

**THE ROLE OF THE JUDICIARY IN THE PROTECTION OF  
SEXUAL MINORITIES IN KENYA**

**A dissertation submitted in partial fulfilment of the requirements of the  
degree LLM (Human Rights and Democratisation in Africa)**

**By**

**IVY IRENE KWAMBOKA NYARANG'O**

**Student Number: 28525206**

**Prepared under the supervision of Mr. Angelo Matusse at the Faculty  
of Law, Universidade Eduardo Mondlane**

**28 October 2011**

## **Plagiarism declaration**

I, IVY IRENE KWAMBOKA NYARANGO, declare that the work presented in this dissertation is original. It has not been presented to any other university or institution. Where the work of other people has been used, it has been duly acknowledged.

Signature:

Date: 28 October 2011

Supervisor: ANGELO MATUSSE

Signature:

Date:

## **Dedication**

This work is dedicated to my beloved lovely daughter, Arielle Shekinah, who has had to endure a year of my absence.

And to my parents, Priscah Moraa and Tim Nyarango for love beyond measure, for looking after my little angel in my absence, for inspiration and then some.

## Acknowledgment

To God, the Almighty, for all.

I am eternally grateful to my family for constant love, unfailing support, prayer and encouragement. I am indebted to my supervisor, Mr Angelo Matusse, for his guidance in the writing of this dissertation and to the Centre for Human Rights, Universidade Eduardo Mondlane. To you I say, *muito obrigada*.

My heartfelt gratitude to the Centre for Human Rights, University of Pretoria, for granting me the privilege and opportunity to be part of this amazing and challenging experience. I appreciate the support of my friends both at home and on the LLM programme. I thank Isabella for struggling with me in Maputo – we did, eventually, learn some Portuguese!

To all whose support has been invaluable including those that I am not able to name for paucity of space, *Ahsanteni sana!*

## Acronyms and abbreviations

African Charter	African Charter on Human and Peoples' Rights
AIDS	Acquired Immune Deficiency Syndrome
African Commission	African Commission on Human and Peoples' Rights
African Court	African Court on Human and Peoples' Rights
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CG	General Comment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
GR	General Recommendation
HIV	Human Immunodeficiency Virus
HRC	Human Rights Council
HR Committee	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
LGBTI	Lesbian Gay Bisexual Transgender Intersex
NEPAD	New Partnership for Africa's Development
OHCHR	Office of the High Commissioner for Human Rights
UPR	Universal Periodic Review
UN	United Nations
Universal Declaration	Universal Declaration on Human Rights

**Table of Contents**

Plagiarism declaration ..... ii

Dedication ..... iii

Acknowledgment ..... iv

Acronyms and abbreviations ..... v

Table of Contents ..... vi

**Chapter 1: Introduction..... 1**

    1.1 Background ..... 1

    1.2 Problem statement ..... 1

    1.3 Research questions..... 4

    1.4 Significance of the study ..... 4

    1.5 Literature review ..... 4

    1.6 Research methodology ..... 6

    1.7 Limitations ..... 6

    1.8 Overview of chapters..... 6

**Chapter 2: The international framework for protection of sexual minority rights ...7**

    2.1 Introduction ..... 7

    2.2 Cultural relativism versus universalism ..... 8

    2.3 International protection of sexual minorities ..... 9

        2.3.1 The UN Charter ..... 9

        2.3.2 The international Bill of Rights ..... 10

        2.3.3 Other treaties and General Comments or Recommendations ..... 14

        2.3.4 Resolutions and special mechanisms ..... 16

        2.3.5 The Yogyakarta Principles ..... 17

    2.4 Regional framework for protection of sexual minorities ..... 18

2.4.1	The European system.....	18
2.4.2	The Inter-American system.....	19
2.4.3	African human rights system.....	19
2.5	Conclusion .....	21
<b>Chapter 3: The judiciary and protection of minority rights .....</b>		<b>23</b>
3.1	Introduction .....	23
3.2	The role of the judiciary in protecting minorities .....	23
3.3	Judicial review: A few case studies .....	25
3.4	Challenges to judicial enforcement of sexual minority rights .....	27
3.4.1	Cultural attitudes.....	27
3.4.2	Religion.....	28
3.4.3	The counter-majoritarian dilemma .....	29
3.5	Conclusion .....	33
<b>Chapter 4: The role of Kenya’s judiciary in decriminalising same-sex conduct ....</b>		<b>34</b>
4.1	Introduction .....	34
4.2	The criminal law provisions against same-sex conduct and their origins .....	35
4.3	The framework for decriminalisation of same-sex conduct in Kenya.....	36
4.3.1	The Constitution.....	36
4.3.2	International law.....	38
4.3.3	Limitation of rights.....	39
4.4	Factors necessary for successful striking down of anti-homosexuality legislation	39
4.4.1	A reformed and independent judiciary .....	39
4.4.2	Judicial activism and purposive interpretation of the Constitution.....	40
4.4.3	Participation of human rights organisations .....	42
4.5	Conclusion .....	43

<b>Chapter 5: Conclusions and recommendations</b> .....	44
5.1 Conclusions.....	44
5.2 Recommendations .....	45
<b>Bibliography</b> .....	48



# Chapter One: Introduction

## 1.1 Background

The debate stirred by the recent appointment of a chief justice and deputy chief justice under the judicial reform process envisaged in Kenya's new Constitution<sup>1</sup> has, once again, brought to the fore the attitude surrounding sexual minorities.<sup>2</sup> A section of religious organisations and citizens rejected the nominees because they perceived the duo to either belong to or to support sexual minority groups.<sup>3</sup>

The hostility and antipathy directed at the two is not new. In recent times, the clergy and state officials have been quoted calling for the arrest of gays.<sup>4</sup> It is common for perceived homosexuals and lesbians to be harassed because of their sexual orientation.<sup>5</sup> Support for the rights and welfare of this group draws quick condemnation. In October 2010, a minister who stated that there should be HIV/AIDS mitigation programmes for lesbians and gays was sharply criticised by religious leaders who termed her remarks 'satanic' and 'contrary to African culture', and called for her dismissal.<sup>6</sup>

LGBTI individuals, on their part are becoming increasingly vocal in demanding recognition of their rights. As a result, the sexual minority rights debate has been galvanised anew. There is concern on both sides of the debate about the social and legal transformation envisaged under the new Constitution and the extent to which it protects the rights of sexual minorities.

## 1.2 Problem statement

One of the most glaring forms of marginalisation in Kenya is that directed at sexual minorities. This category of persons has gained the least advancement in the move towards realisation of their rights. The LGBTI community has to operate out of sight for fear of reprisals from the larger

---

<sup>1</sup> The Constitution was approved at a referendum of 4 August 2010 and subsequently promulgated on 27 August 2010.

<sup>2</sup> 'Sexual minorities' is used in this work interchangeably with 'LGBTI individuals' to refer to all persons normally discriminated against because of non-conformity with conventional sexual orientation, gender identity behaviour or inclination.

<sup>3</sup> See 'Kenyan church rejects Mutunga, Baraza' [africanews247.com/news/kenyan-church-rejects-mutunga-baraza](http://africanews247.com/news/kenyan-church-rejects-mutunga-baraza) (accessed 17 May 2011)

<sup>4</sup> 'Kenya's PM Raila Odinga threatens arrest of gays' [http://www.bbc.co.uk/worldservice/africa/2010/11/101129\\_kenya\\_odinga\\_gays.shtml](http://www.bbc.co.uk/worldservice/africa/2010/11/101129_kenya_odinga_gays.shtml) (accessed 25 April 2011).

<sup>5</sup> see eg 'Kenya chiefs stop Mombasa 'gay wedding'' <http://news.bbc.co.uk/2/hi/8511321.stm> (accessed 12 June 2011); 'Clerics seek harsher laws for gays' *Daily Nation* 14 June 2011.

<sup>6</sup> 'Minister condemned for promoting gay inclusion' <http://www.mask.org.za/kenyan-minister-condemned-for-promoting-gay-inclusion/> (accessed 12 June 2011).

society including educational institutions, religious organisations and the police.<sup>7</sup>

The key cause for this marginalisation is the continued criminalisation of consensual same-sex relations between adults in private. Sodomy and same-sex conduct, termed ‘carnal knowledge against the order of nature’, ‘gross indecency’ and ‘indecent practices between males’, are felonies punishable by imprisonment under the penal laws of Kenya.<sup>8</sup> Kenya is among 80 countries in the world which criminalise consensual same-sex between adults.<sup>9</sup> LGBTI persons are constantly rounded up, held in detention without charge beyond the constitutionally mandated 24 hours or presented in court on trumped-up charges such as possession of narcotic drugs.<sup>10</sup> Abetting this is a cartel of state agents who use the law to invade private homes and blackmail or extort LGBTI persons with threats of arrest.<sup>11</sup> Anti-homosexuality laws have also created a conducive environment for institutionalisation of blackmail by private citizens, causing LGBTI persons to hide even further.<sup>12</sup>

These laws, while inherited from the former colonial masters, have been retained in Kenya’s statute books. The provision in section 11A of the Sexual Offences Act outlawing ‘indecent practices’, is a latter-day addition inspired by the Penal Code. Like in much of Africa, these laws continue to evoke heated, polarising debate.<sup>13</sup> Religious leaders and one section of the citizenry support the continued existence and enforcement of anti-homosexual legislation and even call for harsher penalties while the LGBTI community, human rights advocates and another section of the citizenry view them as the epitome of violation of the rights of LGBTI individuals and an indication of Kenya’s failure to abide by its international obligations.<sup>14</sup> Significant international bodies have taken the latter view.<sup>15</sup>

---

<sup>7</sup> See generally, Kenya Human Rights Commission ‘The outlawed amongst us: A study of the LGBTI community’s search for equality and non-discrimination in Kenya’ (2011). This report gives an analysis of the violations directed at the LGBTI community in Kenya eg harassment by state officials, threats of death and physical violence, exclusion, stigmatisation, extortion, blackmail, expulsion from learning institutions, medical research abuse, denial of healthcare services etc.

<sup>8</sup> Penal Code secs 162, 163 & 165; Sexual Offences Act sec 11A

<sup>9</sup> See Human Rights Watch ‘This alien legacy, the origin of sodomy laws in British colonialism’ (2008) 4.

<sup>10</sup> Kenya Human Rights Commission report (n 7 above) 21.

<sup>11</sup> As above.

<sup>12</sup> Kenya Human Rights Commission report (n 7 above) 45.

<sup>13</sup> S Tamale ‘Out of the closet: unveiling sexuality discourses in Uganda’ (2003) 2 *Feminist Africa Changing Cultures* <http://www.feministafrica.org/index.php/out-of-the-closet> (accessed 12 June 2011).

<sup>14</sup> L Mute ‘Africa’s hypocrisy on human rights, sexual orientation and gender identity’ <http://www.pambazuka.org/en/category/comment/53072/print> (accessed 13 June 2011).

<sup>15</sup> See eg concluding observations of the Human Rights Committee on Tanzania’s fourth periodic report, 96<sup>th</sup> Session, Geneva, July 2009CCPR/C/TZA/CO/46 August 2009 para 22. The Committee urged states parties to take steps to de-criminalise same sex conduct and protect homosexuals from discrimination and harassment; Draft Report of the Working Group on the Universal Periodic Review of the UN Human Rights Council on Kenya’s Universal Periodic Review, 6 May 2010 . Kenya was urged to decriminalise consensual same-sex conduct; the UN Human Rights

The Constitution of Kenya affirms the principles of equality, inclusiveness and protection of marginalised persons. Articles 27(4) and 27(5) prohibit indirect and direct discrimination. The grounds of non-discrimination are open ended and can be read to include gender identity and sexual orientation.<sup>16</sup> Article 31 guarantees the right to privacy. It is, therefore, a matter of concern that the anti-homosexuality laws are allowed to stand and are employed to harass individuals for expressing their orientation. Sexual orientation is defined 'by reference to erotic attraction in the case of heterosexuals to members of the opposite sex [and] in the case of gays and lesbians to members of the same sex'.<sup>17</sup> Thus, the marginalisation of sexual minorities is based upon their identity. Their life styles are termed 'un-African' and 'deviant', in order to justify discrimination and marginalisation.

The position that heterosexuality is the only natural form of sexual expression is grounded in a cultural framework that labels homosexuality pathological and immoral.<sup>18</sup> Yet, morality is a concept that calls for tolerance and accommodation within society.<sup>19</sup> Marginalisation cannot co-exist with morality. Equal treatment of citizens is a moral imperative that states should enforce.

The judiciary can play a role in the protection of sexual minorities who, because of lack of numbers, cannot effectively assert their rights through the electoral process. This is feasible now that the new Constitution seeks to reform the judiciary and, more, to establish a society 'based on human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised'. It also incorporates general rules of international law and treaties ratified by Kenya into the domestic laws of Kenya. While there is no specific treaty addressing sexual minority rights, there is significant exposition and jurisprudence on other human rights instruments that can be relied on to protect the rights of sexual minorities.

This dissertation evaluates the potential for judicial protection of sexual minorities in Kenya in light of the new constitutional order. It focuses on decriminalisation of homosexuality as a strategy for legal and policy reform.

---

Committee made a finding in *Toonen v Australia* that criminalisation of consensual same-sex acts between adults in private was a violation of the ICCPR; See also Human Rights Council Resolution on human rights, sexual orientation and gender identity A/HRC/17/L.9/Rev.1 of 17 June 2011.

<sup>16</sup> Kenya Human Rights Commission Report (n 7 above) 12.

<sup>17</sup> E Cameron 'Sexual orientation and the constitution: A test case for human rights' (1993) 110 *South African Law Journal* 450.

<sup>18</sup> M Machera 'Opening a can of worms: A debate on female sexuality in the lecture theatre' in A Signe (ed) *Rethinking sexuality in Africa* (2004) 157.

<sup>19</sup> JJ Shestack 'The philosophical foundations of human rights' (1998) 20 *Human Rights Quarterly* 201-234.

### 1.3 Research questions

The main question that this research seeks to answer is: How can the judiciary aid the protection of sexual minorities in the new constitutional order?

Subsidiary questions are:

- a) what is the international framework for the protection of sexual minorities?
- b) what is the role of the judiciary in the protection of human rights and how can courts overcome the anti-majoritarian dilemma in protecting the rights of minorities?
- c) does the new Constitution of Kenya provide a normative framework for protection of sexual minority rights?
- d) what factors are necessary for decriminalisation of same sex-conduct in Kenya?

### 1.4 Significance of the study

This study contributes to the debate on sexual minority rights in Kenya. It examines the Constitution, same-sex penal prohibitions and the prevailing attitudes towards sexual minority rights in light of the general principles of international law and international legal instruments now incorporated into Kenya's law under the new Constitution. It makes a case for utilising the judiciary to strike down laws prohibiting same-sex conduct so as to attain greater protection for sexual minorities.

### 1.5 Literature review

A significant amount of scholarship has been expended on the subject of sexual minority rights in Africa though not much literature exists with regard to the situation in Kenya. De vos<sup>20</sup> argues strongly for legal protection of sexual minorities. He identifies law as a tool that can be employed in protecting gays and lesbians. His writing does not, however, assess how domestic courts can use international law and commitments to ensure protection of the rights for sexual minorities.

Quansah<sup>21</sup> contrasts the attitude of the judiciary in Zimbabwe, Botswana and South Africa with regard to the protection of sexual minority rights and concludes that courts in South Africa are more prepared to protect those rights than in the other two countries. He postulates that this is because the South African Constitution expressly recognises the rights of sexual minority rights

---

<sup>20</sup> P De Vos 'On the legal construction of gay and lesbian identity and South Africa's transitional Constitution' (1996) 12 *South African Journal on Human Rights* 265.

<sup>21</sup> EK Quansah 'Same-sex relationships in Botswana: Current perspectives and future prospects' (2002) 4 *Africa Human Rights Law Journal* 201.

while the other two do not. He, nonetheless, calls for a broad interpretation of the rights to privacy, equality and dignity in order to assure protection of minorities. This work concurs with this position and adds that Kenya's judiciary must also apply international legal instruments as it is obligated to.

Ako<sup>22</sup> has done a comparative study of the situation in Uganda, Malawi, South Africa and Botswana. While some of the issues under discussion may coincide with this study such as the origin of anti-homosexuality laws and attitudes towards LGBTI individuals, the current work speaks to the peculiar circumstances of Kenya, in particular the opportunity for enhanced protection provided by a new and progressive Constitution.

Prior to the decriminalisation of sodomy in South Africa, Cameron<sup>23</sup> had argued that sodomy should be decriminalised because it treats homosexuality as an insult. These views are pertinent in the application of salient constitutional provisions to anti-sodomy laws. Writing later,<sup>24</sup> he stated that the African concept of 'ubuntu' or oneness ought to galvanise people towards the protection of sexual minority rights. This appears risky because much of the vitriol directed against homosexuality and 'unconventional' gender identity arises from the characterisation of these as un-African, alien and inimical to African cultural values.<sup>25</sup>

Regarding the role of the judiciary, Bickel<sup>26</sup> was probably the first to write on judicial activism, which he termed 'judicial review' and regarding which he expressed the counter-majoritarian dilemma. He presented the view that the judiciary should apply principles drawn from the evolving morality of society in deciding cases even if it means applying principles outside of the constitution. While this study may not agree with the extent of this proposal, it does agree with the underlying tenet that judicial protection of human rights should entail a purposive interpretation of constitutional enactments and that in a constitutional democracy, the judiciary should rise above subjective popular sentiment and give effect to the bill of rights.

---

<sup>22</sup> EY Ako 'The debate on sexual minority rights in Africa' unpublished LLM dissertation, University of Pretoria 2010.

<sup>23</sup> E Cameron 'Un-apprehended felons: Gays and lesbians and the law in South Africa' in M Gessiver & E Cameron (eds) *Defiant desire: Gay and lesbian lives in South Africa* 90.

<sup>24</sup> E Cameron 'Constitutional protection of sexual orientation and African concepts of humanity' (2001) 118 *South African Law Journal* 642.

<sup>25</sup> L Keevy 'Ubuntu versus the core values of the South African Constitution' (2009) 34(2) *Journal for Juridical Science* 44.

<sup>26</sup> A Bickel *The least dangerous branch: The Supreme Court at the bar of politics* (1962) 21.

## **1.6 Research methodology**

This work will be based on library research. When looking at the Kenyan situation focus will be given to the relevant legislative enactments, policies and case law. The work will also include use of the Internet.

## **1.7 Limitations**

The sexual minority rights debate in Kenya is still at the level of attainment of basic rights for LGBTI individuals. Thus, this study focuses on this through proposals for de-criminalisation of same-sex conduct. It does not address same-sex civil unions for this would be premature in the Kenyan context. Further, the discussion on religious attitudes will only address Christianity, this being the most outspoken religion on sexual minority issues and reflecting the Judaeo-Christian roots of Kenya's anti-homosexuality laws. Finally, there is limited jurisprudence on sexual minority issues in Kenya and recourse will be had to comparative constitutional systems where necessary.

## **1.8 Overview of chapters**

Chapter two will discuss the international framework for protection of sexual minorities. It will evaluate treaties, regional human rights systems, pronouncements of treaty bodies and special mechanisms. Chapter three will address the judiciary and the protection of minorities. It will look at democracy, human rights, minorities and case studies on protection of minorities. It will also explore socio-cultural and religious attitudes impacting sexual minorities, the counter-majoritarian difficulty and how to overcome it. Chapter four will address the judicial protection of sexual minorities under Kenya's new constitutional dispensation including the framework for de-criminalisation of same-sex conduct. It will also examine other factors necessary for spurring de-criminalisation. Chapter five will present conclusions and recommendations

# Chapter Two: The international framework for protection of sexual minority rights

## 2.1 Introduction

In modern state-based societies, sexual minorities comprise one of the largest minority groups experiencing widespread discrimination and the protection of their rights is an international human rights issue.<sup>27</sup> There is currently no explicit international instrument on sexual minority rights. As Lau states:<sup>28</sup>

Recognition of sexual orientation is still developing. The contours of sexual orientation are unclear. There is no human rights treaty with the words 'sexual orientation' in its title, nor any such treaty that specifically delineates sexual orientation rights.

The trend is to protect LGBTI individuals within the existing legal framework with the likelihood of a comprehensive free-standing instrument in future.<sup>29</sup> This flows from the fundamental premise that all human beings are entitled to basic rights by the simple fact of their being human.<sup>30</sup> These guarantees impose upon state parties the duty to respect, protect and fulfil the rights of all.<sup>31</sup> This entails obligations to: refrain from activity that may interfere with the enjoyment of rights; ensure that third parties do not violate rights; and, create circumstances that are conducive for the realisation of rights.<sup>32</sup> With regard to sexual minority rights, there is a chasm between the obligations assumed by ratification of instruments and the observance thereof, a factor aided, perhaps, by the never-ending tension between cultural relativism and universalism.

This chapter explores the arguments for universal enjoyment of human rights against those for cultural relativism. It then reviews the protections accorded to sexual minorities in some international human rights instruments, specifically, the UN Charter, the Universal Declaration on Human Rights (Universal Declaration), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention Against Torture CAT, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) along with the monitoring mechanisms in the treaties and the pronouncements of treaty bodies.

---

<sup>27</sup> E Heinze *Sexual orientation: A human right* (1995) 58.

<sup>28</sup> H Lau 'Sexual orientation: Testing the universality of international human rights law' (2004) 71 *University of Chicago Law Review* 1689.

<sup>29</sup> F Viljoen *International human rights law in Africa* (upcoming revised edition 2011).

<sup>30</sup> Heinze (n 27 above).

<sup>31</sup> M Sepulveda et al *Human rights reference handbook* (2004) 16.

<sup>32</sup> Sepulveda (n 31 above) 14.

It then looks at the regional mechanisms in the European, Inter-American and African human rights systems. The chapter concludes with some observations on how protection of sexual minorities can be enhanced.

## 2.2 Cultural relativism versus universalism

The position of most African states in interpreting and applying human rights standards to gender identity and sexual orientation exemplifies the perennial conflict between cultural relativism and universalism. The former view maintains that human rights standards must be construed in the context of a particular socio-political environment. The latter holds that human beings, wherever they be, are entitled to certain fundamental rights and freedoms, which inhere to them purely by reason of their being human. The idea of universal enjoyment of rights is traceable to the Universal Declaration.<sup>33</sup> African and Asian states often view universal application of human rights as a western concept intended to interfere with internal affairs of states and to impose the 'ideological patrimony of western civilisation'.<sup>34</sup> On their part, western states perceive the insistence on cultural context as a ruse for the denial of rights.<sup>35</sup>

It is acknowledged that law and legal principles do not operate in a vacuum and moral or social considerations are bound to surface in applying recognised rights to LGBTI persons. Because of this, human rights players must utilise innovative strategies to deal with the protection of minorities.<sup>36</sup> It is necessary to raise courts to their role as custodians of justice, and not mere rubber stamps for majority positions, to uphold their duty of ensuring fundamental rights for all regardless of the popularity of their decisions.<sup>37</sup> In doing so, they can draw inspiration from local circumstances and scholarship. As Lau states:<sup>38</sup>

Human rights definitions are still compatible with their native philosophies despite their origin in Western liberalism. For instance...the Koran may be interpreted either to further the agendas of oppressive regimes or to support a universalist understanding of human rights...Confucian scholars have used Confucian texts to support universalism: they argue that there is a substantial convergence between Confucianism and political liberalism.

---

<sup>33</sup> CM Cerna 'Universality of human rights and cultural diversity: Implementation of human rights in different socio-cultural contexts' (1994) 16 *Human Rights Quarterly* 740.

<sup>34</sup> As above.

<sup>35</sup> As above.

<sup>36</sup> J Gondi 'Discrimination on the basis of sexual orientation: An international comparative analysis' in M Killander (ed) *Human rights litigation and domestication of human rights standards in sub-Saharan Africa* (2007) 16.

<sup>37</sup> As above.

<sup>38</sup> Lau (n 28 above).



Similar strategy can be used to address the argument that extending human rights protections to sexual minorities runs counter to religious edicts and African cultural norms.<sup>39</sup>

## 2.3 International protection of sexual minorities

### 2.3.1 The UN Charter

The UN Charter creates legal obligations for member states and mandates the UN to formulate principles of international human rights law.<sup>40</sup> Among these are respect for justice and guarantees of fundamental human rights. Member-states have agreed to the terms of the Charter, hence the UN can exercise authority over states that fail to adhere to the directives laid down in UN instruments.<sup>41</sup>

The preamble states that member-states must grant equality and fundamental human rights to all. It mandates the UN to 'reaffirm faith in fundamental rights, in the worth and dignity of the human person and in the equal rights of men and women'. It authorises the UN to create conditions under which justice and respect for obligations arising from treaties and other sources of international law can be maintained. Article 1 states that one goal of the UN is encouraging and promoting respect for fundamental freedoms and human rights for all without distinction as to sex, race, language or religion. The principle of non-discrimination is reiterated in article 55 in relation to economic and social development.

By outlawing gender discrimination the UN creates a basis for protection for sexual minorities.<sup>42</sup> Marginalisation of and discrimination against LGBTI persons for failure to conform to conventional gender identity roles or sexual expression constitutes a form of sex discrimination.<sup>43</sup> As the UN Charter categorically states that individuals must not be discriminated against based on sex, the UN recognises sexual minorities in its framework for human rights protection.<sup>44</sup>

Admittedly, this interpretation is wider than the traditional understanding of sex discrimination but it must be borne in mind that the UN has expanded other concepts such as 'family' to cater for

---

<sup>39</sup> Gondi (n 36) above.

<sup>40</sup> UN Charter, art 2 para 4; For list of UN members see <http://www.un.org/overview/unmember.html> (accessed 18 August 2011).

<sup>41</sup> UN Charter, arts 5 & 6; P Narayan 'Somewhere over the rainbow: International human rights protections for sexual minorities in the new millennium' (2006) 24 *Boston University International Law Review* 324.

<sup>42</sup> Narayan (n 41 above) 325.

<sup>43</sup> As above.

<sup>44</sup> MS Aguirre & A Woolgram 'United Nations policy and the family: Redefining ties that bind a study of history, sources and trends' (2002) 16 *Brigham Young University Journal of Public Law* 128-129.

the different psychological and cultural structures that have developed since various covenants were first agreed upon.<sup>45</sup> In the absence of explicit enactments relating to the rights of LGBTI individuals, the provisions in the Charter can be utilised to recognise sexual minorities under the term 'sex'.<sup>46</sup>

By ratifying the UN Charter, member states have agreed to support the UN to uphold the ideals of the Charter and, as such, the UN can take a stronger position to include anti-discrimination measures on the basis of sexual orientation and gender identity.<sup>47</sup> With greater enforcement, there would not be much room for member states to interpret instruments in a manner that allows for persecution of sexual minorities.

### 2.3.2 The international Bill of Rights

The now-defunct UN Commission on Human Rights drafted the international Bill of Rights comprising the Universal Declaration,<sup>48</sup> the ICCPR,<sup>49</sup> the ICESCR<sup>50</sup> and two Optional Protocols to the ICCPR, the first allowing individuals to present complaints to the Human Rights Committee and the second providing for elimination of the death penalty.<sup>51</sup> The Universal Declaration lays down the general principles of international human rights law while the ICCPR and ICESCR delineate the actual rights and the various limitations thereto.<sup>52</sup> This section looks at provisions of the Universal Declaration and ICCPR that implicate the rights of sexual minorities. The ICESCR is considered alongside other treaties in the next section.

---

<sup>45</sup> Narayan (n 41 above) 5; see also 'Report of the Fourth World Conference on Women' Beijing 4-15 September 1995' U.N.Doc.A/CONF.177/20 (17 October 1995), <http://www.un.org/esa/gopher-data/conf/fwcw/off/a-20>; 'Final Programme of Action, Cairo International Conference on Population and Development', Cairo, September 5-13, 1994, U.N.Doc.A/CONF.171/13 (18 October 1994), <http://www.iisd.ca/Cairo/program/p05001.html> (accessed 27 August 2011).

<sup>46</sup> See eg UN ECOSOC, Working Group on Arbitrary Detention, Civil and Political Rights, Including Torture and Detention U.N.Doc. E/CN.4/2003/8/Add.1 (24 January 2003) para 27; Concluding Observations of the Human Rights Committee: Poland U.N.Doc.CCPR/C/79/Add.110 (29 July 1999).

<sup>47</sup> Narayan (n 41 above) 326.

<sup>48</sup> GA Res 217A UN GAOR, 3<sup>rd</sup> sess, 1<sup>st</sup> plen mtg, U.N. Doc A/180 (12 Dec 1948) <http://www.unhchr.ch/udhr/lang/eng.pdf> (accessed 27 August 2011).

<sup>49</sup> GA Res 2200A (XX1) UN GAOR supp (no 16) UN Doc A/6316 (16 December 1966) <http://www.unhchr.ch/html/menu3/b/a-ccpr> (accessed 27 August 2011).

<sup>50</sup> GA Res 2200A (XX1) UN GAOR supp (no 16) UN Doc A/6316 (16 December 1966), <http://www2.ohchr.org/english/law/cescr.htm> (accessed 27 August 2011).

<sup>51</sup> Optional Protocol to ICCPR, GA Res 2200A (XX1) UN GAOR supp (no 16) UN Doc A/6316 (6 December 1966) <http://www2.ohchr.org/english/law/ccpr-one.htm>, Second Optional Protocol to ICCPR Aiming at the Abolition of the Death Penalty GA Res 44/128 annex 44 UN GAOR Supp no 49 UN Doc A/44/49 (1989), <http://www2.ohchr.org/english/law/ccpr-death.htm> (accessed 27 August 2011).

<sup>52</sup> Narayan (n 41 above) 327.

## ***The Universal Declaration on Human Rights***

The Universal Declaration asserts that all human beings are entitled to the stipulated freedoms and rights 'without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*'.<sup>53</sup> The Declaration, being a resolution, is not binding. However, its principles have been accepted into practice by a multitude of courts, organisations and countries as well as being incorporated into various treaties and may be binding as customary international law.<sup>54</sup>

It contains civil, political, economic, social and cultural rights that are fundamental to all persons. These include the right to: life; liberty and security of person; fair trial; equal protection of the law and non-discrimination; privacy; freedom of assembly and association; right to adequate standard of living, education and medical care; and, right to participate in the cultural life of the community. It also contains provisions that have proven singularly essential to LGBTI individuals at risk of maltreatment including safeguards against torture, slavery, detention and cruel, degrading or inhuman treatment, which are the most severe forms of state-endorsed discrimination.<sup>55</sup>

The prohibition on discrimination on 'other status' extends protection to sexual minorities seeing as virtually all clauses begin with 'everyone' thus conferring positive rights to all.<sup>56</sup> Past UN conferences have adopted this interpretation and used the term 'other status' to accord protection to LGBTI individuals.<sup>57</sup>

Some states may try to use Article 29 to avoid extending rights and freedoms to sexual minorities. The article states that persons are protected as long as they observe the 'just requirements of morality, public order and the general welfare in a democratic society'. Because states generally persecute sexual minorities on the grounds of morality, they can reference this provision to deny protection.<sup>58</sup> This argument is, however, easily refuted by reference to article 30 which requires that interpretation of the Declaration should not be in a manner that deprives individuals of the rights set out.

---

<sup>53</sup> Universal Declaration, art 2.

<sup>54</sup> Narayan (n 41 above).

<sup>55</sup> J Wislet 'International human rights law and sexual orientation' (1994) 18 *Hastings International and Comparative Law Review* 11.

<sup>56</sup> Narayan (n 41 above) 329.

<sup>57</sup> Eg UN Conference on Human Settlements: Habitat 11 Summit, Istanbul, Turkey, 3-14 June 1996 'The Habitat agenda, goals, and principles' UN Doc A/S-25/3. By this, the UN Global Plan of Action employed the phrase 'other status' to ensure equal access by sexual minorities to basic services and shelter.

<sup>58</sup> Narayan (n 41 above) 329.

## ***The International Covenant on Civil and Political Rights***

The ICCPR came into force in 1976 and has been ratified by 167 states. It is the principal instrument under the UN system that sets out the civil and political rights of individuals and a key ally in the struggle for the rights of sexual minorities.

It guarantees basic rights such as life, liberty and security of the person.<sup>59</sup> It outlaws arbitrary arrest and detention, and deprivation of liberty except on grounds and in accordance with procedures established by law.<sup>60</sup> The ICCPR further guarantees the right to fair trial and to treatment with while in detention.<sup>61</sup> States that administer or permit violence or discrimination against LGBTI individuals deny those individuals the most fundamental rights and are in violation of the ICCPR.

The ICCPR imposes obligations on state-parties to ensure equal protection before the law and protection against discrimination for all. Further, state-parties are under obligation to ensure protection against invasion of privacy. Article 17 provides as follows:

- 1) No one should be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attack to his reputation or honour.
- 2) Everyone has a right to the protection of the law against such interference or attacks.

The Human Rights Committee (the HR Committee), which supervises and monitors implementation of the ICCPR,<sup>62</sup> considered the interpretation of article 17 in *Toonen v Australia*.<sup>63</sup> Toonen, a gay rights activist, had challenged the validity of Tasmanian law which outlawed homosexual conduct. He contended that criminalising same-sex conduct violated his right to privacy as well as the right to non-discrimination and equality before the law. Tasmania argued that there existed a moral basis for maintaining the law in that domestic social customs are relevant to the reasonableness of interfering with privacy.<sup>64</sup>

The HR Committee held that Tasmanian law was in violation of Toonen's right to privacy and dismissed the morality argument. On the question of whether the violation represented a

---

<sup>59</sup> ICCPR, arts 6, 9.

<sup>60</sup> ICCPR, arts 9, 10.

<sup>61</sup> Art 9(4).

<sup>62</sup> The HR Committee is formed under article 28 of the ICCPR and performs four tasks: receiving and considering communications; receiving and considering state reports on the status of implementation of the ICCPR; issuing general comments; and, receiving and considering inter-state complaints.

<sup>63</sup> *Toonen v Australia* communication no 488/1992, UN Human Rights Committee (31 March 1994) UN Doc No CCPR/C50/D/488/1992, 11RR 97.

<sup>64</sup> *Toonen*, para 6.6.

justifiable infringement, the HR Committee employed a test of reasonableness to evaluate Tasmania's claim that decriminalisation of sodomy adversely affected implementation of effective measures in HIV/AIDS prevention. The Committee stated that to be reasonable, the infringement must be necessary and proportional to the end sought. It concluded that criminalisation was not a reasonable measure in preventing the spread of HIV/AIDS.<sup>65</sup>

*Toonen* also addressed the right to equality which was raised in respect to articles 2(1) and 26 of the ICCPR. Under article 2(1):

Each state party undertakes to respect and ensure to all individuals ... the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 provides:

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

Toonen argued that alternative sexual orientation should be included in the expression 'other status' to apply protection to gays and lesbians. The HR Committee found that 'sex' as a ground for non-discrimination is to be interpreted to encompass 'sexual orientation'.<sup>66</sup>

It is clear, therefore, that in international law, sexual conduct between consenting adults in private, including same-sex activity, is protected. Criminalising same-sex between consenting adults in private is a violation of the right to privacy and to non-discrimination. The position is buttressed in the HR Committee's decision in *Young v Australia*<sup>67</sup> in which the HR Committee stated that same-sex partners have the right to receive government benefits in the same way as heterosexual domestic partners.

The HR Committee has also issued recommendations to state parties to improve state practices with regard to LGBTI individuals. Such recommendations have been made to, among others, the United Kingdom, the United States, Sudan, Colombia, Zimbabwe, Trinidad and Tobago, Hong

---

<sup>65</sup> *Toonen* para 8.3, 8.3.

<sup>66</sup> *Toonen* para 8.7

<sup>67</sup> Communication no 941/2000 UN Human Rights Committee (12 August 2003) UN Doc CCPR/C/78/D/941/2000.

Kong, Sweden, El Salvador, Egypt, the Philippines and Argentina.<sup>68</sup> The recommendations are general in nature and range from educational campaigns to repeal of anti-homosexuality legislation.<sup>69</sup>

In expounding the rights to privacy and to non-discrimination, the HR Committee has issued General Comments (GCs) 16<sup>70</sup> and 18.<sup>71</sup> In GC 16, the Committee observed that states were not indicating in state reports whether they were observing their obligations under the ICCPR with regard to the right to privacy. It stressed state duty to take legislative, judicial and administrative measures to give effect to this right. GC 18 emphasised that non-discrimination is a principle of human rights protection which states are duty-bound to respect in fulfilment of their obligations under the ICCPR.

### **2.3.3 Other treaties and General Comments or Recommendations**

A number of other treaties have provisions that can be interpreted to protect sexual minorities. Four of these are discussed below, that is: ICESCR; CAT; CRC; and, CEDAW. Also highlighted are some of the General Comments (GCs) and General Recommendations (GRs) of the respective treaty bodies that implicate rights of sexual minorities. GCs and GRs form part of the mechanisms employed by UN treaty bodies to ensure compliance with treaty obligations. They clarify and expound the content and scope of provisions in treaties.

The ICESCR guarantees a number of socio-economic rights. The Committee on ESCR has issued GCs 14,<sup>72</sup> 15<sup>73</sup> and 18<sup>74</sup> relating to access to healthcare, water and employment. GC 14 on the right to the highest attainable standard of health under article 12 requires states to ensure that health-care and information on health-care are availed without discrimination of any form including colour, race, sex or sexual orientation. GC 15 addresses the right to adequate living under article 11 and the right to health under article 12. It emphasises that protection against

---

<sup>68</sup> UN human rights treaties, equality and discrimination, sexual orientation concluding observations, [http://www.bayefsky.com/themes/equality\\_sexual\\_concluding\\_observations.php](http://www.bayefsky.com/themes/equality_sexual_concluding_observations.php) (accessed 22 August 2011).

<sup>69</sup> As above.

<sup>70</sup> CCPR GC 16, privacy, 8 April 1988, <http://www.unhcr.org/refworld/docid/453883f922.html> (accessed 20 August 2011).

<sup>71</sup> CCPR GC 18, non-discrimination, 11 October 1989, <http://www.unhchr.ch/tbs/doc.nsf/0/3888b0541f8501c9c12563ed004b8d0e?Opendocument> (accessed 20 August 2011).

<sup>72</sup> CDESCR GC 14, highest attainable standard of health 11 August 2000 <http://www.unhchr.ch/tbs/doc.nsf/%28symbol%29/E.C.12.2000.4.En> (accessed 20 August 2011).

<sup>73</sup> CDESCR GC 15, water, 20 January 2003 <http://www.unhchr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94> (accessed 20 August 2011).

<sup>74</sup> CDESCR, GC 18, right to work, 24 November 2005, <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/E.C.12.GC.18.En> (accessed 20 August 2011).

discrimination cuts across all the obligations of the state in the ICESCR and states must not discriminate in the provision of water, particularly to the marginalised and vulnerable. In GC 18, the Committee restates the commitment to the protection of all including sexual minorities by stating that discrimination in access to and maintenance of employment on the basis of sexual orientation is prohibited.<sup>75</sup>

On its part CAT,<sup>76</sup> expands the Universal Declaration and ICCPR's prohibition against torture and cruel treatment. Customary international law prohibits torture and, as such, the legal obligations created by CAT are binding on all states, including those that have not ratified CAT.<sup>77</sup> The Committee against Torture supervises and monitors implementation of the CAT.<sup>78</sup> As a result of state-sanctioned harassment of LGBTI persons, the Committee against Torture has issued recommendations to several countries including Egypt and Brazil regarding the ill-treatment of sexual minorities in detention facilities.<sup>79</sup> However, there is no mechanism to enforce compliance with the recommendations and most go un-actioned. Also, state reports due under CAT, as with those under other Conventions, are usually submitted late or not at all.

The Committee on the Elimination of Discrimination against Women which oversees implementation of CEDAW has elaborated the core obligations of states under article 2 on elimination of discrimination. The Committee's GR 28 clarifies that discrimination based on sex is interlinked with other factors including sexual orientation and gender identity, and requires states to condemn 'all forms of discrimination including forms not explicitly mentioned in the Convention or that may be emerging'.<sup>80</sup>

---

<sup>75</sup> GC 18 para 12 (b).

<sup>76</sup> Convention against Torture, G.A.Res. 39//46 (10 December 1984), <http://www.un.org/documents/res/39/a39r046> (accessed 23 August 2011).

<sup>77</sup> See 'Torture and the Law' Vienna Colucci, Amnesty International (November 2001), [http://www.amnestyusa.org/Reports\\_statements\\_and\\_Issue\\_Briefs/Torture\\_and\\_the\\_law/page.do?id=1107981&n1=3&n2=38&n3=1052](http://www.amnestyusa.org/Reports_statements_and_Issue_Briefs/Torture_and_the_law/page.do?id=1107981&n1=3&n2=38&n3=1052) (accessed 23 August 2011).

<sup>78</sup> See CAT, art 17.

<sup>79</sup> See OHCHR, 'Conclusions and recommendations of the Committee against Torture: Egypt' U.N Doc. CAT/C/CR/29/4 (23 December 2002); Committee against Torture, 26<sup>th</sup> session, Geneva (30 April – 18 May 2001), [http://www.ishr.ch/hrm/tmb/treaty/cat/reports/CAT\\_26.hmt#\\_ftnref6](http://www.ishr.ch/hrm/tmb/treaty/cat/reports/CAT_26.hmt#_ftnref6) (accessed 20 August 2011).

<sup>80</sup> CEDW, GR 28, core obligations under art 2, 16 December 2010, <http://www2.ohchr.org/english/bodies/cedaw/comments.htm> (accessed 20 August 2011).

Finally, the Committee on the Rights of the Child with oversight over the CRC has issued GC 3<sup>81</sup> and 4<sup>82</sup> which state that in providing health care services to children, states parties are under duty not to discriminate on the basis of sexual orientation.

### 2.3.4 Resolutions and special mechanisms

The Universal Periodic Review (UPR) of the Human Rights Council (HRC) provides an avenue for engagement on sexual minority rights through the review of state reports at intervals. A number of states have been questioned on the rights of LGBTI persons as part of the review process and have been urged to consider decriminalising consensual same-sex conduct between adults. At its initial review in 2008, Botswana was requested to repeal its sodomy laws.<sup>83</sup> At Kenya's review in 2010, the same request was extended.<sup>84</sup> At the political level, advances have been made through a number of statements,<sup>85</sup> culminating in the 2011 HRC 'Resolution on Human Rights, Sexual Orientation and Gender Identity'.<sup>86</sup> The Resolution asks the OHCHR to conduct a study on violation of the rights of sexual minorities world-wide with a view to initiating remedial measures.

Pursuant to resolution 6/29 of the HRC, The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health submitted a report at the HRC's 14<sup>th</sup> session in 2010.<sup>87</sup> The report considered the right to health in light of criminalisation of certain forms of sexual conduct, including consensual same-sex relations. It observed that criminalising same-sex conduct contributes to lack of access to health-care services with debilitating effect on the attainment of the right to health. The report recommended repeal of laws that discriminate on the basis of gender identity and sexual orientation or criminalise same-sex conduct in order to create an environment favourable for the attainment of the right to health.

---

<sup>81</sup> CRC, GC 3, HIV/AIDS, 17 March 2003, <http://tb.ohchr.org/default.aspx?Symbol=CRC/GC/2003/3> (accessed 20 August 2011).

<sup>82</sup> CRC, GC 4, adolescent health and development, 1 July 2003 <http://www.unhcr.ch/tbs/doc.nsf/%28symbol%29/CRC.GC.2003.4.En> (accessed 20 August 2011).

<sup>83</sup> UN Doc A/HRC/10/69, 13 January 2009, para 91; Belgium also recommended that Benin 'consider decriminalising homosexual activities between consenting adults (Belgium)' (UN Doc A/HRC/8/39, 28 May 2008, par 56(6)); see also UN Doc A/HRC/8/43, 2 June 2008 in respect of Zambia.

<sup>84</sup> See Draft Report of the Working Group on UPR, [http://lib.ohchr.org/HRBodies/UPR/Documents/Session8/KE/A\\_HRC\\_WG.6\\_8\\_L.7\\_Kenya.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session8/KE/A_HRC_WG.6_8_L.7_Kenya.pdf) (accessed 28 August 2011).

<sup>85</sup> See eg statement introduced by Argentina, at General Assembly, on 18 December 2008, with 66 states in support. Kenya was not among the six African countries in support.

<sup>86</sup> UN Doc A/HRC/17/L.19/Rev.1 (15 June 2011).

<sup>87</sup> A/HRC/14/20 <http://www2.ohchr.org/english/issues/health/right/annual.html> (accessed 29 August 2011).



The UN Special Rapporteur on Torture receives complaints related to torture and visits states to investigate detention facilities, prisons and other places in which suspects are questioned.<sup>88</sup> In 2001 the Special Rapporteur asked for reports from states on ill-treatment of LGBTI individuals at the hands of state officials. The Special Rapporteur stated that ‘...sexual minorities are disproportionately subjected to torture and other forms of ill-treatment because they fail to conform to socially constructed gender expectations’.<sup>89</sup> The Special Rapporteur reported that discrimination on the ground of sexual orientation contributes to dehumanisation of victims, which is a prerequisite for torture.<sup>90</sup>

Resolutions and special mechanisms are not binding for they are soft law but they represent international standards which are useful in articulating protections in international instruments.

### **2.3.5 Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity**

The Yogyakarta Principles<sup>91</sup> have been hailed as a milestone in the protection of the rights of LGBTI individuals.<sup>92</sup> The Principles represent a statement of intent bringing in one document the provisions of international human rights instruments which implicate the rights of sexual minorities. They are premised on the principle that human rights do not admit exceptions.

In relevant part the Principles require states to decriminalise homosexuality on the basis of equality and non-discrimination and to ensure the protection of the private realm for all.<sup>93</sup> The Principles also require that religion should not be invoked to defeat the right to equal protection before the law for sexual minorities.<sup>94</sup>

The Principles, like other soft law, have no binding force but may serve as a guideline to states in their conduct.<sup>95</sup>

---

<sup>88</sup> See OHCHR, Fact sheet no 7/Rev.1, complaints procedure, <http://www.ohchr.org/english/about/publications/fs7.html> (accessed 20 August 2011).

<sup>89</sup> Human Rights Watch ‘Sexual orientation and gender identity: Briefing to the 60<sup>th</sup> session of the UN Commission on Human Rights’ (2004), <http://hrw.org/english/docs/2004/02/02/global17249.htm> (accessed 20 August 2011).

<sup>90</sup> As above.

<sup>91</sup> Yogyakarta Principles <http://www.yogyakartaprinciples.org/index.php?item=25> (accessed 23 August 2011).

<sup>92</sup> ‘Yogyakarta principles: A milestone for lesbian, gay, bisexual and transgender rights’, [http://hrw.org/english/docs/2007/03/26/global15546\\_txt.htm](http://hrw.org/english/docs/2007/03/26/global15546_txt.htm) (accessed 23 August 2011).

<sup>93</sup> Principles 2, 6.

<sup>94</sup> Principle no 21.

<sup>95</sup> J Dugard (2005) *International law: A South African perspective* 37.

## 2.4 Regional framework for protection of sexual minorities

In the quest for protection of sexual minority rights, more definite legal strides have been made in the European and the American human rights systems.<sup>96</sup> The protections in these systems are considered hereunder, as well as those in the African human rights system.

### 2.4.1 The European system

The European Court of Human Rights has dealt with the issue of sexual orientation since the early 1980s by applying the European Convention on Human Rights and Fundamental Freedoms on the basis of violations of the right to privacy. In *Dudgeon v UK*,<sup>97</sup> and a number of subsequent cases,<sup>98</sup> the European Court held that laws that criminalise consensual sex between adult men in private violated the right to privacy. Consequently, de-criminalisation of same-sex relations is a condition for membership to the Council of Europe.<sup>99</sup>

In *Lustig-Preen v UK*,<sup>100</sup> the Court held that an omnibus ban on homosexuals in the military violates the right to privacy under the European Convention. It went further in *Da Silva Mouta v Portugal*,<sup>101</sup> to find, as well, a violation on the basis of equality.<sup>102</sup> In the case, a father had been deprived of the custody of his children during divorce proceedings because of his sexual orientation. The Court held that the domestic Portuguese court 'made a distinction based on considerations regarding the applicant's sexual orientation, a distinction which is not acceptable under the Convention'. It ruled that there was no reasonable relationship of proportionality between the means employed and the aim sought to be achieved, and found violation of article 8 (right to family life) taken alongside article 14 (non-discrimination).

In *Alekseyev v Russia*,<sup>103</sup> the Court found that a ban on a 'Gay Pride Parade', because the parade could provoke violent reaction violated the right to non-discrimination. It found such a ban incompatible with the fundamental values of the European Convention 'if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority'.<sup>104</sup>

---

<sup>96</sup> Viljoen (n 29 above).

<sup>97</sup> (1981) 4 EHRR 149.

<sup>98</sup> See eg *Modinos v Cyprus*, 22 April 1993, Series A No 259; *Norris v Ireland*, 26 October 1988, Series A No 142.

<sup>99</sup> Viljoen (n 29 above).

<sup>100</sup> (2000) 29 EHRR 548.

<sup>101</sup> Application 33290/96, *Da Silva Mouta v Portugal*, final judgment 21 March 2010.

<sup>102</sup> See also Application 13102/02, *Kozak v Poland*, 2 March 2010.

<sup>103</sup> Applications nos 4916/07, 25924/08 and 14599/09 21 October 2010.

<sup>104</sup> Par 81.

## 2.4.2 The Inter-American system

In the Inter-American system, sexual minorities have utilised the political space afforded by the Organisation of American States (OAS) Assembly to call for greater commitment by states.<sup>105</sup> In 2008, the OAS General Assembly adopted a ‘Resolution on Human Rights, Sexual Orientation, and Gender Identity’ which called on states ‘to express concern about acts of violence and related human rights violations committed against individuals because of their sexual orientation and gender identity’.<sup>106</sup> This call has been expanded in subsequent resolutions in 2009,<sup>107</sup> 2010,<sup>108</sup> and 2011 to address concerns of discrimination. They urge states to ‘adopt the necessary measures to prevent, punish, and eradicate such discrimination’ against individuals based on gender identity and sexual orientation; and require states to ensure satisfactory protection of human rights defenders working in this field.<sup>109</sup>

So far, one case relevant to the rights of sexual minorities, *Atala and daughters v Chile*,<sup>110</sup> has been submitted to the Inter-American Court, after the Inter-American Commission in its merit report found the denial of custody of the petitioner’s daughters because the petitioner was living with her lesbian partner to be a violation of the American Convention. The case is still pending.

## 2.4.3 African human rights system

### *The African Commission on Human and Peoples’ Rights*

In 1981, the Organisation of African Unity adopted the African Charter on Human and Peoples’ Rights (the Charter or the African Charter) as the regional instrument for the protection and promotion of human rights. The African Commission on Human and Peoples’ Rights (the Commission) is created under the Charter with the twin mandate of promoting and protecting the rights outlined in the Charter. In carrying out its protective mandate, the Commission receives and considers communications from individuals or groups. It also receives state reports and reviews them for compliance with obligations under the Charter.

The rights in the Charter are available to everybody without distinction. The terms used to denote the bearers of rights are ‘every human being’, ‘every individual’ and ‘everyone’.<sup>111</sup> Article

---

<sup>105</sup> Viljoen (n 29 above).

<sup>106</sup> OAS Doc AG/RES 2435 (XXXVIII-O/08), 3 June 2008.

<sup>107</sup> OAS Doc AG/RES 2504 (XXXIXO/09).

<sup>108</sup> AG/RES. 2600 (XL-O/10), 8 June 2010.

<sup>109</sup> OAS Doc AG/RES 2653 (XLI-O/11), 7 June 2011.

<sup>110</sup> Case 1271-04, Report No. 42/08, Inter-Am. C.H.R., OEA/Ser.LV/II.130 Doc. 22, rev. 1 (2008).

<sup>111</sup> African Charter, arts 2 to 17.

2 provides that there is no ground upon which anyone may be denied protection under the Charter. It contains an open-ended list of grounds on which states may not discriminate, ending with 'other status'. This means that individuals enjoy the rights in the Charter irrespective of their gender identity or sexual orientation. While the rights of sexual minorities, like those of everyone else, may be limited, the limitation can only be by a rational process in line with article 27(2) and in the jurisprudence of the Commission or the Court.<sup>112</sup>

The Commission was called upon to consider the rights of homosexuals in *William Courson v Zimbabwe*.<sup>113</sup> The complainant challenged the criminalisation of sexual conduct between men in Zimbabwe and the utterances of senior political figures condemning the practice. The Commission did not make a finding on the communication because the complainant withdrew the case. However, in *Zimbabwean Human Rights NGO Forum v Zimbabwe*<sup>114</sup> the Commission stated that non-discrimination under article 2 aims to ensure equality of treatment for individuals irrespective of a number of grounds, including 'sexual orientation'. This reflects the interpretation given by the HR Committee to the non-discrimination provision in the ICCPR in *Toonen* and other cases. It is expected that should a matter concerning sexual minorities be presented, the Commission and the African Court will heed international jurisprudence. Articles 60 and 61 of the Charter require consideration of international human rights instruments when interpreting the Charter.

With regard to its promotional mandate, the Commission has dealt with the issue pragmatically through quiet accommodation.<sup>115</sup> It has posed questions on the treatment of LGBTI individuals during the examination of state reports.<sup>116</sup> When it considered Cameroon's state report in 2006, Commissioners posed questions concerning abuse of homosexuals and the Commission included 'concern for the upsurge of intolerance towards sexual minorities' in the Concluding Observations.<sup>117</sup>

---

<sup>112</sup> Viljoen (n 29 above).

<sup>113</sup> *William Courson v Zimbabwe*, Communication 136/94, *Eighth Annual Activity Report*, Annex VI at 21 (1995); 2000 African Human Rights Law Reports (1995).

<sup>114</sup> (2006) AHRLR 128 (ACHPR 2006) 169. The observation was obiter dicta since the case did not directly concern the question of sexual orientation.

<sup>115</sup> See R Murray & F Viljoen 'Towards Non-Discrimination on the Basis of Sexual Orientation: The Normative Basis and Procedural Possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 86.

<sup>116</sup> Murray and Viljoen (n 115 above) 102-4.

<sup>117</sup> Concluding observations on the first periodic report of Cameroon, 39th ordinary session, 11-25 May 2005, <[http://www.achpr.org/english/other/Con\\_Observations/Cameroon/2nd\\_COs%20Cameroon.pdf](http://www.achpr.org/english/other/Con_Observations/Cameroon/2nd_COs%20Cameroon.pdf), (accessed 27 August 2011).

Some of the special mechanisms of the Commission have also dealt with the protection of sexual minorities. For example, the Commission's Committee on HIV as part of its mandate deals with 'men who have sex with men', as a category of persons who have been identified as a 'vulnerable group'.<sup>118</sup>

However, the Commission declined to grant observer status to the Coalition of African Lesbians ostensibly because the organisation's objectives were at odds with the Charter and the Charter does not recognise sexual minority rights. These reasons, as Viljoen argues,<sup>119</sup> are spectacularly unconvincing. Perhaps there is cause to sensitise the Commission on its role in upholding the rights of all, including sexual minorities, before moving for a definitive interpretation on the protection of sexual minorities in the Charter.

### ***The African Peer Review Mechanism (APRM)***

The APRM is a procedure under the African Union by which states evaluate one another regarding, *inter alia*, their record of human rights.<sup>120</sup> While the mechanism provides an opportunity for examination of the treatment of sexual minorities, the issue has yet to be raised in the consideration of reports of the various African countries.<sup>121</sup> This is probably a reflection of the political nature of the mechanism as well as the socio-cultural context of the issue of sexual orientation in Africa.

## **2.5 Conclusion**

It has been demonstrated in this chapter that while there is no explicit instrument dealing with the rights of sexual minorities, the existing human rights instruments and mechanisms protecting the rights of all and can be applied to sexual minorities. Various international treaties and declarations, treaty bodies as well as the special mechanisms of the UN and the regional systems assert the universality of human rights. The various guarantees have been interpreted to apply to LGBTI individuals.

As expounded above, it is clear that the mechanisms have not been effectively utilised. For instance, recommendations by the HR Committee are rarely implemented and states continue to criminalise homosexual conduct and to harass suspected homosexuals on the basis of those

---

<sup>118</sup> See Resolution on Establishment of a Committee on the Protection of the Rights of People Living with HIV and Those at Risk 26 May 2010.

<sup>119</sup> Viljoen (n 29 above).

<sup>120</sup> As above.

<sup>121</sup> As above.

laws. States are chronically late with their reports and many state reports do not contain information on treatment of sexual minorities. It is necessary for the treaty bodies to adopt a more forthright stance in interpreting treaty provisions to include LGBTI individuals. This will probably enhance state action in upholding their rights. International human rights law should be expanded to denounce and prohibit discrimination against sexual minorities with obligations on signatory states to enact legislation protecting them. Treaty bodies should exert pressure to compel governments to submit reports in time and develop reporting guidelines that contain a section for reporting on handling of the rights of sexual minorities.

Finally, NGOs should play a more active role through sensitisation, submitting shadow reports to treaty bodies and presenting complaints against offending states under the various mechanisms available. African NGOs in particular must take every opportunity to articulate the rights of LGBTI individuals before the African Commission and the African Court in order to draw attention to this important aspect of human rights.

## Chapter Three: The judiciary and protection of minority rights

### 3.1 Introduction

If it be admitted that a man possessing absolute power may misuse that power by wronging his adversaries, why should not a majority be liable to the same reproach? Men do not change their characters by uniting with one another; nor does their patience in the presence of obstacles increase with their strength. For my own part, I cannot believe it; the power to do everything, which I should refuse to one of my equals, I will never grant to any number of them - Alexis de Tocqueville, 'Tyranny of the Majority'.

For rights to be actualised and democracy to thrive there is need for conditions which, while allowing for collective decision making, ensure that individuals are respected and enjoy the entitlements due to them under the constitution. These conditions must protect the substantive equality of persons by ensuring that minorities are not oppressed by the majority. In the tripartite configuration of state organs, the judiciary is the most suitable institution for ensuring this protection.

This chapter evaluates the role of the judiciary in protecting human rights, in particular the rights of minorities in a majoritarian constitutional democracy, and why the judiciary is the best safeguard. It then looks at a few cases where the power of judicial review has been invoked. Next, it examines the challenges that judiciaries are likely to encounter in the quest to decriminalise homosexuality, these being: cultural attitudes, religious beliefs and the counter-majoritarian dilemma. It also puts forward proposals as to how each may be overcome. The chapter ends with a conclusion.

### 3.2 The role of the judiciary in protecting minorities

The judiciary, more than any other organ of government, has an immense constitutional duty to safeguard the integrity of democracy, particularly, through protecting fundamental rights and freedoms.<sup>122</sup> In a constitutional democracy, the judiciary is empowered to determine whether the executive and the legislature conduct their duties in compliance with the constitution.<sup>123</sup> Judicial power is the authority granted courts to interpret and declare the law, which serves as a deterrent to the abuse constitutional rights.<sup>124</sup> The judiciary must employ this power to stop excesses by the

---

<sup>122</sup> BK Twinomugisha 'The role of the judiciary in the promotion of democracy in Uganda' (2001) 9 *African Human Rights Law Journal* 3.

<sup>123</sup> Twinomugisha (n 122 above) 7.

<sup>124</sup> As above.

executive and legislature in order to promote fundamental rights in a democratic, free and just society.<sup>125</sup> This it does through judicial review by which it evaluates laws, and legislative and executive acts for compliance with the constitution. The power of judicial review is particularly important in the protection of minority rights including LGBTI individuals.

LGBTI individuals in much of Africa are an invisible vulnerable and voiceless minority.<sup>126</sup> Contrary to the thinking of most, their invisibility and silence are not a manifestation of shame, but rather an attempt at avoiding the social stigma and prejudice perpetuated and reinforced by the criminalisation of same-sex activity, which has ensured that sexual minorities stay marginalised in society.<sup>127</sup>

Minority status means that LGBTI individuals cannot harness political power to influence the enactment of legislation for protection against discrimination and other prejudices. Like other minorities in constitutional democracies, LGBTI persons must rely on the courts to protect their rights.<sup>128</sup> The courts protect minorities by enforcing bills of rights which invariably contain guarantees and protections relating to the right to non-discrimination and equality. In a constitutional democracy, courts are the custodians of constitutional rights. Through the power of judicial review, they are charged with protecting citizens from having their rights trampled underfoot by other arms of government.<sup>129</sup> They are clothed in independence so that they can uphold constitutional rights without being hostage to popular sentiment.<sup>130</sup>

Most legal systems empower courts to exercise judicial review. This power may be granted to ordinary courts or to special courts. Judicial review is directly exercised in many cases in the application of human rights and the interpretation of the bill of rights. The decriminalisation of same-sex conduct through judicial review of anti-homosexuality legislation, which this paper proposes, represents a typical resort to this power. Indeed, minority rights have been the subject of judicial review in various fora and different countries.<sup>131</sup> The next section highlights a few instances when this power has been invoked.

---

<sup>125</sup> J Dugard 'Judging the judges: Towards an appropriate role for the judiciary in South Africa's transformation' (2007) 20 *Leiden Journal of International Law* 967.

<sup>126</sup> MM Chilisa 'Two steps back: A critique of the Kanane case' (2007) 1 *The Botswana Review of Ethics, Law and HIV/AIDS* 45.

<sup>127</sup> See Ackerman J in *National Coalition of Gays and Lesbians Equality and another v Minister of Home Affairs and others* 2000 2 SA 1 (CC).

<sup>128</sup> Chilisa (n 126 above).

<sup>129</sup> As above.

<sup>130</sup> As above.

<sup>131</sup> S Bauth 'Human rights and the criminalisation of consensual same sex sexual acts in the commonwealth, South and Southeast Asia' Working paper (May 2008) ii.



### 3.3 Judicial review: A few case studies

#### ***Lemeiguran & 3 others v Attorney General & 2 others***<sup>132</sup>

The High Court of Kenya was called upon to decide on the right of participation in public affairs of the Il Chamus community, a small but distinct group of about 30,000 persons. The Il Chamus contended that since independence, no member of the community had been elected to parliament and none would be because of the make-up of their constituency in which they were a minority. They would, therefore, continue to be marginalised in all spheres of life. The High Court upheld the Il Chamus' claim and asserted that minority groups have the right to participate in public life. It declared the Il Chamus a special interest group in terms the Constitution and ordered the Electoral Commission of Kenya to take steps to ensure adequate representation of special interest groups including the Il Chamus.

#### ***The National Coalition for Gay and Lesbian Equality & Another v the Minister of Justice & Others***<sup>133</sup>

The Constitutional Court of South Africa decriminalised the common law offence of sodomy and struck down as unconstitutional section 20A of the Sexual Offences Act as well as sections of the Criminal Procedure Act<sup>134</sup> and Security Officers Act<sup>135</sup> which outlawed sexual conduct between men in particular circumstances. The Court explored the possibility of more than one orientation and relied on Section 9 of the South African Constitution which prohibits discrimination on the basis of, among other grounds, sexual orientation. It granted the status of political minority to lesbians and gays and held that criminalisation of homosexuality amounts to unfair discrimination because homosexuals are a dis-favoured minority group.<sup>136</sup>

#### ***Naz Foundation v Government of NCT of Delhi & Others***<sup>137</sup>

The New Delhi High Court invalidated section 377 of the Indian Penal Code to the extent that it criminalised 'carnal knowledge against the order of nature'. The Court held that the impugned provision violated the right to dignity, privacy, health, equality and health. It stated that criminalisation of homosexuality creates an unreasonable classification that targets homosexuals

---

<sup>132</sup> (2008) 3 KLR (EP) 325.

<sup>133</sup> 1999 1 SA 6 (CC) 21.

<sup>134</sup> Act 51 of 1977.

<sup>135</sup> Act 92 of 1987.

<sup>136</sup> See judgment, para 16, 27.

<sup>137</sup> 160 Delhi Law Times 277.

and public disgust or animus towards a vulnerable minority is not a valid ground for discrimination.

### ***Lawrence v Texas***<sup>138</sup>

The US Supreme Court invalidated a Texas law that criminalised certain sexual conduct between two persons of the same sex. The Court stated that the constitutional guarantee to liberty gave full rights to engage in their preferred activity without interference by the government.

Similarly, in *Commonwealth of Kentucky v Jeffrey Wasson*<sup>139</sup> the Court considered the constitutionality of the offence of 'deviate sexual intercourse with another person of the same sex' in light of the privacy and equality provisions in the Kentucky Constitution. It examined the basis of singling out homosexual acts for different treatment and concluded that merely because a majority of persons, speaking through the legislature, consider one kind of intercourse offensive is not a rational basis for the criminalisation of the preference of homosexuals.

### ***Utjiwa Kanane v the State***<sup>140</sup>

A full bench of the Botswana Court of Appeal was called upon to determine the constitutionality of the anti-homosexuality provisions of the penal laws in light of the non-discrimination and equality guarantees of the Constitution. The penal law outlawed unnatural offences and indecent practices between males. The Court, in failing to declare the impugned provisions unconstitutional, stated that the time was not ripe for Botswana to de-criminalise homosexuality because the majority of the Batswana viewed homosexuality negatively.

### ***Banana v the State***<sup>141</sup>

In this Zimbabwean case, the challenged offence was 'unlawful intentional sexual relations per anum between two human males'. The Supreme Court declined to declare the relevant provision unconstitutional and held that criminalisation of consensual homosexual sex did not constitute discrimination under the Constitution and even if it had, the law was justifiable in a democratic society.

It is clear from the above that in many instances, courts will rise above popular sentiment and

---

<sup>138</sup> 539 US (558) 2003 41.

<sup>139</sup> 842 SW 2d 487 (Ky 1992).

<sup>140</sup> 2003 (2) Botswana Law Review (BLR) 67 (CA).

<sup>141</sup> 2000 4 LRC 621 (ZSC).

uphold the rights of minorities through the review of unconstitutional laws. However, as *Kanane* and *Banana* show, in other instances there is reluctance by the courts to depart from societal stereotypes and prejudice against sexual minorities. In these cases the courts abdicated their sworn responsibility and wrongfully subjected the rights of minorities to majoritarian preferences.

The two cases point to need for the judiciary to employ a purposive interpretation of the bill or rights to protect minority rights. With specific reference to sexual minority rights, they must overcome a number of challenges. Among these are cultural attitudes, religious belief and the counter-majoritarian difficulty.

### **3.4 Challenges to judicial enforcement of sexual minority rights**

#### **3.4.1 Cultural attitudes**

The discourse on and resistance to sexual minority rights usually revolves around the claim that homosexuality is un-African, contrary to religious tenets and, therefore, immoral. A number of African leaders, including those of Kenya, Uganda, Zimbabwe and Namibia, have been quoted in recent years publicly making homophobic statements likening homosexuality to bestiality with the aim of raising public opprobrium against LGBTI individuals. They maintain that homosexuality is an unnatural perversion borrowed from the West and a threat to African society.<sup>142</sup> This work responds to this claim in two ways: firstly, there is evidence to contradict the assertion of 'un-African-ness' and, secondly, African culture recognises diversity and embraces inclusiveness.

Scholars have refuted the proposition that homosexuality is a bourgeois Western concept brought to Africa by white colonial masters or Arab slave traders. Sociologist Murray gives numerous accounts of cultural practices throughout Africa showing that same-sex conduct took place before colonialism.<sup>143</sup> Other studies show that sexual relations between men may not have been institutionalised in all instances but they were practised and largely tolerated.<sup>144</sup> Among the Baganda, Iteso, Langi, Bahima and Banyoro of East Africa, homosexuality was generally accepted and certain males were considered female and could marry men.<sup>145</sup> Similarly, reports

---

<sup>142</sup> See eg J Rukweza 'Is homosexuality really un-African' <http://www.pambazuka.org/en/category/comment/32974> (accessed 16 September 2011).

<sup>143</sup> SO Murray 'Homosexuality in traditional Sub-Saharan Africa and contemporary South Africa' in SO Murray & W Roscoe (eds) *Boy-wives and female husbands: Studies on African homosexuality* (1998) 1-18.

<sup>144</sup> EE Evans-Pitchard 'Sexual inversion among the Azande' (1970) 72 *American Anthropologist* 1428-1434; M Roscoe 'The Mamlukes' in SO Murray (ed) *Cultural diversity and homosexuality* (1997) 213-219.

<sup>145</sup> See S Tamale 'Out of the closet: unveiling sexuality discourses in Uganda' <http://www.feministafrica.org/index.php/out-of-the-closet> (accessed 20 September 2011); J Lawrence *The Iteso: Fifty years of change in Nilo- Hermitic tribe of Uganda* (1957) 24; J Driberg *The Lango: A Nilotic tribe of Uganda* (1923) 46;

show that among the Swahili-speakers of the Kenyan coast, there were numerous instances of same-sex relationships.<sup>146</sup>

The portrayal of homosexuality as un-African and alien is, therefore, inaccurate and contrary to established fact. In any event, it is contestable whether there actually exists an 'African culture' seeing as Africa is not homogenous and within it are varied cultures and practices. As well, culture is not static but changes over time in response to developments within society.<sup>147</sup>

Some authors argue that in order to overcome the cultural argument against homosexuality, it is useful to explore openings within culture that accommodate the preference. Thus, instead of dismissing views against homosexuality as backward and insular, it would be more productive to identify values in African culture that promote inclusiveness. Since there is no 'African culture' as such, one can point to the duty to respect and protect diversity, dignity and equality as values in a diverse, constantly changing society.<sup>148</sup> As Oloka-Onyango suggests, the claim that penalising homosexuality protects African identity can be challenged by promoting the understanding of 'culture' as a large canvas.<sup>149</sup> On this canvas are represented various cultures in acknowledgment of diversity in class, gender and other identities which, taken together, constitute the African cultural identity.<sup>150</sup>

### 3.4.2 Religion

Christianity is perhaps the most vocal religion in the condemnation of homosexuality. The scripture often quoted in this regard is Leviticus 18:22 which states; 'thou shall not lie with mankind as with womankind: it is an abomination'. The early Christian church, premised its harsh stance against homosexuality on this Old Testament edict.<sup>151</sup> The medieval church also accepted that homosexuals should be punished by being put to death, a position espoused by many Christians today.<sup>152</sup> However, it is curious that Jesus Christ, on whose teachings the Christian church is grounded, is not recorded speaking about homosexuality and often performed acts

---

S Muchanga 'The Nkole of South western Uganda' in A Molnos (ed) *Cultural source materials for planning in East Africa* (1973) 87; R Needham *Right and left in Nyoro symbolic classification* (1973) 67.

<sup>146</sup> Murray (n 143 above) 80; see also D Kuria *Understanding homosexual people in pre-colonial Kenya* (2005) 108-109; N Sussman 'Sex and sexuality in history' in BJ Sadock et al *The sexual experience* (1976) 7.

<sup>147</sup> CI Nyamu 'How should human rights and development respond to cultural legitimisation of gender hierarchy in developing countries?' (2000) 41 *Harvard International Law Journal* 381.

<sup>148</sup> IR Gunning 'Arrogant perception world travelling and multi-cultural feminism: The case of female genital surgeries' (1992) 23 *Columbia Human Rights Law Review* 203.

<sup>149</sup> J Oloka-Onyango 'Who is watching big brother? Globalisation and the protection of cultural rights in present day Africa' (2005) 27 *Human Rights Quarterly* 1248.

<sup>150</sup> As above.

<sup>151</sup> I Sloan *Homosexual conduct and the law* (1987) 2.

<sup>152</sup> As above

seemingly in violation of the edicts of the Leviticus. For instance, in the story recorded in the gospels about a woman caught committing adultery,<sup>153</sup> He seemingly violated the directive to stone her to death.<sup>154</sup>

Not all Christians are of the view that homosexuality is antithetical to Christianity. Some clergy maintain that the attack on homosexuality is an extension of American cultural wars in which Africa is a proxy motivated by funding.<sup>155</sup> In 1998, Anglican bishops issued a resolution in which they stated that while they considered homosexuality incompatible with scripture, they recognised that there are persons who experience homosexual orientation and the church should minister sensitively to all and denounce unreasonable fear of homosexuals.<sup>156</sup> Similarly, the Synod of Anglican Bishops of Southern Africa has stated that the rights of homosexuals should be protected because it is contrary to scripture to support or permit discrimination and oppression of people based on sexual orientation.<sup>157</sup>

Leviticus calls homosexuality an abomination as it does eating lobster, shrimp and pork,<sup>158</sup> wearing clothes made from more than one fibre and sowing two seeds in one field.<sup>159</sup> The question is whether the millions of persons who do these acts commit 'abominations' and should be shunned. Christianity being a religion that preaches love for others as for oneself calls for acceptance, not condemnation. As Archbishop Tutu puts it:<sup>160</sup>

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

### 3.4.3 The counter-majoritarian dilemma

Judicial review has been attacked variously as an affront to democracy. According to Bickel and other scholars, judicial review is 'a deviant institution' because it allows unelected judiciaries to

---

<sup>153</sup> See eg John 8:1-11.

<sup>154</sup> Leviticus 20:10.

<sup>155</sup> K Kaoma 'Globalising the culture wars: US conservatives, African churches and homophobia' (2009) 4.

<sup>156</sup> Resl 1.10 'Human sexuality' <http://www.lambethconference.org/resolutions/1998/1998-1-10.cfm> (accessed 17 September 2011).

<sup>157</sup> Statement from the Synod of Anglican bishops on homophobia, 8-11 February 2010 <http://constitutionallyspeaking.co.za/statement-from-the-synod-of-anglican-bishops-on-homophobia/> (accessed 17 September 2011).

<sup>158</sup> Chapter 11:7.

<sup>159</sup> Chapter 11:11.

<sup>160</sup> 'Archbishop Tutu supports LGBTI rights full acceptance and inclusion'

<http://leonardoricardosanto.blogspot.com/2011/08/no-gay-rights-in-kenya-human-rights-is.html> (accessed 20 September 2011).

countermand pronouncements of majoritarian legislatures.<sup>161</sup> They argue that when courts declare statutes unconstitutional, they reverse the product of majoritarian democracy thereby engaging in a process of legislating that is counter-majoritarian.

The counter-majoritarian difficulty is rooted in the structural theory of majoritarian governance and popular sovereignty.<sup>162</sup> The theory is in turn premised on the belief that important pronouncements must never be divorced from the electorate or from the body representing the electorate.<sup>163</sup> According to opponents of judicial review, appointed judges must not be allowed to declare unconstitutional decisions of elected persons or officers controlled by elected persons. As posed by Bickel,<sup>164</sup>

the root difficulty is that judicial review is a counter-majoritarian force. When the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of the representatives of the actual people of the here and now... it exercises control not in behalf of the prevailing majority but against it. That, without mystic overtones, is what actually happens... It is the reason the charge can be made that that judicial review is undemocratic.

Because of this tussle, courts are often hesitant to take decisions that are unpopular with the majority for fear of antagonising them and losing legitimacy. Yet, in the protection of minorities, judicial review is perhaps the only avenue available to minorities. Viewed this way, judicial review need not be antithetical to democracy.

Indeed some constitutional theorists posit that the argument that judicial review is anti-democracy flows from a reductionist understanding of democracy in which democracy is seen simply as majority rule.<sup>165</sup> Others concede that while judicial review may appear anti-democratic, it is important for the enhancement of constitutional governance and for ensuring democracy.<sup>166</sup> They seek to define democracy widely in order to reconcile it with judicial review.

The majoritarian view takes the position that democracy must be understood in procedural terms where important issues are determined in accordance with the wishes of the majority and laws and policies are endorsed by the majority.<sup>167</sup> According to this view, the judiciary should implement the wishes of the majority and no more. Allowing judges to question the stated desire

---

<sup>161</sup> Bickel (n 26 above) 16.

<sup>162</sup> YT Fisseha 'Who interprets the Constitution' unpublished LLM thesis, University of Pretoria, 2004 22.

<sup>163</sup> As above

<sup>164</sup> Bickel (n 161 above).

<sup>165</sup> Fisseha (n 162 above) 23.

<sup>166</sup> Fisseha (n 162 above) 24.

<sup>167</sup> B Brian *Democracy and power: Essays in political theory* (1991) 25.

of the majority would be tantamount to undermining the essential features of democracy and transforming the judge to 'a philosopher king, sitting in judgment on the morality and wisdom of all society's social policy choices'.<sup>168</sup>

Other theorists take the view that democracy is inter-linked with content and 'is a regime characterised by certain ends and values towards whose realisation a certain political group aims and works'.<sup>169</sup> The fundamental values of the unit cannot be destroyed or altered by the majority who, in any event, do not have an exclusive claim to the meaning of democracy or the constitution.<sup>170</sup> This view posits that an effective democratic society must have institutional restraints on the authority of the majority government.<sup>171</sup> This restraint, they argue, is best achieved by the judiciary, this being an institution not amenable to majoritarian pressure.<sup>172</sup> This is the position that this paper endorses.

### ***Addressing the counter-majoritarian difficulty: Human rights as a component of democracy***

Perhaps, to resolve the counter-majoritarian difficulty, it is necessary to view human rights as a necessary component of democracy and the courts as its custodians. Democracy does not merely entail the right to vote, but encompasses promoting, protecting and respecting fundamental rights and freedoms.<sup>173</sup> As Sedley states:<sup>174</sup>

A democracy is more than a state in which power resides in the hands of a majority of elected representatives: it is a state in which individuals and minorities have an assurance of certain basic protections from the majoritarian interest and in which independent courts of law hold the responsibility for interpreting, applying and importantly – supplementing the law laid down by Parliament in the interests of every individual, not merely, the represented majority.

Thus, in exercising the power of judicial review for the protection of minorities, courts are not subverting democracy but rather protecting and upholding it by ensuring that a key tenet of democracy, that is human rights even for the most vulnerable, is maintained. The function of the courts must be understood as providing a better society for everyone.<sup>175</sup> This is more so for the

---

<sup>168</sup> M Redish *The constitution as political structure* (1995) 8.

<sup>169</sup> N Bobbio *Democracy and dictatorship* (1989) 157 quoted in Fisseha (n 160 above) 24.

<sup>170</sup> E Chemerisnsky 'The vanishing constitution' (1989) *103 Harvard Law Review* 76-77

<sup>171</sup> Fisseha (n 162 above) 24.

<sup>172</sup> Redish (n 168 above) 79.

<sup>173</sup> Twinomugisha (n122 above) 5.

<sup>174</sup> S Sedley *The making and remaking of the British constitution* (1997) 5.

<sup>175</sup> Twinomugisha (n 122 above 7).

marginalised who cannot be protected through other structures. The High Court of Kenya put it thus:<sup>176</sup>

The concept of democracy is not a static one; it must accommodate and embrace the minorities, the social outcasts and the down-trodden of each age. It must constantly devise strategies and processes to improve the status of minorities and to protect minority interests and others who cannot effectively have a voice in the competition of the majority in the electoral process and in other processes in a democracy. The minorities shall always have a room in democracies and their room should never be shut or emptied.

It is clear, then, that democracy requires that questions of rights not be left solely to the vagaries of public opinion for constitutions are not intended to protect those individuals that society likes and leave unprotected those that are unpopular or those that the majority considers morally objectionable.<sup>177</sup> Constitutional guarantees must be upheld and must not be subjected to the whims of the majority. The Bill of Rights is an acknowledgment that majority is not always right and some rights, such as equality and protection of minorities from discrimination, are the underpinnings of civilisation.<sup>178</sup> This is the principle that judicial review seeks to secure. Justice Chaskalson explains it thus:<sup>179</sup>

Public opinion may have relevance to the enquiry but it in itself is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be the decision there would be no need for constitutional adjudication... The very reason for ... vesting the power of judicial review of all legislation in the Courts was to protect the rights of minorities who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised of our society. It is only if there is a willingness to protect the worst and weakest amongst us, that all of us can be secure that our own rights will be protected.

This connection between human rights and democracy has been recognised in a number of international platforms. For instance, NEPAD affirms Africa's commitment to democracy including protection of individual and collective freedoms, enforcement of the rule of law, the quality of which is determined by the respect and protection of human rights particularly for disadvantaged and vulnerable persons.<sup>180</sup> As well, the African Union lists among its core principles respect for

---

<sup>176</sup> *Lemeiguran* (n 132 above) 379 4.

<sup>177</sup> M Makau 'Why Kenyan Constitution must protect gays' *Sunday Nation* 25 October 2009 19.

<sup>178</sup> As above.

<sup>179</sup> *S v Makwanyane and Another* 1995 3 SA 391 (CC) 394.

<sup>180</sup> NEPAD 'Declaration on Democracy, Political, Economic and Corporate Governance' AHG/235 (XXXVIII) Annex 1 7.



human rights, democratic principles, the rule of law and good governance.<sup>181</sup>

The OHCHR has stated that democracy cultivates the realisation of human rights and vice versa and that ‘democracy, development and respect for all human rights and fundamental freedoms are interdependent and mutually reinforcing’.<sup>182</sup>

### 3.5 Conclusion

This chapter has demonstrated that in constitutional democracies, minorities are dependent on the judiciary to enforce and protect their rights. The courts do this through enforcement of the bill of rights, which calls for a purposive and wide interpretation of constitutional guarantees and review of legislation for constitutionality so as to shield voiceless minorities from the tyranny of the majority. The exercise of this power is not necessarily inimical to democracy, for democracy denotes not just the right to vote but the upholding of the rule of law and human rights for all, particularly the marginalised.

While many courts perform this role proactively and effectively, others are held back by timidity and deference to public opinion and popular sentiment. In the quest to protect the rights of LGBTI persons particularly in Africa, it is incumbent upon courts of law to take up their rightful positions in society and exercise their constitutional mandate without fear, favour or prevarication. It is only when the courts step up that minorities and other marginalised groups can reap the entitlements due to them in equality with other human beings.

---

<sup>181</sup> AU Constitutive Act, art 4(m).

<sup>182</sup> OHCHR ‘Promotion of the right to democracy’ Res 1999/57.

[http://www.unhcr.ch/Huridocda/Huridoca.nsf\(symbol\)/E.CN.4.RES.1999.57.En?Opend](http://www.unhcr.ch/Huridocda/Huridoca.nsf(symbol)/E.CN.4.RES.1999.57.En?Opend) (accessed 30 September 2011); see also OHCHR ‘Promoting and consolidating democracy’ Res 2000/47

[http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.RES.2000.47.En?](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.RES.2000.47.En?) (accessed 30 September 2011); UN General Assembly ‘Promoting and consolidating democracy’ Res A/RES/55/96.

## Chapter Four: The role of Kenya's judiciary in decriminalising same-sex conduct

### 4.1 Introduction

The foregoing chapter has emphasised the judiciary's role in the protection of minority rights. In Kenya, this role is critical for sexual minorities because of prevalent homophobic sentiment. At its last UPR in 2010, Kenya received recommendations to decriminalise homosexuality and take measures to ensure protection and equal treatment for LGBTI individuals. It rejected the recommendations on the basis that homosexuality is 'culturally unacceptable' in Kenya.<sup>183</sup> Similarly, during the constitutional review process which culminated in the adoption of a new Constitution, a member of the Committee of Experts tasked with drafting the Constitution stated that protection of sexual minorities would not be included in the Constitution because then majority of Kenyans would reject it.<sup>184</sup> Indeed, no explicit provision was made for the protection of sexual minorities in the final Constitution or in any of the initial drafts.

Parliament echoes this homophobia and it is not foreseeable that it will decriminalise homosexuality in a long time.<sup>185</sup> Kenya's legislature has always been jittery about legislating laws which might, even wrongly, be construed as tolerating LGBTI issues as was seen during the enactment of the Sexual Offences Act, 2006 and the Reproductive Health Bill proposed by FIDA-Kenya but subsequently withdrawn.<sup>186</sup> It is also not foreseeable that the Executive will introduce legislation on decriminalisation.<sup>187</sup> In light of this, the judiciary provides the only realistic opportunity for prompting legislative reform around decriminalisation of same-sex acts.<sup>188</sup> There exist provisions in the Constitution of Kenya which, with bold interpretation, should result in decriminalisation.

This chapter looks at the prospects for judicial de-criminalisation of same-sex conduct in Kenya. It is divided into four parts. The first looks at the penal provisions against sodomy and their origin. The second reviews the legal framework available to the judiciary for striking down these provisions. The third part addresses judicial independence, activism and participation of human rights organisations as key factors necessary for successful application of the legal framework for

---

<sup>183</sup> Report of the Working Group on the Universal Periodic Review Kenya <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/144/88/PDF/G1014488.pdf?OpenElement> (accessed 20 September 2011).

<sup>184</sup> 'Gays say draft ignored them' *Daily Nation* 20 November 2009 6.

<sup>185</sup> L Mute 'Rethinking contested rights: Critical perspectives on minority rights in Kenya' (February 2011) 14.

<sup>186</sup> As above.

<sup>187</sup> As above.

<sup>188</sup> Mute (n 185 above) 17.

decriminalisation. It ends with conclusions.

## 4.2 The Kenyan criminal law provisions against same-sex conduct and their origins

As stated in chapter three above, the irony in the contention that homosexuality is contrary to African culture is that in Kenya, sodomy was legislated by colonial Britain to reflect the 'British Judeo-Christian values of the time'.<sup>189</sup> Sections 162, 163 and 165 of the Penal Code<sup>190</sup> are a colonial inheritance. They are modelled along section 377 of the Indian Penal Code which provided a 'model template' for sodomy legislation introduced in the Sub-Saharan Africa colonies during the 1890s and early 1900.<sup>191</sup> This was done without cultural consultation with the aim of inculcating European morality into recalcitrant natives.<sup>192</sup> While not out-rightly criminalising homosexuality, the provisions criminalise conduct that is taken to be uniquely engaged in by homosexual persons and almost exclusively punish homosexuals or perceived homosexuals.<sup>193</sup> Section 162 provides in relevant part:

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

Section 163 states: 'Any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for seven years'. Section 165 outlaws committing, encouraging or attempting 'acts of gross indecency' between males and imposes a penalty to five years imprisonment. Homosexual practice is also outlawed in the Sexual Offences Act which criminalises 'indecent acts' between adults subject to a penalty of five years imprisonment.<sup>194</sup>

These provisions are the bane of LGBTI individuals whose prospects for engaging in consensual sex are criminalised with the result that their rights are undermined.<sup>195</sup> Britain repealed its own sodomy legislation in 1967 following the Wolfenden Committee Report of 1956 which concluded that same-sex acts between consenting adults in private implicates private morality outside the

---

<sup>189</sup> Human Rights Watch 'This alien legacy: The origins of "sodomy" laws in British colonialism' (2008) 1.

<sup>190</sup> Chapter 63, laws of Kenya.

<sup>191</sup> HF Morris 'A history of the adoption of codes of criminal law and Africa in British colonial Africa 1875-1935' (1974) 18 *Journal of African Law* 7.

<sup>192</sup> As above.

<sup>193</sup> LM Wanyeki 'Do we need the state in our bedrooms?' <http://www.pambazuka.org/en/category/features/64748/print> (accessed 20 September 2011).

<sup>194</sup> Act 3 of 2006, section 11A.

<sup>195</sup> Mute (n 185 above) 10.

realm of law and should not be criminal.<sup>196</sup> It has also called on former colonies to follow suit. Notwithstanding this, Kenya, alongside many former British colonies, has continued to hold onto these colonial relics. Indeed, of the 80 countries that criminalise sodomy over 40 are members of the Commonwealth.<sup>197</sup> Of this legacy Wintemute states:<sup>198</sup>

Environmental lawyers are familiar with the idea of an obligation on corporations to clean up toxic waste they have left behind on land they have used. During the British Empire, the British travelled around the Empire dropping 'legal toxic waste' in every country they conquered, in the form of laws against anal intercourse (derived from Christian religious law) or against sexual activity between men. (One can imagine an elephant leaving large streaming piles of waste behind it!) In many of these countries, no such laws would ever have been passed but for the British invasion. Unfortunately, Britain's 'toxic legal waste' is still harming the social environment.

### **4.3 The framework for decriminalisation of same-sex conduct in Kenya**

#### **4.3.1 The Constitution**

The Constitution grants power to the judiciary to test the constitutionality of legislation and action.<sup>199</sup> While same-sex marriages are unconstitutional under article 45, the anti-homosexuality legislation lends itself to challenge. A number of rights are implicated and this part highlights the following: equality and non-discrimination; protection for vulnerable persons; privacy and dignity; and, health.

#### ***Equality and non-discrimination***

The Constitution contains modern non-discrimination and equality guarantees with a commitment to these principles woven throughout the document.<sup>200</sup> Equality is listed in article 10 as one of the values on which governance is based alongside human dignity, social justice, equity, inclusiveness, non-discrimination, human rights and protection of the marginalised. The national values are to be applied in interpreting the Constitution and other laws and in the creation and enforcement of policies. Article 20 requires that equity and equality be promoted in interpreting

---

<sup>196</sup> 'Report of the departmental committee on homosexual offences and prostitution' (4 September 1957) <http://ukpmc.ac.uk/articles/PMC1990699/reload=0;jsessionid=20A8F68CCA8851C7CAA6930122920A7B> (accessed 20 September 2011).

<sup>197</sup> Human Rights Watch 'This alien legacy' (n 189 above).

<sup>198</sup> R Wintemute 'Lesbian and gay rights in India: International and comparative perspectives' draft article quoted in S Bauth 'Human rights and criminalisation of consensual same-sex sexual acts in the Commonwealth, South and Southeast Asia' (May 2008) 24.

<sup>199</sup> See eg Constitution of Kenya (2010) arts 2(4), 22, 23, 163,165.

<sup>200</sup> J Fitzgerald 'The road to equality? The right to equality in Kenya's new Constitution' (2010) 5 *The Equal Rights Review* 56.

the Bill of Rights. It is clear that the drafters intended protection of vulnerable groups and respect for diversity to be fundamental tenets when interpreting the Bill of Rights and the whole Constitution.<sup>201</sup>

The right to equality and non-discrimination affirmed in article 27 includes 'full and equal enjoyment' of all rights and freedoms.<sup>202</sup> The article restates the equality of everyone before the law and to the equal protection and equal benefit of the law. Article 27(4) prohibits discrimination on a wide range of grounds including sex, dress, marital status, conscience or belief. While the list does not include sexual orientation or gender identity, the listed grounds are not exhaustive; the list is indicative with the operative word being 'including'.<sup>203</sup> This allows persons suffering discrimination on grounds other than those indicated to mount a challenge. This is fortified by article 259(4)(b) which states that the word 'includes' means 'includes, but is not limited to'. Equal protection of the law covers the whole range of rights from the right to life, protection from torture cruel and degrading treatment, the right to privacy, the right to health and others.<sup>204</sup> The provisions on equality and non-discrimination, more than any other, provide the platform for the repeal of the anti-homosexuality penal provisions.<sup>205</sup>

### ***Protection of vulnerable persons***

Articles 55 and 56 of the Constitution have particular provisions on the rights of marginalised groups and minorities. They obligate the state to put in place particular measures to ensure their protection. Minorities are not defined but the article 260 definition of 'marginalised community' is wide enough to encompass sexual minorities. Extending this protection calls for progressive thinking as there is already move to exclude sexual minorities from the ambit of this clause.<sup>206</sup>

### ***Privacy and dignity***

Article 28 recognises every person's inherent right to dignity and requires this to be respected and protected. Criminalisation of sexual conduct along with the harassment and humiliation that ensues therefrom represent serious assault upon individuals' dignity.

The right to privacy recognises that every individual is entitled to a realm of private intimacy

---

<sup>201</sup> Fitzgerald (n 200 above) 57.

<sup>202</sup> As above.

<sup>203</sup> Fitzgerald (n 200 above) 58.

<sup>204</sup> Mute (n 183 above) 7.

<sup>205</sup> Mute (n 183 above) 12.

<sup>206</sup> eg Draft National Human Rights Policy discusses minorities and marginalised communities in a manner specifically excluding sexual minorities.

where relationships can be established without interference from the state or community and without dictate as to who individuals can be intimate with.<sup>207</sup> State interference with privacy is justifiable when protecting citizens from harm, such interference being proportional to the harm posed.<sup>208</sup> Interference with consensual same-sex conduct in private does not protect from any harm; it represents perceived symbolism and reinforces prejudice.<sup>209</sup>

## **Health**

Article 47(1) of the Constitution guarantees the right to the highest attainable standard of health. Criminalisation of same-sex relations implicates enjoyment of this right for it marginalises members of a high risk group in relation to the incidence and spread of HIV/AIDS.<sup>210</sup> The marginalisation fuels stigma and discrimination, increasing obstacles in accessing sex health information and treatment.<sup>211</sup> In Kenya, studies show that marginalisation encourages risky behaviour such as unprotected homosexual as well as heterosexual intercourse.<sup>212</sup> The Kenya AIDS Indicator Survey, 2007, reveals that 65% of gay men also engage in heterosexual conduct and Kenya Medical Research Institute studies show the strain of HIV prevalent among gay men in Kenya to be similar to that found in heterosexuals, quite unlike the situation in other countries.<sup>213</sup>

Decriminalising offences targeting sexual minorities who are at high risk of HIV/AIDS will eliminate a major barrier to Kenya's ability to ensure the highest attainable standard of health to all.

### **4.3.2 International law**

Kenya is a party to all major international and regional human rights instruments including those discussed in chapter two above.<sup>214</sup> Prior to August 2010, it was necessary for international instruments to be domesticated before they could be applied domestically. The situation changed with the adoption of the new Constitution. Articles 2(5) and 2(6) explicitly recognise international

---

<sup>207</sup> Ackermann J in *National Coalition Case* (n 133 above) 30.

<sup>208</sup> Commonwealth Human Rights Initiative 'The impact of criminalising same-sex sexual conduct in the Commonwealth' [http://humanrightsinitiative.org/index.php?option=com\\_content&view=article&id=780&Itemid=579](http://humanrightsinitiative.org/index.php?option=com_content&view=article&id=780&Itemid=579) (accessed 20 September 2011).

<sup>209</sup> As above.

<sup>210</sup> See *Toonen* (n 63 above) para 8.5; *NAZ Foundation* (n 137 above).

<sup>211</sup> 'Punitive laws threaten HIV progress' <http://www.hrw.org/en/news/2009/11/25/world-aids-day-punitive-laws-threaten-hiv-progress> (accessed 30 September 2011).

<sup>212</sup> Mute (n 185 above) 4.

<sup>213</sup> Mute (n 185 above) 5.

<sup>214</sup> For a list of international instruments ratified by Kenya see [http://www.lib.ohchr.org/.../KSC\\_UPR\\_KEN\\_S08\\_2010](http://www.lib.ohchr.org/.../KSC_UPR_KEN_S08_2010) (accessed 20 September 2011).

law as part of the laws of Kenya. Article 2(5) states: 'The general rules of international law shall form part of the law of Kenya'. According to article 2(6): 'Any treaty or convention ratified by Kenya shall form part of the law of Kenya'. In addition, article 21(4), which falls under the Bill of Rights, obligates the state 'to enact legislation to fulfil its international obligations in respect of human rights and fundamental freedoms'.

Having acceded to or ratified the core human rights instruments, Kenya has the duty to respect rights by not curtailing the rights of adults to engage in consensual sex; to protect those rights against violations by third parties; and, to fulfil the rights through legislative and administrative policies that foster an appropriate environment for their enjoyment.<sup>215</sup>

### **4.3.3 Limitation of rights**

Article 24 of the Constitution provides the criteria by which a right may be limited. Under this provision, a right can only be limited by law and only to the extent 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. It lays down detailed requirements for any legislation or act looking to justify limitation. The scope is so narrow that it is difficult to see how anti-homosexuality legislation can be a justifiable limitation to the rights of LGBTI individuals.

## **4.4 Other factors necessary for successful striking down of anti-homosexuality legislation**

### **4.4.1 A reformed and independent judiciary**

Under the old constitutional order, Kenya's judiciary was subservient and largely kowtowed to the executive.<sup>216</sup> This was brought on by a number of factors including a flawed mode of appointment and dismissal of judges. The result was lack of judicial independence and a judiciary described as 'unprincipled, eclectic, vague, pedantic and inconsistent' with a conservative bend on constitutional interpretation.<sup>217</sup>

It must be pointed out that even under the old order, the judiciary did make some judgments that showed tentative steps towards progressive enforcement of rights such as in *Lemeiguran*<sup>218</sup> and

---

<sup>215</sup> Mute (n 185 above) 7.

<sup>216</sup> See eg M Mutua 'Justice under siege: The rule of law and judicial subservience in Kenya' 23 *Human Rights Quarterly* (2001); ICJ 'Kenya: Judicial independence, corruption and reform' (2005).

<sup>217</sup> G Muigai 'Political jurisprudence or neutral principles: Another look at the problem of constitutional interpretation' (2004) 1 *East African Law Journal* 1.

<sup>218</sup> n 132 above.

in *Njoya*.<sup>219</sup> However, this was largely the exception. When presented with an opportunity to take a stand for sexual minority rights in *R.N v Attorney General and others*<sup>220</sup> the Constitutional Court dithered and fell back on the majoritarian argument. In the case, an intersex person had sought a declaration that certain statutes were discriminatory and unconstitutional for only recognising the male and female sexes. The Court, while acknowledging that the person had suffered cruel treatment in being subjected to strip searches by the authorities, rejected the contention that the male-female binary of statutes was discriminatory. It stated that upholding the claim would be tantamount to introducing a third category of sex which the Kenyan society was not ready for.

The stage is expected to change with the new constitutional order. An elaborate process of appointment with a complex removal process with all modern guarantees of independence and security of tenure insulates the judiciary both from executive power and majoritarian politics. This should translate to greater protection for minorities.

The creation of the Supreme Court of Kenya under Article 163(3)(b) with appellate jurisdiction over the lower courts on decisions relating to the Bill of Rights as well as the revamping, reconstitution and reformation of the entire judiciary portend much for Kenya. There is much to look forward to in terms of judicial independence with the expectation that this independence will spur the High Court or the Supreme Court to nullify anti-homosexuality legislation.

#### **4.4.2 Judicial activism and purposive interpretation of the Constitution**

Kenya's new Constitution has been widely hailed as a modern progressive document with a comprehensive, justiciable Bill of Rights. However, as with all constitutions, guarantees are expressed in abstract and general terms leaving it to the courts to determine what they mean in concrete terms.<sup>221</sup> The burden of realising constitutional guarantees by sexual minorities in Kenya lies with the constitutional courts, in particular the Supreme Court. As the ultimate protector and enforcer of the Constitution its primary role is elucidating, safeguarding and developing the values inherent in the Constitution.<sup>222</sup>

The striking down of the penal provisions against homosexuality will require a purposive interpretation of the equality and non-discrimination guarantees in the Constitution. In assessing the meaning and scope of these rights *vis a vis* the offending sections of the criminal law, the

---

<sup>219</sup> *Njoya & others v Attorney-General & others* (2004) AHRLR 157 (KeHC 2004).

<sup>220</sup> [2010] eKLR.

<sup>221</sup> R Dworkin *Life's dominion: An argument about abortion, euthanasia and individual freedom* (1993) 119.

<sup>222</sup> NJ Udombana 'Interpreting rights globally: Courts and constitutional rights in emerging democracies' (2005) 5 *African Human Rights Law Journal* 56.



courts will need to hearken to the truism that a constitution is not frozen in time; it is a living instrument applied to the evolving needs of society.<sup>223</sup> In the words of Lord Bingham in *Reyes v The Queen*.<sup>224</sup>

... the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the Constitution as if it were found in a will or deed or charterparty. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The Court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society

The courts have to interpret the relevant provisions in a manner that overrides government interest because human rights protect not just individuals within a democracy, but democracy itself.<sup>225</sup> This calls for some amount of activism. The courts need to look for openings to create jurisprudence by interpreting constitutional rights creatively.<sup>226</sup> This is also the responsibility bestowed upon them by article 20 of the Constitution, that is: 'to develop the law to the extent necessary to give effect to rights; adopt the interpretation that most favours the enforcement of a right or freedom; and, promote the core constitutional values and the spirit of the Bill of Rights'.

Kenya's Constitution, being new and untested has not generated much jurisprudence and while there is some jurisprudence from the old constitutional order, the only case that has addressed sexual minority rights is *R.N. v Attorney General*.<sup>227</sup> As indicated, this case was a study in deference to public opinion rather than on purposive and generous interpretation to safeguard the rights on minorities.

In the absence of home-grown jurisprudence, comparative bill of rights jurisprudence is important in this early phase before the Supreme Court develops local jurisprudence. As O'Connor states,<sup>228</sup>

While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from ... distinguished jurists ... who have given thought to the same difficult issues that we face.

The Constitution of Kenya incorporates international law into domestic law, but is silent on

---

<sup>223</sup>As above.

<sup>224</sup>[2002] AC 235.

<sup>225</sup>R Dworkin *Taking rights seriously* (1977) 7.

<sup>226</sup>Udombana (n 222 above) 57.

<sup>227</sup>n 220 above.

<sup>228</sup>SD O'Connor 'Keynote address before the 96<sup>th</sup> annual meeting of the American Society of International Law' (2002) 96 *American Society of International Law proceedings* 350.

comparative domestic law. This notwithstanding, comparative constitutionalism is important in giving guidance, inspiration, reassurance and perspective to courts in determining similar issues and giving a benchmark against which decisions can be evaluated.<sup>229</sup> To this end, the judgments of the Constitutional Court of South Africa, the US Supreme Court, the High Court of India as well as others that have addressed the decriminalisation of same-sex conduct must provide useful perspectives.

#### 4.4.3 Participation of human rights organisations

Kenya's human rights community, while extremely vibrant, has not taken enough intervention in the protection of sexual minorities.<sup>230</sup> Using the concept of anti-subordination Mutua argues that human rights advocates must oppose all forms of oppression, for it is hypocritical and futile to oppose one form while condoning another.<sup>231</sup> They must also approach the matter from a fundamentalist perspective by realising that it is in their interest to defend all against violations for once one group is defeated, the oppressor will seek another.<sup>232</sup>

Both the national human rights institution and NGOs have a critical role to play in getting the anti-homosexuality legislation struck down. The Kenya National Human Rights and Equality Commission - established under article 59 of the Constitution as the successor to the Kenya National Commission on Human Rights and the National Commission on Gender and Development – and NGOs need to strategise on how best to use the Constitution to get the offending provisions annulled. In particular, it will be imperative to initiate strategic litigation to challenge the discrimination engendered by anti-homosexuality laws using the equality and non-discrimination provisions which are wide enough to admit gender identity and sexual orientation as protected grounds.<sup>233</sup> The *locus standi* provisions in article 22 permit the national human rights institution or NGOs to initiate action in their own name on behalf of affected individuals if that be necessary.

It is necessary to involve other players such as the media to raise awareness and conduct education on the importance of protecting rights for all.

---

<sup>229</sup> VC Jackson 'Narratives of federalism' (2001) 51 *Duke Law Journal* 263.

<sup>230</sup> Mute (n 185 above) 10.

<sup>231</sup> B Spadadici 'Human rights scholar Makau Mutua delivers 'straight' talk on homosexuality in Kenya' <http://www.italy.org/13280/human-rights-scholar-makau-mutua-delivers-straight-talk-homosexuality-kenya> (accessed 25 September 2011).

<sup>232</sup> Mute (n 185 above) 11.

<sup>233</sup> Fitzgerald (n 200 above) 66.

## **4.5 Conclusion**

For sexual minorities in Kenya, the promise of equal enjoyment of rights under the new constitutional dispensation remains illusory unless the judiciary engenders legislative reform and decriminalises homosexuality. The criminal provisions against same-sex conduct are rooted in colonialism and the former colonial master has long since repealed its own provisions and has been issuing calls to Commonwealth countries that criminalise homosexuality to reconsider their stance.

The Constitution of Kenya has a number of guarantees which if purposively and broadly interpreted should translate into enhanced protection for LGBTI individuals. Such a move requires a departure from the traditional approach of Kenya's judiciary which has seen constitutional provisions interpreted restrictively and conservatively so as to deny protection to those that need it the most.

The human rights community has a role to play and should move to initiate strategic litigation with a view to getting the offending provisions in the Penal Code and the Sexual Offences Act struck down.

## **Chapter Five: Conclusions and recommendations**

This study sought to establish the role the judiciary can play in protecting the rights of sexual minorities in Kenya with particular reference to the decriminalisation of sodomy and same-sex conduct which are outlawed in sections 162, 163 and 165 of the Penal Code and section 11A of the Sexual Offences Act. It was premised on the fact that criminal provisions against homosexuality are often the main cause of violations against sexual minorities. The provisions implicate a number of rights and hamper efforts at preventing the spread and incidence HIV/AIDS.

### **5.1 Conclusions**

Firstly, there is a host of international and regional human rights instruments and mechanisms that protect the rights of sexual minorities on equal footing with those of other individuals. The instruments uphold a range of rights from the right to life, to equal protection before the law, non-discrimination, health and others. The obligations in the instruments and mechanisms have not been effectively performed with regard to sexual minorities in Kenya. Kenya has the obligation to protect, respect and fulfil these rights. The guarantees espoused are not mere rhetoric; they need to be translated into actual protection by demonstrable means.

Secondly, the new Constitution of Kenya provides broad guarantees that are applicable to all, including LGBTI individuals. While the Constitution is not perfect - for instance it specifically denies same-sex couples the right to marry - it presents an improved framework which can be utilised to decriminalise consensual same-sex conduct. The national values and principles of governance such as inclusiveness, human dignity, human rights, equality and discrimination provide a beginning point for the challenge to criminalisation of homosexuality. Moreover, the Bill of Rights guarantees of equality and non-discrimination, dignity, health and others are also important. Further, the inclusion of international law provides an avenue for invoking international legal standards, mechanisms and instruments all of which point to a trend of decriminalisation of same-sex conduct and equal treatment for LGBTI individuals

Thirdly, the criminal law provisions in the Penal Code and the Sexual Offences Act represent a blatant violation of the constitutional and international guarantees. These laws provide justification for discrimination against gays and lesbians and denial of rights. Individuals and organisations have fallen on the reason that Kenyan law criminalises same sex conduct to justify failure to take action in protecting the rights of LGBTI individuals. These criminal provisions are a colonial relic

introduced into the country at the turn of the last century. Britain repealed its own sodomy laws more than 40 years ago yet Kenya continues to retain the provisions. Religion and culture are often invoked to justify homophobia and attacks against LGBTI individuals but they cannot in law legitimise the failure of the state to fulfil its obligations towards this marginalised group.

Finally, the time is ripe for the repeal of these laws and the judiciary presents the most practical avenue for this repeal. The judiciary bears the greatest responsibility in engendering legislative and other reform. It is the role of the judiciary to ensure that the state meets its obligations by protecting all, including this voiceless minority.

## **5.2 Recommendations**

### **To Kenya's judiciary**

As stated above, the judiciary bears the constitutional duty of safeguarding human rights for all. The Constitution vests the power of judicial review in the judiciary with the mandate to review legislation and action of other arms of government for constitutionality. The time has come for the Kenyan judiciary to demonstrate without equivocation that it is fully versed with this role and that Kenyans can look up to it for protection of their rights and freedoms. The striking down of anti-homosexuality legislation is long overdue. It is expected that a legal challenge to this legislation will be mounted shortly and the judiciary must strike a blow for human rights and strike down the offending provisions. In doing this, the judiciary must appreciate that its role is not to act as a mouthpiece for the majority, but to ensure that everyone, particularly minorities and marginalised persons are accorded the protections due to them.

Given the dearth of local jurisprudence on sexual minority rights in Kenya, the Supreme Court and the High Court must take every opportunity to develop this area of law. They must extend the frontiers of non-discrimination and equality to bring within the protection of the Bill of Rights as many marginalised groups and persons as possible. There is plenty of jurisprudence in the international arena as well as in comparative constitutional systems from which to borrow.

### **To the Kenyan government and other governments that criminalise homosexuality**

Governments need to recognise that laws that criminalise same-sex relations flout the principles of dignity, non-discrimination and equality and are incompatible with guarantees of fundamental rights and freedoms. They must also realise that these laws present a barrier to efforts to

combat the spread of HIV/AIDS. They must prioritise decriminalisation of homosexuality and extend health programmes on HIV/AIDS to persons that engage in same-sex conduct.

### **To the African Commission and the African Court**

The African Commission has in large measure been ambivalent about the protection of sexual minorities. This is exhibited in its differing pronouncements such as in *Zimbabwe Human Rights Forum* where it appeared to state that protection against discrimination extends to sexual orientation but in an apparent turn-around denied the Coalition of African Lesbians observer status ostensibly because of its objectives were not in tandem with Charter.

In other regional systems such as the European human rights systems, it is the supra-national institutions that have taken the mantle to spearhead protection of sexual minorities. The African Commission and the African Court need to borrow a leaf from this and take an unequivocal forthright stance in interpreting the provisions of the African Charter to include explicit protection for LGBTI individuals. The two institutions should denounce discrimination against sexual minorities and pronounce obligations on states to enact legislation to protect them. The Commission should also use state reporting to ensure compliance with the Charter and enforce state accountability. It should enhance its reporting guidelines to include a section for reporting on the handling of the rights of sexual minorities.

### **To the Kenya National Human Rights and Equality Commission and Kenyan NGOs**

Action around decriminalisation of same-sex conduct has to be initiated by human rights organisations. Human rights advocates must realise that it falls on them to defend and advance the protection of LGBTI persons. They need to conduct massive education and sensitisation to disabuse citizens of the belief that LGBTI persons are not entitled to equal rights with other citizens. They must engender a new thinking around sexual minorities as beneficiaries of human rights.

To do this, they must rise above their own individual prejudices and biases. It is not open to human rights advocates to cherry-pick rights or causes by defending those they deem palatable and ignore those they consider not to their taste. They need to urgently join effort and strategise on how to get the offending provisions of criminal law repealed. They have to initiate strategic public interest litigation and move the High Court to declare unconstitutional the criminal law provisions against same-sex conduct.

They also need to persistently impress upon the African Commission the necessity for a clear pronouncement that the rights in the African Charter are available to all, including sexual minorities. They must exert pressure on the government of Kenya to make a declaration under article 5(3) of the Protocol to the African Human Rights Court so as to empower the Court to receive complaints from individuals and NGOs.

Finally, all African NGOs should play an active role in submitting shadow reports to treaty bodies and presenting complaints for violations against LGBTI individuals under the various international mechanisms available. International pressure can force reform of discriminatory laws and influence conduct within states.

### **To the LGBTI Community in Kenya**

The LGBTI community needs to be seen and heard, not just on sexual minority issues but also on other public interest and governance issues. As part of the push towards 'mainstreaming' sexual minority issues, they should speak out against other vices afflicting Kenyan society such as poor governance, corruption and discrimination against other groups. It is appreciated that the high levels of intolerance against LGBTI persons in Kenya present a threat to safety. Thus, it is imperative that proper strategy for public engagement be conceived to prevent harm to life and limb.

With regard to the decriminalisation of same-sex conduct, the LGBTI community must join up with other organisations to initiate action for a declaration of unconstitutionality against the anti-homosexuality provisions in the Penal Code and the Sexual Offences Act.

**Word count: 17,863**

## Bibliography

### Books and chapters in books

Bickel, A (1962) *The least dangerous branch: The Supreme Court at the bar of politics* New Haven: Yale University Press

Brian, B (1989) *Democracy and power: Essays in political theory* Oxford: Clarendon Press

Cameron, E 'Un-apprehended felons: Gays and lesbians and the law in South Africa' in Gessiver, M & Cameron, E (eds) (1995) *Defiant desire: Gay and lesbian lives in South Africa* London: Routledge

Driberg, J (1923) *The Lango: A Nilotic tribe of Uganda* London: TF Unwin Ltd

Dugard, J (2005) *International law: A South African perspective* Cape Town: Juta & Company

Dworkin, R (1993) *Life's dominion: An argument about abortion, euthanasia and individual freedom* New York: Vintage

Dworkin, R (1978) *Taking rights seriously* Cambridge: Harvard University Press

Gondi, J 'Discrimination on the basis of sexual orientation: An international comparative analysis' in Killander, M (ed) (2007) *Human rights litigation and domestication of human rights standards in sub-Saharan Africa* Pretoria: Pretoria University Law Press

Heinze, E (1995) *Sexual orientation: A human right* Leiden: Martinus Nijhoff

Kuria, D (2005) *Understanding homosexual people in pre-colonial Kenya* (unpublished) Nairobi

Lawrence, J (1957) *The Iteso: Fifty years of change in Nilo- Hermitic tribe of Uganda* Oxford: Oxford University Press

Machera, M 'Opening a can of worms: A debate on female sexuality in the lecture theatre' in Signe, A (ed) (2004) *Rethinking sexuality in Africa* Uppsala: Nordic Africa Institute

Murray, SO 'Homosexuality in traditional Sub-Saharan Africa and contemporary South Africa' in Murray, SO & Roscoe, W (eds) (1998) *Boy-wives and female husbands: Studies on African homosexuality* (1998) New York: Palgrave Macmillan



Mushanga, S 'The Nkole of South Western Uganda' in Molnos, A (ed) (1973) *Cultural source materials for planning in East Africa* Nairobi: East African Publishing House

Needham, R (1967) *Right and left in Nyoro symbolic classification* Cambridge: Cambridge University Press

Redish, M (1995) *The constitution as political structure* Oxford: Oxford University Press

Roscoe, M 'The Mamlukes' in Murray, SO (ed) (1997) *Cultural diversity and homosexuality* New York: Irvington

Sedley, S (1997) *The making and remaking of the British constitution* London: Blackstone Press Limited

Sepulveda, M et al (2004) *Human rights reference handbook* Costa Rica: University for Peace

Sloan, I (1987) *Homosexual conduct and the law* New York: Oceana Publications

Sussman, N 'Sex and sexuality in history' in BJ Sadock et al (1976) *The sexual experience* Baltimore: Williams & Wilkins

The Holy Bible, New International Version

Viljoen, F *International human rights law in Africa* (forthcoming edition 2011)

### **Journals and other articles**

Aguirre, MS & Woolgram, A 'United Nations policy and the family: Redefining ties that bind: A study of history, sources and trends' (2002) 16 *Brigham Young University Journal of Public Law* 128

Cameron, E 'Constitutional protection of sexual orientation and African concepts of humanity' (2001) 118 *South African Law Journal* 642

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

Cerna, CM 'Universality of human rights and cultural diversity: Implementation of human rights in different socio-cultural contexts' (1994) 16 *Human Rights Quarterly* 740

Chemersinsky, E 'The vanishing constitution' (1989) 103:43 *Harvard Law Review* 76

Chilisa, MM 'Two steps back: A critique of the Kanane case' (2007) 1 *The Botswana Review of Ethics, Law and HIV/AIDS* 45

De vos, P 'On the legal construction of gay and lesbian identity and South Africa's transitional Constitution' (1996) 12 *South African Journal of Human Rights* 265

Dugard, J 'Judging the judges: Towards an appropriate role for the judiciary in South Africa's transformation' (2007) 20 *Leiden Journal of International Law* 967

Evans-Pitchard, EE 'Sexual inversion among the Azande' (1970) 72 *American Anthropologist* 1428-1434

Fitzgerald, J 'The road to equality? The right to equality in Kenya's new Constitution' (2010) 5 *The Equal Rights Review* 56

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

Jackson, VC 'Narratives of federalism' (2001) 51 *Duke Law Journal* 263

Keevy, L 'Ubuntu versus the core values of the South African Constitution' (2009) 34(2) *Journal for Juridical Science* 44

Lau, H 'Sexual orientation: Testing the universality of international human rights law' (2004) 71 *University of Chicago Law Review* 1689

Morris, HF 'A history of the adoption of codes of criminal law and Africa in British colonial Africa 1875-1935' (1974) 18 *Journal of African Law* 7

Muigai, G 'Political jurisprudence or neutral principles: Another look at the problem of constitutional interpretation' (2004) 1 *East African Law Journal* 1

Murray, R & Viljoen, F 'Towards Non-Discrimination on the Basis of Sexual Orientation: The Normative Basis and Procedural Possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 86

Mutua, M 'Justice under siege: The rule of law and judicial subservience in Kenya' (2001) 23 *Human Rights Quarterly* 96

Narayan, P 'Somewhere over the rainbow: International human rights protections for sexual minorities in the new millennium' (2006) 24 *Boston University International Law Review* 324

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

O'Connor, SD 'Keynote address before the 96<sup>th</sup> annual meeting of the American Society of International Law' (2002) 96 *American Society of International Law proceedings* 350

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

Quansah, EK 'Same-sex relationships in Botswana: Current perspectives and future prospects' (2002) 4 *Africa Human Rights Law Journal* 201

Shestack, JJ 'The philosophical foundations of human rights' (1998) 20 *Human Rights Quarterly* 234

Twinomugisha, BK 'The role of the judiciary in the promotion of democracy in Uganda' (2001) 9 *African Human Rights Law Journal* 3

Udombana, NJ 'Interpreting rights globally: Courts and constitutional rights in emerging democracies' (2005) 5 *African Human Rights Law Journal* 56

Wislet, J 'International human rights law and sexual orientation' (1994) 18 *Hastings International and Comparative Law Review* 11

## **Reports/Papers**

Bauth, S 'Human rights and the criminalisation of consensual same sex sexual acts in the commonwealth, South and Southeast Asia' Working paper (May 2008)

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

International Commission of Jurists 'Kenya: Judicial independence, corruption and reform' (2005)

Kaoma, K ' Globalising the culture wars: US conservatives, African churches and homophobia' (2009)

Kenya Human Rights Commission 'The outlawed amongst us: A study of the LGBTI community's search for equality and non-discrimination in Kenya' (2011)

Mute, L 'Rethinking contested rights: Critical perspectives on minority rights in Kenya' (February 2011)

Report of the departmental committee on homosexual offences and prostitution (Wolfenden Committee Report) (4 September 1957)

Report of the Fourth World Conference on Women' Beijing 4-15 September 1995  
U.N.Doc.A/CONF.177/20 (17 October 1995)

### **International instruments and other documents**

African Charter on Human and Peoples' Rights, 1981

Committee on Economic Social and Cultural Rights, General Comment No 14, 2000

Committee on Economic Social and Cultural Rights, General Comment No 15, 2003

Committee on Economic Social and Cultural Rights, General Comment No 18, 2005

Committee on Elimination of Discrimination against Women, General Recommendation No 28, 2010

Committee on the Rights of the Child, General Comment No 3, 2003

Committee on the Rights of the Child, General Comment No 4, 2003

Conclusions and recommendations of the Committee against Torture: Egypt U.N. Doc. CAT/C/CR/29/4 (23 December 2002) Committee against Torture, 26<sup>th</sup> session, Geneva (30 April – 18 May 2001)

Concluding Observations of the Human Rights Council on Tanzania's fourth periodic report, 96<sup>th</sup> Session, Geneva, July 2009 CCPR/C/TZA/CO/46 August 2009

Concluding Observations of the Human Rights Committee: Poland U.N. Doc. CCPR/C/79/Add.110 (29 July 1999)

Concluding observations on the first periodic report of Cameroon, 39th ordinary session, 11-25 May 2005

Constitutive Act of the African Union, 2000

Convention against Torture, 1984

Draft Report of the Working Group on the Universal Periodic Review of the UN Human Rights Council on Kenya's universal periodic review on 6 May 2010

Final Programme of Action, Cairo International Conference on Population and Development', Cairo, September 5-13, 1994, U.N. Doc.A/CONF.171/13, 18 October 1994

Human Rights Committee, General Comment No 16, privacy, 8 April 1988

Human Rights Committee, General Comment No 18, non-discrimination, 11 October 1989

Human Rights Council Resolution on Human Rights, Sexual Orientation and Gender Identity A/HRC/17/L.9/Rev.1 of 17 June 2011

International Covenant on Civil and Political Rights, 1966

International Covenant on Economic Social and Cultural Rights, 1966

NEPAD 'Declaration on Democracy, Political, Economic and Corporate Governance' AHG/235 (XXXVIII) Annex 1

OAS General Assembly 'Resolution on Human Rights, Sexual Orientation, and Gender Identity

OAS Doc AG/RES 2435 (XXXVIII-O/08), 3 June 2008

OHCHR, Fact sheet no 7/Rev.1, complaints procedure

OHCHR 'Promoting and consolidating democracy' Res 2000/47

OHCHR 'Promotion of the right to democracy' Res 1999/57

Optional Protocol to ICCPR, 1966

Report of UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health A/HRC/14/20

Report of the Working Group on the Universal Periodic Review, Kenya

Resolution on Establishment of a Committee on the Protection of the Rights of People Living with HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV ACHRP/Res 163 (XLVII), 2010

Second Optional Protocol to ICCPR Aiming at the Abolition of the Death Penalty, 1989

UN Conference on Human Settlements: Habitat 11 Summit, Istanbul , Turkey, 3-14 June 1996  
'The Habitat agenda, goals, and principles' UN Doc A/S-25/3

UN General Assembly ' Promoting and consolidating democracy' Res A/RES/55/96

UN ECOSOC, Working Group on Arbitrary Detention, Civil and Political Rights, Including Torture and Detention U.N.Doc. E/CN.4/2003/8/Add.1 (24 January 2003)

Universal Declaration of Human Rights, 1948

United Nations Charter

Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity

### **Cases: International**

*Toonen v Australia* communication no 488/1992, UN Human Rights Committee (31 March 1994)

UN Doc No CCPR/C50/D/488/1992, 1IRR 97

**Cases: Regional (African, European and Inter-American)**

*Alekseyev v Russia* Applications nos. 4916/07, 25924/08 and 14599/09 21 October 2010

*Atala and daughters v Chile* 1271-04, Report No. 42/08, Inter-Am. C.H.R., OEA/Ser.L/V/II.130 Doc. 22, rev. 1 (2008)

*Da Silva Mouta v Portugal* Application 33290/96 21 March 2010

*Dudgeon v UK* (1981) 4 EHRR 149

*Kozak v Poland*, Application 13102/02 2 March 2010

*Norris v Ireland*, 26 October 1988, Series A No 142

**Cases: Domestic**

*Banana v the State* 2000 4 LRC 621 (ZSC)

*Commonwealth of Kentucky v Jeffrey Wasson* 842 SW 2d 487 (Ky 1992)

*Lawrence v Texas* 539 US (558) 2003 41

*Lemeiguran & 3 others v Attorney General & 2 others* (2008) 3 KLR (EP) 325

*Lustig-Preen v UK* (2000) 29 EHRR 548

*Modinos v Cyprus*, 22 April 1993, Series A No 259

*National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) 21

*National Coalition of Gays and Lesbians Equality and another v Minister of Home Affairs and others* 2000 2 SA 1 (CC)

*Naz v New Delhi* 160 Delhi Law Times 277

*Njoya & others v Attorney-General & others* (2004) AHRLR 157 (KeHC 2004)

*R.N v Attorney General and others* [2010] eKLR

*Reyes v The Queen* [2002] AC 235

*S v Makwanyane and Another* 1995 3 SA 391 (CC) 394

*Utjiwa Kanane v the State* 2003 (2) Botswana Law Review (BLR) 67 (CA)

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

*Young v Australia* Communication no 941/2000 UN Human Rights Committee (12 August 2003)  
UN Doc CCPR/C/78/D/941/2000d

*Zimbabwean Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) 169

### **Dissertations/Theses**

Ako, EY 'The debate on sexual minority rights in Africa' unpublished LLM dissertation, University of Pretoria 2010

Fisseha, YT 'Who interprets the Constitution' unpublished LLM dissertation, University of Pretoria 2004

### **Constitutions**

Constitution of Kenya (2010)

### **Legislation**

Criminal Procedure Act no 51 of 1977 (SA)

Penal Code Chapter 63 Laws of Kenya

Sexual Offences Act 3 of 2006 Laws of Kenya

Security officers Act 92 of 1987 (SA)

### **Newspaper articles**

'Clerics seek harsher laws for gays' *Daily Nation* 14 June 2011



'Gays say draft ignored them' *Daily Nation* 20 November 2009 6

Makau, M 'Why Kenyan Constitution must protect gays' *Sunday Nation* 25 October 2009 19

### **Internet sources**

'Archbishop Tutu supports LGBTI rights full acceptance and inclusion' <<http://leonardoricardosanto.blogspot.com/2011/08/no-gay-rights-in-kenya-human-rights-is.html>> (accessed 20 September 2011)

Commonwealth Human Rights Initiative 'The impact of criminalising same-sex sexual conduct in the Commonwealth' <[http://humanrightsinitiative.org/index.php?option=com\\_content&view=article&id=780&Itemid=579](http://humanrightsinitiative.org/index.php?option=com_content&view=article&id=780&Itemid=579)> (accessed 20 September 2011)

Human Rights Watch 'Sexual orientation and gender identity: Briefing to the 60<sup>th</sup> session of the UN Commission on Human Rights' (2004) <<http://hrw.org/english/docs/2004/02/02/global17249.htm>> (accessed 20 August 2011)

'Kenya chiefs stop Mombasa 'gay wedding'' <<http://news.bbc.co.uk/2/hi/8511321.stm>> (accessed 12 June 2011)

'Kenyan church rejects Mutunga, Baraza' <[africanews247.com/news/kenyan-church-rejects-mutunga-baraza](http://africanews247.com/news/kenyan-church-rejects-mutunga-baraza)> (accessed 17 May 2011)

'Kenya's PM Raila Odinga threatens arrest of gays' <[http://www.bbc.co.uk/worldservice/africa/2010/11/101129\\_kenya\\_odinga\\_gays.shtml](http://www.bbc.co.uk/worldservice/africa/2010/11/101129_kenya_odinga_gays.shtml)> (accessed 25 April 2011)

'Minister condemned for promoting gay inclusion' <<http://www.mask.org.za/kenyan-minister-condemned-for-promoting-gay-inclusion/>> (accessed 12 June 2011)

Mute, L 'Africa's hypocrisy on human rights, sexual orientation and gender identity' <<http://www.pambazuka.org/en/category/comment/53072/print>> (accessed 13 June 2011)

'Punitive laws threaten HIV progress' <<http://www.hrw.org/en/news/2009/11/25/world-aids-day-punitive-laws-threaten-hiv-progress>> (accessed 30 September 2011)

Resl 1.10 'Human sexuality' < <http://www.lambethconference.org/resolutions/1998/1998-1-10.cfm>> (accessed 17 September 2011)

Rukweza, J 'Is homosexuality really un-African' <<http://www.pambazuka.org/en/category/comment/32974>> (accessed 16 September 2011)

Spadadici, B 'Human rights scholar Makau Mutua delivers 'straight' talk on homosexuality in Kenya' < <http://www.i-italy.org/13280/human-rights-scholar-makau-mutua-delivers-straight-talk-homosexuality-kenya>> (accessed 25 September 2011).

Statement from the Synod of Anglican bishops on homophobia, 8-11 February 2010 <http://constitutionallyspeaking.co.za/statement-from-the-synod-of-anglican-bishops-on-homophobia/> (accessed 17 September 2011)

Tamale, S 'Out of the closet: unveiling sexuality discourses in Uganda' (2003) 2 *Feminist Africa Changing Cultures* <<http://www.feministafrica.org/index.php/out-of-the-closet>> (accessed 12 June 2011)

'Torture and the Law' Vienna Colucci, Amnesty International (November 2001), <[http://www.amnestyusa.org/Reports\\_statements\\_and\\_Issue\\_Briefs/Torture\\_and\\_the\\_law/page.do?id=1107981&n1=3&n2=38&n3=1052](http://www.amnestyusa.org/Reports_statements_and_Issue_Briefs/Torture_and_the_law/page.do?id=1107981&n1=3&n2=38&n3=1052)> (accessed 23 August 2011)

UN human rights treaties, equality and discrimination, sexual orientation Concluding Observations <[http://www.bayefsky.com/themes/equality\\_sexual\\_concluding\\_observations.php](http://www.bayefsky.com/themes/equality_sexual_concluding_observations.php)> (accessed 22 August 2011)

'Yogyakarta principles: A milestone for lesbian, gay, bisexual and transgender rights', [http://hrw.org/english/docs/2007/03/26/global15546\\_txt.htm](http://hrw.org/english/docs/2007/03/26/global15546_txt.htm) (accessed 23 August 2011)

Wanyeki, LM 'Do we need the state in our bedrooms?' <http://www.pambazuka.org/en/category/features/64748/print> (accessed 20 September 2011)