuals in Kenya. Lack of formal registration has compromised the ability of the organisation to operate because it cannot enter into basic contracts such as leasing premises or opening bank accounts, thus curtailing its ability to raise funds to support advocacy. It has also violated their right to freedom of association and non-discrimination.

The NGLHRC challenged the decision of the NGO Coordination Board in the High Court on the basis that the denial to register violated the right to freedom of association as well as non-discrimination as guaranteed in the Constitution. The Court agreed with the petitioner and held that the denial to register violated the right to freedom of association thus unconstitutional. The government appealed to the Court of Appeal against the decision. The appeal is yet to be heard and decided. A decision in favour of the registration of NGLHRC could provide the foundation for a legal strategy that might later allow a direct challenge of the constitutionality of sodomy laws in the Penal Code.

To sum up, civil society advocates for the rights of gays and lesbians have been allowed to register in Uganda and South Africa. This has helped in facilitating their operational activities of public awareness campaigns, advocacy and strategic litigation as well as enjoying their right of freedom of association and assembly. Kenya, on the other hand, has not allowed gays and lesbians to register their organisation. This has affected their operational activities including strategic litigation, which could be used to challenge sodomy laws.

Civil society in South Africa and Uganda has employed strategic litigation as a way to challenge sodomy laws and actions of governments that violate the rights of homosexuals respectively. They both adopted the incremental approach to litigation where favourable decisions formed basis for future petitions. Further, the arguments presented by the counsel for civil society have had a huge impact on the judgments.

The contribution of lawyers who participated in the litigation of the *National Coalition Case* before the Constitutional Court, in establishing constitutional jurisprudence on the rights of homosexuals in South Africa has been enormous. Therefore, it is important for civil society to engage lawyers who have a clear understanding of the rights of gays and lesbians.

The focus now turns to lessons Kenya and Uganda could draw from the South African experience.

7.11 Conclusion

This chapter had one major objective: to provide a comparative legal analysis of the decriminalisation of same-sex sexual conduct in Kenya, Uganda and South Africa. The chapter started with an analysis of the equality clauses and the rights to privacy and human dignity in

three countries and how they can be utilised as a tool to advance a case for the decriminalisation of same-sex sexual conduct in Kenya and Uganda. The chapter has discussed the role of courts, legal and political culture, Parliament and civil society in the push for decriminalisation and the lessons Kenya and Uganda can draw from the South African experience.

The Bill of Rights in all three Constitutions guarantees the rights to equality, human dignity and privacy. These rights are important in the fight for the decriminalisation of same-sex sexual conduct. According to judicial decisions from foreign courts and international human rights tribunals, sodomy laws violate the rights to equality, human dignity and privacy. The equality clause in the South African Constitution expressly prohibits discrimination on the basis of sexual orientation. This has been instrumental in the push for the decriminalisation of same-sex sexual conduct since it provides a straightforward provision upon which discrimination is not allowed.

That is not the case with the equality provision in both Kenyan and Ugandan Constitutions. On the one hand, the equality clause in Kenyan Constitution has adopted an open list approach which could be interpreted to include sexual orientation as a prohibited ground for discrimination under ‘other status’ category. On the other hand the equality provision on the Ugandan Constitution adopts a closed list approach making it quite difficult to include sexual orientation as a prohibited ground. However, both Kenyan and Ugandan equality clauses prohibit discrimination on the basis of sex. For such to be interpreted in favour of the rights of gays and lesbians, one has to give the equality clause a creative and progressive interpretation by including and reading ‘sexual orientation’ within the ‘sex’ category. This has been described as the ‘sex discrimination argument’. This particular argument has its own weaknesses and therefore it is difficult to entirely rely on it. It is therefore advisable for the argument to be

advanced in conjunction with other arguments or as an alternative to other arguments. It appears the equality clause in the Kenyan Constitution offers two arguments that may be advanced in favour of the decriminalisation as opposed to the Ugandan equality clause that can only offer one argument for the advancement of the same.

On the role of courts, the chapter started on the premise that judiciary has a strong constitutional responsibility to secure the protection of the rights of gays and lesbians through embracing the concept of judicial activism and thus interpreting the equality clauses in the Constitutions creatively and progressively. The Constitutions have entrusted to the judiciary the duty of construing constitutional provisions and safeguarding human rights. Thus, the judiciary must exercise its constitutional powers to ensure the protection of human rights and fundamental freedoms. For judges in Kenya and Uganda to uphold constitutional values such as human dignity and equality, they should not rely on public opinion as a determining factor in resolving constitutional human rights issues, especially with respect to those socially controversial ones such as homosexuality. Instead, they should feel compelled to select those values and principles from the Constitution which promote and protect human rights of all citizens including homosexuals. Judges can extend protection to homosexuals by interpreting the Constitution in a progressive and creative manner. In short, they must embrace the notion of judicial activism.

Parliament can decriminalise same-sex sexual conduct through either amending the relevant provisions in the Penal Code or giving effect to a judicial decision that has invalidated sodomy laws.

The last chapter provides a conclusion and makes specific recommendations.

CHAPTER EIGHT

CONCLUSION, LESSONS AND RECOMMENDATIONS

8.1 Introduction

This concluding chapter has three objectives. First, it restates the major findings of this study. Second, it provides lessons Kenya and Uganda can draw from the South African experience. Lastly, it provides specific recommendations aimed at enhancing the protection of the rights of gays and lesbians in Kenya and Uganda. .

This thesis examined how the rights to equality, human dignity and privacy could be interpreted and applied in favour of the decriminalisation of same-sex sexual acts. It examined how courts could interpret the rights to equality, human dignity and privacy in a progressive and creative manner to protect the rights of gays and lesbians, on the one hand, and how Parliament could repeal the provision of sections 162 and 145 of the Kenyan and Ugandan Penal Codes respectively to decriminalise same-sex sexual conduct. It used Kenya and Uganda as case studies as the two have laws prohibiting same-sex sexual acts between consenting adults and the equality clauses of their Constitutions does not list sexual orientation as a prohibited ground of discrimination. South Africa was used to provide a comparative approach to the study as it has decriminalised same-sex sexual acts after the Constitutional Court declared sodomy laws unconstitutional. South Africa also provides for the protection of the rights of gays and lesbians in its Constitution by expressly including sexual orientation on the list of prohibited grounds of discrimination. It could therefore provide some lessons for Kenya and Uganda.

In order to achieve the aforementioned objective, the thesis first tackled the question whether the criminalisation of same-sex sexual conduct in most African countries including Kenya and Uganda is justified. It then examined the international and regional human rights law position on the decriminalisation of same-sex sexual conduct. After examining the decriminalisation of same-sex sexual conduct in South Africa through the inclusion of sexual orientation in the list of prohibited grounds of discrimination and the decision of the Constitutional Court to decriminalise homosexual acts, it went on to examine the potential of advancing arguments based on the rights of equality, human dignity and privacy guaranteed in the Kenyan and Ugandan Constitutions to make a case for the decriminalisation of same-sex sexual conduct in both countries. This was followed by a comparative analysis of the constitutional frameworks of Kenya, Uganda and South Africa to determine the extent to which equality clauses and the rights to human dignity and privacy could be interpreted and applied to decriminalise same-sex sexual acts in Kenya and Uganda based on the wording of the relevant constitutional provisions. Then the role of courts, legal and political culture, Parliament and CSOs in advancing the rights of gays and lesbians in all the three countries was examined. Lastly, the lessons Kenya and Uganda could learn from the South African experience were provided.

8.2 Justifications for the criminalisation of homosexuality in Africa

One of the questions that this thesis addressed was whether the criminalisation of same-sex sexual acts in most African states including Kenya and Uganda is justified. As demonstrated in chapter two, those who are opposed to the decriminalisation of same-sex sexual conduct base their arguments on moral, cultural, historical and religious grounds. The opponents of decriminalisation of same-sex sexual conduct have argued that homosexuality is a western

import and un-African. This argument contradicts historical facts as there are many examples offered by historians that highlight the existence of same-sex sexual acts in a number of African societies.¹

Religious values have also been used to justify the criminal prohibitions of same-sex sexual acts in Africa. Religious leaders believe that same-sex sexual act is condemned by God and it is against God's nature. This argument has been challenged based on selective interpretation of the Bible. Recent interpretation has questioned whether the Bible condemns same-sex sexual acts.² In addition, most prominent and respected Christians were involved in relationships which would almost certainly be viewed as homosexual in cultures hostile to same-sex eroticism.³ Thus, the condemnation of same-sex sexual acts in the Bible is open to argument.

There is no clash between constitutional supremacy and the acceptance of religion as part of history and society. This has been shown by most constitutions in their preambles referring to 'Almighty God'. For instance, the Nigerian Constitution declares the country to be a 'sovereign nation under God'.⁴ The Kenyan Constitution acknowledges the 'supremacy of the Almighty God of all creation' in its preamble.⁵ From a legal perspective less value is attached to the preamble because it has no specific binding legal force unlike other provisions of the

¹ History shows that there is strong evidence that homosexual behaviour existed in African warrior societies when young men forced to be heterosexually chaste until marriage sought alternative ways to relieve their urges. See R Gaidzanwa 'Masculinities and Femininities at the University of Zimbabwe: Student perspectives and responses through the affirmative action project' in R. Gaidzanwa (ed.) *Speaking for Ourselves: Masculinities and Femininities amongst Students at the University of Zimbabwe Harare, University of Zimbabwe Affirmative Action Project* (2001) 11.

² J Boswell *Christianity, social tolerance and homosexuality: Gay people in Western Europe from the beginning of the Christian era to the fourteenth century* (1980) 240. He has argued that recent interpreters of the story of Lot at Sodom discovered that the story was meant to show God condemning inhospitality not homosexuality. It is also argued that the reference to homosexuality in the New Testament are meant to taint not condemn some of the Israelites' opponents who accepted homosexuality.

³ Boswell (n 2 above) 243.

⁴ Preamble of the Nigerian Constitution.

⁵ Preamble of the Kenyan Constitution.

Constitution. However, there are cases where the preamble embraces one particular religion. For instance the preamble in the Zambian Constitution declares Zambia a ‘Christian nation’.⁶ In such cases the distinction between the church and the State becomes more controversial and it makes the State non-secular.⁷ In spite of that, it is still arguable that the legal force as a matter of strict interpretation makes it subordinate to the supremacy of the Constitution which is affirmed in the more binding provisions of the Constitution.

The argument that Africans traditionally integrated religion in all their societal affairs does not apply in all cases and circumstances. Human experience shows that all people hold opinions and views about something. These views are informed by a number of factors such as religion, education, disappointments, happiness and even their own personal encounters. In a constitutional democracy like Kenya, South Africa and Uganda, it is the values and principles enshrined in the Constitution that matters because these values and principles were agreed upon through an inclusive process. It is not the extent to which views and opinions that are informed by one aspect of life such as religion that counts. It is without a doubt that the Constitution and religion may and often do overlap, but this overlap does not result from the force of religion but from the extent of its inclusion in the Constitution.

This thesis also highlighted the argument that same-sex sexual conduct is socially produced and a personal choice. The labelling of homosexuality as socially produced has led to people believing that sexual orientation can be influenced, and therefore gays and lesbians are in a position to change their lifestyles and become heterosexuals. Evidence from science and

⁶ Preamble of the Zambian Constitution.

⁷ V Klinken ‘Gay rights, the devil and the end times: public religion and the enchantment of the homosexuality debate in Zambia’ (2013) Religion 1-22.

psychology has demonstrated that homosexuality is not limited to time and culture. In addition, there is psychological evidence that homosexuals have no choice about their sexual orientation.⁸ Homosexuality exists around the world and throughout history. As indicated in chapter two, there are convincing arguments to see Kenya and Uganda decriminalise same-sex sexual acts.

8.3 International and regional human rights law

The next issue pertains to the position of international and regional human rights law on the criminalisation of same-sex sexual conduct. The discussion in chapter three showed that the HRC and the ECtHR have held in several cases that sodomy laws violate the rights to privacy and equality of gays and lesbians as guaranteed in the ICCPR and the ECHR respectively. The HRC and ECtHR have put forward two arguments for extending protection to homosexuals. First, they argued that homosexuals should be treated as a sexual minority group that needs a special protection by international human rights law. Second, they argued that same sex sexual acts take place in private between consenting adults. Therefore, their activities do not cause any harm to the public and therefore state interference should be limited to protect their right to privacy.

As demonstrated in chapter three, international human rights law clearly provides a forum through which Kenya's and Uganda's sodomy laws could be challenged. Both countries have ratified the ICCPR. The HRC explicitly held that sodomy laws violate the ICCPR, thus bringing a claim would be the most straightforward approach to attacking Kenya's and Uganda's sodomy

⁸ Dr. Gregory M. Herek, a tenured professor on the psychology faculty of the University of California, Davis, surveyed a U.S. national probability sample of 662 self-identified lesbian, gay, and bisexual adults. Dr. Herek found that 88% of gay men and 68% of lesbians reported they had no choice at all about their sexual orientation, while another 7% of gay men and 15% of lesbians reported only a small amount of choice. Only 5% of gay men and 16% of lesbians felt they had a fair amount or a great deal of choice.

laws in the international arena. However, this may not be happen anytime soon. Although, Kenya and Uganda have ratified the ICCPR they have not acceded to the jurisdiction of the judicial bodies of the ICCPR. Kenya and Uganda are not parties to the Optional Protocol to the ICCPR, which is how a state party recognises the competence of the HRC to receive and consider communications from individuals who claim to be victims of violations by state party of any of the rights guaranteed in the Covenant. This makes the option of using the HRC unavailable until they ratify the Protocol.

An analysis of the European and the American human rights systems has demonstrated that judges have the power to change the direction of the court and apply its substantive and procedural principles to promote the protection of all human rights. Both the Inter-American and European Courts have interpreted the treaty progressively to include sexual orientation in the list of prohibited grounds of discrimination extending protection to the rights of gays and lesbians.

The only way to expand the scope of the African Charter is the ability of the African Union (AU) to elect competent judges. Individuals that serve on the African Commission and African Court are elected using a similar procedure: individuals are nominated by State parties and elected by the Assembly of Heads of States and Government of the AU.⁹ While there is very little information which one can use to determine the attitudes of the judges of the Court so far, the nature of the position of a judge is much dissimilar from that of a commissioner, which could prove to be significant in changing the African view on gays and lesbians.

The Court is populated by judges who, contrary to the commissioners, are prohibited from participating in any activity of a nature that will compromise the independence and impartiality

⁹ Art 33 African Charter and arts 12-14 African Women's Protocol

of the judge.¹⁰ Article 5 of the Rules of Court, further, states that no judge may ‘hold a political, diplomatic or administrative position or function as government legal adviser at the national level’. No commissioner is required to meet such requirements. It could be argued that the judges of the Court, similarly to the judges on the Inter-American Court, would approach matters before them based on the law within its jurisdiction and other relevant sources, as spelled out in the Protocol and the African Charter, with the aim to uphold and protect all human rights. In doing so, they should act separately from the States that have set up this monitoring mechanism to achieve the essential purposes of the Constitutive Act of the AU to promote and protect human and peoples’ rights in accordance with the African Charter and other relevant human rights instruments.¹¹

The African Court should formulate their procedures in a way that would make individual complaints reach it without difficulty. Its willingness to be persuaded to align itself with its regional counterparts is also critical in addressing communication regarding rights of gays and lesbians. It should also be willing to learn and draw some lessons on positive aspects from other regional human rights bodies. In so doing any application challenging sodomy laws is likely to succeed before the Court.

The fact that the rights of homosexuals are recognised by the HRC, the ECtHR, the African Commission, as well as some foreign courts, serves as an indicator to Kenyan and Ugandan courts that this is neither a fleeting right or outrageous claim. They should use the international consensus as a clear indicator that laws prohibiting same-sex sexual acts have no place in Kenya and Uganda, whose Constitutions guarantees the rights to human dignity, equality and privacy.

¹⁰ Art 18 African Women’s Protocol.

¹¹ Art 3(h).

There is no personal liberty when the State uses criminal laws such as sodomy laws to control the lives of homosexuals.

8.4 Differences in the wording of the equality clauses

The next issue is the differences in the wording of the equality clauses in the three Constitutions and how that would affect the extent of protection of the rights of gays and lesbians. The thesis shows that the Kenyan, South African and Ugandan Constitutions contain equality clauses. These equality clauses are worded differently. The equality clause of the South African Constitution lists sexual orientation as a prohibited ground of discrimination while the equality clauses in the Ugandan and Kenyan Constitutions excluded sexual orientation as a prohibited ground of discrimination. The equality clause of Kenyan Constitution adopted the open list approach to prohibited ground of discrimination while the equality clause of the Ugandan Constitution adopted a closed list to prohibited ground of discrimination. The differences in the wording of the equality clauses have an impact on the extent to which the right to equality could protect the rights of gays and lesbians in all the three countries. The thesis further shows that the inclusion of sexual orientation on the list of prohibited grounds of discrimination and progressive interpretation of the constitutional provisions on human dignity, privacy and equality by the Constitutional court were very significant in the decriminalisation of same-sex sexual conduct in South Africa.

As argued in chapter four, the context of apartheid shaped the constitutional making process and the jurisprudence of the Constitutional Court of South Africa. The equality clause in the South African Constitution was a basis for the challenge of constitutionality of sodomy laws. The clause prohibits discrimination on the ground of sexual orientation. The clause guided the

Constitutional Court in evaluating the constitutionality of sodomy laws. In the case of *National Coalition* the Constitutional Court relied heavily but not exclusively on the principle of equality to strike down sodomy laws.

The discussion in chapters five and six shows that the equality clauses in the Kenyan and Ugandan Constitutions do not contain sexual orientation in the respective list of prohibited grounds of discrimination. However, as argued in chapters five and six, advocates for the rights of homosexuals could use the existing prohibited grounds of discrimination to make their arguments. The equality clauses in both Constitutions provide for sex as a prohibited ground of discrimination. The argument advanced must link sex discrimination to sexual orientation discrimination. The advocates have to convince judges to read sexual orientation into the sex category on the basis that criminality of a sexual act committed by a man or a woman turns on the sex of his partner and thus, sodomy laws discriminate based on the sex of the partner.

The only possible way of pushing for the decriminalisation of same-sex sexual conduct in Uganda using the equality provision is, as argued in chapter seven, using the sex discrimination argument. This is because the equality clause in the Ugandan Constitution adopts a closed list approach. Kenya, on the other hand, adopts an open list approach to its equality provision by using the words ‘any other ground including’. This means that the list of prohibited grounds of discrimination is not exhaustive. It could be expanded to include a new and emerging ground such as sexual orientation.

8.5 Role of courts and Parliament in decriminalisation

In chapter seven the role of the courts and parliament in the decriminalisation of same-sex sexual conduct was discussed. The chapter shows that the judiciary has a significant role to play in the protection of the rights of gays and lesbians in Kenya and Uganda. This has been illustrated by cases that have been decided in courts. There is no doubt that courts will still remain an avenue to be used by gay advocates to advance their rights for a considerable period of time. However, there is no clear indication of which direction courts would take if the question of criminalisation of same-sex sexual acts in both countries is challenged on the basis that they violate the rights to human dignity, equality and privacy, considering the prevailing political and legal culture as well as the impact of public opinion on court decisions.

Gay rights advocates should think carefully about the timing and framing of strategic litigation on issues around decriminalisation of same-sex sexual acts before moving to courts to challenge the penal provisions. A number of factors would have to be considered before a court petition is filed. They should consider the political and legal culture as well as public opinion at the time of initiating the court process.

The recent judicial decisions in Kenya on gay rights also give some hope to the gay community. In *Eric Gitari* the Court allowed the registration of an LGBTI organisation to advance their interests. This does not mean that progress in this regard will be easy considering the time societies around the world have taken to deal with the question of decriminalisation of same-sex sexual acts. However, the decision of the Court in this case reflects a bench that is confident, progressive and transformative. The Kenyan Constitution has played a big role in reaching such a bold decision.

Uganda has also recorded victory in the courts. In the *Oloka-Onyango* case, the Court struck down the Anti-Homosexuality Act 2014 on the basis of a lack of a quorum without addressing substantive rights issues involved in the case. In my view, it was easy for the Court to invalidate the law without having addressed the more controversial human rights issues raised in the legislation. The Court is yet to address the question of sodomy laws being discriminatory against gays and lesbians. Secondly, the declaration of the law unconstitutional by the court does not stop anyone from introducing new legislation to further criminalise same-sex sexual acts in Uganda. It is hard to predict at this moment which direction the court would take if such situation happens.

At the same time it is crucial to remain sensitive to the possible negative effects of progressive and transformative judicial decisions, which are fuelled by the popular opinion on the topic. For instance the *Eric Gitari* decision was followed by the *Weekly Citizen* newspaper publishing names and photographs of gay rights activists. This exposed them to more police harassment and public humiliation. Religious leaders also expressed their opposition to the decision.

The other challenge that could arise where judicial decisions favour gay rights advocates is the battle over separation of powers between legislature and judiciary and the question of over-judicialisation of controversial social issues. This was the case in India. After the High Court in *Naz Foundation* declared sodomy laws unconstitutional, the Indian Supreme Court overturned the decision stating that it is only Parliament that has the power to repeal the law to decriminalise same-sex sexual acts in India.

Although there is no doubt that the battle for the decriminalisation of same-sex sexual acts in Kenya and Uganda will be long and rough, gay rights advocates should keep fighting and they will eventually emerge victorious. It is universally accepted that discrimination on the ground of race is prohibited and evil. It is also universally accepted that discrimination against women in all spheres is prohibited. Changes take place. Changes will take place. It is a matter of time before sodomy laws are invalidated or repealed in Kenya and Uganda.

The struggle for the realisation of the rights of homosexuals in Kenya and Uganda has always proved difficult because their sexual orientation is not acceptable to the majority. One may assume that those who oppose same-sex sexual acts do so in the belief that it is unnatural, immoral and unbiblical. This is understandable to the extent that many people's religious faiths teach that same-sex sexual act is not right. However, whereas sympathy can be extended to this assertion, it cannot be correct to allow the majority to prescribe to the minority what is correct and acceptable to the minority simply because the majority enjoys numerical advantage over the minority. Powell J in *Furman v State of Georgia*¹² correctly pointed out that reliance on majority perceptions in human rights analysis when he stated:

The weight of evidence indicates that the public generally has not accepted either the morality or social merit of the views so passionately advocated by the articulate spokesmen for abolition. But however one may assess the amorphous ebb and flow of public opinion generally on this volatile issue, this type of inquiry lies at the periphery – not the core of judicial process in constitutional cases. The assessment of popular opinion is essentially a legislative not a judicial function.¹³

¹² *Furman v State of Georgia* (1972) 43.

¹³ *Furman* para 44.

A similar statement was made by Jackson J in an earlier decision of *West Virginia State Board of Education v Barnette and Others* when he stated:

The very purpose of the Bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities.....and to establish them as legal principles to be applied by the courts. One's right to life.....and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.¹⁴

It is clear that while public opinion is important in setting the parameters of a public discourse on issues of homosexuality, it must not be permitted to override what are clearly legal doctrines in the analysis of the rights of gays and lesbians. In view of that, courts must be cautious at all times to ensure that they do not reduce themselves to courts of public opinion by throwing away legal principles and pandering to the ideas and caprices of the majority.

It was also argued in chapter seven that Parliament has a dual role to play in the decriminalisation of same-sex sexual conduct in Kenya and Uganda. One way is through passing an amendment to the Penal Code to remove provisions that criminalises same-sex sexual acts. The other way is to give effect to a court decision that has invalidated sodomy laws on the basis of being in violation of constitutional provisions.

The focus now turns to lessons Kenya and Uganda could draw from the South African experience.

¹⁴ *West Virginia State Board of Education v Barnette and Others* (1942) 638.

8.6 Lessons for Kenya and Uganda from the South African experience

The drafting history of the South African Constitution and context shaped the realisation of the rights of gays and lesbians in South Africa. Therefore lessons need to be drawn cautiously, taking into account those two factors.

The process of drafting the South African constitution was a deliberate attempt to have an instrument of government that embraced basic human rights.¹⁵ The Final Constitution not only included numerous constitutionally enforceable rights but also established a society based on democratic values, social justice and rights and fundamental freedoms. The Constitution included an equality clause that prohibited unfair discrimination on the basis of sexual orientation to address the historical plight of gays and lesbians. They wanted an instrument that would remind all South Africans that all historical promises would remain relevant to address present and future problems. The Constitutional Court has always reminded all South Africans of the commitment they made in the Constitution even when the commitments are challenging and personally disfavoured.

Context is vital in helping the court to assess the impact of sodomy laws on gays and lesbians. The Court had to consider the context of the existing discrimination as well as the context of the rights guaranteed in the Constitution. Context showed that sodomy laws in South Africa were used as a tool of oppression and expression of social approval.¹⁶ This was unacceptable under the new constitutional dispensation. The Constitutional Court has categorically stated that it is

¹⁵ J Faull 'Praising the South African Constitution.' Africa is a country (blog) https://www.google.co.za/search?sclient=psy-ab&biw=1024&bih=628&noj=1&q=Jonathan+Faull+%E2%80%98Praising+the+South+African+Constitution%E2%80%99+africa+is+a+country&oq=Jonathan+Faull+%E2%80%98Praising+the+South+African+Constitution%E2%80%99+africa+is+a+country&gs_l=serp.12...13002.14378.1.16362.7.7.0.0.0.0.523.924.4-1j1.2.0...0...1c.1.64.serp..5.0.0.YgH4jfr-RE accessed on (17 February 2016).

¹⁶ *National Coalition* para 151.

impossible to ignore context and declared it was not blind to the context in which some rights were included in the Constitution.¹⁷

The Court has approached the discrimination and violence towards gays and lesbians as a contextual reality that has been reflected in their decisions rather than looking at it as an unfortunate fact to be ignored. The Court has acknowledged the exclusion of gays and lesbians from recognition of their relationships as well as discrimination they faced on the ground of their sexual orientation. The Court went further to acknowledge the negativity with which gays and lesbians are commonly viewed in South Africa and strongly affirmed that ‘the ubiquity of a prejudice cannot support its legitimacy.’¹⁸

This was clearly pointed out in the discussion of religious views against same-sex marriage. Justice Sachs acknowledged the role of procreation in religious understanding of marriage but denied its importance to a legal understanding of marriage as an institution.¹⁹ The court emphasised that it has a constitutional duty to take seriously religious views of the majority of South Africans as well as protect the rights of the marginalised and vulnerable in society. The Court stated that ‘certainly the court cannot assess the correctness of particular biblical interpretations of sources of law but it can assess that marriage equality has no direct impact on marriages of traditional believers.’²⁰ Thus the court cannot use religious views of some as a guide to the interpretation of the constitutional rights of others.²¹ The legislative support for gay rights from the ANC and the discussions of the meaning and importance of protecting gay rights

¹⁷ *National Coalition* para 153.

¹⁸ *National Coalition* para 113.

¹⁹ *Fourie* para 85.

²⁰ *Fourie* para 92.

²¹ *Fourie* para 92.

in the context of South Africa's constitutional values dramatically supported the realisation of substantive equality for gays and lesbians.

Four lessons could be drawn from the South African experience for Kenya and Uganda. First, gay rights advocates should identify their demands and rank them according to their viability. The ones considered easier demands should be brought to court first, such as a petition for registration of an organisation that advocates for their rights to enable them enjoy their freedom of assembly, expression and association. Any court ruling that grants gays and lesbians the right to form an organisation could provide the basis for a legal strategy that may later allow a direct challenge to the provisions in the penal code. This could be followed by an issue that may be considered more controversial by many such as challenging the constitutionality of the sodomy laws in the Penal Code. The idea would be to use an incremental approach to litigation. Favourable decisions to homosexual petitioners would form the basis for further decisions dealing with their rights. In this sense, the role of the judiciary is very fundamental in the fight against criminalisation. Courts in South Africa have played a significant role in striking down legislation against same-sex sexual conduct, despite public opinion, thus sending a message of tolerance and respect for human rights. Courts have issued progressive judgments and judicial orders to steer State organs to act on their constitutional obligations.²²

Second, the importance of the equality clause in the Constitution as a starting point for a strategy to fight for the promotion and protection of the rights of gays and lesbians cannot be over-emphasized. The fight for equality principles, non-discrimination, human dignity and privacy was essential in order for the South African Constitutional Court to declare sodomy laws

²² The *National Coalition* and *Fourie* cases forced the government to repeal laws on that criminalised homosexuality and prohibited same sex unions respectively.

unconstitutional. The absence of sexual orientation as a prohibited ground of discrimination in the Kenyan and Ugandan Constitutions does not necessarily make the strategy unattainable in both countries. Both the Kenyan and Ugandan Constitutions establish general principles of equality and non-discrimination, as well as the recognition and protection of the right to human dignity and the right to privacy. This can and should be used by gay rights advocates as a tool to fight against criminalisation of same-sex sexual conduct.

Third, the impact of international and comparative law on gay rights jurisprudence in South Africa cannot be overstated. Apart from constitutional provisions, the Constitutional Court of South Africa drew greatly from the decisions from foreign courts in adjudicating over the constitutionality of sodomy laws. The expansive case law prohibiting discrimination based on sexual orientation is very significant in a comparative context, particularly at the moment when a number of domestic courts are adjudicating and debating the issue. The comparative aspect also indicates that the social-cultural perceptions of same-sex sexual conduct are now a transnational phenomenon.

Lastly, change through judicial decisions without popular public support is an ineffective, insecure and more symbolic strategy in protecting the rights of gays and lesbians in any jurisdiction. Without changes in public opinion, steady legal gains of the last twenty years are threatened by a potential constitutional amendment in South Africa. Gay rights advocates in Kenya and Uganda should note that the legal protections of homosexuals require four factors, which are mutually exclusive, to be present: constitutional text; a confident, progressive and transformative bench; a supportive political class; and a strong public support.

The next section provides specific recommendations to a number of institutions and individuals.

8.7 Specific recommendations

This section makes specific recommendations to National Human Rights Institutions (NHRIs), Kenyan and Ugandan governments, political leaders, Parliament, the African Commission, the gay and lesbian community in Kenya and Uganda and CSOs to enhance the protection of gays and lesbians in Kenya and Uganda.

8.7.1 To National Human Rights Institutions (NHRIs) in Kenya and Uganda

NHRIs, such as the Kenya National Commission on Human Rights and the Ugandan Human Rights Commission working closely with NGOs should realise that it falls on them as government institutions responsible for the promotion and protection of human rights for all to develop strategies that will ensure rights of gays and lesbians are realised, protected and respected. They have a constitutional and statutory duty to defend and advance the protection of the rights of all citizens in their respective countries including gays and lesbians. They need to conduct large-scale education and public awareness campaigns to dislodge citizens' beliefs that homosexuals are not entitled to equal rights. In addition, as human rights advocates, they should challenge the constitutionality of sodomy laws in Kenyan and Ugandan courts. They should initiate strategic public interest litigation and move the courts to strike down sodomy laws on the basis that they contravene relevant Constitutional provisions.

Public interest litigation plays a vital and significant role in directing the course of the rights of homosexuals. It can be launched not just to win a case but also as part of a broader reform agenda to create awareness on homosexuality in society.

In addition to litigation, it is recommended that greater focus must be placed on the process of 'integrative and constructive dialogue' with governments, rather than a narrow focus on

litigation. This is because such engagement allows for a far more extensive participation of non-governmental organisations and members of the public than court processes and thus would have a stronger claim to greater legitimacy. It is when people engage one another openly on the rights of gays and lesbians that these rights can be taken away from sophistry to the day-to-day life of people as they live it in bars, villages and streets. Besides, outcomes of political consultative processes and dialogue have a greater acceptability to the people than court decisions. As the Roman Catholic theologian John Courtney Murray strongly remarked, ‘civility dies with the death of dialogue’.²³

8.7.2 To the Kenyan and Ugandan Parliaments

It is necessary for Kenya and Uganda to decriminalise same-sex sexual acts through legislative processes to allow homosexuals to freely form and engage in sexual relationships without fear of arrest and harassment. Parliament should repeal relevant sections in the Penal Code that criminalise consensual same-sex sexual acts. Moreover, Parliament should pass a comprehensive equality and non-discrimination law that expands prohibited grounds of discrimination to include sexual orientation because the ground was excluded from the equality clause in the Constitutions. The existing legislation does not include sexual orientation in the list of prohibited grounds of discrimination. This will offer protection to gays and lesbians in political, economic and social spheres.

8.7.3 To the political class

The decriminalisation of same-sex sexual acts alone will not suffice, since the views against same-sex sexual acts are still heavily embedded in the minds of many Ugandans and Kenyans.

²³ M Nussbaum *Sex and Social Justice* (1999) 185.

They strongly believe that same-sex sexual conduct is unacceptable behaviour in Africa. In order to remove the stereotypes, prejudices, hatred and related homophobic tendencies from the minds of people, political leaders in Kenya and Uganda should engage in a decisive, unbiased and broad based process of expansive sensitisation of its people to the idea that homosexuals are human being as well and equally deserving of dignity and respect to their personhood. As Fanon explains:

Sometimes people hold a core belief that is very strong. When they are presented with evidence that works against their belief, the new evidence cannot be accepted. It would create a feeling that is extremely uncomfortable, called cognitive dissonance. And because it is important to protect core belief, they will rationalise it, ignore and even deny anything that does not fit in with the core belief.²⁴

It is this cognitive dissonance about same-sex sexual act that must be addressed to remove prejudices and homophobic tendencies. Since the law alone might not be able to address cognitive dissonance, the political class and all people of influence should help in addressing these beliefs and attitudes.

8.7.4 To the Government

The Kenyan and Ugandan governments should ensure that in the composition of the National Gender and Equality Commission and the Ugandan Human Rights Commission respectively, at least one commissioner specifically represents the interests of gays and lesbians. The Australian government appointed Mr. Tim Wilson as a commissioner in the Australian Human Rights

²⁴ F Fanon *The wretched of the earth* (2004) 230.

Commission in February 2014.²⁵ Wilson is openly gay and is an advocate for gay rights and same-sex marriages.²⁶ He represents interests of gays and lesbians in the Commission.

8.7.5 To the CSOs

CSOs should play an active role in submitting shadow reports to human rights treaty bodies and presenting complaints for violations of the rights of homosexuals under the various international and regional mechanisms available. International pressure can force legal reforms of discriminatory provisions and influence the conduct within states. CSOs should also develop programmes that sensitise the police and judicial officers on issues concerning gays and lesbians.

8.7.6 To the gay and lesbian community

The gay and lesbian community in Kenya and Uganda needs to be seen and heard, not just on the issues touching on their rights, but also other issues of public interest and governance. Furthermore, gay and lesbian community should collaborate with CSOs to initiate an action for the striking down of the sodomy laws on the basis that they are unconstitutional.

8.7.7 To the African Commission and UN Human Rights Council

At the regional level, the African Commission should coordinate and streamline efforts aimed at the protection and promotion of rights of gays and lesbians in Africa. In particular, it must spearhead research around the issue in line with article 45 of the African Charter so that policy makers and other role players could make interventions or can act on the basis of credible

²⁵<http://www.attorneygeneral.gov.au/MediaReleases/Pages/2013/Fourth%20quarter/17December2013-AppointmentofMrTimothyWilsonasHumanRightsCommissioner.aspx> (accessed 24 September 2015).

²⁶ Tim Elliott 'Tim Wilson: Freedom fighter' *Sydney Morning Herald* 22 February 2014.

information.²⁷ In order to succeed in this endeavour, the African Commission should collaborate with (and not shun) NGOs that advocate for the rights of homosexuals. The African Commission should also use state reporting to ensure compliance with the African Charter to enforce state accountability. It should enhance its reporting guidelines to include a section for reporting on the manner in which government authorities deal with gays and lesbians and their commitment to the implementation of a resolution on protection against violence and human rights violations against gays and lesbians that was adopted in April 2014.

In other regional human rights systems such as the European human rights system, it is the ECtHR that has taken the lead in spearheading the protection of the rights of gays and lesbians. The African Commission should borrow a leaf from this and take a strong a progressive approach in interpreting the African Charter to include the protection of homosexuals. The African Commission should call on States to respect and protect the rights of gays and lesbians and pronounce obligations on African states to repeal legislation that criminalises same-sex sexual acts.

At the UN level, it is an appropriate time for the UN Human Rights Council to appoint an independent expert or establish a procedure to monitor and report on violence and discrimination against gays and lesbians and to advise member states on the best way to protect and respect rights of homosexuals.

²⁷ Article 45 of the African Charter provides that ‘in promotion of human rights, the African Commission must undertake studies and researches on African problems in the field of human and people’s rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and people’s rights and should the case arise, give its views or make recommendations to governments.

8.8 Implementation strategy

It would be important for the specific recommendations made above to be brought to the attention of actors mentioned above such as the NHRIs, Parliament, judiciary and CSOs for purposes of formulating practical strategies of implementation. In order to do so, part of this thesis could be given to the Kenya National Commission on Human Rights and the Ugandan Human Rights Commission as well as the LGBTI rights organisations and members of the judiciary to help them internalise the possible constitutional provisions and arguments that could be used to decriminalise same-sex sexual acts in Kenya and Uganda.

All in all, this thesis concludes that the decriminalisation of same-sex sexual conduct in Africa particularly in Kenya and Uganda depends on the domestic courts and not parliaments at the moment. Courts are better placed because of the mandate bestowed on them by the Constitution. They have a constitutional duty to interpret the Constitution by upholding values and principles enshrined in the Constitution. However, because of the passive nature of our courts, judges do not act on their own initiative. They only apply their mind to suitable cases brought before them. Therefore, it is important for gays and lesbians in Kenya and Uganda to know that it is their responsibility to initiate the process by petitioning the court to determine the constitutionality of sodomy laws. However, they should also know that it is difficult to find lawyers who will be willing to take up the cases on the rights of homosexuals due to fear of violence, death threats or stigma. It is therefore crucial for law schools to train a new generation of lawyers who are not only conversant with the arguments but also willing to take up cases and represent gays and lesbians in court. Judges should also be sensitised on issues of sexual orientation through training.

Gays and lesbians should not be so disappointed with the African Commission stance on the rights of gays and lesbians. It took 26 years for the ECtHR to make a decision in favour of gays and lesbians. The first submission to the ECtHR in 1955 which challenged German sodomy laws being in violation of the ECHR failed. There were other subsequent submissions that failed before the 1981 decision in *Dudgeon* that found sodomy laws in Northern Ireland in were in violation of the provisions of the ECHR.

In addition, gays and lesbians should not expect too much from the African Commission as a regional human rights body. Practice has shown that positions taken by such institutions tend to follow rather than lead national trends. It was only after a number of European countries had decriminalised same-sex sexual conduct acts that European human rights bodies enforced this position at the regional level. So far only South Africa has decriminalised same-sex sexual acts. The African Commission could be waiting for more African countries to decriminalise these acts before it can make a decision in favour of decriminalisation of same-sex sexual conduct.

Although there is no doubt that the battle for the decriminalisation of same-sex sexual acts in Kenya and Uganda will be long and rough, gay rights advocates should keep fighting and they may eventually emerge victorious. It is universally accepted that discrimination on the ground of race is prohibited and evil. It is also universally accepted that discrimination against women in all spheres is prohibited. Changes take place. Changes will take place. It is a matter of time before sodomy laws are invalidated or repealed in Kenya and Uganda.

These conclusions and recommendations are not just matters of academic interest, nor are they frivolous speculations around a controversial topic. Quite literally, for tens of thousands of gay and lesbian people across Africa, they are a matter of life and death. They also speak to the

innate dignity all humans have, a dignity cruelly and unfairly denied to this minority of people,
whose time for social and legal protections has come.

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