

**'THE DEBATE ON SEXUAL MINORITY RIGHTS IN AFRICA: A
COMPARATIVE ANALYSIS OF THE SITUATION IN SOUTH
AFRICA, UGANDA, MALAWI AND BOTSWANA'**

**Submitted in Partial fulfilment of the requirements of the degree LLM
(Human Rights and Democratisation in Africa)**

By

Ernest Yaw Ako

Student number: 1034176

**Prepared under the supervision of Professor Letitia Van Der Poll at the
Faculty of Law, University of the Western Cape,**

29 October 2010

DECLARATION

I, Ernest Yaw Ako, declare that the work presented in this dissertation is original. It has not been presented to any other University or Institution. Where the work of other people has been used, references have been provided. It is in this regard that I declare this work as originally mine, and it is hereby presented in partial fulfilment of the requirements for the award of the LLM Degree in Human Rights and Democratisation in Africa.

Signature: _____

Date: _____

Supervisor: Professor Letitia Van Der Poll

Signature: _____

Date: _____

DEDICATION

I dedicate this work to God Almighty, for being my provider and protector throughout this LLM course. Also to my family and friends in Ghana and on this LLM programme, and to all who suffer violence, discrimination, and stigma because of their sexual orientation.

ACKNOWLEDGEMENTS

My acknowledgment goes to the Centre for Human Rights, University of Pretoria, the Community Law Centre and the Faculty of Law of the University of the Western Cape, for facilitating my successful completion of this LLM course. I would like to thank my supervisor, Professor Van Der Poll, for reading every word of this study and making incisive comments. Also, to Dr. Magnus Killander, Dr. Jamil Mujuzi, Pierre Brouard, Chacha Bhoke Murungu, Conrad Bosire, and Maria. Thank you all for your incisive comments.

Also to some special people like Trudi Fortuin, who ensured that my stay in Cape Town was eventful. To Flora, Jacinta, Bridgette, Marian, Nichola, Nicholas, Ajibike, Ivy, Dick Mambulasa and Wedi Djemba, thanks for your friendship.

Table of Contents

Declaration	ii
Dedication	iii
Acknowledgements	iv
Table of Contents	v
List of Abbreviations	viii
Chapter 1: Introduction	
1.1 Background to study	1
1.2 Statement of the research problem	3
1.3 Research question	5
1.4 Significance of the study	5
1.5 Literature review	6
1.6 Methodology	8
1.7 Limitations of the study	8
1.8 Definition of technical terms	8
1.9 Overview of Chapters	9
Chapter 2: The protection of sexual minority rights in international and regional human rights framework	
2.1 Introduction	11
2.2 International human rights framework	12
2.3 UN human rights treaty bodies	13
2.3.1 Communications	14
2.3.2 State reporting	15
2.3.3 General comments	15
3. The UN Charter based system	17

3.1 The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (SR on health)	17
4. The Universal Periodic Review	18
5. Soft law	18
5.1 The Yogyakarta principles	18
5.2 Statement of human rights, sexual orientation and gender identity (statement on human rights)	19
6. Regional human rights law	19
6.1 The African human rights system	19
6.2 The African Union	19
6.3 The African Commission on Human and Peoples' Rights	20
6.3.1 Communications	20
6.3.2 State reporting	20
7. The African peer review mechanism	20
8. Universalism as against cultural relativism	21
9. Conclusion	22

Chapter 3: The attitude to sexual minority rights in Botswana, Malawi, Uganda and South Africa

3.1 Introduction	23
3.2 Botswana's treatment of sexual minority rights	23
3.2.1 The Constitution of Botswana	23
3.2.2 The Penal Code of Botswana	24
3.2.3 The attitude of the judiciary towards sexual minority rights in Botswana	25
3.3 The treatment of sexual minority rights in Malawi	26
3.3.1 The Constitution of Malawi	26
3.3.2 The Penal Code of Malawi	26
3.3.3 The attitude of the judiciary towards sexual minority rights in Malawi	27
3.4 The treatment of sexual minority rights in Uganda	28
3.4.1 The Constitution of Uganda	28

3.4.2 The Penal Code Act of Uganda	28
3.4.3 The attitude of the judiciary towards sexual minority rights	28
3.5 The treatment of sexual minority rights in South Africa	29
3.5.1 The Constitution of South Africa	29
3.5.2 The criminal laws of South Africa	29
3.5.3 The attitude of the judiciary towards sexual minority rights	30
3.6 Conclusion	30

Chapter 4: Challenges and prospects to recognition of sexual minority rights in Africa

4. Introduction	31
4.1 Challenges to decriminalisation of same sex acts in Africa	31
4.2 Homosexuality as a choice	31
4.3 Homosexuality as immoral and a religious abomination	32
4.4 Homosexuality as offensive to the African culture and tradition	33
4.5 Prospects of decriminalisation and recognition of homosexuality in Africa	34
4.5.1 The role of international law in securing sexual minority rights in Africa	34
4.5.2 The role of the African Commission	35
4.5.3 The threat of losing the fight against HIV/AIDS	35
4.5.4 The role of human rights activism	36
4.6 Conclusion	36

Chapter 5: Summary of findings, conclusion and recommendations

5. Summary of findings	37
5.1 Conclusions	37
5.2 Recommendations	38
5.2.1 To the UN human rights framework	38
5.2.2 To presidents and politicians of African countries	38
5.2.3 To judges who adjudicate cases involving sexual minority rights	38
5.2.3 To African NGO's	38
Bibliography	40

ABBREVIATIONS

AFRICAN CHARTER	African Charter on Human and Peoples' Rights
AU COMMISSION	African Union Commission
CERD	Convention on the Elimination of Discrimination
CRC	Convention on the Rights of the Child
GC	General Comments
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
SR ON HEALTH	Special rapporteur on Health
UPR	Universal Periodic Review
UNIVERSAL DECLARATION	Universal Declaration on Human Rights

CHAPTER ONE

1. Introduction

*This is the worst it has ever been; they say we are evil. They want to kill us.*¹

1.1 Background to study:

Gays, lesbians,² and laws that criminalise homosexuality³ in Africa have been the subject of heated public debate in recent times.⁴ Criminalisation and attempts at re-criminalisation of homosexuality in some African countries have generated a lot of debate on the issue.⁵ The central theme in these debates has been the justification and maintenance of sodomy laws, as against the argument for the repeal of these laws because it violates the rights of gays and lesbians.

According to Human Rights Watch, more than 80 countries in the world criminalise consensual same sex sexual activity between adults in private.⁶ It is estimated that there are about 38 countries that criminalise homosexuality in Africa, accounting for almost half of the countries that criminalise homosexuality in the world.⁷

¹ 'Africa's gays and lesbians under siege' *Times live* 6 June 2010 available at <http://www.timeslive.co.za/sundaytimes/article488727.ece/africas-gays-lesbians-under-siege> (accessed 16 August 2010).

² The term gays and lesbians would be used interchangeably with the terms 'homosexuals' or 'sexual minorities', which is an umbrella term that refers to lesbians, gays, bisexuals, transgendered and intersex persons. The study focuses on lesbians, gays and bisexuals. See section 1.8 on page 9 for a list of definitions of technical terms used in this study.

³ For the purpose of this study and ease of reference, the laws that criminalise homosexuality would be referred to as sodomy laws.

⁴ 'Obama condemns Uganda's anti-gay bill' Daily monitor 5 February 2010 available at <http://.monitor.co.ug/news/National/-/688334/856042/-/whyce/-/index.html>. The Uganda Anti-homosexuality bill was also widely discussed in the foreign press in many European countries and in America, see 'Foreign press hits Uganda over gays' Daily Monitor available at <http://www.monitor.co.ug/news/national/-/688334/-/wgroqi/-/index.html> (accessed 15 October 2010).

⁵ In Botswana, the debate was triggered by the case of *Kanane v the State* (2003) (2) BLR 64 (CA); in Malawi, the debate was sparked by the trial of *Republic v Steven Monjeza Soko and Tiwonge Chimbalanga Kachepa*, case number 359 of 2009 available at www.saflii.org (accessed 1 October 2010); in Uganda, the debate which started in 2003; S Tamale 'Out of the closet: unveiling sexuality discourses in Uganda' (2003) 2 *Feminist Africa changing cultures* 1. Available at <http://www.feministafrica.org/index.php/out-of-the-closet> (accessed 10 September 2010); was rekindled by the Anti-homosexuality Bill 2009.

⁶ Human Rights Watch 'This alien legacy, the origin of "sodomy" laws in British colonialism' (2008) 4, footnotes omitted.

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

The sodomy laws in many African countries were inherited from the colonial masters of these countries.⁸ The provisions in the Penal Codes of Botswana,⁹ Malawi¹⁰ and Uganda¹¹ were inherited from the British, who colonised these countries. Uganda has made attempts at re-criminalising homosexuality with the death penalty as the maximum penalty for 'aggravated homosexuality'.¹²

The ramifications of these sodomy laws for the rights of gays and lesbians in Africa have been very grave. Gays and lesbians in Africa have been subjected to hate speech, harassed by police and civilians, physically assaulted; and in some instances remanded in prison custody for indefinite periods, convicted, or even murdered.¹³ Even after their deaths, there is still violence against sexual minorities.¹⁴

Separate considerations or a combination of them may motivate the verbal and physical attacks on gays and lesbians, but it is submitted that even though the non existence of sodomy laws in a country does not guarantee the protection of sexual minority rights, the existence of sodomy laws embolden 'perpetrators' to launch these attacks.

As stated earlier, there are two diametrically opposed view points on the debate. One school of thought thinks that homosexuality should be criminalised and supports sodomy laws. Some even think that the current sodomy laws that exist in their countries are not punitive enough and support calls for re-criminalisation of homosexuality.¹⁵ The other school of thought maintains that sodomy laws violate the rights of sexual minorities and are a violation of the international obligations of countries that maintain these laws.¹⁶

⁸ Human Rights Watch 'This alien legacy the origin of British sodomy laws in Africa' (n 6 above) 4.

⁹ The Penal Code Chapter 08:01(n 7 above), section 164(c) prohibits 'unnatural offence' and section 167 prohibits 'indecent practices'.

¹⁰ The Penal Code, Chapter 7:01 of the laws of Malawi (n 7 above)

¹¹ The Penal Code Act Cap 120 of Uganda (n 7 above) section 145.

¹² Anti homosexuality Bill, 2009, Bill no. 18, clause 3(2).

¹³ For a detailed discussion of violence against gays and lesbians in many African countries see Human Rights Watch More than a name, state sponsored homophobia and its consequences in Southern Africa (2003); see also Amnesty International Crimes of hate, conspiracy of silence, torture and ill treatment based on sexual identity (2001).

¹⁴ 'Even after death, abuse against gays continues' *Associated Press* 11 April 2010 available at http://www.msnbc.msn.com/id/36376840/ns/world_news-africa/ (accessed 20 October 2010).

¹⁵ n 12 above.

¹⁶ The UN Human Rights Committee has consistently maintained that homosexuality should be decriminalized and countries should take steps to protect homosexuals from discrimination and harassment. See for instance the concluding observations of the Human Rights Committee on United Republic of Tanzania's fourth periodic report, 96th session, Geneva, 13-31 July 2009 CCPR/C/TZA/CO/46 August 2009 6 at para 22.

Four countries have been selected as the focus of this study. Malawi, Uganda, and Botswana have a colonial inheritance of sodomy laws¹⁷ that have generated some debate for varied reasons. Botswana and Malawi have invoked their laws in cases before their courts.¹⁸ Uganda has made attempts at re-criminalising its 'sodomy' laws and has also attracted some amount of debate. These countries are not the only 'hot spots' of the homosexual debate in Africa, but they are examples of recent developments that offer an interesting insight into the debate.

South Africa is the fourth country. It brings an interesting aspect to the debate as well, which may be of relevance to contrast with what pertains in the three other countries above. South Africa recognises the rights of sexual minorities and offers them protection in its constitution.¹⁹ South Africa's history, which is different from that of the three countries, may have informed this situation, but the interest in South Africa is not so much of its history but the comprehensive jurisprudence and debate it has generated over the years.²⁰

This study makes no pretence at settling this debate but hopes to contribute to it by unpacking the arguments of both sides in the light of international human rights law, and makes suggestions on the way forward.

1.2 Statement of the research problem

The central problem to be explored in this study is the criminalisation and attempts at re-criminalisation of homosexuality by African countries in apparent violation of the international human rights obligations they have assumed, by ratifying treaties that offer protection to sexual minorities.

¹⁷ n 8 above.

¹⁸ In the case of Botswana, see *Kanane v the state (Kanane case)* 2003 (2) BLR 67 (CA), discussed in section 3.2.3; in Malawi see *Republic v Steven Monjeza Soko & Tionge Chimbanga Kachepa* (Malawi gay trial) criminal case no 359 of 2009, discussed in section 3.3.3.

¹⁹ Act 108 of 1996; see section 9(3).

²⁰ The Constitutional Court of South Africa has developed a lot of jurisprudence on sexual minority rights, notable among which is *National Coalition for Gay and lesbian Equality v The Minister of Justice* (1998) 12 BCLR 1517 (CC) where the Court declared the continued criminalisation of sodomy as unconstitutional.

Apart from plunging Africa into a polarised and sometimes acrimonious debate,²¹ sodomy laws have also been the source of violation of the rights of sexual minorities in Africa. Thus, when homosexuals are arrested, detained and harassed by the police, remanded into prison custody by courts and even physically attacked by civilians, these acts are justified on the basis of sodomy laws among others.

The arrests, harassments and incarcerations of sexual minorities are just a fraction of the problems that sexual minorities face in Africa. Alleged homosexuals have been subjected to forced medical examination upon arrest;²² organisations that work in their interest have been denied official registration to enable them to operate legally and attract the needed financial support;²³ sexual minorities have been driven underground by sodomy laws and they have been unable to access HIV/AIDS prevention, treatment and care services.²⁴

Meanwhile, Uganda, Malawi and Botswana are state parties to relevant international human rights treaties like the International Covenant on Civil and Political Rights (ICCPR),²⁵ which affords protection to sexual minorities. The monitoring body of the ICCPR, the Human Rights Committee has consistently stated that sodomy laws are in conflict with the ICCPR and must be repealed.²⁶

In its examination of state reports, the Human Rights Committee has urged state parties to take steps to decriminalise same sex acts, regretted the lack of measures to protect and prevent discrimination against homosexuals, and urged state parties to take all necessary measures to protect homosexuals from discrimination and harassment.²⁷

²¹ S Tamale 'Out of the closet: unveiling sexuality discourses in Uganda' (2003) 2 *Feminist Africa changing cultures* 1 available at <http://www.feministafrica.org/index.php/out-of-the-closet> (accessed 10 September 2010).

²² Soko and Kachepa were forced to undergo medical examination to ascertain whether they had had sex through the anus, see Malawi gay trial (n 18 above) 6, 17.

²³ The lesbians, gays and bisexuals of Botswana (LeGaBiBo) was refused registration by the Registrar of Societies in Botswana because, 'LeGaBiBo would be used for unlawful purposes since homosexual acts are criminal offenses in the country.' See 2007 country report on Botswana by the United States Department of State available at <http://www.state.gov/q/drl/rls/hrrpt/2007/100467.htm> (accessed 20 October 2010).

²⁴ CA Johnson 'Off the map: How HIV/AIDS programming is failing same-sex practicing people in Africa' (2007) 57. See also 'report of the special rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (2010) submitted to the Human Rights Council A/HRC/14/20 8.

²⁵ The ICCPR was opened for signature, ratification and accession by the General Assembly resolution 2200 A (XXI) of 16 December 1966 and entered into force on 23 March 1976 in accordance with article 49 of the ICCPR, as of 26 July 2010 there are 166 state parties.

²⁶ (n 16 above).

²⁷ As above.

In spite of these pronouncements by the Human Rights Committee, state parties, including Uganda, Malawi and Botswana still retain sodomy laws and have not protected sexual minorities or prevented discrimination against them. It has rather institutionalised harassment and discrimination against sexual minorities because of the sodomy laws that they retain.

This study therefore takes an interest in exploring the arguments and justifications for the continued criminalisation of homosexuality in Africa, in spite of the existence of international human rights law that provides protection for sexual minority rights. The study also examines the impediments to, and prospects of, the realisation of sexual minority rights in Africa.

1.3 Research question

This study focuses on one research question, which is:

What protection does international human rights law afford to sexual minorities and how does this translate into their effective protection in practice in Africa?

1.4 Significance of the study

This study is a contribution to the debate on sexual minority rights in Africa. It examines the Constitutions, sodomy laws and the attitudes of the various African countries under focus, to sexual minority rights, in the light of their international human rights obligations. It contributes to the debate by making suggestions as to how to synchronise these laws, policies and practices with international human rights obligations, if the two are out of sync.

The study therefore aims at clarifying a burning issue in Africa which has resulted in violence against gays and lesbians because of their sexual orientation.

1.5 Literature review

A great deal of scholarship has contributed to the debate on sexual minority rights in Africa. Murray and Viljoen²⁸ discuss the possibility of using the procedures of the African Commission on Human and Peoples' Rights (African Commission) to bring the issue of sexual minority rights to the attention of the African Commission. They suggest innovative and strategic ways of bringing such a sensitive issue before the African Commission, by for instance, lobbying some of the Commissioners and also using the Non Governmental Organisations (NGO) forum that precedes the African Commission's sessions, to open up debate on sexual minority rights in Africa, but caution that the time is not yet due to approach the Commission. However, unlike the authors, this study makes the point that there is an urgent need to approach the Commission with issues on sexual minority rights.

Cameron²⁹ also drew attention to the need for legal protection for homosexuals as a category of persons in need of protection. He suggested that constitutional protection of a person's sexual orientation should be included in the South African Constitution. His arguments preceded the adoption of the final Constitution of South Africa and are thus otiose. In a further contribution, he underscored the principle of 'ubuntu', an African cultural conception of humanity, as being the motivating factor for the protection of sexual minority rights in the South African Constitution.³⁰ This study disagrees with using 'ubuntu' as a concept to secure the rights of sexual minority rights, because as Keevy rightly notes, 'throughout sub-Saharan Africa, ubuntu's shared values and beliefs regard homosexuality and lesbianism as 'un-African and alien to African culture.'³¹

De Vos³² argues that the importance of having legal protection for gays and lesbians cannot be overemphasised. He points to the fact that the law is an important tool around which gays and lesbians can organise to attain legal equality. This study agrees with such an approach, De Vos, however, does not focus on the link between international law and the commitments they engender at the domestic level, the subject matter of this study, to attain legal equality.

²⁸ R Murray & F Viljoen 'Towards non-discrimination on the basis of sexual orientation: the normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 87.

²⁹ E Cameron 'Sexual orientation and the constitution: a test case for human rights' (1993) 110 *South African Law Journal* 450.

³⁰ E Cameron 'Constitutional protection of sexual orientation and African concepts of humanity' (2001) 118 *South African Law Journal* 642.

³¹ L Keevy 'Ubuntu versus the core values of the South African Constitution' (2009) 34(2) *Journal for Juridical Science* 44.

³² P De Vos 'On the legal construction of gay and lesbian identity and South Africa's transitional constitution' (1996) 12 *South African Journal on Human Rights* 265.

Quansah,³³ on his part, compares the attitude of the judiciary towards sexual minority rights in Botswana, South Africa and Zimbabwe. He asserts that while the judiciary in South Africa have protected the rights of sexual minorities, the judiciary in Botswana and Zimbabwe have failed to do so. He acknowledges that the unique protection afforded to sexual minorities in the Constitution of South Africa may account for this, but nevertheless insists that a broad and generous interpretation of the concepts of equality, dignity and privacy by the courts in Botswana and Zimbabwe could achieve the same results as in South Africa. This study agrees with Quansah's position and extends the debate further, that judges must give effect to international human rights treaties as well.

Mujuzi³⁴ also joins the debate by analysing the decision of the Ugandan High Court which protected the rights of two women who were arrested, harassed and detained by the police on suspicion of being lesbians. Mujuzi's analysis centres on the reliance of the court on international human rights instruments to arrive at its decision, that even if the accused were lesbians, which the court refused to admit, they were entitled to their privacy and dignity. The focus of the author's contribution is on the effect of international human rights instruments on the decisions of courts in Uganda. It does not however address the relationship between Penal Codes that criminalise homosexuality and international human rights law, which is addressed in this study.

Chilisa³⁵ makes the point that criminalisation of homosexuality reinforces the societal prejudices and stigma against sexual minorities. He implores the judiciary in a constitutional democracy to 'vigorously protect constitutional rights without fear or favour'. The essence of Chilisa's contribution to the debate is that the judiciary in a constitutional democracy should not pander to 'popular subjective views' about legal issues before them and should interpret the bill of rights to protect the rights of sexual minorities. This study takes a similar position and adds that the judiciary must also be guided by the international human rights treaties that their countries are state party to.

It is significant to point out that the existing literature on the subject, as reviewed above, does not directly address the link between the international human rights obligations of African countries, their

³³ EK Quansah 'Same-sex relationships in Botswana: current perspectives and future prospects' (2002) 4 *African Human Rights Law Journal* 201.

³⁴ JD Mujuzi 'Even lesbian youths or those presumed to be lesbians are protected by the Constitution of Uganda-but to a limited extent: rules the High Court' (2009) 6:4 *Journal of LGBT Youth* 441.

³⁵ MM Chilisa 'Two steps back for human rights: a critique of the Kanane case' (2007) 1 *The Botswana Review of Ethics, Law and HIV/AIDS*.

sodomy laws, Constitutions, and attitudes towards sexual minority rights and their justifications or otherwise. This study investigates this link and makes recommendations on the way forward.

1.6 Methodology

The study will be conducted by desktop research only. It will involve a critical analysis of relevant laws, decisions of various courts in Africa, international human rights treaties, some concluding observations of a treaty monitoring body, reports of human rights organisations, books, journal articles, and newspaper reports among others.

1.7 Limitations of the study

The study is situated in Africa and examples may be drawn from several African countries. However, given the time limit and space allotted for this study, only four African countries will be covered. These are South Africa, Uganda, Malawi and Botswana. The study examines the international human rights obligations of these countries as against laws and practices that are in conflict with these obligations. Among others, it considers the justifications for criminalising homosexuality as against the need for respect of the rights of sexual minorities. The issue of same sex marriage is not discussed in this study. The debate in Africa at the moment largely focuses on ensuring basic human rights for homosexuals and a repeal of sodomy laws and that is the focus of this study. Current events in the selected countries will be discussed, but where necessary, activities that have a bearing on this study from the early 1990's will also form part of the discussion. The discussion on religion will also focus on Christian religion only, as a basis of the origin of sodomy laws.

Even though the study will attempt a comprehensive coverage of the relevant issues and reflect as much as possible the true state of events in these countries, it is limited by the inaccessibility of some documents and information from the selected countries.

1.8 Definition of technical terms

The technical terms below are clarified as follows: ³⁶

³⁶ F Viljoen 'Sexual minorities in sub-sahara Africa: A legal analysis of sexual orientation and gender identity' 2009 7. See also 'Legabibo true life stories & poems that may change your perceptions' (2009) v.

- (i) Sexual minorities: 'An umbrella term that refers to the whole spectrum LGBTI persons: homosexuals (gays and lesbians), bisexuals, transgendered and intersex persons.'
- (ii) Sexual orientation: 'The sexual, emotional and affective attraction for people of the different genders, the same gender or more than one gender'
- (iii) Gender identity: 'A person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body... and other expressions of gender, including dress, speech and mannerisms.'
- (iv) Lesbian: 'A lesbian woman is someone who is, physically, emotionally and affectively attracted to other women'
- (v) Gay: 'A gay man is someone who is physically, emotionally and affectively attracted to other men.'
- (vi) Bisexual: 'A man or woman who is physically, emotionally and affectively attracted to members of both genders.'
- (vii) Transgender: 'A broad term, encompassing all persons whose gender expression or identity differs from the expectations associated with the physical sex they were born into'
- (viii) Intersex persons: 'Refers to people whose physical sexual differentiation at birth is not typical position of being physically intermediate between the two sexes often involves ambiguous genitalia, but may be limited to atypical chromosomal patterns. The term 'hermaphrodite is often used as a synonym...'

1.9 Overview of chapters

The study comprises five chapters, with this chapter as the first. Chapter two focuses on international and regional human rights protection of sexual minority rights. It examines the obligations that African countries assume when they ratify international human rights treaties. It also examines the concluding observations and decisions of human rights monitoring bodies, and their impact on sexual minority rights in Africa.

Chapter three explores constitutions, sodomy laws, and attitudes of African states to sexual minority rights, in the light of their international human rights obligations and the bill of rights in their constitutions.

Chapter four analyses the impediments to the realization of sexual minority rights in Africa and examines the main arguments for and against, and their contribution to the debate on sexual minority rights.

Chapter five is the summary of the findings, conclusions and recommendations.

CHAPTER TWO

The protection of sexual minority rights in international and regional human rights framework

2.1 Introduction

There is indubitable evidence to suggest that a plethora of international human rights laws and mechanisms exist for the protection of all persons, including sexual minorities.³⁷

This chapter entails a review of some international human rights protection contained in the Universal Declaration on Human Rights (Universal Declaration),³⁸ the International Covenant on Civil and Political Rights (ICCPR),³⁹ and the International Covenant on Economic Social and Cultural Rights (ICESCR),⁴⁰ in relation to sexual minorities. The chapter then examines the monitoring mechanisms employed by the treating bodies established under these treaties,⁴¹ the special procedures,⁴² as well as the Universal Periodic review (UPR) of the Human Rights Council.⁴³

In addition, this chapter examines the content of some 'soft law'⁴⁴ and its effect on sexual minority rights. At the regional level, the African human rights system⁴⁵ is examined to point out some of the human rights protection that the African human rights system offers to sexual minorities.

³⁷ For the purposes of this study the term international human rights instruments is used here to encompass treaties, declarations, resolutions, recommendations and concluding observations.

³⁸ The Universal Declaration was adopted in 1948 by member states of the UN and contains about thirty rights which several scholars and governments claim has attained the status of *jus cogens*. See M Sepulveda et al *Human rights reference handbook* (2004) 14.

³⁹ (n 25 above), as of 22 October 2010 there are 166 state parties available at http://treaties.un.org/Pages/ViewDetails.aspx?&TREATY&mtdsg_no=IV-4&chapter=4&lang=en (accessed 22 October 2010).

⁴⁰ The ICESCR was opened for signature, ratification and accession by the General Assembly resolution 2200 A (XXI) of 16 December 1966 and entered into force on 3 January 1976 in accordance with article 27, as of 22 October 2010 it has 160 state parties, available at http://treaties.un.org/Pages/ViewDetails.aspx?&TREATY&mtdsg_no=IV-4&chapter=4&lang=en (accessed 22 October 2010).

⁴¹ 'The human rights treaty bodies are committees of independent experts that monitor implementation of the core international human rights treaties... created in accordance with the treaty they monitor' or pursuant to a UN resolution. See for instance article 28 of ICCPR in respect of the Human Rights Committee; and UN resolution 1985/17 of 28 May 1985 in respect of the UN Economic and Social Council, the treaty body for the ICESCR available at <http://www.2ohchr.org/english/bodies/cescr/index.htm> (accessed 20 August 2010).

⁴² "The 'special procedures' is the general name given to the mechanisms established by the Commission on Human Rights and assumed by the Human Rights Council to address either specific country situations or thematic issues in all parts of the world", see <http://www.2.ohchr.org/english/bodies/chr/special/index.htm> for a list of all 31 thematic and 8 country mandates (accessed 20 August 2010).

⁴³ The UPR is a process established by Human Rights Council designed to review the human rights records of all 192 member states of the UN on an equal treatment basis pursuant to UN General Assembly resolution 60/251 of 15 March 2006, see <http://www.ohchr.org/EN/UPR/Pages/UPRMain.aspx> (accessed 20 August 2010).

⁴⁴ Soft law is the general name given to declarations and statements which are not treaties.

⁴⁵ The African human rights system consists of several interconnected parts like the African Commission, the AU Commission, the African Peer Review Mechanism, etc for a comprehensive discussion of the African human rights system see generally, F Viljoen *International human rights law in Africa* (2007); E Ankuamah, *The African Commission on Human and Peoples' Rights practice and procedure* (1996).

Lastly, the chapter will explore the arguments put forward for the universal enjoyment of human rights as against the argument that the enjoyment of human rights should be subject to specific social and cultural differences.

It is submitted that the international human rights framework imposes a tripartite obligation on state parties to international human rights instruments to 'respect', 'protect' and 'fulfil' fundamental human rights for all persons.⁴⁶ Thus state parties to international human rights instruments evince a clear and manifest intention to implement the human rights instruments they have ratified. However, it is pertinent to note that there is a wide gap between what the international human rights framework espouses and its implementation in practice, especially in relation to sexual minority rights in Africa. The following sections explore the international human rights framework for the protection of sexual minorities, in the order stated above and concludes with an observation on the missing link between the theory and practice that is needed to enhance the protection of sexual minority rights in Africa.

2.2 International human rights framework

It was acknowledged in section 1.1 that there are two main arguments to the debate on sexual minority rights in Africa. One of the arguments posits that the continued criminalisation of same sex acts, and the violence perpetrated against sexual minorities, is a violation of their fundamental human rights. This argument is premised on the provisions of the international bill of rights which provides a basis for the recognition of the rights of all persons, because they are human beings.⁴⁷

A cardinal principle which is a feature of human rights treaties is the prohibition of discrimination in the enjoyment of fundamental human rights.⁴⁸ Article 2 of the Universal Declaration provides that the enjoyment of the rights enshrined in the declaration shall be enjoyed by all persons regardless of their status.⁴⁹ The ICCPR and the ICESCR also contain similar provisions which also seek to provide for the enjoyment of fundamental human rights for all persons without distinction of any kind.⁵⁰

Another principle, also recognised as core to the enjoyment of fundamental human rights is the principle of equality. This may be found in the ICCPR.⁵¹ The right to equality has two forms of application. The first is that all persons are entitled to equal treatment before the law. This requires that all persons are treated equally in respect without any differentiation; as such a differentiation will be a violation of the law.⁵²

⁴⁶ The duty to 'respect' entails an obligation on the part of the state to refrain from taking measures that may deprive individuals of the enjoyment of their rights; the duty to 'protect' imposes an obligation on the state to individuals from human rights violations by third parties; the duty to 'fulfill' makes it incumbent on states to create opportunities for the realisation of basic needs enshrined in international human rights instruments; see Sepulveda et al (n 38 above) 16.

⁴⁷ The Universal Declaration, the ICCPR and the ICESCR are together classified as the International Bill of Rights, see *UN human rights fact sheet no 30 6*.

⁴⁸ The Human Rights Committee has noted that the principle of non discrimination is a 'basic and general principle relating to the protection of human rights' see general comment no 18 of the Human Rights Committee (1989) para 1.

⁴⁹ Article 2 states: 'everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind...'

⁵⁰ Article 2(1) ICCPR; article 2(2) ICESCR.

⁵¹ Article 26 ICCPR.

⁵² Sepulveda et al (n 38 above) 307.

The second aspect of the equality principle is to the effect that everyone has the right of equal protection of the law. This means that laws shall be applied equally to all persons without regard, for example, to their sexual orientation.⁵³

International human rights law also provides for the right to dignity and bodily integrity. Thus the Universal Declaration and the ICCPR provides for the respect of bodily integrity of all persons.⁵⁴ This means that a person shall not for instance be subjected to forced experiments or medical examination to ascertain whether or not he has had sex through the anus, in order to establish that he is a homosexual.

Another important right recognised by international human rights norms is the right to privacy, which 'applies to a wide spectrum ranging from phone tapping to sexual orientation'.⁵⁵ The Universal Declaration and the ICCPR recognise this right as central to the human being.⁵⁶ In effect, these provisions seek to ensure that what two consenting adults do out of public view does not become the subject of legislation and is protected, in so far as it does not harm the public.

The central theme that runs through these international human rights treaties is that they are the entitlements that every human being may claim regardless of his or her race, colour, sex, religion or other status. It is submitted that these rights are entitlements due sexual minorities as well, since they also fall into the category of right bearers mentioned in these documents.

It is significant to point out, that the international human rights treaties mentioned above do not specifically provide protections for persons on the grounds of their sexual orientation. However, the right to non discrimination, equality, right to dignity and bodily integrity, as well as the right to privacy are central to every human being in living a decent and meaningful life. If homosexuals are denied these rights, while heterosexuals enjoy them, it offends against the principle of non discrimination and equality.

2.3 UN human rights treaty bodies

Under the aegis of the UN, several human rights treaties have been adopted to secure for all persons their fundamental human rights.⁵⁷ One such treaty is the ICCPR, whose monitoring body is the Human Rights Committee.⁵⁸ The aim of the supervision and monitoring of the ICCPR by the HR Committee is to ensure that state parties to the ICCPR abide by their treaty obligations.⁵⁹ The HR Committee therefore performs four main tasks which are the receipt and consideration of 'communications'; receipt and consideration of state reports; the issuance of general comments; and the receipt and consideration of inter state complaints.⁶⁰ The first three functions are discussed below.

⁵³ As above.

⁵⁴ Article 1 Universal Declaration; article 10 ICCPR.

⁵⁵ Sepulveda et al (n 38 above) 249.

⁵⁶ As above.

⁵⁷ These include the eight core treaties of the UN like the ICCPR, ICESCR, Convention on the Rights of the Child (CRC), Convention on the Elimination of Racial Discrimination (CERD), Convention on the Elimination of Discrimination against Women (CEDAW), etc.

⁵⁸ The Human Rights Committee was set up in 1976 to monitor the ICCPR, while the Committee on Economic, Social and Cultural Rights (CESCR) was created in 1987 to monitor the ICESCR.

⁵⁹ n 41 above.

⁶⁰ (n 47 above) 14, 15.

2.3.1 Communications

The Human Rights Committee (HR Committee) was set up by article 28 of the ICCPR and it is made up of a committee 18 persons who are of 'high moral character' with some competence in the field of human rights and legal experience, drawn from countries that are state parties to the ICCPR.⁶¹

For a communication to be admissible, the individual must be a victim of a violation of any of the rights under the ICCPR and should be against a state party to the ICCPR and the Optional Protocol (OP) to the ICCPR.⁶² Pursuant to this mandate, the Human Rights Committee has received and considered communications on a broad range of issues including matters relating to the rights of sexual minorities. With the exception of Botswana which is not a state party to the OP to the ICCPR, Uganda, Malawi and South are state parties.⁶³ All the four countries are also state parties to the ICCPR.

It is pertinent to note that the committee has not yet considered any communication in respect of any African country in relation to sexual minority rights, but useful lessons could be drawn from its concluding observations on matters affecting other countries especially in relation to the rights of sexual minorities. In its consideration of the case of *Nicholas Toonen v Australia*,⁶⁴ the Committee made a definitive pronouncement on article 2 and 26 of the ICCPR, stating that non discrimination on the grounds of sex includes sexual orientation. Thus the Committee put beyond doubt the protection afforded sexual minorities and fills the gap identified in the ICCPR, in the previous section.

It is submitted that the communications procedure of the HR Committee, though a useful procedure has rarely been used by African countries. No communication has been brought against any of the countries under focus, and it is less likely that this procedure may be invoked by victims of human rights violations in Africa. It takes several years for a communication to be received and considered and this might impose time and resource constraints on potential users from Africa, especially when the process is far away from them. Another impediment is that domestic remedies must be exhausted before the procedure could be accessed.⁶⁵ Also the fact that a state party must have ratified the Optional Protocol before a communication could be brought against it, makes it impossible, for instance, for a person in Botswana whose rights under the Covenant are violated to bring a communication against Botswana, because Botswana has not ratified the OP to the ICCPR. Thus, though a useful mechanism, access to the Human Rights Committee through communications is far removed from Africans.

⁶¹ Article 28 ICCPR.

⁶² Article 1 Optional Protocol to the ICCPR.

⁶³ Uganda, Malawi, South Africa and Uganda acceded to the OP to the ICCPR on 14 November 1995; 11 June 1996; and 28 August 2002 respectively available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en (accessed 22 October 2010).

⁶⁴ Communication 488//92, Human Rights Committee, U.N Doc. CCPR/C/50/D/488/1992(Mar. 1994).

⁶⁵ Article 2 OP to the ICCPR.

2.3.2 State reporting

The requirement of state reporting⁶⁶ under the ICCPR is a feature of the UN which is aimed at ensuring that member states of the UN fulfil their human rights obligations in order to advance human rights in the world.⁶⁷ Thus under article 40 of the ICCPR, state parties are required to submit an initial report within one year of that country becoming a state party to the ICCPR, and subsequently to submit periodic reports, as specified by the HR Committee for each state party.⁶⁸

In the Committee's recent examination of Botswana's initial report,⁶⁹ it noted, among others, that Botswana's laws that criminalise same sex activities between consenting adults in private were in violation of the ICCPR. The Committee urged Botswana to 'repeal these provisions of its criminal law'.⁷⁰ In the examination of the reports of other African countries, the Committee has made similar observations and urged the state parties to bring their legislation in conformity with the ICCPR.⁷¹

State reporting is a useful mechanism of 'ensuring the observance of human rights at the international level as well as ensuring a government's accountability to its own people and the international community'.⁷² However, it has been rendered ineffective because state parties do not submit their reports as expected of them under the treaty. Thus the 'inspection' of a state's human rights record envisaged by Viljoen⁷³ is not achieved. Further, since there are no sanctions applied for not reporting, state parties are at liberty not to report. It is submitted that the Human Rights Committee should be proactive and constantly remind states whose reporting times are due, through the international media and urge them to provide reasons for not reporting. In addition, the reporting guidelines should specifically contain a section that should specifically ask states to report on the measures they have taken to protect sexual minority rights, as the records show that for instance, Botswana failed to mention sexual minority rights in its report to the Committee.

2.3.3 General comments

The concept of general comments (GC)⁷⁴ forms an integral part of the mechanisms used by the UN treaty bodies to secure compliance of countries to their obligations under the various treaties. The various treaty bodies have issued a GC as a way of elucidating the scope and content of the provisions in the various treaties.

⁶⁶ All the core international treaties have a reporting system that requires state parties to submit periodic reports in compliance with their obligations under the treaty. See for instance article 40(1) of ICCPR; article 16-23 of ICESCR; article 44 of the CRC; article 19 of the Convention against Torture (CAT) etc.

⁶⁷ UN resolution E/Res/624 B (XXII) of 1 August 1956 required UN member states to submit periodic reports on advancement of human rights, a feature which has subsequently been adopted by the treaty bodies.

⁶⁸ Article 40(1)(a),(b) ICCPR.

⁶⁹ UN Doc CCPR/C/BWA/CO/1, 24 April 2008.

⁷⁰ As above para 22.

⁷¹ See for instance the concluding observations on Namibia's initial report, UN Doc CCPR/CO/81/Nam, August 2004 and Zambia's third report in 2007, UN Doc CCPR/C/ZMB/CO/3, 9 August 2007.

⁷² K Quashigah 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism' (2002) 2 *African Human Rights Law Journal* 261.

⁷³ F Viljoen *International human rights law in Africa* (2007) 37.

⁷⁴ Otherwise known as general recommendations under CERD and CEDAW, apart from clarifying the import of the provisions of a treaty, general comments may also indicate the information to be included in state reporting, role of national human rights institutions, etc.

GC's clarify the import of the various treaties and the obligations required to be performed by states parties. GC's therefore reiterate the meaning and scope of some of the provisions under the treaty; the obligations states have undertaken to fulfil, and the relevant steps that states parties ought to take in order to achieve the aims and objectives of the treaty.

In this section, GC's made by three treaty bodies which implicates the rights of sexual minorities are considered in turn. First, the GC made by the Economic, Social and Cultural Council (ECOSOC), which is the body that oversees the ICESCR; second, the GC made by the Human Rights Committee, the body that is responsible for ensuring compliance with the provisions of the ICCPR; and third, the GC of the Committee on the Rights of the Child (CRC), charged with the oversight responsibility of the CRC.

In GC 14,⁷⁵ 15⁷⁶ and 18,⁷⁷ the ECOSOC made some poignant statements in relation to the rights of sexual minorities. The crux of these GC's is the prohibition of discrimination in relation to access to health care, provision of water and access to and maintenance of employment.

In GC 14, the ECOSOC elaborated on the scope and meaning of article 12 of the ICESCR, on the 'right to the highest attainable standard of health'.⁷⁸ The Committee observed that the essence of state parties' obligations is to ensure that access to health care and educational information on health care be made available to all persons without distinction of any kind including race, colour, sex, language as well as sexual orientation.

The committee emphatically noted that education on health issues and access to health care services should particularly be made available "on a non-discriminatory basis especially for the vulnerable and marginalised groups."⁷⁹ Similarly, in GC 15, the committee observed, commenting on articles 11 and 12 of ICESCR,⁸⁰ that the obligation of non discrimination on any grounds pervades all covenant obligations of states,⁸¹ so, states should not discriminate in the provision of water to all persons, especially the most vulnerable or marginalised⁸². Finally in GC 18, the Committee reiterated its commitment to ensuring protection for sexual minorities by underscoring in similar language that, discrimination "in access to and maintenance of employment"⁸³ on grounds of sexual orientation among others was prohibited.

The Human Rights Committee has also made some definitive statements in GC 16⁸⁴ and 18.⁸⁵ In GC 16 the Committee gave credence to article 17 of the ICCPR, which guarantees the right to privacy and stressed that in securing the right to privacy of citizens, states were duty bound to take

⁷⁵ Compilation of general comments and general recommendations adopted by human rights treaty bodies HRI/GEN/1 Rev. 9(vol 1) 2008 78.

⁷⁶ As above 97.

⁷⁷ As above 139.

⁷⁸ Article 12(1) of the ICESCR states: 'the state parties to the present covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.

⁷⁹ General comment no 14 para 19.

⁸⁰ Article 11 guarantees adequate standard of living for everyone including the right to food while article 12 provides for the highest attainable standard of physical and mental health.

⁸¹ General comment no 15 para 13.

⁸² As above para 12(c) (iii).

⁸³ General comment no 18 para 12(b)(i).

⁸⁴ (n 75 above) 191.

⁸⁵ As above, 195.

administrative, legislative and judicial measures to give effect to the purpose of this provision.⁸⁶ In its GC 18, the committee stressed that the principle of non discrimination is a general human rights protection clause and it was incumbent on states parties to respect this provision as part of their obligations under the covenant.

The last GC to be considered is that of the CRC which issued GC 3⁸⁷ and 4.⁸⁸ In sum, the Committee observed that states parties are under an obligation not to discriminate in the provision of health care services to children on the basis of their sexual orientation.

GC's is an important mechanism that elucidates the obligations of state parties under the treaties, but they are only effective if state parties adhere to them in their reports. Consistently, the clarifications made by the various treaty bodies are ignored when states report, however, as stated in the previous section, states have failed to report, rendering GC's redundant.

3. The UN Charter based system

3.1 The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (SR on health)

The SR on health is a unique mechanism of the UN which focuses on health as a thematic area that the UN deems requires special protection. Pursuant to UN Human Rights Council resolution 6/29, the SR on health submitted a report to the Human Rights Council at its fourteenth session held on 27 April 2010.⁸⁹

The report examined the right of everyone to the highest attainable standard of health and its relationship with criminalisation of three forms of adult sexual behaviour which included 'consensual same sex conduct (together with sexual orientation and gender identity).⁹⁰ The SR on health observed that there was a close relationship 'between the concepts of privacy, equality and dignity' and appraised 'its effects on the enjoyment of the right to health'.⁹¹

Among others, the SR on health observed that criminalisation of same sex conduct though not singularly responsible, had contributed immensely to non access to health care services, lack of self worth and dignity, stigma, violence and abuse against same sex practicing adults. That criminalisation of same sex acts had had a debilitating impact on the enjoyment of the right to health.

The SR on health recommended that decriminalisation of same sex consensual conduct, as well as a repeal of 'laws that discriminate in respect of sexual orientation and gender identity',⁹² are necessary to ensure an environment conducive to the enjoyment of the right to health.

⁸⁶ The committee stated in para 2 that there was no indication in the state reports that state parties were complying with their obligations under the treaty.

⁸⁷ (n 75 above) 245.

⁸⁸ As above 248.

⁸⁹ Report of the SR on health to the Human Rights Council at its fourteenth session, A/HRC/14/20 available at <http://www2.ohchr.org/english/issues/health/right/annual.htm> (accessed 20 August 2010).

⁹⁰ As above, para 4.

⁹¹ As above.

⁹² As above, para 26.

The special procedure on thematic issues like health is a very useful mechanism adopted by the UN to address pertinent human rights issues. It is submitted that the violations of sexual minority rights are so grave, especially in Africa, that it is important that the UN appoint a Special Rapporteur on violence, discrimination and stigma against gays and lesbians to keep the issue constantly on the agenda of the UN, until a lasting solution is found to the grave violations.

4. The Universal Periodic Review

The Human Rights Council conducts a universal periodic review (UPR) of reports of states parties on a periodic basis. The Human Rights Council has reviewed the reports of some African countries including Benin, Burundi, and Cameroon.

Of particular interest to this study is the consideration of the initial report of Botswana submitted to the Human Rights Council.⁹³ The report of the High Commissioner for Human Rights, which was submitted to the Council, reiterated the call made by the Human Rights Committee that Botswana should repeal its sodomy laws.⁹⁴ The working group of the Council also noted that Botswana should 'adopt the necessary measures to combat discrimination of all kinds, including those based on sexual orientation.'⁹⁵

Unlike the appraisal of the human rights record of state parties by the Human Rights Committee, which is constituted by experts, the UPR is a review of a state by other states. It is pertinent to note, that issues of sexual minority rights have been raised by countries outside Africa. For instance, representatives of Slovakia and the Czech Republic raised the need for Botswana to decriminalise same sex consensual activity.⁹⁶ This reinforces, the perception that homosexuality is a foreign culture, and may affect whether or not Botswana will react positively.

5. Soft law

'Soft law', unlike treaties, are of no binding effect and are acknowledged as statements of intent calling on the international community to respect certain conduct. Thus it has been argued, that 'soft law' 'is now another often perplexing ingredient in the multi-faceted evolution of international law'.⁹⁷ It does not have the force of law because unlike a treaty, states have not signed or made any undertaking to be bound by such laws. The Yogyakarta principles and the statement on human rights, sexual orientation and gender identity are two such soft laws that have a bearing on sexual minority rights and shall be considered here.

5.1 The Yogyakarta principles

The Yogyakarta principles, is a statement of intent, which puts together in one document, all the rights in various international treaties that offer protection to sexual minorities. The principles contain detailed sets of provisions that touch on the rights of sexual minorities. It asserts that sexual minorities are entitled to certain core fundamental human rights, enjoyed by all persons, such as privacy, dignity, and equality among others. It also asserts that these rights are guaranteed under international law and are meant to be enjoyed by all persons including sexual minorities.

⁹³ A/HRC/WG.6/3/BWA/1 5 September 2008.

⁹⁴ A/HRC/WG.6/3/BWA/2 2 October 2008 para 26.

⁹⁵ A/HRC/10/69 13 January 2009 para 18.

⁹⁶ As above.

⁹⁷ HJ Steiner et al *International human rights in context* (2007) 161.

5.2 Statement of human rights, sexual orientation and gender identity (statement on human rights)

In December 2008, the statement on human rights was endorsed by sixty six countries world wide and presented to the UN General Assembly for adoption.⁹⁸ It is significant to note that out of the sixty six countries that endorsed the statement; six African countries were part of it. It is unfortunate that none of the countries under review in this research participated in the endorsement of this statement.

Just like the Yogyakarta principles, the statement on human rights lacks binding effect and thus states may not be held directly accountable under it. However, it is submitted that just as the Universal Declaration was adopted and subsequently given recognition, these important laws on sexual minority rights will achieve important recognition. Suffice to say, that some of the provisions in the Yogyakarta principles are recognised human rights guaranteed in treaties ratified by states.

6. Regional human rights law

6.1 The African human rights system

The African Human Rights system, as a mechanism for the protection of human rights on the African continent consists of several inter connected parts that work together to secure for all persons in Africa, their fundamental human rights. This section briefly examines three bodies under the African human rights system and their impact on sexual minority rights in Africa.

6.2 The African Union

The African Union Commission (AU Commission) comprises of heads of states of all African states, except Morocco and is the highest decision making body of the African Union.⁹⁹ It meets periodically to take decisions concerning certain pertinent issues affecting Africa. It is yet to issue any statement on sexual minorities.

However, it has given an indication of its support for sexual minority rights in its position on HIV. In its statement the AU interpreted vulnerable people affected by HIV/AIDS to include men who have sex with men.¹⁰⁰ Thus, there is a slow but conscious indication that the AU recognises the problem that men who have sex with men face and are prepared to fashion policies targeted towards them even if it is in the context of HIV.

⁹⁸ <http://ilga.org/ilga/en/article/1211> (accessed 16 August 2010).

⁹⁹ The African Union(AU) is the successor to the Organisation of African Unity(OAU), see the Constitutive Act of the AU adopted in Lome, Togo in July 2000 and entered into force in July 2002 in C Heyns & M Killander (eds) *Compendium of human rights documents of the African Union* (2010) 4.

¹⁰⁰ Africa Union, 'Africa's common position to the UN General Assembly special session on AIDS', June 2006 available at http://www.africa-union.org/root/au/conferences/past/2006/may/summit/doc/en/UNGASS_Common_Position.pdf (accessed 16 August 2010).

6.3 The African Commission on Human and Peoples' Rights

6.3.1 Communications

The African Commission on Human and Peoples' Rights (the African Commission), has two main mandates, the promotional and protective. Under its protective mandate the Commission receives and considers communications submitted to it mainly by individuals and groups of individuals. The Commission missed the opportunity to consider a communication submitted to it in 1994.¹⁰¹ The complainant in the case withdrew the matter, thus denying the Commission the opportunity to consider the matter.

However, in a later decision, the Commission has interpreted 'other status' in article 2 of the African Charter on Human and Peoples' Rights to include sexual orientation¹⁰². This is a healthy development as it signals the Commission's preparedness to consider future communications affecting sexual minorities as a human right and gives a favourable ruling to that effect.

6.3.2 State reporting

The Commission has the power to review the human rights performance of African states in the light of their obligations under the Charter.¹⁰³ In the consideration of South Africa's state report in 2005, the South African delegation was quizzed about the possibility of marriage between people of the same sex. South Africa answered by saying that there was nothing wrong with protecting persons of the same sex. The delegation further observed that if the matter comes up for determination as to whether or not same sex persons are entitled to marriage rights, the matter may be determined by the courts in South Africa according to their constitution.¹⁰⁴

In another state report considered by the Commission which was submitted by Cameroon, questions were raised by some Commissioners about the treatment of gays and lesbians in Cameroon. Even though the questions pointed in the direction that Cameroon appeared to be violating the rights of gays and lesbians, Cameroon justified its ill treatment of gays and lesbians by stating that same sex acts were immoral and that international law provided them with an opportunity to outlaw such practices, if they conflicted with the 'morals' of society.¹⁰⁵

The same problems identified with state reporting under the ICCPR are the same problems which confront the African Human Rights system. As a way forward, the AU Commission may publicly remind states that have failed to report to do so.

7. The African Peer Review Mechanism

The African Peer Review Mechanism, as its name suggests, is a peer review of countries by other countries on the continent as regards, among others, their human rights record. It provides an opportunity for states to examine the treatment of sexual minorities in countries in Africa. However,

¹⁰¹ *Courson v Zimbabwe* (2000) AHRLR 335 (ACHPR 1995).

¹⁰² *Zimbabwe human rights NGO forum v Zimbabwe* Communication 245/2000 21st Activity report of the African Commission on Human and Peoples' Rights (May-November 2006) January 2007 EX.CL/322(X) Annexure III paragraph 169.

¹⁰³ Article 62 of the African Charter.

¹⁰⁴ Viljoen (n 36 above).

¹⁰⁵ As above.

as yet, the issue of sexual minority rights has not been raised in the discussion of reports on countries.

It may appear that an important opportunity to appraise countries' treatment of sexual minorities is being missed, but as an ongoing process there must come a time when such an issue should be raised. However, this seems unlikely as the 'peers' who review each other may all be opposed to the recognition of sexual minority rights and may not focus on such issues.

8. Universalism as against cultural relativism

There has been an ongoing debate between 'universalism' and 'cultural relativism' in relation to the enjoyment of fundamental human rights. The 'universalism' argument is that human beings, wherever they live on the globe, are entitled to certain fundamental human rights which are inherent in them simply because they are human beings. The 'cultural relativism' argument on the other hand says that the enjoyment of human rights is contingent on the culture of a people, and varies as cultures vary, and that there can be no enjoyment of the same human rights everywhere. Cerna¹⁰⁶ concedes that the idea of universal enjoyment of human rights may be traced to the Universal Declaration. While the countries in Africa and Asia see the universal enjoyment of human rights as a western idea that interferes in their internal affairs and part of the 'ideological patrimony of the western civilisation',¹⁰⁷ the western countries like the United States of America insist that social and cultural enjoyment to fundamental human rights is a recipe for authoritarian governments to perpetuate abuses.¹⁰⁸ Addo, acknowledges this tension between 'universalism' and 'cultural relativism' and says that:

*The traditional scholarly narrative on the relationship between cultural diversity and universal respect for human rights suggests a tension which must at best be managed. There is however no consensus among scholars as to the best way to reconcile or manage this tension and so creating an intellectual gap between universalist and cultural relativist schools of thought...*¹⁰⁹

Recent developments suggest that the scales tilt in favour of the universalism argument. It has been argued¹¹⁰ that UN human rights bodies engage in 'constructive dialogue on national periodic reports' submitted to them by state parties, and that they 'challenge specific cultural practices that they consider to be harmful or contrary to human rights guarantees'.¹¹¹

In the African context, African leaders, in a joint statement prior to the 1993 Vienna Conference, affirmed that: 'the universal nature of human rights is beyond question; their protection and promotion are the duty of all states, regardless of their political, economic or cultural systems'.¹¹²

¹⁰⁶ CM Cerna 'Universality of human rights and cultural diversity: implementation of human rights in different socio-cultural contexts' (1994) 16 Human Rights Quarterly 740.

¹⁰⁷ As above.

¹⁰⁸ As above 3.

¹⁰⁹ See MK Addo 'Practice of United Nations human rights treaty bodies in the reconciliation of cultural diversity with universal respect for human rights' (2010) 32 Human Rights Quarterly 601.

¹¹⁰ As above.

¹¹¹ As above.

¹¹² 'Final declaration of the regional meeting for Africa of the World Conference on Human Rights in Report of the regional meeting for Africa of the World Conference on Human Rights, Tunis, 2-6 November 1992, UN Doc A/CONF.157/AFRM/14 (24 November 1992) [2], quoted in M Killander 'African human rights law in theory and practice' in S Joseph & A McBeth (eds) Research handbook on international human rights law (2010) 411.

9. Conclusion

It has been argued in this chapter that there are several human rights instruments and mechanisms that provide for the protection of all persons, including sexual minorities. Firstly, there is no binding international human rights treaty that specifically provides protection for sexual minority rights. However, it was argued that the international bill of rights provides human rights guarantees such as the right to equality, non discrimination, privacy, dignity and bodily integrity, which could be interpreted to provide protection for sexual minorities. The Human Rights Committee has also defined sex to include sexual orientation, thus providing direct protection for sexual minorities.

Secondly, the reporting mechanism under the UN system as well the African human rights system is fraught with difficulties. State parties to the various instruments have not done their reporting as required under the treaties and even where they have reported, have failed to report on sexual minority rights. For example, Botswana's initial report to the Human Rights Committee was due in 2001, yet Botswana submitted its report to the Human Rights Committee in 2006 and failed to report on sexual minority rights.¹¹³

It is submitted that the Human Rights Committee should give a specific reporting requirement for states to report on measures that it has taken to respect, protect and promote sexual minority rights. Apart from pooling resources to present shadow reports on state parties obligations in respect of sexual minorities, NGO's may also organise information sessions to highlight the Human Rights Committee's concluding observations, and the failure of the state party concerned to respect its obligations in relation to sexual minorities, to open up spaces for debate on sexual minority rights in Africa.

In addition, the special procedures which focus on thematic issues have proved useful. It is submitted that if a special rapporteur on violence, discrimination and stigma against gays and lesbians is appointed by the UN, it will assist in focusing on the issues that violate the rights of sexual minorities, and keep the issue constantly on the agenda of the UN, until a lasting solution is found to end violence against sexual minorities.

As regards the African human rights system, it is submitted that there is the need to present the African Commission the opportunity to determine the rights of sexual minorities. Even though Murray and Viljoen¹¹⁴ contend that the time may not be right to approach the African Commission, it is submitted that a definitive pronouncement is urgently needed to ensure protection of sexual minority rights in Africa. If the recent interpretation of article 2 of the African Charter by the African Commission, that 'sex' includes 'sexual orientation'¹¹⁵, as well as the Commission's own jurisprudence which relies heavily on international law, is anything to go by, then it is submitted that the time has come for the African Commission to determine the rights of sexual minorities in the context of the African Charter.

¹¹³ Malawi and South Africa's initial reports were due in 1995 and 2000 respectively but have failed to report. Uganda reported in 2003, when it was supposed to report in 1996 see <http://www.unhcr.ch/tbs/doc.nsf> (accessed 16 August 2010).

¹¹⁴ (n 28 above).

¹¹⁵ (n 102 above).

CHAPTER THREE

The attitude to sexual minority rights in Botswana, Malawi, Uganda and South Africa

3.1 Introduction

It has been argued in the preceding chapter that there is a plethora of international human rights treaties and mechanisms that recognise and protect sexual minority rights. However these treaties and mechanisms become meaningful only when they are implemented at the domestic level. Thus, the relevance of international human rights treaties in protecting the rights of all persons at the domestic level cannot be over emphasised. It is for the implementation and observance of the tenets of these rights at the domestic level that these treaties are opened for signature to all countries of the world.

This chapter, drawing on the protection offered to sexual minorities in international human rights laws, argued in chapter two, focuses on a comparative analysis of the attitude towards sexual minority rights in four countries, namely, Botswana, Malawi, Uganda and South Africa. It will analyse how each of the selected countries have given effect to sexual minority rights in its Constitution, the legal position in the criminal laws and the attitude of the judiciary towards sexual minority rights. These three indicators will be measured against the background of the country's international obligations and ascertain whether or not the country in question is respecting its international obligations.

3.2 Botswana's treatment of sexual minority rights

3.2.1 The Constitution of Botswana and sexual minority rights

The Constitution of Botswana was adopted in 1966 when Botswana became an independent country.¹¹⁶ The Constitution recognises a democratic system of government with an elected president and members of parliament.¹¹⁷ Botswana also has a judiciary which is appointed by the president in consultation with the Judicial Service Commission.¹¹⁸ The judiciary is independent of the executive and parliament. The president has power to perform the executive functions of the country, while parliament has the power to make and amend laws, including the Constitution.¹¹⁹ The judiciary is responsible for interpreting the law and enforcing the rights of all persons in Botswana. It is headed by the judge president who oversees the functioning of the courts of Botswana. The Constitution provides for the Court of Appeal as the highest Court of Botswana and the High Court in addition to other courts.¹²⁰ Significantly, the Constitution provides:

*Where any question as to the interpretation of this Constitution arises in any proceedings in any subordinate court and the court is of the opinion that the question involves a substantial question of law, the court may, and shall, if any party to the proceedings so requests, refer the question to the High Court.*¹²¹

¹¹⁶ Country report of Botswana submitted to the Human Rights Committee by the government of Botswana (n 93 above).

¹¹⁷ As above.

¹¹⁸ Constitution of Botswana, section 96, 100 respectively, for the High Court and the Court of Appeal judges.

¹¹⁹ As above, sections 86, 89.

¹²⁰ As above, sections 95, 99.

¹²¹ As above, section 105(1).

An appeal from any decision regarding the interpretation of the Constitution 'lies as of right to the Court of Appeal'.¹²²

The Constitution of Botswana has a bill of rights,¹²³ which prohibits discrimination on any grounds¹²⁴ and guarantees the right to privacy¹²⁵ and personal liberty¹²⁶ among others. It is noteworthy, that the Constitution of Botswana, unlike the Constitution of South Africa, does not prohibit discrimination on grounds of sexual orientation. It only prohibits discrimination on the grounds of sex. Also, unlike the South African Constitution, which expressly provides in section 39, that the Courts must apply international law in cases before them, the Constitution of Botswana does not have any such provision.

In spite of these shortcomings of the Botswana Constitution, it is submitted that a progressive and purposive interpretation of the word 'sex' to include 'sexual orientation' by the judiciary in Botswana could secure the rights of sexual minorities in Botswana.

3.2.2 The Penal Code of Botswana

The Penal Code of Botswana dates back to when Botswana became a British protectorate.¹²⁷ This reinforces the assertion that many of the laws that criminalise same sex acts between consenting adults in private, in Africa, are colonial relics.¹²⁸ Section 164 provides:

Any person who- (a) has carnal knowledge of any person against the order of nature; (b) has carnal knowledge of an animal; or (c) permits any other person to have carnal knowledge of him or her against the order of nature, is guilty of an offence and is liable to imprisonment for a term not exceeding five years.

Section 167 also provides:

Any person who, whether in public or private, commits any act of gross indecency with another person, or procures another person to commit any act of gross indecency with him or her, or attempts to procure the commission of any such act by any person with himself or herself or with another person, whether in public or private, is guilty of an offence.

It is common knowledge that homosexual acts have been interpreted to mean carnal knowledge against the order of knowledge as well as an act which is grossly indecent. In 1998 these sections were amended to broaden the scope of same sex acts offences to include women as well.¹²⁹

¹²² As above, section 106.

¹²³ As above, sections 3 to 19.

¹²⁴ As above, section 15.

¹²⁵ As above, section 9.

¹²⁶ As above, section 5.

¹²⁷ The Penal Code of Botswana was adopted in 1950, see Penal Code chapter 08-01 of Botswana (n 7 above).

¹²⁸ This alien legacy, the origin of "sodomy" laws in British colonialism (n 6 above) 4.

¹²⁹ Penal Code (Amendment) Act 1998 amended section 22 of the Penal Code with the insertion of 'or her' after 'him' and 'or herself' after 'himself'.

3.2.3 The attitude of the judiciary towards sexual minority rights in Botswana

While providing a bill of rights that appears to offer important protections for the rights of all persons, including sexual minorities, in the Constitution, the Penal Code of Botswana appears to take back what the constitution provides by discriminating against persons on grounds of their sexual orientation.

The judiciary of Botswana was presented with an opportunity to interpret the bill of rights in the Constitution, in the light of the provisions of the Penal Code that criminalise homosexuality, in the case of *Kanane v The State*.¹³⁰ The brief facts of this case are that, sometime in December 1994, Mr. Kanane, a citizen of Botswana, was arrested with one Mr. Norrie, a British national, at a place called Maun Village near the capital of Botswana, Gaborone. The two were charged under sections 164 and 167 of the Penal Code of Botswana for committing indecent practices with another male and in the alternative, committing an unnatural offence.¹³¹

Mr. Norrie pleaded guilty, paid a fine and was subsequently deported to Britain. Mr. Kanane, on the other hand, pleaded not guilty and challenged the provisions of the Penal Code under which he was charged, as discriminatory against men, 'averring that the relevant sections of the Penal Code were ultra vires s 3 of the Constitution of Botswana.'¹³² In sum, Mr. Kanane's argument was that sections 164 and 167 were unconstitutional in the light of section 3 of the constitution, which provided, that every one was entitled to enjoy certain basic fundamental and individual freedoms without discrimination.

This raised a constitutional matter which had to be dealt with by the High Court of Botswana. The High Court held among others that the provisions of the Penal Code that criminalised same sex acts were constitutional. On appeal to the Court of Appeal, the highest Court of Botswana, the Court upheld part of the appellant's case that section 167 of the Penal Code was unconstitutional because it was discriminatory on grounds of gender, while section 164(c) was not in violation of the Constitution, because it was not discriminatory on grounds of gender.

The *Kanane case* is important for two reasons. First of all it tested the resolve of the Bill of Rights of Botswana to protect citizens regardless of their sexual orientation. Secondly it also tested the ability of the judiciary to interpret the bill of rights in a purposive manner to protect the rights of all persons, including sexual minorities, cognisant of Botswana's international obligations as well as decisions of other courts in other jurisdictions.

Not only has the *Kanane case* exposed Botswana as reneging on its international obligations, it has also demonstrated that the rights of persons in Botswana may be determined according to the thinking of the majority in society. It is noteworthy that in the consideration of Botswana's periodic report to the UN Human Rights Council, the Council observed that Botswana was violating its obligations under the ICCPR and chided Botswana to live up to its obligations.¹³³

¹³⁰ (n 18 above).

¹³¹ As above, 1.

¹³² As above.

¹³³ (n 69 above) para 22.

3.3 The treatment of sexual minority rights in Malawi

3.3.1 The Constitution of Malawi

The Constitution of Malawi¹³⁴ guarantees the executive, parliament and the judiciary as structures of governance and states that the judiciary shall be independent of the powers and influence of any person or institution in the exercise of its 'functions, powers and duties'.¹³⁵

The Constitution provides certain human rights guarantees that seem to protect all persons including sexual minorities. Key among these rights are the right to liberty, human dignity and personal freedoms, equality, privacy and freedom of association.¹³⁶

It may appear that the rights provided for in the constitution provide an unassailable regime of human rights protection of all persons, including sexual minorities. On paper that may be so, but this is yet to be tested in respect of non discrimination on the grounds of a person's sexual orientation.

The main obstacle to such a test is the legal requirement which allows the Chief Justice of Malawi to certify whether or not a matter is a constitutional matter fit to be determined by the courts.¹³⁷ Thus, the Chief Justice refused to certify as a constitutional matter whether or not the provisions of the Penal Code of Malawi, that criminalises same sex acts, are unconstitutional, in the case of *Republic versus Steven Monjeza Soko and Tionge Chimbalinga Kachepe*¹³⁸.

Thus even though the Constitution appears to offer a comprehensive set of rights for the protection of all persons in Malawi, including sexual minorities, the opportunity for invoking these rights may be inhibited by the exercise of the powers invested in the chief justice, and thus may be mere words on paper and not effective after all.

3.3.2 The Penal Code of Malawi

The Penal Code of Malawi criminalises same sex acts between consenting adults,¹³⁹ and appears to claw back some of the basic protection that the constitution offers individuals. The Malawian Penal Code criminalises 'buggery',¹⁴⁰ 'permitting another person to have carnal knowledge with one against the order of nature'¹⁴¹ and the offence of 'indecent practices between males'.¹⁴²

The Penal Code is a remnant of colonial rule which was inherited by the government and people of Malawi.¹⁴³ In its defence of its anti homosexual stand, the government of Malawi argue that homosexual practices are un-African and alien to the African culture and point to the Penal Code as the reference point for this argument.

¹³⁴ Constitution of the Republic of Malawi (Revised) 2004 came into provisional force on 18 May 1994 and into definitive force on 18 May 1995. The revised edition consolidates all amendments as of 21 January 2004.

¹³⁵ As above, section 103.

¹³⁶ As above, sections 15 to 46.

¹³⁷ Section 9(3), Courts (Amendment) Act 2004.

¹³⁸ (n 18 above)

¹³⁹ (n 7 above) section 153(a).

¹⁴⁰ As above.

¹⁴¹ As above, section 156.

¹⁴² As above.

¹⁴³ (n 8 above).

Yet there is documented evidence to the contrary that the Penal Code was put in place by the colonial government and has its roots in the Christian religion of the colonial master at the time, and not a product of African culture.¹⁴⁴ The provisions of the Penal Code, as they stand, fly in the face of constitutional provisions which guarantee privacy, dignity, equality, freedom of the individual, and freedom of association among others.

3.3.3 The attitude of the judiciary towards sexual minority rights in Malawi

Not surprisingly, and following the line of Botswana in the *Kanane case*, Malawi also applied the colonial relic in its Penal Code that criminalises same sex acts and sentenced a gay couple to fourteen years imprisonment in May 2010.¹⁴⁵

A challenge of the constitutionality of any law has to be certified by the Chief Justice of Malawi before it can heard by a court.¹⁴⁶ The Chief Justice refused to certify the challenge to the 'sodomy' laws, because, as he put it, the application 'lacked clarity on the proceedings that the Constitutional Court was expected to certify on'.¹⁴⁷ That failing, the two gay men, Tiwonge Chimbalanga Kachepa (aged 20) who self-identifies as a woman, and Steven Monjeza Soko (aged 26), had to face the 'wrath' of Chief Resident Magistrate, Nyakwawa Usiwa Usiwa in the Blantyre magistrate court.

The trial and conviction of the couple received international condemnation. Under pressure from the international community, and after a meeting with the UN secretary General, Mr. Bingu Wa Mutharika, the Malawian President granted a presidential pardon to the couple, who have since been released.¹⁴⁸

Just like Botswana, Malawi appears to be violating its international obligations, especially under the ICCPR. While presenting a strong regime of human rights protection in its constitution in accordance with legislative measures as required of it under the ICCPR, in reality, these rights appear to be on paper only. They are out of reach of ordinary citizens, especially the homosexual community whose rights to privacy, dignity, and bodily integrity are violated with impunity and without redress. Malawi is due to undergo a Universal Peer Review under the UN Human Rights Council in 2011 and it remains to be seen how Malawi justifies its treatment of sexual minorities.

Thus far, the Penal Code erodes the rights provided for in the constitution but until such time that the constitutionality of these provisions will be tested and probably declared unconstitutional, they remain mere paper rights bereft of any power to protect the rights of, especially, sexual minorities.

The president of Malawi granted the couple a pardon and they were released from prison, but same sex consensual acts still remain a crime in Malawi.

¹⁴⁴ As above.

¹⁴⁵ *Republic versus Steven Monjeza Soko and Tionge Chimbalanga Kachepa* criminal case number 359 of 2009 (n 18 above).

¹⁴⁶ Section 9(3), Courts (Amendment) Act 2004 (n 137 above).

¹⁴⁷ 'Malawi: country not safe for homosexuals' available at <http://allafrica.com/stories/201003140001.html> (accessed 16 August 2010).

¹⁴⁸ 'Under pressure, Malawi's leader pardons gay couple' ABC news, available at <http://abcnews.go.com/international/wirestory?id=10778353> (accessed 16 August 2010).

3.4 The treatment of sexual minority rights in Uganda

3.4.1 The Constitution of Uganda

The Constitution of Uganda,¹⁴⁹ like that of Malawi and Botswana, establishes the executive, parliament, and the judiciary. It contains important human rights protection for the rights of all persons in Uganda. However, the constitution contains an express prohibition barring marriage between persons of the same sex. An amendment sponsored by the government saw the insertion of a clause which prohibited same sex marriages in 2005.¹⁵⁰ It has been argued that perhaps, Uganda stands out as the only African country to have an express prohibition on same sex marriages in its constitution, even though many African countries prohibit and punish same sex acts in their Penal Codes.¹⁵¹

3.4.2 The Penal Code Act of Uganda

The Penal Code Act of Uganda¹⁵² criminalises same sex acts between consenting adults in private. It punishes persons who engage in such acts with a maximum penalty of life imprisonment.¹⁵³ a maximum penalty of life imprisonment. Like Botswana and Malawi, this piece of law was inherited from Uganda's colonial masters.

Not satisfied with the status quo, there are ongoing discussions to pass another law to punish homosexuality. The proponent of the Bill, Mr. David Bahati, envisaged a punishment of the death sentence for 'aggravated homosexuality'. The reasons for the introduction of the new bill, among others, are for the preservation of the morals, culture and family unit of Uganda. However, the Bill has been criticised in several quarters. Some of the criticisms levelled against the Bill suggests that if passed, the Bill will derail efforts to implement an effective strategy to curb HIV/AIDS. It may drive persons in same sex relationships underground and keep them out of prevention, care and treatment strategies.

It may appear that Uganda is violating its international obligations in respect of international treaties that it is a state party to. The criticisms and international condemnation that the 'anti homosexuality bill' has received have stalled the passage of the bill, but for all intents and purposes, Uganda has signalled to the world its abhorrence of same sex acts.

3.4.3 The attitude of the judiciary towards sexual minority rights

An important case that reveals the attitude of the Ugandan judiciary to the rights of sexual minorities is; *Victor Juliet Mukasa and Yvonne Oyo v The Attorney General of Uganda*¹⁵⁴. Even though the

¹⁴⁹ The Constitution of Uganda, 1995.

¹⁵⁰ The Constitution (Amendment) Act, 30 September 2005, (Amendment of Article 31 of the constitution, paragraph 10).

¹⁵¹ JD Mujuzi 'The absolute prohibition of same-sex marriages in Uganda', *International Journal of Law, Policy and the Family* 3.

¹⁵² Penal Code Act, chapter 20 of the Laws of Uganda section 145.

¹⁵³ See section 145(c) (as above).

¹⁵⁴ *Victor Juliet Mukasa and Yvonne Oyo v Attorney General* (Misc Cause No. 247/06), High Court of Uganda, Kampala, judgment of 22 December 2008, unreported, on file with author.

court warned that it is not a case about homosexuality,¹⁵⁵ it is evident from the facts of the case that clearly it was a matter related to the rights of two alleged lesbians. The brief facts of this case are that the two alleged lesbians were arrested and molested by the police on suspicion of being lesbians and showing affection for each other in public, based on a report by their neighbours to the police. The court held, among others, that their right to freedom, dignity and property had been violated and awarded them compensation. The decision is important for at least two reasons. First it relies on international law to uphold the rights of the complainants, which suggests that in future if the courts in Uganda adopt such an attitude, then the rights of sexual minorities may have some protection. The Court relied on article 1 of the Universal Declaration, and article 3 of CEDAW to make a finding, that the right to dignity and protection from inhuman treatment of the applicants had been breached by the police.¹⁵⁶

Second, the decision shows that given the opportunity, the Courts in Uganda may apply the Bill of rights to protect the rights of all persons without discrimination. It is a welcome development and an important one for the protection of sexual minority rights.

3.5 The treatment of sexual minority rights in South Africa

3.5.1 The Constitution of South Africa

The Constitution of South Africa expressly recognises the rights of sexual minorities. It does so by prohibiting discrimination on some listed grounds, including a person's sexual orientation.¹⁵⁷ It therefore follows that the Bill of Rights in the Constitution, which grants certain rights such as the right to equality, dignity and privacy, among others, applies to all persons, including sexual minorities. South Africa has been hailed as a good example for other African countries to emulate when it comes to respect for the rights of all persons, including sexual minorities.¹⁵⁸

The Constitution further obligates the courts to apply their minds to international law and foreign law when interpreting the constitution.¹⁵⁹ This means that important jurisprudence respecting sexual minority rights from international human rights bodies, as well as courts of other jurisdictions, is relevant in the South African context to ensure enjoyment of sexual minority rights. Thus, South Africa's Constitution provides very important rights which are enjoyed by all persons, including those with a homosexual orientation.

3.5.2 The criminal laws of South Africa

South Africa did not have a specific Penal Code that criminalised same sex acts like Botswana, Malawi and Uganda. Laws that criminalised homosexuality were found in some criminal laws.¹⁶⁰ However, the provisions of these laws became unconstitutional subsequent to the ruling of the Constitutional Court in the case of *National Coalition for Gay and Lesbian Equality and Another v Minister of justice and others*.¹⁶¹ The amendment of the criminal laws to align them with the decision

¹⁵⁵ As above, 16.

¹⁵⁶ As above, 17.

¹⁵⁷ Section 9(3) of the South African Constitution Act 108 of 1996.

¹⁵⁸ Murray & Viljoen (n 28 above) 87.

¹⁵⁹ Sections 39(1)(b) and (c) of the South African Constitution.

¹⁶⁰ These were the Criminal Procedure Act 51 of 1977; the Security Officers Act 92 of 1987; and section 20A of the sexual Offences Act 23 of 1957 which prohibited sexual conduct between men in certain circumstances.

¹⁶¹ 1999 1 SA 6 (CC) 21.

of the Constitutional Court was an important step forward towards recognising sexual minority rights and setting the pace for other African countries to emulate. Thus consensual same sex acts is no longer an offence in South Africa, courtesy the Constitutional Court's decision

3.5.3 The attitude of the judiciary towards sexual minority rights

The attitude of the judiciary towards sexual minority rights in South Africa has been very encouraging and has acted as the catalyst that has ensured comprehensive protection of sexual minority rights. The courts have given important decisions which have had far reaching implications for the rights of sexual minorities, some of which will be examined below.

In the *National Coalition for Gay and Lesbian Equality case*¹⁶² for instance, the Court held that the Common law offence of sodomy and other criminal laws that prohibited same sex acts between men was unconstitutional and invalid. Also the Constitutional Court in the case of *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*¹⁶³, gave a boost to sexual minority rights in South Africa. After examining section 25(5) of the Aliens Control Act,¹⁶⁴ the court found that the section unfairly discriminated against gays and lesbians on the overlapping and intersecting grounds of sexual orientation and marital status because the subsection failed to extend benefits accorded heterosexuals to homosexuals.¹⁶⁵

3.6 Conclusion

This chapter has examined and compared the attitude towards sexual minority rights in four African countries, namely, Botswana, Malawi, Uganda and South Africa. Having examined the constitutions, the criminal laws, as well as the attitude of the judiciary towards sexual minority rights, there is an emerging trend which raises very important issues which may be discussed fully in the next chapter.

Of the four countries, it is only South Africa which has decriminalised same sex acts. The important lessons for the other countries is that, relying on constitutional provisions and international human rights instruments, as well as the jurisprudence of the monitoring bodies of these international instruments, it is clear that the Penal Codes that criminalise same sex acts have outlived their usefulness.

Again, it is important to note that the penal codes, which have been applauded as upholding African cultural values, are indeed colonial relics, primarily informed by religious beliefs and not African tradition.

The attitude of the judiciary, with the exception of South Africa and Uganda in the *Mukasa case*, has not been helpful. Malawi's Constitution, just like that of South Africa, allows the court to consider international law when deciding a case.¹⁶⁶ But the noticeable thing about the attitude of the judiciary in all these countries, except South Africa, is that they pander to the whims and caprices of the majority in society who frown upon same sex relationships.

¹⁶² As above.

¹⁶³ 2000 2 SA 1 (CC).

¹⁶⁴ Act 96 of 1991.

¹⁶⁵ Cases like *Satchwell v President of South Africa*, 2002 6 SA 1 (CC) and *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA) 362 where the Constitutional Court and the Supreme Court of Appeal respectively, extended the duty of support accorded to heterosexuals to homosexuals.

¹⁶⁶ Section 11(2)(c), (n123 above).

CHAPTER FOUR

Challenges and prospects to recognition of sexual minority rights in Africa

4. Introduction

This fourth chapter is devoted to addressing three main challenges to recognition of the rights of homosexuals in Africa. It also explores four prospects that could motivate the recognition of these rights in Africa.

In chapter one it was argued that violence and discrimination against homosexuals was very grave. Following from there, chapter two observed that in response to this violence and discrimination, the international human rights framework offers protection to sexual minorities. In spite of this protection, it was reckoned in chapter three that there was a gap between the international human rights framework protections and what obtains at the domestic level, in practice. Thus in spite of international human rights protection, homosexuals are bereft of any protection at the domestic level. This chapter therefore explores what has accounted for the gap in the protection of homosexuals in African countries, as well as ways of filling this gap.

The arguments which have been put forward to justify the criminalisation of same sex acts in Africa include the following: that homosexuality is a choice and not as a result of a person's biological make up; same sex acts are immoral and an abomination, according to religion; and homosexuality is against the cultural values of African societies and thus un-African, among others.

Diametrically opposed to these views are arguments to the effect that homosexuality is not a choice but a result of a person's biological make up. It is also argued that morality must be distinguished from legality and should not be used as a basis to deny persons their fundamental human rights. It is further argued that homosexuality existed in many African communities whose members have not made any contact with the outside world;¹⁶⁷ therefore, any claims that homosexuality is foreign and a threat to the African family and society, and thus un-African, are unfounded.

4. Challenges to decriminalisation of same sex acts in Africa

4.1 Homosexuality as a choice

The fundamental basis of all the arguments for sustaining criminalisation against homosexuality is that homosexuality is a way of life that some persons have chosen to adopt. This argument flows from the state sponsored homophobia and the general attitude towards sexual minority rights by many persons in society.

Clearly, such a view is misplaced and sums up the ignorance or lack of knowledge of what homosexuality is. There is overwhelming evidence to suggest that being a homosexual is not something people choose to become, but rather as a result of their biological make up.¹⁶⁸

¹⁶⁷ S Tamale 'Out of the closet: unveiling sexuality discourses in Uganda, available at <http://www.feministafrica.org/index.php/out-of-the-closet> (accessed 10 September 2010).

¹⁶⁸ J Gloucester *Homosexual relationships* (1979) 13.

4.3 Homosexuality as immoral and a religious abomination

Support for the continued criminalisation and re criminalisation of same sex consensual sexual activity has very often hinged on the argument that homosexuality is immoral and a religious abomination. The Holy Bible, in the Old Testament says 'Thou shall not lie with mankind, as with womankind:it is abomination'.¹⁶⁹ It states further, that:

*If a man also lie with mankind, as with woman, both of them have committed an abomination; they shall surely be put to death; their blood shall be upon them.*¹⁷⁰

Sloan argues, that based on this Old Testament approach to Christianity, the early Christian church believed that homosexuality was abnormal and should be severely punished.¹⁷¹ He argues further, that the medieval Christian church also believed that 'homosexuals should be put to death by burning, hanging or burning alive'.¹⁷² This attitude towards homosexuality has characterised a greater section of the Christian church till today.

Uganda's clergy, which comprised the Seventh Day Adventist, the Pentecostal churches, the orthodox and the mufti, expressed support for the Ugandan anti homosexuality Bill, saying that 'homosexuality is an evil and is anti-godly'.¹⁷³ The group also reckoned that the death penalty clause in the Bill should be scrapped, and substituted with life imprisonment.¹⁷⁴

It is significant to note that despite this strong opposition to homosexuality by the Christian religion there are indications that not all Christians and the clergy are opposed to homosexuality.

Kaoma, an Anglican pastor from Zambia, asserts that the attacks on African's gays and lesbians is an extension of a cultural war on homosexuality which started in the United States of America(US), gradually spreading to Africa, making Africans 'a kind of collateral damage of the US cultural wars'.¹⁷⁵ He asserts that the rights of homosexuals in Africa should be respected and African churches should not fight US evangelical proxy wars and spread homophobia in Africa, because of the funding they receive.¹⁷⁶

In its resolution 1.10 (d), Anglican Bishops worldwide, at their meeting in Lambeth Palace in Canterbury, England, observed that:

*While rejecting homosexual practice as incompatible with scripture, calls on all our people to minister pastorally and sensitively to all irrespective of sexual orientation and to condemn irrational fear of homosexuals...*¹⁷⁷

The Synod of the Anglican Bishops of Southern Africa also issued a statement condemning the Anti-homosexuality Bill in Uganda. It stressed that the death penalty in the bill was a breach of God's commandment not to kill and appealed to law makers to uphold the rights of homosexuals,

¹⁶⁹ Leviticus 18:22 The Holy Bible, King James version.

¹⁷⁰ Leviticus 20:13, as above.

¹⁷¹ IJ Sloan *Homosexual conduct and the law* (1987) 2.

¹⁷² As above.

¹⁷³ 'Clergy: jail gays, don't hang them' *The Daily Monitor*, 29 October 2009 1.

¹⁷⁴ As above.

¹⁷⁵ K Kaoma 'Globalising the culture wars, US conservatives, African churches, & homophobia' (2009) 4.

¹⁷⁶ As above 5.

¹⁷⁷ J M Dyer 'The official report of the Lambeth Conference' (1999) 381.

because it is 'immoral to permit or support oppression of, or discrimination against people on the grounds of their sexual orientation, and contrary to the teaching of the gospel.'¹⁷⁸

The religious arguments are polarised along two views. Homosexuality is condemned by one side of the argument that says that it is an abomination and must not be tolerated. The other side of the argument holds the view that homosexuality is incompatible with scripture, yet the church has a duty to love all persons without regard to their sexual orientation.

It is submitted that the latter view, that the church should not wage war against homosexuals is to be preferred because it is situated within the human rights argument. This view recognises the respect for the rights of all persons because they are human beings, with inherent, inalienable rights and not because of their sexual orientation.

4.4 Homosexuality as offensive to the African culture and tradition

One obstacle that has derailed the recognition of sexual minority rights in Africa, is the argument that homosexuality is un-African. It is argued that homosexuality is foreign and alien to the African society,¹⁷⁹ and according to Bahati, poses a threat to the African family.¹⁸⁰

It has been argued that there is no one such thing as an African culture. There are many and different cultures on the African continent and there is evidence to suggest that in some cultures, for example the kabaka of Uganda, homosexuality was practiced and accepted.¹⁸¹ Therefore the argument that homosexuality is un-African is not entirely correct and ignores important historical facts.

Also, it has been argued that the problems that confront the modern African state is not homosexuality and its related problems. It is argued that concerns over homosexuality are used to divert attention from the problems that confront African states and their culture, like 'the hundreds of thousands of families that sleep without a meal or the millions of children who die unnecessarily everyday from preventable or treatable diseases such as malaria, diarrhoea, measles, pneumonia, etc.'¹⁸² Not to mention corruption, greed, nepotism and the desire to hold onto power at all costs. A common 'enemy' unites the electorate who, if we are honest, are not well informed on matters of sexuality and are easily manipulated by arguments around morality and nationality.

¹⁷⁸ Statement of the synod of Anglican Bishops on homophobia available at <http://constitutionallyspeaking.co.za/statement-from-the-synod-of-anglican-bishops-o> (accessed 5 March 2010).

¹⁷⁹ Mwaikasu J, in the kanane case at the High Court in Botswana denied the existence of homosexuality in Africa and came to a conclusion that homosexuality is a foreign culture which had its 'origin in, and were predominant among, the white societies, particularly in the west and those who had migrated there' quoted in kanane case(n18 above) 78.

¹⁸⁰ Paragraph 3.0 (b) of Bill no 18 (n 12 above) states "the objectives of the Bill are to prohibit and penalise homosexual behavior and related practices in Uganda as they constitute a threat to the traditional family".

¹⁸¹ Tamale, (n 5 above).

¹⁸² S Tamale 'a human rights assessment of the anti-homosexuality bill' public dialogue held on 18 November 2009 at the Makerere University, on file with author.

4.5 Prospects of decriminalisation and recognition of homosexuality in Africa

4.5.1 The role of international law in securing sexual minority rights in Africa

Increasingly African countries encounter pressure to respect their international obligations by giving effect to their treaty obligations. It was argued in chapter two that the mechanisms of human rights enforcement at the UN have been brought to bear on African's treatment of sexual minorities. For instance, the Human Rights Committee's concluding observations of the United Republic of Tanzania are noteworthy:¹⁸³

The Committee reiterates its concern at the criminalisation of same-sex sexual relations of consenting adults, and regrets the lack of measures taken to prevent discrimination against them... The state party should decriminalise same-sex sexual relations of consenting adults and take all necessary actions to protect them from discrimination and harassment.

The relevance of being a state party to an international covenant is to implement the provisions of the treaty in the domestic setting. Thus decisions made by monitoring bodies are supposed to be implemented by the state party to reflect respect for its international obligations.

In this regard, the jurisprudence of the Human Rights Committee, regarding sexual minority rights, ought to be respected and implemented by states parties to the ICCPR. Therefore, state parties to the ICCPR, like Botswana, Malawi, Uganda and South Africa are bound by these pronouncements and cannot abdicate their responsibility to respect sexual minority rights.

In the recent Universal Periodic Review report of Botswana, the working group of the Human Rights Council expressed concerns about Botswana's treatment of sexual minorities and observed in its recommendations that Botswana should 'decriminalise homosexual relations and practices/consensual same-sex activities between adults; and outlaw discrimination on the basis of sexual orientation.'¹⁸⁴

Quite apart from pressure from the international human rights framework, there is also pressure from the international community, calling on states to respect the fundamental human rights of all persons in their jurisdiction. Malawi came under international pressure recently after it convicted two gay couple to fourteen years imprisonment for getting married.

After a meeting with the UN Secretary General, President Bingu Wa Mutharika granted a presidential pardon to the two alleged convicts. His comments after the grant of the presidential pardon and the release of the two alleged homosexuals suggested that he was not pleased to grant the presidential pardon but was compelled to do so by the pressure exerted on him by the UN Secretary General, as well as the condemnation of the trial by the international community.¹⁸⁵

¹⁸³ Concluding observations of the Human Rights Committee, United Republic of Tanzania, ninety-sixth session, Geneva, 13-31 July 2009 CCPR/C/TZA/CO/4 6 August 2009 6 at paragraph 22.

¹⁸⁴ See report of the working group on the Universal Periodic Review, Botswana, Human Rights Council ,tenth session Agenda item 6 A/HRC/10/69 13 January 2009 19 at para 23.

¹⁸⁵ 'Under pressure, Malawi's leader pardons gay couple' (n 147 above).

4.5.2 The role of the African Commission

The mandate of the African Commission¹⁸⁶ has not been invoked in any sexual minority case yet. However, if the African Commission would follow its recent posture and adopt the same strategy it has adopted in other cases, relying on international law and applying general comments of some relevant international bodies, then there is some hope that sexual minority rights would be given some favourable hearing by the Commission, if there is an opportunity to do so.

In *Social and Economic Rights Action Centre and Another v Nigeria*¹⁸⁷ (SERAC case) and a few other cases,¹⁸⁸ the African Commission has referred frequently to international law to find a violation of a right that is not provided for in the Charter. However, while insinuating that there is some promise in this approach, Viljoen and Murray admonish that there is the need to tread cautiously, as “there are considerable risk with this mechanism and its use is not recommended”.¹⁸⁹ They argue that there is the need to lobby Commissioners and ensure that the time is right for the African Commission to consider the subject of sexual minority rights before such communications are presented to the Commission.

While agreeing with the view-point of these two authors, I think that the time has come for the law to be tested. After all, if the African Commission does not endorse the rights of sexual minorities, there are alternative fora internationally, which may offer a sympathetic hearing, as seen in the jurisprudence of the Human Rights Committee. In the unlikely event that the African Commission refuses to endorse sexual minority rights in Africa, then it may do so, not based on a clear and purposive reading of the law but by other considerations, as the courts in Malawi and Botswana have done. There is some optimism however that the African Commission would uphold sexual minority rights when given the opportunity.

This view is fortified by the recent decision of the African Commission in *NGO forum of Zimbabwe v Zimbabwe*. The African Commission stated clearly that the definition of ‘sex’ in article 2 of the African Charter could be defined to include sexual orientation.¹⁹⁰ This gives an indication of the direction a case involving sexual minority rights might take if the Commission is confronted with such an issue.

4.5.3 The threat of losing the fight against HIV/AIDS

The challenge of HIV/AIDS in several African countries has served as a wake up call to rethink the treatment of sexual minority rights in Africa. Many African countries have adopted HIV/AIDS policies that have left out men who have sex with men. The result has been that the policies they have adopted have not achieved the desired results.¹⁹¹

¹⁸⁶ The African Commission has a promotional and protective mandate. The promotional mandate deals with issues such as holding of conferences and seminars on particular issues among others, while the protective mandate refers to the power to receive and determine communications. For a detailed discussion on this subject see F. Viljoen ‘international human rights law in Africa’ (2007).

¹⁸⁷ (2001) AHRLR 60 (ACHPR 2001) quoted in C Heyns & M Killander (eds.) ‘Compendium of key human rights documents of the African Union, third edition (2007) 251.

¹⁸⁸ Heyns & Killander, as above 172.

¹⁸⁹ Murray & Viljoen (n 28 above).

¹⁹⁰ Zimbabwe human rights NGO forum v Zimbabwe, Communication 245/2000, 21st Activity Report of the African Commission on Human and Peoples’ Rights (May-November 2006) January 2007, EX.CL/322(X), Annexure III, paragraph 169.

¹⁹¹ Johnson (n 24 above) 57. See also the report of the special rapporteur on health (n 24 above) 8.

For instance in the case of male prisoners who have sex with other male prisoners they may acquire the HIV virus while in prison as a result of having unprotected sex. If they are released after serving their sentences, they may infect their partners. It is therefore imperative that interventions aimed at curbing the spread of HIV/AIDS targets prisoners too. Thus the argument that the government may be condoning a criminal act must give way to the necessity of combating an imminent danger to society.

4.5.4 The role of human rights activism on sexual minority rights

There is no discounting the fact that generating activism around the subject of sexual minority rights is one important step towards decriminalisation of same sex acts, and recognition of same sex rights in Africa. In this regard there is the need for more activism at the level of Africa by Africans, to ensure that society is educated about the rights of sexual minorities. This is not an easy task as attempts to do this have been met with repression by various governments in Africa¹⁹² and laws that "prohibit the licensing of organisations which promote homosexuality".¹⁹³

Thus, it is important that Africans and African organisations take up the fight and ensure that in spite of the difficult conditions under which they work, they will continue to advocate for the rights of sexual minorities to ensure that the latter's rights are respected, protected and fulfilled. It is therefore commendable that a coalition of about forty African Non Governmental Organisations (NGO's), came together to condemn the imprisonment of the alleged gay couple in Malawi and called for a repeal of the 'discriminatory criminal law'.¹⁹⁴

4.6. Conclusion

The challenges that confront the decriminalisation and recognition of sexual minority rights in Africa are indeed daunting. In order to overcome this dilemma of criminalisation of same sex acts, political leadership plays a critical role. Where political leaders are sensitive to the human rights of all persons including sexual minority rights and understand the issues at stake they may lead the way for an unbiased discussion on the rights of sexual minorities in their countries.

Judges must also give effect to constitutional rights, such as the prohibition of discrimination, equality before the law, as well as respect for privacy and dignity of the individual. It is admitted that the South African Constitution prohibits discrimination on grounds of sexual orientation, and may account for the bold decision by the courts to declare sodomy laws unconstitutional. However, the Ugandan High Court, in the *Victor Juliet Mukasa* case, shows that courts may use international law, as well as the rights in their constitutions, even in the absence of an outright prohibition of discrimination on the grounds of sexual orientation, to secure the rights of sexual minorities.

¹⁹² Ottoson(n 7 above) 45.

¹⁹³ Anti-homosexuality bill (n 106 above) paragraph 3.0 (d).

¹⁹⁴ 'African civil society organizations condemn criminal prosecution in Malawi same-sex case and call for repeal of discriminatory laws and dismissal of charges, available at http://www.southernafricalitigationcentre.org/news/item/African_civil_society_organisations (accessed 2 March 2010).

CHAPTER FIVE

Summary of findings, conclusion and recommendations

5. Summary of findings

This study sought to examine the debate on sexual minority rights in Africa. It reckoned from the onset that the debate on sexual minority rights in Africa centred mainly on continued criminalisation and re criminalisation of homosexuality on the grounds that it was immoral and un-African, as against the argument that criminalisation of homosexuality violates the rights of sexual minorities.

Firstly, the investigation found out that there are about thirty eight countries in Africa that criminalise homosexuality. Secondly, most of these laws are colonial relics which were inherited from the colonial masters of these African countries, yet these laws have been the reference point for saying that homosexuality offends the African 'culture' and should thus be punished.

Thirdly the study also found out that there is a plethora of international human rights law and mechanisms that affords protection to sexual minorities in Africa. Yet in spite of these laws and mechanisms and in apparent disregard of their international obligations, many African countries continue to disregard sexual minority rights.

Finally, the study found that there are many impediments to the realisation of sexual minority rights in Africa. These impediments range from the stance taken against homosexuality by some Presidents of Africa, thus ensuring that there is no objective and constructive debate on the subject; that homosexuality is a choice and a threat to the 'traditional' African family; and also that homosexuality is immoral and un-African.

5.1 Conclusions

In view of the findings above, the following conclusions are made:

First of all, the laws that criminalise same sex relationships in Africa are colonial relics that have outlived their usefulness. These laws have been overtaken by the human rights provisions in the constitutions of several African states. Also many African countries are state parties to international treaties whose monitoring bodies have a body of jurisprudence, which imposes an obligation on state parties to respect sexual minority rights, which cannot be ignored.

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 African states that have ratified these relevant international treaties that protect sexual minority rights, to give effect to these rights.

It is submitted that the real threat that confronts the African society is not homosexuality. Rather, diseases, poverty, hunger, corruption and the myriad of problems that have kept Africa underdeveloped, are the real challenge that confronts Africa. It is these challenges, rather than the red herring of homosexuality, which have to be addressed by African leaders.

5.2 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 following persons or bodies for consideration and possible implementation;

5.2.1 To the UN human rights framework

There is an urgent need to appoint a special rapporteur on violence, discrimination and violence against gay and lesbian men and women. This will ensure that more pragmatic steps of engaging with the African countries are taken, than to wait for them to submit their country reports, several years after they are due.

5.2.2 To presidents and politicians of African countries

The findings emerging from the study shows that there has been a politicisation of the issue of sexual minorities in Africa. Going forward, there is a need for an open dialogue about the rights of sexual minority rights in Africa. Such a process should be led by presidents, politicians, and opinion leaders, who should encourage the discussion in an unbiased manner in an atmosphere of respect, devoid of insults, threats and name calling. This is because the debate has been dominated by the majority of the population who are heterosexual and has been premised on emotions, insults and the intimidation of homosexuals.

5.2.3 To judges who adjudicate cases involving sexual minority rights

The evidence so far adduced points to the fact that where cases involving sexual minorities are brought before judges in domestic courts in Africa, the disturbing trend is that these cases have been decided based on the alleged morality and thinking of the heterosexual majority in society.¹⁹⁵

The rule of law and constitutional supremacy suggest that the judiciary is the custodian of the law in any country and when people's rights are infringed upon, even by the executive, it is the judiciary they turn to for protection. It is also important that the judiciary does not to pander to the whims of the majority in society, as to do so will mean that the rights of the minority will be trampled upon by the majority. All societies need to strike a balance between minority and majority rights if social inclusion and diversity are to be acknowledged. If the laws that criminalise homosexual acts are discriminatory and offend constitutional rights of privacy and equality, judges must be bold to declare such laws as unconstitutional.

5.2.3 To African NGO's

The battle for recognition and protection of sexual minority rights must be fought and won by NGO's working in Africa.

One accusation which has been made is that people who are pushing the agenda for sexual minority rights in Africa are foreigners, thus reinforcing the argument that homosexuality is foreign and being forced on Africans by outsiders. When foreigners have become involved to lobby for sexual minorities on the African continent, their actions could reinforce antipathy towards them and accusations of outside influence.

¹⁹⁵ *Kanane v The State; Republic v Steven Monjeza Soko and Tiwonge Chimbalanga* (n 5 above).

Thus the duty rests with Africans and African organisations to prove these critics wrong and take up the fight for the recognition of sexual minority rights in Africa. There is now a vigorous, albeit threatened, sexual minority rights movement in Africa with significant work on decriminalisation, education, empowerment and mobilisation.¹⁹⁶ This movement cannot be ignored.

In sum, I have argued that the time for recognition of sexual minority rights in Africa has come. Recognising these rights is just the starting point, as actual discriminatory laws, policies and attitudes will need to be addressed over time. Importantly, the recognition of same sex rights in Africa should not be conflated with marriage-this may be an ultimate endpoint. For now, the starting point for much of Africa is to decriminalise same sex acts; African governments must lead the debate to respect, promote and fulfil the rights of all persons, including sexual minorities, as required by international and domestic law, and banish harassment, forced medical examinations and imprisonment of sexual minorities.

Word count: 17, 992 (including footnotes)

¹⁹⁶ To mention a few, in Uganda there is the Sexual Minorities Uganda(SMUG); in Zimbabwe there is Gays and Lesbians of Zimbabwe (GALZ); in Botswana there is the Lesbians, Gays and Bisexuals of Botswana (LeGaBiBo); in Cameroon, there is Alternatives-Cameroun; in South Africa there is International Gay and Lesbian Human Rights Commission(IGHLRC) and several others.

BIBLIOGRAPHY

Books

Ankumah, E (1996) *The African Commission on Human and Peoples' Rights practice and procedure* Martinus Nijhoff Publishers

Gloucester J *Homosexual relationships* (1979) Wickman Press Ltd

Heyns, C & Killander, M (eds) (2007) *Compendium of human rights documents of the African Union* 3rd ed Pretoria: Pretoria University Law Press

Heyns, C & Killander, M (eds) (2010) *Compendium of human rights documents of the African Union* 4th ed Pretoria: Pretoria University Law Press

Sepulveda, M; Banning, TV; Gudmundsdottir, GD; Chamoun, C & Genugten WJMV (2004) *Human rights reference handbook* University for Peace

Sloan, IJ (1987) *Homosexual conduct and the law* Oceana Publications

Steiner, HJ; Alston, P & Goodman, R (2007) *International human rights in context* Oxford: Oxford University Press

Viljoen, F *International human rights law in Africa* (2007) Oxford: Oxford University Press

Chapters in books

Killander, M 'African human rights law in theory and practice' in S Joseph & A McBeth (eds) (2010) *Research handbook on international human rights law* Edward Elgar Cheltenham

Journal articles

Addo, MK 'Practice of United Nations human rights treaty bodies in the reconciliation of cultural diversity with universal respect for human rights' (2010) 32 *Human Rights Quarterly* 601

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

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

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

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

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

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

Mujuzi, JD 'Even lesbian youths or those presumed to be lesbians are protected by the Constitution of Uganda-but to a limited extent: rules the High Court' (2009) 6:4 *Journal of LGBT Youth* 441

Mujuzi, JD 'The absolute prohibition of same-sex marriages in Uganda', (2009) *International Journal of Law, Policy and the Family* 1

Murray, R & Viljoen, F 'Towards non-discrimination on the basis of sexual orientation: the normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 87.

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

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

Tamale, S 'Out of the closet: unveiling sexuality discourses in Uganda' (2003) 2 *Feminist Africa* 1.

Newspaper Articles

'Africa's gays and lesbians under siege' *Times live* 6 June 2010

'Obama condemns Uganda's anti-gay bill' *Daily monitor* 5 February 2010

'Foreign press hits Uganda over gays' *Daily Monitor* 7 February 2010

Even after death, abuse against gays continues' *Associated Press* 11 April 2010

Clergy: jail gays, don't hang them' *The Daily Monitor*, 29 October 2009

International and regional instruments

Universal Declaration of Human Rights 1948

International Covenant on Civil and Political Rights 1966

International Covenant on Economic Social and Cultural Rights 1966

Optional Protocol to the International Covenant on Civil and Political Rights 1966

Convention on the Rights of the Child 1989

Convention against Torture 1984

African Charter on Human and Peoples' Rights 1981

UN documents, resolutions, and general comments

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

Concluding observations on Botswana's report to the Human Rights Committee UN Doc CCPR/C/BWA/CO/1, 24 April 2008

Concluding observations on Namibia's report to the Human Rights Committee UN Doc CCPR/CO/81/Nam, August 2004

Concluding observations of the Human Rights Committee on United Republic of Tanzania's fourth periodic report, 96th session, Geneva, 13-31 July 2009 CCPR/C/TZA/CO/46 August 2009 6 at para 22.

Compilation of general comments and general recommendations adopted by human rights treaty bodies HRI/GEN/1 Rev. 9 (vol 1) 2008

Country report of Botswana submitted to the Human Rights Committee by the government of Botswana

General Assembly resolution 60/251 of 15 March 2006

Report of the special rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (2010) submitted to the Human Rights Council A/HRC/14/20 8.

Report of the working group on the Universal Periodic Review, Botswana, Human Rights Council ,tenth session 6 A/HRC/10/69 13 January 2009

UN resolution E/Res/624 B (XXII) of 1 August 1956

UN resolution 1985/17 of 28 May 1985

UN human rights fact sheet no 30

Zambia's third report to the Human Rights Committee 2007, UN Doc CCPR/C/ZMB/CO/3, 9 August 2007

Legislation

1966 Constitution of Botswana

2004 Constitution of the Republic of Malawi (Revised)

1995 Constitution of Uganda

1996 Constitution of the Republic of South Africa

Anti-homosexuality Bill 2009 (Uganda)

The Penal Code Act Cap 120 (Uganda)

Penal Code, Chapter 08:01 (Botswana)

Penal Code, Chapter 7:01 of the laws of Malawi

Penal Code Act, chapter 20 of the Laws of Uganda

Courts (Amendment) Act 2004 (Malawi)

Criminal Procedure Act 51 of 1977 (South Africa)

Security Officers Act 92 of 1987 (South Africa)

Sexual Offences Act 23 of 1957 (South Africa)

Case law

Courson v Zimbabwe (2000) AHRLR 335 (ACHPR 1995)

Du Plessis v Road Accident Fund 2004 1 SA 359 (SCA)

Kanane v the State (2003) (2) BLR 64 (CA)

National Coalition for Gay and lesbian Equality v The Minister of Justice (1998) 12 BCLR 1517 (CC)

Republic v Steven Monjeza Soko and Tiwonge Chimbalanga Kachepa, case number 359 of 2009

Satchwell v President of South Africa, 2002 6 SA 1 (CC)

Victor Juliet Mukasa and Yvonne Oyo v Attorney General (Misc Cause No. 247/06), High Court of Uganda, Kampala, judgment of 22 December 2008

William Courson v Zimbabwe

Zimbabwe human rights NGO forum v Zimbabwe Communication 245/2000 21st Activity report of the African Commission on Human and Peoples' Rights (May-November 2006) January 2007 EX.CL/322(X) Annexure III

Websites

http://www.southernafricalitigationcentre.org/news/item/African_civil_society_organisations
(accessed 2 March 2010)

<http://constitutionallyspeaking.co.za/statement-from-the-synod-of-anglican-bishops-o> (accessed 5 March 2010)

<http://allafrica.com/stories/201003140001.html> (accessed 16 August 2010)

<http://abcnews.go.com/international/wirestory?id=10778353> (accessed 16 August 2010).

<http://www.timeslive.co.za/sundaytimes/article488727.ece/africas-gays-lesbians-under-siege> (accessed 16 August 2010)

<http://.monitor.co.ug/news/National/-/688334/856042/-/whyce/-/index.html>. (accessed 16 August 2010)

<http://www.monitor.co.ug/news//national/-/688334/-/wgroqi/-/index.html>(accessed 16 August 2010)

<http://ilqa.org/ilqa/en/article/1211> (accessed 16 August 2010)

<http://www.2ohchr.org/english/bodies/cescr/index.htm>(accessed 20 August 2010)

<http://www.2.ohchr.org/english/bodies/chr/special/index.htm>(accessed 20 August 2010)

<http://www2.ohchr.org/english/issues/health/right/annual.htm> (accessed 20 August 2010)

<http://www.ohchr.org/EN/UPR/Pages/UPRMain.aspx> (accessed 20 August 2010)

<http://www.feministafrica.org/index.php/out-of-the-closet> (accessed 10 September 2010)

www.saflii.org (accessed 1 October 2010)

http://www.msnbc.msn.com/id/36376840/ns/world_news-africa/ (accessed 20 October 2010)

<http://www.state.gov/g/drl/rls/hrrpt/2007/100467.htm> (accessed 20 October 2010)

http://treaties.un.org/Pages/ViewDetails.aspx?TREATY&mtdsg_no=IV-4&chapter=4&lang=en (accessed 22 October 2010)

http://treaties.un.org/Pages/ViewDetails.aspx?TREATY&mtdsg_no=IV-4&chapter=4&lang=en (accessed 22 October 2010)

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en (accessed 22 October 2010)

Others

'Africa's common position to the UN General Assembly special session on AIDS', June 2006

Amnesty International 'Crimes of hate, conspiracy of silence, torture and ill treatment based on sexual identity' (2001)

Country report on Botswana by the United States Department of State (2007)

Dyer, JM 'The official report of the Lambeth Conference' (1999)

Final declaration of the regional meeting for Africa of the World Conference on Human Rights in Report of the regional meeting for Africa of the World Conference on Human Rights, Tunis, 2-6 November 1992, UN Doc A/CONF.157/AFRM/14 (24 November 1992)

Human Rights Watch More than a name, state sponsored homophobia and its consequences in Southern Africa (2003)

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

Johnson CA 'Off the map: How HIV/AIDS is programming is failing same-sex practicing people in Africa' (2007)

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

Legabibo 'True life stories & poems that may change your perceptions' (2009)

Ottosson, D 'State-sponsored homophobia a world survey of laws prohibiting same sex activity between consenting adults' (2008)

Tamale, S 'A human rights assessment of the anti-homosexuality bill' public dialogue held on 18 November 2009 at the Makerere University

The Holy Bible, King James Version (1611)

Viljoen, F 'Sexual minorities in sub-sahara Africa: A legal analysis of sexual orientation and gender identity' (2009) 1