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ATTITUDES OF THE NAMIBIAN POLICE TOWARDS LESBIAN AND GAY GROUPS IN KATUTURA

by

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DECLARATION

I, the undersigned, hereby declare that the work contained in this dissertation is my own original work and has not previously in its entirety or in part been submitted at any other university for a degree.

ACKNOWLEDGEMENTS

I would like to dedicate this paper to my family and friends for the support and encouragement they have given me. I also want to thank my supervisor Prof M Hansungule for supervising this dissertation. Thank you so much and God bless you.

ABSTRACT

The plight of the LGBT community in has been pronounced Namibia with several individuals being discriminated, beaten and even arrested. More often than not, their human rights are abused by the community including the police who have a mandate to serve and protect all individuals. Feeling like social outcasts, some LGBTI persons have been pushed to extremities including considering suicide as an escape to the pressures of their often constricted world that is characterized by name-calling and insult.

A quick survey of Namibia's law reveals a conflicted position that is not clear on the legality of homosexuality. However in 2001, the Supreme Court in a landmark decision ruled that the Constitution does not criminalize homosexuality. Regardless of this critical ruling, the Namibian society remains a highly homophobic country whose political leaders have often issued instructions to arrest and deport homosexuals. The study therefore examines the history, tolerance and experiences of the LGBTI community in order to highlight the need to secure human rights for all. The idea of pursuing a study on the attitudes of police officers towards homosexuals finds its roots in the Wendelinus Hamutenya spectacle, a Namibian homosexual man who suffered violent homophobic attacks at his place of residence in Katutura. Mr Hamutenya had just returned from South Africa where he had been crowned the winner of Mr Gay Namibia, when a mob of men swooped on him. The gay man sought to press charges against his assailants and proceeded to the Wanaheda Police Station in Katutura where he opened up two complaints. This case comprised of assault with the intent to do grievously bodily harm, threats to murder, and *crimen injuria*. The researcher was overwhelmed with emotion upon learning that Mr Gay's dockets had vanished from the police station and the police officers could not do anything as far as his cases were concerned.

LIST OF ABBREVIATIONS

ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ICJ:	International Court of Justice
LGBTI:	Lesbian, Gay, Bisexual, Transgender and Intersex
ORN:	Out Rights Namibia
UDHR:	Universal Declaration of Human Rights
UN:	United Nations

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CHAPTER ONE

1 INTRODUCTION

1.1 Background of the study

In many countries around the world, several lesbian, gay, bi-sexual and transgender persons endure diverse human rights abuses because of their sexual orientation. To put this in perspective, thirty-six states in Africa still prohibit homosexual relations between consenting adult males.¹ Such relationships are considered as a criminal offences which even attract the death penalty in four African states including Mauritania, Sudan, northern Nigeria and Southern Sudan.² Instead of reforming these unreasonable laws, several other African states are aiming at steepening the penalty for homosexuality from prison sentences to the death penalty.³ These countries include Uganda, Liberia, Burundi and Nigeria.⁴

Similarly, many lesbians and gays in Namibia are subjected to discrimination, stigma and labelling. They are often treated in cruel and inhuman manner, which society actively encourages.⁵ In addition to the recognised names Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI), which are accepted by civilised societies the world over, the Namibian society has coined other derogatory names or terms. These names and terminologies demonstrate societal intolerance towards LGBTI, for they are referred to as “omasheng”, “gamas”, and “moffies” in the local Namibian languages.⁶

¹ LGBTI Rights: mapping anti-gay laws in Africa. Tightening laws and increasing punishments. Available at: <https://www.amnesty.org.uk/lgbti-lgbt-gay-human-rights-law-africa-uganda-kenya-nigeria-cameroon> (accessed 12 August 2015).

² As above.

³ T Walker (14 March 2014) 'How Uganda was seduced by anti-gay conservative evangelicals: Critics of the country's homophobic law blame the views of fundamentalist US Christians.' Available at: <http://www.independent.co.uk/news/world/africa/how-uganda-was-seduced-by-anti-gay-conservative-evangelicals-9193593.html> (accessed 26 June 2016).

⁴ As above.

⁵ Namibian law on LGBT issues: Gender Research and Advocacy Project Legal Assistance Centre (2015), Available at: http://www.lac.org.na/projects/grap/Pdf/LGBT_mono.pdf (accessed 20 August 2015).

⁶ As above.

Homosexuals are also treated inhumanly when they are detained by police officers. Fellow inmates subject them to physical violence, threats, and sexual abuse while awaiting trial. Their situation is exacerbated by the fact that officers ignore their reports of abuse at the hands of their fellow inmates.⁷ However, several individuals have come together to form groups and communities with the prime objective of protecting and promoting the rights of gays and lesbians in Namibia. The Out Rights Namibia (ORN) is the best examples of such organizations that are pioneering change in the treatment of LGBTI persons.⁸ What is very sad and evident is that Namibians, including the police force, still fail to recognise the LGBT community and its members as human beings. The group is actually seen as cultural disruptors and traitors who have chosen to adopt an alien culture and lifestyle. Religious doctrines also play a debilitating role in as far as the treatment of LGBTI is concerned. Most of the different religious communities in Namibia label LGBTI as sinners or anathema who do not fear God.⁹

The above observations stress the fact that being lesbian or gay in Namibia is seen as a social, religious and cultural problem that is considered contrary to African values.¹⁰ It is common to hear individuals and public figures say that gays and lesbians are taking advantage of Namibian democracy that was attained through sacrifice of lives. Dr Sam Nujoma, the former Namibian President, threatened gay and lesbians saying ‘the police must arrest, imprison and deport homosexuals and lesbians found in Namibia.’¹¹ Embedded in this threat was the insinuation that the LGBT community was not welcome in Namibia. It was actually not only a threat but also an order directed to the police.¹² However, this chain of events does not absolve police officers

⁷ C Ukwimi (2010) ‘Outright Action International formerly known as International Gay and Lesbian Human Rights Commission: Documenting LGBT Discrimination in Namibia.’ Available at: <https://iglhrc.wordpress.com/2011/03/30/documenting-lgbt-discrimination-in-namibia/> (accessed 15 May 2016).

⁸ N 5 above; see also: Outright Namibia (ORN) waves the Rainbow Flag. Available at: <http://search.proquest.com/openview/6a82082e78ba778027efe28d5671823d/1?pq-origsite=gscholar&cbl=25421> (accessed 17 April 2015).

⁹ The Namibian: Prejudice Fuels Denial of LGBT Rights, available at: <http://www.namibian.com.na/index.php?id=122865&page=archive-read> (accessed 17 April 2015).

¹⁰ OSISA: Tough times for LGBTI in Namibia too by Gwen Lister (2013) available at: <http://www.osisa.org/lgbti/blog/tough-times-lgbti-namibia-too> (accessed 10 May 2014).

¹¹ IOL News: “Nujoma declares war on gays and lesbians” Available at: <http://www.iol.co.za/news/africa/nujoma-declares-war-on-gays-and-lesbians-62486> (accessed 10 May 2014).

¹² N 8 as above; See also OSISA: Tough times for LGBTI in Namibia too by Gwen Lister (2013) available at: <http://www.osisa.org/lgbti/blog/tough-times-lgbti-namibia-too> (accessed 18 May 2015).

from the responsibility for human rights abuses. This further demonstrates the plight and discrimination against gays and lesbians in Namibia.

The major problem faced by the ORN, and groups like it, is that the cases opened by gays and lesbians are not attended to by the police.¹³ As a result, gays and lesbians remain victims of crime and human rights violations based on their sexuality and sexual orientation. Being gay in Namibia is considered as practicing sodomy.¹⁴ According to Namibian Common Law which is based on Roman-Dutch law, sodomy is a criminal offence that is punishable and prohibited within the society. Therefore, being gay is a criminal offence in the country. However, there has been one important case reported recently by one of the gays assaulted in Namibia. In this case, the victim was commendably placed under police protection.¹⁵ However, this is indeed an exceptional case. Many other similar cases have been disregarded by the authorities. The disregarding of cases such as these has inevitably left many gays and lesbians living under the threat of being arrested, as they are said to be practicing sodomy.

The Republic of Namibia which was previously known as South West Africa, received independence in 1990.¹⁶ Namibia is a monist state. Monist states do not acknowledge the difference between international and national laws.¹⁷ International law is automatically enforceable within the state and there is no need for translation of international law into national law through the enactment of an act.¹⁸ International law is therefore binding upon Namibia.

The Republic of Namibia is a signatory and member state to the several international human rights treaties aimed at abolishing and eradicating human rights violations. Namibia's adoption

¹³ As above.

¹⁴ P Shipo (2010) 'The Prohibition of same sex marriages and its implication for Namibia's obligation in terms of the Constitution, Various international, and regional human rights instruments.' (Thesis) Available at: <http://www.wisis.unam.na/theses/shipo2010.pdf> (accessed 18 April 2015).

¹⁵ News 24 (2011) 'Mr Gay Namibia beaten up, robbed.' Available at: <http://www.news24.com/Africa/News/Mr-Gay-Namibia-beaten-up-robbed-20111208> (accessed 17 April 2015).

¹⁶ The Namibian struggle for independence – 1966 – 1990 – a historical background, available at: <http://www.sahistory.org.za/article/namibian-struggle-independence-1966-1990-historical-background> (accessed 06 April 2015).

¹⁷ V Moreno-Lax and P Gragl 'Introduction: Beyond monism, dualism, pluralism: The quest for a (fully-fledged) theoretical framework: Co-implication, embeddedness, and interdependence between public international law and EU law' (2016) 35(1) *Yearbook of European Law* 455-470.

¹⁸ As above.

and ratification of international instruments is done in accordance with the principles of monism. Article 144 of the Constitution of Namibia¹⁹ states the international principles and agreements form part of Namibia's common law and are thus binding. The Namibian Constitution therefore adopts the position of international law which expressly becomes part and parcel of Namibian law. In Namibia sodomy is not legal²⁰ and the country has always had difficulties in protecting the rights and liberties of the homosexual people. In fact, it has rather become a 'trend' in the Namibian legal system to exclude homosexual relationships from the important legal provisions.²¹ The Namibian Deputy Minister of Home Affairs and Immigration, Teopolina Mushelenga, in 2005 stated that the homosexuals had 'betrayed' the country during the fight for freedom. He further stated that they were to blame for the deadly HIV/AIDS pandemic and their lifestyle was offensive to Namibia's traditions and customs.²² Hon Kawana also stated that the Domestic Violence Bill '*does not give protection to any homosexual relationships*' because such relationships '*are not recognized by the Namibian customs or by the law of our Republic.*'²³

The paper therefore focusses on a township in Namibia called Katutura, examining the violations many gays and lesbians suffer. It pays specific attention to what goes on when homosexuals are at social gatherings in order to understand how they are treated. It extends the analysis to the treatment they receive from the police when seeking to press charges against those who violate their rights. It further questions whether the police are concerned with protecting human rights of the homosexuals or just criminalising their behaviour, which is said to be unnatural and un-African. Finally, this dissertation proposes strategies that can be employed to change police perceptions towards LGBTI in an effort to recognise and protect the rights of all individuals.

¹⁹ Art. 144 of the Constitution of Namibia.

²⁰ See the Common Law Statutes on the law on Sodomy.

²¹ S LaFont and D Hubbard (2007) '*Unravelling Taboos: Gender and Sexuality in Namibia.*' Gender Research & Advocacy Project, Legal Assistance Centre. Windhoek Namibia. Available at: <http://www.lac.org.na/projects/grap/Pdf/unravellingt.pdf> (accessed 20 June 2015).

²² OutRight Action International (13 September 2005) '*Namibia: African NGOs Respond to Statement by Namibian Deputy Minister on Gays and Lesbians "Betraying the fight for freedom."*' International Gay & Lesbian Human Rights Commission. Available at: <https://www.outrightinternational.org/content/namibia-african-ngos-respond-statement-namibian-deputy-minister-gays-and-lesbians-betraying> (accessed 20 June 2015).

²³ Deputy Minister of Justice (Hon Kawana), Second Reading Speech, National Assembly, 22 October 2002 in Chapter 2: Defining Domestic Violence, 35. Legal Action Center Namibia. Available at: <http://www.lac.org.na/projects/grap/Pdf/seekingch1-3.pdf> (accessed 21 June 2015).

1.2 Problem statement

The unlawfulness of homosexuality which is otherwise known as sodomy in the criminal code, has led to the rights of many homosexuals being infringed upon within the community. Many cases of assault, all sorts of brutality and stigmatisation suffered by the homosexual community and individuals are not usually taken seriously by the police. According to Out Rights Namibia (ORN), a Namibian LGBTI human rights based organization, also known as 'Men having Sex with Men and Women having Sex with Women', such cases are not filed and as a result perpetrators go unpunished and justice is never served. These LGBTI communities also suffer violations under police officers who threaten to detain them as they are said to be committing sodomy. Homosexuals are therefore not protected by the law based on the sexuality or sexual orientation and this contravenes international law that aims to promote and protect human rights of all individuals without distinction.

This study therefore investigated the attitudes of the Namibian Police Officers towards Lesbian and Gay Group in Katutura, one of the most densely populated suburbs in Windhoek. It was also in the interest of the researcher to determine whether or not the act of sodomy and Chapter 3 of the Namibian Constitution are appropriate and functional in a democratic society. A democratic society is founded on the rule of law, justice and respect for human rights and human dignity. It is a society in which people who constitute sexual minorities expect to be protected, unless there is a need to review and reform the efficient and effective implementation of the Preamble of the Namibian Constitution Act No 1 of 1990.

1.3 Research questions

This paper sought to answer to the following questions:

- What treatment do homosexuals in Katutura receive from police officers?
- Should chapter 3 of the constitution be reviewed?
- Should the offence of sodomy in Namibia penal statutes remain on the statute book?

- What is the attitude of police officers in Katutura towards homosexuals?

1.4 Methodology

This dissertation draws information from both primary and secondary sources. The primary sources include interviews with relevant stakeholders including the police, members of the community and some prominent persons. The secondary sources include textbooks, international instruments and journals articles. The methods of data analysis adopted herein include qualitative, descriptive as well as the analytical methods. These methods will be useful in determining the relevant information for this thesis.

1.5 Motivation

The idea of pursuing a study on the attitude of police officers towards homosexuals finds its roots in the Wendelinus Hamutenya spectacle, a Namibian homosexual man who suffered violent homophobic attacks at his place of residence in Katutura. Mr Hamutenya had just returned from South Africa where he had been crowned the winner of Mr Gay Namibia, when a mob of men swooped on him. The gay man sought to press charges against his assailants and proceeded to the Wanaheda Police Station in Katutura where he opened up two cases. The cases comprised of assault with the intent to do grievously bodily harm, threats to murder and *crimen injuria*. The researcher was overwhelmed with emotion upon learning that Mr Gay's dockets vanished from the police station and the police officers could not do anything as far as his cases were concerned.

This paper not only sets out the attitudes of the Namibian police towards gays and lesbians in katutura, but also looks at the patterns of homophobic treatment which this group suffers from members of the Katutura society. It discusses some of the fundamental rights enshrined in the Namibian constitution, and the violations, restrictions and discriminatory practices against the rights of the LGBTI. The paper also discusses the criminalisation of LGBTI with reference to a few regional cases.

The aim of this research paper is to make a positive contribution to education, sexual rights and programs targeting LGBTI and police in Namibia. The objective is to provide evidence to

legislators, organization, and academics which present an in-depth understanding of sexuality within the police officers and the community in Namibia. Exploring police understanding and attitudes towards these issues will enable Namibians to identify the needs of the police in terms of sex identity education and the prevention of discrimination on the basis of sexual orientation. The findings will also serve to identify problematic areas concerning LGBTI that require legislative reformation. In addition, it will aid in the development of educational and training needs for relevant stakeholders.

1.6 Significance of the study

The results of this study would contribute to the overall evaluation of police officers' attitudes in relation to how they protect the human rights of all nationals, or even individuals visiting the country, irrespective of their sexual orientation or choices. The Ministry of Safety and Security could make use of the findings when revisiting the Police Department and Correctional Services policies for further improvement of the protection of LGBTI's rights. In addition, results may also assist in the development of curriculum for staff development, especially when it comes to diverting civil claims meant to compensate victims of unlawful detention, or as a result of infringing on people's rights.

The results may further influence research studies on other government institutions in relation to how homosexuals should receive equal treatment and recognition received by their colleagues in their work environment. It is meant to provide an understanding of humanity and how one's behaviour could have a negative impact on fellow human beings; even learning how to uphold the spirit of "Ubuntu".

1.7 Limitation of the study

The research study faced a number of constraints, namely; securing time for interviews proved elusive as police officers have the tendency of avoiding revealing their *modus operandi*. The fact that the topic at hand is considered sensitive out there did not make the situation better as officers would not want to reveal how they handle homosexuals fearing backlash. However, the

fact that the researcher is a police officer helped soften the usually hard stance taken by senior officers especially at the target section where data had to be gathered.

1.8 Delimitation of the study

The study was confined to the Khomas Region, Windhoek, in the residential area of Katutura.

Figure 1: A Map of Khomas region where the study was undertaken



1.9 Definition of terms

Lesbianism which refers to a female that is attracted to other women sexually, emotionally and romantically, is also a synonym of homosexual, while gay refers to a male person who is attracted to other men sexually, emotionally and romantically, gay is a synonym of homosexual.²⁴ Similarly, a bisexual is a person that is capable of having romantic, sexual and emotional feelings towards another individual of either sexes. In other words, he/she can love another individual either of their own sex or the opposite sex.²⁵

Intersex on the other hand, refers to condition where someone's reproduction organs are not typically or dominantly male or female.²⁶ It has been observed that intersex people often undergo

²⁴ We Are Family: A safe space for LGBTQI and straight ally youth 'Lesbian, Gay and Bisexual Glossary of Terms.' Available at: <http://www.wearefamilycharleston.org/lgbt-a-z-glossary/> (accessed 26 June 2015).

²⁵ We Are Family (n 22 above).

²⁶ As above.

surgical intervention to assign their sex when they are babies. It is believed that such intervention is physically or psychically problematic.

Transgender identifies with both male and female roles, and members of an alternative sex. They sometimes modify their bodies with plastic surgery, hormones or electrolysis. Therefore, transgender refers to people whose gender identities are different from their given sex.²⁷

Sexual orientation should not be confused with **sexual preference** because it is inherent or immutable enduring attraction to another person emotional, relational, romantic or sexual it maybe same-sex orientation, bisexual orientation or opposite sex orientation.²⁸

1.10 Outline of chapters

Chapter two:

This chapter discusses the existing literature on the treatment of homosexuals in Namibia by the community. This chapter examines the ideologies, theories, laws and perceptions towards the LGBTI community and how this affects the enjoyment of human rights. This section will therefore examine theories and concepts like vulnerability, social stigma and gender identity which help to understand the LGBTI community and their interactions with other community members.

Chapter three:

Chapter three focusses on the relationship between the Namibian police and LGBTI individuals in the community. The first step of this assessment would be to determine the structure of the Namibian Police Force and how this influences the effectiveness of the police force. It explores whether LGBTI receive the same protection and treatment by members of the police force. This inquiry is important because the police are the first line of defense against disorder and abuse of human rights. It is therefore important to determine whether members of the LGBTI are treated equally.

²⁷ As above.

²⁸ As above.

Chapter four:

This chapter discusses the international law position on the treatment of LGBTI. Particular attention is given to human rights law which encourages equal treatment of all human beings. This inquiry will also involve an examination of the interaction between international law and Namibian Common Law, and how the two overlap to provide essential protections with particular attention on LGBTI rights.

Chapter five:

Chapter five which is the last section of this thesis is the concluding chapter. It summates the major themes and main points of the dissertation and highlights the major points discussed therein. The chapter also proposes some reforms that will be important in securing the protection of the rights of the LGBTI community.

CHAPTER TWO

2 LITERATURE REVIEW

2.1 Introduction

Apart from increasingly generating conflicts, controversies and misgivings relating to the Lesbian, Gay, Bisexual, Transgender and Intersexual (LGBTI) community continue to rise. This is particularly true in countries where people continue to face wide spread reproach, condemnation and prosecution on the basis of their sexual orientation. There are a lot of misconceptions and innuendoes about members of this community, particularly in most African societies including Namibia.²⁹ The on-going debate on the LGBTI people in Namibia is mainly centered on homosexuality which is harshly condemned both by government and Namibians in general.³⁰ However, there are certain stark differences that exist between Namibia's diverse ethnic groups which influences their conception of LGBT lifestyles.³¹

Apart from South Africa where the rights of gays and lesbians are recognized and protected by law, homosexuals in Africa are largely treated with grave intolerance, outright rejection and lack of recognition. This is unlike most Western societies where homosexuality is treated with greater liberalism.³² In Namibia, members of the LGBTI community are constantly living under fear of homophobic attacks.³³ In addition, discrimination against such persons is prevalent within the community. According the 2013 human rights report on Namibia, discrimination and violence based on gender identity and sexual orientation ranked amongst the top three human rights violations in Namibia.³⁴

²⁹ A Patrick, P Geschiere, and G Reid 'Homophobic Africa? Toward a more nuanced view.' (2012) 55(3) *African Studies Review* 145; L Scott 'Two Novembers: Movements, Rights, and the Yogyakarta Principles.' *World* (2008).

³⁰ Scott (n 29 above).

³¹ A Currier and MC Joëlle 'The politics of pre-emption: Mobilisation against LGBT rights in Liberia.' (2017) *Social Movement Studies* 1-15.

³² Patrick et al. (n 29 above) 146.

³³ R Lorway "'Where Can I be Deported?' Thinking Through the 'Foreigner Fetish' in Namibia." (2008) 27(1) *Medical anthropology* 70-97.

³⁴ Namibia 2013 Human Rights Report. Available at: <https://www.state.gov/documents/organization/220354.pdf> (accessed on 30 June 2015).

For the purpose of this study it is therefore imperative to examine and contextualize some theoretical nuances that clearly define homosexuality, discrimination, social stigma, gender identity and inequality. It is also important to examine other related concepts in order to determine how homosexuals are perceived in the Namibian society.

2.2 Homosexuality

Homosexuality basically involves persons of same sex who are sexually and emotionally attracted to each other.³⁵ Such men and women are therefore categorized as homosexual people. Homosexual refers to individuals who are attracted to people of the same sex romantically, sexually, emotionally and relationally. Homosexuality according to Richard Isay, is hinged on the predominance of same-sex sensual preference over time.³⁶ The definition of homosexuality in its self is very debatable because different lifestyles and behaviors have been confused with sexual orientation. It is argued that sexual orientation can be divided into four parts: the biological sex; gender identity; social sex role; and sexual orientation.³⁷ It is important to understand that biological sex, social sex roles and gender identity does not relate to sexual orientation.³⁸ The terms 'gay' and 'lesbian' are most popularly used by people who identify themselves as homosexuals in contrast with the term 'straight' that is used by heterosexual people.³⁹

The process of 'coming out' publicly and identifying yourself as gay or lesbian can be the most challenging period in the lives of homosexuals living in a homophobic society such as Namibia.⁴⁰ It has been argued that homosexuality often results from an exposure to inadequate sex role training or role models.⁴¹ This argument is however found to be baseless because there is no

³⁵ We Are Family: A safe space for LGBTQI and straight ally youth 'Lesbian, Gay and Bisexual Glossary of Terms.' Available at: <http://www.wearefamilycharleston.org/lgbt-a-z-glossary/> (accessed 26 June 2015).

³⁶ RA Isay 'On the analytic therapy of homosexual men.' *The psychoanalytic study of the child*, (1985) 40(1), 235-254.

³⁷ MG Shively and JP De Cecco 'Components of sexual identity' (1977) 3(1) *Journal of homosexuality* 41-48.

³⁸ As above.

³⁹ See also: E Coleman 'Assessment of sexual orientation' (1987) 14(1-2) *Journal of Homosexuality* 9-24.

⁴⁰ C Grov, DS Bimbi, JE NaniN, & JT Parsons 'Race, ethnicity, gender, and generational factors associated with the coming-out process among gay, lesbian, and bisexual individuals' (2006) 43(2) *Journal of sex research* 115-121.

⁴¹ DG Brown 'Sex-role preference in young children' (1956) 70(14) *Psychological Monographs: General and Applied* 1.

study that indicates that children brought up by homosexual parents are likely to be homosexual, nor are homosexual products of homosexual parents.⁴² Every human being therefore has biological sex, gender, gender identity, gender role and sexual orientation.

Prominent public officials, statesmen and opinion leaders in the country have expressed strong sentiments and antagonism against homosexuality. While speaking at the opening of SWAPO Women's Congress in 1996, former President Sam Nujoma warned that homosexuals must be condemned and rejected in the Namibian society.⁴³ In 2001, Nujoma also reiterated his position in a speech he delivered at the University of Namibia.⁴⁴ At the occasion, he noted that 'the Republic of Namibia does not allow homosexuality (or) lesbianism here. Police are ordered to arrest you and deport you or imprison you.'⁴⁵ The barrage of hate speech and comments in the Namibian media also attest to the level antagonism against homosexuals. There was an instance when a serving Cabinet Minister, Jerry Ekandjo, went as far as calling for the elimination of gays in Namibia.⁴⁶ This is how bad such hate speech against homosexuals can be. While also reacting to a recent report of a gay couple that had conducted their marriage in South Africa before returning to Namibia, Elijah Ngurare, the Secretary of the Youth League of the ruling SWAPO party, noted that the said first Namibian gay marriage was totally detestable.⁴⁷ The youth leader added that the police must arrest them because, according to him, such a marriage is moral decay at its worst.

⁴² CJ Patterson 'Children of lesbian and gay parents' (1992) 63(5) *Child development* 1025-1042; S Golombok and F Tasker 'Do parents influence the sexual orientation of their children? Findings from a longitudinal study of lesbian families' (1996) 32(1) *Developmental psychology* 3; FL Tasker and S Golombok *Growing up in a lesbian family: Effects on child development* (1997) Guilford Press.

⁴³ Human Rights Watch (13 May 2003) 'More than a name: State-sponsored homophobia and its consequences in Southern Africa.' Available at: <https://www.hrw.org/report/2003/05/13/more-name/state-sponsored-homophobia-and-its-consequences-southern-africa> (accessed 26 June 2015).

⁴⁴ AllAfrica (20 March 2001) "Namibia: President Urges 'Gay Purge'" Available at: <http://allafrica.com/stories/200103200214.html> (accessed 26 June 2015).

⁴⁵ KE Obasola 'An ethical perspective of homosexuality among the African people' (2013) 1(12) *European Journal of Business and Social Sciences* 77-85; N Viau-Skreslet (Nov 2009) 'State-sponsored homophobia in Africa: fueling the HIV/AIDS epidemic' *The Upstream Journal*. Available at: <https://www.upstreamjournal.org/2009/11/state-sponsored-homophobia-in-africa-fueling-the-hiv-aids-epidemic/> (accessed 01 July 2015).

⁴⁶ News24 (21 March 2001) 'Namibian gays challenge Nujoma.' Available at: <http://www.news24.com/xArchive/Archive/Namibian-gays-challenge-Nujoma-20010321> (accessed 02 June 2015).

⁴⁷ G Lister (04 May 2013) 'Tough times for LGBTI in Namibia too.' Open society Initiative for Southern Africa. Available at: <http://www.osisa.org/lgbti/blog/tough-times-lgbti-namibia-too> (accessed 02 June 2017).

On the other hand, male homosexuality is presumed to be as result of extreme demands by society that boys must be masculine.⁴⁸ Male children who cannot live up to these standards of masculinity often sought to find solace in feminine roles. Homosexuality therefore often resulted from exposure to inadequate sex role training or role models. Sigmund Freud argued that the most influential causation of homosexuality stems from a biologically rooted bisexual predisposition and is the expression of a universal human trend.⁴⁹ Freud therefore believed that human beings go through the unavoidable 'homoerotic' development phase in the process of achieving heterosexuality.⁵⁰ He argued that certain kinds of life experience can arrest this evolutionary process and the individual then remains captivated at a homosexual level. In Namibia, a girl behaving as a boy does not upset or cause more commotion than a boy dressed up as a girl. Women can live with each other, hold hand and even kiss without any public outcry but two men living together is perceived very wrong and unacceptable.

Judd Marmor argued that there is evidence to believe that the notion of homosexuality being un-African or un-natural has deep rooted fears and anxieties.⁵¹ Those fears over time have come to be identified under the concept of homophobia. She argues that homophobia represents a pathological fear of homosexuality known to be based on these factors.⁵²

- (a) A deep seated concerning one's own sexuality and gender identity.
- (b) A simple ignorance of homosexuality and
- (c) Strong religious indoctrination.

It is further argued that people comfortable with their own gender identity are less threatened by homosexuality and the same can be said for people who are liberal in their religious beliefs, the so-called extremists or born-again. Those who have no religious affiliations are less homophobic than the fundamentalists of all faiths. The most significant source of negative

⁴⁸ L Ovesey 'The homosexual conflict: An adaptational analysis' (1954) 17(3) *Psychiatry* 243-250.

⁴⁹ S Rado 'A critical examination of the concept of bisexuality' (1940) 2(4) *Psychosomatic Medicine* 459-467.

⁵⁰ M Hatt 'The male body in another frame: Thomas Eakins' "the swimming hole" as a homoerotic image' (1993) *Journal of Philosophy and the Visual Arts: The Body*, ed. Andrew Benjamin (London: Academy Editions/Ernst & Sohn, 1993), 18.

⁵¹ J Marmor (1980) *Homosexual behavior: A modern reappraisal*.

⁵² J Stephenson (2000) *Out of the Closet and Into the Light: Clearing Up the Myths and Giving Answers about Gays and Lesbians*. iUniverse.

homophobic attitudes is ignorance within the general public as to what makes people homosexual. It is widely believed that homosexuality is a free choice driven by a conscious act that results from seduction, imitation or exposure to homosexuals.⁵³

An assessment of criminal laws within most African Commonwealth countries reveals that their penal laws still embody anti-sodomy laws with specific regard to gay men.⁵⁴ Research throughout the twentieth century on the origins and frequency of differences in sexual orientation, led to reforms in the criminal laws of the countries that first adopted anti-sodomy laws.⁵⁵ It therefore follows that there is no justification for the sustained resistance in reforming the existing anti-sodomy laws in Africa. There is an urgent need for the repeal of those laws in order to protect the human rights of all individuals.

Other concepts and terminologies within subject of homosexuality include, lesbianism which refers to a female who is attracted to other women sexually, emotionally and romantically lesbian is also a synonym of homosexual, while gay refers to a male who is attracted to other men sexually, emotionally and romantically, gay is a synonym of homosexual.⁵⁶ Similarly, a bisexual is a person that is capable of having romantic, sexual and intimate feelings for someone of the same sex and/or someone of the opposite sex.⁵⁷

Intersex on the other hand, refers to condition where someone's reproduction organs are not typically or dominantly male or female.⁵⁸ It has been observed that intersex people often undergo

⁵³ EV Siegel *Female homosexuality: Choice without volition* (Vol 9) (2013) Routledge.

⁵⁴ LGBTI Rights: mapping anti-gay laws in Africa. Tightening laws and increasing punishments. Available at: <https://www.amnesty.org.uk/lgbti-lgbt-gay-human-rights-law-africa-uganda-kenya-nigeria-cameroon> (accessed 12 August 2015).

⁵⁵ M Kane 'Social movement policy success: Decriminalizing state sodomy laws, 1969–1998' (2003) 8(3) *Mobilization: An International Quarterly* 313-334.

⁵⁶ We Are Family: A safe space for LGBTIQ and straight ally youth '*Lesbian, Gay and Bisexual Glossary of Terms.*' Available at: <http://www.wearefamilycharleston.org/lgbt-a-z-glossary/> (accessed 26 June 2015).

⁵⁷ As above.

⁵⁸ JM Schober 'Feminizing genitoplasty: A synopsis of issues relating to genital surgery in intersex individuals' (2004) 17(5) *Journal of Pediatric Endocrinology and Metabolism* 697-704; GP Quinn, MB Schabath, JA Sanchez, SK Sutton and BL Green 'The importance of disclosure: lesbian, gay, bisexual, transgender/transsexual, queer/questioning, and intersex individuals and the cancer continuum' (2015) 121(8) *Cancer* 1160-1163.

surgical intervention to assign their sex when they are babies. It is believed that such intervention is physically or psychically problematic.

Transgender individuals identify with both male and female roles, and members of an alternative sex. They sometimes modify their bodies with plastic surgery, hormones or electrolysis. Therefore transgender refers to people whose gender identities are different from their given sex.⁵⁹ Sexual orientation should not be confused with sexual preference because it is inherent or immutable enduring attraction to another person emotionally, relationally, romantically or sexually.⁶⁰ It may be same-sex orientation, bisexual orientation or opposite sex orientation.⁶¹

2.3 Discrimination

According to the Black's law dictionary, discrimination means the unequal treatment and protection of individuals.⁶² However, the basic tenets of international human rights law which state that 'all human beings are born free and equal in dignity and rights without distinction as to race, sex, language, or religion,'⁶³ is unfortunately ignored in Namibia. LGBTI persons are often discriminated against on the basis of their sexual orientation.⁶⁴ The trend is very disturbing because the Supreme of Namibia in its ruling in 2001 declared that homosexual conduct is not illegal, adding that the prohibition against sexual discrimination in the constitution does not prohibit discrimination on the basis of sexual orientation.⁶⁵

Reports also abound of a high number of youths who are unemployed as a result of their LGBTI status and many of such persons have resorted to drug and alcohol abuse which has further rendered them more vulnerable to discrimination.⁶⁶ Worse still, the police openly treat violence, discrimination and all manners of violations against the rights of LGBTI persons without the level

⁵⁹ We Are Family (n 35 above).

⁶⁰ RL Sell 'Defining and measuring sexual orientation: A review' (1997) 26(6) *Archives of sexual behavior* 643-658.

⁶¹ As above.

⁶² H Campbell *Black's law dictionary* (1990) St Paul Minn: West Publishing Co.

⁶³ Art 1 of the UDHR.

⁶⁴ R Lorway 'Dispelling "heterosexual African AIDS" in Namibia: Same-sex sexuality in the township of Katutura' (2006) 8(5) *Culture, Health & Sexuality* 435-449.

⁶⁵ *Chairperson of the Immigration Selection Board v Frank* 2001 NR 107 (SC), 135F-I.

⁶⁶ Namibia 2014 Human Rights Report. Available at: <https://www.state.gov/documents/organization/236600.pdf> (accessed on 30 June 2015).

of seriousness that it deserves. For instance, seven men allegedly beat up a transgendered woman in the northern Oshiwambo area, claiming that the assault was not due to her transgendered status and the police refused to investigate the case.⁶⁷ However, it must be noted lesbians are not receiving as much discrimination as gays. At the Katutura police station, lesbians' cases are recorded more than the gays'. According to Chief Inspector Ismael Basson, the commandant of the Katutura police station because of the level of discrimination gay men receive, they avoid reporting criminal cases to the police.⁶⁸ Lesbian women are seen as tougher or stronger and may seem to be intimidating some police officers therefore the officers wouldn't dare to upset them.⁶⁹ Instead, they render them quick assistance to get rid of them at the police station.

It is important to note that police attitudes differ when dealing with gays and lesbians. The discrimination towards gays and lesbian differ too, gays are more discriminated upon than lesbians in Namibia.⁷⁰ For example, if a male teacher is suspected to be gay, parents develop great fear for their children but that fear won't be the same as a female teacher who is suspected of being lesbian.

Generally, the LGBTIs are discriminated against in all domains of life be it in schools, churches, the job market, hospitals to a point that they are even disowned by their own families and friends.⁷¹ What is very sad and evident is that Namibia still fails to recognize the LGBT community and its members as dignified human beings. They are often treated badly, stigmatized, discriminated, labelled, seen as culture disruptors and regarded as non-God fearing.⁷² Not only

⁶⁷ Namibia 2013 Human Rights Report. Available at: <https://www.state.gov/documents/organization/220354.pdf> (accessed on 30 June 2015), 24.

⁶⁸ Namibia 2016 Human Rights Report. Available at: <https://www.state.gov/documents/organization/265496.pdf> (accessed on 30 June 2015).

⁶⁹ MJ Kahn 'Factors affecting the coming out process for lesbians' (1991) 21(3) *Journal of Homosexuality* 47-70.

⁷⁰ D Altman, P Aggleton, M Williams, T Kong, V Reddy, D Harrad and R Parker 'Men who have sex with men: Stigma and discrimination' (2012) 380(9839) *The Lancet* 439-445.

⁷¹ As above.

⁷² A Gorman-Murray, and CJ Nash 'Queering religion, religious queers: a geographical commentary. *Queering religion, religious queers* (2014) xxiii-xxxvi.

is the act of homosexuality in Namibia seen as a social problem, it is also viewed as a religious and cultural problem.⁷³

2.4 Vulnerability

From the discussions above, it is quite accurate to say that LGBTIs are a vulnerable minority group in Namibia. The concept of vulnerability has been applied to various situations encountered by the UN monitoring bodies.⁷⁴ When looking at LGBTIs, it is clear to identify a relationship between vulnerability and discrimination although they are not perfectly equivalent concepts. Vulnerability in people is often caused by age, belonging to indigenous communities or minorities, disability, victimization, migration, poverty, gender, internal displacement and deprivation of liberty.⁷⁵

2.5 Social Stigma

The issue stigmatization of the LGBTI persons on the basis of their sexual orientation remains another complex challenge.⁷⁶ The word stigma, according to Erving Goffman, a renowned sociologist, can be defined as a 'process whereby certain groups with certain attributes are considered unworthy or discreditable.'⁷⁷ Goffman further categorized racial minorities, physically disabled persons and homosexuals as stigmatized individuals. He further noted that one difference between these groups is that the first two categories are not usually held responsible for their physical state while homosexual individuals are.⁷⁸ He further explains that

⁷³ A Van Klinken, and E Chitando (Eds.) (2016) *Public Religion and the Politics of Homosexuality in Africa*. Routledge.

⁷⁴ AR Chapman and B Carbonetti 'Human rights protections for vulnerable and disadvantaged groups: The contributions of the UN Committee on Economic, Social and Cultural Rights' (2011) 33(3) *Human Rights Quarterly* 682-732.

⁷⁵ JA Nel 'LGBTI affirmative practice guidelines: Psychology contributing to the "rainbow (in the) nation"?' (2013).

⁷⁶ AH Mavhandu-Mudzusi and M Ganga-Limando 'Being Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) students at a South African rural university: Implications for HIV prevention' (2014) 16(2) *Africa Journal of Nursing and Midwifery* 125-138.

⁷⁷ E Goffman 'Selections from stigma' (1997) 203 in *The disability studies reader* 215.

⁷⁸ Goffman (n 77 above) 133. Goffman further states that 'a stigma is an attribute that makes a person different from others in a social category, and it reduces the person to a tainted or discounted status. A stigma is sometimes called a handicap, and it is made up of a discrepancy between the virtual (or perceived) identity and the actual identity of the stigma's bearer.'

homosexuality is categorized as a moral shortcoming. Therefore, homosexuals, according to him are held accountable for what is believed to be their choice.

As a result of the stigma attached to homosexuality, behavioral manifestations associated with being gay, lesbian, bisexual or transgender are often postponed whereas heterosexual behavior need not be.⁷⁹ Eventually such postponement causes both the affected individual and the society some degree of hardship.⁸⁰ Another consistent feature of stigma globally is that it interferes with it the ability of a homosexual person to move beyond orientation and creates room for people to label themselves, and at the same time be labelled by others.⁸¹

Against this background, same-sex sexual activity is widely perceived as a taboo by majority of Namibian citizens. LGBTI persons, according to a report released by the office of the ombudsman, are usually subjected to mockery, physical assault and even verbal abuse during times when they visited other locations other than their places of abode.⁸² Central to the topic of discrimination against homosexuals is the concept of sexual stigma. Social stigma may be defined as 'inferior status, and relative powerlessness that society collectively accords to any non-heterosexual behavior, identity, relationship, or community.'⁸³ Sexual stigma at its core represents societal perceptions on the degraded state of homosexuality within the community.⁸⁴ Despite of individual sexual orientations, Namibians and indeed Africans still view homosexuality as an evil within society that has negative consequences. Members of society are not shy of expressing their spiteful perceptions about individuals who are involved in homosexual relationships, behaviors, dressing and lifestyle. In consequence, sexual stigma is a concept that is shaped by societal perceptions and not necessarily the subjective attitude of a particular individual.⁸⁵ This

⁷⁹ SW Cole, ME Kemeny and BR Visscher 'Elevated physical health risk among gay men who conceal their homosexual identity' (1996) 15(4) *Health Psychology* 243.

⁸⁰ As above.

⁸¹ BM Dank 'Coming out in the gay world' (1971) 43(2) *Psychiatry* 180-197; KH Griffith and MR Hebl 'The disclosure dilemma for gay men and lesbians: "coming out" at work' (2002) 87(6) *Journal of applied psychology* 1191.

⁸² Namibia 2014 Human Rights Report. Available at: <https://www.state.gov/documents/organization/236600.pdf> (accessed on 30 June 2015), 23.

⁸³ GM Herek 'Confronting sexual stigma and prejudice: Theory and practice' (2007) 63(4) *Journal of Social Issues* 905-925.

⁸⁴ Herek (n 83 above) 2.

⁸⁵ As above.

conceptualization therefore determines how perceptions are created, articulated, sustained and evolve over time.⁸⁶ It is therefore argued that our cultural meaning of manhood which is focused on strength/masculinity is central to the construction of homophobia within the community.

2.6 Gender identity and equality

The concept of gender identity basically refers to how someone feels about themselves in feminine or masculine terms.⁸⁷ In other words, gender identity is all about a person's evaluation of themselves either as a man or a woman.⁸⁸ Interestingly, LGBTI rights have dominated the gender and sexuality debate in Namibia. Attempts at reformation of anti-sodomy laws which are a colonial legacy derived from the principles of Roman-Dutch Common Law have been strongly opposed by religious institutions, the community at large, as well as government officials.⁸⁹

Gender is therefore an identity associated with either being feminine or masculine that determines whether an individual is a male or female. It is important to note that gender and sex are two different concepts. According to social science scholars, sex refers to the biology of human that is means being male and female.⁹⁰ As a result the differences based on gender and sex have led to discrimination and inequality. Discrimination and inequality based on gender and sex is a result of the traits attributed to being feminine and masculine as well as being male and female respectively. It has been argued that being both male and masculine means being strong, active and tough while in contrast being female and feminine means being passive, weak and dependent.⁹¹ These traits and identities are usually defined by cultural constructions.

In addition, the difference between sex and gender gave rise to attempts to distinguish between biological and social distinctions.⁹² Feminists argue that the difference between men and women

⁸⁶ MS Kimmel 'Masculinity as homophobia: Fear, shame, and silence in the construction of gender identity' (2004) *Race, class, and gender in the United States: An integrated study* 81-93.

⁸⁷ MG Shively and JP De Cecco 'Components of sexual identity' (1977) 3(1) *Journal of homosexuality* 41-48.

⁸⁸ As above.

⁸⁹ A Currier 'Decolonizing the law: LGBT organizing in Namibia and South Africa' (2011) In *Special Issue Social Movements/Legal Possibilities* (pp. 17-44). Emerald Group Publishing Limited; B Kennedy 'Homosexuals in the periphery: Gay and lesbian rights in developing Africa (2006).

⁹⁰ RK Unger 'Toward a redefinition of sex and gender' (1979) 34(11) *American Psychologist* 1085.

⁹¹ SJ Arnold (1992) *Femininity and masculinity* (Doctoral dissertation).

⁹² C West and DH Zimmerman 'Doing gender' (1987) 1(2) *Gender & society* 125-151.

in neutral institutions like law is socially constructed and therefore subject to change.⁹³ It is therefore argued that men can be socialized to act or behave more like women and women can behave like men given the above argument. An example of this is the Fa'afafine in Samoa who are born male but are raised up as women in order to help out with feminine tasks in the home.⁹⁴ Even the body which is regarded as natural can be reconstructed in order to enhance size and configuration. The extent to which differences between men and women are sexed re-emerged in the 1980s resulting from the popularization of socio-biological theories of difference.⁹⁵ Gender is an identity associated with being womanly and manly and consequently defines masculinity or femininity. According to feminist theories, sex relates to the biology of human beings being masculine and feminine.⁹⁶ These differences based on gender and sex has given birth to the inequality and discrimination of LGBTIs. It has been argued that gays for example are feminine, passive and look like women.⁹⁷ They are emotional and easily overpowered by men which means they are weak. They are dependent and need to be provided for as opposed to masculinity which symbolises strength, activeness and toughness.⁹⁸ These personalities and identities are typically defined by social and cultural constructs.

Similarly, inequality in this context refers to a situation where all human beings within the society are not afforded same privileges and rewards based on statuses.⁹⁹ Often people are differentiated from each other because of their culturally defined attributes.¹⁰⁰ For instance men who are seen as too feminine are usually labelled and treated differently because of these contrasts of sexuality. While the society expects men to be masculine and some display feminine traits, this may illegitimately warrant being treated badly, stigmatized and suffer inequality as

⁹³ BI Fagot, CS Rodgers and MD Leinbach 'Theories of gender socialization' (2000) *The developmental social psychology of gender*, 65-89.

⁹⁴ PL Vasey and NH Bartlett 'What can the Samoan "Fa'afafine" teach us about the Western concept of gender identity disorder in childhood?' (2007) 50(4) *Perspectives in biology and medicine* 481-490.

⁹⁵ JR Tudge and PA Winterhoff 'Vygotsky, Piaget, and Bandura: Perspectives on the relations between the social world and cognitive development' (1993) 36(2) *Human Development* 61-81.

⁹⁶ C Delphy 'Rethinking sex and gender' (1993) 16(1) In *Women's Studies International Forum* 1-9.

⁹⁷ JM Bailey *The man who would be queen* (2003) 86.

⁹⁸ As above.

⁹⁹ S Fenstermaker and D Zimmerman 'Gender inequality: New conceptual terrain. *Doing gender, doing difference*, 25-39.

¹⁰⁰ As above.

they are not afforded similar opportunities based on their sexuality.¹⁰¹ According to the law dictionary equality is the condition of enjoying the same rights, privileges, and immunities, and being accountable to the same responsibilities, that equality is equity.¹⁰² However the Namibian constitution does not describe what is meant by ‘equality.’ However, Article 10 of the Namibian Bill of rights states that all persons shall be equal before the law under the Equality and Freedom from Discrimination Article.¹⁰³ The section goes on to include that people may not be discriminated against on the grounds of sex, race, colour, ethnic origin, faith, creed or social or financial status.¹⁰⁴ Most relevant to this article is the exclusion of – sexual orientation. No provision is given as to the meaning of equality if sexual orientation is not included. This is perhaps because the Namibian Constitution, like most other African constitutions, was designed to afford for fundamental rights in general positions, so as not to delay or restrain the progression of the law. For the most part, it has been left up to the courts to explain equality and there has been no absence of opportunities for the courts. Most often the definition of equality is influenced and to a certain extent determined by the legal, social, political and historical background of each jurisdiction. Namibia is no exception to this rule.

2.7 Outright Namibia (ORN)

In response to the homophobia attacks against members of the LGBTI community in Namibia, a few vocal LGBTI organizations have been established by concerned individuals and groups that are actively involved in social mobilization and advocacy for the protection of sexual minorities. For many years, groups like Sister Namibia¹⁰⁵ and the Rainbow Project Namibia¹⁰⁶ were actively engaged with issues involving every LGBTI person in the country. The LGBTI movement in Namibia, however witnessed a quantum leap when a coalition of the community and activists

¹⁰¹ Tudge (n 95 above) 66.

¹⁰² H Campbell *Black's law dictionary* (1990) St Paul Minn: West Publishing Co.

¹⁰³ Art 10 Constitution of Namibia.

¹⁰⁴ As above.

¹⁰⁵ For more on Sister Namibia, see: <https://sisternamibia.com/> (accessed 20 June 2017).

¹⁰⁶ R Lorway *Namibia's rainbow project: Gay rights in an African nation* (2014) Indiana University Press.

came together in March 2010 to form Outright Namibia (ORN) with a mandate of creating a safe environment for LGBTI individuals in Namibia.¹⁰⁷

The ORN has its headquarters in Windhoek with a network of regional leaders and support groups. The organization was officially registered November 2010 as a Trust that is headed by a Board of Trustees.¹⁰⁸ ORN acts as an advocate for lesbian women, gay men, bisexuals, transgender and intersex people in Namibia in an effort to redress the problem of homophobia in Namibia.¹⁰⁹ ORN adopted a strategic five year plan that dictates its organizational themes under the following pillars: Emancipation and Movement Building, Human Rights, Health and Legal Reform and Institutional Strengthening and Capacity Building. It is foreseen that discussions around this framework would be a critical part of the national consultative meeting/national congress.¹¹⁰ These frameworks enable the Trustees to share this strategic framework with the national LGBTI community and get guidance and direction on the relevance of proposed interventions. ORN operations and management will also be guided by the values of the organization simplified to IIPEPI: Inclusive, Innovation, Participation, Empowerment, Passion and Integrity.¹¹¹

ORN has since its inception carried out reports with specific reference to the police who did not attend to concerns and complaints made by LGBTI individuals. The reports have also highlighted cases in which police themselves ridiculed cases of human rights abuses. It was however noted that beginning 2011, the Ombudsman together with the Health Ministry had improved relations with LGBTI individuals and organisations. This collaboration was also seen in the inclusion of LGBTI communities in the National Strategic Framework for HIV/AIDS 2010-16 as one of the main groups that require outreach.

On the national, regional and international scene, ORN has emphasized its objective to pioneer the LGBTI movement and consciousness, and introduce societal interventions aimed at ensuring

¹⁰⁷ See: <https://www.outrightinternational.org/region/namibia> (accessed 20 March 2017).

¹⁰⁸ As above.

¹⁰⁹ As above.

¹¹⁰ As above.

¹¹¹ OSISA: Open Society Initiative for Southern Africa 'OutRight Namibia.' Available at: <http://www.osisa.org/lgbti/namibia/outright-namibia> (accessed 22 June 2016).

a safe environment for its members. ORN therefore operates as a platform upon which lesbian women, gay men, bisexuals, transgender and intersex people in Namibia can have their issues addressed including homophobia.¹¹² The organization has also continually raised awareness on the laxity of police in the handling of LGBTI complaints. Central to the complaints are allegations of harassment, verbal assault, physical violations and unreasonable refusal of essential amenities. The organization is therefore essential for emphasizing the wellbeing LGBTI in Namibia.

2.8 Conclusion

Chapter two examined the literature framework within the context of LGBTI. The chapter explored the different concepts and theories that have informed the discourse on the treatment and acceptance of LGBTI individuals within the community. These concepts included homosexuality, discrimination, vulnerability and social stigma. These concepts as developed over the years have been instrumental in understanding society's understanding and tolerance of LGBTI individuals. One of the most important concepts was the difference between sex and gender which determine the masculinity or femininity of an individual.

Whereas most individuals are born with distinctively male or female genitalia, the social construction of gender roles are taught based on socialization and enculturation. As was seen in the case of the Fa'afafine of Samoa, some cultures raise boy children as girls and vice versa in order to redress an imbalance in the genders of their children. The determination of who adopts what gender role is vested on the elders in the family. It was therefore established that while the biological differences between male and female are naturally determined, the gender roles may be taught. The acceptability of such roles ultimately depends on the community in which the individuals live.

¹¹² As above.

CHAPTER THREE

3 ATTITUDES OF THE NAMIBIAN POLICE TOWARDS LGBTI

3.1 Introduction

Chapter three examines the Namibian Police structure, functions and duties in relation to LGBTI persons in community. In addition, this chapter will assess the attitudes and interaction between the police forces and LGBTI individuals and any avenues of redress should there be misconduct on the part of the police. The chapter will further examine the theories of policing and accountability mechanism that minimize the

The police are defined as the function of the executive branch of government which is entrusted to preserve public order and tranquillity, protection and morals. The police have the mandate to ensure prevention, detection, and punishment of crimes.¹¹³ The Police are non-military individuals or organisation given a general right by the government to use coercive force to enforce the law. The primary role will be to respond to group conflict problems or to individual's problems that involve in illegal behaviour.

3.2 The structure of the Namibian Police

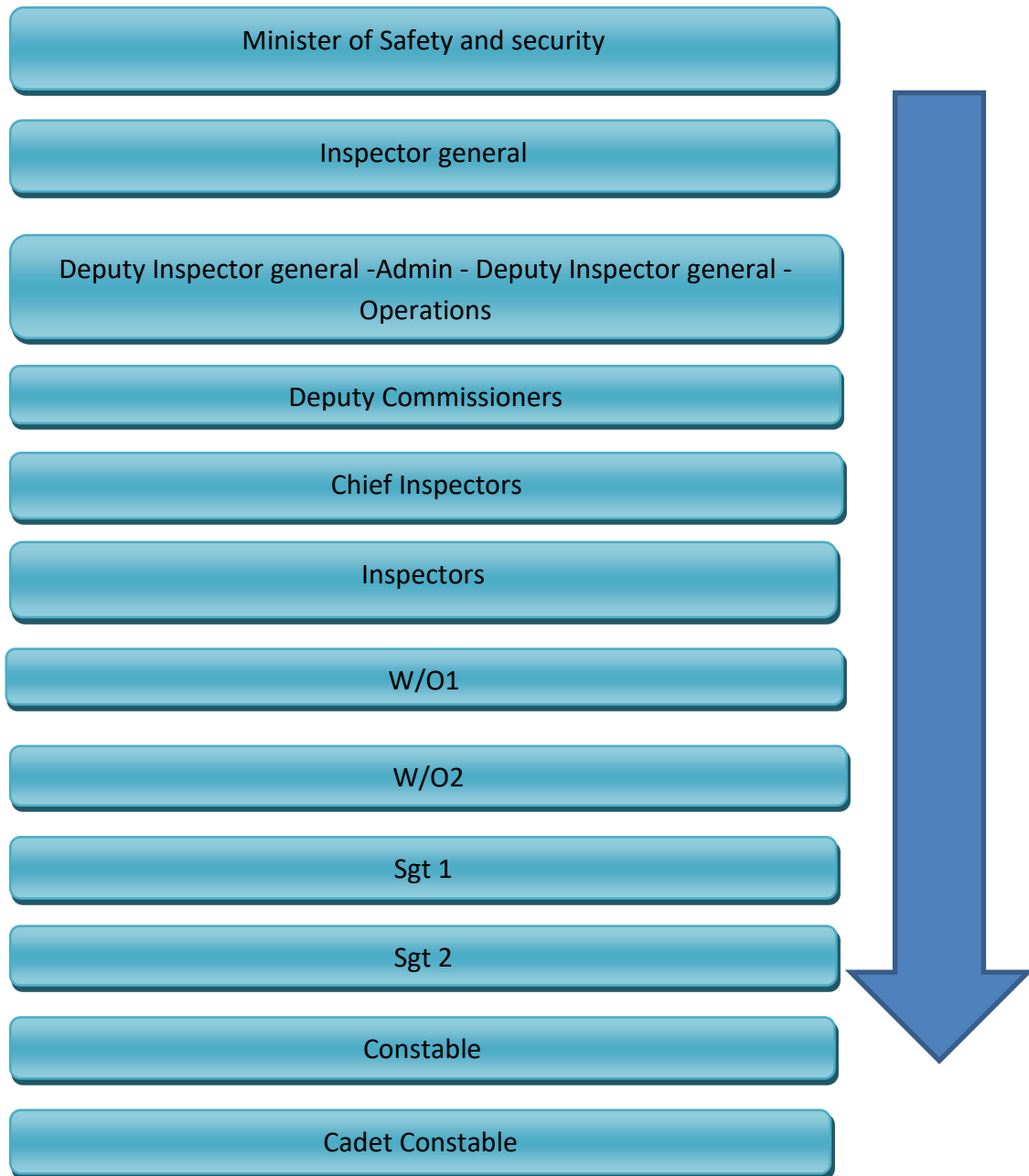
The Namibian Police was established under Section 2(1) of the Promulgation of Police Act, 1990 (Act 19 of 1990). The preamble states the purpose of the Police Act which is to '... provide for the establishment, organization and administration of the Namibian Police Force; to regulate the powers and duties of the Force and to prescribe the procedures in order to secure the internal security of Namibia and to maintain law and order; to regulate the discipline, appointment, promotion and discharge of members of the Force; and to provide for incidental matters.'¹¹⁴ The police force has the responsibility of enforcing laws, developed by the legislative branch and interpreted by the judiciary branch. The police are also part of the criminal justice system which

¹¹³ J Goldstein 'Police discretion not to invoke the criminal process: Low-visibility decisions in the administration of justice' (1960) 69(4) *The Yale Law Journal* 543-594.

¹¹⁴ Preamble to the Promulgation of Police Act of 1990.

includes the courts and the correctional organisation (prison system).¹¹⁵ The police have a number of ranks constituting different positions of power and authority as well as levels of accountability as illustrated in the diagram below:

Namibian police hierarchy of command



¹¹⁵ As above.

Section 13 of the Police Act outlines the functions of force and the powers and duties of members of the police force.¹¹⁶ According to the Act, these functions include: ‘the preservation of the internal security of Namibia; the maintenance of law and order; the investigation of any offence or alleged offence; and the prevention of crime.’¹¹⁷ Law enforcement officers are mandated by the Act under Section 14 to perform their functions while respecting the law.¹¹⁸ The Members of the police force are also under an obligation to respect orders from their superiors. Other functions that the police may carry out include the execution of summons and warrants. The Police Act also provides for disciplinary measures under Section 17 (Chapter III). These measures may be instituted against members of the police force who are found guilty of misconduct. They include fines, suspension with or without pay, and permanent dismissal from the police force.¹¹⁹

The police play a vital role in society and their role cannot be overstressed. Without a functional police force, law and order is compromised and that would lead to an undesirable state of lawlessness. A lawless society remains a breeding ground for all sorts of vices which can cripple a society’s vital institutions.

3.3 The Namibian police interaction with LGBTI

Namibia’s Roman-Dutch Law heritage that was adopted at independence effectively criminalized sodomy. However, it must be noted that although the prohibition was instituted, it was never enforced in practice. Sodomy is considered as deliberate anal sexual relations between males. However, it must be noted that this definition is not extended to anal sex that takes place between a heterosexual or lesbian couple. The consensus among the general public was that of animosity towards same-sex sexual activity and it was considered taboo. Despite this, the Supreme Court in 2001 held that homosexuality is not illegal.¹²⁰ This court ruling is very significant because it reforms the common law on homosexuality that was inherited after colonialism.

¹¹⁶ Sec 13 of the Police Act.

¹¹⁷ As above.

¹¹⁸ Sec 14 of the Police Act.

¹¹⁹ Sec 17 of the Police Act.

¹²⁰ *Chairperson of the Immigration Selection Board v Frank* 2001 NR 107 (SC), 135F-I.

However, it is noted that while the common law of Namibia effectively legalises homosexuality and sexual relations, public opinion towards homosexuality remain divided to the extent that even the police have been accused of homophobia. It is noted that when LGBTI individuals are harassed by members of the public and they seek redress from the police, the officers also shun, insult and harass them for being homosexual. This conduct has discouraged LGBTIs from reporting cases of abuse relating to their sexuality.

It has even been noted that LGBTIs who are employed by the Namibian police have had to hide their sexuality for fear of reprimand by their colleagues. Those who disclosed their sexuality in the past were pressurized so much that they had to resign from their positions.

The degree to which individuals participate in the policing process is related to a sense of civic responsibility to report crime and assist the police in crime prevention. This in turn affects the participation of the community crime prevention initiatives and other similar programs.¹²¹ It is important to take note that the police must serve all people without discrimination on the basis of sexual orientation. Therefore, LGBTI people are entitled to report crimes without fear of being harassed and discriminated against just as any other community members have. It is said that the police exist for the purpose of producing the value of freedom from disorder and those criminal acts that interfere with the freedom to pursue personally and socially fulfilling objectives.¹²² The Namibian police have a positive relationship only with certain groups of the society whom they perceive to be upright and not wrongdoers such as homosexuals.

It is important to note that Namibia which is a democratic society requires order unlike undemocratic societies which need distinctive kind of order that is not imposed by an uncontrollable force. The police in a democracy such as Namibia must not only know the most effective techniques for maintaining order or maintain trust, but must also know techniques which maintain order in a manner that serves to preserve and to extend the precious value of a

¹²¹ R Trojanowicz and B Bucqueroux 'Community policing' (1990) *A contemporary perspectiva* (Cincinnati, Anderson Publishing Co., 1998).

¹²² M Brake and C Hale *Public order and private lives: The politics of law and order* (1992) London: Routledge.

democratic society.¹²³ The police are not a separate or alien entity from the community.¹²⁴ The law of agency is in effect in that society is the principal employee and the police are the agents. It is the principal (the society) who possess the greater authority. Police systems exist to preserve and enhance democratic values within the community. But in many African countries and in particular Namibia, LGBTI often live in fear of being victimised as they are not protected by law enforcement officers.

Weinberg argued that an individual cannot adequately thrive in an environment of constant disapproval and pretentiousness. Such an environment effectively illegalizes and ridicules their lifestyle and ambitions, mocks and sneers at them from all sides without regard to their feelings.¹²⁵ When LGBTI people go to the police station to report violence against them, the Namibian police members on duty have on many occasions joked and sneered at the LGBTI victim reports, succeeding in discouraging them from reporting incidences of violence against them. Behaviours of state agencies such as the police have a detrimental effect on the lives of LGBTI people such as depression, fear, suicide and many psychological complications.

It has been reported that hundreds on Namibians die annually by committing suicide.¹²⁶ A considerable number of such suicide cases can be attributed to a homophobic society. Teenagers who consider themselves to be homosexual are more likely to attempt suicide than their heterosexual counterparts.¹²⁷ The aim of the research was to assess the living environments of gays to determine whether it has a bearing on the higher suicide rate.¹²⁸ It was established that teenagers living in awkward social settings were more likely to consider suicide by more than 20

¹²³ J Comaroff and J Comaroff 'Policing culture, cultural policing: law and social order in postcolonial South Africa' (2004) 29(3) *Law & Social Inquiry* 513-545.

¹²⁴ NG Fielding *Community policing* (1995) Oxford University Press.

¹²⁵ D Weinberg 'On the social construction of social problems and social problems theory: A contribution to the legacy of John Kitsuse' (2009) 40(1) *The American Sociologist* 61-78.

¹²⁶ World Health Rankings (May 2014) *Namibia: Suicide*. Available at: <http://www.worldlifeexpectancy.com/namibia-suicide> (accessed 27 June 2016).

¹²⁷ Centers for Disease Control and Prevention (21 June 2017) *LGBTI Youth*. Available at: <https://www.cdc.gov/lgbthealth/youth.htm> (accessed 28 June 2017).

¹²⁸ K Gilbert (29 April 2011) *Study: Gay teens five times more likely to attempt suicide*. Available at: <https://www.lifesitenews.com/news/study-gay-teens-five-times-more-likely-to-attempt-suicide> (accessed 20 June 2017).

percent.¹²⁹ Peter Sprigg who works with the Family Research Council noted that the findings of the study should not be interpreted to mean that gay teenagers are less likely to consider or commit suicide when placed in a supportive environments. In contrast however, gay teenagers are much more likely to consider committing suicide in relation to their heterosexual counterparts regardless of the concern of environment. As such, gay teenagers constitute a vulnerable group.¹³⁰

The Namibian Ministry of health and social services reported that a high number of suicide cases were recorded between 01 September 2013 and 10 September 2014. The country with a population of 2.3 mil people the country is divided into 14 Regions/Provinces. The suicide pattern varies from region to region, a total number of 300 suicides and 1305 attempted suicide cases were reported.¹³¹ Many attempted suicide case are not reported, figures could be high according to the Chief Social worker in the Ministry of health.¹³² It is widely believed that the causes of suicide are relationships or health related issues. This was particularly more pronounced when the HIV/AIDS pandemic was intense. It is important to note that it is not only health and relationship problems can lead to suicide. In many cases, learners have committed or considered suicide because of their bullying experiences.¹³³ Therefore, it is plausible that many people in Namibia commit suicide because of being labelled, stigmatised, and discriminated upon and not being protected by the police forces who have the mandate of protecting them.

Namibian Police Spoke Person Commissioner Adwin kanguatjivi noted that in most cases no suicide notes are left leaving society to speculate on the cause of such action.¹³⁴ According to Roberg and Kuykendall police exist for the purpose of producing the value of freedom.¹³⁵ However, if the Police are equally subjecting them to discrimination, stigma and labelling number

¹²⁹ As above.

¹³⁰ As above.

¹³¹ The Namibian (10 August 2011) *Suicide in Nam a crisis*. Available at: <http://www.namibian.com.na/index.php?id=83768&page=archive-read> (accessed 20 June 2016).

¹³² As above.

¹³³ As above.

¹³⁴ The Namibian Sun (28 October 2013) *Four suicides reported over the weekend*. Available at: <https://www.namibiansun.com/news/four-suicides-reported-over-the-weekend> (accessed 20 June 2017).

¹³⁵ R Roberg and JL Kuykendall *Police & society* (1993) Wadsworth Pub. Co, Belmont, California.

of suicide cases are doomed to rise. It is evident that Namibia still fails to recognise the LGBT community and its members as human beings. They are treated badly, stigmatised, treated unfairly, discriminated, labelled and seen as culture disruptors who are not God-fearing. Not only is being gay in Namibia seen as a social problem but also as a religious and cultural problem. They are further considered un-African. It is simply said that the LGBTI minorities are taking advantage of the Namibian democracy that was attained by sacrificing lives.

DR. Sam Nujoma the former Namibian president threatened gay and lesbians saying ‘the police must arrest, imprison and deport homosexuals and lesbians found in Namibia’¹³⁶ implying that LGBT community was not welcome in Namibia. As was noted earlier, this was not only a threat but also an order given to the police. This further proves the deepened and furthered discrimination against gays and lesbians in Namibia, and the reason for the depression. There are currently 74 countries in the world that criminalise same sex sexual acts between consenting adults according to the International Lesbian, Gay, bisexual and transsexual Association (ILGA).¹³⁷ In Sudan, some southern parts of Somalia, Mauritania and Nigeria consensual same sex behaviour is punishable by death.¹³⁸

It must also be noted that as per the Namibian Police basic training and development courses, sodomy is a schedule one offence under section 40, 42 and 49 of the Criminal Procedure Act and carries the same sentence as bestiality.

3.4 Conclusion

Chapter three examined the interaction between the Namibian Police Forces and the LGBTI community. It was firstly noted that the primary role of the police in every democracy is to preserve law and order. The police is mandated to carry out this duty in conjunction with members of the community through collaborative efforts known as community policing. In order for community policing to succeed, there is a need for the police to foster good working

¹³⁶ IOL News: “Nujoma declares war on gays and lesbians” Available at: <http://www.iol.co.za/news/africa/nujoma-declares-war-on-gays-and-lesbians-62486> (accessed 10 may 2014).

¹³⁷ S Fenton (17 May 2016) ‘LGBT relationships are illegal in 74 countries, research finds’ *Independent*. Available at: <http://www.independent.co.uk/news/world/gay-lesbian-bisexual-relationships-illegal-in-74-countries-a7033666.html> (accessed 22 June 2016).

¹³⁸ L Edmondson ‘Uganda is too sexy: Reflections on Kony’ (2012) 56(3) *The Drama Review* 10-17.

relationships with members of the community in which they operate. However, the police force in Namibia has often ridiculed members of the LGBTI and even denied them some privileges which are afforded to other community members. Sadly, this code of conduct has derived legitimacy from politicians who have openly shunned the LGBTI community regardless of the position of the common law. This has even led to some drastic measures like suicide on the part of the LGBTI.

CHAPTER FOUR

4 INTERNATIONAL LAW AND SEXUAL MINORITIES IN NAMIBIA

4.1 Introduction

This chapter looks at the global and regional normative standards in relation to the legal protection of lesbian, gay, bisexual, transgender and intersex persons in Namibia. Instances of human rights violation and the criminalisation of persons of lesbian, gay, bisexual, transgender and intersex orientation and sexual identity abound throughout Africa and around the world.¹³⁹ In many countries around the world, same sex relationships between consenting adults is a criminal offence punishable by laws which bear their justification on the grounds of public morality.¹⁴⁰ The problem has become widespread, not only with regard to the discriminatory treatment of persons who identify as sexual minorities but in some cases involving unlawful detention, violence, banishment or death.¹⁴¹ Within the context of the steadily growing movement for the protection of lesbian, gay, bisexual, transgender and intersex persons; it is relevant to examine the scenario in Namibia in relation to the standards set by international human rights law in order to determine the kind of treatment that they are given and whether the government provides any kind of legal protection.

The question that the chapter engages with is to examine to what extent Namibian law and the legal system guarantee protection of the rights of lesbian, gay, bisexual, transgender and intersex orientation in accordance with international human rights standards. In section 2 that proceeds, the chapter looks at international human rights law and the protection of sexual minority rights. It figures out the international as well as regional treaty based and non-treaty based human rights instruments that make provision implicitly or explicitly for the protection of persons who identify as sexual minorities. The chapter goes further to examine in section 3 the normative standards

¹³⁹ S Ndashe 'Seeking the protection of LGBTI rights at the African Commission on Human and Peoples' Rights' (2012) 15(17) *Feminist Africa* 17-38.

¹⁴⁰ International Court of Justice 'international human rights law and the criminalization of same-sex sexual conduct' (2010) *International Court of Justice Briefing Paper 2*, 1-12.

¹⁴¹ J Steidl 'Politicized Devotion to a Popular Saint: Daniel Zamudio and LGBT Rights in Chile' (2016) 16(2) *Spiritus: A Journal of Christian Spirituality* 189-214.

on the rights of sexual minorities deriving from the international human rights instruments. The chapter concludes in section 4 by highlighting the normative standards set by regional and international instruments in relation to the situation of lesbian, gay, bisexual, transgender and intersex persons in Namibia.

4.2 International Human Rights Law and Protection of Sexual Minority Rights

This section aims to look at how international human rights law may be used to provide protection to sexual minorities, especially in the case where their protection is not guaranteed through national mechanisms. The question of sexual orientation and gender identity has become very topical in recent years, particularly inspired by an extended theoretical and legal recognition and international campaigning for widespread acceptance of sexual orientation and gender identity as human rights concerns. It has been argued that to approach the question of sex simply through a binary lens of just looking at a person as male and female negates a whole spectrum of variations to the human form.¹⁴² Lesbian, gay, bisexual, transgender and intersex individuals make up a minority and by extension an extremely vulnerable group of persons that are struggling to locate their space in a world that is supposed to accommodate everybody but is still predominantly hostile to some category of persons.

Sexual minorities continue to face grave situations of intolerance in many parts of Africa and throughout the world due mainly to the lack of, or inadequacy of protective mechanisms.¹⁴³ It is established that sexual minority rights are human rights, which imply that they also apply universally.¹⁴⁴ The widespread victimisation of sexual minorities has become a human rights concern not just pertaining to the individuals or peoples concerned or the countries where they live, but a global concern of multidimensional proportions. As such, protection for this category of persons is guaranteed and regulated by international human rights law. Thus, in the absence of domestic instruments protecting the rights of lesbian, gay, bisexual, transgender and intersex

¹⁴² S Kirven, E Eguren and M Caraj *Protection Manual for LGBTI Defenders* (2010) Protection International 8.

¹⁴³ M Ungar 'Lesbian, gay, bisexual, and transgendered international alliances: The perils of success' (2001) *Forging radical alliances across difference: Coalition politics for the new millennium*, 235-248.

¹⁴⁴ Art 1 and 2 of the UDHR.

persons, recourse can be derived regional and international instruments to determine the measure of protection that is actually guaranteed to these persons. This however is only possible if the countries concerned have ratified those international and regional instruments. This chapter mainly focuses on the International Bill of Human Rights and on the African Charter.

4.3 International guarantees for the protection of sexual minority rights

Several provisions in the Universal Declaration of Human Rights can be interpreted to provide direct protection to persons identified as sexual minorities. Specifically, the Declaration provides that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind relating among others to sexual orientation.¹⁴⁵ The Universal Declaration at its face value does not impose binding legal obligations. In addition, all the rights contained therein have been amplified and given the force of positive law in the two international covenants that emanated from it. The discussions on the rights of sexual minorities shall be based mostly on the provisions of the two Covenants.

The International Covenant on Civil and Political Rights upholds and promotes the civil and political rights that every human person is entitled to enjoy. The Covenant specifically recognises and guarantees protection on the civil and political rights of every individual without any form of distinction, including on the basis of sex.¹⁴⁶ The International Covenant on Economic, Social and Cultural Rights obligates states parties to ensure that the rights guaranteed by the Covenant will be exercised without discrimination of any form based on certain characteristics, including on the ground of sex.¹⁴⁷ Sex, by its literal meaning implies the state of being male or female.¹⁴⁸ It denotes a differentiation between a man and a woman judging by certain physical features attributed to these categories of persons. However, some people have declined to be identified

¹⁴⁵ As above.

¹⁴⁶ International Covenant on Civil and Political Rights (ICCPR) 1966 art 26. It was held in the landmark decision of *Toonen v. Australia* in 1994 that the reference to “sex” in articles 2(1) and 26 of the Covenant must be interpreted to include sexual orientation.

¹⁴⁷ International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 art 2(2).

¹⁴⁸ AS Hornby ‘Oxford Advanced Learner’s Dictionary’ (2005) 7th edition Oxford University Press 1339.

by these conventional paradigms and would want to be seen by how they choose to be identified. In this instance, the qualification of sex needs to also apply in their circumstance to mean sexual orientation or sexual identity that they choose to associate with.

Both Covenants prohibit any form of discriminatory practice that may be perpetuated against any person to whom the rights enshrined in the treaty documents are guaranteed. The Covenants guarantee the equality of everyone to the full enjoyment of all the rights enshrined in each of the treaty provisions and provide protection under the law against discrimination of any kind, among others on the ground of sexual orientation.¹⁴⁹ Everyone, including lesbian, gay, bisexual, transgender and intersex persons has the right to liberty and security of person and therefore is protected from victimisation because of their sexual identity.¹⁵⁰ In relation to the perpetuation of violence and threat of life against sexual minorities, the Covenant on Civil and Political Rights further recognises the right to be protected from violence and discrimination for all people¹⁵¹ as well as the right of access to justice when such rights are violated.¹⁵² The range of civil and political rights have been described as ‘emancipation rights’, which inform the struggle against oppression, subjugation and discrimination.¹⁵³ These rights provide right holders, in this instance sexual minority groups, the arsenal to resist suppression by other dominant groups in society.

The Covenant on Civil and Political Rights also enshrines the right to freedom of association as well as the right to privacy.¹⁵⁴ It implies that lesbian, gay, bisexual, transgender and intersex persons have the right to decide whoever they choose to associate in terms of sexual relationship and no one, in respect of the right to privacy is allowed to interfere with the relationship. Persons who identify as sexual minorities may become victimised or suffer a violation of their rights as a result of their sexual orientation or gender identity. In this regard, the International Covenant on

¹⁴⁹ Art 3 and 26 of the ICCPR.

¹⁵⁰ Art 9 of ICCPR.

¹⁵¹ Organización de Transexuales por la Dignidad de la Diversidad (OTD) & International Gay and Lesbian Human Rights Commission (IGLHRC) ‘Human Rights Violations of Lesbian, Gay, Bisexual & Transgender (LGBT) People in Chile’ (2013) *Paper presented to the 018th Session of: International Covenant on Civil and Political Rights Human Rights Committee of the United Nations, Geneva* 3 (1-8). See also Art 6(1) and 7 of ICCPR.

¹⁵² Arts 9(4) of ICCPR.

¹⁵³ CC Ngang ‘Socio-economic rights litigation: A potential strategy in the struggle for social justice in South Africa’ (2013) *LLM dissertation, University of Pretoria* 7.

¹⁵⁴ Art 22(1) and 17(1) respectively.

Civil and Political Rights makes provision to the effect that everyone, including lesbian, gay, and bisexual, transgender and intersex persons has the right to due process of the law, to a fair trial and to effective judicial remedy.¹⁵⁵ By signing and ratifying the Covenant, states parties commit and are obligated to take necessary steps, including to scrap discriminatory laws and also to take legislative and other measures to ensure the protection of everyone, including sexual minorities and that access to remedy is made certain.¹⁵⁶

Though anti-sexual minority feelings remain high within many circles around the world, Robert Ermanski has argued that the International Bill of Human Rights provides a framework for the international protection of human rights within which persons, who identify as lesbians, gays, bisexuals, transgender and intersex may find guarantees of protection under the law.¹⁵⁷ Apart from the international human rights system, regional human rights systems also constitute sources of human rights law.

4.4 Regional guarantees for the protection of sexual minority rights

The African Charter constitutes the primary regional mechanism for the protection and promotion of human and peoples' rights on the African continent. The Charter makes provision for individual, family and group rights.¹⁵⁸ It guarantees protection to vulnerable and marginalised persons such as women, children, the aged and the disabled.¹⁵⁹ It however, does not enshrine any explicit recognition or protection of the rights of lesbian, gay, bisexual, transgender and intersex persons as a vulnerable and marginalised category. Like other international human rights instruments, the Charter is unsurprisingly silent in stating the question of sexual orientation or in addressing the rights of sexual minorities. This could probably be as a result of the fact that at the time of drafting the Charter, the question of sexual orientation might not have been an issue that posed any serious concerns as did the question of racial discrimination, for example, which

¹⁵⁵ Arts 2(3) and 14 of ICCPR.

¹⁵⁶ Arts 2(2) of ICCPR.

¹⁵⁷ RA Ermanski 'The Right to Privacy for Gay People Under International Human Rights Law' (1992) 15(1) *Boston College International and Comparative Law Review* 141-164.

¹⁵⁸ African Charter on Human and Peoples' Rights 1981; Art 2-17 deal with individual rights, Art 18 deals with family rights and Art 19-24 deals with group of solidarity rights.

¹⁵⁹ Art 18(3) and (4) of the African Charter.

demanding more urgent attention at the time. Today the question of sexual minorities has become one of the most topical concerns that needs to find expression in the law, which incidentally is subject to interpretation.

Thus notwithstanding the vacuum, the Charter enshrines a number of provisions under which protection of the rights of sexual minorities may be averred, principally on the basis of the fact that they are human beings with inherent rights like any other person. Protection that is due to lesbian, gay, bisexual, transgender and intersex persons can only be read into the principles of equality and non-discrimination which the Charter makes provision for. The Charter guarantees the right to equality and prohibits any form of discrimination based on a person's sexual orientation among other characteristics. With regard to equality, the Charter provides that 'all peoples shall be equally; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.'¹⁶⁰ It implies that lesbian, gay, bisexual, transgender and intersex persons have the same human rights like every other human person. The non-discrimination clause specifically states that:

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

This provision is subject to interpretation to the effect that it is applicable to sexual minorities since it guarantees for 'every individual' entitlement to enjoy the rights and freedoms recognised in the Charter without distinction of any kind including on the basis of sex or other status.¹⁶¹ No person may be treated differently on account of the person's sex, which has generally been associated only with being male or female. The word 'sex' as one of the grounds on which discrimination is prohibited, may be interpreted to refer to a person's sexual identity or orientation as was established in *Toonen v Australia*.¹⁶² Apart from the word 'sex', reference to 'other status' implies that the grounds on which discrimination is prohibited in Article 2 of the

¹⁶⁰ Art 19 of the African Charter.

¹⁶¹ LEF Huamusse 'The right of sexual minorities under the African human rights system' (2006) *LLM dissertation, University of Western Cape* 23.

¹⁶² *Toonen v Australia* (Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992) para 8.7.

Charter is not exhaustive.¹⁶³ A person's sexual orientation can be interpreted to constitute one of such other status that the Charter contemplates as a ground on which distinction may not be tolerated.¹⁶⁴

Same sex practicing persons are often discriminated against and their rights to equality are equally violated. They are also sometimes also treated with a lot of disdain as if they are less human than others. Additionally, legal protection for sexual minorities is guaranteed by the Charter. This commands respect for the dignity that every person is born with and prohibits all forms of torture, cruel, inhuman or degrading treatment.¹⁶⁵ Unlike other instruments, the African Charter is silent on the aspect of privacy as a ground on which homosexual behaviour may be protected. When seeking protection for lesbian, gay, bisexual, transgender and intersex persons on the African continent recourse may be derived from the Charter under the equality and non-discrimination clauses as well as under the clause on the prohibition of torture, cruel, inhuman or degrading treatment but not on the basis of privacy.

The African Charter also obligates state parties to ensure the promotion and protection of 'morals and traditional values' recognised by the particular community.¹⁶⁶ This poses a serious/dilemma for the protection of sexual minorities. This is because of the fact that most state-perpetuated homophobia and criminalisation of same-sex behaviour in the form of sodomy laws is founded on the grounds that homosexuality contravenes the virtues of culture and morality, and is against African values. The African Commission on Human and Peoples' Rights has however taken a progressive step towards remedying the plight of sexual minorities on the African continent. Most recently in May 2014, the African Commission adopted a resolution calling for the protection against violence and other human rights violations perpetuated against sexual minorities on the basis of their real or imputed sexual orientation or gender identity.¹⁶⁷

¹⁶³ Huamusse (n 161 above) 23.

¹⁶⁴ Huamusse (n 161 above) 24.

¹⁶⁵ Art 5 of the African Charter.

¹⁶⁶ Art 17(3) of the African Charter.

¹⁶⁷ African Commission on Human and Peoples' Rights 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, adopted at its 55th Ordinary Session held in Luanda, Angola, from 28 April to 12 May 2014.

The resolution does not elaborately spell out the nature of protection that is to be provided to sexual minorities and also does not provide remedies for violation. However, its adoption marks a significant milestone in the discourse on the protection of sexual minorities, especially in a continent where the subject has until now been treated as taboo. The Resolution establishes that it is wrongful for the state or a non-state actor to perpetuate any act of violence or violation of human rights on the basis of a person's sexual orientation or identity.¹⁶⁸ The Resolution calls on states parties to adopt appropriate legislative, administrative and judicial measures to sanction all forms of violence targeted at persons on the basis of their imputed or real sexual orientation or gender identities.¹⁶⁹ As a simple declaratory statement of the African Commission, the Resolution has no legally binding force; but it can be relied upon alongside the African Charter to provide protection to sexual minorities in Africa.

The provisions of the African Charter together with those of the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights provide certain normative standards in relation to the protection of sexual minority rights, which I move on to examine in the next subsection.

4.5 International Human Rights Law Standards on Sexual Minorities

The normative standards on the rights of sexual minorities which are discussed in this section constitute certain general principles and minimum requirements established by international human rights law as universal or the highest standards of application for promoting, protecting and defending the rights of lesbian, gay, bisexual, transgender and intersex persons globally, including in Namibia. These are standards which state governments are required to comply with when drafting domestic legislation, as international human rights law obligates state parties to international treaties to ensure that the rights provided therein are respected and fulfilled. International human rights normative standards are of such nature that when there is conflict with local standards, the international standards prevail.

¹⁶⁸ ACHR Resolution 275 (n 167 above) para. 1.

¹⁶⁹ ACHR Resolution 275 (n 167 above) para. 4.

4.6 Universality of human rights

International human rights law guarantees to every individual universal enjoyment of all human rights. Except otherwise stated, international human rights law establishes the standard that human rights are of universal relevance, which means they are applicable everywhere, at any time and to everybody. The principle of universality of human rights thus implies that lesbian, gay, bisexual, transgender and intersex persons are entitled to the enjoyment and protection of all the human rights and fundamental freedoms that are guaranteed to everyone. Kirven, Eguren and Caraj have made clear that sexual minorities are not advocating for special rights but are laying claim to the same universal human rights that every other person is entitled to¹⁷⁰ for the simple reason that they are human beings with the right to the recognition and preservation of their humanity.¹⁷¹

The fact that sexual minorities identify themselves differently from what mainstream society considers as acceptable sexual behaviour may prejudice their personalities in many different ways, but should not according to international human rights standards lessen their right to the enjoyment of the universal guarantee of inalienable human rights. Former UN High Commissioner for Human Rights, Louise Arbour has remarked that the shameful silence on the stigma attached to issues surrounding sexual orientation and gender identity and violence against LGBT represents an ultimate rejection of the fundamental principle of the universality of rights.¹⁷²

4.7 Human Dignity

Dignity is that inherent part of every human person that nobody may want to afford to lose. It is an inalienable entitlement that every person is born with and therefore should not be degraded by others. Dignity is recognised by international human rights law as one of those fundamental

¹⁷⁰ Kirven, Eguren & Caraj (n 142 above) 7.

¹⁷¹ Human Rights Resource Centre 'Understanding lesbian, gay, bisexual and transgender rights as human rights' available at: <http://www1.umn.edu/humanrts/edumat/hreduseries/TB3/intro.html> (accessed: 4 November 2014).

¹⁷² Louise Arbour, UN High Commissioner for Human Rights at the International Conference of Homosexuals and Transsexuals in Montreal, 26 July 2006; Kirven, Eguren & Caraj (n 142 above) 10.

human rights that cannot under any circumstance of law be derogated. In this regard, international human rights law has designated standards according to which people may live a life with dignity. To violate those standards means treating a person as inferior or less than a human being whereas, to advocate and promote them is to demand that the human dignity of all people be respected.¹⁷³

However, this may not always be the case. Lesbian, gay, bisexual, transgender and intersex persons have often been described by the rest of society as animals; with very pejorative and degrading names like dogs and pigs.¹⁷⁴ This conveys the notion that they are less than human beings and therefore do not deserve to enjoy the same rights as ‘the rest of us’ who are perceived to be ‘normal’ people.¹⁷⁵ Such a societal attitude has serious devastating impact on the dignity of persons who identify themselves as sexual minorities. In National Coalition for Gay and Lesbian Equality, the Constitutional Court of South Africa held that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society.”

The Court established that:

There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.

Human dignity as an international human rights standard ensures that every human person including; lesbian, gay, bisexual, transgender and intersex people is guaranteed recognition and protection not because of who they are but essentially for the sake of their humanity, coupled with the fact that human rights are intended to provide protection to every individual on an egalitarian basis.

¹⁷³ Human Rights Resource Centre (n 171 above).

¹⁷⁴ J Donnelly ‘Non-discrimination and sexual orientation: Making a place for sexual minorities in the global human rights regime’ in P Baehr, C Flinterman, and M Senders (eds) *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights* (1999) Amsterdam: Royal Netherlands Academy of Arts and Sciences 8 (93-110).

¹⁷⁵ Donnelly (n 174 above) 8.

4.8 Equality and Non-discrimination

Equality and non-discrimination are two interdependent human rights principles that explain and complement each other. James Matshekga has figured out that the principles of equality and non-discrimination as fundamental themes of international human rights law are interconnected that describing the meaning of the latter assumes the definition of the former.¹⁷⁶ Equality and non-discrimination set a normative standard that the rights and freedoms guaranteed by human rights law are to be exercised and enjoyed by every human person regardless of personal characteristics, including a person's sexual orientation or gender identity.

International human rights law provides that lesbian, gay, bisexual, transgender and intersex people are entitled to the same human rights pertaining to every other person, which includes the right to non-discrimination in the enjoyment of the totality of human rights.¹⁷⁷ Laws that criminalise sexual conduct on the basis of a person's sexual orientation have been said to be antagonistic to international human rights law.¹⁷⁸ The right to be free from discrimination is guaranteed by international law provisions on non-discrimination and equal protection of the law.¹⁷⁹ European Union High Representative, Catherine Ashton has stated that 'cultural, traditional or religious values cannot be invoked to justify any form of discrimination, including discrimination against LGBTI persons'.¹⁸⁰ To deny protection or other associated rights to sexual minorities on the basis of their sexuality, sexual expression, sexual orientation or sexual identity would amount to discrimination which is prohibited by human rights law. In *Zimbabwe NGO Human Rights Forum v Zimbabwe*, the African Commission on Human and Peoples' Rights established the principle that:¹⁸¹

¹⁷⁶ J Matshekga 'The African Charter on human and peoples' rights and the protection and promotion of the right to equality and non-discrimination for homosexuals: A discussion' (2003) 9 *Fundamina* 118 (114-123).

¹⁷⁷ European Union External Action 'Human rights: Lesbian, gay, bisexual, transgender and intersex (LGBTI)' (2013) European Union External Action Factsheet 1 (1-2).

¹⁷⁸ International Court of Justice (n 140 above) 4.

¹⁷⁹ As above.

¹⁸⁰ C Ashton 'Declaration by the High Representative Catherine Ashton on behalf of the European Union on the occasion of the International Day against Homophobia and Transphobia' (2014) *European Union* 1-2.

¹⁸¹ Communication 245/2002 – Zimbabwe Human Rights NGO Forum/Zimbabwe, 21st Activity Report, EX.CL/322(X), Annexure III at para 169; International Court of Justice (n 2 above) 8.

Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under Article 2 of the Charter provides the foundation for the enjoyment of all human rights... The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.

Jack Donnelly has quite vividly illustrated how the right to non-discrimination has been used progressively as an international human right standard by which the rights of certain minority groups such as non-white people and women, who at one point were considered to be of inferior status has been recognised and protected.¹⁸² The fact that international human rights instruments do not explicitly enshrine the words 'sexual orientation' as a ground for recognition and protection of the rights of sexual minorities is of negligible importance. It is clear that international human rights law, in practice, guarantees protection to every person, including lesbian, gay, and bisexual, transgender and intersex persons from discrimination on the basis of their sexual orientation.¹⁸³

4.9 Privacy

The guarantee of privacy as a human rights standard insulates individuals against arbitrary and unlawful interference with their private life.¹⁸⁴ In the same way that individuals are protected from discrimination on grounds of sexual orientation, sexual activity between consenting adults is protected from interference by the right to privacy.¹⁸⁵ The Human Rights Committee in *Toonen v Australia* established that 'adult consensual activity in private is covered by the concept of "privacy."' ¹⁸⁶ Every individual is entitled to privacy for the decisions that he or she makes about personal relationships and activities.¹⁸⁷ In the *National Coalition for Gay and Lesbian Equality v the Minister of Justice*, the Constitutional Court of South Africa held that:¹⁸⁸

¹⁸² Donnelly (n 174 above) 6.

¹⁸³ International Court of Justice (n 140 above) 12.

¹⁸⁴ Ermanski (n 157 above) 148.

¹⁸⁵ International Court of Justice (n 140 above) 9.

¹⁸⁶ *Toonen v Australia* 1994 para. 8.2.

¹⁸⁷ International Court of Justice (n 140 above) 10.

¹⁸⁸ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para. 32.

Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.

In *Nadan and McCoskar v State*, the High Court of Fiji at Suva determined that the 'state has no business in the field of private morality' and that the criminalisation of sexual conduct between consenting adults of the same sex in private. It was held that this would constitute a severe restriction on a citizen's right to build relationships with dignity and free of state intervention and cannot be justified as necessary.¹⁸⁹ Robert Ermanski holds the opinion that the scope of the right to privacy and its ability to offer human rights protection to persons who make up sexual minorities remains ambiguous.¹⁹⁰ The ambiguity stems from the fact that the guarantee of privacy is not absolute, not only for sexual minorities but also for every other person. Treaty provisions that guarantee the right to privacy are in many instances limited by imposed obligations and the requirements of morality and the need to protect the public interest.¹⁹¹ Thus, privacy remains a potential ground on which to establish protection for sexual minorities but its guarantees cannot absolutely be relied upon unless its limitations are sufficiently curtailed.

In the absence of adequate legal protection and consequently the lack of public space for sexual minorities to exercise and enjoy their human rights as a result of the criminalisation and victimisation of sexual minorities through widespread homophobia in a world that is predominantly heterosexist, many homosexual, bisexual, and transgender or intersex persons are forced into secluded living and subjected to feelings of shame and isolation.¹⁹² Thus, in spite of the guarantees of the right to privacy as a normative standard set by human rights law, the forced privacy to which sexual minorities are subjected precludes them from exercising and enjoying the full range of human rights. Interestingly, the African Charter does not make

¹⁸⁹ *Nadan and McCoskar v State* [2005] FJHC 500 para 183.

¹⁹⁰ Ermanski (n 157 above) 148.

¹⁹¹ Ermanski (n 157 above) 147-148.

¹⁹² Kirven, Eguren & Caraj (n 152 above) 10.

provision on the right to privacy as a ground for the recognition and protection of human rights on the basis of which the protection of sexual minorities in Africa may be evoked.

4.10 Conclusion

Central to the protection of human rights which, cuts across international human rights law are the universal principles of universality of human rights, human dignity, non-discrimination and equality before the law and privacy. The normative standards that have been analysed above, which derive from international and regional human rights instruments provide general guidelines for the realisation of human rights in general and for the protection of the rights of lesbian, gay, bisexual, transgender and intersex persons in particular. These standards are essentially theoretical are therefore by themselves are inadequate for effectively upholding and protecting the rights of sexual minorities because in most cases they lack appropriate and effective enforcement mechanisms. Effective legal protection of sexual minority rights can most appropriately be achieved under domestic law.

It is evident that the domestic legislation of most African countries, including Namibia are still hostile to sexual minorities, often based on the grounds of morality and cultural value systems. Meanwhile, international human rights law often requires state parties to human rights treaty instruments to take appropriate legislative and other measures through domestication to ensure that the provisions of the international and regional treaty instruments become directly application in domestic law. It is worth noting that human rights are not universally absolute but subject to justifiable limitations, according to which states may lawfully restrict any persons rights in order to protect the rights of others, to ensure the general welfare of society, to ensure public order, to promote morality, and to guarantee the security of every other person in society.¹⁹³ The requirement of justifiable limitation however, does not negate the fact that every human person has the right to protection on account of the fact that they are human, which constitutes the underlying normative principle that cuts across international human rights law.

¹⁹³ Ermanski (n 157 above) 146.

Namibia has a very good record with regard to the signing, ratification or accession to international human rights treaties.¹⁹⁴ The country has ratified and deposited its instruments of ratification of the African Charter in 1992.¹⁹⁵ The major problem is with implementation of the treaty provisions in relation to the protection of sexual minorities in Namibia. This is of great significance for the protection of sexual minorities in Namibia as the extent to which the country is bound by the normative standard established by international human rights law is relatively minimal.

¹⁹⁴ African Commission on Human and Peoples' Rights 'Ratification table: African Charter on Human and Peoples' Rights' available at: <http://www.achpr.org/instruments/achpr/ratification/> (accessed: 4 November 2014).

¹⁹⁵ University of Minnesota Human Rights Library 'Ratification of international human rights treaties – Namibia' available at: <http://www1.umn.edu/humanrts/research/ratification-namibia.html> (accessed: 4 November 2014).

CHAPTER FIVE

5 CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This final chapter is aimed at addressing the recommendations that the author believes to be necessary in order for a significant change to be brought about within the Namibian society in particular the Namibian police attitude towards individuals based on their sexual orientation. So that all who dwell under the protection of the Constitution can feel and know that they are safe regardless of their sexual orientation (or any other characteristic that distinguishes them from the majority). In this regard the author thinks it essential to depart with the wise words of Morris Dees:¹⁹⁶

‘The fight against hate crime is challenging and demands the attention of every citizen. For legislators, it means refining laws to address the serious threat of hate crime. For educators, it means finding ways to open the channels of cultural understanding among children. For police, it means increased attention to acts of hate violence. For neighborhoods, it means strengthening the bonds of community to embrace diversity and reject acts of bigotry.’

5.2 Conclusion

For change to take place those in legislative or judicial positions have to bring about change and do so with sincerity. With respect, the author begs to differ. Up until now, the fight for social change and acceptance of homosexual, bisexual and transgender persons has been taking place in the upper levels of society. And though the jurisprudence brought forth by the courts is transformative in its very nature and the legislation presented by the legislature is commendable, the fight desperately needs to be brought down to grass root levels where most of the damage and suffering is occurring. This can only be achieved by the implementation of the above measures, with most emphasis being placed on the implementation of education and awareness programmes – especially amongst the youth of tomorrow – because should this battle be

¹⁹⁶ J Levin and J McDevitt *Hate crimes: the rising tide of bigotry and bloodshed* (1993) 12-13.

completely be lost by the current generation, at least the future generations will stand a chance through lessons of tolerance, understanding and the opposition of violence, hatred, crime, victimisation and discrimination. This is not to say that the legislature and judiciary should halt in their efforts, but more to say that their hard work, with no education for the rest of society, bears no fruit at all. The human rights culture, as long as it remains only amongst the most learned of society, will not lead to the societal change that will ultimately see the birth of our aspiration – an open and democratic society based on the values of equality, human dignity and freedom.

In April 2013 the Chairperson of the African commission denounced violence committed against LGBTIs as part of the mandate to protect persons from all forms of violence. Homosexuality is not generally accepted amongst the majority of the people. It is regarded as unnatural and any form of sexual interaction between individuals of the same sex is illegal. Nonetheless, with reference to the Penal Code Act and the article 31(2a) of the Constitution Amendment, the only crimes that should be punishable are case in whereby individuals of the same sex are caught engaging in sexual acts and the prohibition of same sex marriages. However, this is not the case as the inherent and fundamental rights of the LGBTI community are being violated daily.

The LGBTI community and particularly members of the community who openly express their sexual orientation are faced with daily violations, discrimination and restrictions from essential services. From discussions above one can see that the Ugandan community is predominately against homosexuality and as a result the government is failing in the protection of the rights of the members of the LGBTI community.

5.3 Recommendations

With the above in mind the author makes the following recommendations:

5.3.1 Education

Though the author agrees with the statement by Morris Dees above, she submits that even before legal reform can be considered; education has to be given priority above the former. As legal academics we often rush to find the solution for the evils of our time in legal reform and

transformative jurisprudence, but here the author believes that more than laws, the society needs education at each and every single level, but most of all at the grass root levels. What needs to be taught is that hate crimes – regardless of the reason behind them – affect not only the individual or even a group of people, but society as a whole.¹⁹⁷ By implementing education and awareness programmes the responsibility for the protection of all members of society is taken out of the hands of authorities and placed in those of society,¹⁹⁸ delivering the message that if you want substantial change in this society, you will have to work at it yourselves. It must also be born in mind that education is right that state needs to implement so that members of the community can make informed decisions before acting on presumed social divides.

5.3.2 Legal and policy reform

In this regard there is much to be done in order to ensure the protection of the rights of all persons including the rights of LGBTI individuals. First and foremost the state officials need to stop saying one thing at home and acting oppositely at the international level. The state also needs to stop turning a blind eye to blatant violations of constitutional rights. If the constitution prohibits discrimination based on sexual orientation and state is obliged to uphold all constitutional values and principles and these must be upheld at all times and under all circumstances.

Secondly the author submits that in the case of the lesser hate crimes (harassment, hate speech and vandalism) the innovative powers awarded to the equality court by the section 21 of the Equality Act should be utilised to the fullest extent possible. One of the powers given to the court is the power to make an appropriate remedy such as an ‘order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question.’ With regard to the above order the equality court could possibly direct the criminal justice system to enact policies for the training and education authorities about hate crimes.

¹⁹⁷ As above.

¹⁹⁸ Levin & McDevitt (n 196 above) xi.

5.3.3 Amend Section 51 of the Sentencing Act

Section 51 of the Sentencing Act¹⁹⁹ should be amended to include a provision similar to Section 718.2 of the Canadian Criminal Code, which provides that:²⁰⁰

(a) A sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor, . . . shall be deemed to be aggravating circumstances.'

Such an amendment will force courts to take into consideration the hateful nature of an attack during the sentencing of the offender. And though the Prohibition on Hate Speech Bill of 2004²⁰¹ is a commendable effort on the part of government – it falls short in that it does not list sexual orientation one of the prohibited grounds. Furthermore government needs complete the legislative process as far as the above mentioned bill is concerned.

5.3.4 Enact legislation on hate crime

Other than the improvement and refinement of already existing laws, what more needs to be done is the enactment of legislation that specifically addresses hate crimes. The proposed legislation should ideally set out the definition of hate crime and what crimes constitute an offence in this regard. The legislation should also set out the grounds upon which a crime of hate can be committed against another person. Specific attention should be paid to sexual orientation, nationality and ethnicity as grounds for basing these attacks. The objectives of the proposed legislation should include, amongst other things;

- The fulfillment of the state's duties under the Constitution and international law.
- The prevention and combating of crimes of hate.
- The effective prosecution and punishment of persons who commit crimes of hate.

¹⁹⁹ Canadian Criminal Code 1985 section 718.2 available at <http://laws.justice.gc.ca> (accessed 27 November 2010)

²⁰⁰ As above.

²⁰¹ For more information, see: <http://www.info.gov.za/bills/2004/hatespeech.pdf> (accessed 29 November 2010).

- And the provision of support and assistance to victims of these crimes.

Furthermore the proposed legislation should demand the training of police officials, healthcare providers and court officials on hate crimes and related matters. In so doing there should be an improved response to hate crimes by the criminal justice system.²⁰²

Lastly, the author submits that the proposed legislation should provide for the establishment of an intersectional committee that focuses on preventing and combating hate crimes. Naturally, as the empowering legislation, it would also have to set out the mandate, powers, functions and duties of said committee. However, the author strongly suggests that two functions should specifically be awarded to the committee. The first of the functions of the committee should be the establishment and implementation public awareness and education programmes as soon as possible. This should be the main focus of the committee in the initial years after its establishment. The second function – and really it is more of a power than a function that the author suggests – is that in the first five years after establishment of the committee, the committee should receive mandatory annual reports from the SAPS, the national departments of health and social development and the NPA. These reports should detail the works that each of these above role players have done throughout the year to address hate crimes in society.

It is the opinion of the author that the implementation of the above measures will lead not only to improved responses to these crimes from the criminal justice system but also a safer nation for all to reside in.

²⁰² Organisation for Security and Cooperation in Europe,

REFERENCES

Legislation and international instruments

African Charter on Human and Peoples' Rights

African Commission on Human and Peoples' Rights 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, adopted at its 55th Ordinary Session held in Luanda, Angola, from 28 April to 12 May 2014.

Canadian Criminal Code 1985

Constitution of Namibia

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

Police Act of Namibia

Cases

Chairperson of the Immigration Selection Board v Frank 2001 NR 107 (SC), 135F-I.

Communication 245/2002 – Zimbabwe Human Rights NGO Forum/Zimbabwe, 21st Activity Report, EX.CL/322(X), Annexure III

Nadan and McCoskar v State [2005] FJHC 500.

National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC).

Toonen v Australia (Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992) para 8.7.

Books and journals

Altman, D Aggleton, P Williams, M Kong, T Reddy, V Harrad, D and Parker, R 'Men who have sex with men: Stigma and discrimination' (2012) 380(9839) *The Lancet* 439-445.

Arnold, SJ (1992) *Femininity and masculinity* (Doctoral dissertation).

Ashton, C 'Declaration by the High Representative Catherine Ashton on behalf of the European Union on the occasion of the International Day against Homophobia and Transphobia' (2014) *European Union* 1-2.

Bailey, JM *The man who would be queen* (2003) 86.

Brake, M and Hale, C *Public order and private lives: The politics of law and order* (1992) London: Routledge.

Brown, DG 'Sex-role preference in young children' (1956) 70(14) *Psychological Monographs: General and Applied* 1.

Campbell, H *Black's law dictionary* (1990) St Paul Minn: West Publishing Co.

Chapman, AR and Carbonetti, B 'Human rights protections for vulnerable and disadvantaged groups: The contributions of the UN Committee on Economic, Social and Cultural Rights' (2011) 33(3) *Human Rights Quarterly* 682-732.

Cole, SW Kemeny, ME and Visscher, BR 'Elevated physical health risk among gay men who conceal their homosexual identity' (1996) 15(4) *Health Psychology* 243.

Coleman, E 'Assessment of sexual orientation' (1987) 14(1-2) *Journal of Homosexuality* 9-24.

Comaroff, J and Comaroff, J 'Policing culture, cultural policing: law and social order in postcolonial South Africa' (2004) 29(3) *Law & Social Inquiry* 513-545.

Currier, A 'Decolonizing the law: LGBT organizing in Namibia and South Africa' (2011) In *Special Issue Social Movements/Legal Possibilities* (pp. 17-44). Emerald Group Publishing Limited.

Currier, A and Joëlle, MC 'The politics of pre-emption: Mobilisation against LGBT rights in Liberia.' (2017) *Social Movement Studies* 1-15.

Dank, BM 'Coming out in the gay world' (1971) 43(2) *Psychiatry* 180-197

Delphy, C 'Rethinking sex and gender' (1993) 16(1) In *Women's Studies International Forum* 1-9.

Donnelly, J 'Non-discrimination and sexual orientation: Making a place for sexual minorities in the global human rights regime' in P Baehr, C Flinterman, and M Senders (eds) *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights* (1999) Amsterdam: Royal Netherlands Academy of Arts and Sciences 8 (93-110).

Edmondson, L 'Uganda is too sexy: Reflections on Kony' (2012) 56(3) *The Drama Review* 10-17.

Ermanski, RA 'The Right to Privacy for Gay People Under International Human Rights Law' (1992) 15(1) *Boston College International and Comparative Law Review* 141-164.

Fagot, BI Rodgers, CS and Leinbach, MD 'Theories of gender socialization' (2000) *The developmental social psychology of gender*, 65-89.

Fenstermaker, S and Zimmerman, D 'Gender inequality: New conceptual terrain. *Doing gender, doing difference*, 25-39.

Fenton, S (17 May 2016) 'LGBT relationships are illegal in 74 countries, research finds' *Independent*. Available at: <http://www.independent.co.uk/news/world/gay-lesbian-bisexual-relationships-illegal-in-74-countries-a7033666.html> (accessed 22 June 2016).

Fielding, NG *Community policing* (1995) Oxford University Press.

Gilbert, K (29 April 2011) *Study: Gay teens five times more likely to attempt suicide*. Available at: <https://www.lifesitenews.com/news/study-gay-teens-five-times-more-likely-to-attempt-suicide> (accessed 20 June 2017).

Goffman, E 'Selections from stigma' (1997) 203 in *The disability studies reader* 215.

Goldstein, J 'Police discretion not to invoke the criminal process: Low-visibility decisions in the administration of justice' (1960) 69(4) *The Yale Law Journal* 543-594.

Golombok, S and Tasker, F 'Do parents influence the sexual orientation of their children? Findings from a longitudinal study of lesbian families' (1996) 32(1) *Developmental psychology* 3.

Gorman-Murray, A and Nash, CJ 'Queering religion, religious queers: a geographical commentary. *Queering religion, religious queers* (2014) xxiii-xxxvi.

Griffith, KH and Hebl, MR 'The disclosure dilemma for gay men and lesbians: "coming out" at work' (2002) 87(6) *Journal of applied psychology* 1191.

Grov, C Bimbi, DS NaniN, JE and Parsons, JT 'Race, ethnicity, gender, and generational factors associated with the coming-out process among gay, lesbian, and bisexual individuals' (2006) 43(2) *Journal of sex research* 115-121.

Hatt, M 'The male body in another frame: Thomas Eakins'" the swimming hole" as a homoerotic image' (1993) *Journal of Philosophy and the Visual Arts: The Body*, ed. Andrew Benjamin (London: Academy Editions/Ernst & Sohn, 1993), 18.

Herek, GM 'Confronting sexual stigma and prejudice: Theory and practice' (2007) 63(4) *Journal of Social Issues* 905-925.

Hornby, AS 'Oxford Advanced Learner's Dictionary' (2005) 7th edition Oxford University Press 1339.

Huamusse, LEF 'The right of sexual minorities under the African human rights system' (2006) *LLM dissertation, University of Western Cape* 23.

Human Rights Watch (13 May 2003) 'More than a name: State-sponsored homophobia and its consequences in Southern Africa.' Available at: <https://www.hrw.org/report/2003/05/13/more-name/state-sponsored-homophobia-and-its-consequences-southern-africa> (accessed 26 June 2015).

International Court of Justice 'international human rights law and the criminalization of same-sex sexual conduct' (2010) *International Court of Justice Briefing Paper 2*, 1-12.

Isay RA 'On the analytic therapy of homosexual men.' *The psychoanalytic study of the child*, (1985) 40(1), 235-254.

Kahn, MJ 'Factors affecting the coming out process for lesbians' (1991) 21(3) *Journal of Homosexuality* 47-70. Kane, M 'Social movement policy success: Decriminalizing state sodomy laws, 1969–1998' (2003) 8(3) *Mobilization: An International Quarterly* 313-334.

Kennedy, B 'Homosexuals in the periphery: Gay and lesbian rights in developing Africa (2006).

Kimmel, MS 'Masculinity as homophobia: Fear, shame, and silence in the construction of gender identity' (2004) *Race, class, and gender in the United States: An integrated study* 81-93.

Kirven, S Eguren, E and Caraj, M *Protection Manual for LGBTI Defenders* (2010) Protection International 8.

LaFont, S and Hubbard, D (2007) '*Unravelling Taboos: Gender and Sexuality in Namibia.*' Gender Research & Advocacy Project, Legal Assistance Centre. Windhoek Namibia. Available at: <http://www.lac.org.na/projects/grap/Pdf/unravellingt.pdf> (accessed 20 June 2015).

Levin, J and McDevitt, J *Hate crimes: the rising tide of bigotry and bloodshed* (1993) 12-13.

LGBTI Rights: mapping anti-gay laws in Africa. Tightening laws and increasing punishments. Available at: <https://www.amnesty.org.uk/lgbti-lgbt-gay-human-rights-law-africa-uganda-kenya-nigeria-cameroon> (accessed 12 August 2015).

Lister, G (04 May 2013) '*Tough times for LGBTI in Namibia too.*' Open society Initiative for Southern Africa. Available at: <http://www.osisa.org/lgbti/blog/tough-times-lgbti-namibia-too> (accessed 02 June 2017).

Lorway, R 'Dispelling "heterosexual African AIDS" in Namibia: Same-sex sexuality in the township of Katutura' (2006) 8(5) *Culture, Health & Sexuality* 435-449.

Marmor, J (1980) Homosexual behavior: A modern reappraisal.

Matshekga, J 'The African Charter on human and peoples' rights and the protection and promotion of the right to equality and non-discrimination for homosexuals: A discussion' (2003) 9 *Fundamina* 118 (114-123).

Mavhandu-Mudzusi, AH and Ganga-Limando, M 'Being Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) students at a South African rural university: Implications for HIV prevention' (2014) 16(2) *Africa Journal of Nursing and Midwifery* 125-138.

Moreno-Lax, V and Gragl, P 'Introduction: Beyond monism, dualism, pluralism: The quest for a (fully-fledged) theoretical framework: Co-implication, embeddedness, and interdependence between public international law and EU law' (2016) 35(1) *Yearbook of European Law* 455-470.

Namibia 2013 Human Rights Report. Available at: <https://www.state.gov/documents/organization/220354.pdf> (accessed on 30 June 2015), 24.

Namibia 2014 Human Rights Report. Available at: <https://www.state.gov/documents/organization/236600.pdf> (accessed on 30 June 2015).

Namibia 2016 Human Rights Report. Available at: <https://www.state.gov/documents/organization/265496.pdf> (accessed on 30 June 2015).

Ndashe, S 'Seeking the protection of LGBTI rights at the African Commission on Human and Peoples' Rights' (2012) 15(17) *Feminist Africa* 17-38.

Ngang, CC 'Socio-economic rights litigation: A potential strategy in the struggle for social justice in South Africa' (2013) *LLM dissertation, University of Pretoria* 7.

Nel, JA 'LGBTI affirmative practice guidelines: Psychology contributing to the "rainbow (in the nation)"?' (2013).

Obasola, KE 'An ethical perspective of homosexuality among the African people' (2013) 1(12) *European Journal of Business and Social Sciences* 77-85.

Ovesey, L 'The homosexual conflict: An adaptational analysis' (1954) 17(3) *Psychiatry* 243-250.

Patrick, A, Geschiere, P and Reid, G 'Homophobic Africa? Toward a more nuanced view.' (2012) 55(3) *African Studies Review* 145; L Scott 'Two Novembers: Movements, Rights, and the Yogyakarta Principles.' *World* (2008).

Patterson, CJ 'Children of lesbian and gay parents' (1992) 63(5) *Child development* 1025-1042.

Shively, MG and De Cecco, JP 'Components of sexual identity' (1977) 3(1) *Journal of homosexuality* 41-48.

Steidl, J 'Politicized Devotion to a Popular Saint: Daniel Zamudio and LGBT Rights in Chile' (2016) 16(2) *Spiritus: A Journal of Christian Spirituality* 189-214.

Quinn, GP Schabath, MB Sanchez, JA Sutton, SK and Green, BL 'The importance of disclosure: lesbian, gay, bisexual, transgender/transsexual, queer/questioning, and intersex individuals and the cancer continuum' (2015) 121(8) *Cancer* 1160-1163.

Rado, S 'A critical examination of the concept of bisexuality' (1940) 2(4) *Psychosomatic Medicine* 459-467.

Roberg, R and Kuykendall, JL *Police & society* (1993) Wadsworth Pub. Co, Belmont, California. Sell, RL 'Defining and measuring sexual orientation: A review' (1997) 26(6) *Archives of sexual behavior* 643-658.

Schober, JM 'Feminizing genitoplasty: A synopsis of issues relating to genital surgery in intersex individuals' (2004) 17(5) *Journal of Pediatric Endocrinology and Metabolism* 697-704.

Shipo, P (2010) 'The Prohibition of same sex marriages and its implication for Namibia's obligation in terms of the Constitution, Various international, and regional human rights instruments.' (Thesis) Available at: <http://www.wisis.unam.na/theses/shipo2010.pdf> (accessed 18 April 2015).

Shively, MG and De Cecco, JP 'Components of sexual identity' (1977) 3(1) *Journal of homosexuality* 41-48.

Siegel, EV *Female homosexuality: Choice without volition* (Vol 9) (2013) Routledge.

Stephenson, J (2000) *Out of the Closet and Into the Light: Clearing Up the Myths and Giving Answers about Gays and Lesbians*. iUniverse.

Tasker, FL and Golombok, S *Growing up in a lesbian family: Effects on child development* (1997) Guilford Press.

Trojanowicz, R and Bucqueroux, B 'Community policing' (1990) *A contemporary perspectiva (Cincinnati, Anderson Publishing Co., 1998)*.

Tudge, JR and Winterhoff, PA 'Vygotsky, Piaget, and Bandura: Perspectives on the relations between the social world and cognitive development' (1993) 36(2) *Human Development* 61-81.

Ungar, M 'Lesbian, gay, bisexual, and transgendered international alliances: The perils of success' (2001) *Forging radical alliances across difference: Coalition politics for the new millennium*, 235-248.

Unger, RK 'Toward a redefinition of sex and gender' (1979) 34(11) *American Psychologist* 1085.

Van Klinken, A and Chitando, E (Eds.) (2016) *Public Religion and the Politics of Homosexuality in Africa*. Routledge.

Vasey, PL and Bartlett, NH 'What can the Samoan "Fa'afafine" teach us about the Western concept of gender identity disorder in childhood?' (2007) 50(4) *Perspectives in biology and medicine* 481-490.

Viau-Skreslet, N (Nov 2009) 'State-sponsored homophobia in Africa: fueling the HIV/AIDS epidemic' *The Upstream Journal*. Available at: <https://www.upstreamjournal.org/2009/11/state-sponsored-homophobia-in-africa-fueling-the-hiv-aids-epidemic/> (accessed 01 July 2015).

Walker, T (14 March 2014) 'How Uganda was seduced by anti-gay conservative evangelicals: Critics of the country's homophobic law blame the views of fundamentalist US Christians.'

Available at: <http://www.independent.co.uk/news/world/africa/how-uganda-was-seduced-by-anti-gay-conservative-evangelicals-9193593.html> (accessed 26 June 2016).

Weinberg, D 'On the social construction of social problems and social problems theory: A contribution to the legacy of John Kitsuse' (2009) 40(1) *The American Sociologist* 61-78.

West, C and Zimmerman, DH 'Doing gender' (1987) 1(2) *Gender & society* 125-151.

Ukwimi, C (2010) 'Outright Action International formerly known as International Gay and Lesbian Human Rights Commission: Documenting LGBT Discrimination in Namibia.' Available at: <https://iglhrc.wordpress.com/2011/03/30/documenting-lgbt-discrimination-in-namibia/> (accessed 15 May 2016).

Internet sources

African Commission on Human and Peoples' Rights 'Ratification table: African Charter on Human and Peoples' Rights' available at: <http://www.achpr.org/instruments/achpr/ratification/> (accessed: 4 November 2014).

AllAfrica (20 March 2001) "Namibia: President Urges 'Gay Purge'" Available at: <http://allafrica.com/stories/200103200214.html> (accessed 26 June 2015).

Centers for Disease Control and Prevention (21 June 2017) *LGBTI Youth*. Available at: <https://www.cdc.gov/lgbthealth/youth.htm> (accessed 28 June 2017).

Deputy Minister of Justice (Hon Kawana), Second Reading Speech, National Assembly, 22 October 2002 in Chapter 2: Defining Domestic Violence, 35. Legal Action Center Namibia. Available at: <http://www.lac.org.na/projects/grap/Pdf/seekingch1-3.pdf> (accessed 21 June 2015).

Human Rights Resource Centre 'Understanding lesbian, gay, bisexual and transgender rights as human rights' available at: <http://www1.umn.edu/humanrts/edumat/hreduseries/TB3/intro.html> (accessed: 4 November 2014).

IOL News: "Nujoma declares war on gays and lesbians" Available at: <http://www.iol.co.za/news/africa/nujoma-declares-war-on-gays-and-lesbians-62486> (accessed 10 may 2014).

Lorway, R "'Where Can I be Deported?' Thinking Through the 'Foreigner Fetish' in Namibia." (2008) 27(1) *Medical anthropology* 70-97.

LGBTI Rights: mapping anti-gay laws in Africa. Tightening laws and increasing punishments. Available at: <https://www.amnesty.org.uk/lgbti-lgbt-gay-human-rights-law-africa-uganda-kenya-nigeria-cameroon> (accessed 12 August 2015).

Namibian law on LGBT issues: Gender Research and Advocacy Project Legal Assistance Centre (2015), Available at: http://www.lac.org.na/projects/grap/Pdf/LGBT_mono.pdf (accessed 20 August 2015).

News 24 (2011) 'Mr Gay Namibia beaten up, robbed.' Available at: <http://www.news24.com/Africa/News/Mr-Gay-Namibia-beaten-up-robbed-20111208> (accessed 17 April 2015).

News 24 (21 March 2001) 'Namibian gays challenge Nujoma.' Available at: <http://www.news24.com/xArchive/Archive/Namibian-gays-challenge-Nujoma-20010321> (accessed 02 June 2015).

Organización de Transexualespor la Dignidad de la Diversidad (OTD) &International Gay and Lesbian Human Rights Commission (IGLHRC) 'Human Rights Violations of Lesbian, Gay, Bisexual & Transgender (LGBT) People in Chile' (2013) *Paper presented to the 018th Session of: International Covenant on Civil and Political Rights Human Rights Committee of the United Nations, Geneva* 3 (1-8).

OSISA: Open Society Initiative for Southern Africa 'OutRight Namibia.' Available at: <http://www.osisa.org/lgbti/namibia/outright-namibia> (accessed 22 June 2016).

OSISA: Tough times for LGBTI in Namibia too by Gwen Lister (2013) available at: <http://www.osisa.org/lgbti/blog/tough-times-lgbti-namibia-too> (accessed 10 May 2014).

OutRight Action International (13 September 2005) *'Namibia: African NGOs Respond to Statement by Namibian Deputy Minister on Gays and Lesbians "Betraying the fight for freedom."* International Gay & Lesbian Human Rights Commission. Available at: <https://www.outrightinternational.org/content/namibia-african-ngos-respond-statement-namibian-deputy-minister-gays-and-lesbians-betraying> (accessed 20 June 2015).

Outright Namibia (ORN) waves the Rainbow Flag. Available at: <http://search.proquest.com/openview/6a82082e78ba778027efe28d5671823d/1?pq-origsite=gscholar&cbl=25421> (accessed 17 April 2015).

The Namibian (10 August 2011) *Suicide in Nam a crisis.* Available at: <http://www.namibian.com.na/index.php?id=83768&page=archive-read> (accessed 20 June 2016).

The Namibian: Prejudice Fuels Denial of LGBT Rights, available at: <http://www.namibian.com.na/index.php?id=122865&page=archive-read> (accessed 17 April 2015).

The Namibian struggle for independence – 1966 – 1990 – a historical background, available at: <http://www.sahistory.org.za/article/namibian-struggle-independence-1966-1990-historical-background> (accessed 06 April 2015).

The Namibian Sun (28 October 2013) *Four suicides reported over the weekend.* Available at: <https://www.namibiansun.com/news/four-suicides-reported-over-the-weekend> (accessed 20 June 2017).

University of Minnesota Human Rights Library 'Ratification of international human rights treaties – Namibia' available at: <http://www1.umn.edu/humanrts/research/ratification-namibia.html> (accessed: 4 November 2014).

We Are Family: A safe space for LGBTQI and straight ally youth '*Lesbian, Gay and Bisexual Glossary of Terms.*' Available at: <http://www.wearefamilycharleston.org/lgbt-a-z-glossary/> (accessed 26 June 2015).

World Health Rankings (May 2014) *Namibia: Suicide*. Available at:
<http://www.worldlifeexpectancy.com/namibia-suicide> (accessed 27 June 2016).