

Sexual Minority Rights in Cameroon

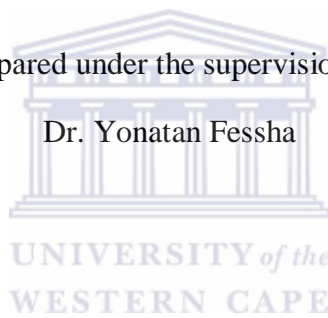
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DECLARATION

I, Ayuk Samuel Ebot, hereby declare that this research paper is original and has never been presented in any other institution. I also declare that secondary information used has been duly acknowledged in this dissertation. It is in this regard that I declare this work as originally mine.

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DEDICATION

I dedicate this study to my beloved son Ayuk Junior and
my entire family for letting me embark on this project



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Remembrance of God Almighty is a priority to me and my sincere appreciation to Him for taking me on this journey and I am humbled by the Grace and Mercy He continuously showed me to make it to the end.

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Key words

Human rights

International human rights law

Homosexuality

Heterosexual

Lesbian, Gay, Bisexual, Transgender

Equality

Cameroon

Discrimination

Indecent acts

Criminalisation



LIST OF ABBREVIATIONS

ADEFHO	Association for the Defense of Homosexual Rights
AU	African Union
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CERD	International Convention on the Elimination of all Forms of Racial Discrimination
CPC	Cameroon Penal Code
CJDHR	Cameroon Journal on Democracy and Human Rights
CRC	Convention on the Rights of the Child
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LGBT	Lesbian, Gay, Bisexual, or Transgender
OAU	Organization of African Unity
OHCHR	Office of the High Commissioner for Human Rights
SCNC	Southern Cameroons National Council
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNHRC	UN Human Rights Council

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CHAPTER ONE

INTRODUCTION

1.1 Background to the study

Homosexuality has often been viewed as something that is “unnatural”.¹ In the past, homosexual activities between individuals were seen as evidence of mental illness. In America, this led to the categorisation of homosexual individuals in the Diagnostic and Statistical Manual of Mental Disorder.² This trend of stigmatizing and criminalising homosexuals is mostly abandoned in the western countries and America. But most states in Africa continue to prosecute individuals based on their sexual orientation. A climate of fear exists across Africa due to the continued prosecution of individuals based on their sexual orientation. In the case of some countries, violation of the rights of sexual minorities is not limited to harassment and assault from fellow citizens or prosecution and detention by authorities. In addition to jail terms, some countries have included financial sanctions on alleged or perpetuated homosexual acts.³ The only exception is South Africa where the Constitutional Court of South Africa⁴ has the common law offences of sodomy between males and related statutory offences to be inconsistent with the constitution because, as applied to consensual relations in privacy between males, they breach the rights of equality, dignity and privacy.⁵

Today, there is an increasing condemnation of laws and acts criminalising consensual sexual relations between adults in their private space. The Human Rights Committee, a body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights (ICCPR) by its state parties, in its examination of state periodic reports,⁶

¹ Sable M ‘A prohibition on anti-sodomy laws through regional customary international law’ (2010) 19 *Review lesbian, gay, bisexual and transgender legal issues* 96.

² Soulforce ‘Gay is okay with American Psychiatric Association (APA)’ available at <http://www.soulforce.org/article/642> [accessed on 25/02/2011].

³ See example Article 70 and 71 of the Angolan Penal Code of 1986.

⁴ *National Coalition for Gay and Lesbian Equality v Minister of Justice*, CCT11/98,1999(1) SA6 (CC), 1998 (1) BCLR1517 (CC)

⁵ The rights to privacy, dignity and equal protection of the law are enshrined in section 9 of the South Africa Constitution of 1996.

⁶ All states parties are obliged to submit regular reports to the Committee on how the rights are implemented. States must report initially one year after acceding to the Convention . The Committee examines each report and addresses its concerns and recommendations to the State party in the form of “concluding observations”. Article 40 of the ICCPR.

regretted the lack of measures to protect and prevent discrimination against sexual minorities. It has urged member states to take all necessary measures to protect sexual minorities from attacks, harassment and social prejudice and to take steps to decriminalise same sex acts.⁷ Despite the absence of the recognition of the rights sexual minorities in the Africa Charter on Human and Peoples' Rights, some scholars have suggested normative basis and procedural grounds that the African Commission on Human and Peoples' Rights (hereinafter referred to as the African Commission) can follow to enforce the prohibition of discrimination on the basis of sexual orientation.⁸ Paradoxically, despite the growing opposition to the prosecution of homosexual individuals, attempts at re-criminalisation of homosexual individuals are seriously considered in some countries.⁹

The central problem to be explored in this study is the criminalisation of homosexuality and the refusal to recognize the rights of sexual minorities in Cameroon. In Cameroon, as in many other African countries, homosexuality is a crime. Article 347 of the Penal Code¹⁰ is used by Cameroonian police and authorities as the basis for criminalising persons suspected of being engaged in homosexual activities. The Penal Code punishes homosexual acts by six months up to five years jail terms and a fine ranging from CFA20, 000 to CFA200.000. Homosexual individuals are harassed, arrested and detained by the police. They are even physically attacked and assaulted by citizens and even members of their families on the basis of sodomy laws and community perception of homosexual relationships. The Cameroonian government continues to use article 347 of its Penal Code to arrest, detain and, in some instances, prosecute individuals on the basis of their sexual orientation.

⁷ The United Nations Human Rights Committee remains deeply concerned about the criminalisation of consensual sexual acts between adults of the same sex and has consistently maintained that such criminalisation violates the rights to privacy and freedom from discrimination enshrined in the Covenant. See for instance the Concluding Observation of the Human Rights Committee on the Republic of Cameroon's fourth periodic report, 99th session, Geneva 12-30 July 2010 CCPR/C/CMR/4 28 and 29 July 2010 (CCPR/C/SR.2739 and 2740) at para 12.

⁸ Murray R and Viljoen F 'Towards a non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 86.

⁹ Uganda has made attempts at re-criminalising homosexuality with the death penalty; see Anti Homosexuality Bill 2009, Bill No 18, clause 3(2). Also a Bill was submitted by the Nigerian Government to the Parliament to make provisions for the prohibition of relationships between persons of the same sex, celebrations of marriage, registration of gay clubs and publicity of same sex sexual relationships, see Amnesty International 'Nigeria: Same Gender Marriage (Prohibition) Bill' violates Constitution' available at <http://www.amnestyusa.org/document.php?lang=e&id=ENGAFR440012009> [accessed on 01/04/2011].

¹⁰ Cameroon Penal Code Law No 1965/67 of 1967 as amended in 1972.

The 62-page report, ‘Criminalizing Identities: Rights Abuses in Cameroon Based on Sexual Orientation and Gender Identity’,¹¹ prepared by *L’Association pour la Défense des Droits des Homosexuels, L’Association pour la Liberté, la Tolérance, l’Expression et le Respect de Personnes de Nature Indigente et Victimes D’Exclusion Sociale au Cameroun*, the International Gay and Lesbian Human Rights Commission, and Human Rights Watch, document the unique brand of abuses that people suffer on the grounds of their sexual orientation or gender identity. It details how the government uses article 347 of the Penal Code to deny basic rights to people alleged to be lesbian, gay, bisexual, or transgender (LGBT). The report describes arrests, beatings by the police, abuses in prison, and a homophobic atmosphere that encourages shunning and abuse in the community. The study argues that people are not punished for a specific outlawed practice but for a homosexual identity.

It was not until 2005 that arrest, detention and prosecution in Cameroon became widespread. Condemnation of homosexual relations between consensual adults gained momentum in 2005 when the Roman Catholic Archbishop of Yaoundé, *Monsignor Victor Tonye Bakot*, sounded the alarm bells during his address, now famously known as “Christmas 2005 homily”.¹² "Moral decadence has reached its paroxysm in Cameroon", he declared. The Archbishop alluded that Cameroonians are copying a bad habit from Europe. That Cameroonians are involved in practices which are against nature, putting at risk the institution of marriage, the family and society as a whole. He went on to condemn incest, adultery and paedophilia, before settling on the main subject of the day, homosexuality.

‘Our youths are being told to indulge in homosexual practice as a condition to obtain employment, to get admission into professional schools, for advancement in society and to get rich quick. What a sacrilege.’

In January and February 2006, after the Archbishop’s Christmas 2005 homily address, three newspapers, *L’Anecdote*, *La Météo* and *Nouvelle Afrique*, took the country by surprise when they published a list of 50 presumed homosexuals, including high ranking public officials

¹¹ Human Rights Watch ‘Criminalizing identities rights and abuses in Cameroon based on sexual orientation and gender identity’ available at <http://www.hrw.org/en/reports/2010/11/04/criminalizing-identities-0> [accessed on 24/02/2011]. A report prepared by *Alternatives-Cameroun, l’Association pour la défense des droits des homosexuels*, Human Rights Watch and International Gay and Lesbian Human Rights Commission.

¹² Dibussi T ‘When private and public spaces collides: Power, sex and politics in Cameroon’ available at http://www.dibussi.com/files/outing_v1.0.pdf [accessed on 02/04/2011].

(ministers, senior administrators), politicians, businessmen and musicians. It was the first time such a list had been published in Cameroon and it caused quite a stir.¹³ These events have stirred up the witch hunt for homosexual individuals in Cameroon.

In order to fight harassment, stigmatisation and above all criminalisation of sexual minorities in Cameroon, two homosexual movements have been established: the *Association pour la Défense des droits des homosexuels* (the Association for the Defense of Homosexual rights [ADEFHO]) and *Alternatives-Cameroun*. These two organisations cover a variety of activities. ADEFHO, which is run by an attorney, is concerned with sexual minority rights and campaigns for the recognition of sexual minority rights. On the other hand, *Alternatives-Cameroun*, which consists of and run by homosexual individuals, is concerned about sexual rights. It has also extended its activities to sexual health.¹⁴ These organisations continue to lobby the government for recognition of gay rights in Cameroon.

1.2 Statement of the problem

Despite the pronouncement made by the Human Rights Council¹⁵ on Cameroon to decriminalise homosexuality,¹⁶ Cameroon, a member of the UN, still retains sodomy laws and has not protected sexual minorities or prevented discrimination against them. It has rather institutionalised harassment and discrimination against sexual minorities through the sodomy law that continues to form part of the law of the land. On the other hand, Cameroon has ratified a number of international treaties that offer protection to sexual minorities. The criminalisation of homosexual individuals in Cameroon begs the question of the relevance of this body of international law designed to protect and promote human rights to sexual minorities in Cameroon. This is the question that this study seeks to address.

With the view to achieve the above mentioned objective, the study seeks to answer the following questions:

¹³ Musa T 'Cameroon: Homosexuality on the rise?' available at http://findarticles.com/p/articles/mi_qa5391/is_200606/ai_n21392718 [accessed on 30/03/2011].

¹⁴ Awondo P 'The Politicisation of Sexuality and Rise of Homosexual Movements in Post-colonial Cameroon' (2010) 37 *Review of African Political Economy* 315.

¹⁵ An Inter-governmental body within the United Nations (UN) system made up of 47 States responsible for strengthening the promotion and protection of human rights around the globe.

¹⁶ United Nations Human Rights Council's Universal Periodic Review of October 2009 (A/HRC/370) at page 54, recommending Cameroon to decriminalise homosexuality and to put a stop to the homophobic atmosphere in the country.

- ◆ What is the argument for criminalising homosexuality in Cameroon?
- ◆ What are the protections that international human rights law provide to homosexual minorities?
- ◆ How does international human rights laws afford protection to sexual minorities in Cameroon?
- ◆ What are the protections that the Constitution of Cameroon provide to sexual minorities?

1.3 Significance of the study

The purpose of this research is to explore the constitution and laws of Cameroon with the view to examine the criminalisation of homosexual minorities in light of the protection afforded to sexual minorities by international human rights law. This research, it is believed, will add to the debate on the criminalisation of homosexual minorities in Cameroon. The study is particularly significant as it seeks to explore and outline a big challenge that faces Africa, in general, and Cameroon, in particular, namely the prosecution of individuals based on homosexual orientation. An added value of the research is that it will take into account recent developments relevant to the field. It seeks to propose avenues for promoting respect for the rights of sexual minorities.

1.4 Objectives of the study

The objective of this study is to explore the criminalisation of persons based on sexual orientation in Cameroon in light of that country's international human rights obligation. The study examines the constitution and laws of Cameroon as applicable to sexual minorities. It aims to discuss recent developments in international human rights law with regard to the human rights basis for decriminalising homosexuality.

1.5 Research methodology

The research takes the form of a desktop study of all the relevant literature including journal articles, books, case law and other relevant materials. International treaties, statutes and conventions, court judgments and reports will also be taken into consideration. The

Cameroonian system is examined by reviewing the constitution, relevant legislation, literature, government reports and other relevant documents.

1.6 Preliminary literature review

Much has been written on the subject of homosexual minorities. But little has been written on the topic in the context of Cameroon. To be precise, many have written on homosexuality in Cameroon from the perspective of social science. Tchouaffe explores the history of homophobia in Cameroon to provide an overview of its colonially corrupted sexual ideology and metaphors as well as its contemporary developments in the country.¹⁷ The author argues that the complexities of Cameroonian's sexual politics are better assessed by artists rather than politicians, often cynically using homophobia as a pretext for power grabbing. The author brings into focus the homology between homosexuality and colonization in order to demonstrate that the politics of patriarchal, sexual domination and subordination during the colonial period were not simply relegated to the private realm. Awondo explores the link between the political concept of homosexuality and the emergence of the homosexual movement in Cameroon.¹⁸ The organisations, along with the youth, who publicly reject homosexuality, are the main actors involved in the political tension surrounding homosexuality in Cameroon. He investigated the issues underlying the rejection of homosexuality and concluded that homosexuality is also influenced by post-colonial tensions and their repercussions.

Ekinneh observes that local non-governmental organisations defending the rights of homosexuals in Cameroon have received massive financial aid from the European Union (EU).¹⁹ He questions the *raison d'être* for such aid, claiming that homosexuality has no place in a society that is founded on the basis of natural law.

In the context of Africa, Murray and Viljoen²⁰ reviewed the possibility of challenging laws that criminalise homosexual before the African Commission on Human and Peoples' Rights (African Commission) and the African Union based on non-discrimination based on sexual

¹⁷ Tchouaffe O 'Homosexuality and the politics of sex, respectability and power in postcolonial Cameroon' (2006) 2 *Postamble* 4.

¹⁸ Awondo P (2010) 315.

¹⁹ Ekinneh A 'Cameroon: Homosexuals and the European Union - Matters arising (Opinion)' available at <http://www.africafiles.org/article.asp?ID=24949> [accessed 05/04/2011].

²⁰ Murray R and Viljoen F (2007) 86.

orientation. The authors argued that respect for integrity and dignity requires that individuals be left free of state interference, which is extended to the domain of sexual choice.

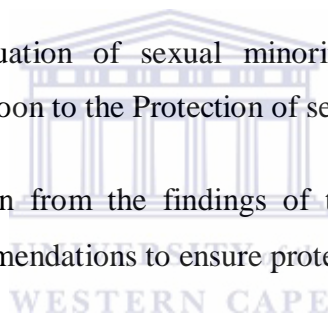
It is important to point out that the existing literature on the subject does not directly address the link between the international human rights obligations of Cameroon, on the one hand, its constitution and sodomy laws in light of homosexual minority rights and its justifications and otherwise, on the other hand. This study investigates this link and makes recommendations on the way forward.

1.7 Structure

The study is composed of four chapters. Chapter two focuses on the international protection of sexual minority rights. It examines the basis on which international human rights law affords protection to sexual minorities.

Chapter three explores the situation of sexual minority rights in Cameroon and the international obligation of Cameroon to the Protection of sexual minority rights.

Chapter four draws a conclusion from the findings of the pervious chapters and makes suggestions in the form of recommendations to ensure protection to sexual minorities.



CHAPTER TWO

THE PROTECTION OF SEXUAL MINORITY RIGHTS IN INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS

2.1 Introduction

This chapter deals with the jurisprudence in international and the African human rights system relevant for the protection of sexual minority rights. It primarily looks at the fundamental rights that are deemed relevant to the protection of sexual minorities. It also provides a brief historical account of the move towards the human rights approach in protecting sexual minorities.

Prior to discussing the consensus on protection of sexual minorities, the cultural and religious debates of homosexual conduct are discussed. The chapter, thus, commences by looking at the cultural and religious debates of homosexuality. It then proceeds to discuss the rights that can be invoked to ensure sexual minority rights.

2.2 Cultural and religious debates on homosexuality

Many African societies continue to maintain that homosexuality is alien to African traditional societies. In addition, in some African countries attempts aimed at re-criminalisation of homosexual conducts are being considered. Thus, the debate and arguments raised here are based on the African perspective. In addition, the position of Cameroon, with regard to this debate, is given particular attention.

2.2.1 Homosexuality as alien to African culture

In most parts of Africa, it is held that homosexuality is foreign and alien to African societies.²¹ As a result, there have been governmental claims and political statements supporting homophobia.²² This is illustrated in the statements of contemporary African

²¹ Sanders A 'Homosexuality and the Law: A Gay Revolution in Southern Africa' (1997) 41 No.1 *Journal of African Law* 101.

²² Human Rights Watch 'More than a name: state-sponsored homophobia and its consequences in Southern Africa' available at <http://www.unhcr.org/refworld/docid/3f4f59710.html> [accessed 16 April 2012].

political leaders, who have vehemently and persistently claimed that homosexuality is “un-African”. In 1995, President Robert Mugabe, the president of Zimbabwe, while denouncing that sexual minorities do not have rights at all, charged that homosexuality was unnatural and un-African, saying that ‘it was an alien culture only practiced by a “few whites” in his country’.²³ In the same vein, President Yoweri Museveni of Uganda, denounced homosexuality as un-African.²⁴ This contention has negatively affected sexual minority rights in many parts of Africa.

The Cameroon government and its officials have similarly denounced that homosexuality is ‘un-African’. This argument is used to justify the detention and conviction of individuals reported of same sex sexual conducts. Replying to a letter from the New York-based International Gay and Lesbian Human Rights Commission (IGLHRC) on the case of the 11 men detained in 2005, the Cameroonian Deputy Prime Minister and Minister of Justice wrote, in a letter dated 23 January 2006, that it is a prerogative of a state to restrict freedom to protect public morality. The minister added that ‘by virtue of the African culture, homosexuality is not a value accepted in the Cameroonian society’.²⁵ In February 2006, a Cameroonian news paper published names and photos of allegedly gay politicians, businessmen and musicians in what editors said was a crusade against “deviant behavior”.²⁶

The above argument that homosexuality is a value not accepted in the African society and hence un-African is challenged by many. Reports indicates that sexual practices between consenting adults of the same sex were considered as normal tradition in some parts of Cameroon long before the colonial rule.²⁷ The same is true in other parts of Africa where it has been discovered that homosexuality is not alien to African traditional societies.²⁸ Some reports indicate that sodomy laws and anti-homosexual laws were introduced by the Europeans against what they called barbaric African practices.²⁹ Thus, according to these reports, before colonialism, Africans do not know that same-sex sexual practice was a crime. Same-sex sexual practices were conducted as a normal activity or as part of a community’s

²³ Rukweza J ‘Is homosexuality really “Un-African” available at <http://www.pambazuka.org/en/category/comment/32974> [accessed 03/04/2012].

²⁴ Rukweza J (2006).

²⁵ Murray R and Viljoen F (2007) 93.

²⁶ Rukweza J (2006).

²⁷ Gunther T ‘Homosexuality among the Negroes of Cameroon and a pangwe tale’ in Murray SO and Roscoe W (eds) *BoywWives and female husbands: Studies of African homosexualities* (1998) 150-152.

²⁸ Epprecht M *Unspoken facts: A history of homosexualities in Africa* (2008) 24-25.

²⁹ Epprecht M (2008) 65-66.

custom. Based on this, some claim that the attack on African lesbians and gays is a globalisation of United States (US) cultural wars incited by US conservatives, making Africa a kind of 'collateral damage of the US cultural wars'.³⁰

2.2.2 Homosexuality as a religious outrage

Criminalisation and attempt at re-criminalisation of homosexual individuals have gained momentum based on the argument that homosexuality is a religious offend. This assertion had its bases from the Old Testament of the Holy Bible which forbids a man to have sexual relations with a fellow man.³¹ Based on this Old Testament pronouncement to Christianity, both the early and medieval Christian churches believed that homosexuality is abnormal and homosexual individuals should be punished with death either by hanging or burning alive.³² Based on this religious view, there are those that condemn homosexuality holding that it is outrage and must not be tolerated in any society. At the same time, there are those rejecting homosexuality on the basis that it is incompatible with the scripture, but still call on all Christians to minister pastorally and show love to all irrespective of sexual orientation.

In Cameroon, homosexual conducts have openly been denounced and condemned by the religious community. Many religious leaders view homosexuality as an unreligious practice, something that has to be eliminated from the community. *Monsignor* Victor Tonye Bakot, a senior Cameroonian Roman Catholic Church leader, in his 2005 Christmas address, publicly denounced homosexuality. He stated that 'moral decadence has reached its paroxysm in Cameroon'.³³ According to Archbishop, Cameroonians are copying a bad habit from Europe, engaging in practices which are against nature, putting at risk the institution of marriage, the family and society as a whole.

³⁰ Kaoma K. 'Globalising the cultural wars, US conservatives, African churches and homophobia, (2009) *Political Research Associates* 4. The discourse on homosexuality in many African countries is largely based on the notion that homosexual practice is an offshoot of the middle class elites of Europe. In this respect homosexuality is considered as extension of imperialism and European influence. For a detail discussion see Johnson CA 'Hearing voices: Unearthing evidence of homosexuality in pre-colonial Africa', in Constantine, S.D. (ed) *The greatest taboo: homosexuality in black communities* (2001) 132.

³¹ The Holy Bible, New International Version (NIV): Leviticus chapter 18 verse 22 (Leviticus 18:22). The Holy Bible further provided punishment for this type of outrage. It provides that if a man lies with a man as one lies with a woman both of them have done what is detestable. They must be put to death; their blood will be on their own heads.

³² Sloan, IJ *Homosexual conduct and the law* (1987) 2.

³³ Dibussi T 2006.

On the other hand, some argue that at the heart of the law that castigates what is referred to as “un-African” (homosexuality) was the influence of a missionary society, which advanced its moral and divine inclination into Africa.³⁴ Kaoma is of the view that the spread of homophobia across Africa is the result of funding Western Conservatives provided to African churches in order to support US evangelical proxy wars.³⁵

2.3 The emerging trend in re-criminalization of homosexuals in Africa

Despite the growing condemnation of the criminalisation of homosexual conducts, attempts at re-criminalisation of homosexual individuals are seriously being considered in some African countries. Uganda has made attempts at re-criminalising homosexuality with the publication of the Anti-Homosexuality Bill (the bill).³⁶ The bill, which was tabled before the Ugandan Parliament was withdrawn and re-tabled, is pending consideration by two committees of the Parliament before being submitted for parliamentary debate.³⁷ Clause 3 of the bill, for example, imposes the death penalty for seven situations which it considers to constitute “aggravated homosexuality”.³⁸ Recently, it is reported that ‘the anti-homosexuality bill was re-tabled on the floor of the House today and has been referred to parliament's legal and parliamentary affairs committee for scrutiny’.³⁹ However, the death penalty was dropped out from the re-tabled bill.⁴⁰ The committee is expected to examine the bill and conduct public hearings and then it will report back to the House for a formal debate.

³⁴ Philips O ‘Constituting the global gay’ in Stychin, C & Herman, D. (eds) *Law and sexuality: The global arena* (2000) 19.

³⁵ Kaoma, (2009) 5.

³⁶ Bill No. 18, The Anti-Homosexuality Bill, 2009, Uganda Gazette No. 47, vol. CII, Bills Suppl. No. 13 (25 September 2009).

³⁷ Amnesty International ‘Uganda: Anti-homosexuality bill is inherently discriminatory and threatens broader human rights’ available at <http://www.amnesty.org/en/library/info/AFR59/003/2010/en> [accessed 06/10/2011].

³⁸ The list of instances amounting to aggravated homosexuality per clause 3(1) of the Bill includes: a) person against whom the offence is committed is below the age of 18 years, b) offender is a person living with HIV, c) offender is a parent or guardian of the person against whom the offence is committed, d) offender is a person in authority over the person against whom the offence is committed, e) victim of the offence is a person with disability, f) offender is a serial offender, g) offender applies, administer or causes to be used by any man or woman any drug, matter or thing with intent to stupefy or overpower him or her so as to thereby enable any person to have unlawful carnal connection with any person of the same sex.

³⁹ Reuters Africa ‘Uganda’s anti-gay bill returns to parliament’ available at <http://af.reuters.com/article/topNews/idAFJ0E81701A20120208?pageNumber=1&virtualBrandChannel=0> [accessed on 26/05/2012].

⁴⁰ BBC News African ‘Ugandan MP revives the anti-gay bill but drops death penalty’ available at <http://www.bbc.co.uk/news/world-africa-16928608> [accessed on 29/05/2012].

Similarly, the Nigerian government submitted a memorandum to the Parliament to make provisions for the prohibition of relationships between persons of the same sex, celebrations of marriage, registration of gay clubs and publicity of same sex sexual relationships.⁴¹ This Bill aims to outlaw, including through criminal sanctions, marriages between persons of the same sex and does not recognize the union of people of the same sex married outside Nigeria. On November 29, 2011, the bill was unanimously passed after the consideration of the report of the Senate Committee on Judiciary, Human Rights and Legal Matters at the House of the Senate.⁴²

Very recently, the situation of sexual minorities in Africa received attention when two Malawian citizens were arrested by the police and charged. In Malawi, the Penal Code criminalises homosexual conducts under the rubric of “unnatural offences and indecent practices between males”.⁴³ The judiciary and authorities in Malawi have rarely prosecuted anyone accused of engaging in same-sex conduct based on the provision of the Penal Code. But this suddenly changed when, on May 18, 2010, a gay couple were convicted of “unnatural act and gross indecency” and sentenced to 14 years in prison.⁴⁴ The case seems to be historic in that, as Chirwa has observed, ‘Malawians woke up from their slumber of denial that homosexuality is not practised by local Malawians, and for the first time began to discuss the openly’.⁴⁵ Chirwa further observed that ‘[i]t will take probably take a little while for Malawi to get to the point of allowing same-sex marriages, but it is hard to defend the criminalisation of homosexual conduct between consenting adults, and Monjeza and Chimbalanga will arguably be recorded in the annals of history as first and stoic pioneers of the rights of this very vulnerable minority group in Malawi’.⁴⁶

However, as mentioned above, sexual minorities, by virtue of their status as human beings, are entitled to the same enjoyment of fundamental rights and freedoms as other human beings. A number of fundamental human rights are relevant for the protection of sexual

⁴¹ Amnesty International ‘Nigeria: Same Gender Marriage (Prohibition) Bill’ violates Constitution’ available at <http://www.amnesty.org/en/library/info/AFR44/001/2009/en> [accessed 6/10/2011].

⁴² Jurist ‘Nigerian same-sex ban infringes individual rights’ available at <http://jurist.org/hotline/2011/12/damain-ugwu-nigerian-marriage.php> [accessed 26/05/2012].

⁴³ Penal Code Cap. 7:01 Laws of Malawi of 1974, Sections 153 and 156.

⁴⁴ *Rep v Steven Monjeza Soko & Tionge Chimbalanga Kachepa* Criminal Case No 359 of 2009 (unreported). See Amnesty International ‘Gay Malawian Couple Sentenced to 14 Years in Prison’ available at <http://blog.amnestyusa.org/iar/gay-malawian-couple-sentenced-to-14-years-in-prison/> [accessed on 26/05/2012].

⁴⁵ Chirwa DM *Human rights under the Malawian Constitution* (2011) 165.

⁴⁶ Chirwa DM (2011) 165.

minorities. Before examining these rights, it is important to look at the move towards human rights based protection of sexual minorities.

2.4 The move towards the protection of rights of sexual minorities

In so far as the protection of the human rights of sexual minorities is concerned, the early development at the international level came when the United Nations (UN) convened the Fourth World Conference on Women in Beijing, China in 1995. The outcome of the conference was the adoption of a Beijing Declaration and Platform of Action.⁴⁷ The Conference, though aimed at achieving greater equality and opportunity for women, had aspects which indicate that sexual minority rights were considered. First, the presence of homosexual individuals was highly recognized at the Conference in Beijing. At the Forum there was a lesbian venue, the "lesbian tent," and a lesbian and gay march was performed during the conference. Eleven explicitly lesbian or lesbian and gay organizations were accredited to the conference.⁴⁸ The endorsement of lesbian and gay organisations provided these organisations with the platform for the promotion and protection of sexual minority rights. This further provided a forum for these organizations to lobby the UN for the recognition of the human rights of sexual minorities. More importantly, the Beijing plan of action obliged governments to take action to eliminate discrimination in employment based on sexual orientation. The plan of action, adopted during the conference, called on states to provide legal safeguards to prevent persecution on the basis of sexual orientation.⁴⁹

A major development came with the adoption of the Yogyakarta Principles. In 2006, in response to well documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, Indonesia, to outline a set of international principles relating to sexual orientation and gender identity. The result was the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity (hereafter referred to as the Yogyakarta Principles).⁵⁰ The Yogyakarta Principles is a

⁴⁷ The UN Fourth World Conference on Women A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 of 4-15 September 1995, Beijing, China.

⁴⁸ Sanders D 'Getting lesbian and gay issues on the international human rights agenda' (1996) 18 No 1 *Human Rights Quarterly* 78.

⁴⁹ Sanders (1996) 78.

⁵⁰ The yogyakarta principles on the application of international human rights law in relation to sexual orientation and gender identity of 26 March 2007 available at http://www.yogyakartaprinciples.org/principles_en.htm [accessed on 30/11/2011].

universal guide to human rights which affirm binding international legal standards intended as a coherent and comprehensive identification of the obligation with which all States must comply. The principles affirm that the principal obligation of states is to implement human rights. It is significant to point out the relevant principles that form part of the discussion in this thesis.

The principles require all states to repeal penal provisions that criminalise homosexuality on grounds of the right to equality and non-discrimination.⁵¹ 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.⁵² Furthermore, the principles call for the condemnation of torture on grounds of one's sexual orientation.⁵³ It also made clear that the right to religion should never be invoked to justify laws that lead to the denial of equal protection before the law.⁵⁴

As noted by the Human Rights Watch, the Yogyakarta Principles are a milestone in the protection of sexual minority rights, as they present a good standard for governments in treating people whose rights are often violated.⁵⁵ According to Long, director of the Lesbian, Gay, Bisexual, and Transgender Rights Program, these principles, 'firmly grounded in the law and precedent, enshrine a simple idea: human rights do not admit exceptions'.⁵⁶ Accordingly, the Yogyakarta Principles address a broad range of human rights standards and their application to issues of sexual orientation and gender identity.

The position of these guidelines in international law has not been clarified, but like any other guidelines, they may be considered as soft law. Dugard argues that soft laws are usually vague standards that are 'intended to serve as guidelines to states in their conduct, but which lack the status of "law"'.⁵⁷ Accordingly, the above guideline could serve the purpose of guiding courts in interpretation of Constitutions in the context of sexual minority rights.

⁵¹ Yogyakarta principles (2007) principle No.2.

⁵² Yogyakarta principles (2007) principle No.6.

⁵³ Yogyakarta principles (2007) principle No.10.

⁵⁴ Yogyakarta principles (2007) principle No.21.

⁵⁵ Human Rights Watch 'Yogyakarta principles a milestone for lesbian, gay, bisexual, and transgender rights: Experts set out global standards for sexual rights and gender equality' available at <http://www.hrw.org/news/2007/03/25/yogyakarta-principles-milestone-lesbian-gay-bisexual-and-transgender-rights> [accessed on 30/11/2011].

⁵⁶ Human Rights Watch 'Yogyakarta Principles' a Milestone for Lesbian, Gay, Bisexual, and Transgender Rights March 26, 2007.

⁵⁷ Dugard J *International Law: A South African Perspective* (2005) 37-8.

The most recent major development in so far as international law and sexual minority is concerned came from the UN. The UN, more recently, adopted its first-ever resolution in support of sexual minority rights.⁵⁸ The United Nations Human Rights Council (herein referred to as Human Rights Council)⁵⁹ accepted a resolution to ban discrimination, based on sexual orientation, on 17 June 2011. The resolution was presented by a South African representative. Out of the 47 UN's Human Rights Council members, 23 members voted for the resolution, 19 voted against and three members were absent.⁶⁰

In a close but historic vote, the council passed a resolution that condemns discrimination against individuals based on their sexual identity. The resolution requested for the establishment of a panel to review instances of discrimination and commission a report on the challenges faced by the sexual minorities across the world. In addition, the resolution requested the High Commissioner for Human Rights to prepare a study on violence and discrimination on the basis of sexual orientation and calls for a panel discussion to be held at the Human Rights Council to discuss the findings of the study in a constructive and transparent manner, and to consider appropriate follow-up. It also calls for a study to recommend 'how international human rights law can be used to end violence and related human rights violations based on sexual orientation'.⁶¹

The resolution is the first UN resolution ever to bring specific focus to human rights violations based on sexual orientation. It affirms the universality of human rights and notes concern about acts of violence and discrimination based on sexual orientation. This resolution of the Human Rights Council sends an important signal of support to human rights and

⁵⁸ Seventeenth Session of the Human Rights Council, Resolution A/HRC/17/L.9/Rev.1, adopted on 17 June 2011.

⁵⁹ The General Assembly established the UN Human Rights Council by adopting a resolution (A/RES/60/251) on 15 March 2006, in order to replace the Commission for Human Rights. The Human Rights Council (UNHRC) is an inter-governmental body within the United Nations System. The UNHRC is the successor to the United Nations Commission on Human Rights (UNCHR, herein CHR), and is a subsidiary body of the United Nations General Assembly. The council works closely with the Office of the High Commissioner for Human Rights (OHCHR) and engages the United Nations' Special Procedures.

⁶⁰ Voting for the resolution were Argentina, Belgium, Brazil, Chile, Cuba, Ecuador, France, Guatemala, Hungary, Japan, Mauritius, Mexico, Norway, Poland, Slovakia, South Korea, Spain, Switzerland, Ukraine, Thailand, the United Kingdom, the U.S., and Uruguay. Voting against it were Angola, Bahrain, Bangladesh, Cameroon, Djibouti, Gabon, Ghana, Jordan, Malaysia, Maldives, Mauritania, Moldova, Nigeria, Pakistan, Qatar, Russia, Saudi Arabia, Senegal, and Uganda. Burkina Faso, China and Zambia abstained, and Kyrgyzstan and Libya were not present.

⁶¹ Seventeenth Session of the Human Rights Council, Resolution A/HRC/17/L.9/Rev.1, adopted on 17 June 2011.

acknowledges that sexual minorities are amongst those most vulnerable, which indicates decisively that states have an obligation to protect this group from violence.

The resolution comes in a time when same sex sexual orientation continues to be a challenging issue for many nations. Considering that homosexuality is a crime in 76 countries,⁶² and with harassment against gays even more commonplace, this statement by the world's alliance, damning abuses against gays and lesbians, send a resounding message that sexual minority rights is gaining an important and long overdue foothold on the world stage. It suggests that the battle may be shifting in favor of acceptance and tolerance. The landmark resolution affirms that human rights are universal and that people cannot be excluded from protection simply because of their sexual orientation.

At the regional level, the Heads of State of Member States of the African Union (AU)⁶³ have shown their support to sexual minority rights, though not directly. In May 2006, the AU, in the Action Plan, adopted during the summit on HIV/AIDS, tuberculosis and malaria in Abuja, Nigeria,⁶⁴ resolved to adopt principles that 'put people at the centre of HIV and AIDS response, especially vulnerable people, eg men who have sex with men...'.⁶⁵ In addition, the AU has indicated its willingness to fight against stigma and discrimination faced by vulnerable groups in Africa, including men who have sex with men (sexual minorities).⁶⁶ The inclusion of men who have sex with men in the list of vulnerable people affected by HIV is an indication that the AU, albeit indirectly, is considering the rights of sexual minorities

⁶² National Union: '76 nations worldwide still make it a crime to be gay' available at <http://www.nupge.ca/content/3443/76-countries-worldwide-still-make-it-crime-be-gay> [accessed 07/07/2011].

⁶³ On September 9, 1999, the Heads of State and Government of the Organisation of African Unity (OAU) issued a Declaration, the Sirte Declaration, calling for the establishment of an African Union, with a view, inter alia, to accelerating the process of integration in the continent to enable it play its rightful role in the global economy while addressing multifaceted social, economic and political problems compounded as they are by certain negative aspects of globalization, available at http://www.africa-union.org/root/au/aboutau/au_in_a_nutshell_en.htm [accessed on 16/05/2011]. The African Union succeeded the OAU, as established by a Constitutive act adopted at Lome, Togo on 11 July 2000 and entered into force in May 2001 in accordance with Art. 28 of the Constitutive Act.

⁶⁴ The African Union Summit, African common position for the UN General Assembly Special Session on AID 2006, on the theme: Universal Access to HIV/AIDS, Tuberculosis and Malaria Services by 2010, Special Summit of African Union on HIV/AIDS, Tuberculosis and Malaria (ATM), Sp/Assembly/ATM3 (I) Rev.2, Abuja, Nigeria 2-4 May 2006 available at <http://www.chr.up.ac.za/undp/regional/docs/audeclaration3.pdf> [accessed 20/05/2011]. During the summit the AU members adopted the Abuja 2006 Action Plan.

⁶⁵ AU Special Summit on HIV/AIDS, Tuberculosis and Malaria (ATM), Abuja, Nigeria 2006, page 4, para V.

⁶⁶ AU Special Summit on HIV/AIDS, Tuberculosis and Malaria (ATM), Abuja, Nigeria 2006 page 4 para. IV.

Same sex sexual orientation has remained on the margins of and largely outside the consideration of the African Commission.⁶⁷ However, the rights of same sex sexual minorities can be seen to have gained momentum within the Commission when one looks at the concluding observations of the Commission on the periodic reports of some member states.⁶⁸ In one example, the South African Commissioner, Barney Pitso, at the twenty-ninth session of the Commission, questioned the Namibian delegation, during the examination of its state report, whether the statements made by the President and Minister of Home Affairs and other leading politicians, that gays and lesbian individuals should be arrested and thrown to jail, 'incites unlawful arrest and pave the way for ordinary citizens to harass and victimise people for no reason but on their sexual orientation'.⁶⁹ Unfortunately, the question was not answered by the government delegate.

In addition, during the examination of the South African state report in 2005, Commissioner El Hassan referred to the possibility of marriage between people of the same sex. The Commissioner, referring to article 18 (3) of the African Charter,⁷⁰ asked what the position is in South Africa. The Minister of Justice, who headed the South African delegation, expressed the view that the principle of non-discrimination on the basis of sexual orientation and the possibility of same-sex marriage does not derogate from the African Charter. The Minister added that claiming the right to same-sex marriage does not pose a dilemma, and it is for the South African courts to decide the matter on basis of the constitution.⁷¹ It suffice to note that silence by the commissioners over the possibility of same-sex marriage in South Africa shows the Commission's reluctant to engaged with the issue.

Another possibility that may be suggested here is utilising the communication procedure before the Commission. The only communication that has been brought before the

⁶⁷ The African Commission was established by the African Charter on Human and Peoples' Rights (the African Charter) which came into force on 21 October 1986 after its adoption in Nairobi (Kenya) in 1981 by the Assembly of Heads of State and Government of the OAU. Per African Charter of 1981, Art 45, the Commission is charged with ensuring the promotion and protection of Human and Peoples' Rights throughout the African Continent. The Commission has its headquarters in Banjul, The Gambia and held its first meeting in 1987. See Murray R and Viljoen F (2007) 87.

⁶⁸ Under article 62 of the African Charter states are required to submit to the Commission every two years on the legislative and other measures taken to implement the Charter. The procedure is that delegates are sent to represent the state at the oral examination of states reports.

⁶⁹ Murray F and Viljoen F (2007) 93.

⁷⁰ Article 18 (1) of the African Charter states that 'the family shall be the natural unit and basis of society'.

⁷¹ Murray F and Viljoen F (2007) 103.

Commission on violation of sexual minority rights is the case of *Courson v Zimbabwe*.⁷² The communication concerns the legal status of homosexuals in Zimbabwe. The domestic laws of Zimbabwe criminalise sexual contacts between consenting adult homosexual men in private. According to the complainant, this prohibition is currently being enforced in Zimbabwe, encouraged by statements against homosexuals by the President and by the Minister of Home Affairs. The appellant alleges a violation of the following Articles 16, 811, 16, 20, 22 and 24 of the African Charter on the basis of the existence in Zimbabwe of anti-homosexual acts. Unfortunately the communication was withdrawn by the author and the Commission saw no need to continue with it. It suffices to note that a finding of a violation of the Charter relating to sexual orientation could set an important precedent in the African continent.

The limitation of the Beijing plan of action, as well as, the Yogyakarta Principles is that they are not binding on UN member states. Reluctance by the African Commission to engage in the debates of sexual minority rights in Africa is posing serious threat on the rights of this group. The emerging trend in African states clearly indicates the need for African Commission to start to take this issue on board. In the absence of comprehensive and binding specific rights of sexual minorities, the question that arises is whether international human rights law affords any protection to sexual minority rights. This is the question that the next section seeks to address.

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2.5 Fundamental rights and the protection of sexual minorities

The idea of human rights rests on the basic assumption that all human beings have certain basic rights simply because they are human.⁷³ The Universal Declaration of Human Rights, in Article 1, states that ‘all human beings are born free and equal in dignity and rights’. Article 2 of the same document recognises equal treatment for everyone. The African Charter⁷⁴ states,

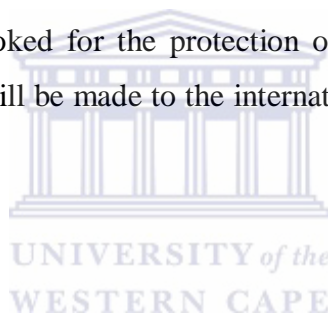
⁷² *William A. Courson v Zimbabwe*, African Commission on Human and Peoples' Rights, Communication No. 136/94 (1995).

⁷³ Heinze E *Sexual orientation: A human right* (1995) 58.

⁷⁴ The African Charter emerged under the aegis of the OAU (since replaced by the African Union). The African Charter is the pivotal human rights instrument on the African Continent. It is a regional human rights instrument that is intended to promote and protect human rights and basic freedoms of all in the African continent. There are two Protocols to the African Charter: one, establishing an African Human Rights Court and another expanding the protection of women's rights in the Charter. The African human rights system is the mechanism that is based on the African Charter on Human and Peoples' Rights for the protection of human rights in the African continent. The African Human Rights system consists of several interrelated branches like the African Union (AU), the African Commission, and the African Peer Review Mechanism.

in its preamble, that freedom, equality, justices and dignity are essential objectives for the achievement of the legitimate aspiration of the African people.⁷⁵ The absence of specific protection raises the question whether sexual minorities can rely on fundamental rights to challenge the criminalisation of individuals because of their sexual orientation.

Fundamental rights relevant for the protection of sexual minorities include, but not limited to the right to life, the right to privacy, the right to equal protection and non-discrimination, and the right to dignity and integrity. These rights are enshrined in, but not limited to, the following UN instruments: the Universal Declaration on Human Rights (hereinafter referred to as Universal Declaration or UDHR),⁷⁶ the International Covenant on Civil and Political Rights (ICCPR)⁷⁷ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁷⁸ These treaties are together referred to as the International Bill of Rights.⁷⁹ These rights are, in addition, recognized and safeguarded in the various regional human rights instruments including the African Charter on Human and Peoples' Rights. The question is whether these rights can be invoked for the protection of sexual minorities. In attempt to answer this question, reference will be made to the international bill of rights and the African Charter.



2.5.1 The right to life

The right to life is enshrined in a number of international treaties. Article 3 of the UDHR provides that '[e]veryone has the right to life, liberty and security of person'. Article 6 of the ICCPR also provides:

'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'⁸⁰

⁷⁵ African Charter on Human and Peoples' Rights preamble, para3-4.

⁷⁶ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)

⁷⁷ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entered into force 23 March 1976, in accordance with article 49.

⁷⁸ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entered into force 3 January 1976, in accordance with article 27.

⁷⁹ The International Bill of Rights provides the basis for the recognition of the rights of all, because they are human beings. See generally the UN human rights Fact Sheet No. 2, GA res. 217 (III) 1948.

⁸⁰ Art. 6 (1) of the ICCPR 1966. Other international instruments aimed at safeguarding the right to life include: Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (1989), Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights (1984), Safeguards Guaranteeing Protection of the Rights of Those

In addition, at the regional level, Article 4 of the African Charter provides:

‘Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.’⁸¹

Article 6 of the ICCPR imposes a duty on states to protect human life against unwarranted action by state agents, as well as, by private persons. The protection against arbitrary deprivation of life, which is explicitly required by the third sentence of article 6 (1) of the ICCPR, is of paramount importance.⁸² The Committee is of the opinion that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the state is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities. It follows, therefore, that failure to protect killing or encouraging killings by state agent or private persons is a violation international human right law.

The importance of the right to life has been widely highlighted. The right to life is the supreme right of the human being.⁸³ It is the most sacrosanct of rights and regarded as inviolable. Accordingly, it is the right from which ‘all other rights flow, and is therefore basic to all human rights’.⁸⁴ It is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation.⁸⁵ Within the African human rights system, the African Commission⁸⁶ has emphasised the importance of the right to life in the following words: ‘The right to life is the fulcrum of all other rights. It is the fountain through which other rights flow, and any violation of this right without due process amounts

Facing the Death Penalty (1984), Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1989), Rome Statute of the International Criminal Court (1998), Convention on the Prevention of Punishment of the Crime of Genocide (1948).

⁸¹ Other regional instruments safeguarding the right to life include African Charter on the Rights and Welfare of the Child (1990).

⁸² UN Human Rights Committee, CCPR General Comment No. 6 (1982) para 3.

⁸³ UN Human Rights Committee, CCPR General Comment No. 6, Article 6 (Right to Life), 30 April 1982, para 1.

⁸⁴ Jayawickrama N *The judicial application of human rights law: National, regional and international jurisprudence* (2002) 243.

⁸⁵ UN Human Rights Committee, CCPR General Comment No. 6 (1982) para 1.

⁸⁶ The African Commission, established under Article 30 of the African Charter, is the treaty body monitoring implementation of the African Charter. Set up in 1987, it is mandated to watch over states’ compliance of the human and peoples’ rights therein contained and to ensure their protection.

to arbitrary deprivation of life'.⁸⁷ Accordingly, it has been submitted that 'the right to life is the first human right, the one which the enjoyment of all the others depends'.⁸⁸

The death penalty might appear to constitute a violation of the right to life but human rights law falls short of insisting that it does. This is a limitation on the right to life. There are a number of situations where states may deprive persons of their lives without breaching international human rights law. The use of the death penalty is one such example:

'In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.'⁸⁹

Human rights law does not prohibit the use of the death penalty as a punishment for crimes but does encourage its abolition and seek to limit its use. Accordingly, death penalty may only be imposed for the most serious crimes, pursuant to a final judgment rendered by a court and providing it is not contrary to the provisions of human rights law. In addition, anyone sentenced to death has the right to seek pardon or commutation of the sentence and death sentence is not to be imposed on anyone below the age of 18 or carried out on pregnant women.⁹⁰ The death penalty otherwise, known as capital punishment, continues to be legitimate and practiced in a number of states around the world.⁹¹

The provision of the right to life, as discussed above, can be used to protect sexual minorities. From the above discussion, it is clear that the right to life imposes on the state a negative obligation to refrain from any infringement of this right or to prevent its possible infringement by a third party. The ultimate scope of the right to life, as set out above, extends to all members of the human family. Thus, no circumstance may justify the taking of human

⁸⁷ *Forum of Conscience v Sierra Leone*, Communication 223/98, Fourth Annual Activity Report, 2000-2001, (2000) AHRLR293(ACHPR 2000), para 20.

⁸⁸ Ouguergouz F *The African Charter on Human Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 91.

⁸⁹ Article 6 (1) ICCPR.

⁹⁰ Article 6 (4) and (5) ICCPR.

⁹¹ Cameroon still maintains the death penalty in its Penal Code, Article 102: Treason and Espionage, Article 111: secession and civil war and capital murder and Article 276: aggravated theft resulting in death. Some states have outlawed the death penalty except for most extreme cases e.g. crimes committed during war. Other states while they may not have outlawed the death penalty are in practice abolitionist by not actually sentencing offenders to death.

life. This suggests that international human rights law provides the legal basis for condemning the executions of sexual minorities by some governments. Therefore, the killing of individuals, based on their sexual orientation, is an infringement of their right to life. This is demonstrated by the increasing and continuous international pressure on states still maintaining death penalty and that, the imposition of death sentence on private sexual practice is clearly incompatible with the international law obligation of states.⁹² The instruments impose on the state a duty to protect sexual minorities for an infringement of their right to life. Failure on the part of the state to provide protection would be regarded as a violation because of its duty under the relevant international instruments.

2.5.2 The right to equality and non-discrimination

At the international level, both the UDHR and the ICCPR encompass the rights of sexual minorities through the equality clause in Article 7 and Article 26 respectively. The UDHR provides:

‘All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.’⁹³

The ICCPR, on its part, provides all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.⁹⁴ The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.⁹⁵ Furthermore, right to equality is recognized and safeguarded in the African regional human instrument. Article 3 of the African Charter provides that every individual shall be equal before the law.

⁹² Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions E/CN.4/2006/53/Add.4 January 7, 2006 mission to Nigeria, para. 37.

⁹³ Article 7.

⁹⁴ Article 26.

⁹⁵ International Covenant on Economic, Social and Cultural Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entry into force 3 January 1976, in accordance with article 27, Art. 3. Also Art. 2 (2) is to the effect that the States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The core of Articles 26 of the ICCPR, as well as, Article 3 of the African Charter, is to prohibit any discrimination and guarantee equal and effective protection against discrimination on any ground. As Jayawickrama has observed ‘[n]o person or group has a right to privileged treatment, nor may a person or group be characterised as inferior and treated with hostility or otherwise subjected to discrimination’.⁹⁶ The notion ‘equal before the law’ does not refer to the substance of the law itself, but to the conditions under which the law may be applied.⁹⁷ In addition, equal protection of the law refers to the content and application of the law. Accordingly, the content and application of the law ‘must be the same for all those who are equally situated’.⁹⁸ It includes the right of all persons to have access to the law and courts and to be treated equally by the law and courts.

Non-discrimination, on its part, is guaranteed in a number of international instruments, as well as, the African Charter. Article 2 of the Universal Declaration⁹⁹ provides that ‘[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. In a similar trait, the ICCPR provides:

‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’¹⁰⁰

The ICESCR provides that ‘[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.¹⁰¹ On its part, the African Charter provides that ‘every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind

⁹⁶ Jayawickrama N (2002) 821.

⁹⁷ Willets DJ ‘International human rights law and sexual orientation’ (1994) 18 *Hasting International and Comparative Law Review* 3.

⁹⁸ Jayawickrama N (2002) 823.

⁹⁹ Universal Declaration, Art. 2.

¹⁰⁰ Article 2 (1) ICCPR.

¹⁰¹ Article 2(2) ICESCR.

such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status'.¹⁰²

The Human Rights Committee has noted that the term 'discrimination' as used in the ICCPR should be understood to imply 'any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms'.¹⁰³ In all, the underlying rationale of Articles 26 and 2(1) is to ensure equal treatment and non-discrimination on listed and unlisted grounds.

The twin principles of equality and non-discrimination, as fundamental rights, are very closely linked in that the right to equality may be said to be a positive expression of non-discrimination.¹⁰⁴ The UN Human Rights Committee emphasised the link and importance of these rights in the following terms:

'Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.'¹⁰⁵

The fundamental rationale of Articles 26 and 2(1) discussed above is to guarantee equal treatment and non-discrimination on listed and unlisted grounds. The question that is raised is whether sexual minorities as a group can be included as a protected group. It has been argued that the term sex 'need not simply be reduced to "gender", that is, to differences between men and women, or, more particularly, to discrimination by men against women. Rather it could include any kind of discrimination arising from sexuality, sexual behavior, or sexual norms'.¹⁰⁶ Pronk has observed that '[i]f the prohibition of discrimination implies that discrimination on the ground of sex is forbidden, then it follows that there can be no such thing as a standard behavioural pattern being attached to gender. Discrimination on the

¹⁰² Article 2 of African Charter.

¹⁰³ UN Human Rights Committee, ICCPR General Comment No. 18: Non-discrimination, adopted at its 948th Meeting, Thirty-seventh Session of the Human Rights Committee, held on 10 November 1989 para 7.

¹⁰⁴ Ouguergouz F (2003) 77.

¹⁰⁵ General Comment 18 (1989), para 1.

¹⁰⁶ Heinze E (1995) 217.

grounds of homosexuality, for that matter, could fall under discrimination on grounds of sex, and could therefore be forbidden'.¹⁰⁷

The interpretation that the provisions of Articles 26 and 2(1) can be regarded as prohibiting non-discrimination based on sexual orientation finds support in the jurisprudence of the Human Rights Committee. This is clear from the case of *Nicholas Toonen v Australia* that was brought before the Human Rights Committee in 1994.¹⁰⁸ In that case, the Human Rights Committee heard a complaint concerning a sodomy law punishing consensual adult homosexual conduct by the criminal code of Tasmania, a state in Australia. The Criminal Code of Tasmania, in sections 122 and 123, criminalised various forms of sexual contact between men, including sexual contacts between consenting adult men in private. The Communication alleges Tasmania's violation of article 2 (equal protection), article 26 (non-discrimination rights) and other rights.¹⁰⁹ In a landmark ruling, the Human Rights Committee concluded that Tasmania's statute criminalising same-sex relations violates Australia's obligation under the ICCPR. The Committee was of the opinion that Tasmania violated the equal protection clause as provided in Article 2 of the ICCPR¹¹⁰. The Committee interpreted these provisions to include prohibition of discrimination based on sexual orientation. According to the Committee, 'the reference to "sex" in Articles 2 paragraph 1, and 26 is to be taken as including sexual orientation'.¹¹¹

More recently, the decision of the Human rights Committee in *Young v Australia*¹¹² has extended the protection of equal treatment before the law to sexual minorities. The applicant, Edward Young, was in a same-sex relationship for many years. His partner was a war veteran and when his partner died, he applied for a pension as a veteran's dependent. He was denied his entitlement because, according to the authorities, the relevant legislations granted pension only to unmarried cohabiting partners of the opposite sex. The Committee held that the

¹⁰⁷ Pronk M 'Homosexuality and International Law' in ILGA (ed) *IGA Pink Book* (1985) 12.

¹⁰⁸ The Human Rights Committee, a body that monitors compliance with ICCPR, is established under the provisions of the ICCPR. States which have signed the Covenant are required to send periodic reports to the Committee on their compliance with the Covenant. If the state has signed the Optional Protocol an individual can send a communication directly to the Committee, alleging that the state is in violation of the Covenant. The Committee will consider the case and give its views on whether a breach has occurred.

¹⁰⁹ *Toonen v Australia*, UN, GA, Human Rights Committee, 15th Session, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (April 4, 1994). See for example Lau H 'Sexual Orientation: Testing the Universality of International Human Rights Law' (2004) 71 *The University of Chicago Law Review* 1700.

¹¹⁰ *Toonen v Australia* supra, para. 9.

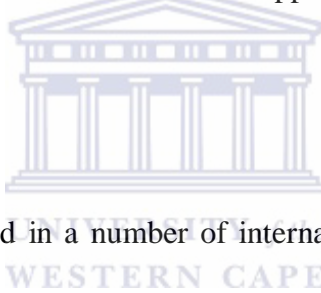
¹¹¹ *Toonen v Australia* supra, para. 8.

¹¹² *Young v Australia*, UN, GA, Human Rights Committee, 78th Session, Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (September 18, 2003).

Australian government was in violation of article 26 of the ICCPR by denying Mr Young pension rights on the basis of his sexual orientation.¹¹³

The decisions of the committee, in the above mentioned cases, the first of their kind in the international tribunal, have created the international basis for the protection of sexual minority rights.

Others, however, have argued that the committee should not have relied on sex to protect sexual minorities. They argue that sexual minority rights could here be protected under the broad term “other status”¹¹⁴ as provided in Article 2 of the UDHR and Article 26 of the ICCPR. This means that the list, as contained in the text of both UDHR and ICCPR, is not exhaustive. Therefore, all forms of discrimination against individuals, based on sexual orientation, can be deemed prohibited by these instruments. The underpinning spirit of equal protection and non-discrimination consists of applying the entire range of human rights law to sexual minorities on an equal basis in as much as it applies to heterosexuals.



2.5.3 The right to privacy

The right to privacy is guaranteed in a number of international instruments. The Universal Declaration provides that:

‘No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.’¹¹⁵

Similarly, Article 17 of the ICCPR, in almost the same words as the UDHR, ensures the right to privacy.¹¹⁶ This right was again espoused and further elaborated in regional instruments, adopted subsequently.¹¹⁷ However, the African Charter does not explicitly protect the right to privacy.

¹¹³ *Young v Australia* supra, para 11.

¹¹⁴ O’flaherty M and Fisher J ‘Sexual orientation, gender identity and international human rights law: Contextualising the Yogyakarta principles’ (2008) 8, No 2 *Human Rights Law Review* 215.

¹¹⁵ Universal Declaration, Art 12. Another conception of “private” appears in the context of Article 18, on freedom of thought, conscience and religion.

¹¹⁶ ICCPR, Art.7.

¹¹⁷ See for example Art. 11 of the American Convention on Human Rights 1969 and Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

The right to privacy is ultimately the 'right to be let alone'.¹¹⁸ Accordingly, the right to privacy allows one to develop into an individual with one's own thoughts, beliefs, hopes, and dreams. It's equally held that the word privacy connotes a necessary alienation that is at the core of all civil liberties.¹¹⁹

The content and nature of the right to privacy is broad and various characterisations emphasise different aspects of the right. However, two aspects stand out: the decisional aspect and the spatial aspect. The decisional aspect 'requires the right to choose the way in which, and the people with whom, one seeks to pursue intimacy'.¹²⁰ Accordingly, Heinze argued that there can be no privacy without the freedom to make choices governing one's intimate relationships with others. This guarantees individual's choice of potential sexual relationships.¹²¹ The spatial aspect, on its part, is illustrated by, but not limited to, the home of individual.¹²² Invasion of the home and other space applies to an actual physical or electronic penetration of a person's private home or other personal space. With regard to the right of privacy, the home and especially the bedroom should be secure against unreasonable searches by the government or should be 'restricted to a search for necessary evidence and should not be allowed to amount to harassment'.¹²³

The Human Rights Committee in the case of *Toonen v Australia*¹²⁴ has indicated that the right to privacy can be used to protect sexual minorities. As indicated earlier, Tasmania, a state within the federal government of Australia, retained as part of its criminal laws, a proscription on sexual conduct done in private between consenting adult homosexuals.¹²⁵ Mr. Toonen, in addition to a claim based on equality and non-discrimination, claimed that his rights to privacy, as granted by Article 17 of the ICCPR, were being violated by the existence of the proscriptions. The Committee explicitly ruled that 'it was "undisputed" that adult consensual sexual activity in private (was) covered by the concept of "privacy"'.¹²⁶ As such,

¹¹⁸ Morris LE and Schwartz AU *Privacy: The right to be let alone* (1962) 1.

¹¹⁹ Steiner HJ et al *International human rights in context: Law, politics, morals, text and materials* (2000) 2ed 735.

¹²⁰ Heinze E (1995) 173.

¹²¹ Heinze E (1995) 174.

¹²² Heinze E (1995) 175.

¹²³ Joseph S Schultz J and Castan *The International Covenant on Civil and Political Rights: Cases, materials and commentary* (2004) 2ed 492.

¹²⁴ *Toonen v Australia*, Communication No. 488/1992.

¹²⁵ Sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code, referring to "unnatural sexual intercourse," "intercourse against nature." and "indecent practice between male persons." *Toonen v Australia* at par. 2.1-2.3.

¹²⁶ *Toonen v Australia*, para 8.2.

by criminalising this conduct, the committee held, Australia had violated its conventional obligation provided by Article 17 of the ICCPR.¹²⁷ As to whether prohibition against private homosexual conduct may be deemed arbitrary, the committee recalls that pursuant to its General Comment 16[32] on article 17, the ‘introduction of the concept of arbitrariness [on the right to privacy] is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the circumstances’.¹²⁸ The verdict of the Committee clearly shows that the Committee relied on the decisional aspect of the right to privacy in order to uphold a violation of the right.

Although the African Charter does not explicitly protect the right to privacy, an inference can be drawn that by ratifying the ICCPR, African states have bound themselves to the protection of the rights to privacy. The African Commission and African Court when interpreting provisions relating to the protection of sexual minorities rights under the African Charter should follow the approach taken in *Toonen and Young*.¹²⁹ Accordingly, the African Commission has an inherent duty to interpret the African Charter in the light of international human rights jurisprudence as required by Article 60 and 61.¹³⁰ In light of the foregoing, it can be said that the African system also protects the rights to privacy of sexual minorities.

From the foregoing, it is clear that the right to privacy can be used to protect the right to engage in consensual same-sex conduct without government or any other interference. According to Ermanski:

‘The scope of the right to privacy in these instruments is critical for gay people. If the right to privacy is interpreted broadly to provide a realm of personal autonomy free from unjustified state intrusion, decisions about personal and sexual relationships could arguably fall within that realm. Such a broad interpretation of the right to privacy could provide a legal basis for protecting gay people from state intrusion.’¹³¹

¹²⁷ *Toonen v Australia*, para 9.

¹²⁸ CCPR General Comment 16[32] on article 17 (Right to Privacy)

¹²⁹ Article 2 of the African Charter .

¹³⁰ Heyns C ‘Civil and political rights in the African Charter’ in Evans M and Murray R (eds) *The African Charter on Human and People’s Rights’ The system in practice, 1986-2000*, (2002) 143.

¹³¹ Ermanski RA ‘A right to privacy for gay people under international human rights law’ (1992) 15 *International and Comparative Law Review* 150.

In sum, according to Gonzales, the underlying rationale is that the ‘human rights obligations to respect the privacy of the individual have far-reaching application’¹³² which make important legal tools available for sexual minorities.

2.6 Conclusion

As indicated above, the lack of explicit and binding rights of sexual minorities has meant reliance on progressive reading into existing human rights provisions, namely the right to life, the right to privacy and freedom from discrimination. These international human rights provisions can be used to protect sexual minorities. A great deal of evidence suggests that avenues for the protection of sexual minority rights exist not only at the international level but also at the regional level.

The criminalisation and attempt at re-criminalisation of individuals based on their sexual orientation in African clearly indicates the need for the African human rights mechanism to take sexual minority rights on board. Given, however, that there has been no mention of sexual orientation by the African Charter so far, the best avenue at this stage at the African human system to lobby on this issue is the African Commission on Human and Peoples’ Rights. The decision of the Human Rights Committee in Toonen case and others as seen above, are great examples to be followed especially by the African Commission. The Yogyakarta principles, though considered as soft law and not binding on member states, serves as reference and guiding principles to the enforcement of the rights of same sex individuals.

¹³² Gonzales JT ‘International legal protection for homosexual sexual conduct’ (1997) 72 *Philippine Law Journal* 18.

CHAPTER THREE

THE PROTECTION OF SEXUAL MINORITY RIGHTS IN CAMEROON

3.1 Introduction

In the previous chapter, it has been established that a plethora of international human rights instruments can be used to protect the rights of sexual minorities. However, these treaties and mechanisms are meaningless if not fully implemented at the domestic level. This chapter draws on the protection offered to sexual minorities in international human rights law and discusses the situation of sexual minority rights in Cameroon. It commences the discussion by outlining the position of the law of Cameroon on same sex sexual conduct. It specifically focuses on the criminalisation of individuals based on their sexual orientation. In order to achieve its objective, it first seeks to determine whether Cameroon has ratified international human rights treaties and the place of these treaties under its domestic law. It examines how the constitution and laws of Cameroon have given effect to the international obligation of Cameroon in so far as the protection of sexual minority rights is concerned. The domestic system will be measured against the background of Cameroon's international obligation and determined whether or not Cameroon is respecting its international obligations.

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3.2 Law criminalising same-sex sexual conduct

The Penal Code of Cameroon¹³³ criminalises same-sex sexual conducts between consenting adults. Section 347a provides:

‘Whoever has sexual relations with a person of the same sex shall be punished with imprisonment, ranging from six months to five years and with a fine of between 20,000 and 200,000 CFA Francs.’

Authorities in Cameroon often rely on this law to prosecute individuals that are accused of homosexuality. The most publicised case of Mbede Roger Jean- Claude is but one example.¹³⁴ Mr. Mbede sent an acquaintance a text message and arranged to meet him on

¹³³ Cameroon Penal Code Law No 67/LF/1 of 12 June 1967, as amended by Ordinance No 72/16 of 1972.

¹³⁴ *The People v Mbede Roger Jean- Claude* 28/2011 YCFI (unreported). See also letter of three NGOs in Cameroon to the Minister of Justice, General Delegate of Security and Secretary of State for Defense, Human Rights Watch ‘Appeal to Cameroon’s top leaders to overturn conviction of Roger Jean-Claude Mbede’ available

March 2, 2011. After arriving at the designated meeting place, he found his acquaintance in the company of policemen, who took him into custody. When questioned by the police, Mbede allegedly told them that he is a homosexual. Mbede was held for seven days at the Gendarmerie du SED Yaoundé before he was charged and transferred to Yaoundé Central Prison.¹³⁵ Mbede made three appearances at the Court of First Instance in Yaoundé and, on April 28, he was found guilty of homosexuality and sentenced to 36 months imprisonment.¹³⁶

A further problem associated with this law is that the authorities rely on it to arrest and eventually prosecute individuals simply based on their physical appearance. In July 2011, Jonas and Francky were arrested when returning from a bar because they "appeared feminine."¹³⁷ They were held for seven days before being charged. During detention, they were beaten and were subjected to anal examinations through which the police were able to secure a confession. They were later charged with homosexuality under section 347 and imprisoned.

In a nutshell, the provisions of the Penal Code have rendered sexual minorities vulnerable. This is a major problem to homosexual individuals as their rights especially the right privacy, equality and non-discrimination are at stake. Sexual minorities in Cameroon have no other choice but to practice their sexuality in the closet. The question that arises here is whether international treaties affording protection to sexual minorities, as discussed in the previous chapter, are enforceable in Cameroon. In an attempt to answer this question, this chapter, in the next section, will explore the status of human rights treaties in Cameroon. Another question that remains unresolved here is whether this law is consistent with the Constitution.

at <http://www.hrw.org/news/2011/05/17/appeal-camerouns-top-leaders-overturn-conviction-roger-jean-claude-mbede> [accessed 29/08/11].

¹³⁵ This raise questions of prolonged detention without trial.

¹³⁶ After the sentence, Barrister Nkom in a press conference said 'the fear and stigma attached to homosexuality is such that the police use the mere existence of the law to trap individuals with impunity. And courts in Cameroon convict those accused even in the absence of evidence'. See press release, Protection line 'Roger Jean-Claude Mbede, Cameroonian homosexual: sentenced to prison under law that criminalizes consensual same sex relations' available at <http://www.protectionline.org/Roger-Jean-Claude-Mbede.html> [accessed 29/08/2011]. Immediately after the judgment, international condemnation and criticism have increased on Cameroon for its position on sexual minority rights. Amnesty International, an international organisation working for the protection of human rights and fundamental freedoms, considered Mbede to be 'a prisoner of conscience, imprisoned solely because of his perceived sexual orientation'. See Amnesty International 'Prisoner of conscience, imprisoned for homosexuality' available at <http://www.amnestyusa.org/our-work/cases/cameroon-jean-claude-roger-mbede> [accessed 29/08/11].

¹³⁷ African Spotlight 'Cameroon: Men arrested for looking gay' available at <http://africanspotlight.com/2011/08/cameroon-men-arrested-for-looking-gay/> [accessed 04/11/2011].

3.3 The status of international treaties in Cameroon

Cameroon has acceded to and ratified a number of treaties that are relevant for the protection of sexual minorities. It acceded to the ICCPR on 27 September 1984. Cameroon has, in addition, ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),¹³⁸ the Convention on the Rights of the Child (CRC),¹³⁹ the International Convention on the Elimination of all Forms of Racial Discrimination (CERD),¹⁴⁰ and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).¹⁴¹ At the regional level, Cameroon has acceded to the African Charter on Human and Peoples' Rights¹⁴² and the African Charter on the Rights and Welfare of the Child.¹⁴³

The efficiency of international (human rights) treaties depends essentially on the implementation of their provision in national laws. The international system seeks to persuade or pressure states to fulfil their obligation through one or another method, either observing national laws that are consistent with the international norms, or making the international norms themselves part of the national legal order.¹⁴⁴ This is generally called domestic internationalisation of human rights treaties. As far as the status of treaties in national law is concerned, two different situations have to be distinguished.

On the one hand, we have states with a "monist system" that practice a technique referred to as "automatic incorporation".¹⁴⁵ In states that follow this system, ratified treaties become national law by virtue of ratification. Thus, the rights provided by treaties are applied by the courts and administrators immediately after ratification. The main responsibility for ensuring the observance of the treaties in domestic law lies with the legislature and the judiciary.¹⁴⁶ In the first place, it is the legislature that has to ensure that national legislation is in conformity with the rules of the treaties. Secondly, it is for the national judiciary to take the treaties seriously and to use them in the interpretation of statutory laws. It is argued that a correlation appears to exist between legislative consent to ratification and automatic incorporation.

¹³⁸ Acceded to on 26 June 1987.

¹³⁹ Ratified on 25 September 1990.

¹⁴⁰ Ratified on 12 December 1966.

¹⁴¹ Ratified on 6 June 1983.

¹⁴² Acceded to on 20 June 1989.

¹⁴³ Acceded to on 5 September 1997.

¹⁴⁴ McCorquodale R and Dixon M *Cases and materials on international law* 4 ed (2003)104.

¹⁴⁵ Steiner HJ and Alston P *International human rights in context: Law, politics and morals* 3 ed (2008) 1096.

¹⁴⁶ Steiner HJ and Alston P (2008) 1097.

Consent by at least one house of the legislature is generally required before the executive may ratify treaties. The monist theory, in effect, hold that international law and domestic law are part of the same legal system, but that international law is higher in perspective value than national law.¹⁴⁷

On the other hand, we have states with a “dualist approach” that practice a technique referred to as “legislative incorporation”.¹⁴⁸ In states with a dualist system, the provisions of ratified treaties do not become national laws unless they have been enacted by legislation following a legislative procedure. According to this approach, ratified treaties have to be transformed into domestic law. Thus, a parliamentary act approves the treaty and authorizes the deposit of the instrument of ratification with legislative body, thereby paving the way for the treaty provisions to be applicable at the domestic level. It has been argued that ratification of treaties, under this approach, is frequently a purely executive act not requiring prior approval of the legislature, but express legislative enactment of treaty provisions is necessary before they become domestic law.¹⁴⁹ The legislative body may refuse to enact legislation implementing a treaty. In this case, the provisions of the treaty do not become national laws. The dualist theory, in effect, is of the position that international law and domestic law are separate and distinct legal systems which operate on different levels and that international law can only be enforced in national law if it is incorporated and transformed.¹⁵⁰

From the ongoing debate, the status of treaties in national law is determined by two different constitutional techniques referred to as “automatic incorporation” and “legislative incorporation”. However, it is clear that:

‘[i]nternational law does not dictate that one or the other method of legislative or automatic incorporation must be used. Either is it satisfactory assuming that the norms of treaties effectively become part of national laws. Conversely, neither method is *ipso facto* satisfactory under international law, if, in practice, the norms of ratified treaties are not applied by national judges and administrators. The method by which treaties become national law is a matter in principle to be determined by the constitutional law of the ratifying state and not a matter ordained by international law.’¹⁵¹

¹⁴⁷ Bederman DJ *International law framework* (2001) 151.

¹⁴⁸ Wallace RM and Olga MO *International law* (2009) 38.

¹⁴⁹ Steiner HJ and Alston P (2000) 1001.

¹⁵⁰ Bederman DJ (2001) 152.

¹⁵¹ Steiner HJ and Alston P (2008) 1096.

It is equally argued that, 'international law no longer constitutes a sphere of law tightly separate and distinct from the sphere of the law of national legal system, rather international law has made a significant inroads into national legal systems, piercing their armour'.¹⁵²

Based on this preposition, the question that remains to be resolved here is the status of human rights treaties in Cameroon. The legal system of Cameroon, like most countries in Africa, is a relic of the colonial era. However, it is unique in that it consists of two distinct and often conflicting legal systems, the English common law and the French civil law, operating in some sort of tenuous coexistence. This makes Cameroon one of the few examples of a dual legal system in the world.¹⁵³ The Cameroonian legal system can, therefore, be described as bi-jural in which French law applies in the eight French speaking provinces and English law substantially applies in the two English speaking provinces, although most of the laws that are now being introduced are essentially based on French legal concepts to unify the two systems.¹⁵⁴

The authority to negotiate and ratify treaties and international agreements is vested in the President of the Republic. However, treaties and international agreements enlisted within the competence of the legislature must be submitted to the Parliament for it to authorise their ratification by the President.¹⁵⁵ The Constitution catalogues the areas within which Parliament is competent to legislate. These include laws relating to the fundamental rights, guarantees and obligations of the citizen, the laws governing public freedoms, labour legislation, trade union legislation and laws on social security and insurance. Where an international treaty or agreement relates to any of the above, the President of the Republic can ratify such treaty or agreement only after prior authorization from Parliament.¹⁵⁶

The relationship between international human rights treaty and national law in Cameroon is governed by Part VI of the 1996 Constitution. Article 5 of the Constitution states that duly approved or ratified treaties and international agreements shall, following their publication, override national laws. The provision of Article 45 clearly imply that Cameroon subscribes to

¹⁵² Cassese A *International law* (2001) 166.

¹⁵³ Anyangwe C *The Cameroonian judicial system* (1987) 59.

¹⁵⁴ Fombad CM 'Researching Cameroonian law' (2007) *New York University School of Law*.

¹⁵⁵ The Cameroon Constitution, Law No. 96/6 of 18 January 1996 as amended, Art. 43.

¹⁵⁶ Article 26 of the 1996 Constitution.

the monist approach, which provides that ratified treaties form part of national law, without any further need for such treaties to be domesticated by the legislative body.¹⁵⁷

It is argued that Cameroon's understanding of the rights provided in the treaties embody the principles of practical reason already incorporated in the bill of rights.¹⁵⁸ In a similar vein, it is argued that human rights principles do not require confirmation by legislatures, nor require transformation to become domestically effective in Cameroon.¹⁵⁹ It is perhaps based on this understanding that the Permanent Mission of Cameroon to the United Nations stated that 'the main conventions on human rights where Cameroon is part in the international level occupy an important place in the order of local judicial norms'.¹⁶⁰ Thus, authorities in Cameroon are therefore expected to familiarize themselves with understanding of the provisions of these human rights treaties, in order to effectively guarantee individuals the rights enshrined by those treaties. Accordingly, any law that deprives individuals of human rights as set in the international and regional treaties given effect to by the constitution is unconstitutional.

The implication of this for sexual minorities is that the rights as enshrined in the treaties do not need any law for their implementation. This implies that sexual minorities can rely on the fundamental human rights endorsed in a number of international and regional treaties, as discussed in the previous chapter, to challenge the provisions of the penal code that criminalizes same sex sexual conduct amongst consenting adults. Thus, homosexual individuals in Cameroon can rely on the provisions of international and regional human rights laws in defending their rights. The continuous existence and implementation of section 347 of the Penal Code makes Cameroon's compliance with the obligation of the above ratified human rights treaties questionable.

¹⁵⁷ McCorquodale R and Dixon M (2003) 109.

¹⁵⁸ Chofofor CA 'Challenges of incorporating and enforcing a bill of rights in the Cameroon Constitution' (2008) 2 *Cameroon Journal on Democracy and Human Rights* (CJDHR) 28.

¹⁵⁹ Kamga DS 'Realising the right to primary education in Cameroon' (2011) 11 *African Human Rights Law Journal* 187.

¹⁶⁰ Note Verbal of The Permanent Mission of Cameroon to the United Nations addressed to the Secretariat of the United Nations, UNGA, A/63/816, April 9, 2009.

3.4 The Constitution of Cameroon and sexual minorities

The Constitution of Cameroon¹⁶¹ does not have a Bill of Rights. The Constitution, rather than outlining a well structured Bill of Rights, mainly enlists a number of human rights in the preamble. The question, however, remains whether the Constitution of Cameroon provides protection to sexual minorities.

3.4.1 Fundamental rights and sexual minorities

The Constitution of Cameroon, unlike the constitutions of many African countries,¹⁶² does not have a bill of rights. The Constitution has no human rights charter. Nor is a specific chapter of the Constitution dedicated to the protection of human rights. The preamble to the Constitution is, however, filled with copious incorporation of international human rights treaties. The preamble to the constitution states that the people of Cameroon:

[A]ffirm their attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of the United Nations, The African Charter on Human and Peoples' Rights and all duly ratified International Conventions relating thereto...¹⁶³

The preamble to the Constitution further provides 'every person has a right to life, to physical and moral integrity and to humane treatment in all circumstances. Under no circumstances shall any person be subjected to torture, cruel, inhumane or degrading treatment'. It provides 'the privacy of all correspondence is inviolate. No interference may be allowed except by virtue of decisions emanating from the Judicial Power'. Finally, it provides that 'all persons shall have equal rights and obligations'.

A question arises whether sexual minorities can rely on the preamble to protect their rights. This raises the question as to whether the preamble to the constitution is, in the first place, enforceable. This is the focus of the next section.

¹⁶¹ The Constitution Cameroon Law No. 96-6 of 18 January 1996 to amend the Constitution of 2 June, 1972.

¹⁶² See for example the Constitution of South Africa 1996. For detail on how African Constitutions have dealt with human rights in their bills of rights see Heyns C *Human rights law in Africa* (2004).

¹⁶³ Para 4 of the preamble to the Cameroon Constitution 1996.

3.4.2 The status of the preamble

The endorsement of rights in the preamble to the Constitution has provoked a debate, especially amongst civil jurists and scholars, whether such stipulations in the preamble create legally enforceable rights. There is a general debate on the status and enforceability of rights in the preamble to a Constitution.

On the one hand, it is often argued that a preamble is not enforceable and has only a minor impact. According to Orgad, the principles in a preamble 'are not regarded as integral part of the law and do not create any rights or have binding interpretative power'.¹⁶⁴ The opinion here is a preamble is meant to have a 'ceremonial-symbolic' function. Based on this reasoning, the preamble, Kent, citing Plato, asserted, 'is designed to convince the people why laws are morally good'.¹⁶⁵ It is provided that 'the preamble is a bland, largely inconsequential collection of sentiments that could have only a limited and sporadic relevance to the array of constitutional problems'.¹⁶⁶ This argument seems to suggest that a preamble should not be ascribed the same legal effect as operative provisions of the Constitution. In Cameroon, similar sentiments are held among some academic. Some argue that the preamble provides contextual guidance and contains mere principles, and therefore not justiciable.¹⁶⁷ It has equally been maintained that the stipulations in the preamble have only moral force.¹⁶⁸

On the other hand, some argue that a preamble is legally-binding and can serve as independent sources for rights that are not mentioned in the body of the constitution.¹⁶⁹ According to this line of argument, the preamble has two functions. The first role is the interpretive function. Based on this role, the preamble embodies a guiding framework for constitutional interpretation.¹⁷⁰ For example, the South Africa Constitutional Court confirmed the preamble's status as a guide when interpreting the Bill of Rights. It provides 'while the

¹⁶⁴ Orgad L 'The preamble in constitutional interpretation' (2010) 8 *International Journal of Constitutional Law* 9.

¹⁶⁵ Kent R 'The uses and audiences of preambles in legislation' (2001) 47 *MCGILL Law Journal* 138.

¹⁶⁶ Mark M, Amelia S and George W 'First words: The preamble to the Australian Constitution' (2001) 24 *University of New South Wales Law Journal* 391.

¹⁶⁷ Afuba MD 'The Constitutional Protection of Civil and Political Rights in Cameroon' (2006) 3 *University of Botswana Law Journal* (2006) 82.

¹⁶⁸ Fogam PK 'Media and the law' in Malcolm FM (ed) *Handbook for African journalists* (1996) 2 ed 86-89.

¹⁶⁹ Orgad L (2010) 12.

¹⁷⁰ Orgad L (2010) 10.

Preamble is not an independent source of rights, it is an inspiration for those rights'.¹⁷¹ In Macedonia, the Supreme Court of the Republic upheld restrictions on the freedom of political association because certain activities were perceived as contrary to the Preamble.¹⁷² In Ukraine, the Supreme Court invoked the Preamble in order to declare the constitutionality of the use of Ukrainian as the state language, an act requiring its use by central and local government agencies.¹⁷³ Secondly, a preamble has a substantive function. According to this argument, the principles in a preamble are considered as part and parcel of the Constitution and are legally binding. According to Schmitt, 'it is a typical error of prewar-era state theory to misconstrue' a preamble as 'mere statement'.¹⁷⁴

In Cameroon, the Constitution clearly provides that 'the preamble shall be part and parcel of the Constitution'.¹⁷⁵ Article 65 effectively grants the preamble the same status as the provisions of the Constitution. This renders the rights and obligations, as stipulated in the preamble, legally enforceable. The preamble can serve as independent sources for rights that are not mentioned in the body of the Constitution. Based on this reasoning therefore, the fundamental rights to life, privacy, equality and non-discrimination, as contained in ICESCR, CRC and the African Charter, all ratified by Cameroon, and enlisted in the preamble to the 1996 Constitution are directly applicable and self-executing in Cameroonian domestic law. Thus, the rights to life, privacy, equality, non-discrimination and any other right are all thereby recognised as constitutionally protected rights.

The implication of this argument to sexual minorities is that the fundamental rights to life, privacy, equality and non-discrimination can be used to protect individuals against criminalisation of same-sex and discrimination. But this is provided that the rights, as provided in the preamble, can be interpreted to extend protection to sexual minorities. This requires one to determine the nature and scope of the rights provided in the preamble.

¹⁷¹ Du Plessis LM 'The evolution of constitutionalism and the emergence of a constitutional jurisprudence in South Africa: An evaluation of the South African Constitutional Court's approach to constitutional interpretation' (1999) 62 *Saskatchewan Law Review* 314- 15.

¹⁷² Orgad L (2010) 11.

¹⁷³ Orgad L (2010) 11.

¹⁷⁴ Schmitt C *Constitutional theory* (2008) 77.

¹⁷⁵ Article 65 of the 1996 Constitution as amended.

3.4.3 Delineating the Content of fundamental rights

In Cameroon, there is a general limitation in terms of understanding the content of rights. This is because the judiciary, in a number of instances, has failed to define the content of rights. In addition, there is generally a lack of jurist and scholarly opinion on the content of rights as provided in the preamble to the Constitution. Even in instances where courts have found a violation of human rights, the respective courts make reference to the rights provided in the preamble to the Constitution without establishing the content of the right in question. In *Richard Tikum and 20 Others v Ngwan Abanyamsick*,¹⁷⁶ the applicants sued the traditional ruler of Guzang village at the Mbengwi High Court for breach of their constitutional rights to freedom of expression, association and the use of property. The High Court simply ruled that the applicants' constitutional rights to freedom of expression, association and property had been violated. In *The People v Nya Henry and 4 others*,¹⁷⁷ five accused persons, who were members of the Southern Cameroons National Council (SCNC), a separatist movement in Anglophone Cameroon, were arrested and charged before a trial magistrate for the offences of violating a “prefectoral order” and unlawful assembly. They were granted bail by the trial magistrate but the prosecutor refused to release them. They were later brought before the Bamenda Court of First Instance. The court, in determining the presumption of innocence, simply provided that:

‘This presumption of innocence is not only a constitutional right but also a human right. And in this wise our constitution again.... Affirms our attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights...’¹⁷⁸

The judiciary did not find it necessary to define the content of presumption of innocence. The judiciary simply makes reference to the rights provided in the preamble. Accordingly, it is argued that:

‘Even in cases where the evidence adduced revealed instances of egregious violations of civil and political rights, the courts have hardly discussed the nature of the rights in issue or referred to the state's obligation to respect, protect and promote human rights.’¹⁷⁹

¹⁷⁶ *Richard Tikum and 20 others v Ngwan Abanyamsick*, Suit No. MBHC/17M12000 (unreported).

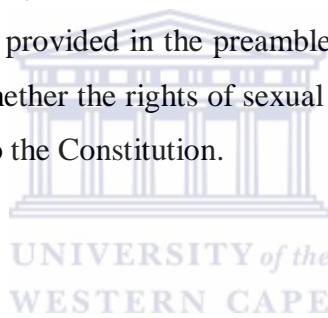
¹⁷⁷ *The People v Nya Henry and 4 others* (2005)1 CCLR (unreported).

¹⁷⁸ *The People v Nya Henry and 4 others* (2005)1 CCLR. pp. 61-66.

¹⁷⁹ Afuba MD (2006) 88.

This implies that a violation of the rights provided in preamble to the Constitution will survive without necessarily defining the nature and scope of the rights.

It is submitted that the nature and scope of the rights can be determined by making reference to the interpretation of similar rights at the international level. This is based on the grounds that the preamble to the Constitution affirms its attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of the United Nations, The African Charter and all duly ratified International Conventions relating thereto. This is further compounded by Article 45 of the Constitution which places duly ratified treaties and international agreements above national laws. This is also one of the implications of a monist approach which, as discussed above, gives international laws precedent, making them part of national laws without further interpretation. Thus, in order to determine whether the rights of sexual minorities are constitutionally protected rights, the interpretation of rights, as discussed in the preceding chapter, at the international level is considered in order to give effect to the content of the rights provided in the preamble. It is based on this understanding that we will seek to determine whether the rights of sexual minorities can be protected by the rights provided in the preamble to the Constitution.



3.4.3.1 The right to life

The right to life could be used to protect sexual minorities. The preamble to the Constitution provides:

‘every person has a right to life, to physical and moral integrity and to humane treatment in all circumstances.’¹⁸⁰

The right to life, as discussed in the previous chapter, has been interpreted widely to include the ‘inherent right to life’.¹⁸¹ The term ‘inherent’ emphasise the supreme character of the right to life, ‘a right which is not conferred on the individual by society or by the state, but which inheres by reason of one’s humanity’.¹⁸² Accordingly, the state cannot take away one’s right to life. Neither can the right to life be waived, surrendered or renounced by anyone. In

¹⁸⁰ Preamble to the Cameroon Constitution of 1996.

¹⁸¹ UN Human Rights Committee, CCPR General Comment No. 6 (1982) para 5.

¹⁸² Jayawickrama N (2002) 256.

addition, it is the duty of the state to protect human life against unwarranted action by state agents as well as by private persons.

Based on this analysis, the killing of individuals on the basis of their sexual orientation, by the state or non-state actors, would be in violation of Cameroon's international obligation. The implication of this to sexual minorities in Cameroon is that homosexual individuals can rely on this right to challenge acts of states and non-state actors that violate their existence as human beings. The state also, based on this right, is under the obligation to protect same sex sexual individuals against acts of state and non-state actors threatening their right to life.

3.4.3.2 The right to privacy

The preamble to the Constitution provides that 'the privacy of all correspondence is inviolate'.¹⁸³ The preamble further provides that 'the home is inviolate. No search may be conducted except by virtue of the law'. The preamble to the Constitution fails to provide for a general right to privacy. It mainly provided for the right to privacy in limited instances, namely in relation to correspondence and home. However, some jurists are of the opinion that the Constitution affords individuals, as well as sexual minorities in Cameroon, the right to privacy based on interpretation of international human rights norms.

'An ideal interpretation of Article 17 would oblige us to hold and believe that the home of an individual is inviolate, therefore a man's homosexual behaviour, especially when committed in private, cannot be held to be an offence under Section 347 of the CPC—but a human rights violation against his privacy, against his person, and even against the quietude of his actions.'¹⁸⁴

As discussed in the previous chapter, in so far the right to privacy is concerned, two aspects stand out: the decisional aspect and the spatial aspect.¹⁸⁵ With its prohibition of the invasion of the home, the preamble to the Constitution of Cameroon, it seems, is concerned with the spatial aspect of the right to privacy.

¹⁸³ Preamble to the Cameroon Constitution of 1996.

¹⁸⁴ Fomeni JA 'The criminalization of homosexuality in Cameroon violates international human rights laws' available at <http://www.transcend.org/tms/2012/03/the-criminalization-of-homosexuality-in-cameroon-violates-international-human-rights-laws/> [accessed 21/052012].

¹⁸⁵ See Section 2.5.3 for the difference between a decisional aspect and a spatial aspect.

In the case of *Toonen v Australia*, discussed in the preceding chapter, the Human Rights Committee explicitly ruled that “it was “undisputed” that adult consensual sexual activity in private (was) covered by the concept of “privacy””.¹⁸⁶ As such, by criminalising this conduct, the committee held, Australia had violated its conventional obligation provided by Article 17 of the ICCPR. Accordingly, same sex sexual individuals in Cameroon can rely on this right and the decision of the Committee to challenge the constitutionality of the law criminalising same sex conducts.

3.4.3.3 The right to equality and non-discrimination

The preamble to the Constitution provides for the right to non-discrimination and equality. The preamble, like Article 2(1) of the ICCPR, extends the rights provided in the Constitution to all ‘without distinction as to race, religion, sex or belief, possesses inalienable and sacred rights’.¹⁸⁷ In addition, the preamble provides for the right to equality. It states that ‘all persons shall have equal rights and obligations’.¹⁸⁸

The question is whether sexual minorities as a group can be included as a protected ground under the Constitution. The fact that the preamble to the Constitution does not specifically prohibit discrimination based on sexual orientation does not explicitly mean that its text does not directly protect this group. As discussed in the previous chapter, it is argued that the term “sex” ‘need not simply be reduced to “gender”, that is, to differences between men and women, or, more particularly, to discrimination by men against women. Rather it could include any kind of discrimination arising from sexuality, sexual behavior, or sexual norms’.¹⁸⁹ As indicated in the previous chapter, the Human Rights Committee in *Young v Australia* has interpreted “sex” in Articles 2 paragraph 1, and 26 of the ICCPR to include prohibition of discrimination based on sexual orientation.¹⁹⁰ The Committee extended the protection of equal treatment before the law to sexual minorities.

The implication of this is that sexual minorities in Cameroon can rely on this right and the decision of the Human Rights Committee to challenge the criminalization of individuals

¹⁸⁶ *Toonen v Australia*, para 8.2.

¹⁸⁷ Preamble to the Cameroon Constitution of 1996.

¹⁸⁸ Preamble to the Cameroon Constitution of 1996.

¹⁸⁹ *Heinze E* (1995) 217.

¹⁹⁰ *Toonen v Australia* supra, para. 8.7.

based on their sexual orientation. In addition, the existence of laws discriminating in Cameroon against individuals based on their sexual orientation questions the international obligation of Cameroon.

3.5 Challenging the constitutionality of the law criminalising homosexuality

From the forgoing, it is clear that the Constitution provides for an indisputable regime of human rights protection in its preamble for sexual minorities. These include, as established above, the right to life, the right to privacy and the right to equality and non-discrimination. Thus, the existence of laws criminalising homosexual conduct would be in violation of the Constitution and Cameroon's international obligation. This begs the question whether the constitutionality of laws criminalising same sex conduct can be challenged. To achieve this objective, the Constitutional Council, that has the power to rule on the constitutionality of laws, will be considered. The focus of this section, therefore, is to discuss the Constitutional Council as a mechanism to guarantee the rights of sexual minorities.

The jurisdiction to interpret the constitutionality of laws in Cameroon is vested with the Constitutional Council.¹⁹¹ The issue at stake here is whether sexual minorities can approach the Constitutional Council to challenge the constitutionality of laws. To resolve this issue, the Council will be examined in light of the following criteria: independence, accessibility and competence. But first, the composition of the Council is worth mentioning.

The Council is composed of two types of members. First, eleven members are appointed for a non-renewable term of nine years, chosen from among personalities of established professional skills, who are of 'high moral integrity and proven competence'.¹⁹² Article 51 (2) of the Constitution provides that 'members of the Constitutional Council shall be appointed by the President of the Republic'. The article states that, amongst the eleven members, three, including the chairman, are designated by the President of the Republic, three by the President of the National Assembly, after consultation with the Bureau, three by the President of the Senate, after consultation with the Bureau and two by the Council of the

¹⁹¹ The Cameroon Constitution of 1996, Art 46 and 47 (1). The details of the organisation and functioning of the Constitutional Council are contained in Law No. 2004/004 of April 2004.

¹⁹² Article 51 (1) of the 1996 Constitution. See also Art. 7(1) of Law No. 2004/004 of April 2004.

Judiciary. Secondly, in addition to the eleven members, all ‘former Presidents of the Republic shall be *ex-officio* members of the Constitutional Council for life’.¹⁹³

According to article 46 of the Constitution, the Council has two functions. The Council has, as its primary function, to rule on the constitutionality of laws. The other function of the Council is to regulate the functioning of states institutions, including settling conflict of powers between the State and the regions and between the regions. Thus, the Council is the competent body to rule on the constitutionality of laws criminalising same sex conduct.

The composition and functioning of the Council raises serious doubts about the Council’s independence, impartiality and effectiveness in discharging its duties, especially ruling on a law that violates the rights of a minority group. A major handicap surrounding the Council is the mechanism for appointing its members. The Constitution, it seems, has vested on the President of the Republic excessive power over the appointment of members of the Council. This raises serious doubts on whether it can operate independently and decide an issue affecting the ordinary citizens against the wishes and interests of the President. It has been contended that ‘nothing prevents the President of the Republic from appointing stooges and other associates whom he can easily manipulate’.¹⁹⁴ It is therefore difficult to see how a body that is likely going to be composed of persons appointed because of their political loyalty can act independently, impartially and effectively.¹⁹⁵

More importantly, for our purpose, another doubt surrounding the Council as an effective institution vested with power of ensuring the constitutionality of laws is the ability of individuals to approach the Constitutional Council to challenge the constitutionality of a law that violates their rights. Generally, there are two main ways that an institution charged with controlling constitutionality of laws can entertain a matter before it. One way is to make it open and available to all citizens. Another way is to restrict it to specific categories of individuals. It is generally recognised that the most efficient system is that which is open to all citizens allowing private individuals to challenge the constitutionality of laws.¹⁹⁶ In

¹⁹³ Art. 51 (2) of the 1996 Constitution. See also Art. 7(3) of Law No. 2004/004.

¹⁹⁴ Fombad CM ‘The new Cameroonian Constitutional Council in a comparative perspective: Progress or retrogression?’ (1998) 42 *Journal of African Law* 135.

¹⁹⁵ An example of this nature could be seen on the appointment of members of Election Cameroon (ELECAM) by the President of the Republic, who are members of the central committee and political bureau of the ruling party, CPDM. See Law N° 2006/011 of 29 December 2006 on appointment of members of ELCAM.

¹⁹⁶ See for example Article 167 of the South African Constitution of 1996.

Cameroon, the Constitution gives access to a limited category of individuals and institutions that may seize the jurisdiction of the Council. The Constitution provides:

‘Matters may be referred to the Constitutional Council by the President of the Republic, the President of the National Assembly, the President of the Senate, one-third of the members of the National Assembly or one-third of the Senators.’¹⁹⁷

It has been strongly argued that the Constitution is ‘modeled according to the French system which restricts the right to challenge the constitutionality of laws to certain specified individuals or groups of individuals’.¹⁹⁸ A weakness of this mechanism is that individuals lack standing before the Constitutional Council in constitutional matters. This provision clearly demonstrates that individuals and civil societies in Cameroon have no *locus standi* before the Constitutional Council. The effect of this, as noted by Afuba, is that ordinary citizens in Cameroon are, therefore, in no position to compel the government to respect their constitutional rights, especially on important matters like human rights.¹⁹⁹ Accordingly, individuals have no legal right to invoke the unconstitutionality of laws criminalising same sex conduct. Restricting individuals’ access to the Council, the Constitution makes individual, especially sexual minorities, whose rights are violated, vulnerable. The effect is that sexual minorities have no ground to petition with the Council to rule on whether Article 347 *bis* of the Penal Code, in particular, violates their rights. Thus, sexual minorities cannot compel the government to respect their rights as enshrined in the preamble to the Constitution.²⁰⁰

3.6 Conclusion

This chapter has established that the status of international human treaties in Cameroon is guaranteed by Article 45 of the 1996 Constitution. The Constitution is explicit on the

¹⁹⁷ Art. 47 (2) of the Cameroon Constitution. Art.48(2) extend this privilege to ‘any candidate, political party that participated in the election in the constituency concerned or any person acting as Government agent at the election’.

¹⁹⁸ Fombad CM (1998) 179.

¹⁹⁹ Afuba MD (2006) 85. It is doubtful if Art. 65, which declares the preamble to be ‘part and parcel of the constitution’ actually adds anything. See also Kobilla, J.M. ‘*Le preamble du texte constitutionnelle du 18 Janvier, 1996: De L’enseigne decorative a l’etalage utilitaire*’ (1996) 23 *LexLata* 33-38.

²⁰⁰ It is worth noting that the Constitutional Council, thus established, has never been put in place. It thus remains a paper work. For the mean time its functions are being performed by the Supreme Court in line with Article 67(4) of the Constitution. Art. 67(4) provide that “the supreme court shall perform the duties of the Constitutional Council until the later is set up”.

supremacy of international human treaties over domestic laws. The constitutional protection of sexual minority rights of sexual minorities has also been established. Therefore, as some jurists have argued, ‘the criminalization of homosexuality as provided for by Section 347 of the Cameroon Penal Code does not only contradict international and regional human rights instruments, but also leads to further human rights violations, by inflicting sanctions on individuals based on a biased and contradictory law’.²⁰¹ Accordingly, the continued existence of Section 347 in the Cameroon Penal Code and abuses faced by individuals based on their sexual orientation violates the rights of these individuals as provided by international human rights instruments which Cameroon has ratified, as well as, the Constitution.

Although the Constitutional Council would be the right institution to rule on the constitutionality of laws criminalising same sex conduct, the lack of standing before the Council by individuals, in general, and sexual minorities, in particular, renders sexual minorities vulnerable.



²⁰¹ Fomeni JA ‘The criminalization of homosexuality in Cameroon violates international human rights laws’ available at <http://www.transcend.org/tms/2012/03/the-criminalization-of-homosexuality-in-cameroon-violates-international-human-rights-laws/> [accessed 21/052012].

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

4.1 Introduction

This chapter provides a brief summary of what has been discussed in the foregoing chapters. The chapter concludes by highlighting a number of recommendations for the purpose of ensuring the rights of sexual minorities in Cameroon and Cameroon's compliance with its international obligations. The recommendations emphasises what the government can do to ensure effective protection and promotion of sexual minority rights in Cameroon.

4.2 Conclusion

This study has examined the debate on sexual minority rights in Africa. It considered from the onset that the debate on sexual minority rights in Cameroon centred mainly on continued criminalisation of homosexuality on the grounds that it was immoral and un-African. From the ongoing debate, the paper has come to the conclusion that tolerance is often bought at a price of silence. Cultural, religious and other factors still reinforce the embarrassment that homosexuals (and their families) are taught to feel on this score. In Cameroon, such feelings are reinforced by colonial laws, governmental hostility, and occasional talk about "African values". This last excuse is invoked to portray homosexuality as a Western phenomenon.

The study has established that there is a plethora of international human rights instruments that affords protection to sexual minorities. The Constitution of Cameroon in its preamble recognised these rights and places them above domestic laws.²⁰² The essence for signing and ratifying international treaties is to ensure that treaties adopted at the international level are implemented at the domestic level to provide meaningful human rights protection for the ordinary citizen. It is therefore incumbent on Cameroon that has ratified these relevant international treaties that protect sexual minority rights to give effect to these rights.

Article 65 effectively grants the preamble the same status as the provisions of the Constitution. This renders the rights and obligations, as stipulated in the preamble, legally enforceable. Based on this understanding, it can be interpreted that the Constitution affords

²⁰² Article 45 of the Cameroon Constitution of 1996.

sexual minorities in Cameroon protection against criminalisation. The provision of Article 347 of the Penal Code criminalising homosexual conducts between consenting adults would be seen as incompatible with the provision of the Constitution.

Although the Constitutional Council would be the right institution to rule on the constitutionality of laws criminalising same sex conduct, the fact that individuals do not have standing before the Council limits the possibility for challenging the constitutionality of the law criminalising same sex conduct.

4.3 Recommendations

In the light of the findings and conclusions drawn above, it is submitted that there are a number of recommendations that are worth considering by the Cameroon government for consideration and possible implementation.

It is recommended that Cameroon should revise its Constitution with specific attention to the incorporation of a bill of rights, and the provision of remedies in cases of human rights violations. In this vein, Cameroon should act to institutionalise the justiciability of human rights in general and in particular the human rights of sexual minorities at the domestic level. The turning point for a sustainable human rights culture in Cameroon lays in the establishment and operation of human rights enforcement mechanisms. In revising the Constitution, non-discrimination based on sexual orientation should be included. Courts should be encouraged to give content to rights.

It is submitted that the government should take urgent steps in order to address the outright expressions of homophobia of which the systematic manner is only a small manifestation. Article 347 of the Penal Code that criminalises homosexual conduct between consenting adult should be repealed.

The immediate establishment of the Constitutional Council, as contemplated in the Constitution is strongly recommended. Furthermore, individuals should be accorded legal standing before the Constitutional Council.

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