

**EXORCISING THE ANTIQUITY SPIRIT OF INTOLERANCE: POSSIBILITIES AND DILEMMAS
OF DECRIMINALISING SODOMY LAWS IN UGANDA**

**Submitted in Partial fulfilment of the Requirements for the Degree LLM
(Human Rights and Democratisation in Africa)**

By

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29 October 2007

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I, Douglas, SINGIZA KAREKONA, declare that the work presented in this dissertation is original. It has never been presented to any University or Institution. Where some other people’s works have been used, references have been provided, and in some cases, quotations made. This dissertation is therefore submitted in partial fulfilment of the requirements for the award of the LLM Degree in Human Rights and Democratisation in Africa, University of Pretoria.

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DEDICATION

This work is dedicated to my late father, Alpha, and to my loving son, Joseph who was exactly one month when I embarked on this rigorous course. Let it inspire him to become a good and enlightened citizen.

Douglas, Karekona Singiza

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ABSTRACT

This dissertation proposes the various methods to decriminalise same-sex sexual intercourse as an offence in Uganda. Chapter one introduces the problem of the sodomy laws and how it has recently taken centre stage in the struggle of human rights in Uganda. The chapter states the problem, the research questions that are proposed to be answered, the objectives of the study, and its scope and methodology. It points out the possible limitations, and reviews the literature on the subject of gay and lesbian rights. Chapter two analyses how gay and lesbian rights can be given effect through constitutional adjudication by reading protection for sexual minorities into the rights to equality, dignity and privacy that are protected in the Ugandan Constitution into three important rights: the rights to equality, dignity and privacy. The Chapter also evaluates the philosophical underpinnings that manifest opposition to gay rights, focusing particularly on religion and traditions. A possible approach to be followed by the African Commission to advance gay and lesbian rights is suggested. It is argued that this can be achieved by giving an expansive meaning to the terms such as “values” and “traditions”. Emphasis is placed on tolerance and diversity as important values in the discourse of human rights in Africa generally and Uganda in particular, by presenting cogent evidence that homosexuality is not inimical to Africa but on the contrary part of Africa. Chapter three suggests that in order to properly address the issue of gay and lesbian rights in Uganda, there is need to evaluate the dominant heterosexual paradigm. Similarly gay and lesbian advocates need to understand the intricate dynamics of culture and religion in Uganda so as to have a dialogue with a view towards possible acceptance. Chapter four concludes with recommendations for improved gay rights advocacy.

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ACRONYMS

AC	African Commission
ACHPR	African Charter on Human and Peoples' Rights
AI	Amnesty International
AIDS	Acquired Immune Deficiency Syndrome
CCPR	International Convention on Civil and Political Rights
CHR	Committee on Human Rights
HIV	Human Immuno-Deficiency Virus
IGLHR	International Gay and Lesbian Human Rights Commission
ILGA	International Lesbian and Gay Association
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
MEI	Minister of Ethics and Integrity
PCA	Penal Code Act
UDHR	Universal Declaration of Human Rights

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Chapter 1: Introduction

1.1 Background to the Study

Recently when a group of gays and lesbians addressed a press conference in Kampala, seeking recognition and protection of their rights from government and the public at large,¹ there was a quick and hostile response from the public and religious organisations that condemned the group as immoral and charged that they were blackmailing the government.² There was also a swift and firm statement from the Minister of Ethics and Integrity that laws would not be changed to recognise the group, though in a bid to save face, the minister indicated that the group's members would not be arrested though the government knew who they were. In addition to the numerous persistent attacks from the different media houses, the public organised a demonstration against the group in the streets of Kampala.³

This has brought the debate on homosexuality into the public arena in a way that had previously not been anticipated. This is not to say that in the past gay and lesbian questions had not generated any debate. However the recent trends indicate that the debate is gaining momentum, in terms of organisation and advocacy strategies by gay and lesbian advocates, to ensure full protection of gays and lesbians as sexual minorities. It also implies that there are many permutations and unresolved issues surrounding gay and lesbian rights in Uganda. This debate follows on the heels of a high court case brought against the state by a claimant who has publicly stated that he is a homosexual, and has alleged an infringement of his right to privacy by the unlawful search of his residence by the police.⁴ Because of the rule of *sub judice* I will not make it part of the discussion in this thesis.⁵

1.2 Rationale of the Research

Anti-sodomy laws feature prominently in many penal systems in Africa. In Uganda, not only are there repressive legal provisions against gays and lesbians, but there are also constitutional prohibitions

¹ Sexual Minorities Uganda (SMUG) Ugandan LGBTI Human Rights Media Campaign Launch Press Conference: 16 August 2007, on-line at <www.sexualminoritiesuganda.org>; 'Homosexuals demand acceptance in society' on-line at <<http://www.monitor.co.ug/news/news08175.php>> (accessed on 2007-17-08).

² 'Uganda rejects a gay rights call' available on-line at <http://news.bbc.co.uk/2/hi/africa/6952157.stm> > (accessed on 2007-08-17); 'Religious leaders rap homosexuals' on-line at <<http://www.newvision.co.ug/D/8/13/581922>> (accessed on 2007-18-08), 'Religious leaders protest gay demands', on-line at <<http://www.newvision.co.ug/D/8/12/582386>> (accessed on 2007-20-08), 'Is Africa homophobic?' On-line at <<http://newsforums.bbc.co.uk/nol/thread.jspa?threadID=7154&edition=2&ttl=20070817204517>> (accessed on 2007-10-25); '95 per cent Ugandans oppose homosexuality', available at <<http://www.monitor.co.ug/news/news08235.php>> (accessed on 2007-2-08); 'DJ suspended over homo talk show', on-line at <<http://www.newvision.co.ug/D/8/12/583941>> (accessed on the 2007-29-08); and 'Ugandans hold anti-gay sex rally' on-line at <<http://news.bbc.co.uk/2/hi/africa/6957336.stm>> (accessed on 2007-21-08).

³ See 'Churches plan demo against gay' on-line at <<http://www.monitor.co.ug/news/news08212.php>> (accessed on 2007-21-08), '95 per cent Ugandans oppose homosexuality', on-line at (<http://www.monitor.co.ug/news/news08235.php>) > (accessed on 2007-2-08).

⁴ See *Yvonne Oyoo and Juliet Mukasa v. the Attorney General* Misc. Application No. 247 of 2006. Confidential summary of the court pleadings on-line at <www.sexualminoritiesuganda.org> (accessed on 2007-08-26).

⁵ The rule of *sub judice* is an English common law rule that bars discussion of court cases before their determination. In Uganda this rule is still strictly enforced. By the time I completed my first draft, the case had been fixed for judgment.

targeting same-sex sexual unions.⁶ There are presently many arguments in Uganda against the acceptance of gay men and lesbians; the commonest of these are that homosexuality is contrary to Africa culture, and constitutes a threat to the family as an institution and undermines African values. The penal laws that target same-sex sexual relations have their origin from Britain,⁷ the former colonial masters. In this regard, it is difficult to argue that they are representative of the social needs of the Ugandan society, unless seen as forming part of the colonial legacy.

Sodomy laws as a starting point, clearly show that law-makers do not exactly appreciate what sexual orientation means, raising the possibility that the law as it stands may be targeting a group for apparently no clearly articulated reasons. It is therefore important to note that '[s]exual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex, in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex'.⁸

To premise marginalisation of a specific group on grounds of a group's identity is a culmination of subjugation, alienation and oppression. Thus what is being punished by the anti-sodomy law is not an act but (also) a person, the 'so called sodomite that performs' the act. What the law denounces is 'the threat that same-sex passion in itself is seen as representing to the heterosexual hegemony'.⁹

The pressing problem is that, because of notions of what may be considered to be African 'values and traditions' and what may be regarded as an affront thereto,¹⁰ discrimination and marginalisation of this group has been systematic and ongoing. This is in spite of the various provision of the Ugandan constitution that guarantee equality, dignity and privacy and the guarantees in African Charter (a document to which Uganda is a state party) that protect the right to equality and dignity.¹¹ Discrimination is not only entrenched by the sodomy laws but is epitomised by the cultural resistance to their repeal.¹² This paper proposes the strategies that could be adopted to ensure meaningful legal

⁶ On July 5 2006, an amendment to the Constitution of Uganda prohibiting same sex marriages passed through Parliament with a majority of 111 votes to 17, with 3 abstentions. See the new article 31(2a) of the Ugandan Constitution.

⁷ These laws were generally imposed by way of reception clauses in the Colonial Ordinances that operated in much of British colonial Africa.

⁸ E Cameron 'Sexual Orientation and the Constitution: A Test Case for Human Rights' (1993) 110 *South African Law Journal* 450.

⁹ See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999(1) S (CC) para 22 per Justice Akermann.

¹⁰ This notion is embedded in article 27 (7) of the African Charter, which imposes a duty to promote and protect African values. This is further buttressed by provisions in the 1995 Ugandan constitution which guarantee the right to culture. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa which emphasises in its Preamble that solidarity and tolerance as its core values offers a possible clarification to the term 'African values'.

¹¹ Uganda is a state party to both the African Charter on Human and People's Rights and the International Covenant on Civil and Political Rights (CCPR). For status of ratification of the African Charter see <http://www.africa-union.org> (accessed on-line 2007-10-15), see also <http://www.ohchr.org/english/bodies/ratification/4.htm> for ratification status of (CCPR) where Uganda's accession date is given as 21 Jun 1995 a.

¹² While in Uganda gay men are referred to as '*abasiyazi*', a derogatory and demeaning term, there is cogent evidence to show that one of the kings of Uganda, a cultural head for the Baganda people in central Uganda, was in fact gay. See S Tamale 'Out of the Closet: Unveiling Sexuality Discourses in Uganda' *Feminist African*, Issue 2003 pp 5-15 on this fact.

reform by relying on the jurisprudence of the South African Constitutional Court, the African Commission and the UN Committee on Human Rights.¹³

The legal basis for changing the present laws is based on the three distinct rights of equality, dignity and privacy, and how they resonate with the postulated African cultures and traditions under the African Charter, which cultures and traditions are embedded attributes of a heterosexual culture in Uganda.¹⁴

The belief that heterosexuality is the only natural form of sexual expression is rooted in a cultural framework that defines heterosexuality as compulsory and homosexuality as deviant or pathological, hence blatantly immoral and disgusting.¹⁵ Shestack argues that morality may be properly understood if it is connected with tolerance of differences in society. Hence equal treatment of all citizens is a moral issue which should be implicated whenever a section of society is alienated.¹⁶ It is contended that there is nothing barring the state from enforcing morality, but only as far as the enforcement of morals does not lead to prejudices, like in this case against gay and lesbians.¹⁷

1.3 Objectives

The general objective of the study is to assess the role of culture and traditions as stumbling blocks in the legal reform that would lead to the decriminalization of same-sex sexual intercourse. The specific objectives of the study are:

- (a) To analyse the extent of the normative legal framework protects gays and lesbian rights in Uganda.
- (b) To determine the role of culture and traditions in formulating this normative this framework.
- (c) To propose the various ways in which culture may provide an entry point in order to effect the decriminalisation of male same sex intercourse or 'sodomy'.

1.4 Research Questions

The study seeks to answer the following questions:

- (a) What stereotypes influence society's views on sexual identity?
- (b) To what extent do these stereotypes impede the decriminalisation of sodomy?
- (c) What strategies may be undertaken to strike down laws that criminalise sodomy?

¹³ *Toonen v Australia* Communication No. 488/1992: Australia 04/04/94 CCPR/C/50/D/488/1992. (Jurisprudence) Convention Abbreviation: CCPR

¹⁴ The African Charter does not provide for the right to privacy, thus postulating the strength of the traditional communalistic structure of society which places less emphasis on individual rights.

¹⁵ M Machera 'Opening a Can of Worms: A Debate on Female Sexuality in the Lecture Theatre' in A Signe (ed) *Re-Thinking Sexuality in Africa* (2004) p157.

¹⁶ J J Shestack, 'The Philosophical Foundation of Human Rights' *Human Rights Quarterly* (1998) 20 pp 201-234 in C Heynes (ed) , *Human Rights Peace and Justice in Africa* (2006) pp 6-7.

¹⁷ Shestack (n 16 above).

(d) How can cross-cultural dialogue help to promote the understanding of sodomy?

1.5 Scope

This study will focus on the sodomy laws in Africa with specific reference to Uganda. Comparison shall be made between the Ugandan and South African legal regimes. Uganda is chosen because it represents one of the African countries where same-sex unions are specifically prohibited by the Constitution.

1.6 Methodology

Desk Work/Library Research: The researcher shall carry out library research for one month. This will be aimed at studying what has been written on gay men and lesbian women's rights with particular emphasis on sexual identity and the various attitudes existing in a multicultural setting. This is because the writer has limited time and resources to undertake any other methods.

1.7 Limitations

A number of limitations are anticipated because of the controversy surrounding not only homosexuality but sexuality as a whole in Uganda. For instance, the subject of gay rights in Africa has not attracted a lot of jurisprudence in many African countries including Uganda thus the author will be confronted with the problem of relying on comparative law that may be misleading in addressing the problem of gay rights. Lastly time and limited space will limit the scope and depth of this thesis.

1.8 Literature Review

A lot has been written on gay and lesbian rights world over so that one may in fact not be able to read all that is available on the subject. A careful scrutiny of the immense volume of works on the subject however reveals some gaps, especially with regard to the African legal landscape.

Cameron argues for the decriminalization of the law against sodomy because it treats gay conduct as monstrous and an insult.¹⁸ Retief discusses the relationship between what he calls moral panic in the law and the police brutality on gay communities in South Africa.¹⁹

Minnow examines people's differences with explicit reference to one's traits as distinct from sameness.²⁰ Bartlett avers that the appropriate way to address questions of exclusion is to expose the unstated norms and to re-evaluate them mainly as a function of a social arrangement that excludes

¹⁸ E Cameron ' " Unapprehended Felons": Gay and lesbians and the law and the law in South Africa' in Mark Gevisser & Edwin Cameron (eds) *Defiant Desire: Gay and lesbian lives in South Africa* (1994) p.90.

¹⁹ G Retief 'Keeping Sodom Out of the Laager: Policing of sexual Minorities in South Africa' in *Defiant Desire* (n 18 above) pp 99.

²⁰ M Minnow (1990) *Making All the Difference: Inclusive, Exclusive, and American Law* pp 53-54.

others.²¹ Prof Pierre de Vos regards relationship between groups as critical to the experience of domination.²²

1.9 Breakdown of Chapters

Chapter II will discuss gay and lesbian rights in the big matrix of the Ugandan Constitution by reading protection for sexual minorities into the rights to equality, dignity and privacy that are protected in the Ugandan Constitution, and exploring ways in which the above rights could be limited and analysing the difficulties of articulating the gay and lesbian protection in these rights, given the heterosexual paradigm within which such articulation must take place. The chapter will evaluate the argument that the discourse of morality is alien to African and will argue that the preservation of African morality was a foreign notion.

Chapter III examines in detail the notion of homosexuality under the African Charter, with specific reference to African values and traditions as set out in the Charter with the ultimate purpose of illustrating that the reference to values is a reference to constitutional values of tolerance, diversity, human dignity and equality that ought to be protected. The interplay between African values and tradition will then form the main thrust in postulating the need for both internal and cross cultural dialogue on gay and lesbian rights in Africa. Chapter IV concludes the thesis with radical suggestions to ensure maximum protection of gay and lesbian rights without necessarily antagonising the heterosexual paradigm.

²¹ K T Bartlett 'Minnow's Social Relations Approach to Deference: Unanswering the Unasked' (1992) 17 *Law & Social Inquiry* 437 pp 5.

²² P de Vos 'Sexual Orientation and the Right to Equality in South African Constitution: *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others*' (2000) 117 *South African Law Journal* pp 17. See also *National Coalition for Gay and Lesbian* (n 9 above).

Chapter 2: Enforcement of Human Rights by Uganda's Constitutional Court: a Discourse of Gay and Lesbian Rights

2.1 Introduction

Protection of human rights in the domestic arena is usually dependent on the Constitution as the main point of reference. According to Udombana, a Constitution is a blueprint which outlines the parameters of the different arms of government since it provides measures for rationality.²³ Prof. Pierre de Vos refers to a Constitution as 'an instrument and a technique of power', that helps in shaping human rights discourse in a given country.²⁴ The jurisdiction to interpret the Constitution in Uganda lies with the Constitutional Court. Article 126 (3) (b) and (4) (a) of the Ugandan Constitution provides for the jurisdiction of interpret the Constitution and to enforce human rights, where any Act of Parliament or any other law or anything done under the authority of any law, contravenes the Constitution and mandates the Court to grant a redress.

In performing the task of interpretation, the Constitution mandates the Court, to take cognisance of the fact that judicial power is exercised in accordance with set norms. This mandate is reflected in the way the Constitutional Court has been interpreting the Bill of Rights. It is important to note that the Constitutional Court is empowered to interpret the constitution where any conduct or act is alleged to be in conflict with it. What is significant is that judicial powers must also be exercised in accordance with the law.²⁵

The Constitution also contains national objectives and directive principles of state policy which indicate which direction the process of interpretation should follow. They include among others the following:

1. National unity and stability.

- (i) All organs of State and people of Uganda shall work towards the promotion of national unity, peace and stability.
- (ii) Every effort shall be made to integrate all the peoples of Uganda while at the same time recognising the existence of their ethnic, religious, ideological, political and cultural diversity.
- (iii) Everything shall be done to promote a culture of cooperation, understanding, appreciation, tolerance and respect for each other's customs, traditions and beliefs.

2. Protection of the family.

The family is the natural and basic unit of society and is entitled to protection by society and the State.

3. Cultural objectives.

Cultural and customary values which are consistent with fundamental rights and freedoms, human dignity, democracy and

²³ N J Udombana 'Interpreting Rights Globally: Courts and Constitutional Rights in Emerging Democracies' (2005) 5 *African Human Rights Law Journal* 47.

²⁴ P. de Vos, 'The Constitution Made us Queer. The Sexual Orientation Clause in the South African Constitution and the Emergence of Gay and Lesbian Identity', in C. Stychin and D. Herman (eds) *Sexuality in the Legal Arena* (2000) p 195.

²⁵ See article 126(1) of the Constitution of Uganda.

with the Constitution may be developed and incorporated in aspects of Ugandan life.²⁶

The Constitution further makes a strong promise on culture in that:

The State shall—

- (a) promote and preserve those cultural values and practices which enhance the dignity and well-being of Ugandans;²⁷

The above stated directive principles of state policy clearly recognise the fact that Uganda is a multicultural society, and that respect for, and tolerance of, divergent views should therefore be of paramount importance. While the protection of the family is emphasised, it is my view that these principles do not clearly define what constitutes a family.²⁸ It could be a family as between a man and woman or it could mean a family as between persons of the same sex. It is clear from the Bill of Rights that only cultures that are not in conflict with fundamental human rights freedoms and dignity are to be promoted.²⁹

Policy directives place obligations on the state and at the same time give momentum to the political expectations of citizens from the different organs of the state in ensuring protection and promotion of human rights. Importantly, policy directives help to interpret certain rights in the Constitution that may not be accurately defined.³⁰ Given the above principles, the Constitutional Court in Uganda could, rely on the directive principles so as to give effect to a right to non-discrimination on the ground of sexual orientation.

2.2 Rules of Constitutional Interpretation Adopted by the Constitutional Court of Uganda

Rules of interpretation of any legal document help in ensuring that there is consistency in the litigation process. Additionally, rules of interpretation make it easier to give effect to certain rights that may not necessarily be specifically defined in a legal document, either because lawmakers had not clearly provided for a right, or because a document is inherently ambiguous.³¹

The Ugandan Constitutional Court has been alive to this fact, given the various rules that it has adopted. In *Charles Onyango Obbo Andrew Mujuni Mwenda v Attorney-General*,³² Justice

²⁶ See generally the National Objectives and Directive Principles of State Policy of the Uganda's 1995 Constitution as amended on p.16.

²⁷ See (n 7 above) p.18.

²⁸ F Angles, *The Origin of the Family, Private Property and State* (1972) pp 12-45, argues that the institution of a 'family' contains the germs of slavery and domination. The original word *famillia* symbolised how many slaves were under one's control.

²⁹ The status of these principles in constitutional interpretation has not been clarified meaningfully by any courts in Uganda; however the Supreme Court of India has given meaning to certain rights on the basis of directive principles of state policy in the constitution.

³⁰ R S. Jeffrey 'Social and Economic Rights in the South African Constitution: Legal Consequences and Practical Considerations' (1993) *Columbia Journal of Law and Social Problems* p 22. See for example article 37 of the Indian Constitution on this point.

³¹ Jeffrey (n 30 above) p 26.

³² Constitutional Petition no. 15 of 1997

Twinomujuni, JA, summarised the rules of constitutional interpretation in Uganda, which have been subsequently followed in many others cases in which different provisions of the Constitution of Uganda had to be interpreted.³³

The judge held that in applying the principles of constitutional construction:

...I take heed of two other pieces of advice drawn from other, but similar jurisdiction, which I find highly persuasive. They are also cited in the cases I have referred to above. In the case of *De Clerk & Suct Vs Du Plassis & Anor* [1994] 6 BLR 124, at page 128–9 The Supreme Court of South Africa (sic) stated:-

“When interpreting the Constitution and more particularly the bill of rights it has to be done against the backdrop of our chequered and repressive history in the human rights field. The state of legislative and administrative means curtailed.....the human rights of most of its citizens in many fields while the courts looked on powerless. Parliament and the Executive reigned Supreme. It is this malpractice which the bill seeks to combat. It does so by laying ground rules for state action which may want to interfere with the lives of its citizens. There is now a threshold which the state may not cross. The Courts guard the door.” [Emphasis mine]

In the later case of *Susan Kigula & 416 others v the Attorney general*,³⁴ the same judge expanded upon the approach adopted earlier and held *inter alia* that the principles which govern construction of a statute are also applicable to construct a constitutional provision, by giving the widest possible meaning, in their ordinary sense, to the words therein.³⁵ Further, that because a Constitutional provision containing a fundamental provision is intended to serve for a long period of time, its interpretation should be dynamic, progressive and flexible, so as to keep pace with ever changing ideals of a society.³⁶ The Constitution, the Judge added, should be interpreted as a whole with no single provision to be relied on to destroy any other. He characterised this rule to be the rule of ‘harmony’ or ‘completeness’ or ‘exhaustiveness’ or ‘paramountcy’ in any written Constitution.³⁷

Finally, the Judge stated that the words of a written Constitution prevail over all conventions, precedents and practices,³⁸ implying that even when one has to rely on comparative law or international law, the Constitution must prevail. Further, it was held, that in order to give effect to the greater purpose of the Constitution, no single provision should be separated from the rest, but that all the provisions should be brought into perspective so that any interpretation of the Constitution conforms with the people’s aspirations since it is from such aspirations that judicial power is derived.³⁹ Importantly, the Court acknowledges, quite rightly and firmly, the supremacy of the Constitution; hence

³³See *Major General David Tinyefuza Vs Attorney General, Constitutional Petition No. 1 of 1997 (unreported)* and on appeal in *Constitutional Appeal No. 1 of 1997 (unreported)* in the Supreme Court of Uganda. *Zachary Olum and Another Vs Attorney General, Constitutional Petition No. 6 of 1999 (unreported)* and *Dr. James Rwanyarare and Another Vs Attorney General, Constitutional Petition No. 5 of 1999 (unreported)*.

³⁴ Constitutional Petition no 6 of 2003 at p.71

³⁵ *Kigula* (n 34 above) rule a

³⁶ *Kigula* (n 34 above) rule b

³⁷ *Kigula* (n 34 above) rule c

³⁸ *Kigula* (n 34 above) rule d

³⁹ *Kigula* (n 34 above) rule e

giving it a towering position in any interpretation process. Invariably any practice or law which contradicts the Constitution is null and void to the extent of such inconsistency.⁴⁰

Fundamentally it was held that in order to guarantee international human rights and freedoms, international standards must be viewed as part of the standard of interpretation, because of the ever evolving notion of human dignity. It was firmly stated that comparative input - especially from countries with similar constitutions - is useful, and therefore an important guide to interpretation of the Ugandan Constitution.⁴¹ Similarly, decisions from international adjudication bodies interpreting human rights documents would be of help.⁴² Thus where there is commonality between our Constitution and international law, decisions thereunder are of persuasive value to the Ugandan courts. Finally the Court pointed out that what is important are the object and purpose of a Constitutional document.⁴³

In sum, the Constitutional Court of Uganda would be able to give notions such as dignity its literal meaning, that is to say, dignity means dignity and nothing else. Secondly, by reading the Constitution as a whole, it becomes easier for notions of equality to become more important, and connected to human dignity. In addition, by applying the purposive approach to legal interpretation, the Court will have to interpret these concepts in a context of humility, human dignity, and tolerance.

I will illustrate how it is practical, given the rules of interpretation of the Bill of Rights, for courts to make a finding against the violation of right to non discrimination on grounds of sexual orientation even when the right is not specifically provided under the Ugandan Constitution. However, in applying these rules, at the back of the Judges' minds is the need to strike a balance between what the aspirations of the people are, and the meaning and importance that should be attached to certain rights. In determining what their aspirations are, the key question should be, in my view, whether human dignity, privacy and equality, as separate rights should prevail over the right to culture and religion.

2.3 Yogyakarta Principles as Litigation 'Radars' to Gay and Lesbian Rights Advocates

According to Human Rights Watch, the Yogyakarta Principles are a milestone in the protection of Gay, Lesbian, Bisexual and Transgender rights,⁴⁴ because they present a good standard for governments in treating people whose rights are often times reviled. 'Firmly grounded in the law and precedents, they enshrine a simple idea: human rights do not admit exceptions'.⁴⁵ First the principles affirm that

⁴⁰ *Kigula* (n 34 above) rule f

⁴¹ *Kigula* (n 34 above) rule g

⁴² *Kigula* (n 34 above) rule h

⁴³ *Kigula* (n 34 above) rule i

⁴⁴ 'Yogyakarta Principles' a Milestone for Lesbian, Gay, Bisexual, and Transgender Rights *Experts Set Out Global Standards for Sexual Rights and Gender Equality* on-line at <http://hrw.org/english/docs/2007/03/26/global15546_txt.htm> (accessed on 2007-10-19).

⁴⁵ Yogyakarta principles a milestone (n 44 above) comments by Scott Long, Director of lesbians, Gay, Bisexual, and Transgender Rights Program at Human Rights Watch.

the principle obligation of states is to implement human rights. I will point out the relevant principles that will form part of the discussion in this thesis.

The principles are clear that all states are required to repeal penal provisions that criminalise homosexuality on grounds of the right to equality and non discrimination.⁴⁶ In addition, the principles require states to ensure the right of each person to enjoy the protection of the private sphere, including intimate decisions like consensual sexual acts.⁴⁷ Further that torture on grounds of ones sexual orientation should be condemned.⁴⁸ Most relevant to our discussion is the counsel that the right to religion should never be invoked to justify laws that lead to the denial of equal protection before the law.⁴⁹

The position of these guidelines in international law has not been clarified, but like any other guidelines, they may be considered as soft law. Prof Dugard argues that soft laws are usually imprecise standards that are intended to serve as guidelines to states in their conduct but which lack the status of 'law'.⁵⁰ Thus the above guideline could serve the purpose of guiding courts in interpretation of constitution in the context of gay and lesbian rights, since they were in fact formulated by experts in the field of human rights.⁵¹

2.4 Gay and Lesbian Rights as understood through the Notions of Dignity, Equality and Privacy under the Ugandan Constitution

The Preamble to the Ugandan Constitution, as amended, provides the platform for better human rights protection.⁵² In the past, it was difficult for courts to strike down laws which were unconstitutional, since no guidance was available to test certain values. For instance, apart from the 1995 constitution, none of the previous constitutions had an elaborate Bill of Rights, particularly with regard to equality. The first independence Constitution was a product of Lancashire compromise negotiations with the colonial power, and the subsequent one in 1967 was overshadowed by what has been described as a political coup by the then Prime Minister against his own government.⁵³

⁴⁶ See the Yogyakarta Principles on the Application of International human Rights Law in Relation to Sexual Orientation and Gender Identity principle No.2 on-line at <<http://www.yogyakartaprinciples.org/index.php?item=25>> (accessed on 2007-10-19).

⁴⁷ Yogyakarta principles (n 45 above) principle No.6.

⁴⁸ Yogyakarta principles (n 45 above) principle No.10.

⁴⁹ Yogyakarta principles (n 45 above) principle No. 21.

⁵⁰ J Dugard (2005) *International Law: A South African Perspective* Lansdowne: Juta and Company pp 37-8.

⁵¹ S.43 of Uganda's Evidence Act Cap 6 provides that when the court has to form an opinion upon a point of foreign law, the opinions upon that point of persons specially skilled in that foreign law, are relevant facts.

⁵² Among others, the Constitution refers to struggles against tyranny and oppression, and a commitment to a better future based on equality, freedom and progress.

⁵³ The 1967 Ugandan Constitution has been referred to as a 'pigeon-hole' constitution since lawmakers were simply ordered to pick it from their pigeon holes and ordered to promulgate it without debate while Parliament was surrounded by armed men. From 1971-1995, Uganda was either in a full dictatorship or quasi military dictatorship.

Just like the South African Constitution,⁵⁴ the Preamble to the Ugandan Constitution provides a promise to break away from the country's repressive past. It fundamentally posits four important rights that are the focus of this paper: equality and freedom from discrimination, respect for human dignity, and privacy. These provisions must be contrasted with the provisions in the Penal Code Act (PCA) that criminalises sodomy, which provides as follows:

Any person who—

- (a) has carnal knowledge of any person against the order of nature;
- (b) has carnal knowledge of an animal; or
- (c) permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence and is liable to imprisonment for life.⁵⁵

The discussion below will show how the PCA provisions on sodomy could be declared unconstitutional with regard to rights to dignity, equality, and privacy as constitutionally posited rights.

2.4.1 Equality and Freedom from Discrimination

Article 21 of the Constitution of Uganda provides for equality of all persons before and under the law, whether in political or social and cultural life, and in every other aspect, without defining the term 'persons'. I proceed from the logical and obvious assumption that "person" includes individuals who are attracted to members of the same sex.⁵⁶

Article 21(2) and (3) list the prohibited degrees of discrimination and define what the term discrimination means. It provides thus:

(2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

(3) For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

This article shows that it is not enough to rely on discrimination *per se*; it must be demonstrated that the discrimination is on prohibited grounds. Thus, one has to show how sexual orientation as a prohibited ground of discrimination could be protected as a right analogous to non-discrimination on grounds of sex.

The Constitutional Court in *FIDA (U) v the Attorney General and others*,⁵⁷ recently declared s.15 of the PCA of Uganda unconstitutional, on the grounds that the section treated adulterous women differently from adulterous men, by invoking article 21 of the Constitution which provides for equality before the law and prohibits discriminating of grounds of sex. Twinomujuni JA who wrote the lead judgement said at page 24:

⁵⁴ See the Preamble to the Constitution of the Republic of South Africa.

⁵⁵ S. 145 of the Penal code Act Cap 120 is in the chapter called offences against morality.

⁵⁶ Articles 21 (2) & (4), 24, 27(1) & (2) and 37 of the Constitution of Uganda provide the frame work for the right of equality and non discrimination.

⁵⁷ *FIDA (U) v the Attorney General and others* Constitutional Petition No. 2/2003

"It is, in my view, glaringly impossible to reconcile the impugned provisions of the Divorce Act with our modern concepts of equality and non-discrimination between the sexes enshrined in our 1995 Constitution. I have no doubt in my mind that the impugned sections are derogation to articles 21, 31, and 33 of the Constitution."

Okello JA added at page 17:

"In the instant case, the evidence available reveals that sections 4(1) and (2), 5, 21, 23, 24, and 26 of the Divorce Act discriminate on the basis of sex. This brings them into contact with articles 21 (1) (2), 31 (1) and 33 (1) & (6) all of which provide against discrimination on the basis of sex. This is a ground for modifying or declaring them void for being inconsistent with these provisions of the Constitution. To the extent that these sections of the Divorce Act discriminate on the basis of sexes, contrary to the articles 21 (1) & (2),

The Court rejected the submission by the state that s.154 be modified to suit the Constitution so as to save the impugned section, reasoning that the section could not be modified as it was not part of the laws that could have been saved by s.273 since it is inconsistent with the Constitution. In this case the PCA provided that a married woman having sex with any man committed adultery, while a married man committed no offence if he had sex with an unmarried woman.

In order to include the right to non-discrimination on ground of sexual orientation as a prohibited ground, in the context of the Ugandan Constitution, it is better to attack sodomy laws from an angle which reveals socially constructed sex normativity that defines homosexuality as an offence, rather than as a case of discrimination on ground of sexual orientation,⁵⁸ because, it may be difficult to argue a case of discrimination on ground of sexual orientation when it is not part of the prohibited grounds. Thus, it is plausible to argue that since gay and lesbian do not fit into the sex roles of who a 'woman' or a 'man' is, the law that targets homosexual conducts discriminates against them on ground of sex. Such a nuanced approach to articulating sex discrimination is helpful, because it adopts a liberal centrist strategy on equality while at the same time articulating the ways in which gay advocacy reaches outside the bounds of traditional liberal understanding of discrimination.⁵⁹

Jurisprudence at the international level indicates that discrimination on the ground of sex now includes a prohibition of discrimination on grounds of sexual orientation.⁶⁰ The drafters of the Ugandan Constitution, aware of the fact that it could not have exhausted all the rights posited in the Bill of Rights, left a door open to include any other rights that may not appear in the Constitution. Hence article 45 states:

The rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms

⁵⁸ D Nejaime 'Marriage, Cruising, and Life in Between: Clarifying Organisational Positionalities in the pursuit of Polytonal Gay Based Advocacy' (2003) *Harvard Civil Rights-Civil Liberties law Review* p 44

⁵⁹ Nejaime (n 58 above) p 120.

⁶⁰ *Toonen* (n 13 above). However its authoritative force appears to have been watered down by of the decision in *X v. Colombia* (UN HR Committee 2007) that has taken a contrary position. At the minimum the latest decision shows the continuous nature of gay debate even at International level.

specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned.

So, relying on international law decisions, one can contend very strongly that the Constitutional Court in Uganda could find an infringement of a right to non-discrimination on the ground of sexual orientation by the PCA provisions that target gays and lesbians, examined against the background of sex as prohibited grounds of discrimination. This is because sex, as a legal and biological term, may not be limited to the heterosexual definition of man and woman, but includes a liberal definition that includes sexual attraction towards members of the same sex.

However, under article 21(4), Parliament is authorised to enact laws which may limit this right as long as it is “acceptable and demonstrably justified in a free and democratic society”.⁶¹ In this regard one could argue that sodomy laws fall within this limitation. Indeed, even a right such as equality could be limited in one way or the other. In *Charles Onyango Obbo*,⁶² the meaning of the provision was subjected to detailed examination.

The Constitutional Court clearly stated that for any right to be limited, one must demonstrate that it is necessary and justified in a free and democratic society. In other words, such limitation must be permissive and be part of the process of an open and transparent society.⁶³ Additionally, it must be limited by a law of general application. It could also be argued that the sodomy laws reflect the people’s aspirations, and are thus permissive under the Constitution. In *Susan Kigula & 416 others v the Attorney-General*, the court rhetorically asked:

Is a "law" which provides for arbitrary, discriminating, unfair and unjust treatment of citizens a law within the meaning of this article? Can a "law" which derogates on the rights of citizen's guaranteed under article 22, 24, 28 and 44 be called law within the meaning of article 126 of the Constitution? A law must always be right, just, fair, not arbitrary, fanciful or oppressive. If a law is not all these, it is no law at all and our courts are not called upon to exercise judicial power in conformity with such a "**law**".⁶⁴

In any case, there are other means such as regulation of same sex conduct that could have been employed, rather than introducing a total ban. In many democratic countries, emphasis is placed on tolerance and acceptance of differences. This includes tolerating people who are erotically attracted to members of the same sex. Thus, since the infringement seems to have failed the test adopted by many democratic countries on limitation of rights, it is contended that the Constitutional Court in Uganda may find such an infringement unjustifiable. As regards public opinion: it has been established by the Constitutional Court in South Africa for example, as well as Human Rights Committee jurisprudence, that public opinion should be considered but in cases where it is strongly

⁶¹ See article 21(3) of the constitution of Uganda.

⁶² *Onyango Obbo* (n 32 above).

⁶³ *Onyango Obbo* (n 32 above) pp 23. For instance article 36(1) of the Constitution of South African has listed a non-exhaustive number of factors by which a right may be limited. They include the nature of a right, importance of a right and purpose of a limitation, nature and extent of a limitation, relationship between the limitation and purpose and the less invasive means to achieve the purpose.

⁶⁴ Cited as constitutional petition no 6 of 2003 p 105.

against certain rights, then courts should engage in a higher level of inquiry in favour of human rights.⁶⁵

2.4.2 Dignity

Article 24 of the Ugandan Constitution does not clearly provide for a right to dignity. However, what is prohibited can be read to imply an indirect acknowledgement of the right to dignity. It provides that: 'No person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment'.

Since the article does not define what the terms "torture" or "cruel or inhuman or degrading treatment" mean, one has to rely on the rule of literal interpretation to determine their meaning and give these terms their ordinary meaning as defined by an English dictionary.⁶⁶ Article 24 imposes an absolute prohibition against violation of this right.

In *AG v S Abuki*,⁶⁷ it was stated that, since the words in article 24 of the Constitution were not defined, they had to be given their ordinary and plain meaning. According to Court's reasoning, a reasonable person does not need to be told what 'torture' is, what 'inhuman' means or what 'degrading' means, since the words are self explanatory. The court drew inference from the right to life which was understood to extend to livelihood. In other words 'dignity' was read in to include the right to life in order to condemn the punishment of banishment.⁶⁸

In *Kyamanywa v Uganda*,⁶⁹ corporal punishment was found to be unconstitutional in terms of article 24 because of the humiliation and pain that was suffered by the accused which was not helped by the presence of a medical officer whenever such punishment was administered. The importance attached to dignity is reinforced further by article 44 of the Constitution which provides for its non-derogation.

One of the attributes of being a human being is the freedom to be what she/he is. This understanding of dignity has its roots in the Kantian notion of dignity that looks at human dignity as forming part of the human worth.⁷⁰ Taking dignity as a related aspect of one's sexuality and sexual attraction, because it involves ones' intimate life, it can be argued that any attempt to regiment a person's sexual life

⁶⁵ *S v Makwanyane* 1995 (3) SA 391 (CC) para 88, where the court held that 'Public opinion may have some relevance to the enquiry, but in itself, it 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 decisive there would be no need for constitutional adjudication'. See also Toonen (n 13 above).

⁶⁶ For example the Concise Oxford English Dictionary (9th ed) defines the terms 'Cruel' as 'indifferent to or gratified by another's suffering or causing pain or suffering especially deliberately' (p 324); 'Inhuman' as '(of a person's conduct etc) brutal, unfeeling, barbarous, unfeeling, or not of human type' (p 700); 'Degrading' as 'humiliating or causing loss of self respect' (p 354); and 'Dignity' as 'the state of being worth of honour or respect' (p 377). The definition of 'dignity' is therefore a broad one where one can slot in any thing that qualifies under the dictionary meaning above.

⁶⁷ Constitutional Appeal No.1/1998 per Oder JSC as he then was.

⁶⁸ *Abuki* (n 67 above) pp7-15.

⁶⁹ Constitutional Reference No.10/2000.

⁷⁰ A Chaskalson 'Human Dignity as a Foundational Value for Constitutional Order' (2000) 16 *South African Journal of Human Rights* 193, pp 196.

directly infringes his\her self-worth, and the freedom not to be treated as a member of a 'flock' or a 'herd'. For instance, as has been argued by Cameron that the fact that homosexuality, and indeed lesbianism are about people's identities that determine to whom they relate erotically, makes any restriction on this attraction a violation of their dignity, and therefore unconstitutional.⁷¹

How dignity as a right is exactly implicated in the sodomy penal provision is what needs to be investigated in order to argue a case for the legal protection of gay men and lesbians. I have already illustrated how notions, such as 'cruel and inhuman punishment' are cognate to human dignity. What remains is to bring sexual orientation within the big picture of dignity. The concept of human dignity is the moral basis of any democratic government, and implies equality to all since it expresses the highest value of the law, informing both the substance and spirit of the Constitution.⁷² It also reveals the connections to a history of international and foreign law that is constituted in many human rights declarations, hence overshadowing all grounds for right infringement such as cultural and religion. It is a solemn commitment to constitutional foundational values.⁷³ To exclude gay and lesbian person from this community of values is fundamentally flawed and logically contradictory.

If one looks at dignity as flowing from a wider human community that would feel the injustice if a member thereof is unjustly treated, then it becomes easier to argue that since sodomy laws demean individuals that form part of a wider society, it is the responsibility of the entire society at large to reject any laws that demean the dignity of one of their own. This re-enforces the idea of recognition of differences which characterise our humanity and co-existence.

The way sodomy law polices and forcefully 'conscripts' people not only undermines their status as human beings, but the threat of prosecution and possible imprisonment also accomplishes their degradation and psychological torture. Symbolically it makes all homosexuals criminals before the law, no matter how innocent they may be simply because of their sexual attraction or identity which keeps them in constant fear of persecution.⁷⁴ The net effect is to 'slur, humiliate and demean the "so-called sodomite", making them inferior and not worth of human dignity'.⁷⁵

Chaskalson, has described the right to dignity as "a foundational value of the constitutional order", reiterating that the protection of human rights can only take place in a country in which, "there is not only equality of rights but also equality of dignity."⁷⁶ Dignity in respect of the sodomy laws in Uganda is further implicated by the fact that the PCA section which provides for the offence also provides for

⁷¹ Cameron (n 8 above).

⁷² Chaskalson (n 70 above). See also V C Jackson 'Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse' (2004) 65 *Mont law Rev* P 25.

⁷³ Jackson (n 72 above) pp28-33.

⁷⁴ *National Coalition for Gay and Lesbian* (n 9 above) para 28 per Chaskalson P.

⁷⁵ *National Coalition for Gay and Lesbian* (n 9 above) para 108 per Justice Sachs.

⁷⁶ Chaskalson (n 70 above) p 196.

bestiality, hence equating homosexuality to animal like behaviour. Indeed, as Cameron correctly remarked, the law against sodomy treats gay conduct as a monster and an insult.⁷⁷

This proposition is encapsulated by Nussbaum who argues that, “human life has certain central defining features,” which include inter alia “having opportunities for sexual satisfaction and being able to have attachments to things and persons outside ourselves [and] to love those who love and care for us”.⁷⁸ In this regard, by declaring s.156 of the PCA unconstitutional on the ground that it infringes gays’ and lesbians’ right to dignity, the fibre of constitutionalism would be tested.

2.4.3 Privacy

Article 27 of the Constitution of Uganda provides for the right to privacy as follows:

- (1) No person shall be subjected to—
 - (a) unlawful search of the person, home or other property of that person; or
 - (b) unlawful entry by others of the premises of that person.
- (2) No person shall be subjected to interference with the privacy of that person’s home, correspondence, communication or other property.

This means that the state is obliged not to interfere with a person’s right to privacy and at the same time to ensure that third parties do not violate the right either. The negative wording of this article implies that it is a ‘hands off’ kind of right, prohibiting the state from infringing one’s privacy by either searching a person, their home or other property, or by entering into their premises or subjecting them to such other interference, as described in article 27(2). The article’s area of prohibition is very wide, since it protects the physical person as well as the space around the private person, for instance the home.⁷⁹

The judgment and views of the Constitutional Court of South Africa (their Constitutional provision on privacy is similar to Uganda’s article 27 of the Constitution), have strong persuasive value in interpreting the right to privacy in Uganda. In *Benstein v Bester*,⁸⁰ the Constitutional Court of South African held that the importance of a right to privacy may be analysed in two ways: first, in relation to privacy in a private sphere, and, secondly, in relation to privacy in the public realm. The right to privacy provides strong protection in the intimate private sphere, and any interference therewith attracts a higher level of scrutiny than that of privacy in the public arena. Thus, the more one moves to the public arena, the more the rights narrows without but disappearing altogether.⁸¹ This approach to privacy has

⁷⁷ Cameron (n 8 above) pp 90.

⁷⁸ M Nussbaum ‘Human Functioning and Social Justice: In Defense of Aristotelian Essentialism’ (1992) 20 *Political Theory* pp 205, 222.

⁷⁹ Article 27(2) of the Constitution of Uganda.

⁸⁰ *Benstein v Bester* 1996(4) CLR 44, para 67. This case is of strong persuasive value since South African and Uganda inherited the English common law doctrine of precedents. According to this case, the right to privacy is a ‘right to be left alone’.

⁸¹ *Benstein* (n 80 above) para 67.

been referred to as ‘the continuum of privacy interest’ by Curie and de Waal.⁸² Under the Ugandan Constitution, there are no internal limitations to this right hence it can be argued that privacy as a right is core to every human being.

Harris however, argues that it would be dangerous for gay men and lesbians to rely on the right to privacy when challenging sodomy laws.⁸³ This is, he says, because if one argues that homosexuality is based on the privacy claim, one inadvertently reinforces societal notions that homosexuality should be hidden from the public debate, because it a private matter and an embarrassment to a litigation process.⁸⁴ It also has problems of blurring lines between the public and private domain, status and conduct, as well as norm and deviance. Thus privacy creates uncertainty and sharpens arguments that allow anti-liberal sentiments that conflate legal issues, which would otherwise be different in a heterosexual context.⁸⁵

Accordingly, arguing for the extension of the right to privacy to gay and lesbian sexuality ‘obfuscates’ the reasons why they are in need of protection, because private claims may dilute the strength of such assertions.⁸⁶ From feminists’ perspective for instance, privacy as a construction is not free from any problems as it bolsters patriarchal restrictions on women’s equality. Critical theories illustrate the unreliability of public and private spheres in the privacy dichotomy, where boundaries are constantly changing and shifting, not on fixed spheres but on social constructions and assumptions.⁸⁷

While the public sphere is one that cherishes equality, the private sphere is configured as one that cherishes domination. Thus far, selectively applied, privacy becomes a sword that protects male domination without advancing gays and lesbians rights. Additionally, privacy has a tendency to stifle debates on sexual orientation even in court, since it promotes the culture of ‘silence’ where publicity and coming out would be important weapons for gay and lesbian rights, advancement and protection.⁸⁸

Thus, when privacy is viewed as an ideology that serves to bolster the heterosexual nuclear family, it may not protect interests of those who are outside such a frame work. Therefore, gay advocates must realise that privacy is sometimes a ‘tough sell’ which may not provide for self-discovery, but, instead,

⁸² I Curie & J de Waal (eds) *The Bill of Rights Hand Book* (2005) pp318.

⁸³ A Harris ‘Outing Privacy Litigation Toward a Contextual Strategy for Lesbian and Gay Rights’ (1997) *George Washington Law Review* p 3.

⁸⁴ Harris (n 83 above) p 4.

⁸⁵ Harris (n 83 above) p 6.

⁸⁶ Harris (n 83 above) pp 7.

⁸⁷ Harris (n 83 above) pp 9.

⁸⁸ Harris (n 83 above) pp 23. See also J Dean ‘From Sphere Boundary: Sexual Harrasment, Identity and the Shift in Privacy’ (1994) 6 *Yale IL & Feminism* 377.

provide against the dangers of disclosure and coming out, which is a strong contradiction;⁸⁹ and like Thomas argues ‘the closet is less a refugee than a prison house’.⁹⁰ This does not entirely mean that privacy as a right serves no purpose. For instance, when properly contextualised it can be fused with equality and dignity since equal treatment of person both in private and public could be advanced as concepts flowing from privacy. Secondly, privacy, it may be argued, that because forms part of human dignity, is firmly protected.

If the assumption that most intimate sexual acts take place in private is accepted to be true, including sex between people of the same sex, it is highly unlikely that one would justify violation of a right to privacy in order to police sexual lives of individuals in their private spheres. The fact that sodomy laws have the effect of policing people’s private and intimate lives makes such laws unconstitutional since they violate a right that is so firmly protected. Though Thomas argues that for gays and lesbians the right to privacy is a double-edged sword which should never be ignored, part of privacy may operate as a shield, especially if viewed as forming a part of wider notion of dignity.⁹¹ In any case, for all its brutality, the PCA provision targeting homosexual conduct remains clumsy, in that there is no recent Ugandan judicial decision involving the application of the provision to demonstrate the usefulness of the law. For that reason, it remains a scare-crow that is, legally speaking, highly disruptive of people’s private lives.

2.4.4 Resistance to Gay and Lesbians Rights on Grounds of Culture and Religion

The term ‘culture’ may not have an accurate and acceptable definition especially when analysed from the legal perspective. It may sometimes be confused the right to culture or to perform certain rites. Tyler provides a possible working definition for the purposes of this discussion, referring to the term as “that complex whole which includes knowledge, belief, art, morals, customs and many other capabilities and habits acquired by man as a member of society”.⁹²

Kaplan and Manes have identified and explored the determinants of social culture. According to the learned authors, these include: economic development, social structure and relationships, ideology, including aspects of religion, philosophy and personality.⁹³ From the above it can be argued that culture is influenced by external factors which are subject to change. For example, economic conditions, ideology, social structures to mention but a few are elements that can change, hence culture and tradition too can change. The question is: if this conclusion is logical and correct how can one preserve and profess such a culture as a right if it is the basis for justifying the current criminal

⁸⁹ Harris (n 83 above) pp 42.

⁹⁰ T Kendall ‘Beyond the Privacy Principle’ (1992) 92 *Columbia Law Review* p 27.

⁹¹ Chaskalson (n 70 above).

⁹² E B Tyler *Primitive Culture*, (1971) p 1.

⁹³ D Kaplan, & et la (1972) ‘Culture Theory’ Prentice – Hall, Englewood Cliffs, in K Sriramesh, & D Vercic, (eds) *The Global Public Relations Hand Book* (2003) p 5.

sanctions against gay and lesbian? The Constitutional Court of Uganda has held that for any person or authority who seeks to derogate from any other fundamental right bears the burden to demonstrate that such derogation is justified in a free and democratic society.⁹⁴ This burden is an onerous one, in my view in light of what I have discussed above in the perspective of sexual orientation.

In Uganda there is a relationship between traditional culture and customary law. Under the Judicature Act of Uganda,⁹⁵ customary law is part of the law that is applicable, except that it is valid as long as it is not repugnant to good morals or inconsistent with the English common law which was introduced in Uganda through colonial ordinances, written law and equity.⁹⁶ In its national objectives and directive principals of state policy, the Ugandan Constitution only promises to uphold those cultural and customary values that are consistent with fundamental rights and freedoms, human dignity and Constitution. Therefore, constitutional validity of culture is premised on its compatibility with the constitution.⁹⁷ It is important to note that laws, culture, customs and traditions which demean the dignity of any of the marginalised groups are prohibited by the constitution of Uganda.⁹⁸

The Constitutional Court in Uganda has not decided on the right to culture or indeed the position of customary law. Recourse will again be had to the South African Constitutional court, whose right to culture under its Constitution in real terms is similar to Uganda's articles 29 and 32(2). In *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi Sithole and Others; S.A Human Rights Commission and Another v President of the RSA and Another*, Ngcobo J, held that there are three ways in which customary law could be established: by judicial notice, by expert evidence, or by text books.⁹⁹ According to her indigenous law or customary law is dynamic and constantly changing; only that it had been distorted in the past by apartheid system.¹⁰⁰

Principally, the inclusion of a right to culture and traditions by drafters of the Ugandan Constitution was an acknowledgement of diversity and celebration of differences. However, beyond the rhetoric of culture and traditions, the Constitution presents significant problems to Judges on how to interpret different cultures and traditions in different contexts. It leaves it open for Judges to second-guess what a particular culture or tradition entails; usually with the aid of 'old wise men'. This creates uncertainty in the entire adjudication process, especially in more controversial cases such as of gay and lesbian rights.

⁹⁴ *Kigula* (n 63 above).

⁹⁵ S.15 of The Judicature Act Cap 13 Laws of Uganda provides that:

(1) Nothing in this Act shall deprive the High Court of the right to observe or enforce the observance of, or shall deprive any person of the benefit of, any existing custom, which is not repugnant to natural justice, equity and good conscience and not incompatible either directly or by necessary implication with any written law.

⁹⁶ Judicature Act (n 95 above).

⁹⁷ Judicature Act (n 95 above).

⁹⁸ See article 32(2) of the Constitution of the Republic of Uganda.

⁹⁹ Reported in (2005) (1) BCLR (1) (CC) para 150. See also (n 51 above) s. 46.

¹⁰⁰ *Bhe* (n 99 above) para 153.

2.5 Sodomy Laws and Morality in Uganda: A Philosophical Analysis

It is not easy to analyse the relationship between law and morality without indicating what the two terms imply. Law is a set of rules, which regulate human conduct, and, which at a social level, is accompanied by social and moral sanctions. For a law to ensure that it commands respect, it must be backed by the threat of force.¹⁰¹ Over and above ‘the command backed by threat’ model - a positivistic legal theory, law must have a meta-physical force for its legitimacy, ‘a realm somewhere within the mystical haze’,¹⁰² or the morality of the law. According to De Vos, if it is true that law produces the discourse of power and knowledge, it also regenerates itself into a related discourse of discipline as well.¹⁰³

Legislatures therefore, in making law must stay in touch with social concerns of that ‘truth’ and ‘discipline’ if the legislative process is to retain legitimacy. The Ugandan PCA provisions that punish sodomy and other “unnatural” offences fall under one of the chapters in the penal code referred to as the “offences against morality”! I have already made reference to it when I discussed equality. I will not repeat the details of the provisions.

The chapter includes all other sexual offences like rape, prostitution defilement, adultery (which has now been declared by the Ugandan Constitutional Court as unconstitutional),¹⁰⁴ to mention but a few. The law decrees that anyone who has anal sexual intercourse with any person, or commits sexual acts against the order of nature is on conviction, liable to a sentence of life imprisonment. However, the law does not provide any guidance as to what “the order of nature” might be. This leaves potential gays and lesbians confused as to what exactly is prohibited.

True, the majority of Ugandans view homosexuality as a perverted practice, which ought to be eradicated from society.¹⁰⁵ Homosexuality is considered to be a disease to be cured, and in extreme cases it has been compared to bestiality.¹⁰⁶ At a theological level it is not treated differently from Sodom and Gomorra in the Bible, deserving the same punishment, or worse than what God meted out to the ‘sodomites’.¹⁰⁷ It can therefore be argued that the view that homosexuality is unnatural and immoral is what the sodomy law does address in so many words.

However, the fact that the Ugandan Constitutional Court has found the law on adultery inconsistent with the Constitution, yet adultery is clearly condemned by the Ten Commandments while

¹⁰¹ M D A Freeman & DA Michael (eds) *Lloyd's Introduction to jurisprudence* (2001) pp 245-50.

¹⁰² T Arnold ‘Law as Symbolism’ in V Aubert (ed) *Sociology of law* (1990) p 46.

¹⁰³ P. de Vos (n 24 above) p 199.

¹⁰⁴ *FIDA (U)* (n 57 above).

¹⁰⁵ Uganda rejects Gay rights (n 2 above).

¹⁰⁶ ‘Behind the Mask’ on-line at <<http://www.mask.org.za/SECTIONS/Africapercountry/ABC/Uganda/uganda108.htm>> July 26, 2005 (accessed on 2007-01-31).

¹⁰⁷ In The Bible, Genesis Chapter 19, the Sodom City is referred to as the evil City.

homosexuality is not,¹⁰⁸ is testimony that the sodomy laws would not be difficult to strike down even if they find more support from the moralists. Additionally the question of morality should be contextualised to mean constitutional morality and not evangelical and theological morality, so as to give effect to the whole constitutional document as a living document.

What most critics of homosexuality do not say, perhaps for obvious reasons, is that homosexuality represents a challenge to the heterosexual hegemony and Uganda's patriarchal society. What is emphasised is that it is taboo for a man to have sex with another man. According to Tamale, taboos, and legal sanctions are some of the ways in which a patriarchal society sustains itself by tightening a rope around "sexual deviates".¹⁰⁹ She further contends that the reason for the attack being primarily against men, points to the fact that the threat posed by lesbians is minimal, due to the politics of masculinity which treats women as passive recipients with no power to sex; hence the law emphatically punishes the acts of men having sex with men, and is less concerned, at least in practice, with what goes on between women and women.¹¹⁰

Minnow takes the view, for instance, that differences between heterosexuals and homosexuals mutate into abnormality, inferiority, irrationality, weakness or evil, which breeds insecurity; hence the greater the insecurity, the greater the desire to protect the 'purity and certain hegemonic identity'.¹¹¹ In this regard the desire to protect the heterosexual hegemony is what is carelessly presented to be a genuine concern for morality and culture in the form of s.145 of the PCA.

Many countries that share the English common law doctrines understand morality in terms of common decency. Thus, historically, in England, Parliament was not expected make laws that contradicted the wishes of the majority, because it was thought they only had to articulate the views of the electorate.¹¹² In my view, in terms of constitutional law, common decency may be understood to mean good values within the constitutional document. In fact, at common law, the inconsistency would be tested against the common law good.¹¹³ The question that is conveniently never asked is whose morals must be considered and who is the best judge thereof? Secondly, what are the underlying values against which

¹⁰⁸The Ten Commandments, Exodus 20:14 on Adultery, in (1994) *The Holy Bible* (NKJV) Thomas Nelson, Inc. p 73. There is no where in the Ten Commandments where Homosexuality is prohibited. The 'sin' of Sodom and Gomorrah in Ezekiel 16:48-49 shows that it was the sin of inhospitality that led to male-male rape not simply to male-male sex.

¹⁰⁹ Tamale (n 12 above).

¹¹⁰ Tamale (n 12 above). See also C Pereira "Where Angels Fear to Tread?" Some Thoughts on Patricia McFadden's "Sexual Pleasure as Feminist Choice" on-line at <<http://www.feministafrica.org/fa%02-2003sp-charmain.html>>, (accessed on 2007-8 02).

¹¹¹ Bartlett 'Minnow's (n 21 above) pp 6.

¹¹² A V Dicey (1905) 55 *Lectures on the relationship between law and Public Opinion in England During the Nineteenth Century* Quoted in PP Graig 'Dicey: Unitary, Self Correcting Democracy and Public law'(1990) 106 *Law Quarterly Review* 15,111.

¹¹³ See for example J Finnis, "Is Natural Law Theory Compatible with Limited Government?" in Robert P. George (ed) *Natural Law, Liberalism, and Morality* (1996) pp 30. See also R P George 'The Concept of Public Morality' *American Journal of Jurisprudence* (2000) University of Notre Dame *Forum on Public Morality* p 3 where the learned author argues that ' the common good of public morality ,that is the good of health moral ecology, generates obligation in justice to all of us...'

all conduct and laws are to be tested? The answers to this question will briefly be suggested in the analysis below.

2.5.1 The Civilising Mission of Sodomy laws: the Right to Religion and the Hollowness of Traditions

The discourse on homosexuality in many African countries is silently premised on the notion that sodomy is a capitalistic creation, an offshoot of the individualism of the middle class elite of Europe.¹¹⁴ In this respect homosexuality is regarded as an extension of imperialism. The rejection thereof is therefore grounded on its alleged imperial connection. This is however only half the truth, for it was the advent of colonialism that brought with it into Africa the moral discourse, through forceful policing of people's sexual lives. It is therefore incorrect to support the penal sanctions against homosexuality on the basis that they promote African values at all. The truth is, that at the heart of the law that criminalises what is referred to as "unnatural offences", was the influence of a missionary society, which advanced its moral and Divine inclination.¹¹⁵

The effect of Christianity can be captured by the tone of article 29(1) (b) of the Constitution of Uganda which provides as follows:

(1) Every person shall have the right to—

(b) freedom to practise any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organisation in a manner consistent with this Constitution;

Whereas the article provides for religious rights in general, in the context of my discussion I will analyse this right in the context of Christianity. The reason for this approach shall become clearer in the later part of my thesis. In any case since the most fervent anti-gay sentiments have recently been orchestrated by Christian religious groups rather than any other groups, makes my decision to single out Christianity much more rational.

Phillips argues that the introduction of Christianity in most African countries brought in the notions of sin in sex, demonised through symbols of the serpent and death.¹¹⁶ Christianity introduced morality and shame, individualism and civility, self respect and order; hence the framework on which sexual regulation was now premised was projected as a dangerous and shameful act and given new perspectives through the teachings of the benefits of purity. The colonial cum theological imposition of

¹¹⁴ C.A. Johnson, 'Hearing Voices: Unearthing Evidence of Homosexuality in Pre-colonial Africa', in D. Constantine Simms (ed) *The Greatest Taboo. Homosexuality in Black Communities*, (2001) pp 132-148.

¹¹⁵ O Phillips 'Constituting the Global Gay' in C Stychin & D Herman (eds) *Sexuality in the Legal Arena* (2000) p 19. See also, for example, "'THIS BODY!'" Supporting Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Organising in East Africa', Conference Report held at Grand Regency Hotel, Nairobi June 15-18, 2006 pp 39 where the Biblical story of Sodom and Gomorra is given a new perspective. The Ten Commandments do not prohibit sodomy but adultery which is common amongst heterosexuals is firmly prohibited.

¹¹⁶ Phillips (n 115 above) pp 21-22.

sodomy laws is manifested in the difficulty which the colonial administrators faced in defining sexual offences, particularly sodomy, debating whether it was an unnatural, a natural or a nurtured act.¹¹⁷

The attempt to invoke traditions is open to criticism, and in some instances very suspicious, when the ultimate purpose is repression. The Adam and Eve story (and not the Madam and Eve one),¹¹⁸ is indeed, a concoction of the Judeo-Christian doctrine, when all that there is, is civilising natives through regulated sex.¹¹⁹ Christianity has had a long history of brutal relationships with colonial agents, repressive post colonial regimes, and apartheid South African, and right wing movements in America with little show of favour to African people. This means that any arguments for the retention of sodomy laws on the premise of protecting African traditions and faith, is not only imaginary, but deceptive and highly hypocritical. As Archbishop Desmond Tutu has recently stated: the obsession of the church with homosexuality has put other pressing social needs that it should be addressing in the limbo.¹²⁰

2.5.2 Possible Approach by the African Commission to Gay Rights in the Discourse on African Values and Traditions

The African Commission has not addressed the question of gay and lesbian rights, in spite of the fact that there have been numerous violations of a right to non-discrimination on grounds of sexual orientation in many African countries, in particular Uganda.¹²¹ Whereas there may be various reasons for this inertness, it is plausible to argue that it is possibly because, so far, no one has convincingly made a strong argument to persuade the Commission that the question of gay and lesbian rights is worth its time and consideration in a respectful manner, given the sensitivities that surround sex and sexuality in Africa.¹²²

Under the African Charter, member states have an obligation to recognise and give effect to all rights there under.¹²³ Thus, any successful illustration that a right to non discrimination on grounds of sexual orientation is part of the protected rights under the African Charter will give rise to an obligation on state parties to recognise and give effect to it. At the same time the African Commission would have to

¹¹⁷ Phillips (n 115 above) p 23

¹¹⁸ Phillips (n 115 above) pp 79-80.

¹¹⁹ Phillips (n 115 above). See also P de Vos (n 24 above) p 197.

¹²⁰ See 'Gays rap US over funding activists' on-line at <<http://www.newvision.co.ug/D/8/12/591690>> (accessed on 2007-08-23); 'Kenya Consecration Deepens Anglican Rift' on-line at <<http://news.bbc.co.uk/2/hi/africa/6971939.stm>>, (accessed on 2007-30-08). See also 'Father Anthony Musaala is gay, says eye witness', on-line at <<http://www.radiokatwe.com/kipindikyafaaza071019.htm>>(accessed on 2007-10-18) to illustrate the Christian hypocrisy.

¹²¹ See agenda of the 41st ordinary session of the African Commission on Human and Peoples' Rights (16 – 30 may 2007, Accra, Ghana), Item 8: Promotion Activities (Public Session) on-line at http://www.achpr.org/english/activity_reports/activity22_eng.pdf (accessed on 2007-08-9), does not include gay and lesbian rights. The Centre for Human Rights University of Pretoria had prepared a clinical group on Gay rights in African of which I was a member to the African Commission.

¹²² R E Howard-Hassmann 'Gay Rights and the Right to a Family: Conflicts between Liberal and Illiberal Belief Systems' (2001) 23 Iss 1 *Human Rights Quarterly Baltimore* p 73 discusses the need to understand certain sensitivities if gay rights are to be properly protected.

¹²³ See article 1 and 2 of the African Charter.

face the uphill task of ensuring that, in protecting any rights under the African Charter, the duty to protect African values and traditions is not abdicated.

This discussion will illustrate a possible approach to the concept of African values, and how they can be circumvented to aid the protection of gay rights. I will start my analysis with two important rights under the African Charter: the right to equality and non-discrimination, and the right to human dignity so as to show how they do fit into the whole matrix of African values and traditions. I have taken this approach because, as will be showed later, any limitation of gay rights under the African Charter may be premised on the false notion that gay and lesbian rights are contrary to the above values. Article 2 of the African Charter provides enjoyment of rights and freedom recognised under there under without distinction of any kind such as inter alia sex or other status.

In interpreting any rights under the African Charter, the Commission is guided by articles 60 and 61 to draw inspiration from international law, and, further, to consider practices consistent with international norms of human rights customs, generally accepted as law, general principles of law recognised by African states, as well as legal precedents. I have already made reference to international law, especially the Human Rights Committee's decision in *Toonen*¹²⁴

The Human Rights Committee made reference to the fact that the word sex may include sexual orientation.¹²⁵ The drafters of the South African Constitution, aware of the need to protect sexual minorities, made sexual orientation a specific prohibited ground of discrimination.¹²⁶ Therefore taking articles 60 and 61 as our point of departure, Commission could seek guidance from international level where a word 'sex' has been given a broader interpretation to include sexual orientation, even if the sexual orientation as a prohibited ground is not included under the ICCPR.¹²⁷ This line of argument is supported by Christoff Heyns, who asserts that the list of prohibited grounds of discrimination in the African Charter is not exhaustive. He contends that discrimination of any kind whatsoever is prohibited by the African Charter and that 'the listed grounds only serve as examples of the kind of discriminations that are envisaged'.¹²⁸

Even if article 1 in part refers to entitlement of rights guaranteed in the Charter, given the fact that the African Human Rights Commission has been able to imply any rights even if they are not provided in

¹²⁴ *Toonen* (n 13 above).

¹²⁵ *Toonen* (n 13 above). According to the Committee they found nothing to stop them from giving a word 'sex' an expansive meaning.

¹²⁶ See S. 9 (1) and (3) of the Constitution of the Republic of South Africa.

¹²⁷ For example the African commission in *Social Economic Rights Action (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 60, read rights which were not in the Charter on the basis of article 60. This approach has been described as 'analogous rights' jurisprudence.

¹²⁸ C Heyns 'Civil and Political Rights in the African Charter' in M Evans & R Murray (eds) *The African Charter on Human Rights and Peoples' Rights, The system in Practice, 1986-2002* (2006) p 143.

the African Charter presupposes that any prohibited ground of discrimination recognised, by other international decisions may be included by implication.¹²⁹ Murry and Viljoen argue that because the list of categories is not closed the right to sexual orientation should be included in the list.¹³⁰ The reasons why discrimination of whatever kind should be frowned upon under the African Charter are not put any better than by Senghor: ‘... Mankind is one and indivisible and the basic needs of a man are similar everywhere. There is neither frontier, nor race when the freedoms and rights attached to human beings are to be protected.’¹³¹

The key question here becomes: can one therefore debate African values without including equality? African values and traditions may be properly understood if one looks at them as concepts with two limbs: one limb flowing from equality and dignity in the traditional liberal sense, and the second limb flowing from the conservative anti-liberal thinking that looks at African values and traditions in their literal sense. Both limbs will be discussed below.

Earlier on in this thesis, while discussing gay rights through the lenses of human dignity in the context of the Ugandan constitution, I explained the meaning attached to the various words forming the core of the right. These include words like ‘dignity’, ‘degrading’, ‘torture’, ‘cruel’, ‘inhuman or degrading punishment and treatment’. I do not intend to give any other meaning to those terms other than those already ascribed thereto. In addition I examined the importance of the right to non discrimination as protected values. The two rights are also firmly protected under the African Charter. Alongside these rights, the fourth preambular paragraph of the African Charter makes reference to consideration of virtues of African Peoples’ historical traditions and the values of African civilisations, ‘which should inspire and characterise their reflection on the concept of human and people’s rights’.

This is buttressed by article 29(7) of the Charter which imposes a duty on states to preserve African cultural values.¹³² The legal position of a preamble in interpreting any legal document is that it acts as a guide to excavate all that may be contained therein. Hence relying on the Preamble as our point of departure, the philosophy of all rights can be identified.¹³³ Thus, if one examines the way the that African Commission has interpreted the right to dignity under article 5, one could conclude that the

¹²⁹ See (SERAC) (n 127 above).

¹³⁰ 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*’, (2000) 1 *Human Rights Quarterly* p 1.

¹³¹ Address delivered by Leopold Sedar Senghor, President of the Republic of Senegal (1979) in C Heyns & K Stefiszyn (eds) *Human Rights, Peace and Justice in Africa: A Reader* (2006) p 49.

¹³² Article 29 (7) of the African Charter provides for a duty ‘To preserve and strengthen positive African cultural values in his relations with other members of society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of the society.’

¹³³ T Sedgwick *A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law* (1874) p 43. The author argues that “A preamble is said to be the key of a statute, to open the minds of the makers as to the mischiefs which are to be remedied and the objects which are to be accomplished by the provisions of the statute”.

Commission holds the view that human dignity is the driving force of all rights in the Charter- a value laden right.¹³⁴ And when combined with the right to non-discrimination, the concept of 'African values' may be concretised. For instance in *Purohit and Another v The Gambia*, the Commission held that human dignity is an inherent basic right, to which all human beings are entitled without discrimination.¹³⁵

Though the African Commission has made numerous findings on article 5, it has not made a finding as to what 'African values and traditions' might mean. However, considering the way it has approached the right to dignity, there is every possibility that its interpretation of 'African values' would have to be consistent with the promotion of human rights generally: which implies that the meaning of the terms 'values' and 'traditions' would be consistent with tolerance and African diversity.

Mutua argues that notions such as 'African values, traditions, and morality', need not present much concern and discomfort to equality advocates in Africa, because what the African Charter refers to are traditions that only enhance the dignity of the individual.¹³⁶ Thus, any law which infringes on the rights to equality and dignity on the basis that it is for the promotion of African values and traditions is off the mark, and not in accordance with what might have been intended for by the Charter drafters. Consequently, any argument in favour of the criminalisation of gay and lesbian conduct on the basis of protecting 'African values and traditions' is illogical and rather misleading, since it goes against the most fundamental core value enshrined under the African charter- human dignity.

2.5.3 Limitation of Rights Generally under the African Charter and the Discourse of African Values

The absence of any specific provision limiting any rights under the African Charter does not imply that all the rights therein are absolute. At the very minimum, it may imply that the Charter is less concerned with limitation than with promotion of rights. However, an interpretation of article 27(2) may imply, in fact, that all rights in the African Charter could be limited, because the article seem to subject the enjoyment of all rights in the African Charter to the rights of others, collective security, morality and common interest. In other words the enjoyment of rights is dependent one the interests of society at large. In the limitation of any rights, a two stage approach, which has been adopted by some jurisdictions, is most appropriate.¹³⁷ Once there is a prima facie violation, the party invoking a limitation

¹³⁴ Article 5 of the African Charter provides as follows: 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of a man particularly slavery, slave trade, torture, inhuman or degrading punishment and treatment shall be prohibited'

¹³⁵ Reported in (2003) AHRLR 96 (ACHPR2003) para 57.

¹³⁶ M Mutua 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 *Virginia Journal of International Law* p 339.

¹³⁷ Both the South African Constitution and the Canadian Charter on Human Rights anticipate a two stage approach which analyses first if there has been an infringement of right and if so whether it is justifiable.

must demonstrate that a limitation is justifiable, and the test requires that a limitation should not make the right illusory.¹³⁸

At first blush, the concept of ‘values of African civilisation’ and the position of the family as the “custodian of morals and traditional values” could form a formidable basis for limiting the right to sexual orientation.¹³⁹ However, broader inquiries into these values contradict the veracity of such a position, since homosexuality is not entirely un-African, but on the contrary there is evidence to show that in the past, people of the same sex had always have sex with each other in most African societies. It was partly because of the fact that homosexuality is indeed part of African society, that the South African Constitution comes out clearly to protect this right¹⁴⁰ since prominent leaders in the ANC were in fact gay.¹⁴¹

Even if it is correct to argue that same-sex intercourse is inimical to African values, the key question is whether a criminal sanction against a category of people enhances those values at all. In *Toonen*,¹⁴² the moral argument was rejected, since the relevant law had in fact been gathering dust because it had for long time not been invoked, thus questioning its usefulness. Thus, the appropriate question becomes: what value is to be attached to tolerating diversity in sexuality in order to promote African values? The African Commission has also come out strongly to reject an evaluation of a limitation of rights based on public opinion, contending that justification of a right can not be derived from popular will,¹⁴³ hence opinions that lead to alienation of another section of society, in my view are void of ‘value’, and should be rejected.

2.5.4 Depicting African Values and Culture as Important ‘Values’ in the Discourse on Gay and Lesbian Rights

In order to understand the terms ‘values’, ‘traditions’ and ‘cultures’ better in the debate on gay and lesbian rights in African, one must look at culture as a changing and not as a static notion, in order to challenge the arguments that deploy cultural beliefs as a justification for gay and lesbian

¹³⁸ See *Media Rights Agenda and Another v Nigeria* AHRLR para 69 and 70.

¹³⁹ See Preamble to the African Charter. See also article 18(2) of the Charter.

¹⁴⁰ Tamale (n 12 above); see also S. Murray and W. Roscoe, *Boy-wives and female husbands: studies of African Homosexualities* (1998) pp 24-70; W. Dynes, *Homosexuality in Sub-Saharan Africa* (1983) pp 20-21; N. Hoad, ‘Tradition, Modernity and Human Rights: An Interrogation of Contemporary Gay and Lesbian Rights’ Claims in Southern African Nationalist Discourses’, (1998) pp 32-43; P de Vos (n 24 above) pp 200-205; G. Conerly, ‘Are you Black first or are you Queer?’, in D. Constantine-Simms (eds) *The Greatest Taboo. Homosexuality in Black Communities* (2001) 7-23.

¹⁴¹ M. Gevisser “Mandela’s stepchildren: homosexual identity in post-apartheid South Africa” in P. Drucker (ed) (2000) *Different Rainbows* pp 12-24; and M. Lekota, ‘Address at Simon Nkoi’s memorial service’ in N. Hoad et al (eds) *Sex and politics in South Africa* (2005) p 56.

¹⁴² *Toonen* (n 13 above) where it was decided that: ‘The Committee cannot accept either that for the purposes of article 17 of the Covenant, moral issues are exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee’s scrutiny...’

¹⁴³ See *Legal Resources Foundation v Zambia*, (2001) AHRLR 84 (ACHPR 2001). See also *National Coalition for Gay and Lesbian Equality* (n 9 above) Para. 136.

inequalities.¹⁴⁴ One should also analyse the above terms as part of the compartments of the ‘moving train’ of human dignity as well as equality under the African Charter without which, the whole train becomes disconnected into stationary and separate coaches. This is important, because, usually in legal settings that provide for both customary and statutory law, normative orders present both opportunities and setbacks in the struggle for equality, especially where customary law is invoked to justify the limitation of rights.¹⁴⁵ Hence the best way to resolve the dilemma is to look at how the two sets of laws supplement, and not how they contradict, each other.

Thus advocates for gay and lesbian rights should adopt measures that seek appropriate openings within the present cultural paradigm and which are postulated on cultural and religious beliefs instead of dismissing such beliefs. Dismissing cultural beliefs per se is not enough; it is like hiding one’s head in the sand, like the proverbial ostrich. Since cultures change over time and cultural and religious beliefs have different interpretations, it is possible to give an interpretation to notions such as ‘equality’ or ‘dignity’ that permits accommodation of gay and lesbian persons within a single dominant culture setting.

The fear by some people of certain cultures is sometimes far-fetched, because it is easier to identify those cultural norms that play an important part in constructing social arrangements, in order to isolate and neutralise them. Formal laws, like the PCA provision on homosexuality, which operate to give legitimacy to dominant articulations of culture and which invoke culture to legitimise intrusions of certain rights, are easier to contradict by demonstrating their lack of credibility, than to simply dismiss them as backward. This is because heterosexual hierarchies usually articulate vague notions of culture, as a smokescreen to hide the role of formal legal institutions in creating those hierarchies.¹⁴⁶

Nyamu contends for instance that, the key to the articulation of culture is found in the methods adopted in challenging such dominant beliefs without antagonising the power baselines.¹⁴⁷ Gay and lesbian advocates must endorse strategies to participate in debates that generate views so as to shape what forms part of culture or what may influence changes therein, because a strategy that supports constitutional changes without dismissing culture as a whole is durable, and firmer in ensuring law reform. Additionally, heterosexually biased social arrangements can easily be challenged once they are projected in the name of culture.

¹⁴⁴ C I. Nyamu ‘How should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?’ (2000) *Harvard international law journal* p 1.

¹⁴⁵ Nyamu (n 144 above) pp 2 See also A An-Aa’im State Responsibility Under International Human Rights to Change Religious and Customary Laws in J R Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) 165, p 173.

¹⁴⁶ Nyamu (n 144 above) pp 5.

¹⁴⁷ Nyamu (n 144 above) p 7.

Mohanty takes the view that one should enquire whether cultural norms are representative enough, or whether they are simply a generalisation of the narrow interests.¹⁴⁸ In Uganda the main argument of those who oppose gay and lesbian rights is based on the ground that homosexuality and lesbianism are evil.¹⁴⁹ This bold assertion should be rejected by gay rights advocates on the ground that to associate being gay with evil is an invention of the culture of the heterosexual norm supported by Christian doctrine, which is inherently imperialistic, and therefore misleading. Secondly since in African there is no single culture that one can conveniently identify because of the diverse nature of the peoples on the continent, the duty imposed to protect African values should relate only to values that promote diversity in an ever changing society.¹⁵⁰

Infusing concepts such as 'African values' with the notion of dignity or equality without pointing out the other complexities that emanate from traditional anti-liberal thinking on gay rights, is however, less helpful. The other limb of African values may also help in ensuring acceptance of gay and lesbian rights. This limb, though weakened by the above analysis, remains pertinent for the continuity of the debate on homosexuality in Africa, because without looking at the possible claims of the other limb, dangers are that gay right claims will be looked at as a foreign imposition of 'unknown' notions through human rights advocates. Sensitivity to anti-liberal views on homosexuality, however, does not mean that one condones those views. Rather, it is aimed at understanding those beliefs and attitudes in order to challenge arguments that deploy culture as a justification for discrimination on grounds of sexual orientation through the force of criminal sanction.¹⁵¹

Amongst these beliefs and attitudes one finds the notion that homosexuality is impure, in which case purity is again connected with cleanliness, sexual restraint, and orderliness in "appropriate" sex roles. The view that same-sex sexual activity is "disorderly" is thus based on the assumption that it violates the approved "natural" roles played by men and women in sex.¹⁵² The first limb of my argument is associated with the liberal way of thinking, whereas the second limb represents the traditional ideals that promote conformity with the 'nature'. The two sides therefore lead to tension which I must address before making a case for gay and lesbian rights.

¹⁴⁸ C T Mohanty, 'Under Western Eyes: Feminist Scholarship and Western Discourses', in C T Mohanty et al. (eds) *Third World Women and the Politics of Feminism* (1991) p 51

¹⁴⁹ See 'Buturo vows to fight homosexuality' on-line at <<http://www.newvision.co.ug/D/8/13/590874>> (accessed on 2007-10-09), where the Minister of Ethics and Integrity is quoted as saying that: "They are trying to impose a strange, ungodly, unhealthy, unnatural and immoral way of life on the rest of our society... I will endeavour to block it. I can assure you on that. Let them go to another country, and not here,"

¹⁵⁰ I R. Gunning 'Arrogant Perception, World Travelling and Multicultural Feminism: The Case of Female Genital Surgeries' (1992), 23 *Columbia Human Rights Law Review* pp at 202-03, where the author uses the phrase 'world travelling' as a phrase that captures the fact that people move among different worlds including social and cultural transformation.

¹⁵¹ Nyamu (n 144 above) pp2.

¹⁵² Tamale (n 12 above) pp 85.

The argument that the preservation of culture through penal condemnation of homosexuality will protect African identity and culture is itself faulty in several respects, making it easier for gay advocates in Africa to challenge it. Oloka-Onyango rationalises the need for caution in defining culture. He argues that while culture may be defined as integrated knowledge of beliefs and behaviour, with capacity of society to learn and transmit them, care should be taken to avoid a dogmatic approach to it so as to be sensitive to expression of diversity dictated by consideration of class gender ethnicity or pure choice. He contends that culture should instead be understood as a broad canvas.¹⁵³

Looking at culture as a broad canvas is rather helpful because only cultures that acknowledge diversities in terms of gender, class or identities can only form what amounts to African cultural identity. Such cultures, should they exist, must be protected and promoted as positive African values under the force of article 29 (7) of the African Charter.

This is not to say that the above approach is not free from any contradictions, because, whereas the traditionalists appeal to restraint, the liberalists are led by self fulfilment, usually condemned as moral decadence. Thus, one may argue that the ideals that underpin individualism and the traditional underpinnings that emphasise the collective will, may lead to a discord in advancing gay rights under the African Charter which emphasises collective rights.¹⁵⁴ Nonetheless, this argument is only sustainable only when viewed from one side of the coin and not from a two sided analysis proposed above.

¹⁵³J Oloka-Onyango 'Who's Watching "Big Brother"? Globalization and the Protection of Cultural Rights in Present Day Africa' (2005) 27 *Human Rights Quarterly* p 1248.

¹⁵⁴Tamale (n 12 above) pp 88. See also Murray 'The Will Not To Know: Islamic Accommodation of Male Homosexualities' in S O Murry & W Roscoe (eds) *Culture, History and Literature* (1997) p 14, where sex and shame dominate the debate on women and homosexuals.

Chapter 3: Cross Cultural Dialogue on Gay and Lesbian Rights: Possibilities and dilemmas

In the preceding discussion I attempted to determine where different rights, now the subject of my discussion, are located under the Constitution of Uganda and the African Charter. I have illustrated that it is possible to read into the Ugandan Constitution a right to non discrimination on ground of sexual orientation by interpreting the rights to dignity, equality and privacy. I have also put into perspective the notion of African values and traditions. However it is still it is necessary to listen to those who argue that criminalisation of gay and lesbian sex is justifiable because it protects cultural values and family traditions. To that end, I now analyse the importance of listening to such voices as a way of encouraging a healthy debate on gay rights in Uganda.

Evans counsels that tolerance and acceptance of differences have become the most proclaimed hallmarks of our humanity and civic virtues.¹⁵⁵ He argues that this being the case, gays and lesbians cannot expect tolerance of their identity from the dominant paradigm if they fail to tolerate the views expressed against them by those who do not support gay identity. Tolerance also means that we must remain attentive to those differences - a strong pillar of human rights culture. Thus membership of a group, an important part of the way in which human beings as social animals acquire a sense of belonging,¹⁵⁶ would be threatened if differences¹⁵⁷ in the ways in which people are attracted to each other erotically are not promoted and protected.

The main concern with the way we deal with differences in much of Africa, according to Evans, is that usually membership of a group becomes a symbol of superiority and self conceited pride against those outside it, leading to the creation of inferiority complexes.¹⁵⁷ The most constructive approach to social or cultural differences or diversity therefore, is to accommodate different identities in a manner that excludes no one. This is because our social nature requires that proof of membership, though an integral part of our ability to find fulfilment in our identities, should affirm our equal legal claims and protection on equal footing.¹⁵⁸

3.1 Essentialist and Constructionist Debates as Pace Setters of the Debate

The debate between essentialism and constructivism is generally about whether gay sexuality is merely one of the sexual-object preferences, or whether it is a complex matter of particular social

¹⁵⁵ J M Evans ' Cultural and Social Diversity of Human Rights, Courts, Traditions and Social change' A revised text of notes prepared for a key note address on August 29, 2003, at the 13th *Triennial and Judges' Association* held at Mangochi, Malawi, on the theme, "Human Rights and Human Needs: Seeking a Judicial Talisman" p 11.

¹⁵⁶ Bartlett 'Minnow's (n 21 above) p 6.

¹⁵⁷ Evans J (n 155 above) p 17. See also 'Mufti wants gays abandoned on islands' On-line at <<http://www.monitor.co.ug/news/news10153.php>> (available on 2007-10-15), the Muslim leader made a suggestion that is akin to banishment in the presence of the head of state who did not contradict him.

¹⁵⁸ Beverley McLachlin, *The Civilization of Difference* (2003) pp1-30.

protocols and regulations.¹⁵⁹ The debate is not about the causes of homosexuality and whether it is natural or nurtured, but rather about the appropriate description of gay identity. Thus, if the tensions that underlie this debate can be resolved, it would help in understanding the content and context of gay identity, and how both gay and 'straight' people should lead their lives.

Essentialist argue that gayness is an intrinsic characteristic that does not change with different histories and cultures; even if the label of gayness had not been made, there are persons, who, throughout history and across different cultures, have always had sex with members of the same sex.¹⁶⁰ They further contend that gay persons are those that experience same sex desire, and believe that there have always been gay people; thus it makes sense to refer to persons who share the same experience as a single group regardless of where and when they lived.¹⁶¹

The constructionists on the other hand, argue that gayness is a characteristic that has meaning only within certain times and cultures; identity categories are a creation of society, resulting from social beliefs and practices.¹⁶² Ortiz argues that is not helpful to take sides in this debate as it may result in misunderstanding gay history and politics. Thus according to him, whether there were gay people in ancient Greece, or whether they emerged recently, as the constructionist argue, matters not. What is critical is that there were people who experienced same sex desire; whether their sexual roles were branded as transgression or subversion of the traditional gender and sexual roles by society is less important.¹⁶³ Ultimately, the debate seems to be on the content given to gay identity, description and label marks, by using different paths, while talking about the same thing.

3.2 Heterosexuality as a Contingent Force in Gay Rights Debate in Uganda

According to An-na'im, the role of cross cultural dialogue is to help universal acceptance of norms, both at "theoretical or conceptual levels by highlighting moral and philosophical commonalities of human cultures and experiences,"¹⁶⁴ because, he argues, a claim that all human rights are universally recognised is a non-starter, even if human rights may be premised on that assumption. His question - namely by whose criteria is the universality of norms verified - is not one that begs simple answers. He argues elsewhere that to achieve consensus on certain human rights norms, there must be a combination of processes and dialogue which would allow a richer and wider understanding of a

¹⁵⁹ J Boswell 'Concepts, Experience and Sexuality'. In Edward Stein (ed) *Forms of Desire: Sexual Orientation and the Social Constructionist Controversy* (1990) pp 20-7.

¹⁶⁰ E Stein 'Conclusion: The Essentials of Constructionism, and the Constructionist of Essentialism', in Edward Stein (ed) (n 159 above) p 29.

¹⁶¹ Stein (n 160 above) p.30

¹⁶² D R. Ortiz 'Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity' *Symposium on Sexual Orientation and the Law* (1993) 10 *Virginia Law Review*, p 11

¹⁶³ Ortiz (n 162 above) pp 22.

¹⁶⁴ A An-Na'im 'Cultural Transformation and Normative Consensus on the Best Interest of the Child' (1994) 8 *International journal of the law and the family* p 63.

human right concepts. He adds that unless there is an internal dialogue with in the heterosexual matrix so as to re-evaluate itself, cross-cultural dialogue will never have any meaningful results.¹⁶⁵

Baxi argues rather convincingly that, because there are differences in the construction of human rights, their universality becomes problematic, leading to constant disagreements due to lack of better approaches. Accordingly, this leads to a contested construction of what are ultimately termed as human rights. She contends that emphasis placed on universalism by contemporary human rights lawyers obscures the normative content of human rights.¹⁶⁶

Consequently, regard must be had to the influence of the church in Uganda's politics, which has become more pronounced over time, in that politicians would not find it comfortable to ignore them.¹⁶⁷ Similarly, most traditional leaders who are constitutionally recognised seem to wield a lot of political power, especially during election time. This makes cultural and religious heads-the super structures of heterosexuality in Uganda, real power brokers in this dialogue.

Already plans are under way to table a Bill in parliament to deal with the 'problem' of homosexuality in Uganda,¹⁶⁸ a plan that could provide an opportune moment for human rights advocates so as to engage law makers and the public at a pre-drafting stage. Since religion and traditional leaders symbolise the heterosexual norm, it would be naïve to ignore them in any debate concerning gay and lesbian rights in Uganda. However heterosexuality as a culture would have to re-evaluate itself before gay advocates engages them.

While dialogue is important, it cannot be the only strategy, because, like in any other struggle, there are times when gay men and lesbians themselves need to stand up and be counted through a process of resistance. Activism must be backed up by intellectual capacity, passion and resilience.¹⁶⁹ According to Heyns, one way of looking at human rights is to look at it from the perspective of resistance to injustice. Where, for example, there is violation of human rights, resistance will be an inevitable and legitimate consequence. This approach to human right as an advocacy tool supports

¹⁶⁵ A An-Na'im 'State Responsibility under International Human Rights Law to Change Religious and Customary Laws' in R. Cook (ed), *Human Rights of Women: National and International Perspectives* (1994) p 165.

¹⁶⁶ U Baxi 'Voices of Suffering, Fragmented Universality, and the Future of Human Rights' in B H Weston & S P Marks, (eds) *The Future of International Human Rights* Marks (1999) pp 101-156.

¹⁶⁷ Both the Catholic and the Protestant Churches in Uganda run some of the secondary and University education institutions. In addition in the last presidential elections, some churches came out strongly to support key candidates a decision that heavily impacted on the outcome of the elections.

¹⁶⁸ See 'Government drafts homosexuality bill' *The New Vision* of 2007-09-28. According to the State Minister for Youth and Children Affairs, James Kinobe, "The government is drafting a Bill which will handle lesbianism and homosexuality. This will have to go with a social approach to the gays' issue. Some of these teenagers do not even know the dangers involved," He adds "The Bill will help determine how we can handle such cases. We are going to do consultations before tabling it in Parliament. We generally do not think these people have to be given rights." On-line at <<http://www.newvision.co.ug/D/8/12/589000>> (accessed at 2007-09-26)

¹⁶⁹ See "THIS BODY!" Supporting Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) (n 115 above).

the view that human rights protection and freedom can not be granted on a silver platter but through defiance and sacrifice.¹⁷⁰

¹⁷⁰ C Heyns, “A Struggle Approach’ to Human Rights’ in Heyns & Stefiszyn (eds) *Human Rights, Peace and Justice in Africa: A reader* (2006) pp 15-24.

Chapter 4: Conclusion and Recommendations

4.1 Conclusion

The Ugandan legal landscape can no longer afford to blow hot and cold! It cannot purport to have a Bill of Rights that promotes and protects a right to human dignity, a right to equality, and a right to privacy, but at the same time turn a blind eye to a blatant infringement of the rights of other persons on the ground that they do not conform to the majority's preferences regarding sexual attraction. The above analysis has therefore put gays and lesbians, as right holders, in a pole-position. However, when all is said and done, it is acknowledged that it is one thing to get a judicial pronouncement about a right, and it is quite another to put it in practice. It is even one thing to have legal reform that protects gay rights and it is quite another for legal reform to lead to acceptance of gay and lesbians as right holders in a heterosexual setting.¹⁷¹

Equally, it is one thing to suggest a method to achieve a dialogue in human rights discourse, and quite another to present it without limitations. In fact one could even go all the way celebrating a victory as a result of a judicial pronouncement about a right or a legislative reform to protect gay and lesbian rights, when in practice, the victory is not worth the paper on which it is written on. This is an immense challenge to all human rights advocates, especially in a society that is so homophobic. A number of problems have been identified by Weston in the any process of dialogue so as to give effect protected rights such as gay and lesbian rights. They range from the nature of participants, people's perspectives, situational, bases of power, strategies, out come and effect, to general conditions.¹⁷²

The nature of the participants may demonstrate their perspectives and intentions in which case an examination of those intentions and perspectives may signal the direction of the dialogue. Where a culture is intended for the promotion of the overall values in a society, in terms of having a transformative and just out look, then it may appeal to a higher degree of legitimacy.¹⁷³

Cultural dialogue will also be more successful if one analyses how a practice is sustained. If, for example, heterosexuality is voluntarily complied with by the majority of the people, then it is more likely to be difficult to challenge its legitimacy. If, on the other hand, the practice is based on force, deception and blackmail, then its legitimacy may be challenged.¹⁷⁴ A brief interrogation of most reasons advanced by cultural apologist reveals that resistance to homosexuality is based on religious

¹⁷¹ See 'Anti-gay group hits back at rights activists' on-line at <<http://www.newvision.co.ug/D/8/13/584305>> (accessed on 2007-31-08). See also 'Is Africa homophobic?' On-line at <<http://newsforums.bbc.co.uk/nol/thread.jspa?threadID=7154&edition=2&ttl=20070817204517>> (accessed on 2007-08-17), where it is reported that 'in South Africa 4 lesbians were murdered last month. The US-based organization Human Rights Watch (HRW), declared that "a climate of violent homophobia" exists in the country'. This is a country whose constitution clearly protects gay/ and lesbian rights.

¹⁷²B Weston 'Universality of Human Rights in a Multicultural World: Towards Respectful Decision-Making' (ed) in B Weston et la (eds) *The future of International Human Rights* (1999) p 65.

¹⁷³ Weston (n 172 above) p 70.

¹⁷⁴ Weston (n 172 above) p 92.

sentiments, because it is against God's creation and command. It is also argued that is against African culture and traditions; it is against the family establishment; and it is responsible for the spread of HIV/AIDS, to mention but a few. All these arguments are a kind of forceful conscription based on deceit and falsity as was argued above.¹⁷⁵

The success of cross cultural dialogue is therefore, dependant on the outcome of the power interaction between the beneficiaries of the culture and its subjects. If the relationship is mutually beneficial, or if it leads for justice to all, then, on the face of it, it will be acknowledged as legitimate. However if a culture benefits and sustains only those who are in a dominant position, and less for those who are affected by its existence, then that culture ought to be questioned,¹⁷⁶ with the intention of disbanding it. It is partly because the exclusionary nature of heterosexuality, as against homosexuality, that I have deeply interrogated its rationality in this thesis.

4.2 Recommendations

It is recommended as follows; that under the present constitutional set up in Uganda a right to non-discrimination on grounds of sexual orientation can be properly articulated through the notions of equality and dignity, and to some extent privacy. However, gay and lesbian advocates should as much as possible avoid relying on the right to privacy in an environment that may opposes sex identities both in private and publicly.

As a matter of strategy, the argument relating to the rights to culture and religion should cleverly be exposed from an angle that subjects them to other highly competing rights, such as equality and dignity. Secondly, the often used moral argument should be interpreted in a manner that reinforces the idea of constitutional morality and the rule of law as overriding considerations in constitutional interpretation. Particularly, it should be pointed out that Christianity as a colonial relic as well as a culture which is difficult to ascertain, should never be a strong basis in determining what is morally reprehensible to Constitution or lawmaking process.

The African Charter, as a regional human rights document, should equally be interpreted in a manner that is consistent with the latest international jurisprudence, in order to include the right to non-discrimination on the ground of sexual orientation as a protected right. Equally, the concept of 'African values' should be understood in terms of human rights values, and not in terms of the cultural relics of domination and subjugation by the dominant paradigm of heterosexual masculinity.

¹⁷⁵ See HIV/AIDS Surveillance Report June 2003 STD/AIDS Control Programme Ministry of Health, P.O. Box 7272 Kampala, Uganda pp 20.

¹⁷⁶ Weston (n 172 above) p 94.

What remains of cultural and religious morality should not be discarded as irrelevant, but should form a basis for a debate leading to a smooth acceptance of gay and lesbian rights by the dominant paradigm. This can be done through civic education, media interaction, and open fora in both legal and academic circles.

An appropriate ideological strategy should be agreed upon from the beginning, prior to any dialogue, so as to avoid 'friendly fire' by gay rights advocates. Any limitations that may hinder reliance on a specific ideology need to be pointed out, with a view to adopting methods that would minimise any possibility of backlashes. Finally human rights advocates in Uganda should walk a fine line to advance gays and lesbian rights, so that there are no missteps that could alienate potential allies from the heterosexual norm. This would help in ensuring that whatever wrong reasons are advanced to justify the exclusion of the enjoyment of rights by people who are attracted sexually to members of the same sex are fended off appropriately.

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Legal Resources Foundation v Zambia, (2001) AHRLR 84 (ACHPR 2001).

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Constitutions Referred to

The Constitution of the Republic of India.

The Constitution of the Republic of South Africa.

The Constitution of the Republic Uganda.

Statutes

The Evidence Act Cap 6 Laws of Uganda

The Judicature Act Cap 13 Laws of Uganda

The Penal Code Act Cap 120 Laws of Uganda.

Regional and International Human Rights Instruments

The African Charter on Human and Peoples' Rights (ACHPR)

International Convention on Civil and Political Rights (CCPR)

ANNEXTURES

ANNEX I

SIGNATORIES TO THE YOGYAKARTA PRINCIPLES

Philip Alston (Australia), UN Special Rapporteur on extrajudicial, summary and arbitrary executions and Professor of Law, New York University School of Law, USA

Maxim Anmeghichean (Moldova), European Region of the International Lesbian and Gay Association

Mauro Cabral (Argentina), Researcher Universidad Nacional de Córdoba, Argentina, International Gay and Lesbian Human Rights Commission

Edwin Cameron (South Africa), Justice, Supreme Court of Appeal, Bloemfontein, South Africa

Sonia Onufer Corrêa (Brazil), Research Associate at the Brazilian Interdisciplinary AIDS Association (ABIA) and co-chair of Sexuality Policy Watch (Co-Chair of the experts' meeting)

Yakin Ertürk (Turkey), UN Special Rapporteur on Violence against Women, Professor, Department of Sociology, Middle East Technical University, Ankara, Turkey

Elizabeth Evatt (Australia), Former member and chair of the UN Committee on the Elimination of Discrimination Against Women, former member of the UN Human Rights Committee and Commissioner of the International Commission of Jurists

Paul Hunt (New Zealand), UN Special Rapporteur on the right to the highest attainable standard of health and Professor, Department of Law, University of Essex, United Kingdom

Asma Jahangir (Pakistan), Chairperson, Human Rights Commission of Pakistan

Maina Kiai (Kenya), Chairperson, Kenya National Commission on Human Rights

Miloon Kothari (India), UN Special Rapporteur on the right to adequate housing

Judith Mesquita (United Kingdom), Senior Research Officer, Human Rights Centre, University of Essex, United Kingdom

Alice M. Miller (United States of America), Assistant Professor, School of Public Health, Co-Director, Human Rights Program, Columbia University, USA

Sanji Mmasenono Monageng (Botswana), Judge of the High Court (The Republic of the Gambia), Commissioner of the African Commission on Human and Peoples' Rights, Chairperson of the Follow Up Committee on the implementation of the Robben Island Guidelines on prohibition and prevention of Torture and other Cruel, Inhuman or Degrading Treatment (African Commission on Human and Peoples' Rights)

Vitit Muntarbhorn (Thailand), UN Special Rapporteur on the human rights situation in the Democratic People's Republic of Korea and Professor of Law at Chulalongkorn University, Thailand (Co-Chair of the experts' meeting)

Lawrence Mute (Kenya), Commissioner with the Kenya National Commission on Human Rights

Manfred Nowak (Austria), UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; member of the International Commission of Jurists, Professor of Human Rights at Vienna University, Austria and Director of the Ludwig Boltzmann Institute of Human Rights

Ana Elena Obando Mendoza (Costa Rica), feminist attorney, women's human rights activist, and international consultant

Michael O'Flaherty (Ireland), Member of the UN Human Rights Committee and Professor of Applied Human Rights and Co-Director of the Human Rights Law Centre at the University of Nottingham, United Kingdom (Rapporteur for development of the Yogyakarta Principles)

Sunil Pant (Nepal), President of the Blue Diamond Society, Nepal

Dimitrina Petrova (Bulgaria), Executive Director, The Equal Rights Trust

Rudi Mohammed Rizki (Indonesia), UN Special Rapporteur on international solidarity and senior Lecturer and Vice Dean for Academic Affairs of the Faculty of Law at the University of Padjadjaran, Indonesia

Mary Robinson (Ireland), Founder of Realizing Rights: The Ethical Globalization Initiative and former President of Ireland and former United Nations High Commissioner for Human Rights

Nevena Vuckovic Sahovic (Serbia), Member of the UN Committee on the Rights of the Child and President of the Child Rights Centre, Belgrade, Serbia

Martin Scheinin (Finland), UN Special Rapporteur on human rights and counter-terrorism, Professor of Constitutional and International Law and Director of the Institute for Human Rights, Åbo Akademi University, Finland

Wan Yanhai (China), Founder of the AIZHI Action Project and director of Beijing AIZHIXING Institute of Health Education

Stephen Whittle (United Kingdom), Professor in Equalities Law at Manchester Metropolitan University, United Kingdom

Roman Wieruszewski (Poland), Member of the UN Human Rights Committee and head of Poznan Centre for Human Rights, Poland

Robert Wintemute (Canada and United Kingdom), Professor of Human Rights Law, School of Law, King's College London, United Kingdom.

ANNEX II

STATUS OF RATIFICATION OF CCPR

Participant	Signature	Ratification, Accession (a), Succession (d)
Afghanistan	.	24 Jan 1983 a
Albania	.	4 Oct 1991 a
Algeria	10 Dec 1968	12 Sep 1989
Andorra	5 Aug 2002	22 Sep 2006
Angola	.	10 Jan 1992 a
Argentina	19 Feb 1968	8 Aug 1986
Armenia	.	23 Jun 1993 a
Australia	18 Dec 1972	13 Aug 1980
Austria	10 Dec 1973	10 Sep 1978
Azerbaijan	.	13 Aug 1992 a
Barhain	.	20 Sep 2006 a
Bangladesh	.	6 Sep 2000 a
Barbados	.	5 Jan 1973 a
Belarus	19 Mar 1968	12 Nov 1973
Belgium	10 Dec 1968	21 Apr 1983
Belize	.	10 Jun 1996 a
Benin	.	12 Mar 1992 a
Bolivia	.	12 Aug 1982 a
Bosnia and Herzegovina 1	.	1 Sep 1993 d
Botswana	8 Sep 2000	8 Sep 2000

Brazil	.	24 Jan 1992 a
Bulgaria	8 Oct 1968	21 Sep 1970
Burkina Faso	.	4 Jan 1999 a
Burundi	.	9 May 1990 a
Cambodia 2 , 3	17 Oct 1980	26 May 1992 a
Cameroon	.	27 Jun 1984 a
Canada	.	19 May 1976 a
Cape Verde	.	6 Aug 1993 a
Central African Republic	.	8 May 1981 a
Chad	.	9 Jun 1995 a
Chile	16 Sep 1969	10 Feb 1972
China 4 , 5 , 13	5 Oct 1998	.
Colombia	21 Dec 1966	29 Oct 1969
Congo	.	5 Oct 1983 a
Costa Rica	19 Dec 1966	29 Nov 1968
Côte d'Ivoire	.	26 Mar 1992 a
Croatia 1	.	12 Oct 1992 d
Cyprus	19 Dec 1966	2 Apr 1969
Czech Republic 6	.	22 Feb 1993 d
Democratic People's Republic of Korea 7	.	14 Sep 1981 a
Democratic Republic of the Congo	.	1 Nov 1976 a
Denmark	20 Mar 1968	6 Jan 1972
Djibouti	.	5 Nov 2002 a
Dominica	.	17 Jun 1993 a
Dominican Republic	.	4 Jan 1978 a
Ecuador	4 Apr 1968	6 Mar 1969
Egypt	4 Aug 1967	14 Jan 1982
El Salvador	21 Sep	30 Nov 1979

	1967	
Equatorial Guinea	.	25 Sep 1987 a
Eritrea	.	22 Jan 2002 a
Estonia	.	21 Oct 1991 a
Ethiopia	.	11 Jun 1993 a
Finland	11 Oct 1967	19 Aug 1975
France	.	4 Nov 1980 a
Gabon	.	21 Jan 1983 a
Gambia	.	22 Mar 1979 a
Georgia	.	3 May 1994 a
Germany 8 , 9	9 Oct 1968	17 Dec 1973
Ghana	7 Sep 2000	7 Sep 2000
Greece	.	5 May 1997 a
Grenada	.	6 Sep 1991 a
Guatemala	.	5 May 1992 a
Guinea	28 Feb 1967	24 Jan 1978
Guinea-Bissau	12 Sep 2000	.
Guyana	22 Aug 1968	15 Feb 1977
Haiti	.	6 Feb 1991 a
Honduras	19 Dec 1966	25 Aug 1997
Hungary	25 Mar 1969	17 Jan 1974
Iceland	30 Dec 1968	22 Aug 1979
India	.	10 Apr 1979 a
Indonesia	.	23 Feb 2006 a
Iran (Islamic Republic of)	4 Apr 1968	24 Jun 1975
Iraq	18 Feb 1969	25 Jan 1971

Ireland	1 Oct 1973	8 Dec 1989
Israel	19 Dec 1966	3 Oct 1991
Italy	18 Jan 1967	15 Sep 1978
Jamaica	19 Dec 1966	3 Oct 1975
Japan	30 May 1978	21 Jun 1979
Jordan	30 Jun 1972	28 May 1975
Kazakhstan	2 Dec 2003	24 Jan 2006
Kenya	.	1 May 1972 a
Kuwait	.	21 May 1996 a
Kyrgyzstan	.	7 Oct 1994 a
Lao People's Democratic Republic	7 Dec 2000	.
Latvia	.	14 Apr 1992 a
Lebanon	.	3 Nov 1972 a
Lesotho	.	9 Sep 1992 a
Liberia	18 Apr 1967	22 Sep 2004
Libyan Arab Jamahiriya	.	15 May 1970 a
Liechtenstein	.	10 Dec 1998 a
Lithuania	.	20 Nov 1991 a
Luxembourg	26 Nov 1974	18 Aug 1983
Madagascar	17 Sep 1969	21 Jun 1971
Malawi	.	22 Dec 1993 a
Maldives	.	19 Sep 2006 a
Mali	.	16 Jul 1974 a
Malta	.	13 Sep 1990 a
Mauritania	.	17 Nov 2004 a
Mauritius	.	12 Dec 1973 a
Mexico	.	23 Mar 1981 a
Monaco	26 Jun 1997	28 Aug 1997

Mongolia	5 Jun 1968	18 Nov 1974
Montenegro ¹⁴	.	23 Oct 2006 d
Morocco	19 Jan 1977	3 May 1979
Mozambique	.	21 Jul 1993 a
Namibia	.	28 Nov 1994 a
Nauru	12 Nov 2001	.
Nepal	.	14 May 1991 a
Netherlands 10	25 Jun 1969	11 Dec 1978
New Zealand 11	12 Nov 1968	28 Dec 1978
Nicaragua	.	12 Mar 1980 a
Niger	.	7 Mar 1986 a
Nigeria	.	29 Jul 1993 a
Norway	20 Mar 1968	13 Sep 1972
Panama	27 Jul 1976	8 Mar 1977
Paraguay	.	10 Jun 1992 a
Peru	11 Aug 1977	28 Apr 1978
Philippines	19 Dec 1966	23 Oct 1986
Poland	2 Mar 1967	18 Mar 1977
Portugal 5	7 Oct 1976	15 Jun 1978
Republic of Korea	.	10 Apr 1990 a
Republic of Moldova	.	26 Jan 1993 a
Romania	27 Jun 1968	9 Dec 1974
Russian Federation	18 Mar 1968	16 Oct 1973
Rwanda	.	16 Apr 1975 a
Saint Vincent and the Grenadines	.	9 Nov 1981 a
San Marino	.	18 Oct 1985 a
Sao Tome and Principe	31 Oct 1995	.

Senegal	6 Jul 1970	13 Feb 1978
Serbia and Montenegro 1	.	12 Mar 2001 d
Seychelles	.	5 May 1992 a
Sierra Leone	.	23 Aug 1996 a
Slovakia 6	.	28 May 1993 d
Slovenia 1	.	6 Jul 1992 d
Somalia	.	24 Jan 1990 a
South Africa	3 Oct 1994	10 Dec 1998
Spain	28 Sep 1976	27 Apr 1977
Sri Lanka	.	11 Jun 1980 a
Sudan	.	18 Mar 1986 a
Suriname	.	28 Dec 1976 a
Swaziland	.	26 Mar 2004 a
Sweden	29 Sep 1967	6 Dec 1971
Switzerland	.	18 Jun 1992 a
Syrian Arab Republic	.	21 Apr 1969 a
Tajikistan	.	4 Jan 1999 a
Thailand	.	29 Oct 1996 a
The Former Yugoslav Republic of Macedonia 1	.	18 Jan 1994 d
Timor-Leste	.	18 Sep 2003 a
Togo	.	24 May 1984 a
Trinidad and Tobago	.	21 Dec 1978 a
Tunisia	30 Apr 1968	18 Mar 1969
Turkey	15 Aug 2000	23 Sep 2003
Turkmenistan	.	1 May 1997 a
Uganda	.	21 Jun 1995 a
Ukraine	20 Mar 1968	12 Nov 1973
United Kingdom of Great Britain and Northern Ireland 12 , 13	16 Sep 1968	20 May 1976

United Republic of Tanzania	.	11 Jun 1976 a
United States of America	5 Oct 1977	8 Jun 1992
Uruguay	21 Feb 1967	1 Apr 1970
Uzbekistan	.	28 Sep 1995 a
Venezuela (Bolivarian Republic of)	24 Jun 1969	10 May 1978
Viet Nam	.	24 Sep 1982 a
Yemen 14	.	9 Feb 1987 a
Zambia	.	10 Apr 1984 a
Zimbabwe	.	13 May 1991 a