

# THE RIGHT OF SEXUAL MINORITIES UNDER THE AFRICAN HUMAN RIGHTS SYSTEM

A DISSERTATION SUBMITTED TO THE FACULTY OF LAW OF THE UNIVERSITY OF  
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27 OCTOBER 2006

## DECLARATION

I, Luis Edgar Francisco Huamusse, declare that the work presented in this dissertation is original. It has never been presented to any other University or institution. Where other people's works have been used, references have been provided, and in some cases, quotations made. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LL.M Degree in Human Rights and Democratisation in Africa.

Signed.....

Date.....



Supervisor: Prof. Pierre De Vos

Signature.....

Date.....

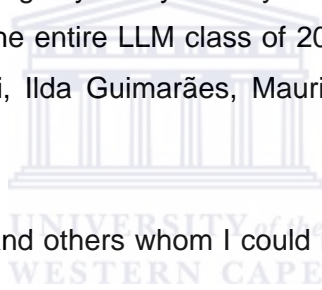
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## ABBREVIATIONS AND ACRNYMS

AIDS	Acquired Immunodeficiency Syndrome
ECHR	European Court of Human Rights
GALA	Gays and Lesbians Alliance
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
LGBT	Lesbian, gay, bisexual, and transgender persons
NGO's	Non Governmental Organisations
RSP	Republic of South Africa
UDHR	Universal Declaration of Human Rights



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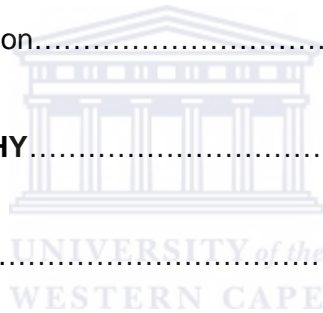
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# CHAPTER ONE

## INTRODUCTION

### 1 Rationale for the research question

The protection of the rights of sexual minorities in many countries in Africa is a controversial issue. It is not unusual to find newspaper reports on gross violations suffered by this minority group. Gays and lesbians are victims of violence, sometimes resulting in death.<sup>1</sup>

Sexual minorities in Africa are often confronted with government actions such as those of the Nigerian government that recently submitted to the parliament a Bill to make provisions for the prohibition of relationships between persons of the same sex, celebration of marriage, registration of gay clubs and societies and publicity of same sex sexual relationships. On the other hand, on the same continent, the South African Constitutional Court recently held that the denial of legal recognition for same-sex marriages was unconstitutional.<sup>2</sup>

#### 1.1 Research question

The question that begs here is why this state of affairs? In view of the situation described above, this study intends to highlight the factors that have brought the continent to this point and give an analysis of the challenges and prospects faced in the protection of the rights of sexual minorities.

The issue that will be addressed therefore is whether the African Charter on Human and Peoples' Rights is interpreted to include at least some protection against discrimination of sexual minorities?

#### 1.2 Objective of the Study

The objective of this study is to suggest possible legal protection and recognition of sexual minority rights under the African Human rights system.

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<sup>1</sup> For example on February 2006 The Sunday Times carried a story entitled 'Teen beaten to death for being a lesbian.'

<sup>2</sup> *Fourie v Minister of Home Affairs* 2005 SA273 (SCA)



### 1.3 Problem statement

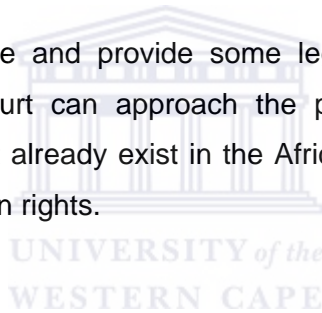
No protection for sexual minorities has yet been explicitly accorded by the African Charter.

Neither has there been a decision by the African Commission (the body with the mandate to interpret the Charter) on human and peoples' rights pertaining to sexual minorities.

In other words, the jurisprudence of African system of human rights is completely silent on that issue.

It is ironic that such deafening silence exists in the midst of gross violation of human rights, perpetuated especially on the domestic level, on the basis of sexual orientation.

The thesis will address this issue and provide some legal avenues in which the African Commission and the African Court can approach the problem, by analysis of analogue practices and legal provisions that already exist in the African Charter and other international and regional law regimes on human rights.



### 1.4 Literature review

The subject of sexual minorities, defined comprehensively in the next chapter, has evoked a considerable amount of comment in academic literature. A number of books and articles have been written on the broad subject of the term. In spite of this, it is not easy to find extensive literature that addresses the precise issue raised by this dissertation. More so, there is little that addresses sexual minorities in the African context. The utility of the existing literature, in terms of books, articles and Internet sources can however not be gainsaid.

The book written by Donnelly<sup>3</sup> focuses largely on the problematisation of sexual minorities discrimination faced by them in international law. Robert Wintemute's<sup>4</sup> coverage of case studies in the United States Constitution, the European Convention on the protection of Human Rights and Fundamental Freedoms and the Canada Charter context though not quite reflective

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<sup>3</sup> J Donnelly *Universal Human Rights in Theory and Practice* (2003)

<sup>4</sup> R Wintemute *Sexual orientation and human rights: The United States Constitution, the European Convection, and the Canadian Charter* (1995)

of the actual practice on the continent give hints as to the direction that the African human rights system should follow. Eric Heinzein<sup>5</sup>, while discussing different approaches to this subject, focuses more on the conceptual view to international law.

Further extensive contribution has been in the form of articles. James Mastshekga's article<sup>6</sup> is a discussion about the problem of this thesis and he initiates the debate providing some specific guidelines on how the African Charter should respond to protection and promotion of rights to equality and non-discrimination of one of the categories of this sexual minorities. A number of other articles on the subject have focused preponderantly on lobbying on the sexual orientation issue, particularly in the context of South Africa Constitution that encompasses sexual orientation as one of the non discrimination grounds. All these works do not however address the specific issues of denial of recognition of the rights of sexual minorities under the African human rights system, which is the subject of consideration in this dissertation.

## **1.5 Research methodology**

The research will be conducted by using library research with special focus on the relevant statutes, books, journals, case law and reports from the media and different human rights organizations. The methodology will also include the use of the Internet.

## **1.6 Limitations of the study**

The study is limited to the protection of the rights of sexual minorities in the African human rights system. The study will not look at specific countries as there are too many in Africa but it is envisaged that the study will refer to some countries such as South Africa on a positive note and then a few other countries that criminalise gays and lesbians in order to get a general picture. The study will also refer comparatively to other national and international Human Rights instruments for guidance on this topic.

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<sup>5</sup> E Heinze *Sexual Orientation: A Human Right* (1995)

<sup>6</sup> J Matshekga 'The African Charter on human and peoples' rights and the protection and promotion of the right to equality and non-discrimination for homosexuals: Discussion' (2003)

## CHAPTER TWO

### SEXUAL ORIENTATION AND SEXUAL MINORITIES

#### 2 Conceptual framework

The term minority refers to individuals who form part of a group that has been, is or may be exposed in future to some form of discrimination. In human rights law minorities are identified, not to justify and promote the discrimination against them, but rather to help them begin the struggle against the discrimination that they continue to suffer.

This Chapter will examine the concept of minorities, against the backdrop of the human rights perspective illuminated above, by identifying a locus of people traditionally facing or in danger of facing discrimination based on their adherence to particular race, ethnicity, or other category.<sup>7</sup>

Since the minorities genre is expansive, attention will be paid to persons discriminated against on the basis of their sexual preference. Key to illuminating this social phenomenon is the concepts of 'sexual orientation' and 'sexual minorities'. These concepts can be explored from various perspectives but the researcher will confine himself to the legal and social because the purpose here is not to review the concepts comprehensively but to use them as a foundation for this thesis.

#### 2.1 Sexual orientation

The terms 'sexual minorities' and 'sexual orientations' are frequently used interchangeably. They could be incorrectly understood to encompass any sexual attraction of anyone toward anyone or anything.<sup>8</sup> But there are distinctions between these terms and it is important to recognize the error in combining the terms without a thorough analysis of the distinctions between them.

Edwin Cameron defines sexual orientation as erotic attraction; in the case of heterosexuals to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. This connotes that a homosexual person can therefore be anyone who is erotically attracted to

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<sup>7</sup> E Heinze (n5 above) 53

<sup>8</sup> 'n 5 above, 45'

members of his or her own sex.<sup>9</sup> This definition is confined to orientation motivated by attraction.

Robert Wintemute expands on this view by introducing an element of the application of one's mind to one's sexual preference. In his view sexual orientation indicates a decision with whom to engage in emotional sexual conduct.<sup>10</sup> Amnesty International goes a step further and defines 'sexual orientation' as referring to a person's emotional, sexual, romantic, or affectional attraction.<sup>11</sup>

This paper embraces the broad definition of sexual orientation to include sexual and emotional attraction and views sexual orientation as different from sexual behaviour because it refers to feelings and self-concept and not the way that conduct of feeling is manifested. The difference in the scope of the definitions can be illustrated by sexual acts between males, which connote a sexual conduct but cannot prima facie be considered homosexual.

For example, some sexual acts between men in prisons, which arise from coercion, could be conducted by a male who does not have a sexual preference for members of the same sex. It is only when a man has emotional or sexual attraction for another man that he can be considered to be gay. This adopts the view that applies to a person's attraction without regard to their conduct; it is referred to as the direction of their emotional sexual attraction.<sup>12</sup> This explanation applies *mutatis mutandis* to all types of sexual orientation – namely heterosexual, homosexual, bisexual and transgender.

Heterosexual attraction involves members of the opposite sex, bisexual when the attraction involves persons of both sexes, while gay men and lesbians are attracted to members of their own sex. Transgender is used as an umbrella term to broadly describe individuals that do not conform to the gender role expectations of their biological sex. It encompasses people who seek sex reassignment, sometimes involving hormones or surgery, to bring their physical characteristics into conformity with their gender identity.

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<sup>9</sup> E Cameron 'Sexual Orientation and the Constitution: a Test case for Human Rights' *South African Law Journal*, (1993) 452

<sup>10</sup> Emotional sexual conduct is considerate by activity or relationship involving two (or more) persons that has, or could be perceived as having, both emotional and sexual aspect or purely sexual aspect, including private sexual activity, public displays of affection, and the formation of couple relationships. See R Wintemute *Sexual Orientation and Human Rights: The United Nation Constitution, the European Convention* (1995) 7

<sup>11</sup> Amnesty International, USA: Stonewalled – still demanding respect. Police abuses against lesbian, gay, bisexual, and transgender people in the USA (2006) 9 available at [http://www.amesty.org./library/Index/ENGAMR510012006?open&of=ENG-347](http://www.amnesty.org./library/Index/ENGAMR510012006?open&of=ENG-347). Accessed:21-08-2006

<sup>12</sup> Wintemute (n4 above) 6

The term 'sexual orientation' therefore is intended, in social science as in law to help to discuss more precisely an aspect of sexual experience that carries a particular social and political significance, and cannot be predicted or controlled.<sup>13</sup> For legal purposes the concept has been found to be vexing because it falls short of determining whether it is the innate feeling or the manifestation of the feeling through sexual activity that is subject to prejudice.

Some think that this difficulty arises partly from the attempt to define sexual orientation in terms of innate attraction rather than acts. Acts are, at least in principle, material and observable in ways that attractions are not.<sup>14</sup> But Hunter rightly refutes this by maintaining that it is difficult or impossible to objectively distinguish, between sexual 'being' and sexual 'doing' in a way, which would permit conclusive determination of the sexual orientation.<sup>15</sup>

This view distinguishes between acts, desires, and identity.<sup>16</sup> These identities are what initiate classification of groups along the lines of sexual preference. Despite the fact that they are not decisive, both 'doing' sexual activity and 'being' homosexual, actual or imputed, serve as indices of violence, persecution and discrimination against the sexual minorities in many countries as will be shown in the next chapter.

## 2.2 Sexual minorities

Any definition of sexual minorities for the purpose of human rights law must concentrate on those who, under contemporary statist regimes are singled out from the rest of society for discriminatory treatment<sup>17</sup> on the basis of the 'sex of the people toward whom one is sexually attracted'.<sup>18</sup> That is on the basis of their sexual attraction.

James Wilets describes 'sexual minorities' as including 'all individuals who have traditionally been distinguished by societies because of their sexual orientation, inclination, behaviour or gender identity' and does not include 'individuals whose sexual identity is based upon non-consensual sexual behaviour.'<sup>19</sup>

The online encyclopaedia Wikipedia states that the term sexual minority:

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<sup>13</sup> Heinze (n5 above) 45

<sup>14</sup> 'as above'

<sup>15</sup> D Hunter 'Life after Hardwick' (1992) *Harvard Civil Rights* 54

<sup>16</sup> 'n5 above, 46'

<sup>17</sup> 'n above, 54'

<sup>18</sup> D Hunter; S Michaelson & Stoddard, T *The Rights of Lesbian and Gay Men* (1992) 67

<sup>19</sup> James D Wilets 'Final HRC Report on Sexual Minorities' available in [www.ohchr.org/english/bodies/hrc/docs/ngos/iusli.pdf](http://www.ohchr.org/english/bodies/hrc/docs/ngos/iusli.pdf). Accessed: 20-08-2006

Is most commonly used in the plural, 'sexual minorities' – is a group whose sexual orientation or practices differ from the majority of the surrounding society. The term was coined (most likely in the late 1960s or early 1970s) by analogy to ethnic minority, initially the term referred primarily to Lesbian and Gays. It has come to include Bisexuals and the spectrum of transgendered people.<sup>20</sup>

Donnelly argues that sexual minorities:

Are those despised and targeted by 'mainstream' society because of their sexuality, victims of systematic denials of rights because of their sexuality (and, in most cases, for transgressing gender roles). Like victims of racism, sexism and religious persecution, they are human beings who have been identified by dominant social group as somehow less than fully human, and thus not entitled to the same rights as 'normal' people.<sup>21</sup>

These definitions imply a numerical standard primarily to groups of people who have had little to do with creating their minorities' status<sup>22</sup> but are nevertheless subjects of widespread discrimination. This oppression is predicated on more than simply the existence of same-gender sexual relations but rather none tolerance by the majority of the populace of any group (minority) that challenges traditionally defined gender roles.<sup>23</sup>

Heinze maintains that discrimination against sexual minorities is conceived where this group is viewed as derogating from the dominant '*normative heterosexual paradigm*'.<sup>24</sup> This concept is based on the idea that the structure of society is related to the structure of a 'normal' family, which is defined as a unit comprising of a man, a woman and children and along the heterosexual lines, ignoring other sexual natural attractions preferences.<sup>25</sup>

Some scholars, for instance Fernand-Laurent, argue that the rights of sexual minorities can only be effectively protected if the very notion of the *normative heterosexual paradigm* is attacked and replaced with a different way of looking at our world.<sup>26</sup>

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<sup>20</sup> Wikipedia, the free online encyclopedia available on: [http://en.wikipedia.org/wiki/sexual\\_minority](http://en.wikipedia.org/wiki/sexual_minority) accessed: 20-08-2006

<sup>21</sup> Donnelly (n3 above) 229

<sup>22</sup> 'n5 above, 51'

<sup>23</sup> Wilets (n19 above) 15

<sup>24</sup> 'n5 above, 37'

<sup>25</sup> 'n5 above,34'

<sup>26</sup> J Fernand – Laurent (1988) *Les problèmes juridiques et sociaux des minorités* 17

Indeed approach of this issue from the angle of normative heterosexual paradigm has provided a pretext for states to justify oppression of sexual minorities<sup>27</sup> especially so in African countries as will be shown herein.

### **2.3 Sexual minorities: Vulnerable category**

As far as legal protection and the exercise of human rights are concerned, sexual minorities in Africa have not been privileged with any recognition. This is supported by the fact that constitutions and laws of the almost all African states do not provide protection to members of this group.<sup>28</sup> The regional human rights instrument, the African Charter on Human and Peoples' Rights is also silent on this issue.

One explanation for this is found in the theory of normative heterosexual paradigm. Sexual minorities are often viewed by many communities in Africa as deviant in that their sexual orientation differs from the norm.<sup>29</sup> This attracts prejudice and opprobrium in a way that is similar to the way in which race and gender characteristics were (in official policy and public discourse) treated in the past.<sup>30</sup> This attitude and behaviour is oppressive as it denies gay men and lesbians their sexual identity.

In most cases, people belonging to sexual minorities are considered with disapproval and disgust.<sup>31</sup> For instance in one of the most authoritative English textbooks on criminal law in South Africa, it is remarked that the 'real reason' for the criminal proscription of sodomy 'is the extreme disgust and abhorrence that such conduct arouses.'<sup>32</sup>

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<sup>27</sup> 'n 26 above,17'

<sup>28</sup> Exceptionally, the Constitution of the Republic of South Africa provides explicitly protection of sexual orientation under the equality clause in s 9 (3)

<sup>29</sup> The Johannesburg Statement on sexual orientation, Gender Identity, available at: [http://hrw.org/lgbt/pdf/joburg\\_statement021304.htm](http://hrw.org/lgbt/pdf/joburg_statement021304.htm)

<sup>30</sup> Cameron (n8 above) 459

<sup>31</sup> Human Rights Watch and International Gay and Lesbian Human Rights Commission *More Than A Name: State-Sponsored Homophobia and its Consequences in Southern Africa* (2003) 35

<sup>32</sup> P M A Hunt *South African Criminal Law and Procedure II: Common Law Crimes* (1982) 271



## 2.4 Attitudes and facts on sexual minorities in Africa

In contemporary statist societies sexual minorities count among the largest minority groups, sharing common patterns of discrimination worldwide. Today, their rights are an international issue.<sup>33</sup>

The idea of human rights rests on the basic assumption that all human beings have certain basic rights simply because they are human.<sup>34</sup> The Universal Declaration of Human Rights states that 'all human beings are born free and equal in dignity and rights'<sup>35</sup>, and recognises equal treatment for everyone.<sup>36</sup> The African Charter on the Human and Peoples' Rights states in its preamble that freedom, equality, justices and dignity are essential objectives for the achievement of the legitimate aspiration of the African people.<sup>37</sup> These provisions imply that sexual minorities by virtue of their status as human beings are entitled to the same enjoyment of fundamental rights and freedoms as other human beings.

Unfortunately the existence of these provisions and principles has not extended the full protection to all victims of systematic discrimination – especially if the victims are part of sexual minorities. For example, in many African countries, the intimate acts and the forming of love or romantic relationships of sexual minorities are criminalised.<sup>38</sup> These formal prohibitions of homosexual conduct are often the residue of colonial laws adopted from European penal codes.<sup>39</sup>

As a result of the existence of the offence of sodomy in the legal framework, there has been governmental discrimination against this group by acts and political statements supporting homophobia.<sup>40</sup> This is illustrated in the statements of contemporary African political leaders, who have consistently and vehemently denied or overlooked the existence of same-sex relationships and persistently claim it is 'unAfrican.'

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<sup>33</sup> Heinze (n6 above) 58

<sup>34</sup> 'as above'

<sup>35</sup> Article 1 of the Universal Declaration of Human Rights, adopted and proclaimed by the United Nation Assembly in resolution 217 A (III) of the 10 December 1948 at Paris.

<sup>36</sup> Article 2 of the Universal Declaration of Human Rights, adopted and proclaimed by the United Nation Assembly in resolution 217 A (III) of the 10 December 1948 at Paris.

<sup>37</sup> African Charter on Human and Peoples' Rights preamble, para3-4

<sup>38</sup> Donnelly (n3 above) 230

<sup>39</sup> 'as above'

<sup>40</sup> Human Rights Watch and International Gay and Lesbian Human Rights Commission (n31 above) 2



In 1995 President Robert Mugabe denounced gays and lesbians as 'sexual perverts' who are 'lower than dogs and pigs'. Rejecting calls for gay human rights, Mugabe said, 'we don't believe they have rights at all'. Mugabe charged that homosexuality was unnatural and un-African, saying that it was an alien culture only practised by a 'few whites' in his country.<sup>41</sup>

Yoweri Museveni, president of Uganda, similarly denounced homosexuality as un-African. He was quoted, by The New Vision, calling on the Ugandan police to arrest all homosexuals or anyone indulging in unnatural sexual practices. Sam Nujoma, while still president of Namibia in 2003, also told a press conference of international journalists that homosexuality was 'borrowed sub culture, alien to Africa and Africans'.<sup>42</sup>

In the same vein former Kenyan president Daniel Arap Moi once said that 'Kenya has no room for homosexuals and lesbians'. In February 2006 a Cameroonian tabloid paper published names and photos of allegedly gay politicians, businessmen and musicians in what editors said was a crusade against 'deviant behaviour'.<sup>43</sup>

The Nigerian government took this prejudice a notch higher by submitting to the parliament a bill to make provisions for the prohibition of relationships between persons of the same sex<sup>44</sup> The Nigerian government argued that those kinds of relations are unnatural and un-African.<sup>45</sup> Those found guilty of these 'crimes' could face up to five years in prison.

Generally such official tolerance and endorsement of discrimination reflects deep currents of social prejudice against sexual minorities. This is a paradox because there is an emerging wealth of anthropological evidence that reveals that same-sex sexual relationships existed in African communities before colonialism. That is way before the people had any interaction with Western culture.

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<sup>41</sup> J Rukweza (2006) *Is homosexuality really 'UnAfrican'* available in: <http://www.pambazuka.org/en/category/comment/32974>. Accessed:31-04 2006; South Africa News Agency SAPA, *BBC Summary of the World Broadcasts*, 3 August1995; Dunton and Palmberg 'Human Rights and Homosexuality in Southern Africa'13

<sup>42</sup> Rukweza (n41 above) 31

<sup>43</sup> 'Homosexuality in East Africa is still taboo' *Pretoria News*. 23 February 2006.

<sup>44</sup> The Bill in paragraph 8 provides: (1) any person how goes through the ceremony of marriage with a person of the same sex is guilty of an offence and liable on conviction to a term of 5 years imprisonment.

(2) Any person how performs, witnesses, aids or abets the ceremony of same sex marriage is guilty of an offence and liable on conviction to a term of 5 years imprisonment. See the Same sex marriage (prohibition) Act 2006.

<sup>45</sup> [http:// news.bbc.co.uk/go/pr/fr/-/1hi/world/Africa/4626994.st](http://news.bbc.co.uk/go/pr/fr/-/1hi/world/Africa/4626994.st). Accessed: 09-04-2006

For instance among the Langi of the northern Uganda, the *mudoko dako*<sup>46</sup> 'males' were treated as women and could marry men.<sup>47</sup> The story was the same among the Iteso,<sup>48</sup> the Bahima,<sup>49</sup> and the Banyoro.<sup>50</sup> These facts contradict the political arguments of homosexuality as been unAfrican.

Furthermore in Uganda, some organisations that engage in homosexual rights protection, such as the Gays and Lesbians Alliance (GALA) have members throughout rural Uganda. A good number are non-literate or semiliterate. It is quite clear that whether they arrived at their homosexuality through 'nature' or 'nurture', outside influence played no part in determining their sexuality.<sup>51</sup>

The discussed tendencies reveal an overt discriminatory attitude towards the existence of sexual minorities in Africa. This issue will be traversed by the author in the next chapter, which focuses on discrimination and will suggest the acknowledgement, if not the acceptance, of the existence of different natural sexual orientation, separate from the idea of bestiality.



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<sup>46</sup> The phrase means the one who became a woman.  
<sup>47</sup> J Driberg *The Lango*. London: Thorner Coryndon (1923) 46  
<sup>48</sup> Laurence, J. *The Iteso: Fifty Years of change in Nilo-Hiamic tribe of Uganda* (1957) 24  
<sup>49</sup> S Mushanga 'The Nkole of the Southwestern Uganda' in Molos(1973) 87  
<sup>50</sup> R Needham, R. 'Rights and Left in Nyoro Symbolic classification' in *Essay on Dual Classification* (1973) 67  
<sup>51</sup> S Tamale *Out of the Closet: Unveiling Sexuality Discourses in Uganda* (2003)7

## CHAPTER THREE

### THE APPROACH OF OTHER INTERNATIONAL HUMAN RIGHTS MONITORING BODIES TOWARDS SEXUAL MINORITIES

#### 3 Introduction

This chapter deals with the jurisprudence in international and regional human rights systems (United Nation system and European system) on sexual orientation and the relationship thereof to the African human rights system. The overarching goal is to assess how the United Nations system and European system may be relevant when it comes to the protection of the rights of sexual minorities' in Africa.

It is based on the premise that the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court) should adopt similar reasoning as those employed in the United Nations and European systems and that this would allow some protection for the rights of sexual minorities in Africa.

The protection of sexual minorities in Africa should be considered in the light of the jurisprudence of international and regional systems because by analogy the circumstances and legal provisions are the same. This theoretical understanding is premised on the fact that all regional and international human rights systems are interrelated and interdependent.<sup>52</sup>

It is the writer's view that although the African system does not explicitly protect the rights of sexual minorities this does not in itself mean that the African human rights system condones discrimination based on sexual orientation.

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<sup>52</sup> According to Article 60 and 61 of the African Charter, the African Commission is obliged to interpret the provisions of the African Charter with due consideration to international law on human and peoples' rights. At the heart of these provisions is the duty of the African Commission to interpret the provision of the African Charter in line with other international legal instruments dealing with the protection of people's rights. The same approach is provided for in Article 3 and 7 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court. According to these provisions the court should consider other human rights instruments rectified by the states concerned.

In addition, since the African Charter does not have explicit provisions dealing with privacy a reasonable approach would be for the African system to follow the jurisprudence of the United Nations system, the International Covenant on Civil and Political Rights and the Human Rights Committee, and European system, European Convention for the Protection of Human Rights and Fundamental Freedoms and European Court on Human Rights.

### **3.1 Protection of Sexual Minorities under the International Covenant on Civil and Political Rights**

The International Covenant on Civil and Political Rights (ICCPR)<sup>53</sup> is the principal international treaty under the United Nation Human Rights system setting out the civil and political rights for all people. African states that are parties to ICCPR are bound to fulfil all obligations that arise under the terms of the Covenant and these obligations include the obligation to protect everyone against all forms of discrimination, and to ensure equal protection before the law.<sup>54</sup>

Article 2.1 of ICCPR states that:

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

In addition, state parties that have ratified ICCPR must ensure the protection of freedom from incursion to privacy.<sup>55</sup> Article 17.1 and 17.2 provide that:

- (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation
- (2) Everyone has the right to the protection of the law against such interference or attacks

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<sup>53</sup> The International Covenant on Civil and Political Rights adopted by the UN General Assembly in Resolution 2200 A (XXI) of 16 December 1966 at New York. Enter into force March 1976.

<sup>54</sup> There are 47 African countries that have ratified the ICCPR. Among them are Zambia, Rwanda, South Africa, Kenya, Somalia, Mozambique etc. For a detailed list see annexure A.

<sup>55</sup> Articles 2, 17 and 26 of the ICCPR See Submitted Shadow report to UNHRC on the occasion of the second and third periodic report of the United State of America pursuant to article 40 of the ICCPR by the Program in International Human Rights Law of the Indiana University School of Law at Indianapolis in co-operation from Stetson University College of Law in Gulfport, Florida. 15

### 3.1.1 Privacy under ICCPR

The United Nations Human Rights Committee (HRC) in *Toonen v Australia* considered the interpretation of Article 17 of the ICCPR.<sup>56</sup> In this case a Tasmanian law prohibiting all private male same-sex activity was found to violate the right to privacy provision encapsulated in ICCPR.<sup>57</sup> The committee found that undisputed adult consensual sexual activity in private is covered by the concept of privacy therefore Mr. Toonen was negatively affected by the continued existence of the provisions of a criminal code that prohibits such activity.

The position of the HRC in this case suggests that in the international human rights arena adult consensual sexual activity in private is protected. Also protected is the private sexual conduct of sexual minorities, arising from their sexual orientation, as defined in this dissertation. This right protects 'private life' meaning that people are allowed to exercise their right to privacy. Any justifiable limitation of the exercise of the right to privacy must fit the criteria of reasonableness, in other words the interference must be justifiable by being necessary and proportional to the ends sought and necessary in the circumstance of the case.

The Tasmanian government justified its interference of a person's privacy, and in this case that of Mr. Toonen, by maintaining that 'decriminalization of homosexual activity runs counter to the implementation of effective education programmes in respect of HIV/AIDS prevention' As to whether there was a justifiable infringement on the right to privacy, the Committee applied a standard of reasonableness under which the interference must be proportional to the end sought and necessary in the circumstances. According to the HRC 'criminalization was not a reasonable means or proportionate measure to achieve the aim of preventing the spread of HIV/AIDS'.<sup>58</sup>

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<sup>56</sup> Communication No 488/1992, *Toonen v Australia*, UNH.R Committee (31 March 1994) UN Doc NoCCPR/C50/D/488/1992, 1 IRR97

<sup>57</sup> Article 17 of ICCPR

<sup>58</sup> *Toonen, v Australia* para.8.3 and 8.5

## 3.2 European Jurisprudence on sexual minorities: European Convention for the Protection of Human Rights and Fundamental Freedoms

The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)<sup>59</sup> contains relatively strong legal protection for sexual minorities. The European Court has handed down several groundbreaking decisions about the rights of sexual minorities against various European states, based on both the right to privacy and the right against discrimination.

### 3.2.1 Privacy under the European Convention

Article 8 of the European Convention provides that:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

This provision was interpreted in the case of *Dudgeon v United Kingdom*<sup>60</sup> where Mr Jeffery Dudgeon complained of the existence in Northern Ireland of a law that criminalized consensual homosexual conduct that had the effect of making certain homosexual acts between consenting adult males a criminal offence. The European Court on Human Rights noted that the existence of the impugned legislation constituted an infringement of Mr Dudgeon's right to privacy (which includes his sexual life) within the meaning of Article 8 (1) of the European Convention.

The court in its *ratio decidendi* observed that the case concerned a most intimate aspect of private life and accordingly there must exist particularly serious reasons before interferences by public authorities can be legitimate and lawful. The respondent government argued that it

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<sup>59</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, signed by members of the Council of Europe on 4 November 1950 at Rome, enter into force on 3 September 1953.

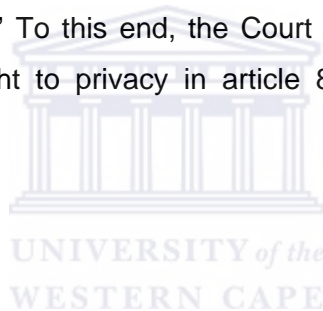
<sup>60</sup> *Dudgeon v UK* (No. 7525/76) (1978) 11 D.R.117

was necessary to have legislation protecting the moral ethos of the society as a whole so as to, inter alia, preserve public order and decency and to protect the citizen from that which is offensive and injurious. This argument had it prevailed would have had the effect of bringing homosexual behaviour between consenting adults in private within the realm of private morality and immorality. The very existence of this legislation continuously and directly affected Mr. Dudgeon's private life.<sup>61</sup>

In the assessment of whether the interference was morally reasonable, the Court took the view that the requirements of morals varies from time to time and from place to place, especially in our era, and that by reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements.<sup>62</sup>

Nevertheless, it was held that the law could not be justified under article 8(2) of the European Convention on Human Rights as necessary in democratic society for protection of 'morals' or 'the right and freedoms of others.' To this end, the Court concluded that the 'sodomy law in Northern Ireland' violated the right to privacy in article 8 of the European Convention on Human Right.<sup>63</sup>

### 3.3 Equality under ICCPR



The ICCPR encompasses the rights of sexual minorities through the equality clause in Articles 26 and 2.1. Article 2.1 is reinforced by Article 26, which provides that 'all persons are equal before the law and are entitled without any discrimination to the equal protection of the law'. The core of Articles 26 and 2.1 is to prohibit any discrimination and guarantee equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In sum, the underlying rationale of Articles 26 and 2.1 is to ensure equal treatment and non discrimination on listed and unlisted grounds.<sup>64</sup> The interpretation of Articles 26 and 2.1 has

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<sup>61</sup> *Dudgeon v UK* Para 41

<sup>62</sup> *Dudgeon v UK* Para 52

<sup>63</sup> *Dudgeon v UK*, Para 63

<sup>64</sup> Article 2.1 is reinforced by Article 26, which provides that all persons are equal before and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.



been considered by the HRC. In the *Toonen* case the Committee interpreted these provisions liberally and held that the reference to 'sex' as one of the ground of non discrimination in article 2, paragraph 1, and article 26 of the ICCPR is to be taken as including sexual orientation.<sup>65</sup>

Furthermore, in *Young v Australia*<sup>66</sup> the HRC noted that it was clear from the legislation of the State party that Mr Young has never been in a position to draw a pension, regardless of whether he could meet all the other criteria under the domestic legal instrument that rules pension issues, as he was living with a member of the opposite sex. The Committee found that the Australian government was in violation of article 26 of the ICCPR by denying Mr Young a pension on the basis of his sexual orientation.<sup>67</sup> In sum, the Committee was of the reasoned opinion that the state had failed to show a justifiable distinction between same-sex and heterosexual couples and that excluding same-sex partners from pension benefits was neither reasonable, nor objective.<sup>68</sup>

This was disposed of by the Committee, which found that the government had discriminated a person the basis of his sexuality in disregard of the equality principle. The Committee felt that sexual orientation cannot be the determinant of lack of entitlement, or anything which is available not in the discriminated group and therefore no one can be discriminated against on basis of his or her sexual orientation.

### **3.4 ICCPR obligations on African State parties: Non-discrimination on basis of sexual orientation**

The decisions and interpretations above by the HRC provide scope to citizens of countries that are parties to ICCPR and the Optional Protocol to the Covenant to advance the right against discrimination based on sexual orientation.<sup>69</sup> In brief, same sex partners can rely on these decisions when they want to challenge the infringement of their privacy or the discrimination against them based on sexual orientation.<sup>70</sup>

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<sup>65</sup> *Toonen v Australia*, Para 8.7

<sup>66</sup> *Edward Young v Australia*, UN Human Rights Committee, No.941/2000, UN Doc CCPR/C/50/D/488/1992

<sup>67</sup> *Young v Australia*, Para 10.4

<sup>68</sup> *Young*, para 10.4

<sup>69</sup> Article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights provides that 'a State party to the protocol should recognize the of Committee to consider claims form individuals subject to its jurisdiction who claim to be victims of a violation by that State party of any of the rights set forth in the Covenant'.

<sup>70</sup> Wintemute (n4 above) 5



It goes without saying that Article 2(1) of the ICCPR requires that all African states that are parties to the Covenant must guarantee all rights protected under ICCPR without distinction of any kind. This includes an obligation not to discriminate against anyone on the basis of his or her sexual orientation or on any other basis. The same issue was raised under article 26 of ICCPR that prohibits any discrimination under the laws of the all African states as party to the ICCPR and guarantees to all persons equal and effective protection against discrimination on any ground based on sexual orientation and other categories.<sup>71</sup>

It should be stressed that although some countries that have ratified the ICCPR have not ratified the Optional protocol, this should not be construed as justification for discrimination based on sexual orientation. The interpretation of the HRC that the protection of equal treatment under the law and prohibition of unfair discrimination also includes discrimination based on sexual orientation applies to all member states of the ICCPR. To my mind, the African Court when interpreting provisions relating to equality in the African Charter should follow the approach taken in *Toonen and Young*.<sup>72</sup>



### **3.5 The relevance of the European system and United Nation system**

Although the African Charter does not explicitly protect the right to privacy an inference can be drawn that by ratifying the ICCPR, African states have bound themselves to the protection of the rights to privacy. The African Commission and African Court when interpreting provisions relating to the protection of sexual minorities rights under the African Charter should follow the approach taken in *Toonen and Young*.<sup>73</sup>

The African Commission has an inherent duty to interpret the African Charter in the light of international human rights jurisprudence as required by article 60 and 61.<sup>74</sup> Article 60 provides that:

The Commission should draw from International law on human and peoples rights particularly from the provisions of various African instruments on Human and peoples rights, the Charter of the United Nations, the Charter of the Organisation of the African Unity, the Universal

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<sup>71</sup> *Toonen*, para 8

<sup>72</sup> Article 2 of the African Charter

<sup>73</sup> Article 2 of the African Charter

<sup>74</sup> C Heyns 'Civil and political rights in the African Charter' in M Evans and R Murray *The African Charter on Human and People's Rights' The System in Practice, 1986-2000*, (2002) 143

Declaration of Human Rights, other instruments adopted by United Nations and by African countries in the field of human and peoples rights as well as from the provisions of various instruments adopted within the specialised agencies of the United Nations of which the parties to present Charter are members.

On the other hand, Article 61 states that:

The Commission should also take into consideration, as subsidiary measures to determine the principles of law, other general or special conventions laying down rules explicitly recognised by member states of the Organisation of African Unity, African practices consistent with international norms on human and peoples rights, custom generally accepted as a law, general principles of law recognised by African states as well as legal precedents and doctrine.

The protocol to the African Court provides that the jurisdiction of the Court shall extend to all cases and disputes submitted to it and any other relevant human rights instrument ratified by the states concerned.<sup>75</sup> In light of the foregoing it can be said that the African system also protects sexual minorities' rights, which means that the African court should follow the same practices that have already been developed in other systems. In conclusion, it is submitted that African states that unfairly discriminate based on sexual orientation can be sued using the same approach followed by HRC in the *Toonen* and *Young* and using the European decisions as persuasive measures to enforce the rights of sexual minorities provided by the African system.

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<sup>75</sup> Article 3 (1) and 7 of the Protocol to the African Charter on Human and peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

## CHAPTER FOUR

### THE AFRICAN SYSTEM OF HUMAN RIGHTS: THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS AND THE RIGHTS OF SEXUAL MINORITIES

#### 4 Introduction

Discrimination on the basis of sexual orientation remains a worldwide phenomenon.<sup>76</sup> This means that it is at the national level where most battles for the protection and promotion of sexual minorities' human rights have to be fought and won. The international and regional systems are merely supplementary and supportive of national struggles.<sup>77</sup> Although this is the case, this chapter is devoted to a discussion of efforts made at regional level, particularly in the African human right system to guarantee sexual minorities' human rights due to the apparent failure of domestic legal systems.

In international human rights law, the principle of non-discrimination is used to fill the vacuum in the equality principle. The principles of equality and non-discrimination as underlying themes of international human rights law are interrelated in such a way that defining the content and meaning of the latter presupposes the explanation of the former.<sup>78</sup>

There is a general consensus that the principles of equality and non-discrimination require, as a rule, that the rights and freedoms recognised and guaranteed in the instruments be granted to all human beings regardless of their personal traits, such as race, sex, birth, national or social origin and other status.<sup>79</sup>

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<sup>76</sup> Amnesty International *Breaking Silence: Human Rights Violations Based on Sexual Orientation* (1994)53.

<sup>77</sup> Matshekga (n6 above) 118

<sup>78</sup> 'as above'

<sup>79</sup> 'as above'

It is currently accepted that general provisions in international human rights instruments are inadequate for the protection and promotion of the rights of the weakest members of society. Sexual minorities still find themselves on the periphery of the international legal framework for the protection of vulnerable groups. There is as yet no specific international or regional human rights instrument that protects and promotes the rights of sexual minorities. The African human rights system is no exception.

#### **4.1 Avenues for the protection of sexual minorities under the African human rights system**

On 27 June 1981, the eighteenth Assembly of Heads of State and Government of the Organisation of African Unity (OAU) adopted the African Charter as a regional mechanism for the protection and promotion of human rights on the African continent. African leaders were willing to recognise that the atrocious human rights violations that were taking place in various African states were a matter of concern for the entire continent.<sup>80</sup>

The African Charter emphasises 'values of the African civilization'.<sup>81</sup> It is the first and so far the only regional human rights instrument to embody peoples' rights and individual and states duties.<sup>82</sup> The Charter also embodies civil and political rights, economic, social and cultural rights, and the right to development. The recognition in the Charter of the three generations of rights gives full effect to the indivisibility and interdependence of human rights.<sup>83</sup>

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<sup>80</sup> Gittleman 'The Banjul Charter on Human and Peoples' Rights: A legal analysis' in Welch Jr & Meltzer (eds) *Human Rights and Development in Africa* (1984) 152; Kannyo "The Banjul Charter on Human and Peoples' Rights: Genesis and political background" in Welch Jr & Meltzer (eds) *Human Rights and Development in Africa* (1984) 128; and Dlamini "Towards a regional protection of human rights in Africa: The African Charter on Human and Peoples' Rights' 1991 *Comparative and International Law Journal of Southern Africa* 189

<sup>81</sup> African Charter its preamble.

<sup>82</sup> F Viljoen, 'Review of the African Commission on Human and Peoples' Rights' in C Heyns (ed.), *Human Rights Law in Africa* (1997) 47

<sup>83</sup> In the 1993 Vienna Declaration and Programme of Action (A/CONF 157/23, 12 July 1993) the universality and indivisibility of human rights is reaffirmed. Art 5 of Part I of the Declaration provides that all human rights are universal, indivisible, interdependent and interrelated.

The primary duty created by the African Charter is the obligation placed on the member states to recognize and give effect to the rights in the Charter, and this broad obligation is considered to have four components, namely, to respect, to protect, to promote and to fulfil the rights recognized.<sup>84</sup> The Charter does not explicitly make reference to the duty of member states to recognize and give effect to the rights of sexual minorities and like most other international human rights treaties it is in fact silent on the issue of sexual orientation.

Similar to other international and regional human rights instruments, the African Charter embodies the principles of equality and non-discrimination as one of its paramount principles. The Charter makes explicit reference to equality in no less than five different provisions.<sup>85</sup> The discussion of the principle of equality and non-discrimination in this chapter will be limited to article 2 and 3 of the Charter because both of these articles provide for a general prohibition against discrimination in the enjoyment of human rights and can be used as the basis for the protection of the right to equality and non-discrimination on the basis of sexual orientation.<sup>86</sup> The wording of article 2 of the African Charter provides that:

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

This provision mirrors the content of article 2 of the ICCPR and as a result, the interpretation given to that Article by the HRC in *Toonen v Australia*, dealing with same-sex relationships should carry substantive weight when the African Commission has to interpret the African Charter's version of article 2.<sup>87</sup> In addition the HRC held that the reference to "sex" in article 26 is to be taken as including sexual orientation.<sup>88</sup> The hope

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<sup>84</sup> Heyns (n74 above) 138

<sup>85</sup> The African Charter makes explicit reference on the principle of equality in articles: 2;3 13;18 and 19

<sup>86</sup> Matshekga(n6 above)121

<sup>87</sup> D McGoldrick, *The Human Rights Committee Its Role in the Development of the International Covenant on Civil and Political Rights*. (1996) 269

<sup>88</sup> *Toonen v Australia* (Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992); para 8.7

is that the African Commission interprets article 2<sup>89</sup> of the African Charter' in light of international human rights jurisprudence as required by article 60 and 61 of the Charter. It is submitted that the African Commission is likely to follow the approach if not explicitly, then implicitly, that all rights in the Charter may be limited if the limitation is justifiable in terms of international practice.<sup>90</sup>

In interpreting the African Charter the African Commission is required under articles 60 and 61 to consider international human rights instruments. It is submitted that the African Commission should follow this. This is because all rights in the Charter may be limited if the limitation is justifiable in terms of international practice.<sup>91</sup>

Article 2 of the African Charter suggests that it is applicable to sexual minorities since it guarantees for 'every individual' the right to enjoy the rights and freedoms recognised in the Charter 'without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political...other status'.

Although sexual orientation is not enumerated in the list of prohibited grounds of non-discrimination, that should not inhibit the application of the article to sexual minorities. It can be argued, as Murray and Viljoen do, that 'sex' as the factor already explicitly provide for by article 2 should be understood to include 'sexual orientation'. This interpretation is supported by the fact that there is no record of any rejection of inclusion of sexual orientation as a ground for non-discrimination during the drafting process of the African Charter.<sup>92</sup> The HRC in *Toonen v Australia* also clarifies that the meaning of 'sex' in the listed grounds of non-discrimination under the article 2 of the ICCPR, includes sexual orientation.<sup>93</sup>

Regarding the scope of article 2, Christoff Heyns correctly argues that the ground on which discrimination is prohibited in article 2 of the African Charter is not exhaustive. He

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<sup>89</sup> 'n above,269'

<sup>90</sup> The United Nation Human Rights Committee and the European Court of Human Rights have subsequently found that the ICCPR and European Convention provide protection to gays in particular; See Heyns (n74 above) 143

<sup>91</sup> 'as above'

<sup>92</sup> R Murray and F Viljoen 'Lobbing on Sexual Orientation Issue: The possibilities before the African Commission on Human and Peoples' Rights and Africa Union', forthcoming, 2007 HRQ4

<sup>93</sup> *Toonen v Australia*, para 8.7

further argues that 'discrimination of any kind is prohibited, and the listed grounds only serve merely as examples of the kinds of discriminations that are envisaged.' The open-ended nature of the list is reinforced by the words 'other status' at the end of the article. The following grounds are, for example, not explicitly listed: gender, age, disability and sexual orientation.<sup>94</sup> Rachel Murray and Frans Viljoen also support this argument and suggest that there is no limit to the amount of categories that might be added to the existing list. They also argue that this means that 'sexual orientation' should be included as a ground on which 'distinction' could not be tolerated.<sup>95</sup>

The text of article 2 of the African Charter suggests two avenues that can be used in regard to protection against non-discrimination of sexual minorities, namely 'other status' and 'sex'. Sexual orientation is a *prima facie* case of 'other status' by which individuals are singled out for odious discrimination.<sup>96</sup> With the inclusion of sexual orientation under the general rubric of 'other status', the idea is to emphasise that the grounds enumerated in the article are illustrative and not exhaustive. In line with the *Toonen* decision, a radical strategy of interpretative incorporation can also be taken by reading "sex" in article 2 to include sexual orientation.

This reading is reasonable because the African Charter does not provide a closed list of all the grounds of discrimination. It can also be argued that it would be impossible to expect the framers of the African Charter to include all grounds of discrimination. To this end the framers of the African Charter decided to add 'other status' which in my view encompasses the rights of sexual minorities.

It should be stressed that discrimination on the grounds of sexual orientation and denial to the right of equal benefits of the law is prohibited by articles 2 and 3 of the African Charter. Article 2 read with article 3 are in line with articles 60 and 61 of the Charter. The thrust of these provisions is to prohibit discrimination on the grounds of sexual orientation or any other kind of discrimination. It should further be noted that discrimination is not sanctioned by the international jurisprudence of human rights law

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<sup>94</sup> Heyns (n74 above) 145

<sup>95</sup> Murray and Viljoen (n94 above) 4

<sup>96</sup> J Donnelly 'Non-discrimination and sexual orientation: Making a place for sexual minorities in the global human rights regime' in Baehr, Flintermann & Senders (eds) *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights* (1999) 93



and far-reaching General Comment of the Committee on Economic, Social and Cultural Rights, which considers that Article 2 (2) of the Covenant that provide grounds of non-discrimination including sexual orientation.<sup>97</sup>

## 4.2 African Commission

The African Commission (Commission) is a body established by article 30 of the African Charter to promote and ensure the protection of human and peoples' rights. In practice there have been very little measures and attention given by the Commission to the rights of sexual minorities and the Commission has had very little occasion to interpret article 2 of the Charter.

In *Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia*, a case brought before the Commission by a Senegalese NGO on behalf of 517 West Africans who were expelled from Zambia on grounds of being in the country illegally, the Commission held that article 2 imposes an obligation on the contracting states to secure the rights protected in the Charter to *all persons* within their jurisdiction (emphasis provided). In *Union Interfricaine des Droits de l'Homme et al v Angola* the Commission emphasised that article 2 requires states to ensure that persons living within their territories enjoy the rights guaranteed in the Charter.<sup>98</sup>

According to James Matshekga the two decisions indicate that the Commissioners' understanding of the meaning and content of article 2 is that firstly the article applies to all human beings. Secondly, the right to equality and non-discrimination is an autonomous but dependent right that can only be violated in conjunction with another article in the Charter. Lastly, article 2 is confined to the enjoyment of the rights guaranteed in the Charter. In essence, this means that the Commission interprets article 2 of the African Charter similar to article 14 of the European Convention on Human Rights.<sup>99</sup>

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<sup>97</sup> General Comment No.14 The right to the highest attainable standard of health (art12) referring in paragraph 18 under the heading 'Non-discrimination and equal treatment' including sexual orientation as one of the grounds of non-discrimination.

<sup>98</sup> Matshekga(n6 above) 118

<sup>99</sup> 'as above'



The protection of sexual minorities in the United Nations and European system of human rights dealing with challenges to 'sodomy' laws was granted on the basis of a broad understanding of the right to privacy. The ICCPR and European Convention provides for such rights.<sup>100</sup> The African Charter does not contain an explicit right protecting the right to privacy and does not make any reference to the issue of sexual orientation.

According to Murray and Viljoen on their expansive interpretation of the rights in the African Charter, it is possible to argue that the African Charter 'implies' the right to privacy. Such an argument may be defended with reference to the approach that the African Commission adopted in the *SERAC* case<sup>101</sup>, which found that existing Charter provisions 'implied' the existence of the right to food and shelter.<sup>102</sup> It may in a similar vein be contended that the right to privacy flows from the cumulative effect of the right to respect for his life and integrity of his person,<sup>103</sup> the right to respect of dignity inherent in a human being<sup>104</sup> and to the freedom and security of a person.<sup>105</sup> This could be based on the fact that persons regard their sexual and emotion attraction to a person of the same- sex as integral to their sexual identity or personality, and from this would follow that an encroachment of that aspect of their person would constitute a violation to their integrity as a person and to their 'inherent human dignity'. Respect for integrity and dignity requires that state parties to the African Charter stop interfering with the most intimate domain of sexual attraction, thus implying the right to privacy.<sup>106</sup>

### 4.3 Limitations on the rights of sexual minorities

I have argued above that the general right to equality and non-discrimination provided for in article 2 and supplemented by article 3 of the African Charter provides a guarantee for sexual minorities of both equality before the law and equal protection of the law, by

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<sup>100</sup> Article 17 of the ICCPR and article 8 European Convention

<sup>101</sup> *Social and Economic Rights Action Centre (SERAC) and Other v Nigeria* (2001) AHRLR 60 (ACHPR 2001)

<sup>102</sup> In *SERAC*, the communication argues that the right to food is implicit in the African Charter, in the right to life (art 4), the right to health (art 16) and the right to economic, social and cultural development (art 22). Para 64, and the right to food is linked to the dignity of human beings and therefore essential for the enjoyment and fulfillment of such other rights as to health, education, work and political participation. Para.65

<sup>103</sup> Art 4 of the African Charter

<sup>104</sup> Art 5 of the African Charter

<sup>105</sup> Art 6 of the African Charter

<sup>106</sup> Murray and Viljoen(n94 above)3

providing that 'every individual shall be equal before the law and shall be entitled to equal protection of the law'. Article 3 ensures that when distinguishing between people or groups of people the law does not have regard to any status, such as, for example: race, religion, or the sexual orientation of the parties unless there are relevant considerations such as collective security, morality and common interests. Article 27(2) of the African Charter plays the role of a general limitation clause in respect of all rights, and some of the provisions in the Charter contain internal limitations.<sup>107</sup> Under the heading 'Duties', article 27(2) provides:

The rights and freedom of each individual shall be exercised with due regards to the rights of others, collective security, morality and common interest.

When dealing with the limitation clause, the African Commission has applied a proportionality test. The Commission has stated that 'the only legitimate reason for limitation to the rights and freedom of the African Charter are to be found in article 27(2)<sup>108</sup> and that the onus is on the state to provide the justification for limiting rights.'<sup>109</sup> Consequently, it seems that the onus is first on the complainant to show that a protected right had been infringed, and secondly on the respondent (usually a state party to the African Charter) to show that the limitation is justified. The Commission has required limitations to be 'necessary' and not just reasonable, 'limitations must be strictly proportionate with and absolutely necessary for the advantages that are to be obtained.'<sup>110</sup> Thus, when limiting the right of sexual minorities, a state has to not only show that it falls within the grounds provided under 27(2) but also that it stands the test of reasonableness and necessity as provided by the Commission.

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<sup>107</sup> Heyns (n74 above) 138

<sup>108</sup> Communications 105/93, 128/94, 130/94 and 152/96, *Media Rights Agenda and Constitutional Rights Project v Nigeria*, Twelfth Activity Report 1998-1999' 712para.68 See also Communications 140/94, 141/94 and 145/95, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* Thirteenth Activity Report 1999-2000, para. 4

<sup>109</sup> Communications 105/93, 128/94, 130/94 and 152/96, *Media Rights Agenda and Constitutional Rights Project v Nigeria*, Twelfth Activity Report 1998-1999, para73 and 77

<sup>110</sup> Communication 105/93, 128/94, 130/94 and 152/96, *Media Rights Agenda and Another v Nigeria* AHRLR paras 69 and 70

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5 Conclusion

The fact that the individual rights of countless persons have been violated on the basis of their sexual orientation indeed suffices to make them candidates for human rights protection.<sup>111</sup> Because one of the tasks of the human rights law is to investigate varieties of discrimination in order to understand, cross culturally, how it is defining that term and what it is combating.<sup>112</sup>

An important consequence of non-recognition of the right in protection of sexual minorities is that they are excluded from sexual health prevention strategies (sexually transmitted infections including HIV/AIDS) and other sexual educational campaigns. This generally exposes them to greater risk of HIV infection and increased stigmatization in society.

It has become widely accepted as 'unfashionable', or at least socially or politically inexpedient, to be overtly racist or a sexist, and to support such racist or sexist attitudes with arguments that 'women are weaker or have less judgement'; 'blacks are inferior or have less ability at specified occupations or activities', but in contradiction it is frequently acceptable to deride persons on the grounds of their sexual orientation.<sup>113</sup>

The debate about protection of sexual minorities from discrimination does not reflect and is not responsive to consideration of power. Non-discrimination against sexual minorities in the African system of human rights does not presume any claim to resource allocation, it embodies a classical 'first generation' rights. The protection of sexual minorities, which call for general protection fit in the words of the African charter 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the chapter without distinction of any kind'.

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<sup>111</sup> Heinze, (n5 above) 57

<sup>112</sup> 'n above,52'

<sup>113</sup> Cameron (n8 above) 456

The equality clauses in the African Charter do not refer explicitly to sexual orientation as one of the grounds of non-discrimination. The *travaux préparatoires* for the African Charter on Human and peoples' right do not record any discussion of the sexual orientation during the drafting sessions. But the African Charter, like all human right instruments, must be regarded as a living instrument, whose interpretation develops over time.<sup>114</sup> The *SERAC* case shows this living approach of interpretation of the Charter by the Commission.

This thesis acknowledges that the implementation of human rights under the African Charter is primarily a domestic matter. Regional implementation is essentially limited to supervision of domestic measures, whether of protection or violation the rights or not compel the duties, by political, quasi-judicial or judicial organs. This argument can be supported by fact that individuals are allowed to seek regional relief only if domestic remedies have been exhausted; in other words, individual communications has to exhausted domestic remedies to be considered by the African Commission in terms of article 56 (5) of the African Charter.

Although in this case, this focused on a discussion of whether the African system could recognize protection of the rights of sexual minorities due to the apparent failure of domestic legal systems.

Supported by this background and the arguments made in the previous chapters inference can be made that under the African System of human rights sexual minorities are protected by two avenues namely:

- a) By adoption of the principles and provisions resident in treaties ratified by African countries. Ratification of the ICCPR for instance imposes on states a duty to meet the obligations of the treaty as require under articles 60 and 61 of the African Commission and Protocol of the African Court. This argument is supported by the stance of HRC in *Toonen* and *Young* cases.

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<sup>114</sup> General Comment No 8 (2006) The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (art. 19, 28 (2) and art 37 *inter alia*) para 20. Committee on the Rights of the Child Forty- second session Geneva, 15 May – 2 June 2006. CRC/C/GC/8

- b) By interpretation the non discrimination grounds listed under equality clause extend to include 'sexual orientation argument which adequately recognizes sexual orientation as an impermissible ground of discrimination is based on a claim to the equal protection under the African human rights system. Because implies that sexual orientation is one of the grounds in 'other status' under the equality provision

The consequence or effects of criminal sanctions against sexual minorities acts is to reinforce the misapprehension and general prejudice of the public, misery and fear, legitimacy or encourage blackmail against sexual minorities, police entrapment, violence.



## 5.1 Recommendations

The adequate protection and recognition of the rights of sexual minorities would entail the follows recommendations to:

Insist that the African Court and the Commission observe the provisions found in the Protocol on the African Human Rights Court that submits to its jurisdiction any matters arising out of the Charter or other relevant human rights instruments ratified by its member states and further apply the provisions of these instruments.

Encourage these two bodies to further interpret the Charter in light of the international jurisprudence that pertains to sexual minorities rights

- a) Persuading legislators or governments to change the law, by repealing existing discriminatory legislation or by creating new legal protection against discrimination, such by amending an existing national law or constitution. The abolition of domestic laws, which provides crime of sodomy; Removal of sodomy from *inter alia* of the Criminals Procedures and other statutory which refer as serious criminal offence.
- b) Persuading national and African Court and human rights tribunal that a particular instance of sexual orientation discrimination violates *existing* human rights law.
- c) The legal protection against non-discrimination of sexual minorities should be targeted in areas such as employment, tenancies, provisions of public resources, insurance and others of public and private services in regards of distribution of goods and public opportunities.

**Word count: 10 540**

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## ANNEXURE A

### Status of ratification of the ICCPR

**Note:** The Covenant was opened for signature at New York on 19 December 1966.

Participant	Signature	Ratification, Accession (a), Succession (d)
Afghanistan	.	24 Jan 1983 a
Albania	.	4 Oct 1991 a
Algeria	10 Dec 1968	12 Sep 1989
Andorra	5 Aug 2002	.
Angola	.	10 Jan 1992 a
Argentina	19 Feb 1968	8 Aug 1986
Armenia	.	23 Jun 1993 a
Australia	18 Dec 1972	13 Aug 1980
Austria	10 Dec 1973	10 Sep 1978
Azerbaijan	.	13 Aug 1992 a
Bangladesh	.	6 Sep 2000 a
Barbados	.	5 Jan 1973 a
Belarus	19 Mar 1968	12 Nov 1973
Belgium	10 Dec 1968	21 Apr 1983
Belize	.	10 Jun 1996 a
Benin	.	12 Mar 1992 a
Bolivia	.	12 Aug 1982 a
Bosnia and Herzegovina <a href="#">1</a>	.	1 Sep 1993 d
Botswana	8 Sep 2000	8 Sep 2000
Brazil	.	24 Jan 1992 a
Bulgaria	8 Oct 1968	21 Sep 1970
Burkina Faso	.	4 Jan 1999 a
Burundi	.	9 May 1990 a
Cambodia <a href="#">2</a> , <a href="#">3</a>	17 Oct	26 May 1992 a

	1980	
Cameroon	.	27 Jun 1984 a
Canada	.	19 May 1976 a
Cape Verde	.	6 Aug 1993 a
Central African Republic	.	8 May 1981 a
Chad	.	9 Jun 1995 a
Chile	16 Sep 1969	10 Feb 1972
China <a href="#">4</a> , <a href="#">5</a> , <a href="#">13</a>	5 Oct 1998	.
Colombia	21 Dec 1966	29 Oct 1969
Congo	.	5 Oct 1983 a
Costa Rica	19 Dec 1966	29 Nov 1968
Côte d'Ivoire	.	26 Mar 1992 a
Croatia <a href="#">1</a>	.	12 Oct 1992 d
Cyprus	19 Dec 1966	2 Apr 1969
Czech Republic <a href="#">6</a>	.	22 Feb 1993 d
Democratic People's Republic of Korea <a href="#">7</a>	.	14 Sep 1981 a
Democratic Republic of the Congo	.	1 Nov 1976 a
Denmark	20 Mar 1968	6 Jan 1972
Djibouti	.	5 Nov 2002 a
Dominica	.	17 Jun 1993 a
Dominican Republic	.	4 Jan 1978 a
Ecuador	4 Apr 1968	6 Mar 1969
Egypt	4 Aug 1967	14 Jan 1982
El Salvador	21 Sep 1967	30 Nov 1979
Equatorial Guinea	.	25 Sep 1987 a
Eritrea	.	22 Jan 2002 a
Estonia	.	21 Oct 1991 a
Ethiopia	.	11 Jun 1993 a
Finland	11 Oct 1967	19 Aug 1975
France	.	4 Nov 1980 a
Gabon	.	21 Jan 1983 a
Gambia	.	22 Mar 1979 a
Georgia	.	3 May 1994 a
Germany <a href="#">8</a> , <a href="#">9</a>	9 Oct 1968	17 Dec 1973
Ghana	7 Sep 2000	7 Sep 2000

Greece	.	5 May 1997 a
Grenada	.	6 Sep 1991 a
Guatemala	.	5 May 1992 a
Guinea	28 Feb 1967	24 Jan 1978
Guinea-Bissau	12 Sep 2000	.
Guyana	22 Aug 1968	15 Feb 1977
Haiti	.	6 Feb 1991 a
Honduras	19 Dec 1966	25 Aug 1997
Hungary	25 Mar 1969	17 Jan 1974
Iceland	30 Dec 1968	22 Aug 1979
India	.	10 Apr 1979 a
Indonesia	.	23 Feb 2006 a
Iran (Islamic Republic of)	4 Apr 1968	24 Jun 1975
Iraq	18 Feb 1969	25 Jan 1971
Ireland	1 Oct 1973	8 Dec 1989
Israel	19 Dec 1966	3 Oct 1991
Italy	18 Jan 1967	15 Sep 1978
Jamaica	19 Dec 1966	3 Oct 1975
Japan	30 May 1978	21 Jun 1979
Jordan	30 Jun 1972	28 May 1975
Kazakhstan	2 Dec 2003	24 Jan 2006
Kenya	.	1 May 1972 a
Kuwait	.	21 May 1996 a
Kyrgyzstan	.	7 Oct 1994 a
Lao People's Democratic Republic	7 Dec 2000	.
Latvia	.	14 Apr 1992 a
Lebanon	.	3 Nov 1972 a
Lesotho	.	9 Sep 1992 a
Liberia	18 Apr 1967	22 Sep 2004
Libyan Arab Jamahiriya	.	15 May 1970 a

Liechtenstein	.	10 Dec 1998 a
Lithuania	.	20 Nov 1991 a
Luxembourg	26 Nov 1974	18 Aug 1983
Madagascar	17 Sep 1969	21 Jun 1971
Malawi	.	22 Dec 1993 a
Maldives	.	19 Sep 2006 a
Mali	.	16 Jul 1974 a
Malta	.	13 Sep 1990 a
Mauritania	.	17 Nov 2004 a
Mauritius	.	12 Dec 1973 a
Mexico	.	23 Mar 1981 a
Monaco	26 Jun 1997	28 Aug 1997
Mongolia	5 Jun 1968	18 Nov 1974
Morocco	19 Jan 1977	3 May 1979
Mozambique	.	21 Jul 1993 a
Namibia	.	28 Nov 1994 a
Nauru	12 Nov 2001	.
Nepal	.	14 May 1991 a
Netherlands <a href="#">10</a>	25 Jun 1969	11 Dec 1978
New Zealand <a href="#">11</a>	12 Nov 1968	28 Dec 1978
Nicaragua	.	12 Mar 1980 a
Niger	.	7 Mar 1986 a
Nigeria	.	29 Jul 1993 a
Norway	20 Mar 1968	13 Sep 1972
Panama	27 Jul 1976	8 Mar 1977
Paraguay	.	10 Jun 1992 a
Peru	11 Aug 1977	28 Apr 1978
Philippines	19 Dec 1966	23 Oct 1986
Poland	2 Mar 1967	18 Mar 1977
Portugal <a href="#">5</a>	7 Oct 1976	15 Jun 1978
Republic of Korea	.	10 Apr 1990 a
Republic of Moldova	.	26 Jan 1993 a
Romania	27 Jun	9 Dec 1974

	1968	
Russian Federation	18 Mar 1968	16 Oct 1973
Rwanda	.	16 Apr 1975 a
Saint Vincent and the Grenadines	.	9 Nov 1981 a
San Marino	.	18 Oct 1985 a
Sao Tome and Principe	31 Oct 1995	.
Senegal	6 Jul 1970	13 Feb 1978
Serbia and Montenegro <a href="#">1</a>	.	12 Mar 2001 d
Seychelles	.	5 May 1992 a
Sierra Leone	.	23 Aug 1996 a
Slovakia <a href="#">6</a>	.	28 May 1993 d
Slovenia <a href="#">1</a>	.	6 Jul 1992 d
Somalia	.	24 Jan 1990 a
South Africa	3 Oct 1994	10 Dec 1998
Spain	28 Sep 1976	27 Apr 1977
Sri Lanka	.	11 Jun 1980 a
Sudan	.	18 Mar 1986 a
Suriname	.	28 Dec 1976 a
Swaziland	.	26 Mar 2004 a
Sweden	29 Sep 1967	6 Dec 1971
Switzerland	.	18 Jun 1992 a
Syrian Arab Republic	.	21 Apr 1969 a
Tajikistan	.	4 Jan 1999 a
Thailand	.	29 Oct 1996 a
The Former Yugoslav Republic of Macedonia <a href="#">1</a>	.	18 Jan 1994 d
Timor-Leste	.	18 Sep 2003 a
Togo	.	24 May 1984 a
Trinidad and Tobago	.	21 Dec 1978 a
Tunisia	30 Apr 1968	18 Mar 1969
Turkey	15 Aug 2000	23 Sep 2003
Turkmenistan	.	1 May 1997 a
Uganda	.	21 Jun 1995 a
Ukraine	20 Mar 1968	12 Nov 1973
United Kingdom of Great Britain and Northern Ireland <a href="#">12</a> , <a href="#">13</a>	16 Sep 1968	20 May 1976



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

