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INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES

**CHALLENGES OF NORMALIZING AND IMPLEMENTING GAY RIGHTS
AS PART OF THE INTERNATIONAL HUMAN RIGHTS:**

CASE STUDY OF KENYA

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ARTS INTERNATIONAL STUDIES.**

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DECLARATION

This research project is my original work and has not been presented for examination in any other university.

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This research project has been submitted for examination with my approval as university supervisor.

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DEDICATION

To the men and women of integrity and to those who believe in championing human rights for all people, I dedicate this work to you.

ACKNOWLEDGEMENT

I would like to acknowledge the following persons whose contributions facilitated the completion of this project.

Firstly, I thank the Almighty God for the gift of life and for giving me the skills, knowledge and energy to be able to complete this paper and the postgraduate degree of Master of International Studies

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ABSTRACT

Two fundamental human rights are the prohibition against discrimination and the guarantee of equal and effective protection against discrimination on any ground to all people. However, these principles have not been applied equally to those who face discrimination based on their sexual identity. There is still a prescribed death penalty in eight countries for homosexual behaviour. In addition, homosexuality is criminalized in approximately 80 countries. In Uganda, there is an on-going debate about a proposed “anti-homosexuality bill,” which would inflict the death penalty on repeat offenders. In Moscow, Russia, gay pride, which entails an openly admitting being a homosexual and demonstrating a sense of dignity in their sexual orientation, has been banned for the next 100 years. The international community recognises human rights as “the foundation of freedom, justice and peace in the world.” Key human rights developments have taken place at the international level, but international human rights law cannot be observed separately from the national human rights laws of those countries that have ratified international treaties. Sovereign states are the central actors, and they assume the daily obligations to protect and respect rights. Therefore, this thesis looks at the role of the state in normalizing and implementing gay rights. It also looks at the characteristics of gays that have kept them out of the human rights work

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CHAPTER ONE: INTRODUCTION

1.1. Background of the Study

In the last 40 years, seismic changes have occurred in social understandings of what is acceptable sexuality. In many settings, social acceptance of sexual behaviour has moved from a 'standard of legitimacy' tied to reproduction and marriage, towards a standard that is governed by individual preference and decisions. In terms of sexual rights, the standard of legitimacy has also arguably moved in favour of affirming principles of autonomy, consent, and non-discrimination. As a normative code that privileges human conscience and liberty, human rights have played an important part in this transformation. More recently, human rights work that focuses on the material and political conditions that enable realisation of rights has also made a crucial contribution to sexual rights by focusing on conditions that enable autonomous decision making to occur on sexual matters. Nevertheless, this evolution has not been adequately conceptualised. Hence, more work needs to be done on the diversity of enabling conditions that differently situated individuals require, as well as the variety of purposes that sexual decision-making needs to address, and more generally, the role of the state (Siegel, 2008).

Two basic human rights principles are the prohibition against discrimination and the guarantee of equal and effective protection against discrimination on any ground to all people. However, these principles have not been applied equally to those who face discrimination based on sexual identity.

There is still a prescribed death penalty in eight countries for homosexual behaviour and homosexual sex is criminalized in approximately 80 countries.¹ In Uganda, there is an on-going debate about a proposed “anti-homosexuality bill,” which would inflict the death penalty on repeat offenders.² In Moscow Russia, gay Pride has been banned for the next 100 years (Djordjevic, 2013).

Lesbian, Gay, Bisexual and Transgender (LGBT) individuals should, like all people, have the right to life, the right to security of the person, as well as the freedom from torture and cruel, inhuman, or degrading treatment. However, there is still a proscribed death penalty in eight countries for homosexual behaviour, and in some 80 countries homosexual sex is criminalized (Djordjevic, 2013). The International Bill of Human Rights guarantees all the right to work, the right to education in a safe environment, and the right to family life.³ However, LGBT people still do not enjoy these rights in all countries. This is despite the fact that these international human rights documents are widely accepted by the states (Blagojevic, 2011). For example, in March 2012, Saint Petersburg, Russia, joined two regions that have passed laws banning what they call gay “propaganda. In Uganda, until May 2011, there was an ongoing debate about a proposed “anti-homosexuality bill,” which would inflict the death penalty on repeat offenders. In 2012, the debate on the law was revived in the Parliament of Uganda, when a speaker, Rebecca Kadaga, promised it as a “Christmas gift” to the people. The struggle to prevent the Ugandan Parliament from adopting this kind of legislation continues in 2013 (Tatchell, 2013).

¹ LGBT rights around the world, official Web site of the International lesbian, gay, bisexual, trans and intersex association (“ILGA”)

² Bill No. 18: The Anti Homosexuality Bill, (25 September 2009) Bills Supplement No. 13 to the Uganda Gazette 47: CII, online: National press <<http://nationalpress.typepad.com/files/bill-no-18-anti-homosexuality-bill-2009>

³ The International Bill of Human Rights is a common name that refers to the four major international human rights documents: the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols

Few people are aware that discussions about lesbian and gay rights began in the United Nations (UN) over thirty years ago at different UN World Conferences, bodies and programmes. The discussion emerged, at the first UN Women's Conference in Mexico (1975), where women's rights activists had to defend themselves against journalists' charges that they "must all be lesbians." At the UN Women's Conference in Copenhagen (1985), women, including lesbians, were engaged in discussions about their right to control their own sexuality. The next UN Women's Conference in Nairobi (1985) saw the first successful strategies at the Non-Governmental Organization (NGO) forum including providing public education on "women loving women," holding lesbian workshops and including explicit language about lesbians in the UN governmental report (Blagojevic, 2011).

In the last decade, it has become common to include language regarding sexual orientation in most human rights declarations at UN and NGO levels. Many governments have changed discriminatory legislation, and have included "sexual orientation" as a ground for protection under their human rights acts. South Africa has one of the best non-discriminatory Constitutions in the world, and it includes protections for the rights of lesbians and gays (as does the Constitution of Ecuador). Many countries have established special bodies and plans to monitor and combat discrimination on different grounds, including sexual orientation. In Sweden, the Act on a Ban on Discrimination in Working Life on Grounds of Sexual Orientation (May 1999) includes a provision for the establishment of a specialized body to monitor and combat discrimination on the basis of sexual orientation and promote full compliance with the Act (Blagojevic, 2011).

1.2. Yogyakarta Principles

The Yogyakarta Principles are a set of principles on the application of international human rights law in relation to sexual orientation and gender identity. The principles affirm binding international legal standards with which all States must comply. Human rights violations targeted toward persons because of their actual or perceived sexual orientation or gender identity constitute an entrenched global pattern of serious concern. They include extra-judicial killings, torture and ill-treatment, sexual assault and rape. They also include invasions of privacy, arbitrary detention, denial of employment and education opportunities, and serious discrimination in relation to the enjoyment of other human rights. Key human rights mechanisms of the United Nations have affirmed States' obligation to ensure effective protection of all persons from discrimination based on sexual orientation or gender identity. However, the international response has been fragmented and inconsistent. As a result, it has created the need for a consistent understanding of the comprehensive regime of international human rights law and its application to issues of sexual orientation, as well as gender identity..

These principles were developed and adopted unanimously. This was by a distinguished group of human rights experts from diverse regions and backgrounds. They included judges, academics, a former UN High Commissioner for Human Rights, UN Special Procedures, and members of treaty bodies, NGOs and others.

A key event in the development of the Principles was an international seminar of many of these legal experts that took place in Yogyakarta, Indonesia at Gadjah Mada University from 6th to 9th November 2006.

The seminar clarified the nature, scope and implementation of States' human rights obligations in relation to sexual orientation and gender identity under existing human rights treaties and law.

The Yogyakarta Principles address the broad range of human rights standards and their application to issues of sexual orientation and gender identity.

The principles affirm the primary obligation of States to implement human rights. Each principle is accompanied by detailed recommendations to States. However, the principles also emphasise that, all actors have responsibilities to promote and protect human rights. Therefore, additional recommendations are addressed to the UN human rights system, national human rights institutions, the media, non-governmental organisations, and others.

1.3. Statement of the problem

The international community recognises human rights as “the foundation of freedom, justice and peace in the world.” On a positive note, the most recent analysis of the jurisprudence and doctrine of the United Nations (UN) human rights system, conducted by the International Commission of Jurists, show that treaty bodies are reacting to demands to protect people from discrimination based on sexual identity. The UN is waving red flags in all directions, and Narayan (2006) demonstrates in her analysis that, six of eight treaty bodies have interpreted their establishing conventions to include sexual orientation.

O’Flaherty and Fisher (2007) analysed the impact and dissemination of the Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity (the “Yogyakarta Principles”),⁴ as well as their legal background. The 2007 Yogyakarta Principles present a collection of human rights principles as related to sexual orientation and gender identity. Yogyakarta principles are not legally binding since they have not been adopted by states. However, they represent an interpretation of existing human right treaties and have been used in the work of the UN and in some member countries.

They were created after an initiative of human rights NGOs that gathered a group of experts to study the state of international law as applied to sexual identity.

Upon reviewing the international community’s current stance on LGBT human rights, evidence shows that anti-sodomy laws violate international human rights law. Numerous U.N. bodies have interpreted crucial human rights treaties to include sexual minorities in their provisions. Furthermore, there is an ever-growing consensus in the international community that anti-sodomy laws contravene fundamental human rights of LGBT individuals that are protected by international law.⁵ Additionally, the binding international agreements to which Kenya is a party requires that states parties take positive measures to realize their provisions. In addition, the new Constitution requires Kenyan officials to “enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.”

⁴ “Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity”, (May 2007), online: Yogyakarta < http://www.yogyakartaprinciples.org/principles_en.htm>.

⁵ The protection of fundamental rights and freedoms guaranteed by the European Convention on Human Rights is not enforced. As in many parts of the world, cultural homophobia prevails and social norms or codes of behaviour exist that, without being expressed in law, work in societies to legitimize oppression. As a consequence, people hide their sexual orientation and/or gender identity. Therefore, violence against LGBT persons is frequently unreported, undocumented and goes ultimately unpunished. Rarely does it provoke public debate and outrage.

On the converse, anti-sodomy laws fuel an overall atmosphere of stigmatization that facilitates discrimination and human rights abuses. The inescapable conclusion of these conditions is that, Kenya's anti-sodomy laws violate its new Constitution (Courtney, 2012).

Search for empirical literature on the issues related to LGBTs in Kenya revealed several studies. For example, Courtney (2012) carried out a study on being gay in Kenya and the implications of the new constitution on anti sodomy laws in the country. On the other hand, Muna (2011) evaluated the African customary laws, rights and women's rights. The Kenya Human Rights Commission, KHRC (2011), conducted a series of interviews with 474 LGBT Kenyans aged eighteen to sixty-five to document their experiences of homophobia within the country. From these studies, none has specifically focused on the challenges of putting gay rights in the context of the international human rights agenda in Kenya. There is, therefore, a gap in literature as far as the study of LGBTs and the extent to which human rights framework protection applies in Kenya.

To fill this gap, the following research questions are explored: What are the characteristics of gays that have kept them outside human rights work in Kenya? What factors block initiatives to put gay issues on the national human rights agenda in Kenya?

1.4. Objectives of the Study

The objectives of this study are:

1. To examine the international legal framework policies and institutions that provides support for LGBTs.
2. To examine gay rights as human rights.
3. To establish the link between LGBT rights and health rights.
4. To determine factors that block initiatives to put gay issues on the international human rights agenda in Kenya.
5. To propose ways in which LGBT rights can be enforced in health provision.

1.5. Literature Review

1.5.1. Recognition of Human Rights for the Minorities

The international community recognises human rights as “the foundation of freedom, justice and peace in the world.” Key human rights developments have taken place at the international level. However, international human rights law cannot be observed separately from the national human rights laws of those countries that have ratified international treaties. The states are the central actors, and they assume the daily obligations to protect and respect rights. The normative power of international human rights law, woven throughout the entire international human rights paradigm, is supposed to help enforce these rights. However, states are often reluctant to give away their sovereignty and can slow down the process on both international local laws. As a result, they can exercise their discretion and not take on certain human rights obligations.

In addition, they can be reluctant to protect those rights on the ground, or can create various administrative and other obstacles, which impede the goal of international human rights law (UDHR, 1948).

The principle of non-discrimination, with the open-ended list of protected grounds is present in all the major international human rights instruments. It has been more than 50 years since the Universal Declaration of Human Rights was adopted. Furthermore, as the culture of human rights continued to spread around the world, so did the different mechanisms for protection and anti-discrimination legislation.

Yet, when it comes to sexual orientation and gender identity at the UN level, all the international human rights mechanisms struggle to name explicitly sexual orientation or gender identity as grounds of discrimination (Djordjevic, 2013).

For example, in 2010, the UN Social, Humanitarian Cultural Affairs Committee (“the Third Committee”) voted for an amendment to the special resolution addressing extrajudicial, arbitrary, and summary executions. The purpose of this amendment was to exclude sexual orientation as one of the laid down basis on which some individuals are targeted for death. This left sexual minorities to be included or excluded through the free interpretation of the discrimination category “the others.” Without the reference to sexual orientation, states can choose whether to consider sexual identity as a protected ground or not. After a widespread international campaign and lobbying by LGBT organisations, another amendment was adopted, and the term sexual orientation was reinstated into the original text. This tug-of-war at the UN has widespread implications. It shows how contentious international human rights can get once sexual orientation is explicitly included in the debates, or in more significant documents such as resolutions (Djordjevic, 2013).

Christianity, Judaism and Islam have been advocating sex strictly for reproductive reasons and they have made systematic efforts to fight against sexual deviations. Christian disagreements on homosexuality matters today constitute divisions among conservatives and liberals, and their major disagreements stem from textual interpretations of the Bible, as well weighing the significance and effects of historical changes on Biblical understanding. Christianity regulated social life for a very long period, and the line between the church and the state of any kind was always very tenuous; even today, the relationship between church and state is very complicated. The leading passage against it in the Bible is the paragraph in Genesis concerning the people of Lot and their sexual practices: They were destroyed because of massive public sexually perverted acts.

The main passage in the Bible condemning male homosexuality says that, “If a man lies with a man as one lies with a woman, both of them have done what is detestable. They must be put to death and their blood will be on their own heads” (Book of Leviticus, 2012).

While the European Court of Human Rights invalidated the Sodomy laws in most European countries by beginning of the 1980s with *Dudgeon v. United Kingdom*, these measures are in contradiction with the vast majority of conservative Middle East countries, and Iran is the flagship country in criminalizing homosexual acts. The case of *Dudgeon v. United Kingdom* was the first successful case before the European Court of Human Rights on the criminalisation of male homosexuality. It was important for setting the legal precedent that ultimately resulted in the Council of Europe requiring that no member state could criminalise male or female homosexual behaviour.

The European Court of Human Rights held that legislation passed in the nineteenth century to criminalize male homosexual acts in England, Wales and Ireland, violated the European Convention on Human Rights. While female homosexual behaviour was never criminal anywhere in the United Kingdom, male homosexual behaviour was previously decriminalised in England and Wales in 1967, in Scotland in 1980, and as the consequence of the judgment in Northern Ireland in 1982 (Morgan, 2006).

It is, however, important to note that The United Nations endorsed the rights of gay, lesbian and transgender people for the first time ever on June 17th 2011. Passing a resolution hailed as historic by the U.S. and other backers and decried by some African and Muslim countries. The declaration was worded cautiously, expressing "grave concern" about abuses because of sexual orientation and commissioning a global report on discrimination against gays. Activists all over the world called it an important shift on an issue that has divided the global body for decades. The resolution expressed concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity. This is an indication that the challenges that face lesbians and gays in the world may end in the near future if the rights are adopted by all countries (Jordans, 2011).

1.5.2. Protection of Gay Rights in Kenya

On August 27, 2010, after over twenty years of debate, Kenyan citizens achieved a new Constitution, replacing the one in place since Kenya gained independence from Britain in 1963. The new Constitution guarantees all Kenyans fundamental rights and freedoms; these include, among others, the right to life, equality and freedom from discrimination, human dignity, privacy, and freedom of expression.

The new Constitution also incorporates international treaties to which Kenya is a party, as well as general principles of international law into Kenya's domestic law. Therefore, this effectively enshrines international human rights norms into the new Constitution (Courtney, 2012).

Despite the new Constitution's more progressive stance, not all Kenyans are able to enjoy the rights guaranteed to them under its provisions. In particular, lesbian, gay, bisexual and transgender (LGBT) Kenyans continue to be targets of verbal and physical injury, sexual violence, and social marginalization. Additionally, they are subject to imprisonment based on their sexual orientation. Under Kenya's Penal Code, engaging in same-sex sexual activity, termed "carnal knowledge of a person against the order of nature," is characterized as an "unnatural offense." Therefore, it is a felony punishable by up to fourteen years in prison. Although the laws are rarely enforced, LGBT Kenyans are still prosecuted and imprisoned under these laws. Furthermore, the laws codify and legitimize a general attitude of homophobia that exists within the country and thereby lead to the routine human rights violations that LGBT Kenyans suffer. As such, the laws instil fear, facilitate abuse, and prevent LGBT Kenyans from achieving the equality to which they are legally entitled (Courtney, 2012).

LGBT Kenyans are routinely harassed or abused by the police, and held in "remand houses." This transpires beyond the constitutional limit without being informed of the charges against them, and they are indicted on false charges. Additionally, interviewees reported that, there is a group of corrupt police officers who extort and blackmail LGBT individuals with the threat of arrest and imprisonment if they do not pay them bribe money.

The report also indicates that other Kenyan citizens physically and sexually assault LGBT Kenyans. In one case, three interviewees reported being gang-raped by groups who “specifically targeted gay men and raped them to ‘punish them for their errant ways. In addition to being subjected to violence, LGBT Kenyans face general stigmatization and exclusion from their families and society. For example, 89% of interviewees who “came out” or “were outed” to their families reported that family members disowned them upon discovering their sexual orientation or gender identity. Others were forced to undergo psychological therapy to “cure” their “confusion.” Still, others were expelled from school or fired from their jobs.

According to the Kenya Human Rights Commission KHRC (2011), religious and political leaders in the community often reinforce these attitudes.⁶ Although efforts to achieve marriage rights for LGBT Kenyans ultimately failed, the new Constitution incorporates three changes that have significant implications for the legality of Kenya’s anti-sodomy laws. Firstly, it features an extensive Bill of Rights and imposes an affirmative duty on the State to promote and fulfil the rights enumerated in the Bill of Rights. Secondly, it incorporates international laws into Kenya’s domestic law. Thirdly, under Article 2 and 4, “any law, including customary law, which is inconsistent with the Constitution, is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.” The new Constitution’s heightened the protection of individual rights coupled with the increased recognition that discrimination based on sexual orientation or gender identity violates international human rights law. Therefore, it provides a strong framework for arguing that Kenya’s anti-sodomy laws are currently unconstitutional under Kenya’s own domestic law (KHRC, 2011).

⁶ For example, a religious elder in the Wajir region publicly stated, “I would remove my dagger and kill if I met any homosexual or lesbian”

1.5.3. Human rights Challenges of LGBTs

While gender identity is generally associated with biological sex (often referred to as cis-gendered), the gender identity of an individual does not necessarily have to tally with their biological sex identity. Many individuals experience their personal identity in very complex ways, and this is not necessarily encapsulated well by the male/female binary construct (Couch et al., 2007).

The terms “transgender” and “transsexual” are often used to describe individuals who do not experience their biological sex and gendered selves in this way. However, there is great variation in how transgender respond to this. This can be exemplified through surgery, hormone replacement, clothing choices amongst others. Transgender people may engage in some, all, or none of these actions.

Berman and Robinson (2010) suggested that, “the term transgendered is generally used to describe those who have not had medical treatment to align their biological sex and gender identity. On the other hand, individuals who have undergone medical treatment often prefer to be known as transsexual.”

However, as the TranZnation report documented, trans people use a wide variety of terms to express their gender and sexuality, including “transman”, “granny tranny” and “genderqueer transboi” to name but a few (Couch et al., 2007). Many of the participants in the study by Couch et al (2007) referred to themselves using more than one term, again highlighting the complexity of individual identity.

A uniform system of law governing human rights at the international level in the field of sexual orientation and gender identity as a subject of non-discrimination would be a very good means of ensuring the fundamental freedoms of all the gay minorities.

Despite the fact that this state of affairs could not occur immediately, the existence of this uniform system of laws would help as a resource for all those countries that are ready to adopt antidiscrimination laws toward LGBT people. For the sake of advancing these issues, UN independent representatives, human rights treaty bodies and human rights experts met to adopt the Yogyakarta Principles. These aim at the application of international human rights law in relation to sexual orientation and gender identity (Yogyakarta Principles, 2012).

Due to stigma and prejudice, and because LGBT people represent a minority of the world population, there is scarcity of reliable studies in the areas of gay challenges and human rights protection. For example, population-based national surveys virtually never include ways to assess sexual orientation, and those that have sought government support have been denied funding (Laumann et al., 1994).

In addition to stigmatization and political obstacles, methodological challenges including problems in recruitment of subjects and definitions of homosexuality or transgender identity, have thwarted research on LGBT human rights issues (Solarz, 1999). With virtually no large-scale random surveys of LGBT populations, researchers and planners must turn to small studies that often use convenience samples. Such data is often biased and uninformative for human rights protection purposes.

Encarnacion (2011) carried out a study on the gay-rights revolution in Latin America marked by the legalization of same-sex marriage in Argentina. Among the factors examined are the use of human-rights rhetoric to end anti-gay discrimination, the employment of the Internet to mainstream gay culture, the creation of a gay market to

leverage clout for the gay community, and critical alliances with the political establishment.

These explanations suggest that the Latin American gay-rights revolution is rooted in political strategizing rather than in social change, which explains the paradoxical trend of rising anti-gay violence in the midst of a gay-rights boom.

Djordjevic (2013) explored the power and weakness of international human rights protections for sexual minorities using Serbia, a transitional country. He used it from a case study approach and recommended the best practices for fostering change. I assessed the situation in Serbia by analysing the formal domestic and international legal framework in comparison to the social outcomes on the ground, as manifested by four years of Pride events. The results of the study suggest that the law cannot achieve change on its own and that alternative “out of the legal box” methods are needed. The results also suggest creating long-term educational initiatives that can generate the necessary pressure from inside the state.

Sheill (2009) and Sanders (2005) have both addressed the debates on this issue. Sheill (2009) discusses the context of adopting the joint statement at the UN General Assembly on human rights, sexual orientation, and gender identity – signed by 66 states in December 2008.

From her perspective, based on working at Amnesty International, a tremendous amount of advocacy was needed just to adopt this document at the UN General Assembly. Sheill (2009) describes the “familiar” dynamics of UN fora whenever sexual orientation is mentioned.

On one side (those who oppose the reference to sexual orientation), there is always “hostility, prejudice, misrepresentation,” and on the other side (those who are trying to advocate for protection against discrimination based on sexual orientation), there is “analysis, evidence,” and frustration.

Sanders (2005) talked about the intense debates that came up at some of the UN World Conferences. This followed as soon as someone proposed to add the words "sexual orientation" in a sentence. However, his general view is that sexual orientation issues will be more openly addressed at the United Nations once reforms at the level of individual states occur. In “Human Rights and Sexual Orientation in International Law,” he maps out all the victories and considers some of the defeats for sexual identity rights internationally, which, in his view, are temporary. This raises a question of where change comes first, locally or internationally.

Lax and Phillips (2009) studied the effects of policy-specific public opinion on state adoption of policies affecting gays and lesbians, and the factors that condition this relationship. Using national surveys and advances in opinion estimation, they created new estimates of state-level support for eight policies, including civil unions and non-discrimination laws. They differentiated between responsiveness to opinion and congruence with opinion majorities. As a result, they found a high degree of responsiveness, controlling for interest group pressure and the ideology of voters and elected officials. Policy salience strongly increases the influence of policy-specific opinion (directly and relative to general voter ideology). There is, however, a surprising amount of non-congruence for some policies; even clear supermajority support seems insufficient for adoption. When non-congruent, policy tends to be more conservative than desired by voters; that is, there is little pro-gay policy bias.

Therefore, there is little to no evidence that state political institutions affect policy responsiveness or congruence.

Viklova (2012) addresses the issue how various religious and legal systems cope with current developments that undermine binary opposition of man and woman including definition of their sexual and cultural identities. More concretely, it tries to explain, how concrete societies and legislations deal with claims of lesbians, gays, bisexuals, and transsexuals (LGBT) that claim broader recognition. It elucidates differences among Western provisions and policies of the relevant legal bodies such as the General Assembly of the United Nations, the European Court of Human Rights, and the Supreme Court concerning these issues. It also points to the nature and real impact of international civil society forces such as Yogyakarta principles that formulate the extension of rights concerning lesbians, gays, bisexuals, and transsexuals. Based on comparison of various legal and religious discourses, it explains current practices of direct and indirect discrimination, and in some non-European national systems, even extra-judicial killings, torture and ill-treatment, sexual assault, rape and other violations of human rights. When emphasizing substantial differences among current European states and non-European ones concerning policies toward lesbian, gay, bisexual and transgender people (LGBT), it shows current tendencies of advancement in the field by common policies of Council of Europe, recent judgments issued by the European Court of Human Rights, as well as civil society efforts such as Yogyakarta principles. Lastly, Swedish standards have been introduced in order to emphasize existing progressive attitudes to LGBT people concerning gay marriages and adoption procedures.

1.6. Justification for the Study

International and local institutions that advocate for LGBT rights in Kenya do not seem to operate under a common legal framework, thus, exposing the LGBT community in Kenya, which leads to being ostracized. Instruments like the universal declaration of human rights, the Kenya constitution 2010, especially chapter 5 on the bill of right, and the penal code do not seem to link with the international institutions. However, there is a need for a critical, systematic a structural review on the service provisions on the legal framework and health provision for this community. Understanding these provisions will not only have a clear understanding of the institutions that provide these services, but to what extent these services are being offered.

Perceived and actual institution marginalization of the LGBT has made the gay community hidden. This begs the question what are their characteristics, where are they found, and how are they excluded outside the human right works in Kenya are amongst the many reasons why we need to critically understand this community. The study will determine the characteristics of gays that have kept them outside human rights work in Kenya and the factors that have blocked any such initiatives. The research will contribute to a vast body of knowledge in revealing the issues that gays face. It will also reveal the reasons why they are not able to get into international human rights agenda.

The study will be of value to the government as it will be able to contribute to policy with regard to the issues that gays face in the country. Therefore, it will be able to put in to legislation appropriate laws that will lead to the protection of gays, as well as allow them to participate in human rights activities without any stigmatization.

The study will also be of value to human rights activists in the area of issues related to gays and lesbians. This is because it will help them understand why they face challenges to get their issues in international human rights agenda. Additionally, it will help them learn of the protections provided by the constitution to ensure that they do not face any discrimination or stigmatization in the country.

The findings of this study will be significant to academicians in that it will add to the knowledge of the researchers in this field of study

1.7. Theoretical Framework

There are three main theories of international human rights that will be reviewed in this study. These are the theories of realism, liberalism, and constructivism.

1.7.1. Realism

Realist theory is intolerant to human rights. The realist world is one where rules are regularly broken, and agreements last only as long as they benefit the contracting parties. As Hobbes put the problem with characteristic clarity, treaties that are not imposed by force 'are but words'. Today's realists (such as Moravcsik, 2000) continue to believe that, for the most part, the diplomacy of human rights is just talk.

Moravcsik (2000) understands that human rights are part of the vocabulary of modern international society: after all, no state leader openly challenges the principles underpinning the human rights regime. The realist contention is that, when push comes to shove, human rights are very low on the list of national policy goals. This explains the prevalence of double standards in international diplomacy, whereby political leaders pay lip service to protecting human rights while, at the same time, allowing these principles to be undermined by the pursuit of other goals.

In other words, in the final analysis, unless the promotion of human rights is in the national interest why it would be rational for states to pursue such goals? (Moravcsik, 2000).

The condition of international anarchy and the pursuit of the national interest are two significant reasons why realists are sceptical about human rights. A third reason is an ethical objection to the assumption of a universal morality that is in many ways the bedrock of the existing human rights regime. As the great realists of the early part of the twentieth century argued (Carr, 1946; Morgenthau, 1948), exhortations to obey the universal moral law are simply techniques to hide the pursuit of narrow selfish interests. All great powers in history have articulated universal claims: we should not be surprised if such measures benefited the dominant power.

Such a convenient linkage between universal morality and the national interest was evident in the justifications for colonial possessions made by the European imperial powers in the nineteenth century, just as democracy promotion consolidated US hegemony in the modern era. Likewise, those living outside the 'greater West' today often complain that human rights are a tool wielded by the powerful to secure various goals such as favourable terms of trade or even a change of regime.

According to realist theorists, these commitments, including their review and enforcement institutions, are nothing more than a reflection of states' power and interests. Treaties and international organizations are, thus, of little concern to realists because they do not impose constraints on hegemonic states. Realists' focus on power as the currency of international affairs does; however, offer an explanation for why non-hegemonic states ratify human rights treaties. Weaker governments accept international obligations because they are compelled to do so by great powers.

The latter, seeking to export their ideological preferences and further their own political interests, coerce weaker states to join human rights agreements. Conversely, where powerful states oppose progressive human rights policies, the realist theory holds that they can block the formation of human rights commitments by other nations (Moravcsik, 2000).

This theory suggests that the government is at the discretion of deciding on the human rights affairs in their country. Therefore, this means that issues to do human rights such as the elite in government normally decide upon gay rights. Hence, if the government in power is not concerned with gay rights, then their issues may not be featured in human rights activities in that country. It should also be noted that the theory suggests that powerful governments force weaker governments to adopt policies that are not in their best interests. Therefore, if such powerful governments do not support gay rights, then other weaker governments may also be forced not to support them (Helfer, 2002).

The search for a sustainable protection and promotion of human rights has often been complicated in a world where a state-centric and realism framework has underpinned much of global politics. Whereas the bipolar balance of the Cold War held everything somewhat stable, the post-Cold War era removed any sort of manageable or measurable balance.

Currently, everything is in flux, from power to security, from sovereignty to economic balance. Further confounding the situation in the post-Cold War era has led to the collapse of order in the so called "zones of turmoil," the widening inequality in the Global South, and the increasing polarization between the rich and the poor countries.

In the case of failed states, social chaos and forced eviction, perpetrated largely within the context of ethnic cleansing and ethno-nationalist strife, have bred violence and civil wars. This has resulted in a perplexing descent into barbarism (Helfer, 2002).

With regard to the moral problems of destitution and inequality, the issue of economic justice has permeated the current polemics over international human rights in an age of globalization. These new issues, along with the traumatic events of the 1990s (particularly in Somalia, Bosnia, Haiti, Rwanda, Sierra Leone, Kosovo, and East Timor), have intensified the preoccupation with and commitment to the internationalization of human rights in academic circles. Increasingly, however, analysts have admonished the compliance gap. They have argued that approval of international human rights instruments is not the same as endorsement (Helfer, 2002).

1.7.2. Liberalism

Liberalism is historically the main challenger to realism in international relations. At the level of ideas, liberalism develops out of a Western tradition of thinking in which the individual has rights that public authorities must respect. While there are varieties of liberal thinking, the central idea is that individual persons have basic rights to free speech, fair treatment in terms of judicial process, and political equality enshrined in a political constitution. While realists to justify the promotion of national self-interest invoke Hobbes and Machiavelli, liberals look to Locke and Kant as their lodestars. Kant's pamphlet 'Perpetual Peace' (Kant, 1991) builds a theory of international liberalism in which all individuals have equal moral worth, and in which an abuse of rights in one part of the world is 'felt everywhere' (Burley, 1993).

It is easy to dismiss liberalism as being utopian. The history of statecraft from the mid-seventeenth century onwards is understood more readily in terms of conflict and aggression. However, as liberals point out, moral universalism has continued to insert itself into the practice of international politics. From the birth of the Enlightenment onwards, states have made significant advances in terms of meeting universal principles central to liberalism. Western states have, over time, enshrined the rights of citizens in legal constitutions, ended the trade of slaves, and then the institution of slavery. In addition, they agreed to protect the condition of workers, and advanced international humanitarian law to protect wounded or captured soldiers, as well as to criminalise the targeting of civilians. Many of these advances that took place between the mid nineteenth and the early twentieth centuries became codified in the internationalization of human rights in the UN system after 1945 (Burley, 1993).

The implementation of human rights standards particularly of gay people in the twentieth century has been chequered. Liberals recognize that the division of global humanity into separate sovereign states presents particular problems when it comes to embedding universal moral principles. Two kinds of responses are triggered by this dilemma.

The first is the attempt to expand the liberal 'zone' such that there are fewer authoritarian states in the world. The second is to strengthen international institutions in the expectation that they can alter the incentives of member states in ways that enhance respect for human rights and human dignity (Burley, 1993).

The theory asserts that the most fundamental influence on international cooperation is not relative power, as Realist theory asserts, nor the institutionalized contractual environment for structuring international bargaining, as Institutionalists (sometimes

termed neoliberal) theory maintains. In the Liberal view, the most important factor defining the opportunities for and constraint on cooperation is the level of convergence of national preferences. This, in turn, reflects the demands of those domestic groups represented by the state (Moravcsik, 1992). Effective international regimes are likely to emerge only where they have deep roots in the functional demands of groups in domestic and transnational society as represented by the domestic political institutions that mediate between society and the state. Regimes foster compliance with international norms not by altering the external incentives facing a unitary state. On the converse, this is achievable by altering the domestic incentives facing societal groups and politicians, thereby shifting the domestic coalitions that define state preferences.

The Liberal theory emphasizes states' rational pursuit of national interests and interests. These reflect the preferences of their component constituencies and the domestic and transnational social context in which they are embedded. It asserts that governments bind themselves to human rights commitments to reduce the political uncertainty that is an inevitable by-product of popular sovereignty.

This is the reason why most governments strive to protect the rights of minority groups in society such as the rights of gay people in their countries. According to one leading liberal theorist, nascent democracies are acutely sensitive to this uncertainty and to the possibility of nondemocratic retrenchment. It is they, rather than established democracies, who press for international commitments and judicial review as a means of 'locking in democratic rule through the enforcement of human rights (Alvarez, 2000).

However, it is important to note that already established democracies have a significant influence on such nascent democracies. As a result, this is why gay rights have not been given the emphasis they ought to on the international scope.

1.7.3. Constructivism

Constructivism differs from realism and liberalism in that it is not a theory of human rights per se. What it offers students of International Relations is a way of thinking about the relationship between norms and interests. Unlike realists and liberals, constructivists argue that there is no necessary tension between the interests of sovereign states and the moral principles associated with the promotion and protection of human rights. The important theoretical point here concerns the constitutive nature of international political reality, specifically how states create, and are created by, shared norms and values (Donnelly, 2003).

The development of human rights needs to be understood according to this dynamic. As is often the case in social life, the international realm is made up of many contending sets of expectations and rules as to how actors ought to behave. While the historically dominant realist logic suggests one form of international conduct, constructivists argue that this inter-state order has been transformed by the emergence of universal values. The protection of human rights, therefore, becomes 'integral to the moral purpose of the modern state, to the dominant rationale that licences the organization of power and authority into territorially defined sovereign units' (Reus-Smit, 2001). Constructivists argue that if states reject universal values outright, they will have to pay a price: this could take the form of condemnation, exclusion, or possibly coercive measures aimed at forcing the new standard of legitimate statehood.

The fact that some governments have already recognized gay rights means that other states will have to do so if they have to be integrated in the rest of the world.

Most African countries consider and have therefore been adamant in their refusal to recognize gay people and to offer them the rights they deserve. This attitude is what has led to the laxity in the protection of gay rights in most African countries.

1.7.4. Theoretical Approach Employed

Realism theory will be employed to explain human rights protection of individuals in Kenya. When UN member states consent to be bound by treaties through ratification, accession or succession, these treaties become legally binding. Unfortunately, not all member states have to sign the human rights treaties.

It is up to the states to decide which of the international human rights obligations they are willing to accept, and to what extent. That is why often, when signing a treaty, states can make unilateral statements known as “reservations,” which have the power to modify or exclude legal effects of certain provisions.

Kenya has ratified the Universal Declaration of Human Rights (UDHR), which affirms in Article 1 that “all human beings are born free and equal in dignity and rights.”⁷ This law part of the Kenyan domestic law through Article 2 (6) of the Constitution of Kenya, 2010.⁸ The Kenya penal code section 162 to 165 criminalizes same sex practices. In Kenya human rights especially related to gay people is very low on the government national policy.

The United Nations Human Rights Committee (UNHRC) urged Kenya to repeal Section 162, Penal Code, which criminalizes homosexuality. On 19 August 2010 in

⁷ Universal declaration of Human rights Article 1

⁸ Constitution of Kenya, 2010. Government Printer, Nairobi .2010

its third periodic report, Kenya responded formally to this recommendation: Kenya may not decriminalize same sex unions at this stage as such acts are considered as taboo and offences against the order of nature, which are repugnant to cultural values and morality.⁹

Developed countries, especially the United States of America have been forcing the developing countries to enforce the Lesbian Gay Bisexual and Transgender rights in their respective countries. In fact, Britain has threatened to limit or prohibit general budget support to countries that restrict the rights of homosexuals.¹⁰ In spite of this, many African countries are continuing to breach international human rights laws, refusing to consider increasing LGBT rights, and in some cases, drafting laws to increase sanctions against LGBT lifestyles.

1.8. Hypothesis

1. Self-stigma by the gay persons affects their self-esteem, and their ability to defend their rights.
2. The human rights frame work in Kenya creates an enabling environment for the gay community to advance their human rights.
3. Most of the institutions that support gay rights are non- state actors
4. National legal statutes criminalize gay relationships, thus, contravening the United Nations Human Rights Frameworks
5. The state does not provide a framework for providing gay friendly services at the health centres.

⁹ "Consideration of reports submitted by States parties under article 40 of the Covenant, Third periodic report of States parties, Kenya", United Nations Human Rights Committee, CCPR/C/KEN/3, 13 January 2011, page 20

¹⁰ "Uganda fury at David Cameron aid threat over gay rights", BBC News, 31 October 2011

1.9. Research Methodology

The research design given the objectives of the study is to determine the characteristics of gays that have kept them outside human rights work in Kenya. It also entails determining the factors block initiatives to put gay issues on the international human rights agenda in Kenya. A descriptive survey design was found to be the best to fulfil the objectives of the study. The target population was self-confessed gays and lesbians in Kenya.

The study utilizes both primary and secondary data. The primary data was collected using structured questionnaires based on the objectives of the study.

Secondary data was collected from various relevant documents and websites such as the Kenya National Human Rights Commission (KNHRC), the United Nations Human Rights Commission (UNHRC), the Gay and Lesbian Coalition of Kenya (GALCK) as well as the government of Kenya. Secondary data was obtained in order to supplement the primary data.

Data analysis was done using descriptive and regression analysis. The data was both qualitative and quantitative to ensure objectivity. This will assist in ensuring the data is free from any selective perception that can dilute its validity and reliability. The results were tabulated where necessary

CHAPTER TWO: FACTORS HINDERING INITIATIVES TO ADDRESS GAY RIGHTS

2.1. The State

The international community recognises human rights as “the foundation of freedom, justice and peace in the world.”¹¹ Key human rights developments have taken place at the international level, but international human rights law cannot be observed separately from the national human rights laws of those countries that have ratified international treaties. The states are the central actors, and they assume the daily obligations to protect and respect rights. The normative power of international human rights law, woven throughout the entire international human rights paradigm, is supposed to help enforce these rights. However, states are often reluctant to give away their sovereignty and can slow down the process on both international and domestic levels. They can do so when participating in the work of international organisations, or they can exercise their discretion and not take on certain human rights obligations. In addition, they can be reluctant to protect those rights on the ground, or can create various administrative and other obstacles, which impede the goal of international human rights law.

Lesbian, Gay, Bisexual, and Transgender (LGBT) rights in Africa are limited in comparison to many other areas of the world. The International Gay and Lesbian Association estimated in 2008 that homosexuality was outlawed in 38 African countries, and in at least 13 African countries, homosexuality was legal or there were no laws pertaining to it.¹²

¹¹ *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR 3d Session, Supp No 13, UN Doc A/810, (1948) 71.

¹² "Africa's lesbians demand change", *BBC News*, reported by Joanna Jolly, 27 February 2008

Since 2011, some first world countries have been considering implementing laws that limit or prohibit general budget support to countries that restrict the rights of homosexuals. In spite of this, many African countries are continuing to breach international human rights laws, refusing to consider increasing LGBT rights, and in some cases drafting laws to increase sanctions against LGBT lifestyles.¹³

Many African leaders feel that gay rights are against the grain of their cultural and religious value systems. In addition, they believe they have a sovereign right to reject what is seen as an imposition by mainly Western nations, which attempts to affect national sentiment via aid.¹⁴

Homosexuality is "largely considered to be taboo and repugnant to the cultural values and morality" of Kenya,¹⁵ and the state punishes same-sex sexual acts as crimes. According to the 2007 Pew global attitude project, 96% of Kenyan residents believe that homosexuality is a way of life that society should not accept, which was the fifth-highest rate of non-acceptance in the 45 countries surveyed.¹⁶ Despite this, various organisations are working to protect and improve LGBT rights.

Kenya became a party to the International Covenant on Civil and Political Rights on 1 May 1972.¹⁷

¹³ "Uganda fury at David Cameron aid threat over gay rights", *BBC News*, 31 October 2011

¹⁴ "Gambian President Says No to Aid Money Tied to Gay Rights", *Voice of America*, reported by Ricci Shryock, 22 April 2012

¹⁵ "List of issues to be taken up in connection with the consideration of the third periodic report of Kenya", United Nations Human Rights Committee, 103rd session, Geneva, 22 November 2011, CCPR/C/KEN/3, paragraph 26, page 5

¹⁶ "Pew Global Attitudes Project", (pages 35, 82, and 117)

¹⁷ Status of the International Covenant on Civil and Political Rights, United Nations Treaty Collection, 19 May 2012

Under Article 40 of the Covenant, the United Nations Human Rights Committee (UNHRC) reviewed and made recommendations on 24 March 2005 concerning Kenya's 18-years late second periodic report.¹⁸ The UNHRC urged Kenya to repeal Section 162, Penal Code, which criminalizes homosexuality. On 19 August 2010 in its third periodic report, Kenya responded formally to this recommendation:

Kenya may not decriminalize same sex unions at this stage as such acts are considered as taboo and offences against the order of nature, which are repugnant to cultural values and morality. Indeed the public gave overwhelming presentations to the Committee of Experts on Constitutional Review against the inclusion of same sex rights under the new constitution. It must, however, be reiterated that the government does not discriminate against anyone in the provision of services. No one is ever required under the law to declare their sexual orientation under any circumstances.¹⁹

Kenya further addressed these issues in May 2012.

Kenya is currently not undertaking any measures to decriminalize same sex unions. Public opinion is strongly against the legalization of same sex unions. The Constitution provides under article 45 (2) that a person has the right to marry a person of the opposite sex, based on the free consent of both parties. However, under article 27 (4), of the Constitution, the grounds prohibited for non-discrimination are not limited. Therefore, this allows room for individuals to claim the violation of their rights on the grounds of their sexual orientation,

¹⁸ Article 40, International Covenant on Civil and Political Rights, Office of the United Nations High Commissioner for Human Rights

¹⁹ "Consideration of reports submitted by States parties under article 40 of the Covenant, Third periodic report of States parties, Kenya", United Nations Human Rights Committee, CCPR/C/KEN/3, 13 January 2011, page 20

in the event that they are discriminated against either directly or indirectly by the State or other individuals. Until such time that public opinion will change, the Government has tried to accord certain protections to lesbian, gay, bisexual, and transgender persons.²⁰

The government officials in Kenya have let their stand on gay issues known. For example, the former Prime Minister Raila Odinga, in November 2010, said the behaviour of gay couples was "unnatural" and that, "If found the homosexuals should be arrested and taken to relevant authorities". He asserted that, "there was no need for homosexual relationships" because the most recent census showed there were more women than men. He said it was "madness for a man to fall in love with another man while there were plenty of women" and that "there was no need for women to engage in lesbianism yet they can bear children".²¹ Days later, Odinga denied ordering the arrest of gay couples, saying he meant only that same-sex marriages are illegal in Kenya.

While the United Nations Human Rights Committee (UNHRC) tries to exert external pressure this only has limited effectiveness in changing homophobic attitudes in Kenya. The responsibility of decriminalizing homosexuality rests upon the political class to influence the society. The state cannot simply change the law, but can also explain to its citizens the obligation to respect and ratify international human rights treaties. However, the fear of political, social and religious backlash undermines the political will to defend gay rights in Kenya.

²⁰ "Replies from the Government of Kenya to the list of issues (CCPR/C/KEN/Q/3) to be taken up in connection with the consideration of its third periodic report (CCPR/C/KEN/3)", United Nations Human Rights Committee, CCPR/C/KEN/Q/3/Add.1, 30 May 2012, paragraph 116, page 20

²¹ "Kenya: PM Orders Arrest of Gay Couples", *Daily Nation*, reported by Lucas Barasa, 29 November 2010, reprinted on AllAfrica.com

No head of state and even politicians are willing to commit to defend gay rights for fear of losing voters' support especially from the village elders and the clergy who have influence especially at the grass root level. This was evident when the former Special Programmes Minister, Esther Murugi, recommended more tolerance towards men who have sex with men (MSM). This happened at a national symposium on "most-at-risk populations" in the coastal city of Mombasa. Several Christian and Muslim religious leaders, including the Federation of Evangelical and Indigenous Christian Churches of Kenya, called for Murugi's resignation and threatened street protests if she is was not fired immediately.

The U.S. Department of State's 2011 human rights report found that "societal discrimination based on sexual orientation was widespread in 2011 and resulted in loss of employment and educational opportunities. Violence against the LGBT community also occurred, particularly in rural areas and among refugees. Nongovernmental organization groups reported that police intervened to stop attacks, but were not generally sympathetic to LGBT individuals or concerns." ²²

On 26th June 2012, the United States embassy in Nairobi held what was believed to be the first ever LGBT pride event in Kenya. A public affairs officer at the embassy said, "The U.S. government for its part has made it clear that the advancement of human rights for LGBT people is central to our human rights policies around the world and to the realization of our foreign policy goals."²³ Similar events were held at other U.S. embassies around the world.

²² 2011 Country Reports on Human Rights Practices: Kenya, Bureau of Democracy, Human Rights and Labor, U.S. Department of State, page 32
²³

2.2. Kenya's obligations under international law and treaties on LGBT rights

Kenya's obligation falls under a number of laws and treaties. First is the international law and treaties on LGBT rights of 1994. Secondly is the United Nations Human Rights Council (UNHRC) confirmed in *Toonen v. Australia*.²⁴ This treaty outlaws criminalizing consensual same-sex activity violates both the right to privacy and the right to equality before the law without any discrimination. Contrary to Article 17 of the International Covenant on Civil and Political Rights (the "Covenant") the above-mentioned laws interfere with privacy rights regardless of whether they are actively enforced, and are an impediment to the implementation of effective education programmes in respect of HIV/AIDS prevention" by driving marginalised communities underground. Subsequently, the UNHRC has affirmed this position on many occasions by urging countries to repeal laws that criminalize consensual same-sex activity and thereby bring their legislation into conformity with the Covenant.²⁵ Kenya is a party to the Covenant, and the country's laws about same-sex sexual activity are a continuing violation of its obligations under the Covenant.

The United Nations Working Group on Arbitrary Detention, in June 2002, found that arrests for being homosexual or for engaging in consensual homosexual conduct are, by definition, human rights violations.²⁶ The arrests constitute an arbitrary deprivation of liberty in contravention of Article 2 of the Universal Declaration of Human Rights and of Article 2.

In addition, they are in contravention of Article 26 of the Covenant. Kenya's laws against same-sex sexual activity are a continuing violation of the Declaration.

²⁴ International Covenant on Civil and Political Rights, Article 17

²⁵ Status of the International Covenant on Civil and Political Rights, United Nations Treaty Collection, 19 May 2012

²⁶ Communication addressed to the Government on 3 September 2001, United Nations Working Group on Arbitrary Detention, Opinion No. 7/2002 (Egypt), adopted 21 June 2002

2.3. United Nations Convention against Torture

Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires each state party to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction". Article 1.1 defines "torture" to be.

Any act by which severe pain or suffering, whether physical or mental, is inflicted intentionally on a person. This is for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind. When such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The Committee against Torture, which officially monitors the implementation of the convention by state parties to the convention, has said that the protection of minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment. Their laws against torture must cover all persons, regardless of "gender, sexual orientation, or transgender identity."²⁷

Kenya became a party to the convention on 21 February 1997; therefore, it is bound by its terms. Any Kenyan law that does not protect from torture all persons regardless of gender, sexual orientation, or transgender identity is a violation of this Convention.

²⁷ "General Comment No. 2 - Implementation of Article 2 by States Parties", Committee Against Torture, CAT/C/GC/2, 24 January 2008, page 6, paragraph 21

2.4. Yogyakarta Principles on the Application of International Human Rights Law in relation to LGBT in Kenya

The international obligations of countries to respect the human rights of all persons, irrespective of sexual orientation and gender identity, were articulated, in 2006, in the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

A group of human rights experts developed and unanimously adopted these principles. Principle 2 “Rights to Equality and Non-Discrimination” affirms that everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity, and specifically obligates countries to:-,

Repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity. Unfortunately, Kenya is yet to repeal the penal code

Principle 6 the “Right to Privacy” affirms the right of everyone, regardless of sexual orientation or gender identity, to the enjoyment of privacy without arbitrary or unlawful interference, and confirms the obligation of countries to, repeal all laws that criminalise consensual sexual activity among persons of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex, as well as different-sex sexual activity.

Ensure that criminal and other legal provisions of general application are not applied to de facto criminalise consensual sexual activity among persons of the same sex who are over the age of consent.

The United Nations High Commissioner for Human Rights, Navanethem Pillay, in a statement to a High-Level Meeting on Human Rights, Sexual Orientation and Gender Identity at the United Nations, on 18 December 2008, affirmed. The principle of universality admits no exception. Human rights truly are the birthright of all human beings. Sadly, there remain too many countries which continue to criminalize sexual relations between consenting adults of the same sex in defiance of established human rights law. Ironically, many of these laws, such as Apartheid laws that criminalized sexual relations between consenting adults of different races, are relics of the colonial era. These laws are becoming recognized increasingly as anachronistic and as inconsistent both with international law and with traditional values of dignity, inclusion and respect for all. It is our task and our challenge to move beyond a debate on whether all human beings have rights for such questions were long ago laid to rest by the Universal Declaration and instead to secure the climate for implementation.

Lesbian, gay, bisexual, transgender, transsexual or intersex, are full and equal members of the human family, and are entitled to be treated as such.

2.5. Religion

Under the current condition, homosexuality is perceived differently by the fifteen main churches of modern Christianity and there is no common view related to the topic.

Many Christians agree that homosexuals should be admitted to the church and that their civil rights should be protected. On the converse, other churches claim that homosexual performance and acts are serious crimes. Religious hostility towards homosexuality and homosexuals can be found not only in the public and religious sphere, but also in the sexual and private areas, and the church's hate speech against

gays is considered a legitimate right of the church given by in America. For example, the first amendment's free exercise of religion. Homosexuals are considered unforgivable sinners and dangerous criminals and most of the Catholic Church used to call homosexuality a mental disorder. In the best case, homosexuality is considered to be a forgivable sin and the church and its members are supposed to provide help to overcome it.

Religion and homophobia have been tied together for centuries. The stronger the powers of religious institutions are in the state, the more the rights of homosexuals are suppressed. Islam is the most telling example of violations of human rights of gays and lesbians: not only with the criminalization of the respective activities, but also with the cruelty of the punishments. Punishment can vary from lashing to the death penalty. It is pertinent to note that in only a few countries where Sharia is the state legislation, steps have been made to decrease the punishment.

The Catholic Church has historically opposed same-sex unions of any kind and the Vatican has opened an official website where there are several articles against the acceptance of homosexual behaviour in the social and legal sphere. For example, Pope John Paul II was very concerned about some countries allowing same-sex marriages. Religious Right pressure groups do not support personal choice.

Instead, they oppose church-state separation and seek political power to mandate their doctrines. Lesbian, gay, bisexual and transgender people would be especially hard hit if the Religious Rights succeeds. The Religious Right's hostility toward LGBT in Kenya is well known.

For years, religious organizations have spewed hateful venom toward LGBT people. In June 2011, Kisauni Islamic College principal Sheikh Majid Obeid blamed inflation and drought on people who engage in same-sex acts. Council of Imams and Preachers of Kenya organising Secretary Sheikh Mohammed Khalifa said, "We are asking Kenyans to shun businesses owned by such people and further show them open discrimination as a way of stopping the beastly act. They grossly abuse rights of others and should not be accepted among the society."²⁸

A mob of 100 people led by religious leaders and village elders on 23 February 2012 stormed a meeting of homosexuals at the Likoni Community Development Fund Youth Empowerment and Library Centre. Likoni police boss, Abagarro Guyo, and district officer, Moses Ouma, then ordered the meeting closed. Sheikh Amir Zani of the Muzadhalfa mosque described the seminar as "illegal, ungodly and unacceptable." He threatened to "mobilise the community to cane the gays if they organised such a meeting again." However, the Ministry of Youth and Sports district officer, David Ogal, defended the organisers of the seminar and accused residents of misunderstanding their aims.

"Here we are dealing with very vital education to vulnerable groups, including gays. We are offering peer and HIV/AIDS education to the youth because they are at the highest risk of infection.

The gay community, like other groups, approached us and requested to be educated on safe sex. They have a right to safe sex. By doing this, we are not promoting

²⁸ Clerics seek harsher laws for gays", *Daily Nation*, reported by Galgalo Bocha, 13 June 2011

homosexuality, but imparting knowledge. There is a lot of social discrimination and stigma about the issue and we as a society must fight it.”²⁹

Peter Karanja, the general secretary of the National Council of Churches of Kenya, said on 11 May 2012, we are concerned that the direction the debate has taken is that of the recognition of homosexuality and prostitution, which are against African beliefs and more so our Christian principles. This is a matter that deserves reflective discussion by our society in recognition of our values and beliefs.

This is a view shared by our Muslim brothers and sisters. We do not, however, imply that those who practice them should be locked up; we believe they need assistance to change from these.³⁰

Religious leaders in Kenya have often used their considerable influence to sway public opinion. While religious groups have contributed significantly to the care of people living with HIV, their frequent opposition to providing HIV services to MSM, and the promotion of condom use, has led to clashes with National HIV Policy.

2.5.1. Religion and Legal System on LGBT Rights

Homosexuality was common in pre-modern societies and there existed a whole tradition of rituals celebrating and manifesting same-sex unions in ancient society (Boswell, 1994).

Ancient Egyptians, Greeks and Romans have generally accepted homosexuality as not only a biologically possible pattern, but also a potential means of spiritual union between two partners of the same sex (Karras, 2000). Compared to these ideas and

²⁹ "Kenya: Gays Flee As Irate Residents Storm Likoni Seminar", *Daily Nation*, reported by Daniel Nyassy, reprinted in allAfrica.com, 23 February 2012

³⁰ "NCCCK says no to push for gay marriages", CapitalFM News, posted by Catherine Karongo, 11 May 2012

practices in ancient world Jewish, Christian and Muslim religion consider homosexuality as a sin and even today in various parts of the world homosexual acts are punishable crimes (Manniche, 1987). Despite the fact that in the last centuries various conceptions, as well as legislations put the cult of the family in a more liberal perspective, religion has played an important role to keep “family” traditional and strictly heterosexual. For example, homosexuals in Islam are called *qawam Lut* (people of Lot). Furthermore, in Islamic law, homosexuality is a crime: punishment for this crime could be a fine, torture or the death penalty (Habib, 2010). The basis for such an attitude towards homosexuality in the Islamic jurisprudence is either the Quran or the Hadiths (The prophet’s saying and deeds when alive).³¹ Several passages, in the Quran, condemn homosexuality and homosexual acts and the most tolerant passage in the Quran regarding the matter is, “If two men among you are guilty of lewdness, punish them both. If they repent and amend, leave them alone” (Quran 4: 16)

There are just a few notes naming a punishment concerning female homosexuality. Since there is no penetration, there is no death penalty for female homosexuals, but the punishment is flogging (Roscoe, 1997). There is a differentiation of the two males engaged in a homosexual act between the active and the passive partners: the active partner is to be lashed 100 times if not married, while an adulterer sodomite should be killed; while the passive partner is to be killed, married or not (Seidman, 2006). Criminalization of consensual homosexuality is very common and cruel in the Islamic world.

The criminal statutes that provide corporal punishment of homosexual acts can be found in the penal codes of more than thirty Islamic countries (Masad, 2002). For

³¹ There is a consensus between the four main legal schools that the same sex intercourse has violated the Islamic law and concrete opinions differ only concerning the concrete nature of punishment.

example, cruel and unusual punishment such as stoning to death, 100 lashes or throwing from a high building are among the measures taken by judges loyal to a textual interpretation of Sharia law in Iran and Saudi Arabia (Modirzadeh, 2006). Criminalization has been an on-going practice despite the fact that it has contradicted the Universal Declaration of Human Rights and several other international covenants. Furthermore, the sentence is very disproportionate for the crime of homosexuality in most of the countries where sodomy acts are present in national legislation.

In Islamic law, punishments for crimes such as homosexuality, adultery and fornication require four witnesses and physical presence at the moment of the act (DNA tests can be accepted as proof). There are thirty-six Islamic countries, which give severe punishments to homosexuals and ten of them apply the death penalty. For example, Iran has passed the death penalty to four thousand homosexuals from the end of the Islamic Revolution in 1979.³² In the Islamic world, international law is perceived as an imposed foreigner of western legal reasoning. In lieu of it, religion is taken as the only source of law, and constitutionality matters meet very primitive standards.

Ways of proving homosexuality are the same for both sodomy and lesbianism, and the standard of proof is by either confession or witnesses. The third method is by the discretion of the judges, and confession requires admitting four times of being engaged in a homosexual act. If the confessions have been less than four times, then the punishment will be as for Tafhiz. The confessor should be mature, of sound mind, with free will and intention. In the event the person confesses and repents, the judge can ask from the leader, Valie Amr, for the person to be forgiven. Only a few Islamic

³² Advancement of human rights standards for LGBT people through the perspective of international human rights law

nations such as Afghanistan, Bahrain, Maldives, Algeria and Qatar punish homosexual acts with fines and jail time instead of corporal punishment. In case of Iran, such punishments for sodomy or lesbianism are the results of a very conservative and arbitrary government imposing on legislatures to put a burden on a specific minority. Iran and most Islamic countries do not have a legal culture of gender equality and women are perceived to have half the authority and credibility of a man in economical and witnessing procedures. The privacy of the bedroom of homosexuals is the starting point of a crime potentially deserving the death penalty. Hence, when the sentence is death penalty, and when that person has no other legal civil procedures to stop these unconstitutional measures, the only way out is exile.

Conclusion

There are substantial differences among various legal and religious systems, as well as differences among legal norms concerning LGBT rights at the national level. Firstly, the difficulties to implement common legal norms or civil society efforts such as above mentioned Yogyakarta principles into international human rights law can be explained by complete fragmentation of national legislation and very often by its opposite logics

The Yogyakarta principles, as an example of civil society efforts, forces a mobilization that could be considered a useful means to remind the UN member states that they are all signatory members of international documents such as Universal Declaration of Human Rights. Therefore, they should pay more attention to the discriminated sexual minority.

In addition, they are charged with the responsibility of reminding the gay minority that it is not only enough to struggle for their negative rights, but also to make efforts to ensure their positive rights be compared to those of heterosexual men and women.

Religion and homophobia have been tied together for centuries. The stronger the powers of religious institutions are in the state, the more the rights of homosexuals are suppressed. Islam is the most telling example of violations of human rights of gays and lesbians: not only with the criminalization of the respective activities, but also with the cruelty of the punishments. Punishment can vary from lashing to the death penalty, and in only a few countries where Sharia is the state legislation, steps have been made to decrease the punishment. There have been presented different timings concerning verdicts of the European Court of Human Rights and the Supreme Court that invalidated Sodomy laws, as well as diverse attitudes of concrete Christian churches concerning issues of homosexuality.

CHAPTER THREE: ACCESS TO HEALTH FACILITIES BY GAY PEOPLE

Universal health care sometimes be referred to as universal health coverage, universal coverage, or universal care usually refers to a health care system, which provides health care and financial protection to all its citizens. It is organized around providing a specified package of benefits to all members of a society with the end goal of providing financial risk protection, improved access to health services, and improved health outcomes.³³ Universal health care is not a one-size-fits-all concept, and it does not imply coverage for all people for everything. Three critical dimensions can determine universal health care: who is covered, what services are covered, and how much of the cost is covered.

The state is able to contribute to universal health care through a mixed model of funding. General taxation revenue is the primary source of funding. However, in many countries, it is supplemented by specific levies (which may be charged to the individual and/or an employer) or with the option of private payments (either direct or via optional insurance) for services beyond those covered by the public system.

LGBT patients experience health issues and barriers related to their sexual orientation and/or gender identity or expression. Many avoid or delay care or receive inappropriate or inferior care. This is because of perceived or real homophobia and discrimination by health care providers and institutions. In other words, the reason is negative personal experience, and the assumption or expectation of negative experience based on knowing of history of such experience in other LGBT people.

³³World Health Organization (November 22, 2010). "The world health report: health systems financing: the path to universal coverage". Geneva: World Health Organization. ISBN 978-92-4-156402-1

Optimal health care for LGBT populations requires access to both competent medical personnel and sensitive prevention services. However, sexual and gender minorities continue to encounter numerous barriers to accessing care. This clusters around 4 main issues, firstly, reluctance by some LGBT patients to disclose sexual or gender identity when receiving medical care.

Secondly is insufficient numbers of providers competent in dealing with LGBT issues as part of the provision of medical care. Thirdly are the structural barriers that impede access to health insurance and limit visiting and medical decision-making rights for LGBT people and their partners. Lastly is the lack of culturally appropriate prevention services. Each of these barriers is important individually, and together they form a challenging gauntlet of barriers to the receipt of medical care for many LGBT citizens

LGBT patients have multiple reasons for not disclosing their sexual or gender identity to providers, including fears of homophobic reactions, confidentiality concerns, past negative experiences with providers, and fear of being stigmatized. This is to the extent that these concerns cause LGBT patients to delay receipt of care or withhold information that may be important to treatment; effective medical care can be compromised. However, disclosure of sexual or gender minority identity is only likely to improve care if providers offer culturally competent and well-informed services in return for example, the provider is aware of the unique health concerns of LGBT populations and is able to assess partnership status and sexual behaviour without assumptions or judgment.

Although attitudes are changing,³⁴ societal misperceptions and discomfort about homosexual behaviour and identity persist, even among health care personnel.³⁵ Unfortunately, neither professional schools nor continuing education programs provide the training needed to improve the attitudes, knowledge, and skills of medical doctors and other health care professionals in caring for LGBT people. Consequently, there are meagre healthcare providers who can provide optimal care to LGBT patients.

LGBT patients in Kenya suffer from ostracism, invasive questioning, rough physical handling, derogatory comments, and breach of confidentiality, shock, embarrassment, unfriendliness, pity, condescension and fear. This has resulted in delays in medical treatment among them, hiding their sexual orientation both of which perpetuate the negative cycle of treatment.

In the case of Kenya where homosexual activities are criminalized by the state, HIV and AIDS education and other forms of preventive health care that should be tailored to LGBT communities are suppressed. Failure to take into account LGBT in health policy setting equals to violation of their rights and resultantly failure to adequately plan for their intervention with regard to their right to health and HIV/AIDS (KHRC, 2011).

Health care providers breach LGBT privacy and confidentiality by exposing their sexual orientation to other colleagues at the facilities.

³⁴ Smith DM, Mathews WMC. Physicians' attitudes toward homosexuality and HIV: survey of a California medical society-revisited (PATHH-II). *J Homosex.* 2007; 52:1–9

³⁵ Schatz B, O'Hanlan K. *Anti-Gay Discrimination in Medicine: Results of a National Survey of Lesbian, Gay, and Bisexual Physicians.* San Francisco, CA: American Association of Physicians for Human Rights; 1994.

These health care providers are not friendly and hardly understand their sexual and reproductive health needs

LGBTs face several challenges in Kenya including high levels of stigma and discrimination. This has resulted into MSM getting married to women in order to hide their status, as well as conform to the heterosexist norms of the society. They also face legal challenges as homosexuality, sex work, and Injecting Drug Users (IDUs) is not allowed in Kenya. This criminalization limits access to health services for sexual minorities especially those who engage in same sex relationships who most of the time are also IDUs. It is difficult to provide needle exchange as IDUs are not allowed. The provision of condoms in prison is seen as promoting homosexuality between prisoners (KHRC, 2011).

At the first UN General Assembly Special Session (UNIGASS) on HIV, in 2001, as well as the agreement to achieve universal care access to HIV and AIDS programs, the Kenyan government has come up with policies that include LGBT in HIV and AIDS programming. The third Kenya National AIDS Strategic Plan (KNASP III) defines Most at Risk Populations (MARPS) as population groups whose behaviour puts them at the greatest risk of acquiring HIV: sex workers (both female and male), Injecting Drug Users (IDUs), and Men who have sex with Men (MSM). MARPs are often hard to reach and stigmatized. This creates barriers to accessing the HIV and STI package of services. The policy also proposes that an enabling environment be created that reduces HIV/STI risk and vulnerability, as well as increase access to services. The government is also looking at having more targeted interventions and greater focus on MARPs. The National AIDS and STIs Control Program (NAS COP), has outlined a Comprehensive Prevention Package for MARPs interventions.

3.1. Right to Health for LGBT

Anand Grover, the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, reported in April 2010 that laws criminalising sexual conduct between consenting adults impede HIV education and prevention efforts and are incompatible with the right to health. The Joint United Nations Programme on HIV and AIDS commonly known as UNAIDS has a similar view. Unfortunately, Kenya has laws that criminalize sexual conduct between same-sex persons; therefore, those laws are incompatible with the right to health.

The national overall HIV/AIDS prevalence declined between 2000 and 2004, but statistics from 2007 show that it is now increasing. In the first ever comprehensive report on MSM (men who have sex with men) and HIV globally compiled by Amfar with figures collected from UNGASS, Kenya scores the highest rate of all when it comes to HIV prevalence among MSM at 43%. Although the lack of adequate statistics from a large number of countries makes it hard to say whether Kenya is in fact the global leader of this tragic league, the figures point to a harsh reality for the country's MSM community. Another report indicates a prevalence of 15.6% (Baraletal).

The variation in the figures above reflects how HIV among Men who have Sex with Men (MSM) is a field still in need of more attention and research. It is gratifying that Kenya is one the countries in East Africa that recently has included MSM as a vulnerable group in the National HIV Prevention Strategy.

The inclusion of MSM into a national strategy can serve as a valuable entry point for LGBT issues, something that has been picked up by Liverpool VCT, which is an

organization that provides free services for MSM in HIV prevention.³⁶ They have also been very active in the advocacy for the inclusion of MSM in the national strategy, as well as continue the work to follow up the implementation of the strategy.

With respect to transgender persons, the governmental Kenya National Commission on Human Rights reported in April 2012. Transgender people in Kenya suffer from stigma and discrimination and are not able to access gender re-assignment therapy.

A witness who testified at the Inquiry indicated that she had undergone all the processes of re-assignment. However, Kenyatta National Hospital declined the surgery and did not offer any reasons for declining. Her attempts to appeal to the Kenya Medical Practitioners and Dentist's Board have not been successful. Without being allowed to complete the therapy, transgender people suffer identity problems since they are biologically either male or female, yet they present themselves in one of the gender by mode of dressing, personality expressions or through other socially defined roles. When arrested, police often face difficulties regarding what cells (male or female) to detain transgender individuals. When at entertainment areas, they are afraid of using bathrooms designated for either sex for fear of being caught by other people and accused or mistaken to be using bathrooms for sexual crimes. The witness testified that sometimes they meet opposite sex partners who demand to have sexual relationships with them.

When they discover that they are neither female nor male (depending on the gender of the sex partner), they scream and attract members of public to their hotel room causing public nuisance, stigma and embarrassment to the transgender person.³⁷

³⁶ <http://www.liverpoolvct.org>

Transgender Education and Advocacy (TEA) is "a human rights organization working towards ending human rights violations against transgender / transsexual people. Established in December 2008, the TEA aims to change the public mentality towards transgender people through awareness raising campaigns, advocating for legal and policy reforms and empowering transgender people.

3.2. Perceived Challenges to LGBT Health and Rights

Legal and Political Climate Same-sex sexual acts remain illegal in the majority of African countries. South Africa is the most publicized exception due to its 1996 constitutional amendment, which made South Africa the first country in the world to enshrine specifically LGBT rights.

Some countries do not have specific legal provisions. In lieu of that, they have codes and provisions against sodomy or “carnal knowledge of another person against the order of nature,” and are used as grounds to imprison LGBT persons. Punishments on the continent range from life imprisonment (Uganda) to a sentence of two months (Rwanda).

Politicians commonly fuel national homophobia, as in statements such as that made by Zimbabwe’s president, Robert Mugabe: “What an abomination, a rottenness of culture, real decadence of culture. Homosexuals are repugnant to my human conscience... immoral and repulsive... Lower than pigs and dogs... Animals in the

³⁷ Realising Sexual and Reproductive Health Rights in Kenya: A Myth or a Reality?, Kenya National Commission on Human Rights, April 2012, pages 95-96

jungle are better than these people because at least they know that this is a man or a woman... I don't believe they have any rights at all.”³⁸

Homophobia remains the overarching concern for LGBT activists. The stigma and discrimination experienced in homophobic societies not only place LGBT at increased risk of physical and emotional damage, but affect groups’ abilities to gather, access resources, or speak out publicly. There has been tension among LGBT communities due to differing stages of readiness to accept the risks associated with activism. Some groups wish to support one another safely and quietly while others are pushing for LGBT and MSM to place public pressure on governments and society to make changes. Infighting over such strategies has often resulted in claims by one group that another is not “legitimate.”³⁹

Identity claims can result in dissension among LGBT persons- MSM and bisexuals, for example, are considered in some circles to be outcasts of the LGBT movement because they are “not really gay.” Those considered most stigmatized within LGBT communities are sex workers of any orientation who face added marginalization because of their activities. The All Africa Rights Initiative (AARI) recognizes these complex identity issues as a challenge to efforts to build a larger and more cohesive movement. Each of AARI’s conferences, trainings, and reports has illustrated the ongoing debate over whom to include, exclude or prioritize.

Exclusion of Women Amidst this debate- at one point of consensus was reached: women (of any orientation or identity) are largely underserved and overlooked within the broader LGBT “movement.” Numerous organizations have chosen to separate

³⁸ "Zimbabwe fury at David Cameron aid threat over gay rights", BBC News, 31 October 2011

³⁹ The Outlawed amongst us: A Study of the LGBTI Community’s search for Equality and Non-Discrimination in Kenya, Kenya Human rights Commission 2011

men from women based either on the fact that their needs are different or that the lower status of women creates an added burden to already stigmatized groups. It is felt that foreign funders are less interested in supporting women's issues, especially related to health, because MSM are seen as being at higher risk for HIV infection. This risk delineation is debated, however, as many WSW also practice anal sex with men. Likewise, lesbians often have sex with men due to the strong social pressure to bear children. Of great concern is the high risk faced by lesbians of rape by men who believe that rape will "cure" these women. In response to a sense of neglect and rejection, LBT women have begun to step up their organizing through the formation of groups such as Minority Women in Action and the Coalition of African Lesbians. Poverty- in many places, resources are scarce and government corruption is prevalent. Resulting problems are magnified for people who belong to a marginalized group that is openly persecuted by the government. Official registration is required for groups to gain legitimacy or to access funding. When it is known that groups support LGBT rights, they are often denied NGO status. In many ways, this leaves resource-strapped groups with no option, but seeking foreign support for their efforts. Ironically, one of Africa's main arguments against homosexuality is that "it is a colonial import" and that it is "not African." Therefore, the fact that the majority of funds supporting LGBT groups come from Western nations only serves to reinforce this notion. The competition among groups for these limited funds has further divided them.

Foreign Funding- according to an activist, in Sierra Leone, LGBT groups typically have a bidding process for the right to attend overseas conferences and trainings.

He said that once in another country, activists can seek asylum or gain access to contacts, which will put them in a better economic position for the long term. In

countries where opportunities and jobs are already scarce, LGBT persons often see working for an NGO as the best option they have for a better life. The desperation for overseas resources has resulted in the creation of some “paper” HIV/AIDS organizations and the illicit pocketing of funds. Within legitimate organizations, uneven bookkeeping practices can create internal arguments and divisions.

When individual survival competes with the integrity of community organizing and movement building, funders can be caught in the middle, often without realizing it.

Lack of resources and capacity-building support- apart from the myriad social, cultural, and political barriers, LGBT groups identify a huge need for resources and capacity-building support. Attempting to organize around health and rights in a hostile environment without materials and skills creates a situation ripe for burnout. Because of the relatively small population of self-identified LGBT persons, social circles overlap and relationships gone sour can affect the level of support and cohesion within communities.

Capacity-building topics that LGBT activists prioritize include organizational development and management. For example, NGO structure, strategic planning, human resource management, leadership skills, advocacy planning and implementation of advocacy campaigns, working with media, knowledge of international human rights standards (e.g., framing discourses on human rights of LGBT people within the public health, women’s rights, international sexual health and rights perspectives), and HIV/AIDS prevention.

Very few LGBT organizations in Africa have office space, a computer, or basic access to the Internet, and are forced to work in Internet cafes or private homes. Very few activists earn a salary for their work.

A comprehensive and systematic capacity-building program does not exist for LGBT activists in East Africa. They seldom have the chance to participate in trainings, and what few opportunities are available do not always respond to their needs. Only a small number of activists have taken part in study visits to other countries. Some East African LGBT activists express disappointment about their interaction with donors, saying they are invited to submit proposals to which they receive no response. Writing a proposal often means spending one's own money on transportation and Internet costs and making a significant time investment. The lack of a response leaves activists feeling discouraged.

Religious institutions are often outspoken and hostile with regard to homosexuality. Since they hold a very powerful position within African society, their influence cannot be overlooked.

Throughout Africa, religion is the basis for most social interaction. Therefore, it is expected of religious institutions, to fill the gaps in basic needs that governments fail to fill. Due to this central role, exclusion of LGBT persons from religious institutions results in wide-ranging consequences. LGBT groups have identified some religious groups and individuals that are supportive of LGBT health and rights. The identification of religious allies remains a priority for many LGBT persons who feel isolated and see the church as a key link to social inclusion. For more information, see *State-Sponsored Homophobia and Its Consequences in Southern Africa*, a joint report by Human Rights Watch and the International Gay and Lesbian Human Rights Commission in which the role of religion in African society was described as “all inclusive.”⁴⁰

⁴⁰ <http://www.hrw.org/reports/2003/>

Conclusion

The state remains as the impediment to health access for the LGBT. Most of the African Government Kenya included they have the discretion on the health affairs in their country. Therefore, this means that health issues to do with health rights for LGBT are normally decided by the elite in government. Therefore, if the government in power is not concerned with gay rights, then their health issue may not feature in the health policies.

Legal and Political Climate, remain a challenge in the health provision for LGBTs; Homophobia especially among the service providers is, hence, they are not able to provide proper services to the LGBT. They fear of going to the health centres by the LGBT means that there is delayed medical attention.

The foreign governments have stepped and have started funding Non-governmental organization to complement the government in providing health service for the LGBT.

CHAPTER FOUR: THE LINK BETWEEN LGBT ISSUES AND THE HEALTH QUESTION

Historically, a majority, in the psychiatric and medical community, labelled the gender identity and sexual orientation of the LGBT individuals pathological or

deviant. Consequently, most lesbians and gays are afraid when it comes to disclosing their sexual orientation to their providers of health care. In addition, many LGBT persons, especially the transgender persons, exhibit reluctance in utilization of mainstream health care services, and are usually underserved medically. In spite of this, LGBT professionals and advocates for health have launched campaigns for change in professional organizations resulting in policy statements addressing needs of LGBT patients and creation of official affiliates of LGBT. For example, the American Psychological Association's Task Force on the Status of Lesbian and Gay Psychologists. As much as these changes have been of importance in the establishment of ethical guidelines for provision of appropriate care, health care providers are still uncomfortable with diversity sexually, and still go ahead to discriminate LGBT patients (Rainbow Access Initiative, n.d).

LGBT persons are part of every community and often are marginalized by some health practitioners. There is diversity when it comes to this; these people come from all the occupations, and comprise people of all ethnicities and races, socioeconomic statuses and ages. The needs and perspectives of LGBT individuals should be considered routinely as pertains to efforts of public health to improve overall health status of each person, and do away with health discrepancies.

Comparisons have already established between the perception of LGBT in the western culture and in the African society. In Hillary Clinton's speech, she states that, someone should not be denied life-saving health care because he/she is a lesbian, gay, transgender or bisexual individual. In addition, in the previous chapter, it came out that, sometimes, lesbians and transgender individuals are subjected to hormonal

therapy in an attempt to correct their sexual orientation and/or gender identity. This chapter seeks to establish the link between the issues of LGBT individuals that deal with the health question. It discusses whether the health sector has any principles pertaining to the LGBT individuals.

In looking at the link between the LGBT issue and the health question, there are a number of aspects to be covered. This is especially the issues of equality in health care, impact on mental health, and health insurance policy. Health, in this case, does not only refer to the physical well-being. The World Health Organization (WHO) defines health as a the state in which there is complete physical, social, as well as mental well-being and not just the absence of a pathological condition. This elaborates the scope of coverage when dealing with health. In order to be able to understand the health of LGBT individuals, it begins with an initial understanding of the oppressive and stigmatizing historical background that these communities have been subjected to. For instance, clubs and bars were usually the only places where LGBT individuals have found safe to gather, as a result, this leads to abuse of alcohol.

LGBT individuals are comprised of people from all races, religions, ethnicities, and even social classes. Gender identity and sexual orientation questions are usually not asked on most state or national surveys, which makes it difficult to approximate the number of LGBT persons, as well as their health needs.

LGBT individuals face health inequalities related to societal stigma, denial of human and civil rights, as well as discrimination. The discrimination of LGBT individuals has been linked to increased rates of psychiatric disorders, suicide and substance abuse. Experiences of victimization and violence are common for LGBT individuals and effects that are long lasting on both the individual and the community. Personal,

family, together with the social acceptance of gender identity and sexual orientation has an effect on the personal safety and mental health of LGBT individuals.

4.1 Previous Research conclusions about LGBT health

LGBT people go through issues of health and barriers that are related to their gender identity and/or sexual orientation or expression. Many avoid care or even delay it or receive care that is inferior or inappropriate due to the real or perceived homophobia, and stigmatization by the providers and institutions of health care providers. In other words, the reason is negative experience at personal levels, the conclusion or expectation of negative experience on the basis of knowing the history of such experience on other LGBT people or both.

Research shows that LGBT individuals seem to be experiencing more problems as pertains to mental health than heterosexuals. Dr. Chakraborty, a researcher of University College London, believes that discrimination could contribute to a higher risk. His research team looked at mental disorder rates among seven thousand, four hundred and three adults residing in the United Kingdom. The details of these adults were obtained from the Adult Psychiatric Morbidity Survey of 2007. From the findings, it was realized that there were significantly higher rates of anxiety, depression, obsessive compulsive disorder, self-harm, phobia, drug and alcohol dependence and suicidal thoughts among the homosexual respondents.

Dr. Chakraborty believed that the findings derived from the research were really worrying. He also said that despite the fact that the level of stigmatization was low, it was higher for homosexuals as compared to heterosexuals. It in turn supported the idea that people who felt discriminated against were bound to experience stressors

socially and it would increase the risk of them experiencing problems mentally. (Collingwood, 2014).

The research team also writes that certain disorders that are neurologic are predicted as a result of discrimination on the basis of sexual orientation even if there is adjustment of variables that are potentially confounding. The analysis of the research team reveals that the rate of suicide attempts is twice as much in lesbian, gay and bisexual people. Also, the risk of anxiety disorder and depression was at least one and a half times greater as was substance and alcohol abuse. The researchers say that there are quite a number of reasons why people who are gay may report psychological difficulties more. These include the problems experienced in growing up in a world that is oriented to values and norms of heterosexuals and the negative impact of stigmatization against homosexuality socially. (Collingwood, 2014)

4.2 Health Issues that are a Concern to LGBT Persons

Mental health is one among others of issues that are a concern in LGBT health. There are quite a number of reasons why people develop psychological or emotional problems in life. Discrimination, negative attitudes as well as violence could be among the factors that contribute to emotional and mental distress for the LGBT individuals. For the transgender individuals, the transition only can be stressful because of the many barriers that need to be overcome.

Letting it out can be emotionally tough as well and most of the time, people have to deal with the rejection that comes from friends and even family. The bisexual individuals face a challenge that is unique in opening up to their potential partners. They have to hide their attractions of the same sex from their friends who are heterosexual. All these stressors have a very big impact on the self-identities and self -

esteem of LGBT individuals. Research shows that LGBT people suffer depression, suicide and anxiety most of the time as compared to the general population.

Studies indicate that the LGBT individuals are most likely to use drugs and alcohol as compared to the heterosexuals. On most instances, gay men and lesbians report to be experiencing issues from use of alcohol and that as they age, they still continue to drink. Gay men are also into the habit of using recreational drugs, “party drugs”, at a rate higher than the general population. These are associated with circuit parties and dance clubs that are common among most bisexual and gay men. Very little has been documented about alcohol and drug consumption rates among the transgender individuals. For the LGBT individuals, drugs and alcohol may be used as a coping strategy for internalized feelings of negativity, discrimination and depression. The dance parties and bars just provide conducive environments for them to meet other LGBT people.

The high risk of infection with HIV is well known among members of the gay community and for a very long time, this topic has taken the lead for any discussion pertaining to sexual health of the LGBT individuals. Sexually transmitted infections for example gonorrhoea and syphilis are also common among gay men who are sexually active as well as bisexual men.

While Chlamydia, HIV and gonorrhoea are transmitted rarely, STIs such as the human papilloma virus (HPV), herpes and trichomoniasis are easily transmitted between sexually active women. Bisexuals and lesbians who have partners of a different sex should also consider the chances of transmission of STIs and HIV and the risk of unplanned pregnancy. Transgender are quiet invisible in research on sexual health. As a result, there is very little known concerning their health risks sexually.

However, some evidence has suggested that trans people often have unprotected sex which is linked to the fact that they experience social isolation most of the time and a self-esteem that is low which is caused by trans phobia and inadequate relevant information on sexual health.

LGBT individuals are on a greater scale likely to be verbally and physically victimized than the other populations. This is particularly true for those who are not able to fit in gender norms, for example, an effeminate gay man or a butch lesbian. The dangers are even more extreme for the transgender people. In 2004, a Statistics Canada study indicated that, compared to heterosexuals, the act of victimization was twice as much for lesbians and gays and 4.5 times greater among bisexuals. LGBT youths also were experiencing bullying and harassment in school at a rate that was alarming.

LGBT individuals have specific cultural norms concerning appearance and body weight. The gay male culture for a long time has valued youth and physical beauty, while among the lesbians, cultural norms seem to encourage heavier body weights and failure to diet and thinness of some desirable standards. Among some gay men, pressure culturally to achieve a body that is perfect has led to use of steroids and compulsive exercise which in the long run can create physical health problems and emotional distress. Gay men, as compared to straight men have an increased likelihood of having a poor body image and experiencing eating disorders such as anorexia or bulimia nervosa. On the contrary, lesbians have an increased chance of being obese or overweight than heterosexual women hence an increased risk of heart disease as well as stroke or other health conditions. Transgender people on the other

hand, have negative body image because of the discomfort with gender of their bodies. (Rainbow Health Ontario, 2014)

4.3 Alarming Findings in the Health of LGBT persons

The health of LGBT individuals requires special attention from public health care providers and the health care sector as a whole to deal with a number of discrepancies and these include the following facts: the youth of the LGBT community are likely to attempt suicide two to three times more and they are also likely to be homeless, lesbians have decreased chances of getting services that are preventive for cancer, men who are gay have higher risk of exposure to HIV and STIs, cases of being overweight are more likely in bisexual females and lesbians, transgender individuals exhibit higher prevalence rates for HIV and/or STIs, issues of mental health, victimization and suicide. The transgender individuals also, as compared to heterosexuals, gay, lesbians and bisexuals, are less likely to have health insurance cover. The elderly LGBT persons have to deal with additional barrier of health due to inadequacy of social services, isolation and the lack of health care providers who are culturally competent. Finally, the LGBT individuals exhibit the highest rate of tobacco, alcohol and other substance use. To improve the quality of life for LGBT individuals, these matters have to be addressed. (Lesbian, gay, bisexual and transgender health, 2014)

A number of factors need to be evaluated continuously and addresses as the years go by and these include: preventing homicides and violence toward the LGBT individuals particularly the transgender persons, there should also be nationally representative data for LGBT individuals in all countries just like there is for heterosexual couples, resilience for the LGBT individuals, the LGBT issues of

parenting throughout their course of life, well-being as well as the health of the LGBT elderly individuals, exploring the sexual as well as gender identity for the youths, development of a wellness model for the LGBT community and recognizing the health needs of the transgender individuals as a medical necessity. (Lesbian, gay, bisexual and transgender health, 2014)

4.4 Health Insurance for LGBT community

Compounding the problem of health discrepancies within the LGBT community is a tenuous link with health care systems. LGBT individuals have decreased chances of having health insurance as compared to the heterosexual population, partially due to the fact that most of the employers do not offer any coverage to domestic partners who are not married. As earlier seen, transgender individuals exhibit the lowest rates of insurance as compared to the other groups. Research has shown that females who are in same sex relationships have a decreased chance of visiting the doctor or having a regular health care source when compared to heterosexual women. They also have an increased likelihood to reporting that they are experiencing medical needs that are unmet due to cost issues.

For LGBT individuals who own a health insurance, having an access to health care that is appropriate can still pose a challenge for example, a transgender person will not gain coverage for any medical procedure or screening for cancer which are not consistent with the gender indicated on their insurance cards, for instance, a pap smear for a transgender male who has an intact cervix. Patients of the LGBT community commonly face discrimination and ignorance when it comes to access health care. While transphobia and homophobia is declining among health workers, it is still really existent. One out of five transgender patients has been denied care by

health care providers. Even the health care providers who mean well have very little training or the experience that is required when it comes to the LGBT populations as well as their health needs. Averagely, students of medicine receive less than five hours of training on issues of the LGBT populations in all of their medical training.

Initial responses that are negative and feared from the providers of health care often keep so many LGBT persons from going for routine health care and screening for cancer. Men who are gay and not out to their providers of health are less likely to get screening for cancer whose prevalence is lower in heterosexual individuals, for instance anal cancer. Lesbians lacking an established and trusted relationship with a physician of reproductive health report rates that are lower for colonoscopy, mammography and pap smears than women who are heterosexual which suggests that inaccessible health care as well as preponderance of homophobia and discrimination in systems of health care contribute to lower screening rates, therefore, LGBT persons have increased of cancer diagnosis at late stages. (National LGBT Cancer Network)

4.5 Bettering the Health of LGBT Individuals

Abrogating LGBT health discrepancies and augmenting efforts to improve LGBT health are really necessary to see to it that LGBT individuals can lead long lives that are healthy too.

The many advantages of addressing the health concerns and decreasing discrepancies include: reductions in rates of disease progression and transmission, increased physical and mental well-being, decreased costs of health care and increased permanence. Efforts to better LGBT health include: controlling sexually transmitted diseases together with HIV using interventions that work, implementing policies against bullying in schools, providing social services that are supportive to decrease

homelessness and suicide among the youth, properly enquiring on and also being supportive of interaction between the patient and health care provider and regular utilization of care, providing medical students should be provided with access to LGBT patients so as to increase the provision of care that is culturally competent. (Lesbian, gay, bisexual and transgender health, 2014)

There have been efforts to deal with the discrepancies in the health care of the LGBT individuals and these include: expanding the domestic partner insurance coverage for health, establishing health centres that are for LGBT individuals and disseminating interventions that are effective for HIV and STIs. Social determinants of health affecting LGBT individuals are related largely to stigmatization and oppression. For example, discrimination that is legal as pertains to access to employment, health insurance, marriage, housing, retirement benefits and adoption, unavailability of anti-bullying laws in schools, unavailability of social programs that target and are appropriate for LGBT individuals whether the youths, adults or even the elderly and inadequacy of health care providers who have sufficient knowledge and are culturally competent as pertains to LGBT health.

There are also physical factors that contribute to healthy LGBT persons and these include: safe areas of school, housing and neighbourhoods, increased access to facilities and activities of recreation, provision of places for them to meet safely and better access to health services. (Lesbian, gay, bisexual and transgender health, 2014)

Conclusion

LGBT individuals are part of every society; they are human as well and should have an easy time in accessing health care. As seen in this document, there are issues that are of concern among them and health care providers should work hand in hand with them to see to it that they are resolved to ensure that these people are living quality lives just like anyone else.

CHAPTER FIVE: LGBT RIGHTS ARE HUMAN RIGHTS

Everyone has their own sexual orientation as well as a gender identity, and this is a shared fact which means that the discrimination of members of the Lesbian, Gay, Bisexual and Transgender community on the basis of their gender identity and/or sexual orientation that affects this community, in the long run affects all of us. Gender identity and sexual orientation are necessary aspects of our lives and at no one point should they lead to discrimination or abuse. Sexual orientation deals with the sexual desires, practices, feelings and identification. Sexual orientation could be towards persons of the different or same sexes. Across the world, there are so many instances where a persons' sexual orientation as well as gender identity can lead to them facing execution, being imprisoned and tortured and being treated with violence or discrimination. The degree of insults is limitless and it is contrary to the fundamental principles of international laws of human right.

5.1 Recent Occurrences Dealing with the LGBT Rights

People in different parts of the world are treated violently and unequally- and sometimes tortured, even executed- because of the people they love, how these people look or who they actually are. Different people in different parts of the world have their own view on the gay rights. In the recent past, there has been a controversial debate over the legalization of gay rights in Uganda. This did not only affect those who are gay in Uganda, it affected all those who are gay around the world. Campaigners of gay rights in Uganda and all over the world celebrated a decision by the constitutional court of the country to do away with a law that was widely condemned on legal technicality.

As they celebrated this ruling, activists gave a warning that homosexuality is still an offence in the east African community under the laws of the colonial era.

The president of the United States of America, President Barak Obama described this legislation as a setback for all the Ugandans and some of the donors' suspended any forms of aid to the country. However, Yoweri Museveni, the president of Uganda, signed into this law in February and this was witnessed by cheering crowds. When he was questioned on homosexuality on CNN, he said that they are disgusting and he did not understand the type of people they were. He also said that he did not know what they were actually doing but he had been told in the recent past and he realized what they did was disgusting. The question to this point is if the information he had was given to him by members of the LGBT community or not. If not then he did not have reason to say this and even go ahead to pass legislative laws. The law was however challenged by 10 petitioners, who included academicians, journalists, both the ruling party and opposition members of parliament, activists of human rights as well as rights groups. They claimed that it was against the constitutional right to be free from discrimination and cruel, inhuman and degrading treatment as well as the right to privacy.

A ruling was made in a Ugandan courtroom which was packed with both opponents and supporters of the legislative measure. Frank Mugisha, the director of Sexual Minorities in Uganda, was among those present and he said that he welcomed the ruling and Uganda's lesbian, gay, bisexual and transgender community could celebrate some victory against the act of oppression. From Uganda's case, it is clear to understand that even those who are heterosexual thought that those who are gay still needed to have their own rights.

The government does not have to select a sexual orientation and/or gender identity for a nation. Being lesbian, gay, bisexual or transgender is criminal in about 80 countries, and the penalty is death in around five of them that is Sudan, Iran, Yemen, Saudi Arabia and Mauritania. Twenty years after Russia decriminalized LGBT acts, Russian gay people are still under pressure over their gender identity and sexual orientation. We still have hate crimes against Russian gay people making headlines abroad, as much as the true scope of this problem is difficult to quantify.

Kenya is likely to become the next ground for battle for the gay rights because the lawmakers have plans to introduce the motion in parliament which will push authorities to strongly enforce the anti-homosexual laws in the country. Activists of gay rights say that the pressure has increased significantly since last month when the neighbouring Uganda passed a strict anti-gay law. The already existing laws in this country make homosexual acts which are not permitted, punishable by serving a term of up to 14 years in prison. Despite the fact that no one has ever been convicted in this country, activists say there are around eight pending cases in court. (Joselow G, 2014)

From this, it is easy to tell that this country still has a long way to go as far as the gay rights are concerned. It is also evident there is still LGBT discrimination in the country and it will take some time for Kenya to embrace the gay rights. The way in which the East African community handled the issue of anti-gay laws in Uganda caught the eye of the global media.

With the increasing world media attention on persecutory acts of violence inflicted on Lesbian, Gay, Bisexual and Transgender (LGBT) persons, a critical question before the global community today is if the gay rights are integrated in the basic human rights.

5.2 Human Rights Denied to LGBT Individuals

Through unique criminal provisions and practices based on sexual orientation, in most countries lesbians, gays and bisexuals are not allowed to have equality in rights. Usually, the laws maintain a greater age of consent for homosexual relations in comparison with heterosexual relations. So many violations have been reported in many parts of the world. These include: The right to non-discrimination and to be free from violence and harassment is normally denied by failing to take notice of sexual orientation in the antidiscrimination laws, the constitutional provisions as well as their enforcement. The right to life is violated especially in states where the sodomy calls for a death penalty. The right to be free from torture or cruel, inhuman or degrading treatment is violated by police practices, including the investigations or in case of lesbians, gays and bisexuals being put in detention. Arbitrary arrest usually occurs in many countries with persons suspected of having a bisexual identity. The freedom of movement is also denied in cases where homosexual relations are not recognized to bi-national couples.

The right to a fair trial is often infringed upon by the prejudices of the officials who enforce the law and judges too. So many other rights are violated and among them are: the right to privacy, the right to free expression and free association, the practice of religion, the right to work, the right to social security, assistance and benefits, the right to physical and mental health, the right to form a family and the right to education. The major principles that guide the rights approach on sexual orientation commonly relate to non-discrimination and equality. Advocates of human rights, lawyers and activists mainly seek to ensure there are social justice and a guarantee of the dignity of lesbians, gays and bisexuals.

Lesbians, gays and bisexuals do not claim any unique or additional rights but, the observance of the similar rights as those of heterosexual people. LGBT persons are denied- either by practices or law- the basic civil, social, political and economic rights.

5.3 UNHCR Publications on LGBT Rights as Human Rights

At the United Nations, the question is gradually becoming an issue of concern. However, it is not really clear what U.N. discussions will result to from the relationship between the gay rights and human rights. Foundational documents by the U.N. seem to provide some guidance. For instance, United Nations charter (1945) encourages “respect for human rights and for fundamental freedoms for all without distinction”. In the same way, Article 2 of the Universal Declaration (1945) states: “Everyone is entitled to all rights and freedoms set forth in this declaration, without distinction of any kind.” Despite this, among the good number of member states that have sworn to protect their citizens’ human rights, relations with the same sex are still illegal. (Gary J. & Rubin S. 2012)

In recent times, UNHCR is reviewing policies to provide protection for people who are fleeing persecution because of their gender identity or sexual orientation. In 2011 July, the United Nations supported the rights of Gay, lesbian and transgender people for the first time ever, passing a statement saluted as historic by the United States and backers and denounced by some Muslim and African countries. However, activists said it was an important shift on crucial issue that has caused division across globe for many decades, and they honoured the Obama administration’s struggle for legalization of gay rights in home country and abroad.

On 15 December 2011- The first ever United Nations report on the human rights of Lesbian, Gay, Bisexual and Transgender (LGBT) people was released.

It detailed how people around the world are killed or have to endure hate –motivated violence, criminalization, detention, and discrimination when it comes to jobs, education and health care as a result of their perceived or real gender identity and sexual orientation. The report, which was released by the UN Office for the High Commissioner for Human Rights (OHCHR) in Geneva, outlined that there was a pattern of violations against human rights which demanded a response and governments also have often overlooked the discrimination and violence on the basis of gender identity and sexual orientation. Violence against LGBT persons tends to be especially immoral when compared to any other bias-motivated crimes. The report found that every part of the world has recorded homophobic violence, and it varied from murder, assault, kidnappings and rapes to arbitrary deprivations of liberty and psychological threats. (United Nations news center, 2011)

In this report, the UN High Commissioner for Human Rights, Navi Pillay, made a call on countries to invalidate any laws that may criminalize homosexuality, do away with the death penalty for any offences that involve sexual relations that have consensual backgrounds, come up with harmonious agreement for the age of consent for homosexual and heterosexual conduct, and enact comprehensive laws against discrimination. Ms Pillay also recommended that member states also needed to investigate promptly all serious incidents or violence or killings perpetrated due to perceived or actual gender identity or sexual orientation and to establish appropriate systems to record incidents of such nature.

The High Commissioner also requested countries to ensure that people fleeing persecution because of their sexual orientation and/or gender identity are not returned to a territory in which their freedom or life is at threat, and that prison laws also recognize that gender identity or sexual orientation is a valid reason to claiming persecution.

Last year, a multipronged global outreach campaign was began to promote greater equality and tolerance for lesbians, gay, transgender people and bisexuals. The high commissioner for human rights, Navi Pillay, said that changing attitudes of people has never been an easy thing and it often begins with conversations that are difficult and this was the reason why the campaign was launched. Free and equal human rights, for both homosexuals and heterosexuals, were bound to inspire so many conversations among the people around the globe as well as across the ideological scope. The Universal Declaration of Human Rights promises a world whereby everyone is born with freedom and equality in dignity and rights without exceptions, people are moving at par. Yet it is still an empty promise for millions of LGBT individuals who are forced to deal with hatred, violence, intolerance and discrimination on a daily basis.” (The Hindu, 2013)

5.4 Hillary Clinton Comments on LGBT rights

In 2011, the secretary of State, Hillary Clinton, marked International Human Rights Day with a speech that was phenomenal in Geneva. Over a thirty minutes course, Clinton delivered a dull yet inspiring speech which took on all the misconceptions and hoaxes about homosexuality and lesbian, gay, bisexual and transgender individuals. Her address merited her standing ovation and will make her and the Obama administration dear to the gay people across the globe.

After clearly outlining the origins of the Universal Declaration of Human Rights and how they apply to everyone who is seeking respect and dignity of who they really are, Clinton declared that gay rights are human rights and human rights are gay rights as well.

Clinton also said that we are equally entitled to our dignity as well as human rights in spite of our looks, origins or position in the society. Earlier on in this document, human rights denied to the LGBT individuals were identified. Clinton also identified these in her speech and she said that, it is infringing upon human rights when people are killed or beaten due to their gender identity, or may be because they are not in line with the cultural norms on how women and men are supposed to behave or look. It is also a violation of human rights whenever governments declare it criminal to be gay, or let those who cause harm to the gay people to go scot-free. It is a violation of human rights when transgender women and lesbians are forcibly subjected to hormonal therapy or subjected to the so-called corrective rape or when individuals are killed after the public calls for acts of violence toward the gays, or when they are forced to run away from their nations to seek refuge in other countries in order to save their lives. And it is an infringe upon human rights when life-saving care is withdrawn or an equal access to justice is denied to people because they are gay, or even public spaces are made out of bounds to people because of their gay nature. (Capeheart J, 2011)

Clinton is against the notion that is prevalent across the world, especially Africa, that homosexuality is portrayed as an evil that is exported from the western hemisphere. She made a call for honest discussion concerning the belief that all people who are gay are paedophiles, that homosexuality is viewed as a disease that can be cured after

being caught, or that gay recruits others into gay habits. Clinton flat-out these beliefs and said that they were simply not true. She however added that they are also not likely to get out of the picture especially if those who accept or promote them are dismissed rather than being invited to share in their concerns and fears. She said that forcing someone to abandon a belief would not cause them to do it.

Clinton went ahead to confront those who used their religious and/or cultural beliefs to justify their prejudice against LGBT persons. This is like the justification that is offered for practices that are violent towards women for example the honour killings, female genital mutilation or widow burning. Some people defend those practices still as being part of traditional culture. However, violence toward women is not cultural; it is a criminal offence. Similarly, as with the case of slavery, acts that were initially justified as approved by God, are now seriously scolded as an unscrupulous violation of the human rights. In each of these cases, we get to a conclusion that no tradition or practice supersedes the human rights that belong to us all. Also, this is true for imposing acts of violence on LGBT person, making their status or behavior look criminal, causing them to flee from their families as well as communities and silently or explicitly giving a go ahead for their killing. This usually bears a notions that rarely are religious and cultural traditions and teachings that actually are in conflict with protection of basic human rights. Indeed, our culture and religion are sources of inspiration and compassion toward our fellow humans. (Capeheart J, 2011)

The secretary also talked about the power of that the law has to making things right even before the society seems to be ready to embrace change that is positive. She said that in many areas, including her own country, legal protections had preceded and not followed border recognition of human rights.

Laws had and still have a teaching effect. Discriminative laws, which verify all other forms of discrimination, should be done away with. Laws that need equal protections strengthen the moral essential of equality. And on a practical note, it is often the case that there must be change of the laws before fears about change come up. (Capeheart J, 2011)

Conclusion

Across the globe, there are varied reactions on the legalization of gay rights. As earlier discussed, gay rights are not unique in nature, they are similar to human rights. Human rights are gay rights and gay rights are human rights. LGBT individuals are human and need to be treated with utmost respect just like any other person; their human rights should not be violated in any way to allow a peaceful coexistence across the world.

CHAPTER SIX: DATA ANALYSIS

6.1. Respondents' Bio-Data

The respondents were asked to state their gender. 75 percent of the respondents stated that they were male whereas 25 percent of the respondents stated that they were female. This is shown in the table 1 below:

Table 1: Gender of the respondents

Gender	Number	Percentage
Male	24	75%
Female	8	25%
Total	32	100%

The study sought to know the sexual orientation of the respondents. The study found out that 3.13 percent of the respondents were heterosexual, 53.12 percent of the respondents were homosexual, and 40.62 percent were bisexual while 3.13 percent of the respondents did not give an answer to that query.

Table 2: Sexual Orientation of the respondents

Sexual orientation	Number	Percentage
Heterosexual	1	3.13%
Homosexual	17	53.12%
Bisexual	13	40.62%
Non respondent	1	3.13%
Total	32	100%

The respondents were asked to indicate their marital statuses. 81.25 percent of the respondents indicated that they were single, 12.5 percent of the respondents indicated that they were married while 6.25 percent of the respondents gave no response. This result of the study is shown in table 3 below:

Table 3: Marital Status of the Respondents

Marital Status	Number	Percentage
Single	26	81.25%
Married	4	12.5%
Non respondents	2	6.25%
Total	32	100%

The respondents were asked to indicate if they had any children. 15.62% of the respondents indicated that they had children whereas 84.38% of the respondents indicated that they had no children. The result of the study is shown in table 4 below:

Table 4: Response towards having children

Children	Number	Percentage
Yes	5	15.62%
No	27	84.38%
Total	32	100%

6.2. Legal Framework and Institutions that Provide Support for LGBTs

The study sought to establish some of the international institutions that support LGBT rights. Some of these institutions were Gay Lesbians Coalition of Kenya (GALCK), Hivos people unlimited, International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), UHAI- East African Sexual Health Right, Open Society Initiative for Eastern Africa (OSIEA), and Liverpool. Thus, both local and international organisations work to support the rights of LGBT in Kenya.

The institutions aim at creating an enabling environment for the LGBTs, as well as promote recognition, acceptance of the gay community in Kenya. The institutions have also started promoting the LGBT people have access to services tailored to their needs and this include sexual reproductive health services, other necessary health and social services. The institutions also provide legal advice, assistance and Lesbian Gay, Bisexual and Transgender (LGBT) sensitive community policing through LGBT police liaison committees that address matters such as gay bashing and blackmail.

The institutions that support the gay rights have also taken the initiative to work with the government whereby they are training the health services providers on gay rights. This enables the health service providers provide friendly services at the health services.

The respondents were asked to highlight the legal frameworks that the institutions highlighted. The results show that the institutions dealt with sexual health rights. This included advocating that the rights of all people regarding health be respected irrespective of their sexuality or sexual orientation. Thus, some of these institutions advocated for the rights of gays to health are respected as they seek healthcare services.

It was also observed that these organisations focused on equality. Specific to gay issues, the respondents observed that the organisations advocated for equality in the way gays were treated in the society so that they enjoy the same rights as those of the heterosexual individuals in the society. Thus, the organisations lobbied for equality status through government agencies and commissions on human rights.

The respondents also noted that the firms supported LGBT society through funding. These organisations funded their various activities across the country through Non-governmental organisations and civic society organisations. They funded gay groups to advocate for their rights and lobby various government agencies on rights of gay in Kenya. They also funded studies on gay society in Kenya.

The results also showed that a number of these organisations also participated in the mobilisation of sex workers in Nairobi and other major towns in Kenya. The sex workers were mobilised to educate them on their rights as well as on HIV/Aids for them to be aware and protect themselves accordingly.

6.3. Characteristics of Gays that Keeps them Outside Human Rights Work

The respondents were also asked to list down the characteristics of gays, which had kept them outside human rights work in Kenya. Some of the issues listed included forceful attitude, which comes out as arrogance and people therefore perceive them to be very violent and shun away from dealing with them.

Identity claims can result in dissension among LGBT persons. MSM and bisexuals, for example, are considered in some circles to be outcasts of the LGBT movement because they are “not really gay.” Those considered most stigmatized within LGBT communities are sex workers of any orientation who face added marginalization because of their activities. The All Africa Rights Initiative (AARI) recognizes these

complex identity issues as a challenge to efforts to build a larger and more cohesive movement. Each of AARI's conferences, trainings, and reports has illustrated the ongoing debate over whom to include, exclude, or prioritize.

The gay society is also not represented in most of the human rights work in Kenya. This limited their involvement in such works in Kenya and internationally. Non-representation therefore means that most of their issues cannot be addressed in human rights work because nobody is available to speak on their behalf on most occasions.

The respondents also noted that the gays were not aggressive enough in championing for their rights.

The assumption that they are paedophiles, lack of unity from entire LBGT community, association with sex workers, fear of exposure, homophobia from society, stigmatization, their relationships are not recognized by law, and existence of few outspoken bodies.

Some of the respondents also cited cross-dressing as some of the features that keep gays outside of human rights work in Kenya. They noted that some gays have too much side shows that make others not see them as serious. Blackmail was also cited as one of the features that make gays not be included in human rights work in Kenya as some people may want to blackmail them in the guise of human rights work. Some of them do not have the necessary knowledge to offer solutions to the plight of gays in Kenya and hence they are excluded from the human rights work.

6.4. Factors Blocking Initiatives to Put Gay Issues on Human Rights Agenda

The respondents were asked further some of the Kenyan legal factors that prevent gay issues from being incorporated into the international human rights agenda. One of the

main issues raised was the penal code, which criminalises gay relationships. This makes it impossible for some of the organisations to be recognised, as well as the rights of gays in Kenya. The responsibility of decriminalizing homosexuality rests upon the political class to influence the society. The state cannot simply change the law, but can also explain to its citizens the obligation to respect and ratify international human rights treaties. But fear of political, social and religious backlash undermines the political will to defend gay rights in Kenya.

The study also sought to determine other factors that prevent gay issues from being incorporated into the international human rights agenda. One of the factors mentioned was religious beliefs, which do not recognise gay relations and therefore cannot allow such issues to become part of human rights agenda. Religion and homophobia have been tied together for centuries. The stronger the powers of religious institutions are in the state, the more the rights of homosexuals are suppressed. Islam is the most telling example of violations of human rights of gays and lesbians: not only with the criminalization of the respective activities, but also with the cruelty of the punishments. Punishment can vary from lashing to the death penalty and in only a few countries where Sharia is the state legislation, steps have been made to decrease the punishment.

Another factor was cultural issues where most African cultures and even in Kenya do not allow or recognise gay relations. This makes it hard for such issues to be part of international human rights agenda.

6.5. Propose ways in which LGBT rights can be enforced in health provision

The respondents were also asked to suggest ways in which LGBT rights can be mainstreamed into health provision services. One of the suggestions was the right to

access basic health to all. They noted that LGBT needed access to basic health care in Kenya and this was important for mainstreaming them into the health services.

The respondents also suggested that there is a need for gays to involve themselves at policy decision levels where they can lobby for some of their rights to access health facilities to be included in the policies.

The respondents also proposed that clinics be built to specifically serve the LGBT in Kenya as being served by usual clinics had kept most of them away from seeking the services. Other health facilities specifically for the LGBT community were also proposed as some of the solutions that could enforce their rights in health provision services. They also proposed that measures be undertaken to trim down on stigmatization of gays in Kenya by holding stakeholder forums and advocacies. They noted that media could help a lot on the issue of reducing stigmatization. Some further proposed that there is a need for the Kenyan constitution to allow gay relations in order to help them be recognised as such and therefore seek health services from hospitals as gays.

6.5.1. Increase Coordination among Funders

The interplay of poverty and competition for outside funding suggests that donors should develop collaborative funding strategies that support the goals identified by the movement as a whole. Communication between donors is key to reducing divisions between groups. In addition, increased coordination can better facilitate co-funding opportunities, thus broadening the scope and impact of work in the region.

Through a combination of regular conference calls and creation of a list serve, donors can better update one another about grantees, strategies, and resources. In this way,

donors can build upon one another's efforts and fill gaps rather than repeating what has already been done. Once communication is strengthened, donor roundtables can serve as more formal strategizing forums. These meetings can also be an opportunity for new funders to share their interests and learn how to best fit into the work that is already underway. Roundtables can also provide opportunities for donors to get feedback and updates from grantees on the most recent needs and developments in LGBT health and rights. This would provide a formal means for grantees to make their voices heard and needs known; keep funders updated and collaborating; and facilitate discussion around strategy development that should be guided by those doing the work.

Donors should also allow LGBT organizations enough time to grow and identify their strategies and priorities before applying for funds. A sensitive approach is needed to ensure that groups have access to knowledge and skills, and the sufficient space and independence to move forward without experiencing external pressure. A participatory approach is needed to ensure that LGBT groups are fully involved in identifying the priorities for LGBT funding in the region.

6.5.2. Establish Safety Network for Activists

The World Social Forum (WSF) opened a much needed space for regional dialogue on LGBT issues, but it also placed the safety of individuals and groups at increased risk.

From this and similar experiences, the need to protect the defenders of LGBT and MSM rights is clear. Lessons learned from other regions for how to effectively establish a safety network for activists must be adapted for this region.

It could be beneficial for a consultant to meet with LGBT groups in Kenya to identify the protective mechanisms that are needed and help determine the support that is required. This would help donors understand the best mechanism for funding such an initiative (e.g., what type of fund to establish, who would oversee it, and protocol/criteria for distribution).

6.5.3. Build Group Capacity

Capacity building that focuses on groups rather than individuals will have a longer lasting impact on LGBT health and rights. Trainings should address needs identified by groups and should be spread among groups. Mutual sharing and exchange of mentoring would help build bridges between groups. This includes ensuring that adequate protection is available and developing regional LGBT networks to coordinate advocacy campaigns. Any effort funders can make to support promotion of cultural and traditional practices in the context of social gatherings (e.g., pride parades, film festivals, community centres) will strengthen community cohesion.

Capacity-building areas that have been identified as priorities by LGBT groups include: legal and human rights systems and usages; peer education/counselling; organizing and public sensitization techniques and strategies; LGBT-specific HIV/AIDS, safer sex, and reproductive health information; and organizational management.

6.5.4. Address Access to Healthcare Barriers and Stigma Associated with HIV/AIDS

There is a gap in services for the LGBT persons who need sexual health education that is tailored to their needs. For example, there are no campaigns geared toward the

HIV prevention needs of MSM in Uganda. Further, there is no access to free condoms and lubricants. Peer education models have proven effective, but trainings that are more widespread are needed, especially among MSM, lesbian, and bisexual populations. In the formal healthcare sector, efforts to train healthcare providers about LGBT-specific health needs, stigma and discrimination, and confidentiality are crucial to increasing access and utilization of healthcare services by LGBT persons. LGBT groups would also benefit from the identification of more LGBT-friendly service providers.

CONCLUSIONS AND RECOMMENDATIONS

Summary of Findings

This study intended to achieve four objectives, firstly, to examine the international legal framework and institutions that provide support for LGBTs. Secondly, to determine the characteristics of gays that have kept them outside human rights work in Kenya. Thirdly, is to determine the factors that block initiatives to put gay issues on the international human rights agenda in Kenya. Lastly, is to propose ways in which LGBT rights can be enforced in health provision.

The results showed that the institutions that were involved in the rights of LGBT in Kenya included both local and international organizations such as GALC, UN, HIVOS, ILGA, UHAI, OSIEA, Liverpool, among others. These organisations dealt with issues of sexual health rights, equality, human rights, support of LGBT through funding, rights to health services, mobilisation of sex workers, HIV/AIDS awareness, rights of gay, and advocacy, among other issues.

Some of the characteristics of gays, which kept them outside human rights work in Kenya were forceful attitude, non-representation, they are not aggressive, the assumption that they are paedophiles, lack of unity from entire LBGT community, association with sex workers, fear of exposure, homophobia from society, stigmatization, their relationships are not recognized by law, and existence of few outspoken bodies.

One of the Kenyan legal factors that prevent gay issues from being incorporated into the international human rights agenda was the penal code, which criminalises gay relationships. This makes it impossible for some of the organisations to be recognised,

as well as the rights of gays in Kenya. Another factor was religious beliefs, which do not recognise gay relations and therefore cannot allow such issues to become part of human rights agenda. Another factor was cultural issues where most African cultures and even in Kenya do not allow or recognise gay relations.

Conclusions

The study found that there are a number of institutions in Kenya that provide support to the LGBT community. Therefore, the study concludes that both local and international organizations such as the UN have been very helpful in supporting the rights of LGBT community in Kenya.

The study also concludes that, a number of features of gays have hindered them from being included in the human rights work in Kenya. These include their cross-dressing nature and lack of seriousness in coming together to champion for their rights. Just a few individuals in Kenya are always parading as gay while the rest of them are too afraid to come out in the open hence nobody takes them seriously.

The study concludes that a number of factors have hindered the initiatives to put gay issues into the international human rights agenda. These include cultural issues especially in Africa, which outlaw gay relations. Legal frameworks also impede such initiatives since the law in Kenya does not recognize gay relations. Further, religious factors also play a major role as no religion in Kenya allows for such relations.

Recommendations

Recommendations for policy relating to the inclusion of gay issues in international human rights agenda are as follows:

Firstly, clinics should be built to specifically serve the LGBT in Kenya as being served by usual clinics had kept most of them away from seeking the services., other health facilities specifically for the LGBT community should be instituted, which could offer solutions that could enforce their rights in health provision services.

Secondly, measures should be undertaken to trim down on stigmatization of gays in Kenya by holding stakeholder forums and advocacies. The media could help a lot on the issue of reducing stigmatization.

Lastly, the legal framework through the constitution needs to allow gay relations in order to help them be recognised as such; hence, seek health services from hospitals as gays.

Suggestions for Further Research

More studies need to be carried out to examine the role of local non-state actors in mainstreaming gay issues in health promotions in Kenya. This could shed light on whether the activities of non-state actors have been instrumental in promoting health services to the gays in Kenya.

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APPENDICES

Appendix 1: Questionnaire

Section 1: Demographics

1. Please indicate your gender

Male

Female

2. Please indicate your sexual orientation

Heterosexual

Bisexual

Homosexual

3. Please indicate your marital status

Single

Married

Separated

Divorced

4. Do you have any children?

Yes

No

Section 2: Study Information

5. State the challenges you have faced in accessing of human rights protection

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.....
.....

6. According to your view, are gay issues being incorporated in international human rights agenda?

Yes

No

7. To what extent do you think gay issues have been incorporated in international human rights agenda?

Very Great extent

Great extent

Neutral

Little extent

Very little extent

8. Kindly list down the characteristics of gays which you think have kept them outside human rights work in Kenya

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9. What do you think are the factors that prevent gay issues to be incorporated in the international human rights agenda?

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10. How do you think LGBT rights can be enforced in health provision

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The End