

**THE IMPACT OF HETERONORMATIVITY ON THE HUMAN RIGHTS
OF SEXUAL MINORITIES: TOWARDS PROTECTION THROUGH THE
CONSTITUTION OF KENYA 2010**

BY

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G80/91622/2013

**A THESIS IN FULFILMENT OF THE REQUIRMENTS OF THE DEGREE
OF DOCTOR OF PHILOSOPHY IN LAW, SCHOOL OF LAW,
UNIVERSITY OF NAIROBI.**

AUGUST, 2016

STATEMENT OF ORIGINAL AUTHORSHIP

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DEDICATION

To my father, the late Nathan Makokha and my mother, the late Racheal Nabifwo. Both of you were born into a world of great constraints that did not allow you to reach any academic skies. But through your hard work, sacrifice and vision, you gave me every opportunity to exploit my dreams. I have reached the skies in many areas and completing this thesis is just one of the many. All this is due to your belief in me. Mum, on your death bed, you were worried that I might not conclude this thesis. Here it is. Thank you and rest in peace.

ACKNOWLEDGEMENTS

First and foremost, I give thanks to the Almighty God for keeping me alive and for looking after me. Glory is to Him, the most merciful. Secondly, I would like to express my sincere gratitude and deep appreciation to my supervisors - Professor W.W.H Okoth-Ogendo (posthumously), Professor Patricia Kameri-Mbote, Professor P.L.O. Lumumba, Professor Oliver Phillips of Westminster University School of Law and Dr. Agnes Meroka of School of Law, University of Nairobi. I wish to thank them most sincerely for your guidance that has enabled me to reach this far. I specifically commend you for the intellectual courage that enabled me to undertake research on a subject that is taboo and dangerous in Kenya. I would also wish to most sincerely thank the School of Law, University of Nairobi for accepting my research in this very prestigious institution. My special thanks to our hardworking and enduring secretary in the Department of Private Law, School of Law, University of Nairobi, Catherine Kamau for graciously agreeing to shape this thesis. I would also like to thank my two sons, Michael and Yuri for standing by me whenever I faced terrible backlash from conservative and dominant forces in society opposed to the liberation of their fellow human beings. I wish to thank them most sincerely for their courage, encouragement and endless love.

ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
APA	American Psychological Association
CAT	Convention against Torture
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
CIPK	Council of Imams and Preachers of Kenya
COE	Committee of Experts
COK	Constitution of Kenya
CRC	Convention on the Rights of the Child
CQR	Consensual Qualitative Research
DOMA	Defense of Marriage Act
DSM	Diagnostic and Statistical Manual of Mental Disorders
ECJ	European Court of Justice
ECT	Electro convulsive shock therapy
ECHR	European Court of Human Rights
EOLSS	Encyclopedia of Life Support Systems
FDGs	Focus Group Discussions
FDA	Foucauldian Discourse Analysis
GALCK	Gay and Lesbian Coalition of Kenya
HIV/AIDS	Human Immunodeficiency Virus/Acquired Immune Deficiency

Syndrome

IACHR	Inter American Charter for Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICPD	International Conference on Population and Development
ICJ	International Commission of Jurists
IDAHO	International Day Against Homophobia
IGLHRC	International Gay and Lesbian Human Rights Campaign
IAHR	Inter-American Court of Human rights
IPC	Indian Penal Code
ISNA	Intersex Society of North America
IRPA	Individual Rights Protection Act
IV	Intravenous
KEMRI	Kenya Medical Research Institute
KHRC	Kenya Human Rights Commission
KNCHR	Kenya National Commission for Human Rights
KNEC	Kenyan Examination Council
LGB	Lesbian, Gay, Bisexual
LGBT	Lesbian, Gay, Bisexual, Transgender
MSM	Men who have sex with Men
MTF	Male to Female

NACOSTI	National Council of Science, technology and Innovation
NACC	National Population Council and the National Aids Council
NCKK	National Council of Churches of Kenya
OAS	Organisation of American States
ECOSOC	Economic and Social Council
PSC	Parliamentary Service Commission
PC	Penal Code
STDs	Sexually Transmitted Diseases
SCK	Supreme Court of Kenya
SMUG	Sexual Minorities of Uganda
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Scientific and Cultural Organisation
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Commission
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commissioner for Human rights
USA	United States of America
USSC	United States Supreme Court
VCT	Voluntary Counseling and Testing
WHO	World Health Organisation

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ABSTRACT

Heteronormativity is Kenya's culture and it permeates all social institutions. Due to this heteronormative culture, lesbian, gay, bisexual and transgender (LGBT) people or sexual minorities in Kenya suffer injustices arising out of discrimination, oppression and marginalisation. These injustices are perpetrated by both State and non-state actors alike, consequences of which are LGBT deprivation of social, economic, cultural, political rights. The Constitution of Kenya 2010 is endowed with normative and institutional provisions that could help alleviate the suffering of sexual minorities. Through the Bill of Rights and other counter-majoritarian provisions throughout the Constitution, it has the potential to provide a framework for the protection and promotion of the human rights of sexual minorities. Specifically, the Constitution embraces the international human rights principles of equality, equity, nondiscrimination and affirmative action which are vital for promotion of equality, equity and nondiscrimination of all people regardless of their sexual orientation or gender identity. Further, the institutions of parliament and judiciary under the Constitution have the express mandate to legislate and interpret the law in a manner that is in consonance with these principles. However, so far, the legislature is yet to put in place a law that promotes the constitutional principles of equality and neither has it repealed laws that discriminate against sexual minorities. The judiciary has so far demonstrated a danger of dual interpretation of the law on matters concerning sexual minorities, with some judges adopting critical and transformative approach to decision making, while the majority still take the conservative, textual and dogmatic approach to interpretation of the Constitutional principles, thus posing danger to the right to enjoy protection by sexual minorities. This jeopardises the protection of sexual minorities from injustices of discrimination, oppression and marginalisation that they have endured for many years. For the equality and nondiscrimination to be enjoyed by sexual minorities, the legislature and the

judiciary need to move away, and have the constitutional duty to move away from the traditional conservative approach to decision-making and embrace a more fluid, critical and transformative approach in their actions. The study responds to fundamental questions about the nature and impact of heteronormativity on the human rights of sexual minorities and how do they navigate through heterosexism; how international human rights principles and standards have been applied through legislative and judicial bodies in other jurisdictions to protect and promote the human rights of sexual minorities; how the legislature and the judiciary in Kenya can adopt more critical approaches to law making and law interpretation in order to protect and promote the human rights of sexual minorities in line with the Constitutional principles of equality and nondiscrimination; and in view of the pervasive and multifaceted nature of heteronormativity, what legal and non-legal mechanisms can be put in place to protect sexual minorities in Kenya. Through John Finnis' transformative and critical principles of practical reasonableness and the deconstructive and norm distablising Queer theory as theoretical framework, the study proposes a new approach to law making and law adjudication by the legislature and the judiciary respectively in order to move away from the binary understanding of sexual orientation and gender identity. The study finds that the perpetration of human rights violations against sexual minorities continues unabated in spite of the fact that the Constitution of Kenya 2010 guarantees all people equality and nondiscrimination before the law and institutions of justice which are empowered to ensure compliance with these principles in their decision making actions. The study also finds that Kenya's legislature and judiciary are both still rooted in dominant paradigms which correspond to traditional sex and gender binaries and hence have been unable to make law to protect sexual minorities.

Methodologically, the study adopts Queer qualitative methodology, which it distinguishes from scientific qualitative methods which are rooted in traditional scientific assumptions towards research. For narrative analysis, the study uses a combination of Foucauldian Discourse Analysis (FDA) and hermeneutic phenomenology as its tools and methods of analysis. It is hoped that the findings of the study can inform the legislature, the judiciary, policy-makers, researchers, academicians, civil society, religious organisations and the general public of the pressing need to explore both legal and non-legal mechanisms to realise justice for sexual minorities.

KEY TERMS: Sexual orientation, gender identity, binarism, unstable, queer, critical, transformative, minorities, practical, reasonableness, equality, heterosexism, marginalisation, human, rights, discrimination, Parliament, Judiciary, Constitution

CHAPTER ONE

GENERAL INTRODUCTION AND CONTEXT

1.0 BACKGROUND

Heteronormativity which is the cause of much suffering to sexual minorities is Kenya's culture and it permeates all social institutions in the country. Due to the heteronormative culture, lesbian, gay, bisexual and transgender (LGBT) people in Kenya suffer severe social injustice, due to human rights violations.¹ These injustices are perpetrated by both State and non-state actors alike, symptoms of which are deprivation of social, economic, cultural, political rights of LGBT people. Like heterosexual people, LGBT people are present in every facet of society. According to Herek, LGBT people vary in socio-economic status, age, type of employment, place of residence, culture and ethnic identity, and other social differences.² The factor that distinguishes them is that they are victims of heterosexism,³ which creates and sustains an environment of stigma and discrimination against them.⁴ Samelius and Wagberg state that human rights violations of LGBT people are widespread and sometimes even justified by political and religious leaders as an important cornerstone to safeguard morality and social order.⁵ This state of affairs occurs worldwide; with many countries having discriminatory national legislation and

¹ See generally Adrienne Rosenberg, The Brazilian Paradox: The Lesbian, Gay, Bisexual and Transgender Battle for Human rights. *Human rights and Human Welfare. Topical Research Digest: Human Rights in Latin America*, p 16. Available at <http://www.du.edu/korbel/hrhw/researchdigest/latinamerica2/digest-uman%20rights%20in%20latin%20america%20vol%202-brazil.pdf>. (Accessed on 28th July, 2016).

² Gregory M Herek. The context of anti-gay violence: Notes on cultural and psychological heterosexism.(1990). In Jack Donnelly, Non-Discrimination and sexual Orientation: Making a Place for sexual Minorities in the Global Human Rights Regime. In Peter Baehr, Cees Flinterman, and Mignon Senders (eds.), *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights*. Amsterdam: Royal Netherlands Academy of Arts and Sciences, 1999, p 93-11. *Journal of Interpersonal Violence*, 5, 316-333

³ Ibid

⁴ Ibid

⁵ Lotta Samelius, erik Wagberg, Sexual Orientation and Gender Identity Issues in Development. *SIDA: A study of Policy and Administration*. November, 2005, p 9. Available at www.sida.se/contentassets/77a0ee71307a4ff49fa0514d080748dc/. (Accessed on 9th January, 2016).

practices, as well as laws that criminalise expressions of sexual orientation and gender identity.⁶ This often tends to 'legitimise' human rights violations against LGBT persons.⁷ On the onset, this study subscribes to the view that people should not be discriminated against on account of their sexual orientation or gender identity so long as their sexual orientation or gender identity does not cause harm to innocent third parties. The thesis argues that sexual minorities, like heterosexual people, are born with an entitlement to human rights. The thesis believes that all people, regardless of their sexual orientation or gender identity, should be able to enjoy their human rights, whether they are visible or not. Further, the study argues that sexual minorities can only enjoy their human rights like other people if their presence is recognised and acknowledged and their human rights guaranteed under the law. The study agrees with Jack Donnelley that human rights do not need to be earned and they cannot be lost because one holds beliefs or leads a particular lifestyle, no matter how repugnant most others in a society find them.⁸ As argued by John Stuart Mill and his protégé H.L.A. Hart, how one chooses to lead one's life, subject only to minimum requirement of law and public order, is a private matter- no matter how publicly one led that life.⁹

The violation of the human rights of sexual minorities is presently an object of concern in several judicial and legal professions around the world, with the 1998 judgment by the Constitutional

⁶ Mindy Jane Roseman & Alice Miller, Normalising sex and its discontents: establishing sexual rights in international law. *Harvard Journal of Law & Gender*. Available at www.law.uchicago.edu/files/Rosmen_Miller_coded.pdf. (Accessed on 30th January, 2016) p 6

⁷ Ibid

⁸ Jack Donnelley, Non-Discrimination and sexual Orientation: Making a Place for sexual Minorities in the Global Human Rights Regime. In Peter Baehr, Cees Flinterman, and Mignon Senders (eds.), *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights*. Amsterdam: Royal Netherlands Academy of Arts and Sciences, 1999, p 93-110. *Journal of Interpersonal Violence*, 5, 316-333.

⁹ See generally Duncan J. Richter, (2000), Social Integrity and Private 'Immorality' The Hart-Devlin Debate Reconsidered. *Essays in philosophy: Vol.2: No. 2, Article 3*.

Court of Colombia aptly demonstrating these concerns.¹⁰ Commenting on the enormity of human rights violations of sexual minorities, the Court noted that:

For a long time, homosexuals have been subject to intense forms of marginalisation and social and political exclusion, not only in our country but also in many other societies. Not only have homosexual behaviours been and continue to be criminalised by various legal provisions but, in addition, in the daily life, people with this sexual preference have been excluded from multiple social benefits and have had to [endure] special stigmatisation, which have amounted to, in the most extreme cases, campaigns of extermination against these populations. [...] This situation of homosexuals has been justified via conceptions according to which these people, because they present/display a sexual orientation different from the majority of the population, but have considered abnormal, ill or immoral, [...] These old conceptions against homosexuality contradict essential values of contemporary public law, based on pluralism and recognition of autonomy and equal dignity of people and different walks of life.

Around the world, sexual minorities are considered the scum of the earth, and they carry the face of evil. In their recent study, Samelius and Wagberg note that LGBT people are used as scapegoats for crime, corruption and health problems and made to represent the evil deviating from religious, moral and family norms and values.¹¹ They are attributed to all sorts of negative qualities connected to their sexual orientation and/or gender identity. Furthermore, they are surrounded by erroneous beliefs, religious condemnation, suspicion, shame and hatred and they suffer from negative consequences with effects to health, safety and economy due to state, community, family and self-repression.¹² Due to demonisation and stigma, LGBT people are driven underground and mostly remain invisible. The South African constitutional Court has aptly noted the plight of sexual minorities in the seminal case of *National coalition of Gay and lesbian Equality and Another vs. Minister of Justice and others of Justice*. Justice Albie Sachs in his judgment in the case captures this when he notes as follows:

¹⁰ Constitutional Court of Colombia, judgement No. C-481/98 of 9 September, 1998, para. 10, 11 and 12 (Original in Spanish, unofficial translation).

¹¹ Lotta Samelius, Erik Wagberg, *supra* note 5 above, p 9.

¹² *Ibid*

[I]n the case of gay history and experience teach us that the scarring [biz] comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are that impinges on the dignity and self-worth of a group. This special ability of gays and lesbians as a minority group whose behaviour deviates from the official norm seems from the fact that [...] gays constitute a distinct though invisible section of the community that has been treated not only with disrespect or condescension but with disapproval and revulsion; they are not generally obvious as a group, pressurized by society and the law to remain invisible their identifying characteristic combines all the anxieties produced by sexuality with all the alienating effects resulting from difference; and they are seen as especially contagious or prone to corrupting others. None of these factors appl[y] to other groups traditionally subject to discrimination, such as people of colour or women, each of who, of course, have had to suffer their own specific forms of oppression.¹³

Nancy Fraser understands LGBT people to be “victims of a mode of social differentiation whose mode of collectivity is that of a despised sexuality, rooted in the cultural-valuational structure of society”.¹⁴ From this perspective, they suffer injustice which is quintessentially a matter of recognition and distributive injustices in the form of denial and deprivation of economic [and other] rights.¹⁵ Fraser states as follows:

Gays and lesbians suffer from heterosexism: the authoritative construction of norms that privilege heterosexuality. Along with this goes homophobia: the cultural devaluation of homosexuality. Their sexuality thus disparaged, homosexuals are subject to shaming, harassment, discrimination, and violence, while being denied legal rights and equal protections - all fundamentally denials of recognition.¹⁶

Davis and Moore posit that historically, group inequalities in social, political, and economic outcomes have existed in virtually all post-hunter and gatherer societies.¹⁷ However, societies have varied significantly in the manner and extent of inequalities, by which characteristics are

¹³ Constitutional Court of South Africa, judgment of 9 October, 1998, Case of National coalition of Gay and lesbian Equality and Another vs. Minister of Justice and others, Case CCT 11/98, paras. 127 and 128.

¹⁴ Nancy Fraser, From Redistribution to Recognition? Dilemmas of Justice in a ‘Post-Socialist’ Age p Available at <http://groups.northwestern.edu/critical/Fall%202012%20Session%204%20-%20Fraser%20-%20From%20Redistribution%20to%20Recognition.pdf> (Accessed on 21st December, 2015).

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Kingsley Davis & Wilbert .E. Moore (1945). Some Principles of stratification. *American Sociological Review*, 10, 242-249

salient markers of status among social groups, and by who is included and excluded within the these groups.¹⁸ Since the late nineteenth century, sexual orientation and gender identity has been a significant marker of social status.¹⁹

Sidanius and Pratto rightly argue that the dominant heterosexual identity groups receive a disproportionately large share of positive social values (such as political power, high social status, wealth, and material resources), while the subordinate homosexual and non-conventional gender identity groups receive disproportionately large share of negative social values, such as low social status, poverty, societal sanctions, and stigmatisation.²⁰ These inequalities in the social structure and its institutions are maintained by attitudes, beliefs, and ideologies that justify the stratification.²¹ Jack Donnelley finds that sexual minorities are despised and targeted by “mainstream” society because of their sexuality or gender identity.²² He notes further that they are victims of systematic denials of human rights and fundamental freedoms because of their sexuality and for transgressing gender roles.²³ Donnelley argues that like victims of racism, sexism, and religious persecution, they are human beings who have been identified by dominant social groups as somehow less than fully human, and thus not entitled to the same rights as “normal” people, “the rest of us.”²⁴

According to the International Lesbian and Gay Association’s (ILGA) 2010 Report on state-sponsored homophobia, homosexual acts are punishable by death in five countries, and are

¹⁸ Jim Sidanius, The interface between racism and sexism. *Journal of Psychology*, (1993), 127, 311-122.

¹⁹ See generally Michel Foucault, *The History of Sexuality: An Introduction*. (New York: Vintage Books, 1990).

²⁰ Jim Sidanius & Fellicia Pratto. *Social dominance: An intergroup theory of social hierarchy and oppression*. (New York: Cambridge University Press 1999).

²¹ Roy Eyerman and Andrew Jamison. *Social movements: A cognitive approach*. (University Park, PA: Pennsylvania state University Press, 1991).

²² Jack Donnelley, supra note 8 above, p 98.

²³ Ibid

²⁴ Ibid

illegal, punishable by fines, lashings or imprisonment, in 76 countries in the world. Although many of these countries do not systematically enforce these laws,

their mere existence reinforces a culture where a significant portion of the citizens need to hide from the rest of the population out of fear: A culture where hatred and violence are somehow justified by the state and force people into invisibility or into denying who they truly are”.²⁵

In a nutshell, LGBT persons are denied justice either by law or practices through deprivation of basic civil, political, social and economic rights. Colleen A. Capper observes that the civil rights movement around the world has identified LGBT individuals as a protected non-majority group which “typically hold less political and economic power in society” and, therefore, can also be classified as “persons on the axis of oppression”.²⁶

Other scholars have rightly argued that the injustices suffered by sexual minorities include violation of rights exercised by the individual such as decisions regarding sexual conduct and partner choice, but also protections of bodily and mental integrity, including equality before the law and access to health services and information.²⁷ And because these rights are not limited to conduct but are about engaging with meanings of sexuality, they also include equal rights to entry into and participation in politics, equality of resources in communities and families, and other rights supporting the formation of opinions and determination of identity and belief.²⁸

Culturally, Kenyan society is structured along binary opposites of male/female, woman/man.²⁹ These binaries are basic to society and omnipresent in everyday life of citizens and failure to fit in them, as is the case with sexual minorities, is seen as suspect, creating a class of the so-called

²⁵Colleen A. Capper, (1999), “(Homo)sexualities, organisations, and administration: possibilities for in[que]ry. *Journal for Educational Administration*, Vol. 44 No. 3.

²⁶ Ibid

²⁷ Mindy Jane Roseman & Alice Miller, Normalising sex and its discontents: establishing sexual rights in international law. *Harvard Journal of Law & Gender*. Available at www.law.uchicago.edu/files/Rosmen_Miller_coded.pdf, p.6. (Accessed on 30th January, 2016).

²⁸ Ibid

²⁹ Scott Geibel, Implications for HIV Prevention, Programs, and Policy, Doctoral thesis submitted to the Faculty of Medicine and Health Sciences, Ghent university, P 20.

“deviants” who are subjected to verbal and physical injury, sexual violence, and social marginalisation.³⁰ Additionally, they are subject to prosecution/imprisonment on the basis of 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 characterised as an “unnatural offense” and is a felony punishable by up to fourteen years in prison.³¹ Although these laws are rarely enforced, LGBT Kenyans are still persecuted under them. Courtney Finerty argues that the laws codify and legitimise general latitude of homophobia that exists within the country and thereby lead to the routine human rights violations that LGBT Kenyans face. These laws instill fear, facilitate abuse, and prevent LGBT Kenyans from achieving the equality to which they are legally entitled.³² Weeks observes that the tragedy of this law for sexual minorities is that just like the late development of the “homosexual”, the law is also a nineteenth century social structure whose purpose was to regulate sexuality to meet the social and economic imperatives of the time. Yet, as noted by several scholars, oppression of sexual minorities is a new development. Weeks, in discussing the act of Henry V111 of 1533 which first brought sodomy within the purview of statute law, argues that:

The central point was that the law was directed against a series of sexual acts, not a particular type of person. There was no concept of the homosexual in law, and homosexuality was regarded not as a particular attribute of a certain type of person but as a potential in all sinful creatures.³³

John Harrison argues that even the early Christian Church did not oppose homosexual behaviour *per se*. In fact, up until the twelfth century “moral” theology was basically indifferent to

³⁰ Courtney Finerty, Being Gay in Kenya: The Implication of Kenya’s New Constitution for its Anti-Sodomy Laws, *Cornell International Law Journal* Vol. 45 p 436-438. p 432. Also see Oliver Phillips, Constituting the Global Gay: Issues of Individual subjectivity and Sexuality in Southern Africa. In Didi Herman and Carl Stichyn, (eds.) Sexuality in the Legal Arena. (Athlone 2000); Sebastian Maguire, The Human Rights of Sexual Minorities in Africa. *California Western International Law Journal*, Vol. 35, issue No. (2004).

³¹ Ibid

³² Ibid p 433.

³³ Jeffrey Weeks, “Questions of identity’ in Pat Caplan (ed.), *The Cultural Construction of Sexuality*, London. (1987), p 31

homosexuality, and legal sanctions were very rare.³⁴ It was only during the latter half of the twelfth century that literary, theological and legal writing began to display hostility toward homosexuals, and by the latter half of the Middle Ages, homosexuality was increasingly associated with heresy.³⁵ Christopher Leslie argues that sodomy laws that emerged later in the modern period, single out homosexuals as the “other”, a member of a criminal class. As sodomite becomes synonymous with homosexual, homosexual becomes synonymous with sodomite, pinning a criminal label on all gay men and lesbian women. This creates stigma with many attendant negative effects on LGBT individuals. Leslie adds that;

Sodomy laws exist to brand gay men and lesbian as criminals. Social ordering necessitates the criminalisation of sodomy, thereby creating a hierarchy that values heterosexuality over, and often to the exclusion of homosexuality. This symbolic effect of sodomy laws is not dependent on their enforcement. Even though very few men and virtually no women ever suffer the full range of criminal sanctions permitted under state sodomy laws, these statutes impose “the stigma of criminality upon same-sex eroticism”.³⁶

Yet, sexual relationships represent a fundamental element of individual identity and an intimate aspect of an individual’s private life.³⁷ As observed by Narayan, discrimination against one because of the way he or she expresses sexual desire is a serious violation of that individual.³⁸ New Natural Law Philosopher John Finnis in his *magnus opus*, Natural Law and Natural rights, enumerates the basic goods that make a person’s life worth living and this study considers sexual expression to be one of those basic social goods that “make one’s life worthwhile”.³⁹ This study

³⁴ John V. Harrison, Peeping Through the Closet Keyhole: Sodomy, Homosexuality, and the Amorphous Right of Privacy. *St. Johns Law Review*, Vol. 74, No. 4, 2000. P 1113

³⁵ *Ibid*

³⁶ Christopher Leslie, Creating criminals: The Injuries Inflicted by “Unenforced” Sodomy Law. *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 35 p 112.

³⁷ Pratima Narayan, somewhere over the Rainbow. . .International Human Rights Protections for Sexual Minorities In The New Millennium. *Boston University International Law Journal* [Vol. 24:313. Available at <https://www.bu.edu/law/central/jd/organizations/journals/international/volume24n2/documents/313-348.pdf> (Accessed on 11th November, 2016). p 313

³⁸ *Ibid*

³⁹ John Finnis, *Natural Law and Natural Rights*, (Oxford University Press, 2 edition, 1980).

argues that sexual expression is one such good. Recent jurisprudence attests to this position. In most of judicial the cases overturning state restrictions on unconventional sexuality, the tribunals have emphasised the intimacy of sexual behaviour and the centrality of sexual conduct to one's identity and personality as a reason for treating the matter as falling within a right to privacy.⁴⁰ According to Felmeth, there is a definite trend to set sexuality apart from other forms of state regulation of private conduct, giving it a privileged status based on its importance to individual identity and self-actualisation.⁴¹

Regarding the centrality of sexuality and sexual expression to the well-being of any individual, the World Health Organisation (WHO) has also recognised sexuality, which encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction, as a central aspect of being human throughout life.⁴² WHO states that for one to be said to be healthy and be leading a worthwhile life, there has to be complete physical, social and mental well-being, and it includes sexual health which is realised in ways other than heterosexual sex for those who do not fit within this socially assumed category.⁴³ Consequently, for sexual health to be attained and maintained, the sexual rights of all persons must be respected, protected and fulfilled.⁴⁴ Unsurprisingly therefore, the international community has acknowledged this aspect of human life and seeks to protect sexual identities and relationships.⁴⁵

Various reasons have often been advanced in Kenya's rejection and subjugation of non-heterosexual sex and unconventional gender identity. Leading politicians and religious leaders

⁴⁰ In Aaron Xavier Felmeth, *State Regulation of Sexuality in International Human Rights Law and Theory*. In *William & Mary Law Review*, Vol. 50 No. 3(2008), p 823

⁴¹ Ibid

⁴² *Defining Sexual Health: World Health Organisation. A Report of a technical Consultation on sexual health*, 28-31 January 2006, Geneva p 5.

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Pratima Narayan, *supra* note 37 above, p 313.

are in the forefront of condemning same-sex sexual relationships, terming it Un-African, with the potential to destroy the traditional African family unit. Those opposed to LGBT protection are also to a large extent influenced by the centrality of the family which influences many aspects of the lives and rights of LGBT persons in Africa. Economic and social protection, status, identity and social prestige are bound up with the completion of family obligations including marriage and reproduction.⁴⁶ They also argue that it is unnatural and/or a mental disorder that needs medical attention. They assert that it is responsible for the spread of HIV/AIDs and offends religious morals.⁴⁷ Yet, literature which shows that homophobia is a product of colonisation in an effort to impose Western morality and civilisation abounds. Several scholars have linked the implantation of Western sexual and civilisation mores to later day homophobia that grips the post-colonial states to date. For instance, Oliver Phillips convincingly argues that the nineteenth century conceptualisation of sexuality was based on the Victorian social values of morality and civilisation which formed the framework for regulation of sexuality in colonial Africa. He states that:

The concepts of 'morality' and 'civilisation' provided a framework for the creation and regulation of a 'sexuality' which went beyond the functional structuring of reproductive relationships, by engaging with a consciousness of the self, centered on self-discipline. With the inculcation of a notion of divine sanction, the consequences of sexual acts became abstracted beyond the regulation of illicit partnerships between lineages, as they came to be loaded with a variety of differing values – of power and perversion – signifying the truth of an individual.⁴⁸

⁴⁶Fergus Kerrigan, Getting to rights the rights of lesbian, gay, bisexual, transgender and intersex persons in africa, 2013 The Danish Institute for Human Rights Denmark's National Human Rights Institution. Available <http://um.dk/en/~media/UM/English-site/Documents/Danida/Partners/Research-Org/Research-studies/LGBT.pdf> at P 12 (Accessed on 2nd December, 2015).

⁴⁷ Sexual Minorities of Uganda (SMUG). Expanded Criminalisation of Homosexuality in Uganda: A Flawed Narrative, 2014. Available at <http://www.sexualminoritiesuganda.com> (Accessed on 29th November, 2015) p 2

⁴⁸ Oliver Phillips, Constituting the Global Gay: Issues of Individual subjectivity and Sexuality in Southern Africa, p 32. In Didi Herman and Carl Stychyn, (eds.) Sexuality in the Legal Arena, Athlone 2000. Available at www.ids.ac.uk/files/dmfile/Globalgay.pdf. (Accessed in 25th December, 2015). p 7.

A study commissioned by the Kenya Human rights Commission (KHRC), a leading human rights non-governmental human rights organisation in Kenya found that same-sex sex is considered to be an affront to African culture, anti-religion (Christianity and Islam), immoral and a Western import and therefore “un-African”.⁴⁹ Murray and Roscoe in their study on African sexualities were also confronted with similar “un-African” claims.⁵⁰ They rightly observe that in recent times, it has become commonplace for African leaders to invoke some form of anti-West nationalism by blaming neo-colonialism for the presence of homosexual behaviour in the country.⁵¹

The ‘Un-African’ thesis which this study interchangeably calls ‘African exceptionalism’ is easily invoked even when there is abundant literature establishing that same-sex practices and non-conventional gender identities were prevalent in pre-colonial Africa. Sylvia Tamale, a leading scholar on sexuality in Africa terms the contention that same-sex relations were unknown in pre-colonial Africa not just a fallacy but also a falsehood.⁵² Tamale rightly observes that a great deal of rich information about African sexualities lies in ancient histories that live through *griots*, *ighyuwas*, *imbogies*, *jelis*, *igawens*, *guels* and other orators around the continent and that historical accounts of African sexualities are alive in folklore, traditional songs, dance, folk art, body markings, clothing, jewelry, names and naming systems.⁵³ Tamale argues that in order for the colonial and imperial agenda to succeed, colonialists embarked on culture transformation of

⁴⁹ Pratima Narayan, supra note 37 above, p 314.

⁵⁰ Stephen O. Murray and Will Roscoe (eds.), *Boy-wives and Female Husbands: Studies in African Homosexualities*. (New York: Palgrave 1998), p 34.

⁵¹ Ibid

⁵² Sylvia Tamale, *Researching and Theorising Sexualities in Africa*. In Sylvia Tamale (ed.), *African Sexualities: A Reader* (Pambazuka 2011), p 19.

⁵³ Ibid

African societies and in the process, implanted the culture of heterosexism, hitherto not the serious problem that it is today.⁵⁴ She observes as follows:

From a historical perspective, prior to colonialism, which fundamentally changed the sexual imagination and practices in Africa, most African traditional societies were characterised by their sexual tolerance and openness. Contrary to received ideas, what western colonialisation brought into African colonies was homophobia and not homosexuality, which was part of a variety of social practices. The colonial administration only extended through anti-sodomy laws the moralistic view of the Church, which perceived same-sex relationships as an expression of cultural primitivism and then encouraged African natives to move towards the so-called modern sexuality; that is, exclusive heterosexuality.⁵⁵

To further discount the fallacy of 'African exceptionalism', several other scholars of African sexual history have in recent past carried out studies that disprove this assertion. For instance, in their recent studies, Murray and Roscoe found that homosexuality existed in Africa prior to colonisation and its subjugation or denial is a creation of colonialists themselves.⁵⁶ The duo convincingly claim that Europeans created a myth that homosexuality was absent or incidental in African societies but it has either been deliberately submerged in discourses, deliberately misrepresented for socio-political reasons or misunderstood because their concept in Africa is alien when viewed in Western sense.⁵⁷

Needless to say, however, one of the reasons behind the apparent confusion about the existence or non-existence of non-heterosexual sexualities and gender identities in pre-colonial Africa is lack of documented records about the African social and cultural lives. Regarding homosexuality in pre-colonial Africa, Bright explains that conceptualisations and experiences of homosexuality

⁵⁴ Ibid p 24

⁵⁵ Ibid

⁵⁶ Murray & Roscoe supra note 50 above, p 21.

⁵⁶ *Ibid*

⁵⁷ See Sussie Jolly 'Gender myths and feminist fables: Repositioning gender in development policy and practice' Institute of Development Studies (IDS) University of Sussex. A paper presented for the International Workshop, July 2003 Sussex, 2-4

[in African sense] are numerous, juxtaposed, conflicting and ultimately complex.⁵⁸ She adds, however, that complex patterns of sexuality emerge from the old texts which differ from the modern ideas of “egalitarian relationships.” African sexualities often consisted of relationships where the age of the partners shifted heavily and this should be the starting point when trying to understand sexual orientations in the pre-colonial society.⁵⁹

Falola and Flemming also note that due to lack of records, there are no easily legible deep histories of sexuality that can connect contemporary African-based people to a pre-18th century ancestry. However, through language, certain forms of art and the writings of colonial anthropologists and administrators hint at the possibilities of sexualities.⁶⁰ Murray rightly quips that “the absence of evidence, particularly an absence proclaimed in official ideology, should not be taken as evidence of absence”. He notes that the lack of a written records prior to colonialism in most of Africa has exposed scholarship to literature written by colonial anthropologists who were part of the colonial system and whose agenda was to distort African sexual history.⁶¹ Tamale, argues that many Western Anthropologists who engaged in the early research into sexuality in Africa were responsible for creating the myth that homosexuality, was non-existent in pre-colonial Africa. She argues that the western anthropological researchers merely picked up from where the colonisers left off in submerging African sexualities and continued (mis)representing African sexualities as exotic and backward.⁶² In Tamale’s view, what was in

⁵⁸ Debra Bright Constructs of homosexual identities: An exploration of the narratives of six White South African homosexual men ‘available at 146.230.141/jspul/bitstream/10413/4344/1/Bright_Debra.2003 (accessed on 14 may 2012).

⁵⁹ Ibid

⁶⁰ Toyin Falola and Tyler Flemming, African civilisations: from the pre-colonial to the modern day: In World civilisations and history of human development. Encyclopedia of Life Support Systems (EOLSS), p 4

⁶¹ Murray & Roscoe, supra note 50 above, P 41

⁶² Ibid p 23

fact introduced in Africa by the colonialists was homophobia which was hitherto not a characteristic of pre-colonial African society.⁶³

Tamale notes that research in the colonial context was conducted along a traditional hierarchy of power between the researcher and the researched and it was almost always assumed that the researchers were all-knowing individuals and the researched naïve ‘subjects’.⁶⁴ It was further presumed that only the former could create legitimate, scholarly knowledge, usually through written reports and publications. There was often little or no knowledge of the role the researched played in the process.⁶⁵ Arnfred, agrees that studies on sexualities in Africa have been motivated by ideological, political and/or social agendas,⁶⁶ noting that keenly observed, “the hypotheses, research questions, research methods and analysis techniques are heavily influenced by these agendas”.⁶⁷ But this cannot be a good enough reason to conclude that these types of sexualities did not exist in pre-colonial Africa as alleged by its detractors.

In his extensive work on sexual minorities and human rights in Africa, post independent African leaders have continued to perpetuate the erroneous argument that there were no non-heterosexual sexual and gender identities in pre-colonial Africa. Maguire states that even after achieving political independence, many African states still feel the impact of colonisation as leaders attempt to impose foreign conceptions of sexuality on their societies.⁶⁸ He notes that while the African politicians might be correct in pointing out “homosexuality” is not native to African, they fail to recognise the history of same-sex relationships within societies that have long

⁶³ Ibid

⁶⁴ Ibid

⁶⁵ Sylvia Tamale, *Researching and Theorising sexualities in Africa* note 52 above, p 14.

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Sebastian Maguire, *The Human Rights of Sexual Minorities in Africa*. *California Western International Law Journal*, Vol. 35, issue No. (2004), p1. Available at <http://scholarlycommons.law.cwsl.edu/cwilj/vol135/issi2>, (accessed on 3rd December, 2013) p 2

allowed for diverse social arrangements around sex and gender.⁶⁹ Indeed the statements made by African leaders do not distinguish self-identified gays and lesbians from those citizens who are engaged in non-heteronormative practices, but who do not identify as homosexual.⁷⁰ In his view, homophobic rhetoric of African leaders ignores the existence of these longstanding practices and instead adopts a narrow conception of what is acceptable: a family arranged around sexual union of an opposite-sex couples.⁷¹ He adds that African leaders who espouse homophobic views actually reflect a way of thinking that originated outside Africa.⁷²

The arrival of missionaries and settlers brought with it the Judeo-Christian construction of sexual desire as an object of discipline by, and for the sake of, one's self, rather than one's lineage, and introduced the admonishment of personal perversions as predilections to be hidden in private, and shamed in public.⁷³ In other words,

the notion of sin, crudely put, what had been important prior to Christianity's arrival, was who was doing it, and what the reproductive consequences (both social and biological) of their actions were, rather than a prohibitive declaration that inquired into the morality of specific acts. What was important in pre-colonial times was consequential physical activity, rather than a projected cognitive desire to be measured as morality or perversion.⁷⁴

Alluding to the European settler impact on sexuality in *Shona* land in the Southern part of Africa, Phillips argues that the new conception of "sexuality" which penetrated *Shona* society, like elsewhere in Africa, was one which was embedded and delivered in a discourse of morality:

Sexuality was not primarily constructed in terms of lineage identity and obligation and sexual matters were judged on the basis of a set of principles whose concerns were a long way from those of marriage alliance which dominated the African society. Sex occupied the realm of the

⁶⁹ Ibid p 3

⁷⁰ Ibid

⁷¹ Ibid

⁷² Ibid

⁷³ Oliver Phillips, Constituting the Global Gay: Issues of Individual subjectivity and Sexuality in Southern Africa, in Didi Herman and Carl Stychyn, (eds.) *Sexuality in the Legal Arena*. (Athlone 2000).

⁷⁴ Ibid

moral, and was linked to concepts of sin, and absolute right or wrong. Not only did these occupiers have new ideas about what constituted a sexual offence; they also had different views about whose business it was that such an offence might have been committed. Two concepts in particular, those of “morality” and “civilisation”, dominated white discussions of African sexual behaviour.⁷⁵

Another reason for submerging non-heterosexual sexualities and gender identities in Africa is the misunderstanding of these phenomena because they are viewed and understood through the prism of western conceptualisation which focuses on individualism; sexual activities as between two or more individuals. In contrast, Phillips notes that sexual relations in pre-colonial Africa were not simply the business of the individuals directly involved, but were conceptualised, negotiated, and celebrated by whole lineage groups; they had an effect on the social identity of the entire lineage. They were not connived as erotic acts separate from kin, but were physically and figuratively constitutive of kinship relations.⁷⁶

Phillips further argues that African leaders such as President Mugabe of Zimbabwe have tended to understand homosexuality as a single stable sexuality thus failing to understand that same-sex relationships that existed in pre-colonial Africa may not necessarily manifest in a fashion that fits within Western conception of homosexuality.⁷⁷ Such African leaders also advance the idea of sexual universalism which scholars strongly discount. According to Phillips, the assertion of universalism that is specifically heterosexual, is predicated on the *a priori* concept of a binary ‘sexuality’ that is fixed within individuals, and is a distinctly western European psychoanalytic polarisation of erotic desire as homo/hetero.⁷⁸ Quoting Greenberg, Phillips posits that:

⁷⁵ Ibid

⁷⁶ Ibid p 7.

⁷⁷ Telling the United Nations General Assembly in New York, on the 29th of September, 2015, Mugabe stated “we are not gays”. Addressing what he called the “new” human rights agenda being pushed by the West and referring specifically to the issue of homosexuality, Mugabe, who is also the current African Union (AU) chair, said: “We reject attempts to prescribe new rights that are contrary to our values, norms, traditions and beliefs”.

⁷⁸ Oliver Phillips, supra note 73 above, p 32.

Homosexuality is not a conceptual category everywhere...When used to characterise individuals, it implies that erotic attraction originates in a relatively stable, more or less, exclusive attribute of the individual. Usually, it connotes an exclusive orientation: the homosexual is not also heterosexual; the heterosexual is not also homosexual. Most non-western societies make few of these assumptions. Distinctions of age, gender, and social status loom larger. The sexes are not necessarily conceived symmetrically.⁷⁹

Phillips further avers that no new sexual activities were brought into Africa but rather it is new offences that were introduced. In his view, the sexual activities that now form the sexuality discourse in post-colonial Africa were not new, but the definitions of these activities were the ones which are new. He states:

The whole conception of how those acts that are now understood to be sexual fitted with gender and broader social relations was very different, and remains mediated by the political economy of gender and reproductive relations. The very idea of what acts constitute sex, and what are the implications of sex, are ideas which are culturally construed and contingent.⁸⁰

This view is supported by Kendall's remarks about the confluences and differences between the conventional existence of erotic relationships between women, and lesbian identities. In a research on lesbian relationships in Lesotho, Kendall states as follows:

What the situation in Lesotho suggests is that women can and do develop strong affectional and erotic ties with other women in a culture where there is no concept or social construction equivalent to 'lesbian', nor is there a concept of erotic exchanges among women as being 'sexual' at all. And yet, partly because of the 'no concept issue and in part because women have difficulty supporting themselves without men in Lesotho, there has been no lesbian lifestyle option available to Basotho women. Lesbian or lesbian-like behaviour has been commonplace, conventional; but it has not been viewed as 'sexual', nor as an alternative to heterosexual marriage, which is both a sexual and an economic part of the culture.⁸¹

In further discounting the 'Un-African' thesis, Wynne Dynes avers that "there is a long history of diverse African peoples engaging in same-sex relations" and that the Whiteman is most probably

⁷⁹ David F. Greenberg. *The Construction of Homosexuality*. (University of Chicago Press, 1988), p 4. In Oliver Phillips, *Constituting the Global Gay* supra note 70 above, p 5.

⁸⁰ Oliver Phillips, *Constituting the Global Gay* supra note 73 above, p 5.

⁸¹ Diana Kendal, *Social Problems in a Diverse Society* (1998) p 239. In Oliver Phillips, *Constituting the Global Gay: Issues of Individual subjectivity and Sexuality in Southern Africa*, p 32. In Herman D. and Stichyn, C. (eds.) *Sexuality in the Legal Arena*, Athlone 2000. Available at www.ids.ac.uk/files/dmfile/Globalgay.pdf. (Accessed in 25th December, 2015). p 5.

the source of African homophobia that perpetuates contemporary persecution of homosexuals.⁸² Shepherd also asserts that “though there are long-lasting gay relationships in the Kenyan city of Mombasa and most homosexual acts are fleeting, paid for in cash”.⁸³ Jean and John Comaroff note that socio-sexual formations during colonialism were at the centre of the power dynamics of the day. In Comaroff’s view, the study of sexualities cannot be abstracted from power, and particular interests.⁸⁴ African homosexual orientation did not conform to the dominant colonial heterosexism and had therefore to be reorganised, oppressed, subjugated and set up for eventual erasure.⁸⁵

Questions must arise as to why post-colonial African leaders are so vehemently opposed to non-heterosexual sex, and specifically homosexual sex. Scholars have advanced several reasons, with some noting that the un-African claims by current African leaders exposes a clear self-serving political agenda. Scholars such as Oliver Phillips⁸⁶ and Jacque Alexander⁸⁷ see nothing but political mischief in such claims, especially when raised by African politicians. The two point out that these arguments reflect a consistent tendency from the 1990s of the formation of post-colonial nationalisms in many states of the global South.⁸⁸ Such tendencies occur through moral discourses involving the exclusion of certain same-sex sexualities and gender forms which then become defined as Western and alien.⁸⁹

Phillips avers that claims of culture and tradition such as those made by Africa’s dominant classes are a tool for entrenchment of heteronormativity for various reasons, mostly self-

⁸²Wayne R. Dynes, In Homosexuality in Sub-Saharan Africa: An Unnecessary controversy’ (1982) p 32

⁸³Gill Shepherd Feuerste in G, al-Marzooq S & Wikan Unni. The Omani Xanith. *Man* 13 (1978), 663-671,

⁸⁴Jean Comaroff & John Comaroff (eds) *Law and Order in the Postcolony*. (University of Chicago Press 2007) p 9

⁸⁵ *Ibid*

⁸⁶Oliver Phillips, *supra* note 73 above, p 17-34.

⁸⁷ M Jacqui Alexander, Not Just (any)Body Can Be A Citizen: The Politics of Law, Sexuality and Postcoloniality in Trinidad and Tobago and the Bahamas, 48 *Feminist Rev.* 5, 15 (1994), p 20.

⁸⁸*Ibid*

⁸⁹ *Ibid*

serving.⁹⁰ He further observes that the notion of “tradition” is a primary modality through which structures of power, and consequently gender coherence are “defended, melted and asserted”.⁹¹ In this view, the socially accepted sexualities are defined as fixed categories between which one cannot deviate and ‘as definitive signifiers of cultural imperialism’.⁹² In so doing, they implicitly define heterosexuality as the universal, thereby affirming both the hegemonic ascendancy of heterosexism, as well as their own allegiance to it.⁹³ Courtney Finerty discerns a lot of irony in the “un-African” claim as advanced in Kenya by religious moralists and political leaders, arguing that anti-sodomy laws, not homosexuality, were imported into African culture from the West and such claims are mere opportunistic arguments that are used to justify refusal to grant sexual minorities legal equality by dominant forces in present Kenyan society.⁹⁴

Apart from the fallacy of African exceptionalism, several scholars lay the subjugation of non-heterosexual ‘African sexualities’ squarely at the feet of Western researchers, who augmented the colonialist agenda of subjugating African sexualities. McClintock supports this view, positing that during the period of imperial expansion and colonisation, African bodies and sexualities became focal points for ‘justifying and legitimising the fundamental objectives of colonialism: to civilise the barbarian and savage natives of the ‘dark continent’.⁹⁵ According to McClintock, texts from 19th century reports authored by white explorers and missionaries reveal a clear pattern of the ethnocentric and racist construction of African sexualities.⁹⁶ Anthropological researches carried out by western anthropologists have one

⁹⁰ Ibid p 23

⁹¹ Ibid

⁹² Pratima Narayan, *supra* note 37 above p 318

⁹³ Ibid p 22

⁹⁴ Courtney Finerty, *supra* note 30 above, p 436-438.

⁹⁵ Mary McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial context* (Routledge 1995) Quoted in S. Tamale (ed.), *African sexualities: A reader* (Pambazuka Press/Fahamu Books 2011) p 77.

⁹⁶ Ibid

particular aim to achieve; to distort pre-colonial African sexualities in order to meet the colonial imperatives.⁹⁷

Dlamini notes that ‘measures for codifying sexual practices extended from colonial administration through to ethnographic scholarship’. Such work, developed and modified until the mid-20th century, has consistently denied the existence of same-sex practices in Africa.⁹⁸

Marc Epprecht, emphasises that anthropology was used to deliberately advance the cause of those interested in the perception of the people they were interested in and in this regard, anthropology was deliberately used to distort the truth about gender and sexualities.⁹⁹ Distortion and subjugation of African sexualities cannot, however, be limited to Western researchers alone. As argued by Mahmood Mamdani, postcolonial Africanists have failed to deconstruct the colonial state and its ideology and have continued to propagate its schewed narrative throughout the post-colonial period.¹⁰⁰

Criminalisation of same-sex sex through a colonial ‘sodomy’ laws is an important tool that has been used to subjugate same-sex sex in Africa on the basis of claims of protection of the traditional African Family unit.¹⁰¹ These claims of protecting the African family unit have also been found to be unfounded. According to Sebastian Maguire, these claims form part of the dominant narrative in Kenya, and are based on the underlying assumption that homosexuality is ‘contagious’ and has potential to kill the family as understood by African¹⁰²s. Yet, in countries such as Niger, Mali, Burkina Faso and Congo which have never criminalised homosexuality do

⁹⁷ Ibid

⁹⁸ B Dlamini ‘Homosexuality in the African context’. (2006). Agenda Special Issue on Homosexuality, 67 128-36.

⁹⁹ Marc Epprecht, *Heterosexual Africa? The history of an idea from the Age of Exploration to the Age of AIDS*, (Athens and Scottsville: Ohio state University Press and University of Kwa-Zulu Natal 2008). p 23

¹⁰⁰ See generally Mahmood Mamdani, *Define and Rule: Native as Political Identity*, (USA: Harvard University Press, 2012).

¹⁰¹ Sebastian Maguire, *The Human Rights of Sexual Minorities in Africa* supra note 68 above, p 2.

¹⁰² Ibid

not have ever-increasing population of gay men and lesbian women, and the traditional African family unit which forms part of their respective societies is alive and well.¹⁰³

This report argues that there are all indications that suggest criminalisation of same-sex sexual conduct actually increases the risk of HIV infection, not just among men who have sex with men, but in the wider society.¹⁰⁴ One of the underlying principles of successful HIV programming is non-discriminatory access to sexual health services. There is overwhelming medical and scientific evidence, promulgated by international organisations such as UNAIDS, which demonstrate criminalisation of homosexuality has severe negative consequences - and therefore public health in general - continued criminalisation exacerbates the situation.¹⁰⁵

South African jurisprudence demonstrates the injustice of criminalisation of same-sex sexual relationships. In the *National Coalition for Gay and Lesbian Equality vs. Minister of Justice*, the court placed significant emphasis on the fact that the general trend in open and democratic societies had been towards decriminalisation of sodomy - a trend which provides further support for the contention that there is no legitimate purpose served by criminalisation. It accordingly endorsed the order of the High court that the common law offence of sodomy, as well as its incorporation into the relevant statutes were unconstitutional and invalid.¹⁰⁶ Some scholars have argued that laws that criminalise sexual behaviour do much more than just regulate through prohibition and control; it creates notions of identity.

Phillips posits that the law, like any form of power, does not just prohibit and control; it does not simply denounce and discredit. It also produces and delivers, and it has the capacity to empower

¹⁰³ Ibid

¹⁰⁴ Ibid

¹⁰⁵ Ibid p 3

¹⁰⁶ *National Coalition for Gay and Lesbian Equality vs. Minister of Justice and others* (1998) (6) BCLR 726, Para 73.

people. It engenders behaviour, it generates ideas and action, it bounds individual responsibility as well as promoting individual capacity and agency, and in so doing, it constitutes individualised notions of identity.¹⁰⁷ In his view, the laws defining sexual offences play a role in giving shape to gender and conceptions of sexuality, they regulate relations between individual people and shape interaction between men and women, and between different men, and different women.¹⁰⁸ The reward certain behaviour and punish other behaviour, and in doing so assess behaviour which fits or does not fit with certain conceptions of masculinity and femininity.¹⁰⁹

Another common charge by the dominant political and religious class in Kenya that homosexuality is “against nature” has also been found not tenable. In Jack Donnelley’s thoughtful analysis, which echoes the arguments by social constructionists such as Foucault, sexuality and sexual orientation are constructed sets of social roles.¹¹⁰ Donnelley further argues that in any event, appeals to natural law are largely outside of the discourse of international human rights.¹¹¹ And as demonstrated by social constructionists such as Foucault and David Halperin among others elsewhere in this chapter, it is true that for extended period tolerated, and even highly valued, (male) homoerotic relationships.¹¹²

Donnelley convincingly argues that even accepting, for the purposes of argument, that voluntary sexual relations among adults of the same sex are a profound moral outrage, discrimination

¹⁰⁷ Oliver Phillips, *Constituting the Global Gay*: supra note 73 above, p 21-22.

¹⁰⁸ Ibid

¹⁰⁹ Ibid

¹¹⁰ Jack Donnelley, *Non-Discrimination and sexual Orientation: Making a Place for sexual Minorities in the Global Human Rights Regime*. In Peter Baehr, Cees Flinterman, and Mignon Senders (eds.), *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights*. Amsterdam: Royal Netherlands Academy of Arts and Sciences, 1999, p 93-110. *Journal of Interpersonal Violence*, 5, 316-333

¹¹¹ Ibid

¹¹² See generally Michel Foucault, *An Introduction*. Vol. 1. Translated from the French by Robert Hurley. (Pantheon Books: New York, 1978).

against sexual minorities cannot be justified from a human rights perspective.¹¹³ In his view, “perverts” and “deviants” have the same human rights as the morally pure, and should have those rights guaranteed by law.¹¹⁴ Members of sexual minorities are still human beings, no matter how deeply they are loathed by the rest of society. Therefore, they are entitled to equal protection of the law and the equal enjoyment of all internationally recognised human rights.¹¹⁵

The argument that sexual minorities suffer from mental illness and require psychiatric attention is also fallacious. This argument has been professionally discounted, following scientific studies by Kinsey¹¹⁶ and Evelyn Hooker, in 1990, the World Health Organisation removed homosexuality from the International Statistical Classification of Diseases and Related Health Problems (ICD).¹¹⁷ The American Psychiatric Association removed homosexuality (which was defined as a mental disorder) from the Diagnostic and Statistical Manual of Mental Disorders

¹¹³ Jack Donnelley, supra note 110 above p 95

¹¹⁴ Ibid

¹¹⁵ Ibid

¹¹⁶ One of the first and probably the most well-known scientific studies on the prevalence of homosexuality in the general population of the United States of America (USA) was that of Kinsey and colleagues in the 1940s. Kinsey’s classification attempted to move away from a dichotomous classification of wither homosexual or heterosexual and is based on a continuum that measures sexual orientation according to seven categories from 0 (exclusively heterosexual) to 6 (exclusively homosexual). The classification is based on past sexual behaviour or experience, and Kinsey referred to as psycho-sexual reaction (such as desire or fantasy). Kinsey’s work has been termed revolutionary because he focused on people’s sexual experiences rather than their sexual identities, and used the terms “heterosexual” and homosexual” as adjectives to describe behaviour, not people

¹¹⁷ Following in the footsteps of Kinsey, Dr. Evelyn Hooker would later specifically study differences in the psychopathology between heterosexuals and homosexuals at the urging of a gay individual and confirm Kinsey’s hypothesis. The first published study comparable to the psychological functioning of non-clinical sample of homosexual was conducted by Evelyn Hooker, and published in the journal of Projective Techniques in 1956. Hooker administered projective test to men who were members of a homosexual organisation in southern California, and to a sample of heterosexual men matched for age, education and IQ. A panel of experts unaware of each participant’s sexual orientation judged most men in both groups to be free from psychopathology. Using Rorschach protocols, they could not differentiate the homosexual men from the heterosexuals at a level better than chance. Hooker concluded from her study that homosexuality did not constitute a clinical entity and that it was not inherently associated with pathology. Evelyn Hooker’s pioneering research debunked the popular myth that homosexuals are inherently less mentally healthy than heterosexuals, leading to significant changes on how psychology views and treats people who are gay. For example, Hooker’s work was the first to empirically test the assumption that gay men were mentally unhealthy and maladjusted. The fact that no differences were found between gay and straight participants sparked more research in this area and began to dismantle the myth that homosexual men and women are inherently unhealthy.¹¹⁷

(DSM) in 1973.¹¹⁸ The Chinese Society of Psychiatry removed homosexuality from its Chinese Classification of mental Disorders in 2001 after five years of study by the association.¹¹⁹ In December 2012 The American Psychiatric Association approved changes to the Diagnostic and Statistical Manual of Mental Disorders to the effect that there will no longer be a diagnosis of “Gender Identity Disorder”. Instead, the new classification of “Gender Dysphoria” will acknowledge the emotional distress that can arise from incongruence between the gender identity that a person experiences and expresses, and the one assigned to them (usually since birth).¹²⁰ The last twenty years have signaled some success in the international gay rights movement.¹²¹

The divergence of scholarly opinions about the historiography of homosexualities and gender multiplicities in Africa notwithstanding, many agree that many forms of same-sex relationships and gender identities existed and still exist in Africa today. LGBT movements and groups have emerged openly in some countries, including Namibia, Kenya, Senegal, Nigeria, among many others and although they may not constitute a distinct social class, LGBT people are, no doubt existent in contemporary Africa.¹²² The modern international human rights movement began after the atrocities committed during World War II. Unfortunately, sexual orientation and gender identity were not initially recognised as important human rights issues.¹²³ However, there has

¹¹⁸ Discrimination on grounds of sexual orientation and gender identity in Europe. Council of Europe Publishing, 2011. Available at www.coe.int/t/Commissioner/Sources/LGBT/LGBTStudy2011_en.pdf. (Accessed on 2nd December, 2015)

¹¹⁹ Ibid

¹²⁰ Fergus Kerrigan, Getting to Rights: The Rights of Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Africa, The Danish Institute For Human Rights. Available at um.dk/en/-/media/UM/English-site/Documents/Danida/Partners/R. (Accessed on 5th December, 2015).P 33

¹²¹ See Richard Isay, Let Civility Reign in Homosexuality Debate; Removing the Stigma, N.Y. TIMES, Sept. 2, 1992 at A 18.

¹²² Sybille N. Nyek and Marc Epprecht, Sexual Diversity in Africa: Politics, Theory, Citizenship (McGill-Queen’s University Press 2013), p 21

¹²³ Human Rights protections for Sexual Minorities in Insular Southeast Asia: Issues and Implications for Effective HIV Prevention. Published by the UNESCO Asia and Pacific Regional Bureau for Education, UNESCO 2011, p 5.

been growing consensus that discrimination on the basis of sexual orientation and gender identity runs contrary to fundamental human rights principles and international law.¹²⁴

According to Narayan, sexual minorities have made substantial progress in obtaining protections of their basic human rights in countries such as Australia, parts of Latin America, North America, South Africa and Western Europe.¹²⁵ As discussed in more detail in chapter four of this thesis, the issue of LGBT persons' rights is now often discussed in the framework of The Universal Declaration of Human Rights, Adopted by UN General Assembly Resolution 217 A (III) of 10 December 1948.¹²⁶ UDHR which proclaims the;

inherent dignity and...the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.“ Human rights are the inalienable rights that a person has simply because he or she is a human being.¹²⁷

This means that one cannot lose these Rights any more than you can cease being human. Human rights are indivisible which means that you cannot be denied a right because it is “less important” than another right. Human rights are also interdependent. This means that all human rights complement each other and are mutually reinforcing to one another. Human rights are also defined as those basic standards that people need to live in dignity. To violate someone's human rights is to treat that person as less than a human being.¹²⁸ While the UDHR and subsequent international human rights documents do not explicitly mention sexual orientation or gender identity, evolving conceptions of international human rights law include a broad interpretation to include the rights and protection of the rights of LGBT people around the world. Regional instruments applicable to violations based on sexual orientation and gender identity include the

¹²⁴ Courtney E. Finerty, *supra* note 30 above, P 433.

¹²⁵ Pratima Narayan, *supra* note 37 above, p 313.

¹²⁶ Lotta Samelius, and erik Wagberg, *Supra* note 5 above, p 14.

¹²⁷ *Ibid*

¹²⁸ *Ibid*

African Charter on Human and Peoples' Rights (ACHPR), the European Commission on Human Rights (HER) and the Inter-American Charter on Human Rights (ACHR).¹²⁹ The international human rights system is based on the concept of which holds that there is an underlying human unity which entitles all individuals regardless of their cultural or regional antecedents to certain basic minimal rights known as human rights. Every human being is entitled to human rights on the basis that they are human.¹³⁰

Kenya has ratified a plethora of international human rights treaties and conventions which guarantee equality and non-discrimination, and which have been purposively been applied to recognise, promote and protect sexual minorities. These instruments include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, social and Cultural Rights (ICESCR), the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the elimination of all forms of racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), International Covenant on Economic, social and Cultural Rights (ICESCR), the convention on the Rights of the child (CRC). Kenya ratified the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment¹³¹ on 2st February, 1997; Kenya ratified the (CEDAW)¹³² in 1984; Kenya ratified the (CERD) on 20th June, 1994; Kenya ratified the (ICCPR), guarantees civil and political rights as the

¹²⁹ Ibid

¹³⁰ Elizabeth M Zechenter, In the Name of Culture: Cultural Relativism and the Abuse of the Individual. *Journal of Anthropological Research*, Vol. 53, No. 3, Universal Human Rights versus Cultural Relativity (Autumn, 1997), p 19-347

¹³¹ Convention against Torture and other cruel, inhuman, degrading treatments or punishments. (Hereinafter referred to as Convention Against Torture (CAT)). GA, Res. 39/46, (Dec.10, 1987) available at: <http://www.un.org/documents/ga/res/39/a39r046.htm>.

¹³² Convention on the Elimination of All Forms of Discrimination against Women, adopted on 18/12/1979, General Assembly Resolution 31/180, UN.G.A.O.R, 34 the Session, Supp. No 46. UN. Doc. A/34/36/ (1980), entered into force 3/9/1981.

foundation of liberty, on the 1st May, 1972; Kenya ratified the (ICESCR) on the 23rd March, 1976; Kenya ratified the (CRC) in 2000. Narayan demonstrates in her analysis that, six of eight of these treaty bodies have interpreted their establishing conventions to include sexual orientation. Additionally, these treaties require that states parties take positive measures to realise their provisions.¹³³

Additionally and to her credit, Kenya's 2010 Constitution incorporates international human rights standards and principles as part of its domestic law, a move that offers hope for sexual minorities. Most importantly, it incorporates the principles of equality and non-discrimination, as well as guaranteeing individual rights and fundamental freedoms. Apart from its normative character, the Kenyan Constitution has entrenched institutions of Parliament and the Judiciary with express mandates to protect and promote the human rights of all Kenyans equally and without discrimination. It spells out remedies for breaches of these rights as well as mode of interpretation upon the judiciary as a decision-making body which stress critical thinking, dignity, purposiveness, inclusiveness and competence in decision-making. Taking all these into consideration, the Constitution has the potential for transformative constitutionalism and in this regard, interpreted with competence and dignity in Finnisian sense, the Constitution, through the institutions of Parliament and the judiciary, has the potential to protect and promote the human rights of all, including sexual minorities. However, despite the Constitution's progressive stance, these institutions face many challenges that militate against their potential to protect and promote

¹³³ Esther Muringo Murigu, challenges of normalising and implementing gay rights as part of the international human rights: case study of Kenya. Master of Arts International Studies, University of Nairobi, 2014, p 19.

the human rights of sexual minorities. This situation exposes them to threats of state-sanctioned persecution from non-state actors as well.¹³⁴

The two basic international human rights principles of prohibition against discrimination and the guarantee of equal and effective protection against discrimination have therefore, not been applied equally to those who face discrimination based on sexual orientation and gender identity in Kenya. Other individual rights and fundamental freedoms such as right to privacy, freedom of association, freedom of assembly, freedom from torture and inhuman treatment, access to information among others as well as socioeconomic rights such as right to work, health, education, shelter among others remain unfulfilled for sexual minorities. Additionally, Parliament is yet to respond to the imperatives of international human rights by enacting domestic legislation to protect and promote the rights of LGBT people and neither has it moved to repeal laws that criminalise consensual gay sex between adults. The inertia by the institutions of Parliament and the Judiciary to use their immense and liberal power under the constitution to protect the human rights of sexual minorities through critical and queer legislative and judicial decision making makes a case for this study.

1.1: PROBLEM STATEMENT

In 2010, Kenya adopted a new Constitution after a long struggle by the people of Kenya to change their governance which had been plagued by among other things, autocratic governance characterised by, among other things, corruption, marginalisation and discrimination against most minority people, leading to massive human rights violations. The legislature and the judiciary as justice institutions were not known for critical decision making in the service of the people. The Constitution of Kenya 2010 is a rich Constitution which guarantees good governance and respect for human rights. Like international human rights law, the Constitution

¹³⁴ Pratima Narayan, *supra* note 37 above, p 315.

guarantees equality and nondiscrimination for all people and it also places high standards of dignity, competence and integrity on legislators and judges in their decision making actions. It allows the application of international human rights jurisprudence which can be used to challenge the pervasive heteronormative culture. Although the Constitution of Kenya 2010 is transformative and emancipatory in nature, the legislature has not enacted laws to protect sexual minorities and has also failed to repeal colonial laws that criminalise adult consensual same sex which does not harm other people. Although to some extent the judiciary has become critical in decision making and has realised progressive judgments in favour of sexual minorities, it however, risks duality in jurisprudence on sexual minorities between progressive judges and conservative, non-critical judges, to the detriment of full protection of LGBT people. The problem of this study is how the legislature and the judiciary can be made to exercise their constitutional mandates of decision making in a transformative, critical and queer manner to protect sexual minorities in the country.

1.2: RESEARCH QUESTIONS

1. What is the nature and extent of heteronormativity in Kenya and how does it impact on the human rights of sexual minorities?
2. In what ways can the constitutionally revamped legislature and the judiciary as institutions of justice apply principles of practical reasonableness to queer and transform their decision-making actions in order to protect sexual minorities?
3. How have international and regional human rights treaty bodies, and national judicial and legislative bodies applied principles of practical reasonableness to challenge heteronormativity

through queered and transformative decision-making towards protection of sexual minorities?

4. In view of the pervasive nature of heteronormativity, what legal and non-legal mechanisms are necessary to protect and promote the human rights of sexual minorities in Kenya?

1.3: STUDY OBJECTIVES

1. To examine the nature and extent of heteronormativity in Kenya and how it impacts on the human rights of sexual minorities;
2. To demonstrate how legislative and judicial bodies elsewhere have applied queer and principles of practical reasonableness towards interpretation of international human rights standards and principles to avail justice to sexual minorities;
3. To examine how Kenya's Parliament and the Judiciary can emulate other jurisdictions and adopt queer and principles of practical reasonableness critical and transformative approaches to protect sexual minorities;
4. To propose both legal and non-legal approaches to ensure the recognition, protection and promotion of the human rights of sexual minorities in Kenya in view of the pervasiveness of heteronormativity.

1.4: LITERATURE REVIEW

This section provides an overview of some of the significant literature in the field of the human rights of sexual minorities. The study duly recognises the importance of existing literature and the review is undertaken with the aim of building on the existing literature and of creating an alternative platform upon which issues of marginalisation of LGBT persons in Kenya can be canvassed, reevaluated and /or renegotiated. The study agrees with Heike Becker in underscoring the importance of existing literature as researchers depend on the result of their predecessors

when conducting research.¹³⁵ Indeed research is impossible when previous methods and results are not considered.¹³⁶ Due to the vast nature of the literature, and because this research project problematises heteronormative definitions of sex and gender identity, the literature review offered here centers primarily on historical analyses in ancient antiquity, social constructionism, scientific, and queer scholarship. This literature review therefore follows these main lines of debate.

The literature review focuses on heteronormativity in Kenya and how it affects the day to day lives of sexual minorities. It provisionally identifies four gaps in the existing literature which the present thesis addresses: Ways through which the constitutionally revamped parliament and the judiciary as institutions of justice can better utilise their constitutionally mandated critical and transformative mandate to recognise and protect sexual minorities in Kenya; How international, regional and national legislative and judicial institutions have approached decision making in their interpretation of the international human rights standards and principles to recognise, protect and promote the human rights of sexual minorities; What legal and non-legal mechanisms are necessary to protect and promote the human rights of sexual minorities in Kenya.

The area of the human rights of sexual minorities in Kenya, though important, has not attracted much academic and intellectual rigour or attention. However, recent times have witnessed scholarly interest in the subject, which has hitherto been considered taboo and shameful. Such interest is a study carried out on the human rights situation of sexual minorities in Uganda and although not comparative in nature, makes a cursory reference to sexual minorities in Kenya.

¹³⁵ Heike Becker, Efundula: Women's initiation, Gender and sexual Identities in colonial and Post-Colonial Northern Namibia, In Signe Arnfred (ed), Re-thinking Sexualities in Africa, (Almqvist&WiksellTrykeri AB, 2004), P 35.

¹³⁶ Ibid

Titled 'Forbidden Identity: the link between lack of LGBT-rights and marginalisation',¹³⁷ Mari Størvold Holan notes that homosexuality is illegal in Uganda by virtue of a British colonial sodomy law incorporated in the penal code, which bans "carnal knowledge against the order of nature". She notes that the interpretation extends to all homosexual practices, including consensual relations between same sex adults. Initially the legislation was intended for men having sex with men but women can also be convicted. On the basis of these laws, suspected and confirmed members of the LGBT-community in Uganda are arrested and detained for days, subjected to torture, sexual violence.¹³⁸

The study further notes that prominent figures in Ugandan society claim that homosexuality is a western decadence and perversion that is threatening to destroy African tradition and values. By making same-sex intimacy equal to European influence in Africa, political leaders have united the people against a common enemy, creating nationalistic pride in the traditional Ugandan culture and morality.¹³⁹ The state-sponsored homophobia, spearheaded by President Museveni and the Minister of Ethics and Integrity along with religious leaders, justifies the police violence and mob justice. Holan compares the situation of homosexuals in Uganda and Kenya, noting that Kenya is less harsh to homosexuals where they escape to from Uganda if they want to "party".¹⁴⁰ Other than noting the relative leniency that sexual minorities experience in Kenya, there is not much else on the true human rights situation of sexual minorities in Kenya and how their situation can be improved.

¹³⁷ Mari Størvold Holan, 'Forbidden Identity: the link between lack of LGBT-rights and marginalisation'. Master's Thesis for Award of Mphil in Development Studies, Norwegian University of Science and Technology (NTNU) Trondheim, May 2009.

¹³⁸ Ibid, p 13.

¹³⁹ Ibid

¹⁴⁰ Ibid

Another important study is a comprehensive research on LGBT people and their human rights situation by the Kenya Human Rights Commission (KHRC). Through a countrywide research, the study examines the human rights situation of sexual minorities in the country. In its ensuing groundbreaking report published in 2012 titled “*The Outlawed amongst us*”, the KHRC notes that LGBT individuals in Kenya face discrimination and massive human rights abuses. It states that LGBT persons are misunderstood discriminated against and denied enjoyment of individual rights and fundamental freedoms, which are enjoyed by their heterosexual counterparts as a matter of course.¹⁴¹ The study further states that LGBT persons are often harassed by state officials, who enforce heteronormativity against presumed homosexual expressions, extort for bribes or ask for favours and change those who do not comply with their demands with trumped up charges. It further noted that there is a deliberate failure by the state to protect LGBT persons from discrimination both in policy and legislation.¹⁴²

Transgender persons, notes the report, have no legal framework that can enable them to change to their preferred genders or undergo or not undergo surgery to change their gender, while same-sex is criminalised by the existing anti-sodomy laws in the country’s Penal code, thus making them live a life like other common criminals. The Kenya Human Rights’ Report found that there is a lot of ignorance about transgender people, coupled with lack of legislative framework to govern their issues. Kenyan law and practice only recognises the male and female gender, and there is no legal framework that allows or facilitates Transgender individuals to choose their gender and have it recognised by law.

¹⁴¹ The Kenya Human Rights Commission conducted a series of interviews with 474 LGBT Kenyans aged eighteen to sixty-five to document their experiences of homophobia within the country. Kenya Human Rights Commission, *The Outlawed Amongst Us: A Study of The LGBTI Community’s Search For Equality and Non-discrimination in Kenya* 19 (2011), p 19.

¹⁴² Ibid

This study is critical in the sense that it is a trail-blazer on a subject that has been hitherto an intellectually no-go zone. It exposes the blatant violation of the human rights of sexual minorities by both state and non-state actors. But more importantly, the study puts the sexual minority discourse into the public arena, which is important as indeed invisibility is one of the most important handicaps that sexual minorities in the country face. The study recommends a raft of measures to combat discrimination against LGBT people.

In a report titled '*The Annual Progress Report: An Assessment by Stakeholder of Government's Performance in Implementation of UPR Recommendations*',¹⁴³ the Kenya National Commission on Human Rights (KNCHR), in partnership with the Kenya Stakeholders Coalition for the Universal Periodic Review (KSC-UPR) launched the report which noted that Kenyan society is not yet ready to decriminalise LGBT issues that are still considered 'morally unacceptable'. It then recommended that the Government undertakes civic education initiatives to raise awareness on anti-discrimination and sexual orientation and gender identity issues. In general, it was noted that the Government is not doing enough to move forward on the issues of sexual orientation and gender identity, and has not taken any steps with regard to the status of transgendered persons.¹⁴⁴

On the issue of torture, the Commission urges that the Prevention of Torture Bill should be passed, and that the government should ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention". Further, the Commission recommended Kenya's ratification of International Treaties and was specifically urged to fast-track the Ratification of Treaties Bill, and to ratify Optional Protocol for the International Convention of the Rights of All Migrant Workers and

¹⁴³The Annual Progress Report: An Assessment by Stakeholder of Government's Performance in Implementation of UPR Recommendations'. Available at <http://www.icj-kenya.org/index.php/media-centre/new/420-knchr-upr-report-launch#stash.9kiFVx17.dpuf>. (accessed on 3rd October 2014).

¹⁴⁴ Ibid

Members of their Families, the Convention on the Prevention and Punishment of the Crime of Genocide, and ILO Convection 169.¹⁴⁵These recommendations have a direct implication on upholding the human rights of sexual minorities. This report is important as it also highlights the human rights violations that sexual minorities in Kenya face. However, it does not identify the constitutional institutions of Parliament and the Judiciary as being central in addressing the human rights situation of sexual minorities in Kenya.

In a study carried out by Scott Geibel, on HIV/AIDS and Men who have sex with Men (MSM) in Kenya, the study found gross violations of the human rights of men who have sex with men especially in accessing healthcare. The study found that same-sex is commonly perceived to be “un-African” or contrary to cultural norms, and believed to be a behaviour or practice that was learned or “imported” from outside cultures.¹⁴⁶The study found that the consequence of threats that leaders and society direct against people who engage in same-sex sexual practices lead to stigma and discrimination.¹⁴⁷ The study also found that Public or interpersonal exposure of their sexual preferences or behaviours potentially put MSM at risk of emotional and /or physical harm.¹⁴⁸This study is important to the extent that is also highlights the human rights violations of sexual minorities. It is also important in that it explains the discourses that underpin unconventional sex in Kenya. As important as it is, the study, however, does not place its focus

¹⁴⁵ Ibid 9 10

¹⁴⁶ Scott Geibel, Implication for HIV Prevention, Program, and Policy, supra note 3 above, p 11.

¹⁴⁷ Ibid

¹⁴⁸ The Gay and the Lesbian Coalition of Kenya (GALCK) is the national umbrella body for Kenyan organisations working for the rights and social well-being and gender minorities. At policy, GALCK advocates legal and policy reforms, including the decriminalisation of consensual same-sex activity, the protection of LGBTI persons from discrimination and violence, and the protection and promotion of their health rights. Furthermore, the organisation seeks to transform negative attitudes and behaviour towards sexual and gender minorities by disseminating information and educational material that counteracts prejudice and ignorance. Ensuring access for LGBTI persons to sexual and reproductive health services tailored to their needs is one of the organisation’s core objectives.

on how the Constitution of Kenya and its institutions of Parliament and the Judiciary can be used to improve the human rights situation of MSMs.

The recent work by Courtney Finerty demonstrates the unconstitutionality of the existing anti-sodomy laws in Kenya's Penal Code. In his seminal paper titled *"Being Gay in Kenya: The Implication of Kenya's New Constitution for its Anti-Sodomy laws"* Finerty discounts the "Un-African" thesis that is used in Kenya to legitimate the existence the anti-sodomy laws in Kenya's Penal code. Finerty notes that homophobia and not homosexuality was imported into Kenyan culture from the West.¹⁴⁹ Tracing the history of the pre-colonial Kenya traditional legal system and the introduction of the colonial legal system, Finerty notes that when Kenya achieved independence in 1963, the new government inherited, recognised and applied the former British legal system, including its Colonial Office Model code. As Kenya's anti-sodomy laws originated from this penal code, they are ultimately reflective of British norms and morally, as opposed to embodying traditional Kenya ideals.¹⁵⁰ This is not to argue that sexual minorities were celebrated or even accepted in pre-colonial Kenya. However, the sentiments that being gay is anti-Kenya fails to acknowledge the crucial role that the West played in entrenching homophobia into Kenya's legal system and its continuous role in preventing LGBT Kenyans as well as LGBT individuals in other African countries from having legal rights.¹⁵¹ The study is critical in the sense that it analyses and exposes the unconstitutionality of the anti-sodomy laws that exist in Kenya's Penal code in the context of the inclusive nature of the Constitution of Kenya 2010.

Another study on LGBT issue in Kenya was undertaken by Esther Muringo Murugi titled *"Challenges of Normalising and implementing gay Rights as Part of the International Human*

¹⁴⁹ Courtney Finerty, *Being gay in Kenya*, supra note 30 above, p 416.

¹⁵⁰ Ibid

¹⁵¹ Ibid

Rights: A case Study of Kenya". This study examines the international legal framework policies and institutions that provide support for LGBTs and the link between LGBT Rights and health rights. Further, it seeks to determine factors that inhibit initiatives to put gay issues in international human rights agenda in Kenya and how LGBT rights can be enforced in health provisions.¹⁵² Murigu notes that even though two fundamental rights of prohibition of discrimination and the guarantee of equal and effective protection against discrimination on any ground to all people, these principles have not been applied equally to those who face discrimination based on their sexual orientation and gender identity.¹⁵³ The study notes that Kenya still retains anti-sodomy laws in its statute books, in spite of availability of empirical evidence that these laws violate both international human rights law and Kenya's own Constitution.¹⁵⁴

The study notes that although the laws are rarely enforced, LGBT Kenyans are still prosecuted and imprisoned under these laws. Furthermore, the laws codify and legitimise 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 instill fear, facilitate abuse, and prevent LGBT Kenyans from achieving the equality to which they are legally entitled.¹⁵⁵ This study notes that 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 ostracised.¹⁵⁶ This study is an important and a bold milestone in studies on sexual minorities in Kenya and a good critique of the lack of legal framework that can address them. It

¹⁵² Esther Muringo Murugi, *supra* note 133 above, p 8.

¹⁵³ *Ibid* P v.

¹⁵⁴ *Ibid* p 8

¹⁵⁵ *Ibid* p 12

¹⁵⁶ *Ibid* p 19

should also be noted that the study was also undertaken during the old constitutional order, and therefore its analysis is not informed by the gains of the Constitution of Kenya, 2010.

1.4.1: A comment on the literature

The literature discussed above demonstrates that there is developing scholarly interest in the issues of sexual minorities in Kenya. Most of the literature cited has focused on the exposure of the human rights violations that sexual minorities in Kenya endure in their day today lives. Most of it is also grounded in health research, thus locating interest in the impact of attitudes on the health situation of sexual minorities. None of them problematises heteronormativity and also although extremely relevant and useful, none has specifically examined the implementation potential of the Constitution of Kenya 2010 and its institutions of justice. None of them explores how a multifaceted approach to protection of the human rights of sexual minorities through legal and non-legal approaches could be useful. There is, therefore a gap in literature in three areas: one, the problematisation of heteronormativity, two, the recognition of the central role of the institutions of Parliament and the Judiciary in their decision-making roles in implementing international human rights standards and principles and three, the application of a multifaceted approach to protection of the human rights of sexual minorities, a gap that the present study seeks to fill.

1.5: HYPOTHESES

1. That heteronormativity is Kenya's culture and it has adverse human rights implications on the human rights of sexual minorities in the country;

2. That since the adoption of the UDHR and the international bill of Rights, UN treaty bodies, regional and national legislative and judicial bodies have adopted queer and principles of practical reasonableness to protect sexual minorities;

3. That inspite of the emancipatory, progressive and inclusive Constitution of Kenya 2010, the legislature and the judiciary have not adopted queer and principles of practical reasonableness in their decision-making actions to challenge heteronormativity and protect sexual minorities;

4. That heteronormativity in Kenya is pervasive and insidious and needs multi-faceted approaches, both legal and non-legal, to combat it.

1.6: JUSTIFICATION OF THE STUDY

This study is justified for various reasons. For over a period of over thirty years, Kenyan people struggled to get a new constitution order in which good governance, the rule of law and respect for human rights, would be guaranteed. The struggle was triggered by the problems of the then independence Constitution which had several shortcomings. First and foremost, the independence Constitution was a libertarian document that made several assumptions about equality and respect for human rights. While it guaranteed the traditional civil and political rights, it did not recognise economic, social and cultural rights which impact on the daily lives of people. It had no guarantees on the all-important principles of equality, equity and nondiscrimination. It had no provisions setting standards for implementation of human rights. It served the traditional job of any constitution that is creating and distributing power among the organs of government without placing a mandate on how they can exercise their decision making mandates in a manner that promoted human rights.

Secondly, over the years, the independence Constitution underwent vicious amendments which centralised power in the presidency and in the process destroyed all the checks and balances that

were meant to ensure democratic governance. The institutions of the legislature and the judiciary (including the executive) were completely emasculated. Legislators danced to the tune of the president, while judges of doubtful competence and integrity standing were solely picked by the president, thereby limiting their independence in their day to day decision making. In their day to day decision making, the legislators and the judges lacked independence and competence, and displayed no dignity in their work. Their decision making actions did not respect the needs of Kenyans and neither did they promote the rule of law and respect for human rights. Thirdly, the independence Constitution did not have provisions that put premium on ethics upon decision makers such as legislators and judges and therefore did not call for integrity and competence on such public officers in their decision making roles.

In complete contrast, the Constitution of Kenya 2010 is hailed rightly as a progressive and transformative document laden with a value system and having provisions that require integrity, dignity and competence of the part of decision making in their day to day actions in serving the people. Further, it has a strong normative structure which includes a powerful Bill of Rights that includes civil and political rights as well as social, economic and cultural rights, which have to be respected and promoted in decision making. It also has incorporated international human rights principles of equality and non-discrimination, which the UN bodies, regional human rights bodies as well as some national institutions have interpreted to include and protect sexual minorities.

This development calls for critical and transformative approaches which include queer methods and principles of practical reasonableness, to decision making on the part of this bodies, to move away from the textual, dogmatic and conservative approaches o the past that led to discrimination against unpopular or powerless citizens such as sexual minorities or insular

minorities. Through express provision requiring progressive decision-making while interpreting the law by judges and in making the law by the legislature, Kenya's legislature and judiciary are in a position to transform the lives of sexual minorities who have suffered human rights violations and continue to do so, due to the pervasive heteronormative culture in the country.

The legislature and the judiciary are yet to exercise this power in a responsible and egalitarian manner and with the integrity required of them when dealing with the marginalised sexual minorities. Although a few progressive judgments have recently emanated from the High Court of Kenya regarding registration of an Association for LGBT persons, intersex and transgender persons, the majority of decision-makers in these institutions remain uncritical, literal, dogmatic and conservative in their approach and have therefore not produced much jurisprudence that can guide the country in protecting sexual minorities. They still remain victims of universalising and binary-based understandings of sexuality and gender identities. Further, international human rights standards and principles created by UN treaty bodies have been able to protect sexual minorities. These standards and principles are now part and parcel of Kenya's constitutional dispensation and can be purposively applied to guarantee inclusivity and respect for all Kenyans. From the literature studied, a number of studies have been carried out on sexual minorities in Kenya, which have confirmed that they are discriminated against and that they face serious human rights violations.

However, there is paucity of literature on how the institutions of Parliament and Judiciary in Kenya as institutions of justice can exercise their power to protect and promote the human rights of sexual minorities through their decision-making actions. Hopefully, this study will also serve as an all-encompassing intellectual monograph for reference by legislators and Judges and will also contribute to the pool of literature that will be used by policy makers, scholars of social

science, legal practitioners, academics, law students and ordinary citizens to understand sexuality as a whole and the human rights of sexual minorities in particular.

1.7: METHODOLOGICAL PERSPECTIVES IN THE COLLECTION AND ANALYSIS OF PARTICIPANT NARRATIVES

This study investigation draws upon qualitative research methods because “their focus on meaning creation and the experiences of the everyday life fit well with the movement goals of visibility, cultural challenge, and self-determination”¹⁵⁷ of sexual minorities. The study, however, eschews the traditional scientific-based qualitative methodology and opts for Queer qualitative methodology. The reason for this preference is that traditional hegemonic qualitative approach enables participants to be the research and results. Thus, the study faults traditional scientific methods due to their hegemonising and universalising assumptions. It argues that such hegemonising qualitative methodologies are often employed to use research subjects’ experiences and testimonies to act as homogenous “truth” derived from observation of individual experiences.¹⁵⁸ However, the individual experiences act as a universal construction of truth that ignores cultural and historical specificities, which sexuality poses. As rightly argued by Michel Foucault, sexuality, sexual orientation and gender identities are products of culture and history and should be understood as such.¹⁵⁹

According to Ferguson, the objective of some social scientific-based qualitative methodologies is to prove a hypothesis by exposing “data” from human subjects.¹⁶⁰ The application of scientific discourse to understanding of human behaviour and experience in relation to cultural and social processes and specificities renders research participants as “test” subjects and entrenches them

¹⁵⁷ Jau Gamson. Sexualities, Queer Theory, and Qualitative Research, p 347-65 in Handbook of Qualitative Research, 2nd edition, edited by Denzin N., Lincoln Y. Sage, 2000), p 348.

¹⁵⁸ Ibid

¹⁵⁹ Ibid

¹⁶⁰ Ibid

into what he rightly calls “discourse of scientific constraint”.¹⁶¹ This study proposes the inclusion of ‘queer theory’ insights into its research. Adopting queer methodology will show that while traditional social science research methods aspire for the objectivity of science, this aspiration is often complicit in a regulatory regime which does less to liberate LGBT experiences, than to account for it, limit it, and often attempt to convert it to something ‘normal’ and acceptable.

Queer methodology based on poststructuralist perspective on research design/preparation, narrative collection, analysis, presentation and self-reflectivity and monolithic-based inquiries is used in this study to deconstruct qualitative methodology born of scientific discourse.¹⁶² Queer methods help to deconstruct hegemonic qualitative practices in order to appreciate and listen to queer and Trans subjects when employing qualitative research and methods. It also helps to challenge the problems of imposing binary-based categories that not only obscure through understandings of gender but also perpetuate social justice.¹⁶³ As a clear departure from the scientific qualitative approaches which view research participants as objects from which “data” is collected and analysed, this study refers to “narrative collection” and “narrative analysis” instead of “data collection” and “data analysis” because the participants are not objects but are individual subjects that have a story to tell.

1.7.1: Narrative Collection

Key informant interviews were used to collect information from a wide range of people. The method was used to gather data from heads and leaders of human rights organisations, the Attorney General’s Chambers, members of the Parliamentary human rights caucus, former

¹⁶¹ Joshua Ferguson, Challenging Scientific Constraint In the Appreciation of Queer and Trans Subjects. *The Qualitative Report*, 2013, Vol. 18 No. 25, 1-13, p 4. Available at <http://www.nova.edu/ssss/QR18/ferguson25.pdf>,

¹⁶² Ibid

¹⁶³ Kath Browne & Catherine J. Nash, (eds). *Queer methods and methodologies: Intersecting Queer theories and social science Research*. (Ashgate, 2010)

ministry of Justice and Constitutional Affairs, Religious leaders among others - who have firsthand knowledge about human rights and sexual minorities. Further, the study used snowball (or chain referral) sampling¹⁶⁴ whereby key informants and target respondents (being subjects who display the qualities the study is interested in investigating) suggested other persons who share similar qualities and would be willing to provide information on the subject of inquiry.¹⁶⁵ It relied on Martin and Dean's recommendation of recruitment from different sources within the LGBT community, supplemented by personal referrals.¹⁶⁶

In addition to empirical data collection, the study adopted desk research and other secondary data collection methods. Secondary research was conducted to obtain existing information that is relevant to this thesis. This component of the research involved the use of library materials such as books, journals, news articles, reports, theses, dissertations submitted in Masters and PhD studies in national and international universities and learning institutions, government policy documents and legal documents which included international and domestic documents, cases, concluded research documents from relevant institutions.

It specifically studied research documents such as the Kenya Medical Research Foundation (KEMRI), the research reports of the National Population Council and the National Aids Council (NACC) and the policy papers of the Ministry of Health of the Republic of Kenya, the British

¹⁶⁴ Snowball sampling was developed by Coleman and Goodman as a means for studying the structure of social networks. Several years after Coleman's and Goodman's development of snowball sampling, what was also termed snowball sampling emerged as a non-probability approach to sampling design and inference in hard-to-reach, or equivalently, hidden populations. Sampling these populations is difficult because standard statistical sampling methods require a list of population members or a sampling frame from which the sample can be drawn. Yet for a hidden population, constructing the frame using methods such as household surveys is infeasible when the population is small relative to the general population, geographically dispersed, and when population membership involves stigma or the group has networks that are difficult for outsiders to penetrate. Groups with these characteristics include LGBTIs.

¹⁶⁵ Abraham G Mugenda. *Social Science Research Theory and Principles of Applied Research and Training Services* (Nairobi 2008) p 198.

¹⁶⁶ John L Martin, & Linda. Dean, Developing a Community Sample of Gay men for an epidemiologic study of AIDS, (1990), *American Behavioural Scientist*, 33, 546-561.

1957 Wolfenden Report among others. It studied world Constitutions including the Kenyan Constitution, the American Constitution, The Ugandan Constitution, the South African Constitution, the German Constitution, the Israeli Constitution among others and relevant international human rights treaties, the UN Charter, the UDHR, and the African Charter on Human and Peoples Rights among other international law documents. To a large extent, legal research methods were also adopted.

1.7. 2: Narrative recording

The narratives collected were recorded through note taking. Ideally it is useful to have full transcripts available to analyse the group discussions through use of tape recorders; however, it was politically and/or practically not possible to do so in the present study. Here, the researcher was the dedicated note taker. This method of data recording was necessitated by the respondents' hesitation to tape recording and the fact that the researcher was keen to provide an informal environment in which the subjects would respond. Moreover tape recording is not a comfortable mode especially for LGBT interviewees since they would not, for good reason want to be taped and that information stored away. This was for their own safety and for purposes of keeping their confidentiality. The method was also suitable for other participants including government officials, members of the public who for fear of reprisals or being seen as insensitive to gays and lesbians did not want tape recording method. Indeed it is advised that in deciding what methods to use in empirical research, the researcher should consider the method that "will surmount the obstacles most efficiently and effectively".¹⁶⁷

Thus the researcher opted to take notes during the interviews. Although the researcher was aware of the fact that note taking would deny me the opportunity to pay full attention to the

¹⁶⁷ Robert F. Simons. Natural language Question Answering Systems (1969). Communications of the ACM, Vol., 13, No. 1, (January, 1970), p 186.

physical cues given by the respondents, it was crucial to take notes during the interviews to ensure that some information was not forgotten or misquoted. In addition, aware of the disadvantage of note taking in comparison to tape recording, the researcher tried to write out as much information as possible from the interviews. Having conducted interviews during the day, I made analytical field notes during the evenings. However to remain engaged with the respondents, the interviews were recorded as spoken by the informants (for those who did not object to notes being taken) without any analysis.

1.7.3: Narrative management

Narrative management was carefully undertaken by the researcher. The inquiry concerns a sensitive topic with potential for stigmatisation, trauma and victimisation. It raised issues of confidentiality and security of both interviewees and the researcher. Indeed, LGBT issues in Kenya and matters of human rights are sensitive and those who are of LGBTgender or sexual orientation face severe ramifications which range from threats to personal security, stigmatisation, humiliation and trauma. Many have faced physical and emotional violence. Many have been humiliated and traumatised through rejection by friends and family, or ejected from schools and homes. The researcher was aware of all these and hence ensured that no information from the interview fell into wrong hands. This meant preferring coding to writing names or using pseudo names of the interviewees. In some instances where it was felt that the information was potentially dangerous, no notes were taken at all. So careful was the researcher and so sensitive were the interviewees that no work was delegated to other researchers.

1.7.4: Narrative analysis Tools

The study is interdisciplinary in content and it required diverse approaches, in line with queer theory, as tools of analysis. It adopted Foucauldian Discourse Analysis (FDA), hermeneutic

phenomenology, comparative approach, philosophical approach, juridico-legal approach and historical approach. FDA and phenomenological hermeneutics were used mostly to analyse narratives collected from LGBT participants, while the rest were used to analyse other primary and secondary data. These tools of analysis are explained below.

1.7.4.1: Foucauldian Discourse Analysis (FDA)

In undertaking to understand sexuality and human rights, this study is attempting to understand the ‘motifs of power’- specifically the power relations between the dominant heteronormativity and the subjugated non-heteronormative. In this regard, the study moves closely to a Foucauldian framework. Discourse analysis differs from other traditions such as seiotics and ethnomethodology in that it emphasises analysis of the power inherent in social relations.¹⁶⁸ Underlying the word ‘discourse’ is the general idea that language is structured according to different patterns that people’s utterances follow when they take part in different domains of social life.¹⁶⁹ Discourse analysis provides insights into the functioning of bodies of knowledge in their specific situated contexts by generating interpretive claims with regard to power effects of discourse on groups of people, without claims of generalisability to other contexts.¹⁷⁰ As an approach to analysing systematic bodies of knowledge (discourses), discourse analysis participates in several traditions of western thought with the major influences on the method being critical social theory, anti-foundationalism, postmodernism and feminism.¹⁷¹ The study is comfortable with any postmodern, anti-foundationalist, poststructuralist, feminist or other deconstructionist approaches to research which are critical of constructionism and are interested in subverting the status quo.

¹⁶⁸ Penny Powers, The Philosophical Foundations of Foucauldian Discourse analysis. *Critical Approaches to Discourse Analysis across Disciplines* 1 (2): 18-34, P 18.

¹⁶⁹ Marianne Jorgensen and Louise J. Phillips. *Discourse Analysis as Theory and Method*. (SAGE Publications, London, Thousand Oaks, New Delhi, 2002), P 12.

¹⁷⁰ *Ibid*, p 18.

¹⁷¹ *Ibid* p 18-19.

Michel Foucault, a poststructuralist, participated in the postmodernist, extension of the critical social theorists' critique of the application of empirical analytic science to the human sciences. The emphasis in Foucault's later work is on the concept of power in specific local human situation.¹⁷² For Foucault, discourse cannot be analysed only in the present, because power components and the historical components create such a tangled knot of shifting meanings, definitions and interested parties over periods of time.¹⁷³ the Foucauldian Discourse (FDA) analysis, is considered naturally "queered". FDA is a useful tool for studying the political meanings that inform written and spoken text,¹⁷⁴ which is central to this study. As opposed to traditional analytics which simply reflect reality in transparent ways, discourse analyses focus specifically upon language as a subject of investigation rather than plainly viewing it as a neutral communicative resource.¹⁷⁵ The kind of knowledge generated by FDA and all discourse analysis exemplifies the quests in the qualitative research paradigm. These analytics acknowledge the interpretivist tradition by aiming to identify ways in which particular versions of reality are constructed through language and other textual sources, as opposed to trying to discover the 'true nature' of reality or inert psychological and social phenomena.¹⁷⁶ Like Queer approaches, FDA offers a particular critical approach to researching psychological and social worlds by considering broader contexts, rigorously dissecting discourses rather than imposing a single theoretical framework.¹⁷⁷

In his quest to reveal power relations, Michel Foucault claimed discourses comprise bodies of knowledge which systematically create and reproduce particular social institutions. Foucauldian

¹⁷² Ibid p 25

¹⁷³ Ibid

¹⁷⁴ Ibid

¹⁷⁵ Peter Cole. Discourse analysis, in Breakwell, G., Hammond, S., & Fife-Schaw, C. (eds.). *Research methods in Psychology*. 243-258. (London: Sage 1995).

¹⁷⁶ Ibid

¹⁷⁷ See Patrick McGhee. *Thinking Psychologically*. (Basingstoke: Palgrave 2001).

analyses expose links between textual sources and powerful social institutions, drawing concerns about domination and subordination associated with the intellectual traditions of Marxism and Feminism.¹⁷⁸ According to Foucault, power is not a group of institutions, or a structure, or a set of mechanisms that ensures the subservience of citizens. Power is not a mode of subjugations functioning by rules instead of violence. Instead, power functions through strategies and practices without conscious direction.¹⁷⁹ Power is not a physical strength we are endowed with in some essentialist manner.¹⁸⁰ Power does not mean a general system of domination by one group over another. In fact, Foucault emphasises that institutions of domination are embodied as much within the dominators as the oppressed. These individual instances of power usually called domination or oppression are effects, or terminal forms of power, points in the web or grid of power relations.¹⁸¹ Foucault distinguishes his notion of power from the juridico-discursive notion of power prevalent in western philosophy and based on the notion of democratically defined person with basic human rights in a sovereign-subject relation.¹⁸² Instead, power is productive of *truth*, rights, and the conceptualisation of individuals, through discourses such as social sciences, bureaucracy, medicine, law and education.¹⁸³

Through FDA, one is able to understand how power relationships are formed and transformed over time. Thus an analysis of discourses surrounding sexual minorities in Kenya is underpinned by the power relations between those who regulate and those who are regulated, the forms of regulation, the resistances to such regulation, who resists, and reasons for such resistance.¹⁸⁴ For example, an

¹⁷⁸ Brice Watcterhouser (ed.). *Hermeneutics and modern philosophy.* (Albany, NY: State University of New York Press 1986)

¹⁷⁹ Marianne Jorgensen and Louise J. Phillips., *supra* note 169 above, p 29.

¹⁸⁰ *Ibid*

¹⁸¹ *Ibid*

¹⁸² *Ibid*

¹⁸³ *Ibid*

¹⁸⁴ Janet Kabeberi Macharia, *Reproducing the Reproducers.* PhD Thesis, University of Leicester, UK, 1994, p 72.

analysis of historical and social discourses may reveal the competing forces between social phenomena and the law, the emanating power relations, and the development of dominant ideologies that influence the decision-making and regulatory processes.¹⁸⁵

1.7.4.2: Hermeneutic phenomenology

Hermeneutic phenomenology, being the process of interpreting and describing human experience to understand the central nature of that experience, is well positioned as a suitable analytical tool for this research because it is “queered”. Hermeneutic phenomenology believes that the understanding of phenomena is contextual and historical. This study holds the view that sexuality and gender identity are historical and contextual. Understanding the lived experiences of LGBT people therefore needs analytical tools which can facilitate their conversation in the context of their history and particular contexts. As rightly argued by Watceterhauser:

Hermeneutical theories of understanding argue that all human understanding is never ‘without words’ and never ‘outside of time’. On the contrary, what is distinctive about human understanding is that it is always in terms of some evolving linguistic framework that has been worked out over time in terms of some historically conditioned set of concerns and practices.¹⁸⁶

Hermeneutic phenomenology as a tool of analysis is preferred because of its emphasis on the world as lived by a person and in this case, individual sexual minorities, not the world or reality as something separate from the person.¹⁸⁷ The inquiry of hermeneutic phenomenology asks questions such as: “what is this experience like?” as it attempts to unfold meanings as they are lived in everyday existence.¹⁸⁸ Polkinghorne identified this focus as trying to understand or comprehend meanings of human experience as it is lived.¹⁸⁹ The ‘life world’ is understood as

¹⁸⁵ Ibid p 73. Edmund Husserl, *The idea of Phenomenology*. (The Hague, The Netherlands: Nijhoff, 1970).

¹⁸⁶ Holly Skodol Wilson & Sally A. Hutchinson. Triangulation of qualitative methods: Heideggerian hermeneutics and grounded theory. *Qualitative Health Research*, (1991), 1, 263-276.

¹⁸⁷ Ibid

¹⁸⁸ Ibid

¹⁸⁹ Ibid

what we experience pre-reflectively, without resorting to categorisation or conceptualisation, and quite often includes what is taken for granted or those things that are common sense.

Gadamer, one of the most prominent theorists on hermeneutic phenomenology states that hermeneutic consciousness is characterised by the 'logical structure of openness': that is, social actors must remain 'open' to what a phenomenon has to say about itself. It offers a mechanism that individuals use to open up and keep open the possibilities inherent in being - possibilities that arise in the existential relationship between the individual and the phenomena that constitute his world.¹⁹⁰

This tool is premised on the truism that interpretation of social phenomena is never a straight forward activity: ambiguity and conflict characterise interpretations, such ambiguity and conflict interpretations can be resolved only through a discursive-dialectic process.¹⁹¹ The most fundamental tenet of hermeneutics is that understanding has a circular structure because understanding always relates to some phenomenon or other, and there is a requirement to posit the basic structure of such phenomena. Gadamer comes up with the hermeneutic circle.¹⁹² Gadamer understood hermeneutics as a process of co-creation between the researcher and participant, in which the very production of meaning occurs through a circle of readings, reflective writing and interpretations.¹⁹³ Through this process, the search is toward understanding of the experience from particular philosophical perspectives, as well as the horizons of participants and researcher. Hermeneutic research demands self-reflexivity, an ongoing conversation about the experience while simultaneously living in the moment, actively

¹⁹⁰ Hans Georg Gadamer, *Philosophical hermeneutics* (David E. Linge, Ed. & Trans.). (Berkeley, CA: University of California Press, 1976) In Tom Butler *supra* note 282 above, p 290.

¹⁹¹ Martin Heidegger (*Being and time*. (New York: Harper, 1962) posits that in understanding phenomena, one remains permanently determined by the anticipatory movement of 'foreunderstanding'.

¹⁹² Hans Georg Gadamer, *supra* note 177 above, p 290.

¹⁹³ Martin Heidegger, *supra* note 178 above, p 56.

constructing interpretations of the experience and questioning how those interpretations came about.¹⁹⁴ Such is the nature of the present study.

1.7.4.3: Comparative approach

Although the study is not comparative in nature, it adopts comparative methodology to understand universal nature and effects of heteronormativity on the human rights of sexual minorities. In this regard, the study examined the application of international human rights principles and standards by the United Nations and several regional human rights systems to protect and promote the human rights of sexual minorities. Several nations around the world have also, through their adjudicative mechanisms interpreted or implemented the international human rights principles in order to protect the human rights of sexual minorities within their jurisdictions. While there are multiple methodologies of comparative law, the study objectives were better achieved by relying on the functional approach and problem-solving approach.

1.7.4.4: Philosophical approach

The study also employed a philosophical approach to research. Mbondenyi argues that there are various modes of philosophical analyses, the more prominent one being the normative analysis, ideological critique, deconstruction and hermeneutic phenomenology analysis.¹⁹⁵ This study concentrated on the normative analysis, hermeneutic phenomenology and ideological critique of cultural claims and nationalistic aspirations adopted by the forces that support heteronormativity

1.7.4.5: Juridico-legal approach

A juridico-legal approach was another method used by the study. The study focuses on principles, institutions, norms and rules that are to be interpreted. Its main concern is more with

¹⁹⁴ Konrad *Zweigert* and Hein *Kötz*. An introduction to Comparative Law (Oxford: Clarendon Press, 1998). 3rd edn. Trans by Tony Weir. xxvi and 714.

¹⁹⁵ Ibid Konrad *Zweigert* and Hein *Kötz*, p 714.

the rules enacted to regulate the functioning and the organisation of institutions and their functioning. The suitability of the juridical/legal approach stems from the fact that this is a primarily legal study. Human rights are a legal concept and international human rights law implies the existence of institutions, norms or rules to protect and promote human rights at the international level.¹⁹⁶ The approach is therefore essential when understanding the international human rights principles and standards as well as Constitutional principles which are central to this study. The study explores legal systems and establishes the observations that are useful in answering the research questions. In addition to legal analysis, academic articles by authors mostly specialised in the legal field and evaluation reports made by different organisations including Amnesty International and the International Gay and Lesbian Human Rights Commission, will be used to demonstrate the implementation of the legal decisions and to provide the theoretical scope.

1.7.4.6: Historical approach

Further, in attempting to understand the various types of human rights, a historical perspective will be used. Much of the study data in terms of literature that is historical in nature will be found in libraries, and the National Archives, courthouses and the prisons as well as from persons conversant with the sexuality in the Kenyan history. Oral interviews with opinion leaders who have direct or indirect experience and knowledge about sexuality in pre-colonial Africa will be carried out. Understanding the historical evolution of human rights necessarily demands digging into history. Research into classical and medieval literature is important. A historical approach to capture these historical elements of the study is important.

1.7.5: Narrative interpretation

The study adopted two theories of interpretation: first, Ricoeur's *hermeneutic arc* and Heidegger's *hermeneutic circle*.¹⁹⁷ Hermeneutics acknowledges that all interpretation is situated, located, a - view from somewhere.¹⁹⁸ Gardner eloquently summarises the active role of the interpreter in critical hermeneutic interpretation:

The hermeneutic approach stresses the creative interpretation of words and texts and the active role played by the knower. The goal is not objective explanation or neutral description, but rather a sympathetic engagement with the author of a text, utterance or action and the wider socio-cultural context within which these phenomena occur.¹⁹⁹

In his theory of interpretation which is based on hermeneutic phenomenology, Ricoeur proposes key concepts to interpretation which include distanciation, appropriation, explanation, and interpretation. They represent the tenets which guide a researcher in interpreting the texts. The first step is distanciation, a standing separate from or being objective in relation to the text.²⁰⁰ Ricoeur posits that "text is discourse fixed in writing" and in his view, text displays "a fundamental characteristic of the historicity of human experience, namely that it is communication in and through distance". The second is explanation, interpretation and understanding and the correlation between understanding and explanation of phenomena. These are carried out at three levels of interpretation, namely: explanation, naïve understating and indepth-understaing were adopted by the researcher.

¹⁹⁷ Ibid

¹⁹⁸ Ibid

¹⁹⁹ Hans Georg Gardner. *Intelligence reframed: Multiple intelligences for the 21st century*. New York: Basic Books, 1999). In Elizabeth Anne Kinsella, *Hermeneutics and Critical Hermeneutics: Exploring possibilities Within the Art of Interpretation*. *Qualitative Social Research, Vol. 7, No. 3, Art. (19 May, 2006)*, p 13.

²⁰⁰ Heather Tan, *et al*, Ricoeur's Theory of Interpretation: An Instrument for Data Interpretation in Hermeneutic Phenomenology. *International Journal of Qualitative Methods*, (2009), 8(4).

In the hermeneutic circle, to understand the text, the researcher/interpreter had an open mind and projected in front of herself meanings for the narratives as a whole as soon as some initial meanings emerged in the narratives. The researcher understood that having a completely open mind that “understands nothing” and she tried to avoid as much as possible any “arbitrary fancies” and biases, and focused on the texts themselves to discern what they meant. Interpretation has the danger of producing conflicts and revealing inadequacies. Being aware of this danger, the researcher was able to work out any conflicts and inadequacies in her interpretation by constantly going back and forth to the narratives and the texts.

1.7.6: Narrative presentation

Generally, primary method of presentation for this thesis in respect of documentary data is the evaluation, critique and synthesis of previously published information. The presentation method includes a number of elements. Some descriptive or interpretive work is necessary throughout the thesis, but the primary form is analytical and critical. Inherent within this approach is also the need to compare various intellectual positions that have been taken to approach the same issue and how they interact with each other in the process.

Thus, Information obtained from secondary sources, notably literature drawn from textbooks, journals, media reports and documents generated by government agencies involved in human rights interventions, were also used to supplement, corroborate and provide theoretical perspectives for discussing and drawing conclusions along the objectives of the study. On the other hand, primary narratives obtained from individual participants through snowball sampling and from Key Informants were analysed along themes derived from the specific objectives of the study to augment, cross-check, enrich and corroborate other data.

1.7.7: Narrative validation

The researcher was cognisant of the fact that the validity of the study findings is maximised. Indeed Onwuegbuzie and Johnson stress the importance of maximisation of validity of data.²⁰¹ Taking into account that queer qualitative research is not exactly tidy; having occasioned attempts and use of various methods for narrative collection, triangulation method for increasing validity of findings was used.

1.8: ETHICAL ISSUES

Rocha has stressed the need for observation of ethical issues in data/narrative collection. Being cognisant of this important requirement, the researcher ensured that all issues touching on ethics were taken into account. Due to the highly secretive and sensitive nature of the research, the study adopted various modes of data collection that were considered suitable. Because many LGBT persons are not open about their sexual orientation and/or gender identity, the researcher knew that the participants in the study could be put at risk by participating in the project unless certain protective mechanisms were established.

A crucial action to protect the participants was to assure them of utmost secrecy of their participation and non-disclosure of their sexual orientation or gender identity, unless they expressly did not mind. Their participation was not known to anyone and this is because no assumptions regarding knowledge about their sexual identity and orientation could be made even by their close family members and friends. The researcher used a content analysis guide that served as a tool to interpret phrases, terms, expressions used by participants in studies of this nature in answering the questions to them.

²⁰¹Anthony Onwuegbuzie and R. Burke Johnson. The validity issue in mixed research (2006). *Research in the Schools*, 13(2), 48–63.

Further, all the requirements by the National Council for Science and Research and Innovation of Kenya (KNCSRI) regarding research in the country were adhered to. The researcher also ensured that no interviewee was persuaded to participate nor was in any way coerced or intimidated to do so. Proper methods of access to all key informant interviewees were used to ensure successful and voluntary information was given.

1.9: STUDY LIMITATIONS

The subject of human rights violations of sexual minorities is a new and not fully explored area, especially in Kenya. It requires detailed interrogations of legal, political and social approaches to the issue. The greatest limitation of this study is the fact that the topic of sexuality in Kenya is generally under-researched due to the taboo nature of the subject matter. Consequently, information remains scarce. Further, the subject of the human rights of sexual minorities is also a fairly new area which is still evolving even within the international human rights system. This makes the normative structures both at the UN and at the African regional systems precarious and almost silent of the subject.

This is then coupled with the fact that the field of study which deals with sexualities in Africa is, itself, in the early stages of development due, again, to the taboo nature of the subject matter. Further, although it is appreciated that there are many categories of people that fall within the sexual minority class, they are different and experience discrimination differently and from different sources. Further, there are ongoing disagreements within the LGBT movement itself, with transgender persons wanting to distance themselves from same-sex practicing persons. A more disaggregated approach to understand these variants would have been most ideal but due to the time limitations, such justice has not been done, hence the study has focused on LGBT generally. It is hoped that more rigorous research will be undertaken by other scholars who are

keen and passionate about human rights of sexual minorities to take up the study from that approach. All these factors pose significant limitations to the study at hand.

10: THESIS CHAPTER OUTLINE

This thesis has seven chapters. Chapter one presents the introduction of the research topic and an overview of the research problem, and highlights the background and justification of the study. It also entails the literature review and makes a rigorous exposition of the methodological approaches to data collection and analysis. It also gives the limitations of the study and this chapter outline.

Chapter two presents the theoretical and conceptual framework for the study. It expounds on the theories that guide the study, more specifically John Finnis' principles of practical reasonableness and the queer theory and how they are relevant to the project study. The chapter further discusses the main concepts that underpin heteronormativity as exposed by the literature, noting their use and relevance to the study.

Chapter three presents a historical perspective of historical approaches to legislative and judicial decision making on matters of sexuality. It examines the evolution of the British sodomy laws, and the religious and cultural imperatives that have shaped regulation of sexuality. It notes the doctrinal and textual interpretations of the law, as well as legislation, culminating in the release of the Wolfenden Report in 1957 and the critical and transformative legislative and judicial decision making approaches that ensued from the Report.

Chapter four offers a rigorous intellectual discussion of international human rights law and how it has been interpreted and applied to recognise and protect sexual minorities. The chapter notes that sexual orientation is not recognised by any of the international human rights treaties but in

recent years, its principles and standards have been utilised by the UN treaty bodies, regional treaties as well as national jurisdictions to promote the human rights of sexual minorities. The chapter notes the limitations of international human rights in the protection of human rights, and gives an analysis of how international human rights principles have been used by adjudicating bodies to further the human rights of sexual minorities. Further, the chapter examines trends in legislative and judicial decision making in issues relating to sexual minorities, specifically addressing how these two processes are reflected in the enactment and judicial decision making prior to the release and implementation of the Wolfenden Report of 1957. Noting that regulation of sexuality in history has been underpinned by the relevant culture and religious beliefs of the time, the chapter examines how Christian religion and culture have been at the center of the evolution of the sodomy laws and their application by courts in interpretation. The chapter also demonstrates the changing tides in legislative and interpretive approaches to sexuality after the Wolfenden Report and how this Report did impact on national legislative and judicial actions on matters of sexuality

Chapter five is the core of this study. It presents Kenya's Constitution 2010 as a preferred country strategy for implementation of international human rights standards and principles. The chapter examines both the normative provisions of the Constitution, and more specifically its expansive Bill of Rights and what that means for sexual minorities. Further, the chapter examines the legislature and the judiciary, as institutions of justice mandated to make decisions through legislative processes and judicial interpretation of the Constitution, its provisions on individual rights and fundamental freedoms. It specifically examines the typology of the legislature, its capacity and challenges in their decision making actions vis-à-vis sexual minorities. It also examines in detail the provisions of judicial review and entrenched power of

interpretation of the judiciary, what this means for sexual minorities, its gains and limitations and challenges vis-à-vis sexual minorities.

Chapter six present the narratives of sexual minorities, capturing their day to day experiences in a deeply heteronormative society. It identifies the social institutions and narratives that serve as structuring forces of heteronormativity and how they shape the way LGBT people view themselves and conduct themselves.

Chapter Seven is the conclusion chapter. It attempts to respond to the four hypotheses set out in chapter one of the thesis, specifically pondering the question how international human rights principles and standards, the Constitution of Kenya and specifically its institutions can be informed by developments in jurisprudence around the world to improve the human rights situation of sexual minorities. Further, it offers recommendations as to what is required to address the grim human rights situation of sexual minorities by suggesting both legal and non-legal-solutions.

CHAPTER TWO

THEORETICAL UNDERPINNINGS OF INSTITUTIONAL DECISION MAKING AND CONCEPTS AROUND HETERONORMATIVITY

2.0: INTRODUCTION

This chapter is about the theoretical and conceptual issues of this study. It presents the theoretical as well as the conceptual framework of the study. It explains the concepts used and the study's own assumptions about the negative impact of heteronormativity on the human rights of sexual minorities in Kenya. The theoretical and conceptual issues are based on the findings presented in the literature reviewed in chapter one and it provides the framework for the research design and narrative analysis. They serve as a foundation to the proposed model of critical, queer and transformative decision-making by institutions of justice. The attendant discussion highlights the relationship and influence of these theories and concepts in relation to critical and transformative decision-making on the part of the legislature and the judiciary in promoting and protecting the human rights of sexual minorities. The following section presents the theoretical framework of the study.

2.1: THEORETICAL FRAMEWORK

Under the constitution of Kenya, Parliament and the Judiciary have the express mandate of implementing international human rights principles of equality and non-discrimination through legislative action and judicial interpretation respectively. The study is a critique of these state institutions as institutions of justice. Since the human rights of sexual minorities touch on issues of social justice, value for human experiences, issues of efficiency, and critical decision-making, it is important that the methodologies adopted by the study overlap to sustain these areas. As

such, the study combines John Finnis' critical, transformative and mindful inquiry as well as Queer theory's deconstructionism as theoretical framework. This section examines these two theories and their suitability for the study.

2.1.1: John Finnis' principles of practical reasonableness

John Finnis is a pioneer in the development of a new yet classically-grounded theory of natural law. Grounded on principles of practical reasonableness, and basic social goods, Finnis' work offers a systematic philosophy of practical reasoning and moral choosing that addresses the great questions of the rational foundations of ethical judgments, the identification of moral norms, human agency and the freedom of will.¹ Finnis' philosophy also addresses the questions of personal identity, the common good, the role and functions of law, the meaning of justice, and the relationship between morality and politics.²

Finnis comes up with his idea of principles of practical reasonableness which assist in achieving some basic social goods that make people's lives worthwhile. Finnis' principles of practical reasonableness are moral in that regard. However, Finnis' idea of morality differs from the thomistic ideology of his philosophical father, Thomas Aquinas in the sense that the latter holds morality to be substantive and refers to the quality of laws whereas that of Finnis refers to the process of achieving them. Finnis' basic practical principles affirm that life, knowledge, play, aesthetic experience, friendship, practical reasonableness and religion are basic goods (ends, purposes, values) of human life.³ They are established by the act of subjectivity reflecting on human character as human beings. They are not known intuitively, but by an act of intellect which, proceeding from felt inclinations and aided by anthropological and psychological

¹ John Keown, Robert P. George, (eds). Reason, Morality and Law: The Philosophy of John Finnis, (Oxford: Oxford University Press, 2013).

² Ibid

³ Valerie Kerbruish, Philosophical Retreat: A Criticism of John Finnis' Theory of Natural law. *Western Australian Law Review*, (1983), p 225.

evidence of what all human societies' value grasps or discovers these categories of human purpose as self-evident. They are also indemonstrable.

They are not inferred from speculative principles. They are not inferred from facts. They are not inferred from metaphysical propositions about human nature, or about the nature of good and evil, or about 'the function of a human being', nor are they inferred from a teleological conception of nature or any other conception of nature. They are not inferred or derived from anything. They are underived (though not innate).⁴

To illustrate his conception of self-evidence, Finnis refers to the principles of rationality in theoretical inquiries. He argues that:

One such principle is that the principles of logic, for example the forms of deductive inference, are to be used and adhered to in all one's thinking, even though no non-circular proof of their validity is possible. Another is that an adequate reason why anything is so rather than otherwise is to be expected, unless one has reason not to expect such a reason. A third is that self-defeating these are to be abandoned. A fourth is that phenomena are not to be regarded as real unless there is some reason to distinguish between appearance and reality...⁵

Finnis' philosophy gives an insight into law making and law interpretation and calls for critical, rational and reasonable decision making on the part of state institutions charged with the duty to make decisions that affect the enjoyment of the basic social goods. He is concerned with the outcomes of decisions by relevant institutions on the social goods on society and those that such decisions affect. Decision makers should be people of integrity, dignity; they should be knowledgeable and possess critical minds if their decisions are to be successful. In his seminal book *Natural Law and Natural Rights*,⁶ Finnis explains that the undertaking of practical reflections on the part of decision makers such as judges or legislators or other statesmen cannot proceed securely without knowledge of the "whole range of human possibilities and

⁴ John Finnis, *Natural Law and Natural Rights*, (Oxford University Press, 2 edition, 1980) p 68.

⁵ Ibid

⁶ Ibid

opportunities, inclinations and capacities, a knowledge that requires the assistance of descriptive and analytical social science”. Finnis succinctly states the basic thesis of his book:

There are human goods that can be secured only through the institution of human law, and requirements of practical reasonableness that only those institutions can satisfy. It is the object of this book to identify those goods, and those requirements of practical reasonableness, and thus to show how on what conditions such institutions are justified and the ways in which they can be (and are often) defective.⁷

Finnis’ theory of principles of practical reasonableness raises the fundamental question regarding consideration of natural law in the context of the discussion of the role of decision-making institutions of a government such as Parliament and the Judiciary. Of relevance to this point is that Finnis attempts to formulate a rational basis for moral action and his central thesis being that the act of making law is an act which can and should be guided by moral principles which are a matter of objective reasonableness.⁸ Finnis defines natural law as “the set of principles of practical reasonableness in ordering human life and human community...” These principles are practical in nature, shifting Finnis’ theory of natural law from the moral arguments of the content of law postulated by Aquinas. Finnis argues that the principles of natural law are “traced out not only in moral philosophy or ethics and ‘individual’ conduct, but also in political philosophy and jurisprudence, in political action, adjudication, and the life of the citizen.”⁹ These principles are buttressed by a;

set of basic methodological requirements of practical reasonableness...which distinguish sound from unsound practical thing and ...provide the criteria for distinguishing between [reasonable and unreasonable acts]. Following these methodological requirements allows one to distinguish

⁷ John Finnis in Michael Payne, “Finnis on Viewpoint and Focal Meaning.” In *Filosofía del Derecho y Filosofía de la Cultura: Memorias del X Congreso Ordinario Mundial de Filosofía del Derecho y Filosofía Social (IVR)*, edited by Jose Luis Curriel, VII: 159–173. 1st ed. Mexico: UNAM, 1982. biblio.juridicas.unam.mx/libros/1/469/17.pdf.

⁸ Brigita White, Is there a place for morality in law? 12 *Queensland University of Technology Law Journal* (1996), p 228.

⁹ Ibid p 220.

between acting morally right or morally wrong and “to formulate...a set of general moral standards.”¹⁰

He further asserts that “the principles of natural law explain the obligatory force...of positive laws, even when those laws cannot be deduced from [the principles of natural law].” This thesis argues that if Finnis is correct and indeed he is correct, then the principles of natural law have the ability to inform state institutions of decision-making on their moral obligations in discharging their legislative and judicial mandate in cases involving insular minorities such as sexual minorities.

Finnis examines the role and duty of government in applying law and in interpreting human rights, which is in line with the aims of this thesis.¹¹ Finnis also attaches much importance to analysing the nature of the moral community and argues that a complete community is one which in addition to being a political community combines a complete variety of relationships and relates it to the law in its focal sense. He grounds the moral rational strength of law in its purposive contribution to the continuance and fulfillment of a complete community.¹² Finnis avers that the basic human goods motivate reasonable action on the part of individuals, families, communities, and governments, and delimit the role and scope of government.¹³

An important aspect of Finnis’ argument concerns the use of human intelligence. He argues that when people consider ~what is the good to be pursued they engage in a practical reasoning, a different type of intelligence that allows us to work out what is right and wrong. Finnis adds that law is able to fulfill its natural law assigned tasks only through institutions and officials that

¹⁰ Ibid

¹¹ Finnis, *Natural Law and Natural Rights*, supra note 4 above p 86-89. For a critique of Finnis's 'self-evidence' Theory and his list of basic goods, see. Harris, Book Review. *Modern Law Review*, 44(1981), 729-735, p. 218 p 57.

¹² Roger Cottrell, *the Politics of Jurisprudence* (2nd Ed.). (Oxford University Press 2003) p 141

¹³ Ibid

effectively exercise authority.¹⁴ In his view, adjudication requires the specification of abstract moral principles to settle complex cases because formally enacted laws can never completely anticipate the circumstances in which principles must apply and natural law authorises judges to exercise their practical reasonableness.¹⁵ Finnis disagrees with positivists that in penumbra cases, judges merely legislate and argues that they go beyond legislation and what is dictated by particular enacted legal rules and in this regard, their activity is categorically different from that of legislators.¹⁶ This is because the judges' duty is informed by the special prudence - the practical knowledge of the expert jurist - of the details of substantive law.¹⁷

In calling for critical reasoning, Finnis has a lot to do with the underlying philosophy of practical reasoning in Critical Legal studies (CLS). Finnis' argument may be equated to practical legal reasoning within the critical Legal studies, which confront the question of how judges decide cases and how judges should decide cases.¹⁸ Practical legal reasoning faults the traditional analytic response to these questions in which judges apply formal methods of legal reasoning, grounded in certainty and formalism, which it finds untenable. Practical legal reasoning abandons the goals of certainty, formal accuracy, and formal legitimacy in legal decision making in favour of more fluid techniques of reasoning and argumentation.¹⁹ Applied to the issue at hand, the principle of practical reasoning on the part of Kenyan judges confronted with the question of the human rights of sexual minorities should not adopt positivist approaches which limit their reasoning and intelligent imagination. They should be fluid and see beyond what obviously is the

¹⁴ John Finnis, *supra* note 4 above. In Gerald Postema, *A Treatise of Legal Philosophy and General Jurisprudence*, Vol. 11 – Legal Philosophy in the Twentieth Century: The Common Law World ; 470

¹⁵ Gerald Postema, *A Treatise of Legal Philosophy and General Jurisprudence*, Vol. 11 – Legal Philosophy in the Twentieth Century: The Common Law World, p 470.

¹⁶ *Ibid*

¹⁷ *Ibid*

¹⁸ See Wellman, *Practical reasoning and Judicial Justification: Toward Adequate Theory*. (1985). *57 U. Colo. L. Rev.* 45.

¹⁹ Jay F. Feinman. *Practical Legal Studies and Critical legal studies*. *87 Mich. L. Rev.* 724 (1988-1989), p 724.

law and conventional practice. They have a fundamental responsibility to exercise their capacities of practical reasoning, especially when dealing with issues of intersectionality and multiplicity which underpin sexuality.²⁰ Indeed Finnis argues that the duties and responsibilities of the legislators and judges are not strictly determined by the conventions of local practice.²¹ Further, Finnis argues that judges in executing their duties must simultaneously look to the abstract principles of morality and to the concrete details of the substantive law they are charged to administer. In his view, competent judges are bound to use their knowledge of their local system to help fashion new, recognisably reasonable determination of human and natural law.²²

Finnis' principles of practical reasonableness involve rationality and reasonableness as its pillars. According to Sartor, practical reasonableness requires both morality and rationality, entails that reasonable practical determinations need to be both rational enough and moral enough.²³ In order for a determination to be reasonable with regard to a certain context such as culture or form of life, it must also be consonant (or at least not completely dissonant) with the ideas prevailing in that context and in particular, with the norms that are practiced in that context.²⁴ Rationality as understood by Sartor pertains to cognition, namely, to the activity through which we process information in order to come at reasoned determinations.²⁵ These determinations can be epistemic, that is, meant to identify the features of the world surrounding us, or practical, that is,

²⁰ Gerald Postema, *supra* note 15 above, p 470.

²¹ *Ibid*

²² *Ibid*

²³ Giovanni Sartor, *A Sufficientist Approach to Reasonableness in Legal decision-making and Judicial Review*. European University Institute, Florence, Department of Law. EUI Working Paper, LAW 2009/07 p1.

²⁴ *Ibid*

²⁵ *Ibid*

meant to establish the goals to be pursued, the plans of action to be implemented, or the norms to be endorsed.²⁶

Sartor states that some criteria of reasonableness used in constitutional and administrative review give a clue for detecting irrationality. For instance, a choice to allocate a certain advantage or burden to certain persons, while not allocating it to others who are in an equal situation does not just violate the principle of equality; it is also an index of irrationality. Similarly, the fact that a choice completely disregards certain values is a strong index of its likely irrationality.²⁷ In the context of the present study, it would mean that protecting heterosexual individuals and failing to protect LGBT on the mere account of their sexual orientation or gender identity calls into question the index of rationality of the concerned decision makers.

Failure by institutions of justice to apply principles of practical reasonableness necessarily result in injustices. Finnis enumerates four types of injustices that may be committed in the making and administration of law and the consequences of such injustice. These include stipulations that may be distributively unjust by appropriating some benefit to a class not reasonably entitled to it, while denying it to other persons, or by imposing on some a burden from which others are, on no just criterion, exempt.²⁸ This study argues that such an injustice does exist in Kenya, where there is no justifiable reason for denying sexual minorities protection and guarantee to basic human rights. This is a reflection of lack of dignity and competence in Finnisian sense. Finnis

²⁶ Ibid

²⁷ Ibid p 25.

²⁸ The other injustices are: First, the exploitation of opportunities by a ruler for partisan advantage through and making of stipulations. Secondly, injustice also takes place when stipulations are also made (without emergency situation) in excess of legally defied authority. Thirdly, the exercise of power otherwise than according to manner and form is an abuse as well as injustice unless those involved consent, or ought to ensure to an articulated, procedures.

understands dignity as a grounding value of human rights and perhaps even as their exclusive normative basis.²⁹

Finnis' argument is that people understand their individual aspirations and *nature* from an internal perspective and that from this we can have an understanding of the good life for humanity in general. In other words, what is a general good may be derived from particular experiences or appreciation of good, although this is not to say that what people in fact want, they always ought to have.³⁰ In other words, what is a general good may be derived from particular experiences or appreciation of good, including such appreciation or experiences of sexual minorities. For instance, the wish for an individual for personal security; a need and desire to earn a living; or a need or desire to lead a healthy life by accessing healthcare facilities, institution or information can be something of general application and thus symptomatic of such general good. As demonstrated in chapter five of this thesis, failure to access healthcare, education, employment, and housing, personal security among others are the glaring human rights violations that sexual minorities in Kenya experience in their daily lives.

In the context of Kenya, Finnis' theory calls for rational, reasonable and critical thinking on the institutions of Parliament and the Judiciary, the theory calls for transformative constitutionalism, if substantive justice is to be realised equally by all Kenyans. The Constitution of Kenya 2010

²⁹ Jeremy Waldron, *Is Dignity the Foundation of Human Rights?* (2013). New York University Public Law and Legal theory Working Papers, Paper 374. p 23. <http://ssrn.com/abstract=2196074> or <http://dx.doi.org/10.2139>. (Accessed on 23rd July, 2016).

³⁰ See John Finnis, 'Natural Law Theories', *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/natural-law-theories>. For his other major works, see 'Positivism and 'Legal Rational Authority'. *Oxford Journal of Legal Studies*, 5 (1985), 74-90, *Natural Law* Vol. I & II, (1991), The International Library of Essay in Law and Legal Theory); 'Natural Law and Legal Reasoning' in Robert George (ed.), *Natural Law Theory Contemporary Essays* (1992), 134-157; 'The Truth in Legal Positivism' in George (ed.) *The Autonomy of Law : Essays on Legal Positivism* (1996); 'Commensuration and Public Reason', in Ruth Chang (ed.), *In commensurability, Comparability and Practical Reasoning* (1997), 215-233; 285-289; 'The Priority of Persons', in Jeremy Horder (ed.) *Oxford Essays in Jurisprudence* Fourth Series (2000), 1-15; 'Natural Law. The Classical Tradition in Coleman and Scott Shapiro *Oxford Handbook of Jurisprudence and Philosophy of Law* (2002), 1-60; 'Aquinas's Moral, Political and Legal Philosophy', The Stanford Encyclopedia of Philosophy (Spring 2006 ed. Edward N. Zalta (ed.)). 'Law and What I Truly Should Decide', *American Journal of Jurisprudence*, 48(2003), 107-129.

makes provisions for expansive dignity, equality and non-discrimination protections and several other counter-majoritarian provisions, which need to be realised through transformative decision-making approaches by these two institutions.

In majoritarian circumstances, the judges and legislators should ask these questions: how are we, as Judges and legislators expected to act in order not to perpetuate discrimination and marginalisations that characterised the old constitutional dispensation? Finnis argues that in their job of interpretation, the judges should be guided by the principle of dignity.³¹ Finnis uses dignity as an obligation on the judges as decision-makers to be competent and superior in knowledge, and be critical and discerning. In this regard, judges should enable the creation of the necessary conditions for each individual to realise their human potential that makes their lives meaningful.³²

Further, when judges make decisions that diverge from the decisions of other courts, they often take care to explain why their jurisdiction has particular requirements - of positive law or social necessity, for example- which justify a different outcome in spite of the commonality of human dignity at stake. In both cases, therefore, they reveal a working hypothesis that human dignity justifies reliance on foreign norms and requires a particular justification for departing from foreign models in judicial decision-making.³³ Finnis' reasoning can be used in the context of international jurisprudence that is useful for the protection and promotion of the human rights of sexual minorities. Human dignity in this way serves as the basis for the 'supra-positivity' of borrowed principles of human rights which Gerald Neumann has identified and described.³⁴

³¹ Ibid

³² Ibid

³³ Ibid

³⁴ Ibid

2.1.2: Queer theory

Queer theory is a diverse body of work that takes the deconstruction of categories of identity and knowledge as its central analytic task.³⁵ Queer approaches of various sorts not only became visible in the HIV/AIDS activism in North America in the 1970s and early 1980s, it also surfaced across a number of disciplines receptive to the problematic of postmodern thinking - architecture, literary theory and criticism, film studies as well as sociology, philosophy and geography.³⁶ Most scholars would concede that queer theorising initially gained greater visibility more quickly in humanities than the social sciences. Work within the humanities challenges the conceptualisation of the modern Enlightenment subject as rational, unified and stable.³⁷ Within the postmodernist theorising, broadly conceptualised, scholars took critical aim at claims about a universal human condition and the linear tale of a progressive human history as artificial, improbable and unduly homogenising of the human experience.³⁸

Queer theory challenges the normative social ordering of identities and subjectivities along the heterosexual/homosexual binary as well as the privileging of heterosexuality as 'natural' and homosexuality as its deviant and abhorrent 'other'.³⁹ According to Sullivan, queer theory is built from the poststructural theories of Michel Foucault, Jacques Derrida, and Jean Francois

³⁵ Stephen Seidman (ed.) *Queer Theory Sociology*. (Blackwell 1996). In Ki Namaste, *The Politics of Inside/Out: Queer Theory, Poststructuralism, and a sociological Approach to Sexuality*, *Sociological Theory*, vol. 12 N. 2. (1994). Also see the works of Judith Butler, *Gender Trouble: feminism and the subversion of Identity*. (New York: Routledge, 1990); Drucilla Cornell. *Beyond Accommodation: ethical feminist, deconstruction, and the Law*. (New York: Routledge, 1992); Gayle Rubin. "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality". *Pleasure and Danger*. Ed. Carole S. Vance. Boston: Routledge and Kegan Paul, 1984. 267-319; Annemarie Jagose.. *Queer Theory: An Introduction*. (New York University Press, 1996); Sedgwick E. *Epistemology of the Closet*. (Berkeley, CA: University of California Press 1990); Spargo T. *Foucault and Queer Theory*. (New York: Icon books, 1999).

³⁶ Kath Browne and Catherine J. Nash. *Queer Methods and Methodologies: An Introduction*, p 3. Available at www.gender.can.ac.uk/mphil/students/browne. (Accessed on 12th July, 2016).

³⁷ *Ibid* p 4.

³⁸ *Ibid*

³⁹ *Ibid* p 5.

Lyotard.⁴⁰ For many queer scholars, the disciplinary effects of the heterosexual/homosexual, man/woman binary understandings of sexuality and gender and a consideration of alternative practices that do not fit into hetero/homo categories are central. A growing body of multi-and interdisciplinary scholarship explores desires, practices and identities that defy the dualities of social categories and unsettle the epistemological and methodological assumptions underpinning much of the work on gender and sexualities - that there is a 'man', 'woman', 'lesbian' or 'homosexual' to be studied as the object of research.⁴¹

Many queer theorists argue, in concert with various feminist, gay, and lesbian scholars that normative understandings of sexuality (and gender) are central, organising principles of society, social relations, and social institutions and are designed to preserve this hegemonic ordering.⁴²

For many, queer theory works specifically to unwrap the commonly taken-for-granted and normalised connections between sexuality and gender in order to render visible their contingent connections.⁴³ Gorman-Murray *et al* argue that 'the notion of queer asserts the multiplicity and fluidity of sexual subjects...and seeks to challenge the processes which normalise and/or homogenise certain sexual and gender practices, relationships and subjectivities.'⁴⁴

As queer theorising has come to be central in much theorising regarding sexual and gendered lives, it has emerged as a scholarly conceptual or theoretical approach, a political perspective and

⁴⁰Nikki Sullivan. A Critical Introduction to Queer Theory. (NYU Press 2003) p 39. In Ki Namaste, The Politics of Inside/Out: Queer Theory, Poststructuralism, and a sociological Approach to Sexuality, *Sociological Theory*, vol. 12 N. 2. (1994)

⁴¹ Brown and Lim, Kath Browne, Jason Lim and Gavin Brown (eds). Geographies of Sexualities: Theories, Practices and Politics. Aldershot: Ashgate Publishing, 2007) Judith Butler, The Gender Trouble. New York : Routledge, 1990).

⁴² Eva Kosofsky Sedgwick. Epistemology of the Closet. (University of California Press, Berkeley. Los Angeles 1990); Patrick Sullivan, Introduction: Culture Without Cultures – The Culture Effect. *The Australian Journal of anthropology*, Vol. 17, No. 3: 253-264.

⁴³ Ibid

⁴⁴ Andrew Gorman-Murray, Kate Darian-Smith and Chris Gibson Scaling the Rural: Reflections on Rural Cultural Studies, (2008).*Australian Humanities Review*, Issue No. 45.

a form of self-identification or assemblage of practices of the self.⁴⁵ Much queer scholarship, however, has made good use of the interdisciplinary debates on poststructuralist Michel Foucault's work detailing how sexuality itself is a historically specific concept as well as a regime of disciplinary knowledge structuring society and social relations.⁴⁶ Foucault's attention to teasing out the available knowledges and systems of meaning in circulation in any one historical period (and place) shifted research foci from a consideration of the constitution of subjects and their subjectivities to a focus on 'discourses', institutions and practices that discipline and reinforce certain understandings about gender and sexuality.⁴⁷

Queer theory is found suitable for this study, first, due to its destabilising social and political critique, queer analyses provides important insights into the contradictions inherent not only in LGBT politics, but also the international structure itself, in which the wider human rights discourse is imbedded. As methodology, queer approach provides methods that reach out to sexual minorities as insular people, some of whom need to be discovered due to their invisibility. Analytically, in conjunction with Finnis' principles of practical reasonableness which are critical in nature, the thought processes and cognitive capacities and capabilities of parliamentarians and judges are critiqued for purposes of making improvements. Queer critique is necessary deconstruction of heteronormativity that enables LGBT people to challenge the dominant social and political order to redefine the meaning of their multiple identities and the contexts in which their lives are situated. But perhaps the most important use of queer theory is its insistence that law is not the only solution to problems that sexual minorities face, though its belief that law has

⁴⁵ Kath Browne and Catherine J. Nash. *Queer Methods and Methodologies: An Introduction*, p 3. Available at www.gender.can.ac.uk/mphil/students/browne. (Accessed on 12th July, 2016).

⁴⁶ Michel Foucault. *The History of Sexuality, Volume 1: An Introduction*. Robert Hurley (Translator). (Vintage; Reissue edition (April 14, 1990)).

⁴⁷ Kath Browne and Catherine J. Nash, *supra* note 45 above, p 5.

no monopoly to “truth”, meaning that for sexual minorities to be fully respected and protected, an array of approaches, including law, have to be applied.

Finnis’ theory places the obligations of dignity, competence, reasonableness and rationality upon members of Parliament and judges in their duty to promote the human rights of all Kenyans equally and without discrimination. Coupled with Queer theory which deconstructs and disrupts traditional and binary assumptions about sexuality and gender identity, these two theories call for more critical, transformative and fluid approaches to decision making and for that reason, they are appropriate for this study.

2.3: CONCEPTS AROUND HETERONORMATIVITY

The literature review in chapter one revealed several concepts within the broader conceptual framework of heteronormativity. They include but not limited to, essentialism, social constructionism, sexuality, sexual orientation, sex, gender homosexuality, social institutions and social structures. All these concepts are complex, difficult to define, and even contentious. In developing comprehensive operational definitions of the concepts, the study carefully examined the literatures on heteronormativity and all other relevant topics to understand the key concepts. The following section explains some of these concepts.

2.3.1: Heteronormativity

The concept of heteronormativity originates from queer theory as a critique of feminist movements and theories reproducing and reifying gender as binary category and a heterosexual norm. The theoretical ground for the term heteronormativity, however, is Foucault’s theory of discourse, which also a theory of knowledge and power as well as his ideas about normative judgments. One of the things is how the discourse on sex has produced categories of sexual practices and sexual identity by which are marked as particular kinds of subjects.

In *The History of Sexuality*, Foucault discusses how our ideas about ourselves are partly built on what type of body we possess. The way we inhabit our bodies and live out our (sexual) identities, shapes the type of life we can expect to live and the relationships we engage in. Even though ethical and social rules about sexual conduct may differ through history and between societies it still is the sexual discourse that defines what is right and wrong. It is through this sexual discourse that forms a set of practices, behaviours, rules and knowledge by which we produce ourselves and are produced as knowing, ethical, social subjects.⁴⁸

In understanding heteronormativity, Queer theorists extend the idea by placing the entire matrix of gender and sexuality on the table.⁴⁹ In their view, gender is that sense of belonging to a particular category of persons (usually “male” or “female”), is intricately wound up in sexuality, often understood to mean “whom do you desire”. They argue that within contemporary Western culture’s binary gender system, one is expected to desire - to - love - someone of the opposite gender.⁵⁰ Michael Warner employs the term “heteronormativity” to more effectively probe the “complex cluster of sexual practices [that] gets confused, in heterosexual culture, with the love plot of intimacy and familiarism that signifies belonging to society in a deep and normal way”.⁵¹

Warner observes that:

A whole field of social relations becomes intelligible as heterosexuality, and this privatised sexual culture bestows on its sexual practices a tacit sense of rightness and normalcy. This sense of rightness – embedded in things not just in sex – is what we call heteronormativity”.⁵²

⁴⁸ Geoff Danaher, Tony Schirato, Jen Webb. Allen & Unwin, *Understanding Foucault (2000)* p 133-36

⁴⁹ Susan Adams, *Heteronormativity and Teaching at Syracuse University*. In Mary Queen, Kathleen Farrell, and Nisha Gupta, *Interrupting Heteronormativity*,. Graduate School of Syracuse University, 2004. Available at [graduateschool.syr.edu/wp-content/uploads/2015/15/interrupting heteronormativity](http://graduateschool.syr.edu/wp-content/uploads/2015/15/interrupting-heteronormativity). (Accessed on 20th January, 2016). P 15

⁵⁰ Ibid p 15

⁵¹ Mary Queen, Kathleen Farrell, and Nisha Gupta, *Interrupting Heteronormativity*,. Graduate School of Syracuse University,(2004), p15. Available at [graduateschool.syr.edu/wp-content/uploads/2015/15/interrupting heteronormativity](http://graduateschool.syr.edu/wp-content/uploads/2015/15/interrupting-heteronormativity). (Accessed on 20th January, 2015).

⁵² Ibid

Rich argues that heteronormativity, at an analytical level, is political.⁵³ Mary Queen *et al* argue that as term, heteronormativity describes the processes through which social institutions and social policies reinforce the belief that human beings fall into two distinct sex/gender categories: male/man and female/woman.⁵⁴The belief (or ideology) produces a correlative belief that those two sexes/genders exist in order to fulfill complementary roles, that is, that all intimate relationships ought to exist only between males/men and females/women.⁵⁵ To describe a social institution as heteronormative means that it has visible or hidden norms, some of which are viewed as normal only for males/men and others which are seen as normal only for females/women.⁵⁶As a concept, heteronormativity is used to help identify the processes through which individuals who do not appear to “fit” or individuals who refuse to “fit” these norms are made invisible and silenced. Heteronormative institutions and practices, then, block access to full legal, political, economic, educational and social participation for millions of people⁵⁷ around the world.

According to Kirzinger, the term heteronormativity is widely used in contemporary political, social, and critical theory to describe socio-legal, cultural, organisational, and interpersonal practices that derive from and reinforce a set of taken-for-granted presumptions relating to sex and gender.⁵⁸These include the presumptions that there are only two sexes; that it is “normal” or “natural” for people of different sexes to be attracted to one another; that these attractions may be publicly displayed and celebrated; that social institutions such as marriage and the family are

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ Ibid

⁵⁶ Ibid

⁵⁷ Ibid p 3

⁵⁸ Celia Kitzinger, *Heteronormativity in Action: Reproducing the Heterosexual Nuclear Family in After-hours Medical Calls*. University of York. Available at incarn.univ.lyon2.fr/cole_thematique/idocoa/documents/05_Kitzinger. (accessed on 11th January, 2016).P 478

appropriately organised around different-sex pairings; that same-sex couples are (if not “deviant”) are “variation on” or an “alternative to” the heterosexual couples. Heteronormativity refers, in sum, to the myriad ways in which heterosexuality is produced as a natural, unproblematic, taken-for-granted, ordinary phenomenon.⁵⁹ Heteronormativity is embodied in what people do rather than in their beliefs, values, ideologies, or faiths. Complicity with heteronormativity does not necessarily imply prejudiced attitudes or beliefs or any deliberate intent to discriminate against LGBT people. Rather, heteronormativity -like other social norms - is embodied and displayed endogenously, in the details of conduct, and may be studied empirically.⁶⁰

Wagenknecht states that the concept of heteronormativity refers to an interdependence of gender and sexuality which defines gender as a binary category and naturalises sexual attraction as directed at the oppositional gender. Non-heterosexual structures of desire are marginalised as deviating from the heterosexual norm. Heteronormativity is the privileging of heterosexuality that results in social pressures to fulfill and conform to heterosexual roles.⁶¹ This leads individuals to conceive of themselves and their social worlds in particular ways such as people are either male or female, should partner with others of the opposite sex, and should act and feel in accordance with social expectations of males or females.⁶² Several scholars have defined

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ Wagenknecht, Peter (2007), Was ist Heteronormativität? Zu Geschichte und Gehalt des Begriffs. In Birgit Hofstätter, The Concept of ‘Heteronormativity’ and its Methodological Implications. Alpen-Adria Universität Klagenfurt | Wien | Graz, IFZ/IFF. Schlogelgasse 2, 8010 Graz, Austria.

⁶² Ibid

heteronormativity/heterosexism as a strong hegemonic force that privileges heterosexuality and organises social life around heterosexual axioms.⁶³

Berlant and Warner define heteronormativity as the institutions, structures of understanding and practical orientations that make heterosexuality seem not only coherent; that is, organised as *a sexuality* but also privileged. Its coherence is always provisional, and its privilege can take several (sometimes contradictory) forms: unmarked, as the basic idiom of the personal and the social; or marked as a natural state; or projected as an ideal or moral accomplishment. It consists of norms that could be summarised as a body of doctrine than of a sense of rightness produced in contradictory manifestations, often unconscious, immanent to practice, such as life narrative and generational identity, can be heteronormative in this sense, while in other contexts form of sex between men and women might not be heteronormative.⁶⁴ Jung and Smith contend that at the centre of heterosexist prejudice is the organising belief that heterosexuality is the normative form of human sexual relations and as such the standard measurement used to evaluate and judge all other sexual orientations.⁶⁵ Because sexual minorities do not fit within the binaries, they face discrimination and oppression.⁶⁶The consequence of imposition of heterosexual norms pressures sexual minorities in most societies to remain silent, submerged and invisible.⁶⁷

Heteronormativity as a culture influences homophobic attitudes and behaviour and is considered the main cause of discrimination and violence against sexual minorities.⁶⁸ Because of the

⁶³ José Esteban Muñoz. *Queers of Color and the Performance of Politics* Muñoz & K. M Thomas, LGBTQ issues in organisational settings: what HDR professionals need to know and do. *New Directions for Adult and Continuing Education*, (2006), 112, 85-95.

⁶⁴ Laurine Berlant and Michael Warner, 'Sex in Public' in *Critical Inquiry* 24 (winter 1998), p 548

⁶⁵ Patricia B. Jung & Ralph F. Smith, *Heterosexism: An Ethical Challenge*. (State University of New York Press, 1993), p 34.

⁶⁶ *Ibid*

⁶⁷ *Ibid* p 4

⁶⁸ *Ibid*

pervasiveness of heterosexism, “lesbians and gay men are oppressed in almost every aspect of their lives” and this oppression is experienced at multiple levels of analysis including the personal, interpersonal or relational, and social or community.⁶⁹ According to Donnelley, heteronormative standards prevail and LGBT individuals are identified as deviate/deviant, mentally ill or criminals in many countries.⁷⁰ While commenting on the hegemonising effect of heteronormativity in American society, Cheshire Calhoun notes that public social interaction and the structure of public institutions are pervaded with the assumption that all people are heterosexual and with opportunities for people to represent themselves as such.⁷¹ According to Calhoun,

humour, formal and informal dress codes, corporate benefits policies, “scripts” for everyday conversation about personal life, public display of family pictures, and so on presuppose that all persons are heterosexual.⁷²

They also enable individuals to publicly represent themselves as heterosexuals. Calhoun observes that unlike “the love that dare not speak its name,” heterosexuality is the love whose name is continually spoken in the everyday routines and institutions of public social life. In her view, this standard for heterosexual as opposed to homosexual is based on the assumption that heterosexuality is and ought to constitute of what it means to be a legitimate citizen.⁷³

Heteronormativity is the foundation of human rights violations of its victims. This is a pervasive injustice that sexual minorities endure. Donnelley rightly notes that least seven countries maintain the death penalty for consensual same-sex practices. More than 80 countries still

⁶⁹Celia Kitzinger, *supra* note 58 above, p 324.

⁷⁰ Jack Donnelley, Non-Discrimination and sexual Orientation: Making a Place for sexual Minorities in the Global Human Rights Regime. In Peter Baehr, Cees Flinterman, and Mignon Senders (eds.), *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights*. Amsterdam: Royal Netherlands Academy of Arts and Sciences, 1999, p 93-110

⁷¹ Cheshire Calhoun, *Sexuality Injustice. Notre Dame Journal of Law, Ethics & Public Policy, Vol. 9 No. 1.* Symposium on Sexual Orientation, Article 9, P 252. In

⁷² *Ibid*

⁷³ *Ibid* P 253

maintain laws that make same-sex consensual relations between adults a criminal offence.⁷⁴ According to the Human Rights Watch, these laws invade privacy and create inequality. They relegate people to inferior status because of how they look or who they love. They degrade people's dignity by declaring their most intimate feelings 'unnatural' or illegal. They can be used to discredit enemies and destroy careers and lives. They promote violence and give it impunity. They hand police and others the power to arrest, blackmail, and abuse. They drive people underground to live in invisibility and fear.⁷⁵

Examples of other grave human rights violations abound. These include extrajudicial killings, torture and ill-treatment, sexual assault and rape, invasions of privacy, arbitrary detention, and denial of employment and education opportunities.⁷⁶ LGBT individuals are also stigmatised, with far-reaching consequences such as loss of self-esteem among the victims, depression which in many cases leads to suicides and attempted suicides. Commenting on the impact of stigma on its victims, Donnelley states that:

Stigmatised groups have less power and access to resources than do 'normals'. ...The ultimate consequence of sexual stigma is a power differential between heterosexuals and non-heterosexuals. It expresses and perpetuates a set of hierarchical relations within society. In that hierarchy of power and status, homosexuality is devalued and considered inferior to heterosexuality. Homosexual people, their relationships, and their communities are all considered sick, immoral, and criminal or, at best, less than optimal in comparison to that which is heterosexual.⁷⁷

Yep asserts that "very early in life children learn from interpersonal contacts and mediated messages that deviations from the heteronormative standard, such as homosexuality, are anxiety-ridden, guilt-producing, fear-inducing, shame-invoking, hate-deserving, psychologically

⁷⁴ Ibid

⁷⁵ Human Rights Watch. This alien Legacy: the origins of 'Sodomy' laws in British Colonialism. In Human Rights, Sexual Orientation and Gender Identity p 88. Available at space.sas.ac.uk/4824/19/03HumanRightsWatch_OriginsOfSodomylaws. (Accessed on 5th December, 2015).

⁷⁶ Ibid

⁷⁷ Jack Donnelley, *supra* note 70 above, p 93-110.

blemishing and physically threatening”.⁷⁸ Elia *et al* describe how social institutions (often implicitly) reproduce assumptions about heterosexuality as the norm and perpetuate privilege for those who ‘fit’ into the prescribed mold of heterosexuality.⁷⁹ Blassius avers that the concept of heteronormativity is widely considered in gender studies as a fundamental contributor to prejudice and oppression based on heterosexism, homophobia, and sexism.⁸⁰ This study adopts the queer understanding of heteronormativity.

Heteronormativity, or the normalisation of heterosexuality, exists across multiple social domains. It is maintained and perpetuated by social institutions such as marriage as well as by everyday actions taken by individuals. It is an unseen force that dictates the boundaries of presumed normal sexuality and even normal social interactions.⁸¹ The culturally accepted heterosexual ideal positions sexual others as deviant, lacking, and wrong, and the societal bias is very strong towards those “others”.⁸² Understanding how the constructs of heteronormativity and sexual orientation relate to one another is useful in helping us understand the human rights outcomes for heterosexuals as well as lesbians, gay men, bisexual and transgender individuals, and others who transgress the rigid expectations that characterise a heteronormative society.

⁷⁸ G.A. Yep, G. A. (2003) The violence of heteronormativity in communication studies: notes on injury, healing, and queer world-making. (In Gust A. Yep, Karen E. Lovaas and John P. Elia (Eds.), *Queer Theory and Communication: From Disciplining Queers to Queering the Discipline(s)* (11-60). New York, NY: Harrington Park Press). In Katarzyna A. Agarwal, *The Impact of Heteronormative Violence on Sexual Minorities in the Workplace* DePaul University College of Communication November 15, 2009.

⁷⁹ Ibid

⁸⁰ Celia Kitzinger, *supra* note 58 above p 324.

⁸¹ Ibid

⁸² Ibid

2.3.2: Sexual Orientation

The study of sexuality encompasses a wide range of topics, including anatomical and physiological phenomena, behavior, desire, and identity, or sexual self-concept.⁸³ Homosexual men and women (in western world often refer to as gay men and lesbian women) have a sexual orientation towards persons of the same sex. Heterosexual men and women (in the western world often referred to as straight persons) have a sexual orientation towards persons of the opposite sex. Bisexual women and men have a sexual orientation towards persons of the same as well as the opposite sex. Heterosexuality, homosexuality and bisexuality are all regarded as “sexual orientations”.⁸⁴ Alfred Kinsey was among the first to recognise sexuality as a continuum rather than a strict dichotomy of gay or straight. To classify this continuum of heterosexuality and homosexuality, Kinsey created a six-point rating scale that ranges from exclusively heterosexual to exclusively homosexual. In his 1948 work *Sexual Behaviour in the Human Male*, Kinsey writes, “Males do not represent two discrete populations, heterosexual and homosexual. The world is not to be divided into sheep and a goat...The living world is a continuum in each and every one of its aspects”.⁸⁵

The term homosexual came into use as a clinical description of men who displayed sexual desires to other men. In modern language the term homosexuality is equally ascribed to male as to female same sex sexual behaviour.⁸⁶ The homosexual identity developed in the late 19th and 20th centuries and diversified into a plurality of gay, lesbian, queer sexual orientation identities.

⁸³ By Cyranowski, Jill M.; Andersen, Barbara L. Schemas, sexuality, and romantic attachment. *Journal of Personality and Social Psychology*, Vol. 74(5), May 1998, 1364-1379.

⁸⁴ Lotta Samelius, Erik Wågberg, Sexual Orientation and Gender Identity Issues in Development. *SIDA: A study of Policy and Administration*. November, 2005, p 9. Available at www.sida.se/contentassets/77a0ee71307a4ff49fa0514d080748dc/. (Accessed on 9th January, 2016).p 11

⁸⁵ See William Little, *Introduction to sociology – First Canadian edition*, p 2. Available at <https://opentextbc.ca/introductiontosociology/chapter/chapter12-gender-sex-and-sexuality/>. (Accessed on 28th July, 2016).

⁸⁶ Lotta Samelius, Erik Wågberg, supra note 84 above, p 11.

All these identities are part of a modernity process. The identity creation process is an intricate and complex dynamics of the relationships between the “one” who has power to name the category and determine its qualities and the “one” who is placed in a category’s counteraction to re-negotiate the qualities and nature that is ascribed to the category.⁸⁷ Generally speaking, sexual orientation has been represented as including one or more aspects of sexuality (e.g. attraction, behavior, desire, identity) that extend beyond physiological and biological processes. Even before the invention of the term ‘sexual orientation,’ distinctions were made by scientists among sexual physiology, behavior, and “psychological” components of sexuality.⁸⁸ However, inconsistency of concepts and definitions across studies of sexual orientation makes it difficult to know, unless explicitly stated, precisely what is meant by ‘sexual orientation’. According to some scholars, sexual orientation is assumed to be synonymous with sexual behavior or desire/attraction while in others it is defined as the combination of sexual behavior and feelings.⁸⁹

A second issue in the study of sexual orientation concerns dichotomous and categorical labeling of sexual orientation domains versus measurement on a continuum.⁹⁰ Pioneering research measured sexual orientation on a seven-point scale ranging from exclusively heterosexual to exclusively homosexual.⁹¹ Among others, has indicated support for such an approach. In contrast to accepting participants’ self-labeled identities as evidence of variation in sexual orientation, others such as Fergusson, *et al* have endorsed statistically derived categorisations (i.e. latent class

⁸⁷ Ibid

⁸⁸ Lewis Frankel, An appeal for additional research about the development of heterosexual male sexual identity. *Journal of Psychology & Human Sexuality*, . (2004). 16, 1-16. 1991, as cited in Kinsey, et al, *Sexual Behaviour in the Human Males*, Indiana University Press, [1948] (1998).

⁸⁹ Ibid

⁹⁰ Alfred Kinsey, et al, *Sexual Behaviour in the Human Males*, Indiana University Press, [1948] (1998).

⁹¹ Esther D. Rothblum, Sexual orientation and sex in women’s lives: Conceptual and methodological issues. *Journal of Social Issues*, (2000),56, 193-204

analysis derived from participants' reports of behavior and attraction); their study determined that three classes of sexual orientation exist: exclusively heterosexual, predominantly heterosexual with some same-sex inclinations, and predominantly homosexual.⁹² The current study has been constructed with particular concern for the definitions of constructs related to sexual orientation and words to capture individuals' sexual experiences and identities.

2.3.3: Sexuality

Sexuality is often thought of as closely related to one of the most critical biological processes, namely reproduction. This view understands sexuality to be a fixed essence that resides within the individual.⁹³ However, sexuality is complex, offering unending lessons about pleasure, creativity, subversion, violence, oppression and living and Oliver Phillips rightly notes that:

Sexuality can be defined by referring to a wide range of anatomical acts and physical behaviour involving one, two or more people. We can relate it to emotional expressions of love, intimacy and desire that can take an infinite variety of forms. Or it can be implicated in the reproduction of social structures and markers through rules and regulations that permit or prohibit specific relations and/or acts. In the end, it emerges that these definitions are far from exhaustive. None of them are adequate on their own but that when considered all together, they reflect the multiple ways that sexuality is manifest and impacts on our lives, and that above all; these definitions all consistently involve relations of power.⁹⁴

But contemporary scholarship understands sexualities as socially constructed, in profound and troubling engagement with the biological, and therefore as heavily influenced by, and implicated within, social, cultural, political and economic forces.⁹⁵ Goettsche defines sexuality as “the individual capacity to respond to physical experiences which are capable of producing body-

⁹² David M Fergusson, L. John Horwood, E.M Ridder, & Annette .L Beautrais., (2005). Sexual orientation and mental health in a birth cohort of young adults. *Psychological Medicine*, 35, 971-981.

⁹³ Dixon Bester Jimmy-Gama, An Assessment of the capacity of facility-based youth friendly reproductive health services to promote sexual and reproductive health among unmarried adolescents: evidence from rural Malawi. PhD Thesis. Queen Margaret University, 2009 p 34

⁹⁴ Oliver Phillips, *Constituting the Global Gay: Issues of Individual subjectivity and Sexuality in Southern Africa*, p 32. In Didi Herman and Carl Stychyn, (eds.) *Sexuality in the Legal Arena*, Athlone 2000. Available at www.ids.ac.uk/files/dmfile/Globalgay.pdf. (Accessed in 25th December, 2015). p 7.-22.

⁹⁵ Ibid

cantered genital excitation that only subsequently becomes associated with cognitive constructs, independent of ongoing physical experiences.⁹⁶ According to the Options for Sexual Health (2008) Report, sexuality is not just sex, though people usually define sexuality in terms of genitals, what people do with them, and who they do it with. Sexuality involves and is shaped by many things including values and beliefs, attitudes, experiences, physical attributes, sexual characteristics and societal expectations,⁹⁷

Sexuality has been defined as "the socio-cultural construction of sex, shaped and defined by the physical, language and [socio-economic] character of each society".⁹⁸ This definition of sexuality falls within the social construction theory, which postulates that sexual feelings and activities, opinions about sexuality, and sexual identities, are not biologically determined, but are products of social and historical constructions.⁹⁹ Foucault in his book "History of Sexuality: An Introduction" argued that there is no such thing as an internal force or drive that can be manipulated in the ways that can change sexuality.¹⁰⁰ He instead stated that what can be manipulated are ideas, definitions, which regulate the ways in which sexuality can be thought of, defined or expressed. According to Foucault, cultures construct the rules, beliefs, values and acceptable behaviours, all elements that underlie the discourse and regulation of sexuality.¹⁰¹ Tiefer also emphasises the importance of culture in defining, shaping and promoting sexuality, including maintenance of socially stigmatised patterns - all of which can affect sexual health. Thus, sexualities can constantly be produced,

⁹⁶ Dixon Bester Jimmy-Gama supra note 93 above, p 34.

⁹⁷ Ibid p35

⁹⁸ Janet Kabeberi-Macharia, *Reproducers Reproduced: Scio-legal Regulation of Sexuality among girls in Kenya*. PhD Thesis, University of Warwick School of Law, Coventry, 1995, p 18.

⁹⁹ Anne Richardson, *Race, Gender and Sexual Orientation*. (Ashgate Publishing., 1993) p 78). Ibid Kabeberi-Macharia.

¹⁰⁰ Michel Foucault, *History of sexuality*. In Dixon Bester Jimmy-Gama supra note 93 above, p 35.

¹⁰¹ Dixon Bester Jimmy-Gama supra note 93 above, p 35.

changed, modified and the nature of sexual discourse and experiences changes accordingly.¹⁰² This study adopts the social construction theory in defining sexuality, and posits that this is crucial in understanding the regulating of sexuality.

2.3.4: Sex and gender

Before exploring the ways in which gender and sex relate to other constructs, it is important to clarify terminology. The words gender and sex have often been used interchangeably in social science literature.¹⁰³ However, feminist scholars have put forth the following delineation: sex refers to the biological and physical manifestations of sex-linked chromosomes, and gender refers to psychological and social characteristics associated with, but not necessarily correlating perfectly with, biological sex categories.¹⁰⁴ Tamale explains that sex and gender go hand in hand; both are creatures of culture and society, and both play a central and crucial role in maintaining power relations in our societies. They give each other shape and any scientific inquiry of the former immediately invokes the latter.¹⁰⁵ Hence, gender provides the critical analytical lens through which any data on sexuality must logically be interpreted. Things that impact on gender relations, for instance history, class, age, religion, race, ethnicity, culture, locality and disability, also influence the sexual lives of men and women. In other words, sexuality is deeply embedded in the meanings and interpretations of gender and systems.¹⁰⁶ This study adopts the feminist understanding of sex and gender.

¹⁰² Leonore Tiefer *Sex is not a natural act and other essays*. (Boulder Company Westview Press, 1995). In Dixon Bester Jimmy-Gama supra note 93 above, p 35.

¹⁰³ Ibid

¹⁰⁴ Judith Butler, *et al*, *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left*, London: Verso, 2000)

¹⁰⁵ Sylvia Tamale, *Researching and theorising sexualities in Africa*. In Sylvia Tamale (ed.), *African Sexualities: A Reader* (Pambazuka 2011) p 11.

¹⁰⁶ Ibid

2.3.5: Stigma

Stigma refers to an enduring condition or attribute, a physical or figurative mark borne by an individual; the attribute or mark is not inherently meaningful; meanings are attached to it through social interaction.¹⁰⁷ Sociologist Erving Goffman defined stigma as a social attribute that is discrediting for an individual or group.¹⁰⁸ Goffman used stigma to refer to “an undesired differentness” and an attribute that is deeply discrediting”.¹⁰⁹ According to Goffman, the term stigma historically referred to a mark of bodily sign “designed to expose something unusual and bad about the moral status of the “signifier”.¹¹⁰

Expanding on Goffman’s social interactionist definition of stigma, Link and Phelan conceptualise stigma as the co-occurrence of labeling, stereotyping, separating, status loss and discrimination.¹¹¹ Inherent to this definition is the idea that this attribute is something which deviates from what society has deemed ‘normal’.¹¹² This attribute can be a physical marking or a behaviour. Because of its deviation from what is considered normal, society responds to this attribute “with interpersonal or collective reactions that serve to ‘isolate’ ‘treat’, ‘correct’ or ‘punish’ individuals engaged in such behaviour”.¹¹³ By virtue of the mark, an individual is regarded by society as diverging in a disfavoured way from its understanding of normalcy.¹¹⁴ Moisiu argues that individuals who inhabit a stigmatised role enjoy less access to

¹⁰⁷ Aleksander Moisiu, Sexual Prejudice and stigma of LGBT People. *European Scientific Journal*, (May 2015), Vol. 11, No. 14, P 62.

¹⁰⁸ See Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity*. (New Jersey: Prentice-Hall, 1963).

¹⁰⁹ Gregory M. Herek, *Sexual Stigma and Sexual Prejudice in the United States: A Conceptual Framework*.

¹¹⁰ Erving Goffman, *supra* note 108 above.

¹¹¹ Bruce Link and J. Phelan, *Conceptualising Stigma*. *Annual review of Sociology* 27:363-85.

¹¹² Edwin Schur, *Labeling Deviant Behaviour” Its Sociological Implications*. (New York: Harper & Row Publishers, 1971), p 24.

¹¹³ *Ibid* P 2.

¹¹⁴ Aleksander Moisiu, *supra* note 107 above, p 64.

valued resources, less influence over others, and less control over their own fate.¹¹⁵ Goffman stresses that stigma is socially constructed.¹¹⁶ Many other writers have emphasised that stigma is very much about the socially constructed meanings associated with a characteristic.¹¹⁷

Sexual stigma is the stigma attached to any non-heterosexual behaviour, identity, relationship, or community. It is socially shared knowledge about homosexuality's devalued status relative to heterosexuality.¹¹⁸ According to Meyer and Northridge, sexual stigma must be understood in its historical context. They argue that whereas homosexual and heterosexual behaviours are ubiquitous among human societies, the idea that individuals are defined in terms of their sexual attractions and behaviours is a relatively recent origin.¹¹⁹ Historians now widely agree that modern notions of homosexuality and heterosexuality, and indeed the very concept of sexual orientation is relatively new and that the latter nineteenth century witnessed significant changes in how sexuality was understood.¹²⁰

One of the consequences of sexual stigma is that it creates social roles and expectations for conduct that are understood and shared by the members of society, regardless of their worn sexual orientation or personal attitudes.¹²¹ Homosexual desires and conduct are regarded negatively relative to heterosexuality, and they are aware of the malevolent stereotypes that are routinely attached to individuals whose personal identities are based on same-sex attractions,

¹¹⁵ Gregory M. Herek, supra note 109 above, p 6.

¹¹⁶ Ibid

¹¹⁷ Ibid

¹¹⁸ Aleksander Moisiu, supra note 107 above, p 64.

¹¹⁹ Gregory M. Herek, Regina Chopp and Darryl Strohl. *The Health of Sexual Minorities: Public Health Perspectives on Lesbian, Gay, Bisexual and Transgender Populations*. Ilan Meyer and Mary E. Northridge (eds.). et al.

¹²⁰ Ibid. (Also see generally Michel Foucault: *The History of Sexuality: An Introduction*. Translated from the French by Robert Hurley. Pantheon Books. New York).

¹²¹ Aleksander Moisiu, supra note 108 above, p 64.

behaviours, relationships, or membership in a sexual minority community.¹²² Due to stigma, sexual minorities endure “social exclusion”, which is not just limited to insufficient income, but it even goes beyond the participation in working life to include things such as housing, education and access to services”.¹²³

Individuals residing stigmatised, LGBT, enjoy less access to valuable resources, less impact on others, and less control over their destiny.¹²⁴ Despite their personal attitudes, and identities based on them, members of society are of the view that homosexual acts and desires and identities based on them, are widely considered bad, immature, ill, and inferior to heterosexuality. The “attribute” is understood by all to determine its bearer as a criminal, or otherwise worthy of social isolation, shame and punishment.¹²⁵

The roles of the stigmatised and “normal” are not merely complementary or symmetrical. They are differentiated from power. Stigmatised groups have less power and access to resources than those considered “normal”.¹²⁶ The ultimate consequence of sexual stigma is a power difference between homosexuals and heterosexuals. It expresses and perpetuates a set of hierarchical relations within society.¹²⁷ In the hierarchy of power, homosexuality is devalued and considered inferior to heterosexuality.¹²⁸ This makes the job of LGBT persons in case of their sexual orientation to be expressed openly, virtually impossible as well as their treatment at work to be discriminatory.¹²⁹

¹²² Ibid

¹²³ See European commission, COM (1993). In Aleksander Moisiu, supra note 108 above, p 63.

¹²⁴ Ibid

¹²⁵ Ibid p 63.

¹²⁶ *ibid* p 64

¹²⁷ Ibid

¹²⁸ Ibid

¹²⁹ Ibid.

This study adopts Erving Goffman's social interactionist meaning of stigma which argues that it is a social and historical construct that has only recently- in the late nineteenth century, found its way into dominant discourse.

2.3.6: Social Structure and Social institutions

The elements of a social structure, the parts of social life that form a sensible whole and direct possible action, are the institutions of society.¹³⁰ Social institutions may be understood to include: the government, work, education, family, law, media, religion, and medicine among others. These institutions direct, or structure, possible social action, meaning that within the confines of these spaces there are rules, norms, and procedures that limit what actions are possible. For instance, family is a concept near and dear to most, but historically and culturally family forms have been highly specified, that is structured.¹³¹ For instance, family is a concept near and dear to most, but historically and culturally family forms have been highly specified, that is structured. According to Dorothy Smith, the standard North American family(or, SNAF) includes two heterosexually-married parents and one or more biologically-related children.¹³² In Kenya, the family would include a man married heterosexually to and one or more women and their biological children and members of the extended family. Although families vary in all sorts of ways, this is the norm to which they are most often compared.

According to feminist theorists, the orthodox conception of marriage, ensconced in the assumption that it is the purveyor of kinship relations, has long been an institution through which

¹³⁰ Miliann Kang, Introduction to Women, Gender, Sexuality Studies (2012). Women, Gender and sexuality studies Educational Material Paper 1. Available at http://scholarworks.umass.edu/wost_ed_materials/1 (Accessed on 9th January, 2016) p 9

¹³¹ Ibid

¹³² Ibid, Dorothy Smith, Texts, Facts, and Femininity: Exploring the Relations of Ruling (Routledge, 1993), p 36.

to reify social inequalities and sustain political hierarchies.¹³³ It is customarily premised on the essentialist foundation of ontological sexual difference. From the Christian viewpoint, marriage is a natural event, part of the human experience from which few - mainly members of the clergy - ought to be exempt.¹³⁴ Marriage therefore is a strictly heterosexual institution which unifies one man and one woman through what they delineate to be most sacrosanct of bonds, marriage and God's law are habitually inflated, thereby situating the institution almost wholly within the realm of religion, and either entirely precluding or relegating as incidental, other ideological variables that have motivated its endurance.¹³⁵ In this regard, the conventional marriage shows itself to be the institutional front of heterosexism - an establishment from which non-heterosexuals are barred.

The consequences are prejudicial, which include among other things, the fortification of inequality through the reification of patriarchy and heterosexism, and the unnecessary regulation of human sexual expression.¹³⁶ The social and legal meaning of marriage has remained grounded in the allocation of the divine. This is demonstrated in the classic 1886 case over polygamy, *Hyde vs. Hyde*, in which the presiding Judge concluded "I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others".¹³⁷ This means that the growing claims of homosexuals towards recognition of their basic rights as well as a more open-minded attitude towards sexual

¹³³ See generally Angela Davis. "Outcast Mothers and Surrogates: Racism and Reproductive Politics in the Nineties." *American Feminist Thought at Century's End: A Reader*. Ed. Linda S. Kauffman. (Oxford and Cambridge, MA: Blackwell Publishers, 1993), 355-366.

¹³⁴ *Ibid*, p 37

¹³⁵ *Ibid*

¹³⁶ *Ibid*

¹³⁷ *Hyde vs. Hyde*, 1886, p 133

minorities in Western societies have created opportunity to re-examine the international dispositions concerning the right to marry.¹³⁸

Regarding the media, it has been argued that images of homosexuality and the gay and lesbian community are often important sources of information and whether the dominant media discourse defines homosexuality as a pervasion, sickness or crime or defines it as a normal expression of human sexuality has a significant impact on how individual gay males or lesbians view themselves and their relationship to society.¹³⁹ Indeed the negative stigma attached to homosexuality is reinforced through interpersonal contact and the media. For instance, in a study carried out by Pearce in the British press treatment of homosexuality showed a pattern of how it was viewed.¹⁴⁰ LGBT persons as youths or young adults have little or no help in understanding or defining themselves as gay or lesbian. Sexual orientation being fixed at a very early age, if not at birth, a gay or lesbian youth develops, or “comes out” in an atmosphere offering little or no information or role models.¹⁴¹ Many accounts of homosexuality were constructed as morality tales, with the homosexual the negative reference point in a discourse that reaffirmed society’s sense of normality. Homosexual were easily signified as the “alien other.”

¹³⁸ Guonundur Alfredsson, Eide Asbjom (eds.), *The Universal Declaration of Human Rights: A common Standard of Achievement*. (Martinus Nijhoff Publishers, 2008), p 327.

¹³⁹ Fred Fejes and Kevin Petrich, *Invisibility, Homophobia and Heterosexism:: Lesbians, Gays and the Media*, *Review of Criticism*, 1993 p 396/ Available at ing14057.weebly.com/uploads/7/6/8/5/7685869/fejes_petrich_invi. (Accessed on 31st December, 2015).Ibid p 397.

¹⁴⁰ Frank Pearce, *How to be immoral and ill, pathetic and dangerous, all at the same time: Mass media and the homosexual*. In C. Cohen & J. Young (Eds.), *The Manufacturer of news: Social Problems, deviance and the mass media* (pp. 284-301)/ Beverly Hills, CA: SagePublications.1973

¹⁴¹ Savin-Williams, *Gay and Lesbian Youth: Expressions of Identity*. (Hemisphere, 1990; In Fred Fejes and Kevin Petrich, *Invisibility, Homophobia and Heterosexism:: Lesbians, Gays and the Media*, *Review of Criticism*, 1993 p 396/ Available at ing14057.weebly.com/uploads/7/6/8/5/7685869/fejes_petrich_invi. (Accessed on 31st December, 2015).

2.3.7: Essentialism and Social Constructionism

The literature on sexual orientation is replete with theories about the causes of homosexuality. However, almost all of the theories of homosexual are predicated on the same basic assumption.¹⁴² Most theories presume that homosexuality is caused by abnormalities in biological, psychological, or social development leading to sexual inversion-that is, having or desiring to have characteristics of the opposite sex including sexual attraction to one's own sex.” it is beyond the scope of this chapter to discuss each of those theories, individually, but it will focus on two most prominent one.¹⁴³ These are the essentialist/social constructionist philosophies.

According to Houston, several questions dominate this debate, with the most commonly asked questions being: does a homosexual exist just as mankind is of the species, Homo sapiens? Is a homosexual orientation intimately intertwined with a person's true identity as a human being? When using the term homosexual, is one accurately defining a person's self, his inner core, and the nature of his being? If it is true, then homosexuality may be implied as natural, and that it is essential to their human wholeness.¹⁴⁴ There are those advocating for homosexuality that hold such a view, that one is born a homosexual. But there are others advocating for homosexuality who holds a conflicting views, that homosexuality only has the meaning which is given to it by the society and culture it is a part of.¹⁴⁵ These conflicting views are usually framed by the parameters of the words “essentialism” and “social constructionism. This section sheds some light on the relevant debates within essentialist and social constructionist paradigm.

¹⁴² Larry Houston. *Essentialism or Social Construction*. Mass: Harvard University Press, 1999), p 3.

¹⁴³ Michael D. Storms, “A Theory of Erotic Orientation Development,” *American Psychological Association*, (2015), p 350.

¹⁴⁴ Ibid

¹⁴⁵ Ibid

2.3.7.1: Essentialism

Essentialism argues that the characteristics of persons or groups are largely similar in all human cultures and historical periods, since they are significantly influenced by biological factors. A key assumption of essentialism is that “a given truth is necessary natural part of the individual and other object in question”.¹⁴⁶ In other words, an essentialist understanding of sexuality would argue that not only do all people have a sexual orientation, but that sexual orientation does not vary across time and place. In this example, “sexual orientation” is a given “truth” to individuals – it is thought to be inherent, biologically determined and essential to their being.¹⁴⁷

The essentialist view of homosexuality may be traced to the late nineteenth century and to Karl Ulrichs who lived in what is present day Germany. Ulrichs was a homosexual himself, and was the first person to theorise about the concept of a homosexual being a “third sex”. He was advocating for legal and social rights for homosexuals. According to Kennedy, Ulrich’s goal was to free people like himself from the legal, religious, and social condemnation of homosexual acts as unnatural. For this, he invented a new terminology that would refer to the nature of the individual, and not to the acts performed.”¹⁴⁸ Houston states that essentialism is an intellectual program in lesbian and gay studies and further posits two variants of essentialism. The first one to develop was essentialism as a metaphysical or universal category of sexual identity, which might be called *identitarian* essentialism. The second variant to emerge focused on the biological explanation of sexual orientation and interpreted it as a naturalised category of behavior; this is *behaviorial* essentialism.”¹⁴⁹

¹⁴⁶ Miliann Kang, supra note 130 above, P 12.

¹⁴⁷ Ibid p 37.

¹⁴⁸ Ibid p 12

¹⁴⁹ Jeffrey Eschoffier. *American Homo: Community and Perversity*. (University of California Press. Berkeley, Los Angeles and London, 1998) p 130

Essentialists claim that categories of sexual attraction are observed rather than created. For example, while ancient Greece did not have terms that correspond to the heterosexual/homosexual division, persons did note men who were only attracted to person of a specific sex.¹⁵⁰ Through history, and across cultures are consistent features, albeit with meaningful variety over time and space, in sexual attraction to the point that it makes sense to speak of specific sexual orientations. According to this view, homosexuality is a specific natural kind rather than a cultural or historical product. Essentialists allow that there are cultural differences in how homosexuality is expressed and interpreted, but they emphasise that this does not prevent it from being a universal category of human sexual expression.¹⁵¹

2.3.7.2: Social Constructionism

Social constructionism as a theory of knowledge argues that concepts that are typically thought to be immutable and solely biological – such as gender, race, class, and sexuality – are products of human definition and interpretation shaped by cultural and historical contexts.¹⁵² As such, social constructionism highlights the ways in which cultural categories are created, changed and reproduced through historical processes within institutions and culture. Therefore, the social constructionists perspective is concerned with the meaning created through defining and categorising groups of people, experience and reality in cultural contexts.¹⁵³ Social construction as philosophy falls within the critical analysis. One of its proponents, Larry Houston argues that social constructionism is a strategy for critical analysis and in this regard, it has placed a stranglehold that on the field of sexuality.¹⁵⁴ In his view, philosophical social constructionist

¹⁵⁰ Kenneth James Dover. *Greek Homosexuality*, (Cambridge, MA: Harvard University Press 1978).

¹⁵¹ *Ibid*

¹⁵² Miliann Kang, *supra* note 130 above, p 35.

¹⁵³ *Ibid*

¹⁵⁴ *Ibid*, p 3

view of sexuality is based upon behaviors and attitudes. An individual's sexual identity, reaching even as far as the preferred object of erotic attraction, is socially created, bestowed, and maintained.¹⁵⁵ One is heterosexual because their sexual attitudes and behaviors are toward members of the opposite sex.¹⁵⁶ For the homosexual, these sexual attitudes and behaviors would be for members of the same sex. Therefore, social constructionists would suggest there is nothing "real" about sexual orientation, except for a society's construction.¹⁵⁷ Social constructionists, who offer critiques of essentialism, run as a common theme in the writings of many contemporary academics whose view may be traced to the 1970s, are advocating for by homosexuals in England and the United States.¹⁵⁸

Social constructionists embody several jurisprudential thoughts such as queer theorists, critical race theorists, post-structuralists, post-colonialists, and many feminists. They consistently take issue with the notion that there are attributes or traits that are intrinsically constitutive of categories such as men and women, heterosexuals and homosexuals, disabled and non-disabled, and so on.¹⁵⁹ The emphases and nuances of the anti-essentialist critiques differ depending on membership in particular academic camps and disciplines.¹⁶⁰ However, the critiques uniformly reject moral, philosophical, and political understandings that are explicitly or implicitly grounded in the notion that identities--and for some critics, even the very idea of a "human being"--are static and fixed, that is, immune or separate from forces of social construction. Anti-essentialist critiques hold instead that much (or all) of what constitutes us as individuals is socially

¹⁵⁵ Ibid p 4

¹⁵⁶ Ibid

¹⁵⁷ Ibid

¹⁵⁸ Lissa Duggan, "Making It Perfectly Clear," p.116 . In Lisa Duggan & Nan D. Hunter. *Sex Wars Sexual Dissent and Political Culture*. (Routledge: New York & London, 1995)

¹⁵⁹ Vivien Burr. *Introduction to Social Constructionism*. (London: Routledge 1995), p 2-5

¹⁶⁰ Ibid

constructed and therefore fluid and contestable.¹⁶¹ According to this view, sexual roles and behaviors arise out of a culture's religious, moral, and ethical beliefs, its legal traditions, politics, aesthetics, whatever scientific or traditional views biology and psychology it may have, even factors like geography and climate. The constructionist view holds that sexual roles vary from one civilisation to another because there are no innately predetermined scripts for human sexuality.¹⁶²

Social constructionists challenge essentialist claims about sexuality. Proponents of essentialism, such as John Boswell prescribe to the "naturalness" of sexuality claim that categories of sexual attraction are observed rather than created. Essentialists' argument is that while ancient Greece did not have terms that correspond to the heterosexual/homosexual, men who were only attracted to person of a specific sex have been noted.¹⁶³ Through history and across cultures there are consistent features, albeit with meaningful variety over time and space, in sexual attraction to the point that it makes sense to speak of specific sexual orientations.¹⁶⁴

According to this view, homosexuality is a specific, natural kind rather than a cultural or historical product.¹⁶⁵ In his celebrated book titled '*Christianity, Social Tolerance and Homosexuality*',¹⁶⁶ Boswell advances the idea that medieval Christian society had been for the most part tolerant of homosexuals. He postulates that although at some points in history homosexuals suffered persecutions, gay people formed their own communities and were largely

¹⁶¹ Ibid

¹⁶² Francis Mark Mondimore. *A Natural History of Homosexuality*, (Baltimore : Johns Hopkins University Press, 1996) p 19

¹⁶³ John Boswell 'The church and the homosexual: An historical perspective, 1979' Keynote address at Dignity's 4th Biennial Convection, (September 1979), p 1

¹⁶⁴ Ibid

¹⁶⁵ Ibid

¹⁶⁶ Hugo Marquez Soljancic, Thesis submitted to the Department of History, Wichita State University, 2011

accepted in urban areas as well until the mid-nineteenth century.¹⁶⁷ Social constructionists believe that humanity does not possess terms to describe sexuality that fully transcend cultural and temporal boundaries. Language – the use of particular terms and concepts – is a cultural process that is tied to particular times, places and forms of social order, including power relations. Social constructionism tends to show that the commonly used concepts and categories are “contingent” and to some extent arbitrary rather than universally valid, a view point that calls for the lifting of the veil of assumptions that turn out to be no more than prejudices.¹⁶⁸ Cultural structures, assumptions and biases of time and place reproduce themselves in psychological, political and social discourses that contain an exercise of power in how the terms of debates, contests and self-understandings are et an hence they examine language and culture, on the premise that reality is constructed by societies rather than being founded only in objective “truth”.

Fergus Kerrigan states that social constructionists are also wary of “essentialists” uncritical use of terms that reproduce dominant understandings, and the repressive elements that these may contain. Thus, words like “heterosexual”, and “homosexual” should, in their view, be subject to critical analysis, as implying a binary understanding that confirms the normative status and dominant position of “heterosexual”, including the implication that those experiencing same-sex attraction will always be in a small minority, and perhaps even that they are to be considered “abnormal”.¹⁶⁹ The present study adopts the social constructionist meaning of sexuality.

¹⁶⁷ Ibid

¹⁶⁸ Fergus Kerrigan, *Getting to Rights: The Rights of Lesbian, Gay, Biseuxal, Transgender and Intersex Persons in Africa*, The Dannish Institute For Human Rights. Available at um.dk/en/-/media/UM/English-site/Documents/Danida/Partners/R. (Accessed on 5th December, 2015), p 16.

¹⁶⁹ Ibid p24

2.3.8: Queer

Queer, as operationally defined by Doty¹⁷⁰, "is a quality related to any expression that can be marked as contra-, non-, or anti-straight" which serves not to identify people as much as forms of communication, and the positions that inform that expression.¹⁷¹ In the 1940s, "queer" was popularised as a pejorative and stigmatising term meaning "sexual pervert" or homosexual."¹⁷² The origin of the word "queer" is uncertain, but it can be traced back to 16th century Scotland, meaning "cross, oblique, squint, perverse, wrongheaded." The first concrete examples of "queer" begin to emerge in the 1700s, and can be loosely understood to have meant "strange," "odd," or "peculiar."¹⁷³ It was not until the early 20th century that "queer" became linked to sexual practice or identity in the U.S. "During the 1910s and 1920s in New York City, for example, men who called themselves "queer" used the term to refer to their sexual interest in other men."¹⁷⁴

Queer can be an adjective, a noun, or a verb. In general use, it is most commonly an adjective, meaning "not normal," or, more specifically, not heterosexual. The word has a negative connotation, particularly in school settings. In the late 1980s, LGBT activism sought to reclaim stigmatised words such as "dyke," "fag," and "queer," with organisations such as Queer Nation emerging within the LGBT community. But queer has developed a meaning beyond its use as inclusive categorisation; as a noun, the word can be used to refer to one included in the marginalised group: a queer! t Often there is a political ideology or intent when this word is used, based in part on a decision to confront what is experienced as discrimination and to commit to a

¹⁷⁰ Alexander Doty, *Making Things Perfectly Queer: Interpreting Mass Culture*. (University Of Minnesota Press; 1 edition 1993), p. xv). In Patrick Dilley, *Queer theory: under construction. Qualitative Studies In Education*, 1999, Vol. 12, NO. 5, 457-472

¹⁷¹ S.M. Gray, *The Queer Sounds of Justice: contemporary Queer Musicking and Transformative Justice in the United States*. Master's Thesis in Peace and Justice Studies Programme, 2012 p 2.

¹⁷² Ibid

¹⁷³ Ibid

¹⁷⁴ Patrick Dilley, *Queer theory: under construction. Qualitative Studies In Education*, 1999, Vol. 12, NO. 5, 457-472

collective identity based on being marginalised because of one's sexuality, rather than simply identification because of one's gender and the object of one's affection.¹⁷⁵

2:4: CHAPTER SUMMARY

This chapter has presented the theoretical and conceptual framework associated with the study. The chapter has presented John Finnis' principles of practical reasonableness as a critical choice with transformative potential on legislatures and judiciary as decision-makers in implementation of international human rights standards and principles in relation to sexual minorities. Further, it has presented Queer theory as framework that moves decision-making from stagnant and fixed binaries of sexuality and gender identity to a more critical and inclusive approach that takes into account the realities of sexuality and gender in contemporary societies. The chapter has also examined the main concepts that underpin heteronormativity and the context within which the study has used them.

¹⁷⁵ See Annamarie Jagose, *Queer Theory: An Introduction*. (New York University Press, 1996).

CHAPTER THREE

SEXUAL REGULATION: NATURE OF LEGISLATIVE AND JUDICIAL DECISION MAKING PRIOR TO THE 1957 WOLFENDEN REPORT

3.0: INTRODUCTION

Regulation of sexuality is not a new phenomenon but an action that has been carried out in varied ways according to individual societies and civilisations. In most cases, regulation of sexuality has often been underpinned by the prevailing cultural and religious philosophies of the individual societies. In these cases, societies' values and notions of propriety have often been based on religious ideologies of morality and these religious and moral discourses have shaped attitudes and laws in respect of sex and gender.¹ Judicial decision making on matters of sexual activities was informed by the general moral attitudes that individual judges held.

This chapter examines the philosophical underpinnings of sexual regulation in the period prior to the evolution of the English sodomy laws. It begins by looking at Sexuality and gender identity in Religious and moral discourses. It also examines legislative and judicial history of English sodomy laws as well as its implications to the British colonies through the Indian Penal Code (IPC). It then gives focus to the manner of implementation of British sodomy laws in Kenya. The chapter further discusses the Wolfenden Report of 1957, the ensuing Hart-Devlin debate and their implications for legislative and judicial decision making that ensued there from in Britain and beyond on matters of sexual orientation.

¹ International Commission of Jurists Practitioners Guide, No. 4. Sexual orientation, Gender Identity and International Human Rights Law, P 5.

3.1: Sexuality and gender identity in Religious and moral discourses

Ideas and law-making concerning sexual orientation and gender identity have historically been embedded within societal perceptions that reflect religious and moral discourses.² Among the Abrahamic religions, there has been a variety of oppression and tolerance of same-sex eroticism at different times, places and among different branches of these religions.³ Jewish law originally condemned all non-procreative sexual practices as part of God's mandate to Adam and Eve to populate the Earth.⁴ There was a strong emphasis on purity. Consistent with violation of purity laws, the penalty for homosexual practices was death.⁵

Other contemporary cultures did not condemn sodomy, and it was variously practiced as part of ritual or healing ceremonies, for money, or as part of the practice of educating the youth.⁶ This changed with the advent of Christianity.⁷ Christians did adopt the prohibition of sodomy. With the adoption of Christianity as the State religion of the Roman Empire in the Fourth century, the law began to reflect this point of view.⁸ For Christian theology, sexual activity outside procreative function was absolutely against religion.⁹ The Catholic Church ruled that same-sex practices among men and women were crimes "against nature" (*crimen contra naturam and crimen nefandum*).¹⁰ Beginning in the tenth century, ecclesiastical writers began to call for renewed persecution of sodomy, but these calls generally went unheeded. Instead, Church law focused on individual penance, with periods of fasting and repentance for 'sins of impurity',

² Ibid

³ Ibid

⁴ Ibid The Bible, Genesis 1:28

⁵ Ibid Leviticus 18:22; 20:13.

⁶ International Commission of Jurists Practitioners Guide, supra note 1 above, p 4.

⁷ Ibid

⁸ Ibid

⁹ Ibid

¹⁰ Ibid p 6

while civil law remained altogether silent on the issue.¹¹ Only in the twelfth century did the church return to the persecutions. Beginning first with the crusader Council of Nablus in 1120 and continuing in the more mainstream Lateran council of 2239, the Catholic Church began to equate sodomy with heresy, asserting that sex for procreation was the “natural order” and rebellion against it was a rebellion *contra naturam* (against nature).¹²

The Cathars, members of a heretical sect of Christianity repressed crusaders in the late twelfth century and early thirteenth centuries were often accused of practicing non-procreative sex. It was felt that one act of heresy would logically lead to the other. The origin of the Cathar heresy in Bulgaria, pronounced *Bougres* in the French of the day, produced the word “buggery”. Once sodomy had been firmly entrenched in church law as a heretical act, European civil lawmakers began criminalising it as well. By the thirteenth century, sodomy was a capital offence throughout Europe. It would remain as such for over half a millennium, carrying over through the Protestant Reformation and with the advent of European imperialism, into Europe’s overseas colonies as well.¹³ As stated above, English anti-sodomy laws have roots in religion and specifically in Judeo Christian culture. Michael Kirby traces the English anti-sodomy laws in the Bible.¹⁴ It was in the Old Testament book of Leviticus, amongst “Diverse laws and ordinances”, that a proscription on sexual activity involving members of the same sex first relevantly appeared. The relevant verse states as follows:

If a man...lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon you.¹⁵

¹¹ Ibid

¹² Ibid p 19.

¹³ Ibid p 7.

¹⁴ Michael Kirby, the Sodomy offence: England’s least lovely criminal law export? (Available at [www.acclawyers.org/we-content/uploads/2011/05/2-Kirby-The sodomy offence](http://www.acclawyers.org/we-content/uploads/2011/05/2-Kirby-The_sodomy_offence)) accessed on 16th January, 2013

¹⁵ Ibid. Leviticus, 20: 13.

The prohibition of homosexuality as laid down in the book of Leviticus, 20:13 appears a number of times in ancient Israel writings, dealing with sexual irregularities. Committing adultery with another man's wife attracted the penalty of death. A man who lies with his daughter-in-law shall be put to death with his victim, seemingly however innocent she might be.¹⁶ According to the study carried out by the Human Rights Watch, the early history of England incorporated into its common law, an offence of "sodomy" in the context of the provision of protection against those who endangered the Christian principles on which the kingdom was founded.¹⁷ In medieval times, the notion of separation between the church and the state had not yet developed.¹⁸ The church had its own courts to try and punish ecclesiastical offences, being those that were perceived as endangering social purity, defiling the kingdom and disturbing the racial or religious order of things.¹⁹

3.2: Legislative and judicial history of English sodomy laws

Historically, the first recorded mentions of "sodomy" in English law date back to two medieval treatises called *Fleta* and *Britton*.²⁰ These treatises suggest how strictures on sex were connected to Christian Europe's other consuming anxieties.²¹ Britton treatise required that Apostle Christians, sorcerers, and the like should be drawn and burnt.²² According to a description of early English criminal laws, written a little later in Norman French, the punishment of burning alive was recorded for sorcerers, sorceresses, renegades, sodomists and heretics publicly

¹⁶ Michael Kirby note 14 above, p 22.

¹⁷ Human Rights Watch, *This Alien Legacy: The Origins of "sodomy" Laws in British Colonialism*, New York, December, 2008. Also see D. Saunders, 377 – *And the Unnatural Afterlife of British Colonialism* (Unpublished, 5th Asian Law Institute Conference, National University of Singapore, May 22, 2008).

¹⁸ *Ibid*

¹⁹ *Ibid*

²⁰ In Leslie Moran, *The Homosexual(ity) of Law* (London: Routledge, 1996), p. 213, n. 2; Britton, quoted in Derrick Sherwin Bailey, *Homosexuality and the Western Christian Tradition* (London: Longmans, 1955), p 86.

²¹ *Ibid*

²² *Ibid*

convicted”.²³ Sodomy was perceived as an offence against God’s will, which thereby attracted society’s sternest punishments.²⁴

Fleta on the other hand required that “Apostate Christians, sorcerers, and the like should be drawn and burnt.”²⁵ Those who have connections with Jews and Jewesses or are guilty of bestiality or sodomy shall be buried alive in the ground, provided they be taken in the act and convicted by lawful and open testimony.²⁶ Both these treatises saw “sodomy” as an offense against God.²⁷ They classed it, though, with other offenses against ritual and social purity, involving defilement by Jews or apostates, the racial or religious other.²⁸ According to the Human rights watch report, this ‘grab-bag’ of crimes matched medieval law’s treatment of “sodomy” elsewhere in Europe and the offense was not limited to sexual acts between men.²⁹ It also included almost any sexual act seen as polluting and in some places is encompassed intercourse with Turks and “Saracens” as well as Jews.³⁰ In part, this is traced to an old strain in Christian theology that held sexual pleasure itself to be contaminating, tolerable only to the degree that it furthered reproduction (specifically, of Christians).³¹

²³ The work By Brittoni is described in H. Brunner, *The sources of Law of England* (tr. Williams Hastie, Edinburgh, T.T. Clark 1888) – Quoted in Michael Kirby supra 14 above, p 13.

²⁴ *Ibid*

²⁵ *Ibid*

²⁶ *Ibid*

²⁷ *Ibid*

²⁸ *Ibid*

²⁹ Human Rights Watch, *Supra* note 17 above, p 17.

³⁰ Christian precepts on sexual practice and sexual imagination were refined in patristic literature between the 1st and 8th centuries A.D. The emphasis was on minimising pleasure and maximising procreative possibility in sexual activity. All acts of intercourse including heterosexual vaginal intercourse outside the “missionary” position, were graded as “unnatural” to the degree that pleasure superseded the purely procreative functions of the sexual act

³¹ Edward Coke, *The Institutes of the Laws of England* (London, E. and R. Brooke 1797) 3rd part, 58: cap X, “Of Buggery, or Sodomy” (quoted in Michael Kirby supra note 385 above).

Legislation against homosexuality in Great Britain first became a function of the State with the Buggery Act in 1533.³² Prior to this it was the role of the church to regulate homosexuality and it was called sodomy.³³ Following the severance by Henry V111 of the link between the English church and Rome, the common law crimes were revised so as to provide for the trial of previously ecclesiastical crimes in the secular courts.³⁴ A statute of 1533, provided for the crime of sodomy, under the description of the “detestable and abominable Vice of Buggery committed with mankind or beast”. The offence was punishable by death.³⁵ The text writers of the English law denounced sodomy and all its variations the strongest language.³⁶ For instance, Edward coke, commenting on the offence of buggery declared:

Buggery is a detestable, and abominable sin, amongst Christians not to be named...[It is] committed by carnal knowledge, against the ordinance of the Creator and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast.³⁷

Until 1885 the only law dealing directly with homosexual behaviour in England was that relating to buggery, and legally, little distinction was made between buggery between man and woman, man and beast and man and man, though the majority of prosecutions were directed at men for homosexual offences.³⁸ This had been a capital crime from the 1530s, when the incorporation of traditional ecclesiastical sanctions into law had been part of the decisive assumption by the state of many of the powers of the medieval church.³⁹ Illustrative of this is when the transvestites

³² Ibid

³³ Ibid

³⁴ Ibid

³⁵ Ibid

³⁶ Ibid

³⁷ In Michael Kirby, supra note 14 above, p 14.

³⁸ Human Rights Watch, Supra note 17 above, p 17

³⁹ See Edward Coke note 31 above, p 32.

Boulton and Park were brought to trial in 1871 for conspiracy to commit buggery, there was considerable police confusion about the nature of the alleged offences.⁴⁰

Prosecutions under this law had fluctuated, partly because of changing rules on evidence, partly through other social pressures.⁴¹ There seems, for instance, to have been a higher incidence of prosecutions (and executions) in times of war; penalties were particularly harsh in cases affecting the discipline of the armed services, particularly the navy.⁴² ‘Sodomite’ (denoting contact between men) became the typical epithet of abuse of the sexual deviant. The legal classification and the epithet had, however, an uncertain status and were often used loosely to describe various forms of non-reproductive sex.⁴³ There was therefore, a crucial distinction between traditional concepts of buggery and modern concepts of homosexuality. The former was seen as a potentially in all sinful nature, unless severely execrated and judicially punished; homosexuality, however, is seen as the characteristic of a particular type of person, a type whose specific characteristics have been exhaustively and inconclusively detailed in many twentieth century textbooks.⁴⁴ According to Brady, “The Buggery Act remained the basis of legislation for prosecuting acts of anal sex between men until 1967”.⁴⁵

The next change came with the offences Against the Person Act in 1828 and 1861.⁴⁶ The Offences Against the Person Act, (also known as Lord Lansdowne’s Act) was an Act of Parliament of the UK which consolidated provisions related to offences against the person (an expression which, in particular, includes offences of violence) from a number of statutes into a

⁴⁰ Ibid

⁴¹ Sean Brady, *Masculinity and Male Homosexuality in Britain 1861-1913*. (Palgrave MacMillan. New York, 2005). p 94.

⁴² Ibid

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ Ibid

single Act.⁴⁷ It was one of a number of criminal law consolidation acts known as Peel's Acts passed with the object of simplifying the law.⁴⁸ According to Brady,

In Sir Robert Peel's Act of 1828, the requirement of proof was diminished to evidence of penetration only, which resulted in an increase in convictions. Nonetheless, the retention of the capital charge meant that juries were still reluctant to convict for unnatural offenses, and men continued to be hanged until 1836 for sodomy and the charge remained a capital indictment until 1861.⁴⁹

A further change and an important one came with the passage of the Criminal Law Amendment Act, of 1885, particularly section 11.⁵⁰ Regarding this amendment, Brady notes as follows:

In 1885, however, Parliament passed an Act to protect women and young girls from being victimised and to suppress female brothels, and on to this was tacked at the last moment an amendment which made gross indecency between adult males a misdemeanor punishable by two years in prison with hard labour. This was initiated by a radical Member of Parliament, Henry Lobouche, Old Etonian, nephew of a lord, who was in his role in Parliament as being the exposure of fraud and scandal in high places. He was editor of a weekly paper, Truth, a nineteenth-century version of private Eye. It was under this amendment that ten years later Oscar Wilde was to be convicted.⁵¹

With this legislation, acts of gross indecency between males whether committed in public or private was a misdemeanor and was liable to imprisonment for up to two years.⁵² This change expanded the definition of a homosexual act while at the same time making it easier for the prosecution of homosexuality.⁵³ A fourth piece of legislation, the Official Secrets Act in 1889 indirectly dealt with homosexuality.⁵⁴ This Act allowed for keeping information from being publicly disclosed for 100 years. It was used to keep government information closed mainly

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Hyde, H Montgomery. *A Tangled Web Sex Scandal in British Politics and Society*. (Constable. London, 1986).

⁵⁰ Ibid p 1

⁵¹ Ibid

⁵² Ibid

⁵³ Ibid

⁵⁴ Ibid

foreign and military secrets, but also any information chosen by the government. This included information about trials of homosexual related offences.

It became a major task of psychology in the present century to attempt to explain the actionology of this homosexual 'condition'.⁵⁵ However, there is strong evidence for the emergence of a distinctive male homosexual sub-culture in London and one or two other cities from the late seventeenth century, often characterised by transvestism and gender-role inversion; and by the early nineteenth century there was a recognition in the Courts that homosexuality represented a condition different from the norm.⁵⁶ Even as late as the 1870s, there was considerable doubt in the minds of the police, the medical profession and the judiciary about the nature and extent of homosexual offences.⁵⁷

The 1861 Offences against the Person Act of Britain removed the death penalty for buggery, replacing it by sentences of between ten years and life. But in 1885 the famous Labouchere Amendment to the Criminal Law Amendment Act made all male homosexual activities (acts of 'gross indecency') illegal, punishable by up to two years hard labour.⁵⁸ In 1898, the laws on importuning for 'immoral purposes', were tightened up and effectively applied to male homosexuals.⁵⁹ Though less severe than capital punishments for sodomy, the new legal situation is like to have ground harder on a much wider circle of people, particularly as it was dramatised in a series of sensational scandals, culminating in the trials of Oscar Wilde, which had the

⁵⁵ Michael Kirby, *supra* note 14 above, p 14.

⁵⁶ *Ibid*

⁵⁷ See generally *The Oscar Wilde Scandal* The Judges agreed that the invective in the indictment was unspecific. They concluded, however, that simply adding the term "buggery" would have the effect of "shewing the intention implied by the epithets." *R. v. Rowed*, cited in Moran 1996, p 38

⁵⁸ Joshua Hepple, Will Sexual Minorities Ever Be Equal? The Repercussions of British colonial "Sodomy" laws. *The Equal Rights Review, Vol. Eight (2012)*, p11

⁵⁹ Sarah Lavender, A Legacy Restored: A Study of Oscar Wilde's Public Perception Over Time. SIRP-NCHC Conference 2011 p 1

function of drawing a sharp dividing line between permissible and tabooed forms of behaviour.⁶⁰

In the nineteenth century, Oscar Wilde had become a world renowned writer most famous for his plays and as a notable member of the aesthetic movement.⁶¹

One fateful decision in 1895, however, changed his life.⁶² Despite having a wife, and two children, Oscar Wilde had developed a very close friendship with Lord Alfred Douglas. Douglas's father, Lord Queensberry, disapproved greatly of their relationship; he feared Wilde was manipulating Douglas' character and that their relationship was inappropriate and had quickly moved beyond friendship.⁶³ Lord Queensberry began harassing Wilde in an attempt to make him cease his relationship with his son. This harassment culminated on February 18th, when Queensberry left a card at the Albermarle Club that Wilde frequented with the fateful words, "For Oscar Wilde, posing as a sodomite".⁶⁴ An accusation of this nature at the time was dangerous because sodomy was considered a severe criminal act.⁶⁵

Wilde brought charges against Queensberry for criminal libel.⁶⁶ After the first trial, Queensberry was found not guilty of libel and the court made an additional verdict that the accusations brought against Wilde were true. Following the trial, Wilde was arrested for "gross indecency."⁶⁷ Gross indecency with another male was deemed illegal under Section 11 of the Criminal Law Amendment Act.⁶⁸ This arrest was followed by two trials in which Oscar Wilde, along with

⁶⁰ Ibid

⁶¹ Ibid

⁶² Ibid

⁶³ Ibid

⁶⁴ Ibid

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Ibid

Alfred Taylor, were being tried of criminal acts. Wilde was convicted of gross indecency and sentenced to the maximum time of two years in jail with hard labour.⁶⁹

Wilde had defied the Victorian era codes of morality and conduct. People at this time shunned away from expressing emotions or sexual feelings.⁷⁰ Homosexuality was considered absolutely shameful and was punished severely.⁷¹ When the verdict was announced in the courtroom cries of joy and celebratory dancing commenced by the public in attendance.⁷² The Judge presiding over Wilde's final trial, Justice Wills had one of the harshest and most telling responses to these events.⁷³ In his sentencing, he referred to the crimes as so horrible that he had to restrain himself when he was forced to talk about it. He pronounced: "People who can do these things must be dead to all sense of shame...It is the worst case I have ever tried..."⁷⁴

Justice Wills had presided over murder cases and other horrible crimes, but he felt that this one was absolutely the most atrocious.⁷⁵ It has been argued that the Wilde scandal in particular was a vital moment in the creation of a male homosexual identity.⁷⁶ It must be noted that the new legal situation did not apply to women, and the attempt in 1921 to extend the 1885 provisions to women failed, in part at least on the grounds that publicity would only serve to make more women aware of homosexuality.⁷⁷ Weeks, Cohen and others regard changes in British

⁶⁹ Ibid

⁷⁰ Ibid

⁷¹ Ibid

⁷² Ibid p 6

⁷³ Ibid

⁷⁴ Justice Wills, in the verdict in Wilde's trial.

⁷⁵ Michael Kirby, *supra* note 14 above, p 16.

⁷⁶ Ibid

⁷⁷ Harry G. Cocks, *Nameless Offenses Homosexual Desire in the Nineteenth Century*. (I.B. Tauris Publishers. London and New York, 2006), p 31.

legislation, particularly the 1855 Laibouchere Amendment to the Criminal Law Amendment Act, as the classification and categorisation of a homosexual ‘species’ in legal arrangements.⁷⁸

In the latter development of English sodomy laws, describing the offence was almost risky and was avoided.⁷⁹ In an 1842 British court case that involved a man accused of committing “nasty, wicked, filthy, lewd, beastly, unnatural and sodomitical practices” in the vicinity of Kensington Gardens, the defense objected that the adjectives gave no indication of what the crime actually was.⁸⁰ The vagueness became more an issue, as in the nineteenth century, reformers set about codifying and imposing order on the chaos of British common law and statute law.⁸¹ The offences Against Person Act in 1861 consolidated the bulk of laws on physical offences and acts of violence into one “modern”, streamlined statute – still the basis for most British law of physical assault.⁸² It included the offense of (consensual and nonviolent) “buggery”, dropping the death penalty for a prison term of ten years to life.⁸³ Brady summarises the English history of sodomy laws as follows:

British legislation, on close examination, was archaic and highly ambivalent in respect to any kind of homosexual category. The Buggery Act of 1553 remained the basis for legislation until 1967. Also, the infamous Criminal law Amendment Act of 1885 simply made all sex acts between all males criminal, rather than indicating any kind of special legal classification. In comparison, continental states appeared to tolerate a burgeoning scientific discourse on the matter. Legislation in all these states either allowed consensual sex between male adults, or had legislative arrangements that were more tolerant than Britain. For instance, France had decriminalised sex between consenting adult males with the implementation of the Codes Napoleon 1805. Also the codes Napoleon were adopted by Italy in 1889.⁸⁴

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ ibid

⁸¹ Ibid

⁸² Michael Kirby, *supra* note 14 above, p 14.

⁸³ Sean Brady, *supra* note 41 above, p 27.

According to Kirby, the result of this history was that virtually no jurisdiction which at some stage during that period was ruled by Britain, escaped the influence of its criminal law and specifically, of the anti-sodomy offence that was part of that law.⁸⁵ The British Empire was at first highly successful as a model of firm governance and social control. At the heart of this governance and control was an ordered system of criminal and other public law.⁸⁶ They naturally considered their laws back home as the best for other jurisdictions.⁸⁷ Thus the anti-sodomy laws applicable in Britain at the time of Coke and Blackstone came swiftly to be imposed or adopted in the huge domain of the British Empire, extending to about a quarter of the land surface of the world, and about a third of its people.⁸⁸ To this day, approximately 80 countries of the world impose criminal sanctions on sodomy and other same-sex activities, whether consensual or not or committed in private or not.⁸⁹ Over half of these jurisdictions are, or were at one time, British colonies.⁹⁰

The nineteenth century saw a challenge mounted against the positions held by Coke and Blackstone.⁹¹ Utilitarian, Jeremy Bentham, a great progenitor of this challenge in his “A Fragment on Government” and “An Introduction to the Principles of Morals and Legislation”,⁹² strongly criticised the two for their complacency about the laws of England, especially Blackstone’s antipathy to reform.⁹³ He urged for the acceptance of the utilitarian conception of punishment as a necessary evil, justified only if it was likely to prevent, at least cost in human

⁸⁵ Ibid

⁸⁶ Ibid

⁸⁷ Ibid p 25

⁸⁸ Ibid

⁸⁹ Ibid

⁹⁰ Jeremy Bentham. *A Comment on the Commentaries and A Fragment of Government*, ed. J.H. Burns., (London: T Payne, 1776). In Michael Kirby *supra* note 14 above, p 26.

⁹¹ Ibid

⁹² Michael Kirby, *supra* note 14 above, p 27.

⁹³ Ibid

suffering, greater evils arising from punitive offences.⁹⁴ Bentham urged the replacement of outdated and chaotic arrangements of the common law by modern criminal codes, based on scientific principles aimed at achieving social progress in order to enable humanity, and in his words “to rear the fabric of human felicity by the hands of reason and of law”.⁹⁵ What could not be achieved in England became an idea and a model that could much more readily be exported to the British colonies, provinces and settlements abroad.⁹⁶ In Kirby’s view, this is what happened. There were five principle models which the Colonial Office successfully provided, according to the changing attitudes and preferences that prevailed in the last decades of the nineteenth century, when the British Empire was at the height of its expansion and power.⁹⁷

3.3: The Indian Penal Code (IPC)

The Indian Penal Code (IPC) became the model for British colonies’ legal systems throughout most of Asia and Africa, including Kenya. Each British colonial territory took over the newest version of it, one legal historian writes:

Improving and bringing them up to date – and the resulting product was then used as the latest model for an enactment elsewhere.⁹⁸

Between 1897 and 1902 The British administrators applied the Indian Penal Code in British African colonies, including Kenya and Uganda.⁹⁹ Some residents complained about the undemocratic character of the codes. British East Africans, for instance, protested a policy of placing “white men under the laws intended for a coloured population despotically governed.”¹⁰⁰ Thus, the Indian Penal code reinforced colonial stereotypes of framing the colonized peoples’

⁹⁴ Jeremy Bentham, *supra* note 90 above.

⁹⁵ James S. Read, “Criminal Law in Africa Today and Tomorrow,” *Journal of African Law*, Vol. 17, No. 2 (Spring 1963), p 5-17.

⁹⁶ Michael Kirby, *supra* note 14 above, p 27.

⁹⁷ *Ibid* p 13.

⁹⁸ *Ibid*

⁹⁹ *Ibid* p 14.

¹⁰⁰ *Ibid* p 15.

sexuality as inherently perverse. Given the racialised nature of colonial power, it would have been surprising if the colonial 'other' did not raise its head in the Victorian sexual imagination.

What was the overall colonial intention of this concoction of the law? It is the argument of this thesis that the construction of African customary law and the imposition of common law on sexual orientation codified the legal constitution of the sexual Africans; heterosexual men and women. It also played the role of the real constitution of African people as colonial subjects which could only take place through a process which would impact upon both their individual as well as their collective lives- psychological transformation on sexual orientation perceptions of themselves and others in society.¹⁰¹

Fanatical focusing on sex and the social processes that transformed the discursive character of sexual relations in Foucault's view, perfectly achieves this. Colonial law brought with it a discourse of morality which was very significant in the constructing of individual subjects - in possession of a sexuality. According to Read, the instrumentalisation of sexuality through the nib of statutory, customary and religious law is closely related to homosexual oppression and gender constructions. The colonial legacies of African sexualities linger today and we see them in contemporary accounts and theories.¹⁰² The IPC provided a model template for sodomy laws for all the British colonies. It referred to 'sodomy' as an odious concept and it punished those who engaged in 'unnatural' acts, although later drafts and other pieces of legislation explicitly referred to 'sodomy.' The formulation was more or less similar to Offences Against the Person Act s.61 in its reference to general criminal concepts. Different versions of the code were

¹⁰¹ Ibid

¹⁰² Ibid

adopted throughout sub-Saharan Africa during the 1890's and early 1900's. The colonisers introduced these laws with no debates or "cultural consultations", to support colonial control.¹⁰³

These laws were meant to inculcate British morality into resistant masses. This legislation was necessary to them because they thought that "native" cultures did not punish "perverse sex" enough. Thus, the colonised needed compulsory re-education in sexual mores. Imperial rulers held that, as long as they sweltered through the promiscuous proximities of settler societies, "native" viciousness and "white" virtue had to be segregated: the latter praised and protected, the former policed and kept subjected.¹⁰⁴ Thus, the anti sodomy laws were meant to set standards of behavior, both to reform the colonised and to protect the colonisers against moral lapses. British imperialists were motivated by economic, social and political reasons for colonialism. Similarly, they had various methods through which they hoped to achieve their aims. According to Sanders, law was one of the most important tools that they used on native populations to achieve a compliant citizenry.¹⁰⁵ Transplantation of their laws and legal systems into the colonies was one of the preliminary agendas. In almost all the colonies, it became an important experiment in the larger colonial project along with exercise in codification like the civil Procedure Code and Criminal Procedure Code to apply the collective principles of common law in colonies, starting with British India.¹⁰⁶

Thomas Babington Macaulay, the president of the Indian Law Commission in 1835, was charged with the testing of drafting the Indian Penal Code also as unifying effort to consolidate and rationalise the "splintered systems prevailing in the Indian subcontinent."¹⁰⁷ Section 377

¹⁰⁵ Joshua Hepple, supra note 58 above, p11.

¹⁰⁶ These are the codes that found their way into Kenya and are in application

¹⁰⁷ Joshua Hepple, supra 58 above, p 11.

predecessor in Macaulay's first draft of the Penal Code was clause 361, which defined a severe punishment for touching another for the purpose of unnatural lust. Macaulay abhorred the idea of any debate or discussion on this "heinous crime, and in the Introductory Report to the proposed draft bill 1837, stated that:

Clause 361 and 362 related to an odious class of offences respecting which it is desirable that as little as possible should be said [... we] are unwilling to insert, either in the text or in the notes, anything which could give rise to public discussion on this revolting subject: as we are decidedly of opinion that the inquiry which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision.¹⁰⁸

Alok Gupta argues that the lack of debate or discussion, suggesting the creation of this definition purely out of the discretion of Macaulay, also explains the vagueness and ineffectiveness of the language of the proposed anti-sodomy section.¹⁰⁹ Narrain states that the concept of an unnatural touch was too vague to be effective penal stature, and the draft was a substantial improvement on the initial draft. Section 377 in its final draft is still shrouded with euphemisms. The final outcome to prevent this "revolting" and injurious activity evolved in the form of the following text:

Section 377: Unnatural Offences- Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to 10years, and shall be liable to fine.¹¹⁰

Section 377 is both very similar to sodomy statues around the world in that it re-instates and codifies the common law offence of sodomy, and at the same time, it is very different from a lot of the sodomy statutes. First, the statute, unlike many other similar laws, does not define a specific offence of sodomy. As a piece of legislation, section 377 applies a vague offence-

¹⁰⁸ Report of the Indian Law Commission on the Penal Code, October, 14, 1837, P 3990-91.

¹⁰⁹ Alok Gupta, Section 377 and the Dignity of Indian Homosexuals. Economic and Political Weekly, November, 18, 2006 p3.

¹¹⁰ Ibid.

without defining what “carnal intercourse” or “order of nature” are- to the general public at large.¹¹¹ Gupta rightly argues that failure to define loathsome offences like anti-sodomy has resulted in the use of euphemism of India. This ambiguity has left it purely to the imagination of the judges to apply it to specific cases and also, in that process, determine what kinds of sexual acts qualify as unnatural offences.¹¹²

In a detailed analysis of the jurisprudence on the anti-sodomy law in Zimbabwe, Phillips convincingly states that the need for labels to fit different possibilities of sex has led to a “continual process” of definition, denigration and capitulation.¹¹³ In his view, the law and its interpretation also ignore the possibility of consent. Further, the failure to distinguish between “two very different situations” of non-consensual and consensual sexual relations implies that “male adult seducers or abusers of young boys, men who forcefully rape other men, and male homosexual (who indulge in consensual sexily activities) are all one and the same thing.¹¹⁴ In this regard, homosexual acts become abominable activities of “consensual heterosexuality” and therefore incomparable.¹¹⁵

Gupta further notes that the mere existence of section 377 even if it cannot and is not being enforced in prosecuting sexual acts in private, adds a certain criminality to the daily lives of homosexual men and put them under the gaze of the law and a constant threat of moral terrorism. Ryan Goodman in a path breaking study on the impact of anti-sodomy law on the daily lives of South African gays and lesbian, despite its actual non-enforcement, argues that:

¹¹¹ Ibid p 5.

¹¹² Ibid p 16

¹¹³ Ibid

¹¹⁴ Ibid P 17

¹¹⁵ Ibid

The state's relationship to lesbian and gay individuals under a regime of sodomy laws constructs...a dispersed structure of observation and surveillance. The public is sensitive to the visibility of lesbians and gays as socially and legally constructed miscreants.¹¹⁶

Amnesty International in its report notes that laws criminalising homosexuality reinforce systemic disadvantage of lesbians, gay men and bisexual people and against transgender people who may be heterosexual and act as an official incitement to or justification for violence against them whether in custody, in prison, on the street, or in the home.¹¹⁷ These laws allow law enforcement officers to invade the private residences of individual alleged to be engaging in consensual same-sex sexual relations. They can result in impunity for arbitrary arrests on the basis of allegations about sexual orientation, rumours of sexual behaviour or objection to gender presentation, with few, if any, consequence for torture or other ill-treatment.¹¹⁸ Further, this report rightly points out that explicit criminal provision against homosexuality are about what people do in private. Yet, more often than not, the laws are used to target people in public, making assumptions on the basis of how individuals presents themselves- their clothing, hairstyle, speech, manner, the company they keep. These laws are thus used for far more than criminalising certain sexual orientations or behaviours – they are used to police gender expression.¹¹⁹

More generally, gender identity is closely linked to sexual orientation as a category of experience and as a reason for abuse. State officials or private individuals who discriminate against or are violent towards individuals based on an assumption of their sexual orientation or gender identity do not make distinctions as to whether or not their victims are lesbian, gay, bisexual or transgender. Transgender people may be targeted because their abusers infer sexual conduct

¹¹⁶ Ibid

¹¹⁷ Amnesty International, *Love, Hate and The Law: Decriminalising Homosexuality*. (London, Amnesty International, July,2008) P5, Available at <http://www.amnesty.org/en/library>. (Accessed on 13th July, 2015).

¹¹⁸ Ibid

¹¹⁹ Ibid p12.

from their gender non-conformity.¹²⁰The Human rights Watch rightly observes that the anti-sodomy laws;

Invade privacy and create inequality. They relegate people to inferior status because of how they look or who they love. They degrade people's dignity by declaring their most intimate feelings 'unnatural' or illegal. They can be used to discredit enemies and destroy careers and lives. They promote violence and give it impunity. They hand police and others the power to arrest, blackmails and abuse. They drive people underground to live in invisibility and fear.¹²¹

The existence of this law has health implications too. For instance, in 1993, the European Court of Human Rights identified some of the effects of having such law on the statute books even if it is not used, observing that it;

entitles individuals to contend that law violates their rights by itself... if they run the risk of being directly affect by it...Moreover, it was found in the national proceedings that one of the effects of criminal sanctions against homosexual acts is to increase the anxiety and guilt of homosexuals leading, on occasions, to depression and the serious consequences which can follow from that unfortunate disease.¹²²

Through this law, the state has a constant gaze into lives of gay and lesbian women. Goodman sees this scenario when he adapts the Foucauldian model of the state as the "panoptic" watchtower, constantly watching and observing the lives of gays and lesbians causing apprehensions, fears and further proximity to the closet-a life of concealment.¹²³ Gupta rightly posits the biggest manifestation of this fear is the self-identification as a "criminal".¹²⁴ Indeed the Human Rights Watch correctly notes that sodomy laws encourage all of the society to join in surveillance, in a way congenial to the ambitions of police and state authorities.¹²⁵ This report

¹²⁰ Ibid

¹²¹ Human Rights Watch, This alien legacy: the origins of 'sodomy' laws in British colonisation. December 2008. 1-56432-419-2, Available at <http://www.unhcr.org/refworld/docid/494b5e4c2.html>. (Accessed on 11th March 2016).

¹²² Amnesty International; supra note 69 above, p 13.

¹²³ See generally Michel Foucault, Discipline and Punish: the Birth of the Prison. Translated from the French by Alan Sheridan. (NY: Vintage Books, 1995) p 195-228. In Ryan Goodman. Challenging the Rules(s) of Law: Colonialism, Criminology and Human rights. Kalpana Kannabiran and Ranbir Singh (eds.). (SAGE Publications, 2008).

¹²⁴ Ibid

¹²⁵ Ibid p 14

opines that this could explain why large numbers of countries that have emerged from colonialism have assumed and assimilated their sodomy laws as part of the nationalist rhetoric of the modern state.¹²⁶ Authorities have kept on refining and fortifying the provision in parliaments and courts- spurred by the false proposition they are bulwark of authentic national identity.¹²⁷

It should be noted that recent developments in Indian jurisprudence has confirmed section 377 of the IPC, making it a lasting legacy of British colonial rule.¹²⁸ The Supreme Court overturned the earlier Delhi high court decision that decriminalised same-sex relationships four years ago.¹²⁹ The bench of Justices Singhvi and S J Mukhopadhaya reversed the Delhi HC's 2009 verdict and held that the 150-year-old Section 377, criminalising gay sex, "does not suffer from the vice of unconstitutionality".¹³⁰ The Times of India newspaper commented that the judgment would turn the clock back, and was being viewed in India and globally as a retrograde step. The possibility of police harassment of homosexuals could no longer be ruled out.¹³¹ The bench said: "In the light of plain meaning and legislative history of the section, we hold that Section 377 IPC would apply irrespective of age and consent." It added that the section does not discriminate any group with a particular sexual preference; a stand that was diametrically opposite to that by the Delhi HC¹³²

It is worth noting that in all the years of its existence, this provision of India's Penal has hardly been applied. Boesch notes that during the 150 years in which section 377 was used in India, 30

¹²⁶ Human Rights Watch, This alien legacy, supra note 73 above, p 115.

¹²⁷ Ibid

¹²⁸ Ibid

¹²⁹ Ibid

¹³⁰ Ibid

¹³¹ Ibid

¹³² Ibid

out of 46 cases (or 65%) were child sexual abuse cases.¹³³ The law used more rarely in cases of non-consensual sex between man and a woman, and even more rarely in same-sex cases. All sodomy cases dealt only with sex between men. This is because it was thought that it could not apply to lesbian sex because it did not involve penile penetration and because women did not have access to public spaces where cruising, public sex and ultimately arrest by police occurred.¹³⁴

Another interesting aspect of this section of the Penal Code is the ridiculousness that it causes in case of its enforcement. The law punishes the homosexual activity and its enforcement would require that the police as law enforcement agents of the state actually catch two men having sex in the privacy of their bedroom. Gupta argues that this would require that;

the reach of the prosecutor powers of the law go into the previously sacred sphere of the home. This would also require that the police leave the everyday work of providing safety to citizens from crimes that actually cause harm, to continuously establishing an espionage network to inform them where homosexual men reside, and to matter their libido cycles to determine exactly when they may indulge in sex.¹³⁵

Despite the lack of official persecution of homosexual in India, section 377 created criminal class. In forming the law, British official allowed Christian moral codes to enter the realm of state and politics in India.¹³⁶ Diana Boesch argues that the sins of Sodom and Gomorrah were referenced in court cases as a social and moral reasoning behind the condemnation of homosexuality.¹³⁷ Boesch observes that;

¹³³ Diana Boesch, *Creating Dignity Out of Despair. The Impact of the 2009 Decriminalisation of Homosexuality in Delhi*, Independent study project (ISP) Collection Paper, 1295. Available at http://digitalcollections.sit.edu/isp_collection/1295. (accessed on 19th March, 2015). P 9

¹³⁴ Ibid

¹³⁵ Alok Gupta, *supra* note 104 above, p 19.

¹³⁶ Joshua Hepple, *supra* note 58 above, p 11.

¹³⁷ Diana Boesch, *supra* note 130 above, p 9.

The legal influences of Western and Christian morality entered into society and began to influence social thought. The realm of section 377 expanded beyond the courtroom into the very lives of all Indians with the growth of homophobia and fear of sexual deviancy.¹³⁸

Kirby argues that the result of this history was that virtually no jurisdiction which at some stage during that period was ruled by Britain, escaped the influence of its criminal law and specifically, of the anti-sodomy offences that was part of that law.¹³⁹ The British Empire was at first highly successful as a model of firm governance and social control. At the heart of this governance and control was an ordered system of criminal and other public law. They naturally considered their laws back home as the best for other jurisdiction.¹⁴⁰ Thus the anti-sodomy laws applicable in Britain at the time of Coke and Blackstone came swiftly to be imposed or adopted in the huge domain of the British Empire, extending to about a quarter of the land surface of the world, and about a third of its people.¹⁴¹

To this day, approximately 80 countries of the world impose criminal sanctions on sodomy and other same-sex activities, whether consensual or not committed in private or not. Over half of these jurisdictions are, or were at one time, British colonies.¹⁴² This is in contrast with other colonial empires such as France, where homosexual acts have been legal since 1791 and the criminal code drafted the National Constituent Assembly after the French Revolution rejected the definition of crimes based on the proscriptions of the Christian religion. Homosexual acts were

¹³⁸ Ibid

¹³⁹ Ibid

¹⁴⁰ Ibid p 25

¹⁴¹ Ibid

¹⁴² Jeremy Bentham., (1776), A fragment on government: being an Examination of what is delivered, on the subject of government in General, in the introduction to sir William Blackstone's commentaries. In Michael Kirby the Sodomy offence: England's least lovely criminal law expert: supra note 12 above, p 26.

thus not mentioned in the new Penal code. The Napoleonic code of 1804 and its subsequent Penal Code of 1810 did not undo the decriminalisation of homosexual intercourse.¹⁴³

England very readily exported to the British colonies, a model of anti-sodomy legislation to provinces and settlements abroad. In Kirby's view, there were five principle models which the Colonial Office successfully provided, according to the changing attitudes and preferences that prevailed in the last decades of the nineteenth century, when the British Empire was at the height of its expansion and power.¹⁴⁴ In East Africa, between 1897 and 1902 The British administrators applied the Indian Penal Code in British African colonies, including Kenya and Uganda.¹⁴⁵ Some residents complained about the undemocratic character of the codes. British East Africans, for instance, protested a policy of placing "white men under the laws intended for a coloured population despotically governed."¹⁴⁶ Thus, the Indian Penal code reinforced colonial stereotype of framing the colonised peoples' sexuality as inherently perverse.¹⁴⁷

The Human rights Watch report describes the strange afterlife of a colonial legacy, demonstrating how one British law- the version of section 377 the colonisers introduced into the Indian Penal Code in 1860-spread across immense tracts of the British Empire. It notes that colonial legislators and jurists introduced such laws, with no debates or 'cultural consultations', to support colonial control. The report states as follows:

They believed laws could inculcate European morality into resistant masses. They brought in the legislation, in fact, because they thought 'native' cultures did not punish 'perverse' sex enough. The colonised needed compulsory re-education in sexual mores.¹⁴⁸

¹⁴³ Victor Asal, *Original Sin: Across National Study of the Legitimacy of Homosexual Acts*, Mine Hall University at Albany: State University of New York, P 7.

¹⁴⁴ *Ibid* p 27.

¹⁴⁵ *Ibid* p 23.

¹⁴⁶ *Ibid*

¹⁴⁷ *Ibid* p 14

¹⁴⁸ Human rights Watch, *This alien legacy*, supra note 75 above, p 86.

Human rights Watch Report also notes that section 377 of the IPC was, and is a model law in more ways than one. It was a colonial attempt to set standards of behaviour both to reform the colonised and to protect the colonisers against moral lapses. It was also the first colonial ‘sodomy law’ integrated into penal code-and it became a model anti-sodomy law for countries beyond India.¹⁴⁹As demonstrated below, these laws formed part of the package that Kenya was bequeathed by the colonial administration.

3.4: Introduction and implementation of British sodomy laws in Kenya

Colonial laws were transplanted into Kenya through the Order in Council of 1897. Pre-colonial law was “essentially customary in character, having its source in the practices traditions and customs of the people.”¹⁵⁰According to Kariuki, prior to colonialism, indigenous African tribes applied their own laws and customs in resolving conflicts and disputes, and this contributed to social cohesion and peaceful coexistence.¹⁵¹ Because African customary law developed out of the customs and practices of the people in response to their circumstances and challenges in life, it essentially differs from one ethnic community to the other.¹⁵² Hence the term ‘African customary law’ does not therefore infer that there existed a single custom followed by all African communities.¹⁵³Once the British colonised Kenya in 1895, however, they instituted their own system of justice to exist alongside customary law:

By the East Africa Order in council 1897 (later repeated in the 1921 Order and applied to the Protectorate), the jurisdiction of the Supreme Court and subordinate courts of Kenya was to be

¹⁴⁹ Ibid p 87

¹⁵⁰ Courtney Finerty, Being Gay in Kenya: The Implication of Kenya’s New Constitution for its Anti-Sodomy Laws, *Cornell International Law Journal Vol. 45 p 436-438, p 437.*

¹⁵¹ Francis Kariuki, Customary Law Jurisprudence from Kenyan courts: Implications for Traditional Justice Systems. Available at www.strathmore.edu/sdrc/uploads/documents/books-and-articles. (accessed on 26th December, 2015) p 2

¹⁵² Ibid

¹⁵³ Ibid

exercised 'so far as circumstances admit...in conformity with the Civil Procedure and Penal codes of India and the other Indian Acts which are in force in the Colony...'¹⁵⁴

In 1930, the British replaced the Indian Penal code with the Colonial Office Model code (based on the Queensland Code of 1899), which remains Kenya's Penal code to this day.¹⁵⁵

Although the colonisers set up a parallel system of courts to administer justice according to "the native law and custom prevailing in the jurisdiction of the tribunal," customary law had to give way to English law if it was "repugnant to justice and morality or inconsistent with the provisions of any Order in Council or with any other law in force in the colony."¹⁵⁶ Finerty argues that this "repugnancy clause" had two implications for customary law: first, customary law was treated as inferior to English law; second, English ideals of legal norms, justice, and morality would be the ultimate test for the validity of customary law.¹⁵⁷ In the areas of Kenya's criminal law, customary law gradually gave way to the Penal code Provisions:

Native criminal law was applied firstly in Native Tribunals subject to the supervision of district officers. But gradually the Tribunals were given jurisdiction to try certain offences under the Penal code...[G]radually, where a Tribunal or a Court was given jurisdiction to try a Penal code offence, it was tried under the relevant sections of the Penal code and not under 'native law and custom,' even where there existed a similar offence under native law and custom. Eventually this resulted in the virtual disappearance of the customary criminal law and so at the end of the colonial period there were only some ten offences which were tried under native law and custom in the African Courts.¹⁵⁸

Phillips notes that of most importance and which this study agrees with, is that through the repugnancy clause, a whole discourse of 'morality' and law is being introduced, but that the morality of the late Victorian period was equated with notions of 'natural justice'.¹⁵⁹ In his view,

¹⁵⁴ Eugene Cotran. The Development and Reform of the Law in Kenya, 27 J. AFR. L. 42, 42 (1983) In Finerty Ibid

¹⁵⁵ Courtney Finerty, supra note 147 above, p 437.

¹⁵⁶ Ibid

¹⁵⁷ Ibid

¹⁵⁸ Eugene Cotran, supra note 151 above, p 44-45.

¹⁵⁹ Oliver Phillips, Constituting the Global Gay: Issues of Individual subjectivity and Sexuality in Southern Africa, in In Didi Herman and Carl Stychyn, (eds.) Sexuality in the Legal Arena. (Athlone 2000), p 5.

sexual relations tended to fall under common law rather than customary law, and various customary practices deemed to be immoral or unnatural were gradually eased into extinction or marginality by the [colonial] administration.¹⁶⁰ He further notes that the idea of morality was central to the civilising mission of the colonisers as it relied on the twin qualities out of which Victorian concepts of a ‘civilised’ and ‘ordered’ society were fashioned – repression and discipline.¹⁶¹ Resisting on the Cartesian concept of the mind’s rational capacity to cultivated order out of the untamed savage nature off the instinct-driven body, Victorian ideals of ‘civilisation’ pictured the primitive ‘nature’ of man as embodied in the supposed atavism of ‘the native’.¹⁶² According to Phillips, they then glorified the exquisite pain of denial as constitutive of civilisation, and introduced a whole new dimension of sexual morality as a measure of social worth.¹⁶³ Add to this the proselytising of the Christian notion of sin and the introduction of a capitalist economy and it suggests the development of a consciousness based around the commodification of sex and the erotic regulation of individual desire rather than the prioritising of procreation and the making of social alliances.¹⁶⁴

It role of the colonising west in entrenching homophobia into Kenya’s legal system, according to Finerty, cannot therefore be downplayed. What is of more significance is that date, this colonial sodomy law gets affirmed every time the issue of prosecution of persons suspected of engaging in same-sex sexual activities arises. In Kenya, this is demonstrated by the former Attorney general of the Republic of Kenya, a man intentionally renowned for his work in human rights in a statement that he made recently. He declared as follows:

¹⁶⁰ Ibid

¹⁶¹ Ibid

¹⁶² Ibid

¹⁶³ Ibid

¹⁶⁴ Ibid p 9

I want to assure the general public that a ... unnatural offences and attempts to commit unnatural offences, otherwise known as homosexuality, are criminal offences under the law.¹⁶⁵

The criminal law relating to regulation of sex brought with it a discourse of morality which was very significant in the construction of individual subjects (in possession of sexuality') into Africa. This is reflected in contemporary definition of criminal liability, social responsibility, and human rights are all actively engaged in the promotion of those notions of individual subjectivity.¹⁶⁶ But what was situation of African sexual minorities' vis -à-vis the law and punishment before the implantation of the British anti-sodomy laws? The following section examines sexuality in pre-colonial Africa, laying basis for our understanding of the disruption of a sexual culture that may not have elevated sexual minorities to a level of dignity, but did wage a war of criminalisation and condemnation of sexual minorities into social abyss. The following section explores the sexual mores in pre-colonial Africa before the transplantation of the Victorian sexual mores and values.

As observed above, in Kenya, as in most African states, pre-colonial law was “essentially customary in character, having its source in the practices, traditions and customs of the people.”¹⁶⁷ Once the British colonised Kenya in 1895, however, they instituted their own system of justice to exist alongside customary law:

By the East Africa Order in Council 1897 (later repeated in the 1921 Order and applied to the Protectorate), the jurisdiction of the Supreme Court and subordinate courts of Kenya was to be exercised ‘so far as circumstances admit . . . in conformity with the Civil Procedure and Penal Codes of India and the other Indian Acts which are in force in the Colony . . .’¹⁶⁸

In 1930, the British replaced the Indian Penal Code with the Colonial Office Model Code (based on the Queensland Code of 1899), which remains Kenya’s Penal Code to this day. When Kenya

¹⁶⁵ Amos Wako, Former Attorney General of Kenya. The East African Standard (Nairobi) June 3,2004

¹⁶⁶ Oliver Phillips, supra note 1156 above, p 4.

¹⁶⁷ Courtney Finerty supra note 157 above, p 436.

¹⁶⁸ Ibid p 437

achieved independence in 1963, the new government inherited, recognised and applied the former British legal system, including its Colonial Office Model Code.¹⁶⁹ As Kenya's anti-sodomy laws originated from this penal code, they are ultimately reflective of British norms and morality, as opposed to embodying "traditional Kenyan ideals."¹⁷⁰ As argued by Finerty, this is not to argue that sexual minorities were celebrated or even accepted in pre-colonial Kenya.¹⁷¹ However, the sentiment that being gay is anti-Kenyan fails to acknowledge the crucial role that the West played in entrenching homophobia into Kenya's legal system and its continuous role in preventing LGBT Kenyans, as well as LGBT individuals in other African countries, from having legal rights.¹⁷² Indeed, the argument against imposing Western values onto Kenya, as well as other African countries, is ultimately an argument in favor of repealing anti-sodomy laws.¹⁷³ Although the laws are rarely enforced, LGBT Kenyans are still prosecuted and imprisoned under these laws.¹⁷⁴

It should also be noted that anti-sodomy law which was part of the colonial agenda did not find a sexual *tabula rasa* in the colonies and neither did it find sexualities in Africa unregulated. Although efforts have been made by Western researchers to paint a pre-colonial Africa as having been devoid of non-conventional sex and sexual identities, a lot of literature exist which shows that various sexualities, including same-sex sexualities existed in pre-colonial Africa. It is

¹⁶⁹ Ibid

¹⁷⁰ Ibid

¹⁷¹ Ibid

¹⁷² Ibid

¹⁷³ Courtney Finerty, *supra* note 157 above, p 438.

¹⁷⁴ For example, in 2006 Francis Odingi was sentenced to six years in prison for having "carnal knowledge of M.O. against the order of nature," and the only reason he did not receive a higher sentence is because he was a student at the time of the "offense. See "Francis Odingi v. Republic, (2006) 2011 e.K.L.R. (C.A. Nakuru). In Finerty *supra* note 99 above.

evident that non-conventional sexual practices such as same-sex were prevalent in pre-colonial Africa, albeit understood differently from the Western conception of such activities.

Extensive research carried out by scholars such as Murray and Roscoe,¹⁷⁵ Eppericht,¹⁷⁶ Ahlberg¹⁷⁷ and Tamale¹⁷⁸ among others establish that same-sex and different gender identities were part and parcel of African life in pre-colonial Africa, albeit expressed differently from the Western version. Rather than, for instance, the sexual act between persons of same sex which is what is considered as same-sex sexual act in Western conception, Phillips rightly observes that sexuality in African sense is defined as something that is experienced and expressed in thoughts, fantasies, desires, beliefs, behavior, practices, roles and relationships, thus strengthening the argument that of a different understanding of sexuality in the African sense that was different from the Western concept of sexuality.¹⁷⁹ Murray and Roscoe also state that complex patterns of sexuality emerge from the old texts. In their view these, may differ and indeed differ from the modern ideals of “egalitarian relationships,” and often consisted of relationships where the age of the partners shifted heavily.¹⁸⁰

Egalitarian homosexualities were also prevalent in a number of Kenyan communities¹⁸¹ and what is considered natural homosexuality was prevalent during adolescence among the *Luos*,

¹⁷⁵ See generally S. Murray S. and, W. Roscoe., (eds.), *Boy-wives and Female Husbands: Studies in African Homosexualities*. (New York: Palgrave. 1998).

¹⁷⁶ See generally Mac Epprecht “The 'unsaying' of indigenous homosexualities in Zimbabwe: Mapping a blind spot in an African masculinity.” (1998). *Journal of Southern African Studies* 24.4:631-651.

¹⁷⁷ See generally Beth Maina Ahlberg., ‘Is there an African Sexuality’ Africa, (1979). *Journal of the International African Institute*, Vol. 64. No. 2.

¹⁷⁸ See generally Sylvia Tamale, *Researching and theorising sexualities in Africa*. In Sylvia Tamale (ed.), *African Sexualities: A Reader*: (Pambazuka 2011).

¹⁷⁹ Oliver Philips, *Myths and realities of African sexualities*” available at www.academia.edu/354257/Myths and realities of African Sex (accessed on (12 April 2012)

¹⁸⁰ Stephen Murray and Will . Roscoe supra note 47 above p. 33.

¹⁸¹ George Kaunda *Sexual Inversion Among the Meru* (1977), 178 (Available a upetc.up.ac.za/available/etd, 4072011-173502

,*Nyuakusu* and the *Kikuyus*. Literature analysed in chapter two of this thesis clearly show there was adult egalitarian lesbian activity among the *Meru*.¹⁸² Another form of sexuality among the Ameru people has been defined in the form of religious leadership role called *Mugawe*.¹⁸³ The effort to submerge non-heterosexual orientations and gender identities cannot also be divorced from Africa's colonial history. As argued by Tamale *et al*, part of the colonial project was to obliterate African culture, including sexual culture in order to advance the colonial agenda. For instance, a case study from Dakar, Senegal suggests that gender and sexual identities in Africa indicates a greater variety of sexual behaviours than the extensive work on heterosexual transmission of HIV suggests.¹⁸⁴

According to Tamale, deliberate disinformation by Western anthropologists have provided rationalities which suggest that homosexual practice was unknown and these rationalities sustain the arguments to date.¹⁸⁵ The works of Mac and Epprecht captured in the preceding chapter are also useful and instructive. Kendal's exposition of the understanding of lesbianism among the Lesotho women is also instructive. In 1987, anthropologist Gill Shepherd reported that homosexuality was relatively common in Kenya, even among Muslims (both male and female). Most Kenyans initially discourage transgender behaviour among their children but gradually come to concept it as an inherent part of the child's spirit (*roho*) or nature (*umbo*).¹⁸⁶

Shepherd observed third-gender men, known in Swahili as *shoga*, who served as passive male prostitutes and wore female clothing, makeup and flowers at social events such as weddings, where they typically mingled with the "other" women. At more serious events such as funerals

¹⁸² Ibid

¹⁸³ Ibid

¹⁸⁴ Michael Kirby, Lessons from Wolfenden – A Methodology for Homosexual Law Reform in the Commonwealth of Nations, Commonwealth Bulletin. Available at www.hirschfeld-eddy

¹⁸⁵ Deborah P. Amory. "Homosexuality" in Africa: Issues and debates' (1997). *Journal of Opinion Vol. 25 No.1 (1997) p 5-10.*

¹⁸⁶ Gill Shepherd, Rank, gender and Homosexuality: Mombasa as a Key Understanding of Sexual Options. In Pat Caplan. (ed.).*The Cultural Construction of sexuality,*(Routledge,1987), p 54.

and prayers meetings, the *shoga* would stay with the men and wear men's attire. Other Swahili terms for homosexual men include *basha* (dominant male), *hanithi* (youth male partner) and *mumemke* (man-woman). Lesbians are known as *msago* ("grinders"). They appear as ordinary women in public but are bold with men and frequently go out of the house alone. Shepherd noted that dominant women in Kenya lesbian relationships are typically older and wealthier.¹⁸⁷

In 1899, German ethnologist Michael Haberlandt studied "sexual contrariness" among Zanzibar natives. He reported homosexual men that he believed were born with "contrary" desires and which the natives described as *amriyamungu* or "the will of God." In Zanzibar, homosexuals are referred to as *mke-si-mume* (woman, not man) and also *mzebeor hanisi* (impotent). Haberlandt noticed their presence at festivals and dances wherein some dressed up like women and others like men, often with special headdresses.¹⁸⁸ Most earned their livings through prostitution.¹⁸⁹

Lesbians were also reported in Zanzibar that dressed as men, undertook masculine endeavors, and utilised dildos to satisfy one another. On mainland Tanzania in the 1930s, British researcher Monica reported homosexuality among young Nyakyusa males during her fieldwork near Lake Nyasa. She was told that lesbians' practices existed as well but saw no direct evidence of it. Among the Kaguru women of central Tanzania, Thomas Beidelman mentioned female initiation ceremonies wherein older women demonstrated sexual acts before young initiates.¹⁹⁰

In 1947, British anthropologist Siegfried Nadel reported masculine-type homosexuals among the *Heiban* tribes of Sudan and transgender types among the *Otoro*, *Moro*, *Nyima* and *Tira*. *Korongo* tribes called effeminate men *londo* whereas the *Mesakin* referred to them as *tubele*. Homosexual

¹⁸⁷ Ibid

¹⁸⁸ Gilbert Herdt and Robert J. Stoller, *Intimate Communication: Erotic's and the Study of Culture*. (Columbia University Press, New York, 1990), p 55.

¹⁸⁹ Ibid

¹⁹⁰ Ibid

marriage was observed in both tribes and a man could marry a younger boy for the bride price of one goat. In 1963, Dr. Jean Buxton complained about the great amount of homosexual behavior he found among the *Mandari* tribes, and in 1977, Pamela Constantinides described homosexual and effeminate male priests in a healing cult known as *Zaar*.¹⁹¹ The *Zaar* cult similar to the *Bori* served as a refuge for women, and effeminate men in conservative Muslim-dominated Sudan. Indeed, Islamic influence in East Africa caused many native tribes to deny their traditional acceptance of homosexuality, thus relinquishing it to the underground. In his 1972 study of the *Nuer* tribes of Sudan, for instance, Brain McDermott was repeatedly told that no homosexuality existed; nevertheless, he inevitably spotted it from time to time and in one case found a tribesman who identified and lived as a woman.¹⁹² The third-gender native was discreetly accepted by the *Nuer* as female and allowed to marry a man.

Lesbianism was also practiced on polygamous *Zande* households, as reported by British anthropologists Charles and Brenda Seligman in 1930. Marital friendships between females were known as *bagburu* and often involved intimate sexual relations. The practices is viewed more suspiciously nowadays and considered by some *Zande* husbands as a type of witchcraft.¹⁹³ In the nineteenth century, Germany controlled Tanzania and most of Ethiopia while the Italians governed Eritrea and much of Somalia. The French ruled Djibouti while the British claimed Kenya the Sudan, northern Somalia and Zanzibar. At the dawn of the twenty-first century, homosexual and transgender behavior was illegal in all East African nations with draconian

¹⁹¹ Siegfried Nadel, *The Foundations of social anthropology*, (Cohen & West, 1958), P33

¹⁹² John H. Gagnon and William Simon, *Sexual Conduct: The Social sources of Human sexuality* (1973). *Journal of the history of Human sexuality*. In Henry Abelove, Michelle Barale and David Halperine (eds.), (Routledge, 1973) P 66

¹⁹³ *Ibid*

penalties meted out in many. This was mainly due to the strong Islamic fundamentalism found in the region.¹⁹⁴

3.6: The Wolfenden Report of 1957

As Britain tottered towards the terminal days of its imperial power, an official recommendation by a set of legal experts - the famous Wolfenden Report of 1957 - urged that 'homosexual behavior consenting adults in private should no longer be a criminal offence'.¹⁹⁵ The recommendations of this committee marked the turning point for homosexual regulation in Britain and beyond. The Committee was formed in the wake of the several scandalous court cases in which homosexuality has been featured. The British Parliament on August 24, 1954 appointed at the committee of 15 men and women whose task it was "to consider... the law and practice relating to homosexual offences by the court" along with the laws relevant to prostitution and solicitation.¹⁹⁶

The Wolfenden Committee Report was pioneering as it set out to rectify the English criminal law by implementing the earlier rationalising views of John Stuart Mill who had argued passionately for a private space, free state from state interference, even if it involves activities that members of society do not like, as long as they do not harm anyone-proudly known as the harm test.¹⁹⁷ The publication of the Wolfenden Report was the first sign that the tide of official repression against homosexuality would be reversed in the United Kingdom (UK).¹⁹⁸

The Committee was a compromise between the desire amongst more conservative elements to do something to control homosexuality and rid the streets of overt displays of prostitution, and a

¹⁹⁴ Ibid

¹⁹⁵ Human Rights Watch Report supra note 496 above, p 88.

¹⁹⁶ Meek, J. Macgregor Gay and bisexual men, self-perception and identity in Scotland, 1940 to 1980. (2011). PhD Thesis P 24. (Available at thesis.gla.ac.uk/2602/1/2010meekphd). Accessed on 11th February, 2015.

¹⁹⁷ Alok Gupta, supra note 61 above, p 481.

¹⁹⁸ Ibid

wish on the part of liberals to find more modern forms of regulation than prison or the law.¹⁹⁹ Its task therefore, was to navigate between the two extremes whilst trying to come up with an acceptable framework.²⁰⁰ In doing this, the Wolfenden Committee took expert advice, including from the already near infamous Alfred Kinsey, the American sexologist.²⁰¹ The committee also included two members of the clergy, then Reverend Canon V.A. Demant, an Anglo-Catholic, and the Reverend R.F.V. Scott of the Church of Scotland.²⁰² A number of witnesses to the committee were also drawn from religious organisation in Great Britain, which demonstrated the belief that religious organisation should be part of any discussing regarding legal reform related to homosexual acts and prostitution.²⁰³

After sitting for 62 days, the committee, in an almost unanimous decision, made radical recommendations that would have a profound impact on Britain which was then widely regarded as having one of the most conservative sexual cultures in the world, with one of the most draconian penal codes.²⁰⁴ The only dissenting voice from the committee came from the committee's most prominent Scot: James Adair, a Church elder and former procurator fiscal.²⁰⁵ Taking a stereotypical and morally driven attitude to homosexuality claiming that these 'trends' and 'tendencies' elicited much 'concern and disgust' from the public,²⁰⁶ he rejected the report. He subscribed to the view that open homosexuality within communities was very real risk

¹⁹⁹ Ibid

²⁰⁰ Ibid

²⁰¹ Jeffrey Weeks, *Wolfenden and beyond: the remaking of homosexual history* p2. (Available at <http://www.historyandpolicy.org/policy-papers/papers/papers/Wolfenden>) accessed on 10th February, 2015)

²⁰² Ibid

²⁰³ Finlay A.J. MacDonald, *Confidence in a Changing Church* (Edinburgh: St. Andrew Press, 2004), p 149

²⁰⁴ Ibid p 2

²⁰⁵ Meek, J. Macgregor, *supra* note 142 above, p 24.

²⁰⁶ Ibid p 65.

to the young in those communities²⁰⁷ and that young men employed within certain professions, the theatre for example would be vulnerable to homosexual advances from older men.²⁰⁸

Upon concluding its deliberations, the Report recommended that homosexual behaviour between consenting adults in private should no longer be a criminal offence.²⁰⁹ The Committee stated its view about the proper objects and purposes of the criminal law in the following terms:

It is not, our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern behavior, further than is necessary to carry out the purposes we have outlined... [to] preserve public order and decency, to protect the citizen from what is offensive and injurious and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable.²¹⁰

The Wolfenden Committee described the function of criminal law as to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official, or economic dependence.²¹¹ Most famously, the Wolfenden Report contained this line:

Unless a deliberate attempt be made by society through the agency of the law to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.²¹²

Against the testimony of all the psychiatric and psychoanalytic witnesses, the Committee found the “homosexuality cannot legitimately be regarded as a diseases, because in many cases it is the

²⁰⁷ Ibid

²⁰⁸ Ibid P 24

²⁰⁹ Ibid

²¹⁰ United Kingdom Home Office, Report of the Committee on Homosexual Offences and prostitution, Cmnd 247, HMSO (1957) p 10

²¹¹ Ibid

²¹² Ibid

only symptom and is compatible with full mental health in other respects.”²¹³ Discussions on the nature of homosexuality during the period preceding and following the publication of the Wolfenden Report fell broadly into two categories; the homosexual as a moral degenerate, and the homosexual suffering from a medical or psychiatric condition.²¹⁴ Within the Wolfenden Report, there is a section of Chapter VI devoted to discussion on the medical treatment possibilities for homosexual offenders.²¹⁵ The Committee concluded that homosexuality was not an illness.²¹⁶ Though principally concerned with deciding whether homosexuality should be treated, they apparently overlooked the possibly more important issue of the effect of the “illness concept” on public attitudes and were seemingly unaware that “treatment”, if defined as help given by clinical professionals, does not necessarily imply illness.²¹⁷

Macgregor argues that the Committee’s limited discussion on the medical aspect of homosexuality might suggest that members of the Committee were not entirely convinced of the merits of medical intervention into human sexuality.²¹⁸ However, discussions from within and without the medical community on treating homosexuality as a medical concern were not limited by the relatively unconvinced reaction of the committee members.²¹⁹ In his view, this raises the question as to how the various disciplines of medicine viewed the homosexual, and to what extent they were successful in removing homosexuality from the legal/moral domain²²⁰

²¹³ Jeffrey Weeks, *Wolfenden Beyond: the remaking of homosexual history* supra note 145 above, p 16.

²¹⁴ Meek, J. Macgregor, *Supra* note 142 above p 49.

²¹⁵ *Ibid* p 47

²¹⁶ John Bancroft, *Homosexuality and the medical profession: A behaviourist’s view. Journal of medical ethics, (1975), p 177.*

²¹⁷ *Ibid*

²¹⁸ *Ibid*

²¹⁹ Meek, J. Macgregor, *Supra* note 142 above, p 49.

²²⁰ *Ibid*

The recommendations of the Wolfenden Report were not adopted until 1967, but its publication prompted a forceful critique from Devlin, then a justice of the High court, and later a Lord of Appeal, and HLA Hart, a Professor at Oxford University.²²¹ Central to the ensuing debate, and very relevant to the debates in Kenya surrounding homosexuality, was the question of the proper province of law in matters of private morality.²²² In his 1958 second Maccabean Lecture to the British Academy and which he called "The Enforcement of Morals",²²³ Devlin framed his central question as: "What is the connection between crime and sin and to what extent, if at all, should the criminal law of England concern itself with the enforcement of moral and punish sin or immorality as such?"²²⁴ Devlin argued that society depended on a shared, public morality and that society therefore had a right to make laws in defense of such morality. He dismissed the notion of sphere of private morality, stating:

It is no more possible to define a sphere of private morality than it is to define one private subversive activity. It is wrong to talk of private morality or of the law not being concerned with immorality as such or try to set rigid bounds to the part which the law may play in the suppression of vice. There are no theoretical limits to the power of the state to legislate against treason and sedition, and likewise I think there can be no theoretical limits to legislation against morality.²²⁵

Coining his "disintegration theory," Devlin made the argument that some degree of conformity to its public morality is essential for society to survive, it is therefore "entitled by means of its laws to protect itself from dangers, whether from within or without."²²⁶ Devlin equates immorality with treason and his advocates for the right of any state defend against the harm that would occur if the actual moral code of a society were allowed to be attacked and

²²¹ Ibid

²²² Ibid

²²³ Patrick Devlin, *The Enforcement of Morals*, Maccabean Lecture in Jurisprudence of the British Academy London (Oxford University Press 1959), In Meek, J. Macgregor, *Supra* note 142 above p 15.

²²⁴ Ibid

²²⁵ Ibid p 37.

²²⁶ Ibid p 45.

weakened.²²⁷ He argued that because an attack on “society’s constitutive morality would threaten society that they were purely private acts.²²⁸

In Devlin’s view, homosexual acts were a threat to society’s morality and legal intervention was essential to ensure both individual and collective survival and to prevent social disintegration due to a loss of social cohesion.²²⁹ To Devlin, homosexuality and treason are capable in their nature of threatening the existence of society and consequently, neither can be safe places beyond the scope of the criminal law by fixed principles of political legitimacy. Says Devlin:

The Law of treason is directed against aiding the king’s enemies and against sedition from within. The justification for this is that established government is necessary for the existence of society and therefore its safety against violent overthrow must be secured. But an established morality is as necessary as good government to the welfare of society. Societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions.²³⁰

In short, Devlin believed that criminal law existed not only for the protection of individuals but also for the protection of society. For Devlin, the morals underlying the law were derived from “the sense of right and wrong which resides in the community as a whole”,²³¹ Society’s morals were” those standards of conduct which the reasonable man approves. Devlin posits that to render individuated non-consensual harm a minimum threshold requirement for legal suppression of immorality (as Wolfenden Committee did) is to miss the way in which deviant behavior produces a collective injury by weakening social solidarity.²³² Devlin’s view of society

²²⁷ See generally Feinberg, at 81-123 (arguing that “one can preserve one’s allegiance to personal autonomy in the way that liberalism require while fully-acknowledge the central and indispensable importance of community in human lives”)

²²⁸ Ibid

²²⁹ Ibid

²³⁰ Patrick Devlin, Supra 160 above, p 14.

²³¹ Ibid

²³² Ibid

and its attendant notion of disintegration preclude setting theoretical limits to the power of the state to legislate against immorality. Since society is entitled to protect itself from both external and internal threats, to Devlin, the Wolfenden report's attempt to define an inviolable area of private morality into which the law may not legitimately interfere collapses. In Devlin's view whether polygamy or homosexuality for instance, should be criminalised or permitted ultimately depends upon the extent to which they offend whatever particular form of sexual union dominant within the constitutive public morality of the society in question.²³³

Professor H LA Hart fiercely criticised Lord Devlin's disintegration thesis which he claimed rested upon a confused conception of what a society is and in his view fails whether a conventional or an artificial sense of "society" is.²³⁴ In a series of lectures, Hart argued that the coercive force of the criminal law should not be used to enforce morality in the absence of other more tangible harms.²³⁵ Thus for Hart the mere belief that certain kinds of sexual activity were immoral was not enough to justify their prohibition. Hart was especially critical of Devlin's thesis that private acts of 'immorality' threatened social disintegration. Hart rejects Devlin's disintegration thesis, terming it incoherent.²³⁶ Hart agreed that the threat to the cohesion of the society by the erosion of one of its dominant moralities would indeed justify legal prohibition, but he requires that such a threat be more than a mere challenge to society's code of conduct.²³⁷ Hart puts the disintegration thesis under pressure of the request for empirical evidence to substantiate the claim that the maintenance of morality is in fact necessary for the existence of society. Hart makes the following argument:

²³³ Ibid p 8

²³⁴ Ronald M. Dworkin, Lord Devlin and the Enforcement of Morals, (1966). *The Yale Law Journal*, vol. 75:986, P 990.

²³⁵ Patrick Devlin, supra note 160 above p 15

²³⁶ Herbert Lionel A. Hart, *Law, Liberty and Morality*, Stanford University Press (1963) p 50

²³⁷ Aaron Xavier Fellmeth, State Regulation of Sexuality. *International Human rights Law and Theory. Volume 50 Issue 3 (December 2008')*, p 897

[Lord Devlin] appears to move from the acceptable proposition that some shared morality is essential to the existence of any society to the unacceptable position that a society is identical with its morality as that is tantamount to the destruction of a society. The former proposition might be even accepted as necessary rather than an empirical truth depending on a quiet plausible definition of society as a body of men who hold certain moral views in common. But the latter proposition is absurd. Taken strictly, it would prevent us saying that the morality of a given society has changed, and would compel us instead to say that one society had disappeared and another one taken continue to exist that it could be asserted without evidence that any deviation from a society's shared morality threatens its existence.²³⁸

The Hart-Devlin debate was cast as an argument over the philosophical wisdom, rather than the constitutional legitimacy, of using morality as a basis for enacting criminal law. Nevertheless, from the very beginning, it was also a debate about whether the law should regulate private consensual sex between men.²³⁹ Lord Devlin used homosexuality as a hypothetical in his Maccabean Lecture, asking whether “we regard it as a vice so abominable that its mere presence is an offence. If that is the genuine feeling of the society in which we live, I do not see how society can be denied the right to eradicate it.”²⁴⁰ For Lord Devlin, the lawmaker's function was to enforce morals and those morals were defined by, and perhaps synonymous with, widely held community standards.²⁴¹

The arguments made by the dueling legal philosophers Patrick Devlin and H.L.A. Hart are now heard in courtrooms, parliaments, and even the corridors of the United Nations. At issue is the role of morality in defining criminal offences and, specifically, whether public morality may be used to justify restrictions on personal conduct that has no harmful effects. The contours of this argument are seen most vividly in discussions about the regulation of sex and sexuality and the decriminalisation of same-sex sexual conduct. There has since been the progression of an idea whether criminal law can be used to enforce a popular conception of morality and the emergence

²³⁸ H.L.A. Hart, *supra* note 173 above, p 51-52.

²³⁹ Aaron Xavier Fellmeth, *supra* note 176 above, p 887.

²⁴⁰ *Ibid*

²⁴¹ *Ibid*

of the use of privacy and equality arguments in international and national jurisprudence. This is a departure from the early responses to morals-based justifications for criminalisation which relied heavily on the harm principle, as developed by Mill and Hart, and the corresponding values of privacy and autonomy, to more recent judgments have emphasised equality and non-discrimination.²⁴²

The Wolfenden Report has been faulted in several quarters. First, it is argued that that it is the one which personified the homosexual. Secondly, it is faulted for relegating the women's sexual issues into the private, thus creating the fine distinction between the private and the public in sexual matters, a problem the human rights advocates for the rights of sexual minorities grapple with today.²⁴³ Mark Tebbit argues:

...The Wolfenden Report's terms of reference mandated it to address the problems' of both male homosexuality and female street prostitution. In developing an approach to regulating both of these terrains, the conceptual practices that were developed and refined were distinctions between the 'public and 'private and 'adult' and 'youth': constructing young people as having different social and sexual capacities and vulnerabilities compared to adults and especially constructing participation in sex with other males as a particular 'danger' for teenagers that they needed to be protected from. In particular, Wolfenden report leads to the more specific application of public/private distinctions to the terrain of sexual regulation and policing. This approach defined 'public' rather broadly and 'private' rather narrowly. Criminisation of sex workers and gay sex in 'public' was seen as necessary to enforce 'public decency'. At the same time, 'adults' were in some circumstances to be granted a limited 'private' right to do what they wanted in the privacy of their own bedrooms behind closed doors.²⁴⁴

These shortcomings notwithstanding, the Wolfenden Report has had remarkable impact in law reform in a number of commonwealth countries. Gary Kinsman rightly observes that the Wolfenden Report became a key text of liberal sexual regulation, in many commonwealth countries, given the legal frameworks and practices of sexual regulation inherited from British

²⁴² Ibid

²⁴³ Mark Tebbit, *Philosophy of Law: An Introduction*. (Routledge, 2005), p 139.

²⁴⁴ Ibid

colonialism.²⁴⁵ Its spirit has formed the foundation for judicial decision making actions of a number of regional and national adjudicatory bodies, for instance the European Court quoting the Wolfenden Report, held in Dudgeon that criminalising “homosexual acts in private” violated the applicant’s right to private life under Article 8 of the Convention. The influences of the Wolfenden report and its influence on ensuing legislative decision making and regional and national jurisprudence is examined more deeply in the next chapter.

3.8: CHAPTER SUMMARY

This chapter has presented the historical terrain of regulation of sexuality and the religious, cultural attitudes have influenced such regulation. It has traced the history of sodomy laws from its evolution, the nature of legislative and judicial actions that have characterised its existence. It has also examined the history of the Wolfenden Report of 1957, and how it marked turning point for legislative and judicial decision making for sexual minorities in jurisdictions that adopted its philosophy. The chapter has established that there has been fundamental departure by legislative and judicial bodies from oppressive and ideological approaches to the rights of sexual minorities to more critical and transformative approaches since the Wolfenden Report. This chapter has established that anti sodomy laws have had a long and agonising history for sexual minorities around the world. However, with the recommendation by the 1957 Wolfenden Report, important milestone have been covered, both through legislative reforms and judicial pronouncements to improve the human rights of sexual minorities around the world and especially in former British colonies which were beneficiaries of the arduous law. The Wolfenden principle resulted in a change of the criminal law in the UK. It was a change that was to come to influence in a number of the colonies and former colonies of Britain. One by one, the old Commonwealth countries

²⁴⁵ Gary Kinsman, Wolfenden in Canada: within and beyond official discourse in law reform struggles. Human Rights, sexual orientation and gender identity, p 184. Available at sas-space.sas.ac.uk/4824/16/06Kinsman_WolfendenInCanada. (Accessed on 23rd, July, 2016).

followed the Wolfenden lead. Reform of the law was achieved in Canada, New Zealand, the States and Territories of Australia and South Africa. Similar reforms were also secured in many of the States of the United States of America and in Ireland which likewise traced its criminal law to Britain. The chapter has established that the Wolfenden Report set critical and transformative standards for legislative and judicial decision-making that resulted in law reforms to protect the human rights of sexual minorities.

CHAPTER FOUR

INTERNATIONAL HUMAN RIGHTS: THE FOUNDATION FOR TRANSFORMATIVE LEGISLATIVE AND JUDICIAL DECISION MAKING FOR SEXUAL MINORITIES

4.0: INTRODUCTION

The preceding chapter tracks the emergence of new legislative and judicial decision making in matters of human rights of sexual minorities following the 1957 Wolfenden Report.¹ This new approach is a clear departure from the previous conservative approach which demonised, tortured and criminalised homosexual sex and was generally oblivious to the human needs and rights of sexual minorities. The new approach which follows the Wolfenden Report takes into account international human rights principles and standards as guiding principles to legislation and judicial action on matters concerning human rights of individuals. Prior to the release of the Wolfenden Report, the horrible World War 11 (WW11) human rights violations which jolted international conscience, had led to the setting up of the United Nations (UN) in 1945.² Since then, the UN has remained the principle organ behind the protection and recognition of human rights in the international sphere. Currently, 193 states, including Kenya, are member states to the UN.³ Shortly after the WW11, the UN adopted the Universal Declaration of Human rights (UDHR) in 1948 in part to condemn the violations that had occurred during the past years and those expected to occur in the future.⁴ In addition, in 1966, the International Covenant on civil and Political Rights (ICCPR) and the International covenant on Economic Social and Cultural

¹ Wolfenden Report of 1957 recommended the decriminalisation of homosexual sex between consenting adults undertaken in private.

² Pratima Narayan Somewhere over the Rainbow . . . International Human Rights Protections For Sexual Minorities In The New Millennium. *Boston University International Law Journal*, Vol. 24(2006), p 327.

³ Kenya was admitted to the United Nations on 16th December, 1963.

⁴ Pratima Narayan, supra note 2 above, p 327.

Rights (ICESCR) were adopted, entering into force in 1976.⁵ Together with the Universal Declaration, they created the International Bill of Human Rights.⁶ The International Bill of Rights was drafted as a way to further the UN goals through social and economic measures.⁷ Over the years, this has been the framework that has guaranteed the protection of the human rights of people around the world. None of the instruments focuses on the human rights of sexual minorities but their interpretation by judicial bodies have covered sexual minorities. Recent efforts through the Yogyakarta Principles have focused on principles that can guide protection of sexual minorities.

This chapter examines the normative foundations international human rights and the notable absence of recognition of the human rights of sexual minorities at the drafting stage of international human rights instruments. The study examines the emergence of recognition and protection of the human rights of sexual minorities through transformative interpretation of international human rights standards and principles by the UN treaty bodies. The chapter specifically examines how LGBT rights have been recognised through the (UDHR), the (ICCPR), the (ICESCR), the (CERD), the (CEDAW), the (CAT) and the (ICRC). It further examines the UN announcements on the rights of sexual minorities as well as the Yogyakarta Principles. It also examines the framework of the African Charter on Human and Peoples' Rights (ACHPR) and the opportunities it holds for recognition and protection of sexual minorities. To conclude, the chapter exposes the limitations that international and African regional human rights frameworks face in respect of protection of the human rights of sexual minorities.

⁵ Ibid

⁶ Ibid

⁷ Ibid

4.1: The absence of LGBT protection in international human rights law

Sexual minorities have not always had a happy history in international law. At the time of drafting and adoption of all the important human rights treaties, the human rights of sexual minorities were ignored and to date, no treaty expressly recognises them. This omission is serious, considering that sexual minorities were persecuted and killed on a massive scale during WW11. In 1935, the entire LGBT reform movement was quashed.⁸ In 1897, after a series of medical studies on homosexuality, German doctor Magnus Hirshfeld founded the Scientific Humanitarian Committee to challenge anti-gay discrimination and reform the law.⁹ Later, in 1919, after mild attempts to spur a gay rights movement, Hirshfeld founded the *Institut für Sexualwissenschaft* (Institute for Sexual Research) to conduct further sexology studies. When Hitler took power in 1933, he banned all gay rights organisations and ordered the demolition of the Institute and public book burnings of the Institute's library archives. From 1939 to 1945, the government persecuted 50,000 to 70,000 men it identified as being gay and forced the men to wear pink triangles on their arms during the Nazi takeover of Germany.¹⁰

In West Germany, gay prisoners from WWII remained enslaved for twenty-four years as the government continued until 1969 to enforce Paragraph 175.¹¹ In the United States, the aftermath of World War II stimulated modern gay activism.¹² During this period, sociologist Alfred Kinsey published two reports, *Sexual Behavior in the Human Male* (1948) and *Sexual Behavior in the Human Female* (1953), which indicated that many Americans exhibited a variety of sexual

⁸ Ibid p 327

⁹ Ibid

¹⁰ see Lambda GLBT Community Services, *Symbols of the Gay, Lesbian, Bisexual and Transgender Movements*, <http://www.qrd.org/qrd/www/orgs/avproject/symbols.htm> (last visited June 20, 2007)

¹¹ STEWART, *supra* note 1, at 13

¹² Sharon E. Debbage Alexander, *Romer v. Evans and the Amendment 2 Controversy: The Rhetoric and Reality of Sexual Orientation Discrimination*, 6 TEX. F.ONC.L. & C.R.261, 268 (2002)

behaviors, including bisexuality and homosexuality.¹³ These studies fueled McCarthyism¹⁴ in the 1950s, during which sexual minorities served as scapegoats in anti-communist purges.¹⁵

No affirmative answer has been offered as to why an explicit reference to sexual orientation or gender identity is missing in the International Bill of Human Rights. Instead, the existing literature is largely characterised by an overall lack of discussion on this matter. Phillip Tahmindjid suggests that the absence of any reference to sexual orientation is related to the political and social undercurrents of the time of the instruments' drafting.¹⁶ Braun observes that the lack of specific reference to sexual orientation is particularly surprising when considering that the UDHR was drafted shortly after World War II, when human rights violations were likely still on the drafters' minds. Despite the fact that an estimated 100 homosexual inmates died in the *Sachsenhausen* concentration camp at the hands of Hitler regime, the UDHR condemning the violations of human rights that occurred during the war remained silent in relation to sexual orientation discrimination.¹⁷

The *travaux préparatoires* to the UDHR reveal a conscious effort not to fracture the delicate consensus among the drafters over sensitive rights.¹⁸ For instance, although concepts of family and marriage were incorporated in the UDHR (Article 16) neither the drafting history of the Declaration nor the final text supports the extension of this right to marriage of same-sex partners, demonstrating the complete absence of human rights issues at this stage. DeLaet notes

¹³ See generally Donald Porter Geddes, *Analysis of The Kinsey Reports on Sexual Behaviour in The Human Male and Female* (Mentor Books 1954).

¹⁴ A period of United States history, lasting from 1950-1954 named for Sen. Joe McCarthy, a Republican from Wisconsin. During this period, the American government actively accused individuals of being members of the American Communist Party and/or sympathisers of the Party.

¹⁵ See K.A. Cuordileone, *Politics in an Age of Anxiety: Cold War Political Culture and the Crisis in American Masculinity, 1949-1960*, 87 *J. AM. HIST* 515, 520-21 (Sept. 2000).

¹⁶ Kerstin Braun, *Do Ask, Do Tell: Where is the Protection Against Sexual Discrimination in International Human Rights law?* *American University International Law Review*, Vol. 29, No. 4, (2014) P 879

¹⁷ *Ibid*

¹⁸ *Ibid* p 120

that, in 1997, international human rights law failed to set promotional standards and guidelines for the prohibition of discrimination on the basis of sexual orientation.¹⁹ DeLaet contends that the silence on LGBT people's human rights in the international community reflected a widespread consensus that discriminatory treatment of LGBT people was a "form of clearly acceptable discrimination."²⁰

The omission of recognition of sexual minority rights in the earlier phase of establishment of international human rights principles dogs sexual minorities to date and in most countries. However, purposive and transformative decisions by the UN treaty bodies, through judicial actions or official pronouncements have offered sexual minorities a window of opportunity that has resulted in their recognition and protection. The following section examines this development in international law.

4.2: Sexual Minorities and protection in international human rights treaties

The fact that the International Bill of Rights does not reference sexual orientation or gender identity as a specific category protected against discrimination does not necessarily mean that LGBT people are not protected from discrimination through international human rights law. In fact, the jurisprudence of the United Nations Human Rights Committee ("HR Committee"), responsible for monitoring compliance with the ICCPR, has established protections for LGBT people under international human rights law by the interpretation of existing treaties.²¹ These treaties also set standards for party States, as the implementers of international human rights law, to put in place domestic mechanisms including legislative and policy measures, to ensure compliance. The following section examines the UDHR and the International Bill of Rights and their implications for LGBT protection.

¹⁹ Ibid

²⁰ Ibid

²¹ Ibid p 879

4.3: LGBT and the Universal Declaration of Human Rights (UDHR)

As noted above, the International Bill of Human Rights does not specifically mention sexual orientation. In relation to non-discrimination, Article 1 of the Universal Declaration states that all human beings are born free and equal in dignity and rights, while Article 2 specifies that

Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²²

Article 7 reaffirms that, “all are equal before the law and are entitled without any discrimination to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”²³ Article 26 of the ICCPR, which states that,

[A]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination... on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁴

Human rights protection for sexual minorities has over the years been discussed within the framework of the UDHR.²⁵ Given that the UDHR explicitly provides protection to individuals of “other status”, the document already affords some degree of protections to sexual minorities.²⁶ Even though the UDHR is not binding, it has provided a legal basis for other binding international human rights instruments such as the ICCPR, ICESCR and African Charter among others. The UDHR asserts that all human beings are “entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language,

²² Ibid

²³ Ibid

²⁴ Ibid

²⁵ Ibid

²⁶ Ibid

religion, political or other opinion, national or social origin, property, birth or *other status*.²⁷ The UDHR also provides unequivocal equal protection for all individuals with regards to all rights included in the Declaration.²⁸

Although the UDHR is merely a resolution in the sense that it is not binding as treaty law on UN member states, nonetheless, the UDHR may be binding as customary international law, because its principles have been accepted into practice by various organisations, courts and countries.²⁹ Article 1 of the Universal Declaration on Human Rights (UDHR) states that:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

This article is the fundamental basis of human right law. Prosecuting homosexuality is a clear violation of this article. The UN General Assembly, in a letter Dated 18th December 2008 from the Permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the United Nations,³⁰ reaffirmed Article 1 of UDHR to include sexual orientation by many members of the United Nations.

But Article 1 of the UDHR is not the only article which outlaws the outlawing of homosexuality. Article 2 of the UDHR also makes the prosecution of homosexuality a violation of human rights, through interpreting protection from discrimination on the basis of “other status” to include sexual orientation. The explicit protection to individuals of “other status,”³¹ provided by the UDHR may also be interpreted to mean that the document already affords some degree of protections to sexual minorities. In fact, most of the clauses of UDHR begin with the word

²⁷ Ibid

²⁸ Ibid

²⁹ Ibid

³⁰ UN Doc. A/63/635, 22 December 2008.

³¹ Universal Declaration of Human Rights, Art .2.

“everyone,” implying they confer rights on all human beings.³² This position has been supported in past UN conferences, where the term “other status” has been deliberately included to provide anti-discrimination measures for sexual minorities.³³ In 2001, a special Rapporteur on Extra-Judicial Summary, or Arbitrary Executions was appointed by the UN Human Rights Commission with an explicit reference to sexual orientation.³⁴

4.4: LGBT and International convention on Civil and Political Rights (ICCPR)

The ICCPR sets out in considerable detail the obligations incumbent on contracting on contracting parties and emphasises that the rights detailed are to be enjoyed by all without discrimination.³⁵ It specifically guarantees the rights to self-determination and liberty and security of person. States parties are required to ensure these rights for all individuals within their territories and subject to their jurisdictions “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”³⁶ Although the ICCPR, like other UN treaties, makes no specific mention to sexual orientation in its text, it stands out as the most effective instrument in protection of sexual orientation rights.³⁷ Thus ICCPR’s Human Rights Committee has on two separate occasions found that discrimination based on sexual orientation is not allowed under the treaty.

³² Timo Makkonen, The Principle of non-discrimination in international human rights law and EU Law’s supra note 515 above p 6

³³ For example, while creating a Global Plan of Action with respect to housing in 1996, the UN incorporated the term “other status” to ensure that sexual minorities would have equal access to shelter and basic services. In 1997, at a special Session on HIV/AIDS, gay men were included in AIDS prevention efforts by including the language, “those at risk [of the disease] due to sexual practice.”

³⁴ The Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions contains language which prohibits the death penalty on the basis of sexual orientation. See 22 UN Doc.E/CN.4/1999/39,a

³⁵ *ibid*

³⁶ Elina Steinerte, Rebecca Wallace, United Nations protection of human rights. Section A: Mechanisms for human rights protection by United Nations bodies p 12.

³⁷ International Covenant on Civil and Political Rights, Art. 9.

These two rulings have focused on Articles 2³⁸, 17³⁹ and 26⁴⁰ of the ICCPR. The obligation to “respect” and “ensure” as espoused under Article 2 of the ICCPR implies both a negative and a positive obligation. States are thus obliged to refrain from restricting these rights as guaranteed in the Covenant, as well as to take positive steps to give effect to these rights. The means by which a state gives effect to these rights has been left up to the state to be decided in accordance with its constitutional processes. The obligation to ensure the rights means also that the state party must take effective measures to ensure that the actions by the private individuals or other private actors. The obligations in Article 2 mean also that the level of protection afforded cannot vary from group, but has to be the same for all.

Article 26 of the treaty contains a free-standing prohibition of discrimination. The Article obliges state parties to ensure that also private parties abide by it. The scope of protection is in this respect limited by the right to privacy. All individuals should, however, be protected from discrimination by private parties in quasi-public sectors such as employment, schools, transportation, hotels, restaurants, theatres, parks, beaches etc. In addition to the prohibition of discrimination as the negative aspect of the right to equal protection of the law, Article 26 contains a positive obligation on states to take steps to protect against discrimination and guarantee to all persons equal and effective protection against discrimination in the areas covered by the first sentence of the Article, that is, all matters dealt with by law. The application of the non-discrimination rule under Article 26 is thus not restricted to rights arising from the

³⁸ Article 2 (1) of the ICCPR states: “Each State Party to the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

³⁹ Article 17 states: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence or to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

⁴⁰ Article 26 states: ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

Covenant, but is-as the Human Rights Committee has held in its practice-applicable also as regards to, for example, economic and social rights.⁴¹ Simply put, the Article provides for equal protection of law to all persons including sexual minorities.

The ICCPR also states that an individual shall be allowed the right to trial before a court if she is deprived of liberty and shall be treated with dignity while in prison.⁴² This, in effect, prohibits such state execution or violence by other parties against sexual minorities on basis of their sexuality as these deny them the most basic right to life in violation of the ICCPR. Article 26 is important in the quest for protection of sexual orientation rights in that its strong enforcement would provide support for other aspects of law, which suggest that the state should play a greater role in the protection of sexual minorities. Where member states selectively recognise some rights but not others, such as the right to engage in same-sex relations, while refusing the right to marriage and family, they contravene article 26.⁴³

Unlike the ICCPR, which guarantees civil and political rights as the foundation of liberty, the International Covenant on Economic, social and Cultural Rights (ICESCR) guarantees the “second generation” rights of economic, social and cultural security.⁴⁴ The ICESCR pledges, among other things, the “right to work, to fair conditions of employment to join and form trade unions to social security, housing, health, education and culture.”⁴⁵ In its preamble, the ICESCR,

⁴¹ This is a move with far-reaching consequences, as noted by M Schein in “Women’s economic and social issues of practical implementation’ in L Hannikainen & Nyakanen *New trends in discrimination law: International perspectives* (1999), p 20.

⁴² International Covenant on Civil and political Rights

⁴³ See *Toonen vs. Australia*, comm. No. 488/1992. U.N. Doc CCPR/50/D/488/1991 (1994)

⁴⁴ See CRAVEN; *supra* note 32, at 8 (citing ICESCR). Note that in the language of human rights, rights are often constructed in the manner of the French Revolution: liberty, equality, fraternity. First generation rights (liberty) protect the civil rights of individuals; second generation rights (equality), protect the right to earn a living and to be secure; and third generation rights (fraternity) protect the collective rights of people or cultures.

⁴⁵ *Ibid*

like the ICCPR, declares that the rights found within it are derived from the “inherent dignity of the human person.”⁴⁶

4.5: LGBT and International Convention on Economic, Social and Cultural Rights (ICESCR)

The ICESCR requires States Parties to take steps to achieve the full realisation of the rights recognised under it.⁴⁷ Kenya ratified the Convention in 1972 but it has not signed its optional protocol which recognises the competence of the convention to hear individual complaints or institute or investigations into breaches.⁴⁸ Article 2(2) of the treaty states as follows:

The states parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status. The formulation of this provision is absolute and practice-oriented, as implied by the notions “guarantee” and “will be exercised.”⁴⁹

The ICESCR does have language that mirrors the non-discrimination language also contained in the ICCPR. In particular, Article 2, Paragraph 2 states: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁵⁰ Taken together with other rights guaranteed within the Covenant, this Article could serve as a powerful means to assert the rights of the LGBT community and, if not dismantle the anti-sodomy laws themselves.⁵¹

⁴⁶ Ibid

⁴⁷ Ibid art. 2(1).

⁴⁸ Kenya Human Right Commission ‘towards equality and anti-discrimination: An overview of international and domestic law on anti-discrimination in Kenya’ (2010)2.

⁴⁹ Toonen v. Australia, Communication No.488/1992, UN.Doc CCPR/C/50/D/488/1992 (1994).

⁵⁰ Courtney Finerty, Being Gay in Kenya: The Implication of Kenya’s New Constitution for its Anti-Sodomy Laws, *Cornell International Law Journal Vol. 45 p 436-438, p 415.*

⁵¹ Ibid

4.6: LGBT and Convention on the Elimination of Racial discrimination (CERD)

The International Convention on the elimination of all forms of racial Discrimination (CERD) requires states to bring an end to “racial discrimination by any persons or group or organisation.”

Article 2 (e) CERD targets discriminatory behaviour by “any person, organisation or enterprises.” As Professor Meron states:

Although contemporary human rights law focuses on the duty of governments to respect the human rights of individuals, human rights violations committed by one private person against another, for example the perpetration of acts of egregious discrimination, cannot be placed outside the ambit of human rights law if that law is ever to gain significant effectiveness.⁵²

4.7: LGBT and Convention on the Elimination of All forms of Discrimination Against Women (CEDAW)

The Convention on the Elimination of All Forms of Discrimination Against Women.⁵³

(CEDAW) was adopted by the General Assembly of the United Nations in December, 1979 and entered into force on 3rd September, 1981.⁵⁴ Kenya ratified the Convention in 1984 but to date has not ratified the optional protocol that competence of the Committee on the Elimination of all forms of Discrimination against women to hear individual complaints or institute investigation into breaches. The Convention is considered the international Bill of Human Rights for Women because of its broad scope in articulating the women rights. However, despite its comprehensiveness, CEDAW does not make a direct mention of sexual orientation within its text.⁵⁵

CEDAW defines discrimination against women as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition,

⁵² Theodor Meron, *Human rights and Humanitarian Norms as Customary Law*, 1989, p.162.

⁵³ Convention on the Elimination of All Forms of Discrimination against Women, adopted on 18/12/1979, General Assembly Resolution 31/180, UN.G.A.O.R, 34 the Session, Supp. No 46. U.N. Doc. A/34/36/ (1980), entered into force 3/9/1981.

⁵⁴ Ibid

⁵⁵ Kenyan Section of the International Commission of Jurists ‘Reporting under international human rights conventions: Conventions on the Elimination of all forms of Discrimination against women (CEDAW) (2005)12.

enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”⁵⁶In the Guidelines on reporting on CEDAW has clarified that”...Convention deals with discrimination directed against women and not with discrimination based on sex.”⁵⁷

The convention enjoins the state to take appropriate measures, including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women and to repeal all national penal provisions which constitute discrimination against women.⁵⁸This section is important in pressing for discriminalisation of homosexual acts and equal parental /adoption rights among others. Importantly the Convention enjoins states to take steps to achieve the elimination of prejudices and customary and all practices based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women. Further, states are required to take measures to modify the social and cultural patterns of conduct of men and women.⁵⁹

In essence, the CEDAW acknowledges that discrimination against women violated the principles of equality of rights and respect for human dignity; States are bound to undertake stipulated measures to end discrimination against women. Therefore, the Convention provides the basis for realising equality between women and men through ensuring women’s equal access to and equal opportunities in political and public life- including the right to vote and to stand for

⁵⁶ CEDAW Art.1

⁵⁷ General Recommendation No.21, 13th Session 1994 available at: <http://www.un.org/womenwatch/daw/cedaw/recomm.htm>. (accessed on 1st May,2012).

⁵⁸ CEDAW Art.2 (f)

⁵⁹ Ibid Article 5 (a).

election as well as health and employment, States parties are to ensure women can enjoy all their human rights and fundamental freedoms.⁶⁰

4.8: LGBT and Convention Against Torture and other cruel, Inhuman or Degrading Treatment (CAT)

The Convention Against Torture and other cruel, inhuman or degrading treatment or punishment⁶¹ was created by the United Nations with the intention of expanding the Universal Declaration of human rights and ICCPR's ban on cruel and unjust punishment⁶² Given that torture is prohibited under customary international law, the legal obligations of the Convention bind even those states that have not ratified the agreement.⁶³ The convention also established the UN Committee Against Torture.⁶⁴ The convention defined torture to mean:

Any act by which severe pain or suffering whether physical or mental is intentionally inflicted on a person 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 ,coercing him or a third person or for any reason based on discrimination of any kind, where 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.⁶⁵

The Convention against Torture extends protection against torture beyond state actors to cover events such as is inflicted by individuals. In essence, the convention mandates the UN to pursue individuals and government who commit torture even where the member states do not have laws protecting sexual minorities or investigate the crime or is reluctant to offer protection to sexual

⁶⁰ Kenyan Section of the International Commission of Jurists (note 52 above).

⁶¹ Convention against Torture and other cruel, inhuman, degrading treatments or punishments. (Hereinafter convention against torture). GA, Res. 39/46, (Dec.10, 1987) available at: <http://www.un.org/documents/ga/res/39/a39r046.htm>.

⁶² Office of the high Commissioner for human rights, Committee Against Torture, available at <http://www.unhchr.ch.html/menu2/6/cat/index.html><accessed on May 30, 2009> (accessed on 1st May, 2016).

⁶³ Vienna Colucci 'Torture and the law'. Amnesty International Reports, (2001) available at: http://www.amnestyusa.org/Reports_Statements_and_Issue_Briefs/Torture_and_the_Law/page.do?id=1107981&nl=3&n2=38&n3+1052. (accessed on 1 may,2016).

⁶⁴ Ibid

⁶⁵ Convention Against Torture,art.1.

minorities.⁶⁶In this regard, the Convention against Torture requires states to make torture illegal, punish those who commit torture or extradite suspects to face trial before another competent court.⁶⁷In 2001, the Special Rapporteur on Torture reported after investigation that “...sexual minorities are disproportionately subjected to torture and other forms of ill- treatment because they fail to conform to socially constructed gender expectations”.⁶⁸ This was after calls for reports on ill-treatment of minorities at the hands of state authorities.⁶⁹ The special Rapporteur concluded that discrimination on the basis of sexual orientation often contributes to the dehumanisation of the victim and therefore, meets the condition to qualify as torture.⁷⁰

The Government Against Torture also requires states to provide training on torture prevention particularly to law enforcement authorities.⁷¹States are also enjoined to investigate allegations of commission of torture against its officials.⁷²Any evidence of statements obtained by using torture against is also barred from admission in trial.⁷³These provisions offer useful buffer against suspects is also barred against inhuman treatment and torture of sexual minorities to admit their stem violation of the law through commission of prohibited sexual acts. They are also important to stem the notoriety of the police to participate in the persecution of sexual minorities especially in developing countries.⁷⁴

⁶⁶ Ibid

⁶⁷ Ibid art .13.

⁶⁸ Human Rights Watch ‘Sexual orientation and gender: Briefing to the 60th Session on the UN Commission on Human Rights’ (2004) available at http://hrw.org/english/docs/2004/02/02/global_7249.htm <accessed on May 30,2009. (accessed on 12 July,2012)

⁶⁹ UN High Commissioner for Human Rights, Call for Submissions at 19-20.G/SO 214 (53-13) (May 31,2001)

⁷⁰ Human Rights Watch, supra note 65 above .p 14

⁷¹ Convention Against Torture art 13.

⁷² Ibid

⁷³ Human Rights Watch, note 65 above, Para 527.

⁷⁴ Ibid p 527

The Convention also prohibits state from returning an individual to a nation where she will be tortured.⁷⁵ In this regard, it requires that states first evaluate the human rights record of the native country and allow victims refugee status if there is reason to suspect that the individual will be tortured.⁷⁶ The committee against Torture has condemned the ill-treatment of people detained on grounds of sexual orientation in Egypt and the discriminatory treatment of gay prisoners in Brazil.⁷⁷

4.9: LGBT and International Convention on the Rights of the Child (ICRC)

The convention on the Rights of the child (CRC)⁷⁸ establishes the Committee on the rights of the child which examines the progress made by State Parties in realising the rights of children as outlined in the convention. States Parties are required to send reports on the measures undertaken for the implementation of these rights.⁷⁹ Kenya has proceeded to domesticate it through the enactment of the children's Acts, Act number 8 of 2001. The convention defines a child as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier". Article 2 of the convention prohibits discrimination and requires governments to ensure protection against discrimination. In addition, the convention proscribes arbitrary or unlawful interference with a child's privacy, family or home and in lawful attacks on his or her honour and reputation.⁸⁰ The right of every child regardless of her sexual

⁷⁵ See the Convention Against Torture, Art 3.

⁷⁶ Ibid

⁷⁷ Committee Against Torture 'Concluding Observations of the Committee against Torture Venezuela' CAT/C/CR/29/2. Para10; Human Rights Committee' Summary Record of the 1645th Meeting of the Human RIGHTS Committee ' CCPR/C/SR.1645(1998),Para 48 (regarding Zimbabwe).

⁷⁸ Convention on the Rights of the Child, adopted on 20/11/1989 by general Assembly Resolution 44/25, UN.Doc. A/44/25, entered into force on 2/9/1990.

⁷⁹ Ibid Article 44.

⁸⁰ ICRC Article 16(1)

orientation to enjoy adequate facilities for physical, mental, spiritual, moral and social development is also recognised under the convention.⁸¹

Two recent General Comments by the CRC have reaffirmed the need to address sexual orientation discrimination in the context of promoting adolescent health and preventing HIV/AIDS. The committee has also recommended that attention be given to sexual orientation as one of the many factors that can expose children to a higher risk of violence and victimisation at school.⁸² The CRC treaty is therefore relevant in addressing sexual orientation discrimination of lesbian and gay children and parents. The UN Committee on the rights of Child has interpreted Article 2 of the convention on the rights of the child as barring disparity between heterosexual and homosexual couples' ages of consent.⁸³

4.3: LGBT in UN Draft Resolutions, Principles and Declarations

Examples by UN bodies demonstrate the attention the human rights issue of sexual minorities keeps receiving. For instance, on November 17, 2011, the United Nations High Commissioner for Human Rights made it clear that “[t]he criminalisation of private consensual homosexual acts violates an individual’s right to privacy and to non-discrimination and constitutes a breach of international human rights law.”⁸⁴ Consequently, sexual minorities have today been allotted some notable space in the extant regional and international human rights order through treaty body jurisprudence.⁸⁵ The protection and promotion of their human rights is as central an enterprise to international human rights project as any other individual, even though sexual

⁸¹ Ibid Article 27

⁸² Committee on the Rights of the Child ‘Report on Comment No.3: HIV/AIDS and the Rights of Children’ CRC/C/111 (2001) para 8.

⁸³ See, for example, Concluding Observation of the Committee on the Rights of the child: (Isle of Man)United Kingdom for Great Britain and Northern Ireland, UN Doc CRC/C/15/Add.134,Para.22 (Oct 16,2000).

⁸⁴ Ibid

⁸⁵ See generally International commission of Jurists, Sexual Orientation, gender identity and International Human rights Law, Practitioners Guide number 4. Available at www.refworld.org/docid/4a783aed2.htm. (Accessed on 1th March 2016).

minorities are late entrants into the human rights discourse.⁸⁶The United Nations General Assembly, in a series of resolutions, has called on states to ensure the protection of the right to life of all persons under their jurisdiction and to investigate promptly and thoroughly all killings including those motivated by the victim's sexual orientation and gender (see, for example, resolution A/RES/67/168). In June, 2011 the United Nations Human Rights Council became the first UN intergovernmental body to adopt a wide-ranging resolution on human rights, sexual orientation and gender identity.

In December 2008, an historic declaration was read out in the United Nations General Assembly (UNGA) on behalf of 66 states. This was the first time that a statement condemning abuses against lesbian, gay, bisexual, and transgender people has been presented in the UNGA.⁸⁷ The declaration reaffirmed 'the principle of non-discrimination, which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity'. The declaration expressed deep concern 'by violations of human rights and fundamental freedoms based on sexual orientation or gender identity,' and the 'violence, harassment, discrimination, exclusion, stigmatisation and prejudice [?] directed against persons in all countries in the world because of sexual orientation or gender identity'.⁸⁸

The UN Special Procedures have increasingly dealt with abuses related to sexual orientation and gender identity. An example is the Special Rapporteur on extrajudicial, summary or arbitrary executions who has included sexual orientation as a factor to consider in his investigations. In its resolution 63/182 on extrajudicial, summary or arbitrary executions, adopted on 18 December 2008, the UNGA reaffirmed the mandate of the Special Rapporteur and urged all states

⁸⁶ Aaron Xavier *Fellmeth*, *Rights*, *Cardozo Journal of Law & Gender*, Vol.20.337, p 343.

⁸⁷ *Ibid*

⁸⁸ *Ibid*

[t]o ensure the effective protection of the right to life of all persons under their jurisdiction and to investigate promptly and thoroughly all killings [...] committed for any discriminatory reason, including sexual orientation, [...] and to bring those responsible to justice before a competent, independent and impartial judiciary at the national or, where appropriate, international level, and to ensure that such killings, including those committed by security forces, police and law enforcement agents, paramilitary groups or private forces, are neither condoned nor sanctioned by State officials or personnel.⁸⁹

4.4: LGBT PROVISIONS UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (ACHPR)

The African Charter on Human and people's rights (ACHPR) which provided the human rights framework for African member states borrows the international human rights principles from the UDHR and bound by them.⁹⁰ Articles 2 and 3 of the African Charter deal with equality. The former provides that individuals are entitled to the rights under the African Charter "without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status. "The latter stipulates that everyone: shall be equal before the law. "The use of phrases "such as" or other status" clearly shows that the list of unacceptable grounds for discrimination is not exhaustive.⁹¹ This language suggests that the drafters foresaw and that the African Charter allows for an expansion of the specific grounds thus accepting the principle that the exact content of the Charter will not be frozen in time. Arguably there is no limit to the growth that could be allowed.⁹²

The Charter recognises the indivisibility and interrelatedness of rights. Specifically, it emphasises that the satisfaction of economic, social and cultural rights as a guarantee for the

⁸⁹ Ibid

⁹⁰ Rachel Murray & Frans Viljeon, Normative Basis and Procedural Possibilities before the African Commission on Human and People's Right and the *African Union Human rights Quarterly*, Vol.29, p 91.

⁹¹ Ibid

⁹² Ibid

enjoyment of civil and political rights.⁹³ Thus it underscores the symbiotic relationship subsisting in the interdependence of rights whereby one category of rights cannot survive without the other. The relationship notwithstanding, the charter guarantees a broad range of civil and political rights which now form the bulk of the African community's jurisprudence. The commission has over the last two decades or so entrenched numerous communications alleging violations of civil and political rights under the Charter.⁹⁴

The Charter contains two primary categories of rights and freedoms in Part 1, Chapter 1 as well as some general provisions applicable to both categories. The first category is individual rights. These individual rights are guaranteed by the Charter in Articles 3-18. The second category is people's rights or collective rights, which apply to peoples as a collectively.⁹⁵ These rights are found in Articles 19-24. The general provisions of Chapter 1 which apply to all rights are found in Articles 1, 2 and 26. The following section is a discussion of these rights and their relevance to the human rights of sexual minorities. This right is stated at article 2 of the Charter. It guarantees every individual enjoyment of the rights and freedoms recognised and guaranteed in the Charter without any distinction of any kind such as race, ethnic group, colour, sex, language, religion, political party or any other opinion, national and social origin, fortune, birth or other status.⁹⁶

The exclusion of individuals from enjoying the rights in the charter on the basis of these grounds may amount to discrimination. 'Discrimination' means any distinction, exclusion or preference that has an effect of nullifying or impairing equal enjoyment of rights.⁹⁷ Although discrimination refers to differentiation on subjective criteria like those mentioned in Article 2 of the Charter,

⁹³ Morris Mbondenyi, *Investigating the Challenges in Enforcing International Human Rights Law in Africa: Towards an Effective Regional System*, p 236. PhD Thesis, University of South Africa, June, 2008.

⁹⁴ Ibid

⁹⁵ Ibid

⁹⁶ ACHPR Article.2

⁹⁷ Morris Mbondenyi, *supra* note 93 above, p 237.

this does not however, rule out affirmative action that may be undertaken to redress past inequality.⁹⁸The Commission has in a number of cases as demonstrated below, interpreted Article 2 in a manner that has abundantly cushioned non-discrimination and the guarantee of socio-economic rights and other individual rights such as right to privacy as well as fundamental freedoms relevant to this study.

In the case of *Recontre Africaine pour la Defense ds Droits de l'Homme v Zambia*, the Commission found that violation of Article 2.⁹⁹The *Zambian government in the organization Mondiale Contre la Torture and Association Internationale des Jurists Demoncrates, Commission Internationale des jurists, Union Interfricaine des Droits de l'Homme (OMCT,AIJD,CIJ, UIUDH) v. Rwanda*, the communication alleged the expulsion of refugees from Rwanda as well as summary executions of Tutsis and political opponents among other human right violations. The commission found that the violations of the rights of the individual in this case were on the basis of their being Burundian nationals, members of the Tutsi ethnic group or members of opposition parties and hence, violated Article 2 of the Charter. The commission concluded that:

There is considerable evidence, undisputed by the government that the violations of the rights of individuals have occurred on the basis of their being Burundian or numbers of the Tutsi ethnic group. The denial of numerous rights to individuals on account of their nationality or membership of a particular ethnic group clearly violates Article 2.¹⁰⁰

⁹⁸ Ibid

⁹⁹ The *Zambian government expelled West African nationals on grounds that they were living in Zambia illegally and that the African Charter did not abolish the requirements for visas and the regulation of movement over national borders between member states. The commission held that the nature of the expulsion by the *Zambian government was discriminatory on the basis of nationality. The commission further noted that Zambia, by ratifying the African Charter, was committed to 'secure the rights protected in the charter to all persons within their jurisdiction nationals, or non-nationals.**

¹⁰⁰ David Weissbrodt, (2011)'United Nations Charter-based procedures for addressing human rights violations'. In Gilbert.G,Hampson,F and Sandoval, C(eds). *The Delivery of Human Rights :Essays in Honour of Professor Sir Nigel Rodley*.Oxon:Routledge,13-38 p 23.

The Commission also found a violation of Article 2 in the case of Purohit and Moore v. Gambia¹⁰¹ in which the communication alleged that the principal legislation governing mental health in Gambia, namely the Lunatics Detention acts of 1917, as outdated and discriminative in effect. The complainants argued that as there were no review or appeal procedures against determination or certification of one's mental state for both involuntary and voluntary mental patients, the legislation did not allow for the correction of an error assuming a wrong certification or wrong diagnosis had been made. In such circumstances, if an error was made and there was no avenue to appeal or review the medical practitioners' assessment there would be a great likelihood that a person could be wrongly detained in a mental institution. In finding a violation of Article 2 and 3 of the charter, the Commission stated:

Clearly the situation presented above fails to meet the standards of anti-discrimination and equal protection of the law as laid down under the provision of Article 2 and 3 of the African charter and Principle 1(4) of the United Nations Principles for the Commission maintains that mentally disabled persons would like to share the same hopes, dreams and goals and have the same rights to pursue those hopes, dreams and goals just like any other human being. Like any other human being, mentally disabled persons or persons suffering from mental illness have a right to enjoy a decent life as normal and full as possible, a right which lies at the heart of the right to human dignity.¹⁰²

Within both the individual and collective rights categories under Part 1, Chapter 1 of the Charter are different types that are often differentiated as either civil and political rights or economic, social and cultural rights. These are not airtight categories and there is crossover between some of them, but generally speaking civil and political rights are those rights which relate to life, liberty, personal security, judicial process and participation in the affairs of one's country and community. Economic, social and cultural rights relate to basic human needs such as food,

¹⁰¹ Communication 241/2001, Purohit and Moore v. Gambia, sixteenth Annual Activity Report of the African Commission on Human and People's Rights (Annex VIII).

¹⁰² Communication 241/2001, Purohit and Moore v. Gambia, sixteenth Annual Activity Report of the African Commission on Human and People's Rights (Annex VIII)

housing, work, health care, education and the expression and preservation of culture. Both types of rights are important for sexual minority people.¹⁰³

Article 5 of the charter protects a number of related rights namely, the rights to the respect of the dignity inherent in a person; the right to recognition of one's legal status; and the rights against all forms of exploitation and degradation of people particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment. The right to the respect of the dignity inherent in a human being is the basis of the human right concept.¹⁰⁴ Article 5 also provides for the prohibition of all forms of torture, cruel, inhuman or degrading punishment and treatment. Although the term torture is still a debatable one, the convention against Torture and Cruel, Inhuman or Degrading treatment or punishment (CTA) has defined it as:

Any act by which never sever pain of suffering whether physical, mental is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or confession ,punishing him for an act he or third person has committed or is suspected of having committed...¹⁰⁵

Article 6 of the charter provides that 'every individual shall have the right to liberty and to the security of his person. No one may be deprived to his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.' This article guarantees individuals, physical liberty by prohibiting unlawful arrests and detention. The enjoyment of this right, however, is subject to reasons and conditions laid down by law. The right to liberty and security of the person require the state to have justifiable grounds for depriving a person of his or her liberty and further requires such deprivation to be in accordance with stipulated procedures.¹⁰⁶

¹⁰³ Ibid

¹⁰⁴ The concept acknowledges that every individual has legal entitlements (rights), by virtue of being human. It is on the basis of this acknowledgement of one's legal status that Article 5 recognises the fact that slavery is a dehumanising practice because it exploits people.

¹⁰⁵ CAT article 8

¹⁰⁶ Morris Mbondenyei, supra note 93 above, p 237.

The individual civil and political rights contained in the Charter are the rights to: equality before the law and equal protection of the law¹⁰⁷life, liberty and freedom from torture, cruel, inhuman and degrading treatment, slavery and other forms of exploitation¹⁰⁸a fair trial¹⁰⁹freedom of conscience and religion¹¹⁰freedom of assembly and association with others¹¹¹freedom of movement and residence¹¹²participate in government¹¹³non-discrimination against women.¹¹⁴ Thus, in a situation where a sexual minority person does not have the same access to legal processes in her country as other members of society or does not enjoy equal protection of the police, for instance, there is a violation of the right to equality before the law and equal protection of the law.

African Charter is widely known as the first international human rights treaty to protect the three ‘generations’ of human rights, including civil and political rights; economic, social and cultural (ESC)rights; and group and peoples’ rights, in a single instrument without drawing any distinction between the justiciability or implementation of the three ‘generations’ of rights.¹¹⁵ Despite this achievement, only a modest number of ESC rights were explicitly included in the African Charter due to a ‘minimalist’ approach adopted during its drafting which at the time was in line with the notion’ to spare [...] young states too many but important obligations.’¹¹⁶ Thus, the African Charter only explicitly recognises the following individual ESC rights: the right to property (Article 14); the right to work under equitable and satisfactory

¹⁰⁷ Ibid

¹⁰⁸ ACHPR Article 5

¹⁰⁹ ACHPR Article 7

¹¹⁰ ACHPR Article 8

¹¹¹ ACHPR Article 10 and 11

¹¹² ACHPR Article 12

¹¹³ ACHPR Article 13

¹¹⁴ ACHPR Article 18(3)

¹¹⁵ Mansuli Ssenyonjo, *Analysing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 years Since the Adoption of the African Charter*, *Netherlands Quarterly of Human Rights*, Vol. 29/3, 358-397, 2011.

¹¹⁶ See Rapporteur’s Report on the Draft ACHPR, QAUDoc, CAB/LEG/67/DARFT Raft.(II) Rev.4, para 13: Viljoen, F., *International Human Rights Law in Africa*, OUP, Oxford, 2007, p.238.

conditions (Article 15); the right to enjoy the best attainable state of physical and mental health (Article 16); the right education (Article 17(1)); and the protection of the family and cultural rights (Articles 17 (2) and (3), 18 (1) and (2) and 61).¹¹⁷

Among the individual ESC rights, which are fundamental for human survival and for living a life of dignity, explicitly protected in the International Convention on Economic, Social and Cultural Rights (ICESCR) but not explicitly included in the African Charter are the right to an adequate standard of living, including adequate food, clothing and housing; social security and the right to the continuous improvement of living conditions.¹¹⁸ Be it as it may the approach of the Charter with regard to this category of rights is a marked departure from that of other regional human rights systems.¹¹⁹ The Charter puts economic, social and cultural rights at par with other rights such as civil and political rights. Its preamble categorically provides that:

...Civil and political rights cannot be disassociated from economic, social and cultural rights in their conception as well as universality and ... the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

The economic, social and cultural rights are justiciable under the charter but there is need for their progressive realisation taking into consideration the circumstances faced by the state parties.¹²⁰ The Charter guarantees the right to health and education among other rights. Article 16 of the charter guarantees everyone the right to enjoy the best attainable state of physical and mental health. States parties to the charter are obliged to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.¹²¹

¹¹⁷ Ibid

¹¹⁸ Ibid p.238

¹¹⁹ Morris Mbondenyi, , supra note 93 above, p 288.

¹²⁰ Evelyn A Ankumah. The African commission on Human an people's Rights.(Kluwer,1996)

¹²¹ Vincent O.Nmehielle ,Development of the African Human rights System in the Last Decade ,(2004).Human Rights Brief 11,no.36-11p 125

The measures contemplated in this Article include but are not limited to elimination of epidermis; availing health services to the people through construction of adequate hospitals and health center; promulgation of appropriated health policies; establishing appropriate legal standards that empower people to demand action against the violation of their right to health; and provision of vaccinations, drugs and other healthcare services.¹²²

The logic of the charter also demands that “other status” should be an expansive and open-ended concept because exclusion from the ambit of Article 2 has the far-reaching effect of foreclosing reliance on other Charter rights.¹²³ On this construction, sexual orientation should be included as a group on which “distinctions’ cannot be tolerated. A denial of the equal benefits of the law on the basis of this personal characteristic is therefore prohibited by Articles 2 and 3. On the basis of Articles 60 and 61 of the Charter, reliance is also placed on a far-reaching “General Comment” of the Committee on Economic, Social and Cultural Rights, which considers Article 2 of the Covenant as proscribing and discrimination, including discrimination based on “sexual orientation.”¹²⁴

According to Murray and Vliojen and which position this thesis fully endorses, the consequence of the interpretative inclusion of “sexual orientation” in Article 2 is that gays and lesbians fall within the protective scope of the Charter as a whole. This conclusion seems almost trite, as it is inconceivable that persons under the jurisdiction of African states would forfeit for example the right to a fair trial, to assemble freely or to property merely on the basis of sexual orientation.¹²⁵

¹²² U. Oji Umzurike, *The African Charter on Human and Peoples Rights*, (2010). *Annual Survey of International & Comparative Law Volume 13 Issue 1 Article 88-30*.

¹²³ *ibid*

¹²⁴ International Covenant on Economic, Social and Cultural Rights, adopted 16 Dec. 1996, G.A. Res. 2200 (XXI), UN GAOR, 21st Sess, Supp. No. 16, art. 2, 2 UN Doc. A/6316 (1966), 993 UNTS. 3 (entered into force 3 Jan. 1976), General Comments NO. 14 (2000), 18 (under the heading “Non-discrimination and equal treatment”); ICCPR, *supra* note 17 art. 2. In Rachael Murray & Frans Viljoen note 90 above, p 9.

¹²⁵ Rachael Murray & Frans Viljoen, *supra* note 90 above, p 10

The African Commission on Human rights has given effect to Article 2 of the ACHPR in the case of Zimbabwe NGO Human rights Forum v. Zimbabwe where the commission stated that “Together with equality before the law and equal protection of the law, the principle of non-discrimination under Art. 2 of the Charter provide the foundation for the enjoyment of all human rights.”¹²⁶ Non-discrimination and equality before the law is therefore well entrenched in the ACHPR.

4.5: The Yogyakarta principles

As stated above, the international system has seen great strides towards gender equality and protections against violence in society, community and in the family.¹²⁷ In addition, 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 to human rights violations based on sexual orientation and gender identity has been fragmented and inconsistent. To address these deficiencies a consistent understanding of the comprehensive regime of international human rights law and its application to issues of sexual orientation and gender identity is necessary.

It is critical to collate and clarify state obligations under existing international human rights law, in order to promote and protect all human rights for all persons on the basis of equality and without discrimination.¹²⁸ The international commission of Jurists and the international service for human rights, on behalf of a coalition of human rights organisations, undertook a project to develop a set of international legal principles on the application of international law to human

¹²⁶ Communication 245/2002, Zimbabwe Human rights NGO Forum v. Zimbabwe. Decided at the 39th Ordinary session, 21 May, 2006. Activity Report, ACHPR, 2006. Also available at <http://www.chr.up.ac.za/index.php/brpwse-bycountry/zimbabwe/506-zimbabwe-human-rights-ngo-forum-v-zimbabwe-2006-ahrlr-128-achpr-2006.html> (last accessed 4 August, 2010)

¹²⁷ The Yogyakarta Principles, Principles on the application of international human rights law in relation to sexual orientation and gender identity.

¹²⁸ Ibid

rights violations based on sexual orientation and gender identity to bring greater clarity and coherence to states' human rights obligations. Distinguished group of human rights experts has drafted, developed, discussed and refined these Principles.¹²⁹ Following an experts' meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6 to 9 November 2006, 29 distinguished experts from 25 countries with diverse backgrounds and expertise relevant to issues of human rights law unanimously adopted the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.¹³⁰

The Rapporteur of the meeting, Professor Michael O'Flaherty, has made immense contributions to the drafting and revision of the Principles.

The Yogyakarta Principles address a 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.¹³¹ Each Principle is accompanied by detailed recommendations to states. The experts also emphasise, though, that all actors have responsibilities to promote and protect human rights. Additional recommendations are addressed to other actors, including the unhuman rights system, national human rights institutions, the media, non-governmental organisations, and funders. The experts agree that the Yogyakarta Principles reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity. They also recognise that states may incur additional obligations as human rights law continues to evolve.

The Yogyakarta Principles affirm binding international legal standards with which all states must comply. They promise a different future where all people born free and equal in dignity and

¹²⁹ Ibid

¹³⁰ Ibid

¹³¹ Ibid

rights can fulfill that precious birthright.¹³² Although not binding in the sense of a treaty, the Yogyakarta Principles are having remarkable influence on the UN, states and non-state actors in interpreting human rights of sexual minorities. The following sections examine the impact of these principles.

4.5.1: Impact of the Yogyakarta Principles

As a pleasant surprise, the Yogyakarta Principles have had a reach and use in nearly every region of the world.¹³³ The Principles have been embraced by activists and policy makers alike for a simple reason: The Yogyakarta Principles de-mystify the large and very legalistic array of international human rights treaties, jurisprudence, and procedural actions. They distill hundreds of pages of documents reflecting decades of advocacy and scholarship into 29 basic principles that emanate from two fundamental, and interlocking, human rights concepts: 1) that human rights law must be universally applied if it is to have any integrity at all, and 2) that every person has the right to be treated with respect and to be free from social and legal discrimination because of who they are.¹³⁴ They reflect a growing mainstream understanding of how human rights law is applied to people with regard to their sexual orientation or gender identity.¹³⁵

Although it is too soon to gage the actual impact of the Principles, there is no doubt that the Yogyakarta Principles have had to date promoted domestic laws, decisions and policies that ensure the human rights of people as they relate to an individual's sexual orientation and/or

¹³² Ibid

¹³³ Paula L. Ettlbrick, Alia Trabucco Zerán, The Impact of the Yogyakarta Principles on International Human Rights Law Development. Available at http://www.ypinaction.org/files/02/57/Yogyakarta_Principles_Impact_Tracking_Report.pdf. (Accessed on 8th October, 2015)

¹³⁴ Ibid

¹³⁵ Ibid

gender identity and in developing international human rights jurisprudence within the United Nations and other human rights bodies.¹³⁶

The first specific citation of the Principles by a field office was in Nepal, in August 2007, where a senior officer delivered a statement at a ceremony ‘to inaugurate the Yogyakarta Principles translated into Nepali’.¹³⁷ He described the Principles as an ‘important document to focus international attention on the need for a more systematic approach to protection’. He went on to situate the Principles within the context of the Nepali peace process and Interim Constitution, acknowledging that the voices of metis are amongst the most marginalised in society, and concluded that ‘the Yogyakarta Principles provide an essential tool for creating awareness, for debate, advocacy and action to develop a proper protective legal framework, and to end abuses against individuals on account of their sexual orientation and gender identity in Nepal’. Similar sentiments were expressed by another senior official in South Africa in December 2007.¹³⁸

While such developments are of interest, it must be observed that they occurred in response to civil society invitations rather than on the basis of any policy-level positioning on the part of OHCHR. Other UN mechanisms to which the Yogyakarta Principles address recommendations include the treaty bodies, the UN ECOSOC and UN agencies. Initial awareness-raising work has begun, with the distribution of the Principles to all treaty-body members, a presentation of the Principles to the annual meeting of Chairpersons of Treaty Bodies, and a briefing to members of the UN HRC.¹³⁹ While this preliminary engagement may assist in advancing the recommendation in the Principles that the treaty bodies integrate the Principles into the

¹³⁶ Michael O’Flaherty and John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*. *Human Rights Law Review* 8:2(2008), 207-248.

¹³⁷ *Ibid* p 338

¹³⁸ International Dialogue on Gender, Sexuality, and HIV/AIDS, ‘Strengthening Human Rights Responses in Africa and Around the Globe’, Johannesburg, 6-10 December 2007.

¹³⁹ Michael O’Flaherty and John Fisher, *supra* note 136 above, p 160.

implementation of their mandates, including their case law and examination of State reports,¹⁶¹ the recommendation that they adopt relevant ‘General Comments or other interpretive texts’¹⁶² is likely to be a significantly longer-term objective

A number of States have expressed a willingness to draw upon the Principles as a guide to policy-making. The Dutch Minister of Foreign Affairs has developed a new human rights strategy to be debated in Parliament, which affirms that ‘the Yogyakarta Principles are seen by the government as a guideline for its policy’,¹⁴⁰ and outlines a number of specific initiatives, including capacity building for international and local NGOs working on these issues. The Canadian government has described the Principles as ‘useful blueprints’ to measure progress on human rights related to sexual orientation and gender identity around the world, and the Uruguayan government referred to the Principles as an ‘important document to assist (it)’ in overcoming discrimination based on sexual orientation and gender identity.¹⁴¹

The Brazilian government intends to publish the Principles in a Portuguese translation and to feature them at an event in 2008 to promote its ‘Brazil without homophobia’ programme.¹⁴² The Argentinean government has stated that many of the issues addressed by the Yogyakarta Principles are also the focus of a National Action Plan for non-discrimination adopted by the government in 2004. At the regional level, the European Parliament’s Intergroup on Gay and Lesbian Rights has endorsed the Principles and a recently appointed Advisor to the Council of Europe’s Human Rights Commissioner has indicated that the Yogyakarta Principles will serve as an important tool in advancing one of the Office’s core priorities, namely country and thematic

¹⁴⁰ Dutch Ministry of Foreign Affairs, ‘A life of human dignity for all, A human rights strategy for foreign policy’, 6 November 2007, at Para. 2.7 (pp. 47 and 48) (unauthorized translation).

¹⁴¹ International Service for Human Rights, Human Rights Watch and International Gay and Lesbian Human Rights Commission, p140.

¹⁴² Ibid

monitoring related to discrimination and human rights violations based on sexual orientation and gender identity.¹⁴³ Within Latin America, where issues of sexual orientation and gender identity have increasingly been discussed as part of the agenda at Mercosur meetings,¹⁴⁴ the support for the Principles expressed by founding members Brazil, Argentina and Uruguay may be expected to result in increased support from other full and associate members.¹⁴⁵

The Principles have been presented and discussed at regional conferences in Africa,¹⁴⁶ Latin America,¹⁴⁷ Eastern Europe¹⁴⁸ and Asia,¹⁴⁹ and requests for copies for distribution have been received from NGOs in a diverse range of countries around the world.¹⁵⁰ The Principles were referenced by civil society in statements addressed to the 2007 Africa-European Union summit. NGOs are also drawing upon the Principles in negotiations with governments. In Northern Ireland, for example, civil society representatives have introduced the Principles for debate at the Bill of Rights Forum of Northern Ireland, constituted to advise on elements for a Bill of

¹⁴³ Boris Dittrich, 'Yogyakarta Principles in New Dutch Human Rights Strategy', 21 November 2007 (unofficial translation); and e-mail communications with Advisor, Office of the Commissioner for Human Rights Council of Europe, January 2008, on file with authors.

¹⁴⁴ At the 9th High Level MERCOSUR meeting that was held in Montevideo in August 2007, the first regional seminar on sexual diversity, identity and gender was held with the participation of government representatives and representatives of civil society from the whole region

¹⁴⁵ LGA Conference, Johannesburg, May 2007; International Dialogue on Gender, Sexuality, HIV/AIDS and Human Rights, ARC International and Coalition of African Lesbians, Johannesburg, December 2007.

¹⁴⁶ The Czech Republic, Switzerland and the Nordic Countries Denmark, Finland, Iceland, Sweden and Norway, cited in ARC International, 'Recognizing Human Rights Violations Based on Sexual Orientation and Gender Identity at the Human Rights Council, Session 4', April 2007; and ARC International, 'Report on Launch of Yogyakarta Principles', June 2007.

¹⁴⁷ International Association for the Study of the Sexuality, Culture and Society (IASSCS) Conference, Peru, June 2007; *4 encuentro de ILGA en America Latina y el Caribe, Peru*, September 2007.

¹⁴⁸ Ibid

¹⁴⁹ LGA Asia-Regional Conference, Thailand, 24-27 January 2008.

¹⁵⁰ Requests for copies and supportive comments have been received from NGOs in countries including Andorra, Argentina, Australia, Belarus, Belize, Brazil, Cameroon, Canada, Chile, China, Denmark, Ecuador, France, Germany, Guyana, Hong Kong, India, Indonesia, Ireland, Japan, Kenya, Kyrgyzstan, Latvia, Lithuania, Mexico, Nicaragua, Nigeria, Peru, the Philippines, Romania, Russia, Senegal, South Korea, Thailand, Tonga, Uganda, United Kingdom, Uruguay, the United States of America and Zimbabwe.

Rights.¹⁵¹ In Kyrgyzstan, a group is using the Principles in meetings with the government to establish procedures for recognising the right of transgender people to official documentation that reflects their gender identity.¹⁵²

Other instances of use of the Principles include NGO actions in South Korea, Belize and the UK.¹⁵³ The first known citation in domestic law of the Principles is contained in a brief submitted to the Nepal Supreme Court by the International Commission of Jurists. The brief invokes the Principles' definition of 'gender identity'. The Principles are being used as teaching tools in university-level and other courses in China, Argentina, UK, USA, Brazil and the Philippines. Civil society has also engaged the media. For instance, a Kenyan group is reportedly using the Principles 'to involve the media in our mission through sexual health and rights policy visibility'.

4.6: CONTEMPORARY LEGISLATIVE AND JUDICIAL DECISION MAKING AND INTERNATIONAL HUMAN RIGHTS

As stated in part one of this chapter, international and regional human rights treaties and conventions have, to date, not incorporated sexual minorities in their normative frameworks. However, through application of international human rights principles of equality and non-discrimination, international and regional Courts have made an important contribution towards the protection of rights with different sexual orientation or gender identity as well as developing

¹⁵¹ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, 10 April, 1998, Strand Three (Rights, Safeguards and Equality of Opportunity) at para. 4, available at: <http://www.niassembly.gov.uk/io/agreement.htm> [last accessed 15 February 2008].

¹⁵² Immigration Law Practitioners' Association (ILPA) and the UK Lesbian and Gay Immigration Group (UKLGIG), 'Sexual and Gender Identity Guidelines for the Determination of Asylum Claims in the UK', July 2007 at para. 3.2.3.

¹⁵³ Ibid

legal arguments based in international law.¹⁵⁴ Through critical and purposive interpretation of the international human rights principles, international, regional and national adjudicating bodies have that injected life into international human rights law to afford protection to sexual minorities.

The Wolfenden Report, as discussed in chapter three of this thesis, laid basis for legislation in jurisdictions such as Britain, Australia, and South Africa among others that made were a drastic departure from the processes that characterised sexual regulation before the Report. Regarding judicial decision-making, UN treaty bodies, regional adjudication bodies as well as national judiciaries have used the normative provisions in the international and regional human rights treaties to create jurisprudence that protects the human rights of sexual minorities.

This chapter then examines the innovative and transformative approaches to legislative and judicial decision-making and how this has translated into a body of law that protects sexual minorities. The chapter examines the impact of the Wolfenden principles on legislative and judicial reforms. It then examines the transformative trends for LGBT in international and regional bodies. It also examines transformative jurisprudence in national courts as well as the emerging transformative jurisprudence in Kenya. It ends with the chapter summary.

4.6.1: The Relevance of the Wolfenden Report to legislative and judicial decision-making on sexual minorities

Finnis's theory of purposiveness in decision-making is reflected in various legislative programmes in many countries. In fact to state that the Wolfenden report injected a transformative and purposive ethos into legislative agenda in many countries is an

¹⁵⁴ Due to diverse approaches, inconsistencies and gaps in law and practice in respect of rights of LGBTIs it was felt by the High Commissioner for Human Rights that a more comprehensive articulation of these rights in International law, and this gave birth to the Yogyakarta Principles.

understatement. Soon after its release, committees were established throughout Britain to promote both the necessity for reform and the justice of the Wolfenden proposals.¹⁵⁵ The Wolfenden Report has laid basis for legislative and judicial action in most commonwealth and other jurisdictions to promote justice for sexual minorities. The report became a landmark in the struggle for toleration of homosexuality in common law countries. Its arguments, grounded in the liberal tradition that harked back to John Stuart Mill,¹⁵⁶ solidly underpinned the impetus to law reform made possible the gay liberation movement. This movement blossomed in the 1970s and later throughout the English-speaking world.¹⁵⁷

The Report, though delayed for about ten years, became the basis for fundamental legislative measures that led to reforms that recognized and protected the human rights of sexual minorities. It is notable that initially, it was a government declaration that the community was ‘not yet ready’ to accept the amendments proposed by the Committee and that such a change was “inconsistent with local moral values”, that the “churches or religious leaders are opposed”¹⁵⁸ and the “reform on this subject is not a priority.”

The Wolfenden Report is credited with initiating the modern conceptual and legislative process that novelly distinguished between public and the private spheres in its argument that the “function of the criminal law” was to uphold public order and decency and to safeguard those deserving society’s protection. But the area of private adult behaviour was no concern to the

¹⁵⁵ Michael Kirby, Commonwealth Bulletin. Lessons from Wolfenden – a Methodology for Homosexual Law Reform in the Commonwealth of Nations. Available at www.hirschfeld-edd-stiftung.de/fileadmin/images/dokumente/170. (Accessed on 6th March, 2016). P 3

¹⁵⁶ John Stuart Mill had argued in “On Liberty”, “Harvard Classics” Volume 25. (P. F. Collier & Son, 1909)

¹⁵⁷ Ibid

¹⁵⁸ This appears to be disputable as the Wolfenden Committee recommendations were supported by the Archbishop of Canterbury, Dr. Geoffrey Fisher who stated “[t] here is a sacred realm of privacy...into which the law, generally speaking, must not intrude. This is a principle of the utmost importance for the preservation of human freedom, self-respect and respectability”. In Michael Kirby, supra note 155 above.

criminal law.¹⁵⁹ Others have described the report as signifying a revolution in the way the government viewed the regulation of sex: its novel distinction between sin and crime is said to underpin the modern approach to morality and criminal law and its legislative products are typically portrayed as embodying the nascent ideals of contemporary era, that sex is “simply not the law’s business.”¹⁶⁰

The Impact of the Report was felt not just in Britain but other English-speaking countries. For instance, in 1961, the American Bar Association approved the draft of a Model Penal Code from which homosexual offences between consenting adults were omitted, and the state of Illinois broke the ice as the first American jurisdiction to adopt the new principle. In Canada, also the words of the Report were heeded, and in 1969, and in 1969 Parliament repealed the section of the Penal code that made homosexual activity a crime.¹⁶¹

In England itself, the Earl of Arran, inspired by zeal to remove what he regarded as a shameful injustice to a persecuted minority, had in 1965 persuaded the House of Lords which is not subject to the control of the electorate to initiate legislation for the same purpose. Eighteen months later, on the initiative of Leo Abse, the House of Commons followed suit, so that in the summer of 1967 the Sexual Offences act became law in England and Wales-though not in Scotland and Northern Ireland, where Protestant fundamentalism worked to stymie repeal of the laws against “immorality”.¹⁶² Committees were established throughout Britain to promote both

¹⁵⁹ Kate Gleeson, Is Wolfenden report a Liberal Document?, Paper presented at 2007 APSA Conference, Monash University, September, 24-26

¹⁶⁰ Ibid p 25

¹⁶¹ Ibid

¹⁶² Ibid

the necessity of reform and the justice of the Wolfenden proposals. Neither of these men was required that reform was required.¹⁶³

At first the age of consent was fixed at 21 years. The law did not at first apply to Scotland or Northern Ireland. Eventually however, the age of consent was lowered to coincide with the applicable to sexual conduct with a person of the opposite sex. In most Commonwealth countries, the statute book, enacted in colonial times, had introduced laws against so-called “unnatural offences” (including sodomy or buggery) and laws concerning acts of sexual indecency between men. Consent and the fact that the participants were adults acting in private did not constitute a defense in such laws.¹⁶⁴ In the early part of the 21st century several pieces of new legislation were enacted, securing the full liberalisation of British law on homosexuality. In the Adoption and Children Act 2002 Parliament provided that an application to adopt a child in England and Wales could be made by either a single person or a couple.¹⁶⁵

The previous condition that the couple be married was dropped, thus allowing a same-sex couple to apply. The Lords rejected the proposal on one occasion before it was passed. Supporters of the move in Parliament stressed that adoption was not a “gay rights” issue but one of providing as many children as possible with a stable family environment rather than seeing them kept in care. Opponents raised doubts over the stability of relationships outside marriage, and how instability would impact on the welfare of adopted children. Similar legislation was adopted in Scotland. Section 28 (called Section 2A in Scotland) was repealed in Scotland within the first two years of the existence of the Scottish Parliament, by the Ethical Standards in Public Life among others.¹⁶⁶

¹⁶³ Michael Kirby the Sodomy offence: England’s least lovely criminal law export? *Association of Commonwealth Criminal Lawyers Journal of Commonwealth Criminal Law, Inaugural Issue 2011*, p 14

¹⁶⁴ *Ibid* p 4

¹⁶⁵ *Ibid*

¹⁶⁶ Scotland Act, 2000

A move to remove a provision in England and Wales was prevented following opposition in the House of Lords, again led by the Baroness Young. Following her death in 2002 it was finally repealed in a new local Government Act, which took effect on 18th November, 2003. During the passage of the bill no attempt was made to retain the section, and an amendment seeking to preserve it using ballots was defeated in the House of Lords. This showed that a significant shift has taken place in the consideration of LGBT issues.¹⁶⁷

Following the adoption of a European Community Directive in 2000, Regulations were introduced on 1st December, 2003 providing for the prohibition of discrimination in employment on the grounds of sexual orientation. On 1st May, 2004 the Sexual Offences Act 2003 entered into force. It swept away all of the previous sex-specific legislation, including the 1967 Act, and introduced instead neutral offences. Thus the previous conditions relating to privacy were removed, and sexual acts were viewed by the law without regard to the sex of the participants.¹⁶⁸

Parliament then went on to legislate for civil partnerships for same-sex couples on 18th November, 2004 with the passage of the Civil Partnership Act. Such partnerships were civil unions, granting to the parties the same rights as a marriage. The first civil partnership ceremony took place at 11.00 (GMT) on 5th December, 2005 between Mathew Roche and Christopher Cramp at St. Barnabas Hospice, Worthing, West Sussex.¹⁶⁹ The usual 14 days waiting period was waived as Roche was suffering from a terminal illness. He died the next day. The First civil partnership ceremonies after the statutory waiting period then took place in Northern Ireland on 19th December, with ceremonies following the next day in Scotland and the day after that in England and Wales.

¹⁶⁷ Michael Kirby, *supra* note 164 above, p 14.

¹⁶⁸ *Ibid*

¹⁶⁹ *Ibid*

On 30th April, 2007 the Sexual Orientation Regulations came into force, following the introduction of similar provisions in Northern Ireland in 2006. They provided a general prohibition of discrimination in the provision of goods and services on the grounds of sexual orientation. Similar legislation has long previously been in force in respect of discrimination on the grounds of sex, race, disability and marital status. The introduction of the Regulations was controversial. A dispute arose between the Government and the Roman Catholic Church in England and Wales over exemptions for Catholic adoption agencies. There were also arguments about the amount of parliamentary scrutiny the draft Regulations received, their being considered for only 90 minutes in a Delegated Legislation Committee.¹⁷⁰

In October, 2007 the Government announced that it would seek to introduce an amendment to the Criminal Justice and Immigration Bill to create a new offence of incitement to hatred on the grounds of sexual orientation. This followed the creation of an offence on religious hatred that had proved controversial in 2006.¹⁷¹ Incitement to hatred on the grounds of sexual orientation is already illegal in Northern Ireland. Other initiatives have included: The establishment of the Commission for equality and human rights on 1st October, 2007; the Commission is tasked with working for equality in all areas and replaced the previous commissions dedicated to sex, race and disability alone.¹⁷² The setting up of the Sexual orientation and Gender Advisory Group within the Department of Health, A provision of the Criminal Justice Act 2003 that a court must treat hostility based on sexual orientation as an aggravating feature for sentence. There is also the Guidance from the crown Prosecution Service on dealing homophobic crime¹⁷³.

¹⁷⁰ Ibid

¹⁷¹ See Racial and religious Hatred Act 2006.

¹⁷² Ibid

¹⁷³ Ibid

Australia too, inherited the United Kingdom sodomy laws on colonisation in 1988. These were retained in the criminal codes passed by the various colonial parliaments during the 19th century, and by the state parliaments after Federation. Following the Wolfenden Report, the Dunstan labour Government introduced a “consenting adults in private” defense in South Australia in 1972. The defense was initiated as a bill and repealed the state’s sodomy law in 1975. The Campaign against Moral Persecution during the 1970s raised the profile of acceptance of Australia’s gay and lesbian communities, and other states and territories subsequently repealed their laws as will be seen below.¹⁷⁴

In 1972, Australia became the first Australian jurisdiction to decriminalise some homosexual acts. Further reforms in this state were achieved in 1975 and 1976. In 1976 and 1980 respectively the Australian Capital Territory and Victoria followed suit and decriminalised some aspects of homosexual behaviour. The Northern Territory became the next jurisdiction to decriminalise consensual homosexual acts between men in 1983, with New South Wales following the trend in 1984.¹⁷⁵ Western Australia became the most recent jurisdiction to implement legislative reforms in 1989.¹⁷⁶

The Legislation of Western Australia provides a curious preamble which begins by acknowledging the inappropriateness of the criminal law to intrude on people’s private lives, but ends with a condemnation of homosexual acts. The legislation in these jurisdictions differs considerably. However, it has a common feature the decriminalisation of some homosexual acts between consenting adults in private. The legislation provides a minimum age of consent at

¹⁷⁴ Ibid

¹⁷⁵ Melissa Bull, Susan Pinto and Paul Wilson, *Homosexual Law Reform in Australia: Australian Institute of Criminology, Trends & Issues in crime and criminal justice No 29*, p 1.

¹⁷⁶ Ibid

which homosexual behavior is allowed and impaired from exploitation. Also contained are provisions to protect people from acts which they have not consented.¹⁷⁷

In Queensland, the Fitzgerald Report recommended that the Criminal Justice Commission review the laws governing voluntary sexual behaviour.¹⁷⁸ As a result on 21 November, 1990 the Queensland State Caucus decided to amend the Criminal Code and the Criminal law (Sexual Offences) Act 1978-1989 to decriminalise consensual sexual activity between adult males in private. It approved the introduction of appropriate legislation, setting the age of consent at 18, while reaffirming its determination to enforce its laws prohibiting asexual interference with children and intellectually impaired persons and non-consenting adults. The introduction of legislation includes a preamble noting that there are limits to the power of the state to intervene in the private lives of its citizens and that it is not the role of the parliament to condone or condemn the subject of the legislation.¹⁷⁹ By 1980, many of the British colonies had secured their political independence from Britain. Legislative repeal of the sodomy laws took place progressively in the old Dominions such as Canada, New Zealand and several states of Australia as seen above.

However, in other jurisdictions as will be seen in the next chapter of the thesis, it was not reform by legislation but by judicial enforcement of human rights principles that commonly helped to achieve this change. An appeal to basic principles and to rational limits on the ambit of the criminal law is effectively a modern application of the concept for which John Stuart Mill had argued. Writing on “social liberty” over a hundred years previously, Mill had advocated the establishment of a system of “Constitutional checks” since:

¹⁷⁷ Ibid

¹⁷⁸ Queensland’s Criminal Code and the Criminal law (Sexual Offences) Act 1978-1989 1989.

¹⁷⁹ Ibid p 2

[s]ociety can be does executes its own mandates: and if it says wrong mandates instead of rights, or any mandates at all in all things which it ought not to meddle, it practices a social tyranny more formidable than may kinds of political oppression, since though not usually upheld by extreme penalties, it leaves fewer means of escape, penetrating more deeply into the details of life, and enslaving the soul itself.¹⁸⁰

The Netherlands, France and other countries with legal systems based on France's Napoleonic code removed "Homosexual offences" from criminal sanctions centuries earlier.¹⁸¹ Nicaragua unveiled its new penal code in November 2007, abolishing prohibition against "sodomy".¹⁸² As noted further noted by Amnesty International, there have been progressive developments enshrining provisions against discrimination on the basis of sexual orientation in the constitutions of Ecuador, Fiji, Portugal and South Africa after years of campaigning by the Blue Diamond Society and other organisations, the Supreme Court of Nepal in December 2007 issued directive orders to the Government of Nepal to end discrimination on the basis of sexual orientation and gender identity.¹⁸³

Also in December 2007, the Bolivian Constituent Assembly approved a clause that would make Bolivia the first country in the world to prohibit in its constitution discrimination on the basis of gender identity. Article 14, paragraph 11, of the draft constitution states explicitly that: "[t]he State prohibits and punishes all forms of discrimination based on sexual orientation [and] gender identity."¹⁸⁴ The most striking set of judicial or quasi-judicial decisions in modern international human rights law, as will be demonstrated in the next chapter of this thesis, have been influenced by the Wolfenden Report. Most of these cases have applied principles of privacy and equality to rule against ant-homosexual criminal laws. These cases began in the European human rights

¹⁸⁰ See John Stuart Mill, "On Liberty", note 155 above, p 10-11.

¹⁸¹ Ibid

¹⁸² Ibid

¹⁸³ Ibid

¹⁸⁴ Ibid

system with decisions in *Dudgeon vs. United Kingdom*.¹⁸⁵ *Norris vs. Ireland*,¹⁸⁶ *Modinos vs. Cyprus*,¹⁸⁷ and *Sutherland vs. United Kingdom*.¹⁸⁸ The same outcome occurred in *Toonen vs. Australia*,¹⁸⁹ a decision of the UN Human Rights Committee. In the Asia-Pacific region, such laws have been declared unconstitutional in Hong Kong, Nepal and Fiji. The majority of the judges in the European court of Human Rights relied on the Wolfenden Report.¹⁹⁰

4.6.2: Transformative trends for LGBT in International Law

In the 1982 case of *Hertzberg v. Finland*,¹⁹¹ the HR Committee considered a communication dealing with the Finnish government's censorship of a broadcasting program addressing homosexuality.¹⁹² The claimant argued that the censorship violated his rights to freedom of expression and information as expressed in the ICCPR.¹⁹³ The HR committee, however, held that the rights to freedom of expression could be subjected to restrictions to protect, for example, public health, order, or morals; because states' morals differed broadly, a margin of discretion had to be accorded to national authorities.¹⁹⁴ On this basis, the HR Committee dismissed the claim and upheld Finland's censorship of the program.¹⁹⁵ In *Young*, the HR Committee held that

¹⁸⁵ *Dudgeon v United Kingdom* (1981) 4 EHRR 149

¹⁸⁶ *Norris v Ireland*, Ireland, Supreme Court (1983) *Norris v. Attorney General* [1984] IR 36. [Case-Law]

¹⁸⁷ *Modinos v Cyprus*, 7/1992/352/426 (European Court of Human Rights 1993-04-22)

¹⁸⁸ *Sutherland v United Kingdom*, 1 July 1997, European Commission on Human Rights

¹⁸⁹ *Toonen v. Australia*. UN Human Rights Comm, Commc'n No.488/1992. UN. Doc. CCPR/C/50/D/488/1992

¹⁹⁰ Douglas A. Sanders, 177 and the Unnatural Afterlife of British colonisation in Asia, (2009). *Asian Journal of Comparative Law*, Vol 4, Iss. No. 1, Art.7, P 28.

¹⁹¹ Human Rights committee Commc'n 61/1979. *Hertzberg et al, v. Finland*, 15th Sess., U.N. Doc. CCPT/C/OP/1 (April 2, 1982).

¹⁹² *Ibid*

¹⁹³ *Ibid*

¹⁹⁴ Michael Hollander, *Gay Rights in Uganda: Seeking to overturn Uganda's Anti-Sodomy Laws*, *Virginia Journal of international Law*, Volume 50-Issue 1-Page 219. Also see Kerstin Braun, *Do Ask, Do Tell: Where is the Protection Against Sexual Discrimination in International Human Rights law?* *American University International Law Review*, Vol. 29, No. 4, (2014); Courtney Finerty, *Being Gay in Kenya: The Implication of Kenya's New Constitution for its Anti-Sodomy Laws*, *Cornell International Law Journal* Vol. 45 p 436-438 supra note 27 above; Sebastian Maguire, *The Human Rights of Sexual Minorities in Africa*. *California Western International Law Journal*, Vol. 35, No. 1 (2004).

¹⁹⁵ *Ibid*

not granting a same sex partner's veteran's pension constituted discrimination on the basis of sexual orientation and explicitly stated that sexual orientation is protected under the "other status" category in Article 26 of the ICCPR/ *X v. Columbia*, another case dealing with the denial of pension transfer on the basis of sexual orientation, affirmed this interpretation of Article 26.¹⁹⁶ The evolving jurisprudence around the matter of LGBT people and international human rights law indicates that the principles of non-discrimination have moved from the private sphere to certain issues in the public sphere. The 1999 case of *Jostlin v. New Zealand*, however, demonstrates that the interpretation of the applicability of international human rights law to LGBT people is still evolving.¹⁹⁷ In this case, the HR Committee held that the right to marriage as stated in Article 23 of the ICCPR was commonly understood as only marriages between men and women and that the refusal to provide marriages between same sex couples in Member States did not result in a violation of their human rights.¹⁹⁸

This position by the HR Committee reflected the foregoing textual and dogmatic reasoning on the part of the HR Committee was to change in the 1994 case of *Toonen v. Australia*¹⁹⁹ in which the HR Committee reversed this textual approach to interpretation to what is considered more critical and transformative approach. The HR Committee in this case considered that the reference to "sex" in article 2, paragraph 1 and 26 is to be taken as including 'sexual orientation'. The HRC thus decided that sexual orientation related discrimination is a suspect category in terms of the enjoyment of Covenant rights²⁰⁰ and more generally for equality before and equal

¹⁹⁶ Kerstin Braun, Do Ask, Do Tell: Where is the Protection Against Sexual Discrimination in International Human Rights law? *American University International Law Review*, Vol. 29, No. 4, (2014), P 881.

¹⁹⁷ H.R. Comm. Comm'cn 902/1999, *Jostlin v. New Zealand*, 75th Sess., July 8-26, 2002, U.N. Doc. CCPR/C/75/D/902/1999, at 8.2-8.3 (July 30, 2002)

¹⁹⁸ *Ibid*

¹⁹⁹ *Toonen v. Australia*. In Michael Hollander, *supra* note 187 above.

²⁰⁰ Article 2 of the ICCPR

protection of the law)²⁰¹Toonen was a citizen of Australia residing in Tasmania and was a leading member of the Tasmanian Gay Law Reform Group.²⁰²He challenged three provisions of the Tasmanian Criminal Code which criminalised various form of sexual conduct between men, including acts between consenting adults conducted in private.²⁰³Although these laws had not been enforced for a number of years prior to Toonen’s claim under the ICCPR, he argued that these laws threatened his privacy by calling into question his long term relationship with a man, his activities as an activists against these laws, and his work on HIV/AIDS in the gay community.²⁰⁴

He also noted that these laws contributed to “discrimination in employment, constant stigmatisation, vilification, threats of physical violence and the violation of basic democratic rights.”²⁰⁵Perhaps somewhat uniquely, he also claimed that the use of derogatory and including language by government officials ‘created constant stress and suspicion’ in what should otherwise be routine meetings with government authorities.²⁰⁶Finally, he claimed that the existence of the laws fueled violence, discrimination and harassment by the general population against the gay community in Tasmania.²⁰⁷

With these claims in mind, Toonen challenged the criminal provisions under ICCPR Articles 2(1), 17 and 26 stating that these domestic provisions: (1) violated his right to privacy, because police could use the acts to enter a household on suspicion;(2) distinguished the privacy of individuals based on their sexual orientations; and (3) only punished men of these actions when conducted with other men, but allowed them when they were conducted with or among

²⁰¹ Ibid

²⁰² Ibid

²⁰³ Ibid

²⁰⁴ Ibid

²⁰⁵ Article 26 of the ICCPR

²⁰⁶ Ibid

²⁰⁷ Ibid

women.²⁰⁸ In its defense, the Tasmanian government stated that Article 17 does not arbitrarily interfere with privacy.²⁰⁹ Therefore, because the laws were not arbitrarily enforced, they were not contrary to Article 17. The government further argued that, because the laws were enacted by democratic process, their enforcement could not be constructed as unlawful.²¹⁰ In addition, the government claimed that the laws were part of its plan to protect Tasmanians from the spread of HIV/AIDS and to protect morality.²¹¹

The Human Rights Committee unequivocally rejected the State's argument and found the laws to be in direct violation of Article 17 of the ICCPR.²¹² The Committee held that even though the laws had not been enforced for a decade, the policy of the State to not enforce the laws against consensual private conduct "does not amount to guarantee that no actions will be brought against homosexuals in the future."²¹³ Further, the link between the law and HIV/AIDS prevention was strongly rejected by the Committee:

[T]he criminalisation of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AID/HIV. The Government of Australia observes that statutes criminalising homosexual activity tend to impede public health programmes" by driving underground many people at the risk of infection."...Secondly..no link has been shown between the continued criminalisation of homosexual activity and the effective control of the spread of the HIV/AIDS virus.²¹⁴

Finally, the Committee rejected the argument that moral concerns are exclusively with the domestic control of nations and outside the ICCPR's jurisdiction because "this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes

²⁰⁸ Michael Hollander, *Supra* Note 194 above, P 219.

²⁰⁹ *Ibid*

²¹⁰ *Ibid*

²¹¹ *Ibid*

²¹² *Ibid*

²¹³ *Ibid*

²¹⁴ *Ibid*

interfering with privacy.”²¹⁵The Committee concluded by noting that, the reference to “sex” in Articles 2(1) and 26 encompasses sexual orientation.²¹⁶

Despite the importance of the Toonen decision affirming, for the first time, the protections under international human rights law for LGBT people, the decision had limitations on the overall application of human rights’ protections to LGBT people. The decision, focused on the violation of the right to privacy and therefore only provided limited guidance on the interpretation of the protections to LGBT peoples’ rights exercised in the public sphere, such as equality, family life, and marriage.²¹⁷ However, the HR Committee revisited and addressed these limitations to a greater extent a decade later in the 2003 case of *Young v. Australia*, in which the HR Committee held that not granting a same sex partner the deceased’s partner’s veteran’s pension constituted discrimination on the basis of sexual orientation and explicitly stated that sexual orientation is protected under the “other status” category in Article 26 of the ICCPR.

4.6.3: Transformative decision making and jurisprudence in the ECtHR

Similar, in *L. & V. v. Austria*, the ECtHR held that a state must be able to provide a sufficient justification for any difference in treatment among groups of people under Article 14 of the Convention.²¹⁸ In *L. & V.*, the petitioners were both gay males who had been sentenced to prison for having sexual encounters with adolescents between the ages of fourteen and eighteen.²¹⁹ Under the Australian Criminal Code, such actions between minors and adults were only illegal if both participants are male; there is no similar restriction for male-female or

²¹⁵ Ibid

²¹⁶ Ibid

²¹⁷ Ibid p 881

²¹⁸ Ibid

²¹⁹ *L. & V. v. Australia* 2003-I Eur.Ct.H.R. 29.

female-female-sexual encounters of this type.²²⁰ In finding that the law violated Articles 8 and 14 of the Convention, the ECHR stated that a difference in treatment is discriminatory under Article 14 if “it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.”²²¹

In a strain reminiscent of the foreign judicial opinions, the Court noted that although there are powerful voices, shaped by religious belief, culture and respect for the traditional family that condemn homosexuality as immoral the true issue is “whether the majority may use the power of the state to enforce these views on the whole society through operation of the criminal law.”²²² Following the lead of *Dudgeon*, the ECHR and other preceding foreign cases and legal bodies, the court recognised that the criminalisation of homosexual conduct by the State invites others to discriminate against homosexuals both the public and private spheres.²²³ In sweeping language the court affirmed all of the decision of the ECHR and foreign courts before it, concluding:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. In rendering its opinion, the Court explicitly cited the Wolfenden Report, as well as cases and statutes in Australia, Columbia, Ireland, Israel, New Zealand and South Africa by reference.²²⁴

The seminal case for gay rights which invoked the principles of right to privacy and discrimination in the ECHR is *Dudgeon v. United Kingdom of Great Britain and Northern*

²²⁰Hollander, *Supra* Note 194 above, P 219.

²²¹ *Ibid*

²²² *Ibid*

²²³ *Ibid*

²²⁴ *Ibid*

Ireland, decided in 1981. Dudgeon was a thirty-five years-old shipping clerk residing in Belfast, Northern Ireland, whose house was raided by police in 1976 under the Misuse of Drugs Act of 1971. Although the search of his house ostensibly to discover drugs, the police station a diary that described “homosexual activities”. Dudgeon was brought into the police station and questioned following the discovery of the diary, but he was never charged with a crime. Under the law of Northern Ireland at the time of the offence, committing or attempting to commit “buggery” was punishable by a maximum of life imprisonment and ten years imprisonment, respectively. These law had been enforced only sixty-two times in the eight year prior to Dudgeon and usually with respect to offences involving persons under the age of twenty-one in fact, the vast majority of prosecutions involved minors below the age of eighteen, although there was no official policy within the police department to only prosecute certain types of buggery cases.²²⁵

Despite this slack of enforcement against adults, Dudgeon’s application to the ECHR claimed that the very existence of these laws constituted ‘an unjustified interference with his right to respect for his private life,’ in violation of Article 8 of the Convention. He further alleged that he had faced discrimination on the grounds of sex, sexuality and residence based on Article 14. In upholding Dudgeon’s claim that the Northern Ireland law violated the Convention, the ECHR noted that, while there was an intense moral climate against homosexuality in Northern Ireland.

[i]t cannot be maintained in these circumstances that there is a ‘pressing social need’ to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by effects on the public.

The court clearly articulated the extreme effects that the mere existence of the ant-sodomy respects the law and refrains from engaging –even in private with consenting male partners- in

²²⁵ Dudgeon v. United Kingdom Series A, No.45. Before the European Court of Human rights 23 September, 1981.

prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to “criminal prosecution,” Although the law itself had not been enforced in the context of an adult relationship in many years, the court noted that it could be enforced at any time and that the police questioning of Dudgeon was directly related to the law, even if no charges were brought. In other words, the ECHR held that a reasonable claim of discrimination and interference with privacy could be sustained even for a law that a state did not directly enforce.

In the case of *Modinos vs. Cyprus*,²²⁶ the ECHR held that the mere fact that the implementation of a penal law has not led to criminal convictions, does not of itself negate the possibility that it has effects amounting to interference with private life, thus the lack of enforcement of a law is no defense to the law’s existence. The ECHR strongly echoed the language of *Dudgeon in Modinos v. Cyprus*.²²⁷ In the *Modinos* case, the petitioner was a gay male, currently in a sexual relationship with another male.²²⁸ While the petitioner was not charged with any crimes under the Cypriot anti-sodomy laws, he claimed that he suffered from “great strain, apprehension and fear of prosecution by reason of the legal provisions which criminalise certain homosexual acts.”²²⁹ Although the law had not been enforced since 1981,²³⁰ the Minister of Justice at the time stated that he did not want the law abolished.²³¹ The ECHR held that the lack of enforcement of a law is no defense to the law’s existence.²³² The court wrote:

[T]he mere fact that the implementation of a penal law has not led to criminal, does not of itself negate the possibility that it has effects amounting to interference with private life. A primary

²²⁶ *Modinos v. Cyprus* 259 Eur.Ct.H.R.(Ser.A) at 25 (1993)

²²⁷ *Ibid*

²²⁸ *Ibid*

²²⁹ Tiffany Mugo, *Problematising the diffusion of LGBTI rights in Africa: The case of Malawi* dissertation submitted in partial fulfillment of the requirement for the award of the degree of Master of Social Science. University of Cape Town, 2013, p 46.

²³⁰ *Ibid*

²³¹ *Ibid*

²³² *Ibid*

purpose of any such laws is to prevent the conduct it proscribes, by persuasion or deterrence. It also stigmatises the conduct as unlawful and undesirable.²³³

Furthermore, the Attorney General's decision not to prosecute cases under this law did not guarantee that he or his successors would not prosecute in the future.²³⁴ As in *Dudgeon*, the Court recognises that some degree of regulation of sexual conduct could be necessary in a free society; however, is also noted that "the interference resulting from regulation of sexual life, a most intimate aspect of private life requires particularly serious reasons before it can be legitimate."²³⁵ The Cypriot government was unable to show any "particularly serious reasons" to maintain the law.²³⁶ The fact that the law had not been enforced in over a decade further showed the lack of a need for such a law.²³⁷

The ECHR concluded by rejecting the assertion that such a law could remain on the books merely because Cypriot citizens may be offended or disturbed by the homosexual conduct of other.²³⁸ The Court noted that any such offense is "outweighed by the detrimental effects which the very existence of the impugned can have on the life of a person with a homosexual tendency like the applicant."²³⁹ In *Goodwin v. United Kingdom*,²⁴⁰ two transsexual women "claimed that the United Kingdom's refusal to change their legal identities and papers to match their post-operative genders constituted discrimination."²⁴¹ The court found in their favour, The European Court of Human rights (ECHR) held there had been violations of the applicants' rights to respect

²³³ Michael Hollander, supra note 194 above, P219

²³⁴ Ibid p 136

²³⁵ Ibid p 137

²³⁶ Ibid p 138

²³⁷ Ibid 139

²³⁸ Ibid p 140

²³⁹ Ibid P141

²⁴⁰ European Commission Application No. 28957/95

²⁴¹ Rights to Privacy

for their private lives and to marry, creating violations of Articles 8 and 12 of the Convention.

The Court found that:

[T]here are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment... [and] [t] here has, according, been a failure to respect her rights to private life of Article 8 of the Convention.²⁴²

In the cases of *lusting-Prean and Beckett v. United Kingdom*²⁴³ considered Great Britain's ban of homosexual from the military to have violated the privacy provisions of Article 8 of the European Convention. In *Salgueiro da Silva Mouta v Portugal* the ECtHR held that a judge's denial of child custody to a homosexual father on the grounds of his sexual orientation created a discriminatory enjoyment of privacy.²⁴⁴ In *Karner vs Austria*,²⁴⁵ the Court held that the Austrian law that denied succession of tenancy to a same sex life companion but allowed the same for a life companion of the opposite sex violated articles 8 and 14 of the convention. In *Karner v. Austria*, the ECHR ruled that an Austrian law that denied succession of tenancy to a same-sex life companion but allowed the same for life companion of the opposite sex, violated Articles 8 and 14 of the Convention.²⁴⁶ In *Karner*, the complainant's life partner contracted AIDS and had designated the complainant as his heirs were he to die.²⁴⁷ Among other things, this entitled the complainant to succeed his partner's tenancy in his apartment.²⁴⁸ The apartment's landlord believed that the tenancy succession law served only to protect life companions of the opposite sex, and brought eviction proceedings that were eventually upheld by the Austrian Supreme Court.²⁴⁹

²⁴² Ibid

²⁴³ *Lusting-Prean and Beckett v. United Kingdom*, (31417/96) [1999] ECHR 71 (27th September, 1999)

²⁴⁴ *Salgueiro da Silva Mouta v. Portugal* 1999-IX 309; (1999) 31 EHRR 1055.

²⁴⁵ *Kraner vs. Australia*, 2003-XI Rur.Ct.H.R. 199, 210-13.

²⁴⁶ Michael Hollander, supra note 194 above, P 21.

²⁴⁷ Ibid

²⁴⁸ Ibid

²⁴⁹ Ibid

Despite the fact that a life companion was neutrally defined in the Rent Act, the Austrian high court ruled that the term must be read as it²⁵⁰ was intended when the status was passed in 1974, meaning that it did not include same-sex couples.²⁵¹ In defense of the Austrian laws, the Austrian high court noted that the protection of the traditional family is a legitimate concern and a state may employ a variety of means to protect it.²⁵² As the ECHR pointed out, however, under the proportionality principle of international law requiring that a restriction be proportional to the harm it is designed to deter an action not merely be suited to achieving the desired aim, '[i]t must also be shown that [the law] was necessary...in order to achieve that aim.'²⁵³

4.7: Transformative decision making and jurisprudence under the African Charter On Human and Peoples' Rights

As stated in the preceding chapter, just like the international human rights treaties, the ACHPR does not expressly provide for protection of sexual minorities. However, its normative provisions touching on international human rights principles have been critically interpreted by the African Commission on Human Rights to include sexual minorities. Economic, social and cultural rights. In the case of *Union Interafricaine des Droits de l'homme & Others v. Angola* which concerned economic, social and cultural rights, the African Commission found that the right to equality protection of the law shall be discriminatory either of itself or in its effect. Hence, this right would be violated when for example a public authority in the performance of the functions of a public office discriminates against a person. The same could be said of law that treats people in a discriminatory manner in respect of, for example, access to shops, hotels, lodging-houses, public restaurants, eating houses, beer halls or places of public entertainment or in respect of access to

²⁵⁰ Ibid p 220

²⁵¹ Ibid p 118

²⁵² Ibid p 119

²⁵³ Ibid p 120

places of public resort maintained wholly or partly out of funds or dedicated to the use of the general public.²⁵⁴

Further, The Commission had the opportunity to address communication alleging violation of Article 6 of the charter. In *Henry Kalenga v. Zambia*,²⁵⁵ which considered a matter of the principles of equality before the law and equal protection of the law, the commission proceeded to declare the matter amicably resolved without consulting the victim. By doing so, the commission missed an opportunity to create jurisprudence under this very important article.²⁵⁶

The complainant who was detained without trial petitioned the commission for his release. Zambia's Ministry of Legal Affairs later informed the commission of his release, after being in detention for three years. Article 9 guarantees the right to freedom of expression. The importance of freedom of expression is demonstrated in many cases considered by the African commission involving article 9. The Commission observed in *Media Right Agenda, Constitutional rights Project v. Nigeria* that freedom of expression is a basic right, vital to an individual's personal development, his political consciousness and participation in the conduct of public affairs in his country.²⁵⁷

The commission had opportunity to interpret this Article in the case of *Free Legal assistance Group Lawyer's Committee for Human Right, Union Interfricaine des Droits de l'Homme, Les Temoins de Jehovah v. Zaire* in which the complainants alleged that the former Zaire government had failed to provide them with basic services. The Commission found that the failure of the government to provide basic services such as safe drinking water and electricity constituted a violation of the right of health. It also held that the shortage of medicines was a

²⁵⁴ Communication 49/91, *Union Internationale des Droits de l'Homme v. Rwanda*, Tenth Activity Report of the African Commission on Human and People's rights (Annex X).

²⁵⁵ *Ibid*

²⁵⁶ *Ibid*

²⁵⁷ *Ibid*

breach of the duty to protect the health of the people under Article 16 of the Charter.²⁵⁸ Article 17 of the Charter guarantees the right to education. This right entails a number of components such as the right to primary education the right to secondary education, the right to higher education, the right to fundamental education, the rights to choice of schools and the Principle of free; primary education .

The Commission emphasised on the importance of the right to education in free Legal assistance group, Lawyers' Committee for Human Rights, Union interfricaine des Droits de l'Homme, *Les Temoins de Jehovah v. Zaire*,²⁵⁹ when it stated that the closure of universities and secondary schools as alleged in the communication constituted a violation of Article 17 of the charter.²⁶⁰ Ssyenyonjo has very correctly observed that it is observed that the Commission's jurisprudence before 2001 as reflected in its decisions, despite finding violations of ESC rights, generally tends to be very fact specific. The Commission thereby failed to develop the normative content of ESC rights under the African Charter. This was due to the failure of the African Commission to give due attention to the interpretation of the relevant provisions protecting ESC rights.²⁶¹

In several communications the Commission has found a violation of the right to property under Article 14 without indicating the scope of this right. For example, in *John K. Modise vs. Bostwana* the complainant had been deported four times from Bostwana. He claimed a violation of the right to property under Article 14 alleging to have suffered heavy financial loses, since the government of Bostwana confiscated his belongings and property.²⁶² The Government of

²⁵⁸ Communications 25/89,47/90.56/91.100/93.Free:ea; Asistance Group Lawyers' Committee for Human Rights, *Union Interfricaine des Droits De l'Humme, Les Temoins de Jehovah v. Zaire*.

²⁵⁹ *Ibid*

²⁶⁰ See Evelyn Ankumah, (1996). African Commission on Human and Peoples' Rights: Practice and Procedures, (The Hague: Martinus Nijhoff Publishers, 1996).

²⁶¹ Manisuli Ssenyonjo, *Analysing the Economic, Social and cultural Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter, Netherlands Quarterly of Human Rights, Vol.2.*

²⁶² See African Human rights commission, Communication No. 97/93 (2000), 14th Activity Report.

Bostwana did not refute this allegation. In these circumstances, the Commission found ‘the above action of the government of Bostwana an encroachment of the Complainant’s right to property guaranteed under Article 14 of the Charter’.³³ There was no attempt to clarify the normative content of the right to property.

With respect to health and education, in *free Legal assistance group, lawyers’ committee for human rights, union interfricaine des Droits de l’Homme, Les Témoins de Jehovah vs Zaire* it was alleged, inter alia, that the mismanagement of public finances the failure of the Government to provide basic services the shortages of medicines and the closure of universities and secondary schools for two years was a violation of the African Charter.²⁶³ The Commission simply stated as follows:

Article 16 of the African charter states that every individual shall have the right to enjoy the best attainable state of physical and mental health and that states parties should take the necessary measures to protect the health of their people. The failure of the government to *provide* basic services such as safe drinking water and electricity and the shortage of medicine as alleged in communication 100/93 constitute a violation of Article 16 (emphasis added).

In *Malawi African Association and Others vs. Mauritania* the African Commission has another opportunity to clarify the scope of prisoners’ right to health but did not do so. In this case, the government detained members of black ethnic groups in Mauritania after the government was criticised by members of the black ethnic groups for marginalising black Mauritians.²⁶⁴ Prisoners were detained in the worst conditions. They only received a small amount of rice per day, without any meat or salt. Some of them had to eat leaves and grass. The prisoners were forced to carry out Labour Day night and they were chained up in pairs in windowless cells. They only received one set of clothes and lived in very bad conditions of hygiene. They were

²⁶³ David Weissbrodt, (2011) ‘United Nations Charter-based procedures for addressing human rights violations’ in Gilbert G.Hampson,F and Sandoval C(eds)*The Delivery of Human Rights: Essays in Honour of Professor SirHigel Rodley*,Oxon:Routledge,13-38, p23.

²⁶⁴ Morris Mbodenyi, supra note 93 above, p 288.

regularly beaten by their guards and kept in overcrowded cells. They slept on the floor without any blankets, even during the cold season.²⁶⁵ The cells were infested with lice, bedbugs and cockroaches and nothing was done to ensure hygiene and provision of health care. As a result some had died in detention. In finding a violation of Article 16 on the basis of the facts above, the Commission stated:

The state's responsibility in the event of detention is even more evident to the extent that detention centers are of its exclusive preserve, hence the physical integrity and welfare of detainees is the responsibility of the competent public authorities. Some prisoners died as a result of the lack of medical attention. The general state of health of the prisoners due to the lack of sufficient food; they had neither blankets nor adequate hygiene. The Mauritanian State is directly responsible for this state of affairs and the government has not denied this facts. Consequently, the Commission considers that there was violation of article 16.²⁶⁶

In *The Social and Economic Rights Action Center and the Center for Economic and Social Rights vs. Nigeria* (SERAC case) the complaints alleged that the Nigeria government violated the right to health and the right to clean environment as recognised under Articles 16 and 24 of the African Charter by failing to fulfill the minimum duties required by these rights. This complainants alleged the government did by: (i) directly participating in the contamination of air, water and soil and thereby harming the health of the Ogoni population;(ii) failing to protect the Ogoni population from the harm caused by the Nigerian national Petroleum Company (NNPC) in a consortium with Shell Petroleum development Corporation (SPDC) but instead using its security forces to facilitate the damage; and (iii) failing to provide or permit studies of potential or actual environmental and health risks caused by oil operations.²⁶⁷ Providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting

²⁶⁵ Ibid

²⁶⁶ Tiffany Mugo, *supra* note 229 above, p 46.

²⁶⁷ Morris Mbodenyi, *supra* note 93 above, p 288.

their communities. Applying the above standards to the facts of the case, the Commission concluded that although Nigeria had the right to produce oil, it had not protected the rights of the Ogoni under Article 16 and 24. Thus, the commission read the rights to health and to clean environment together.

In a decision adopted in 2009, the Centre on Housing Rights and Evictions vs. The Sudan (COHRE case)²⁶⁸ the Commission further elaborated on the scope of the right to health under Article 16 by relying on the interpretation of the right to health in international law. In this communication, the complainants alleged gross, massive and systematic violations of human rights by the Republic of Sudan (involving destruction of homes, livestock and farms as well as the poisoning of water sources) against the indigenous Black African tribes in the Darfur region of western Sudan, in particular, member of the *Fur*, *Marsalit* and *Zaghawa* tribes. It was claimed that the Republic of Sudan was complicit in looting and destroying foodstuffs, crops and livestock as well as poisoning wells and denying access to water sources in the Darfur regions in violation of Article 16. The Commission gave the right to health meaningful content by relying on the normative definition of the right to health as spelt out by the UN Committee on Economic, Social and Cultural Rights in General Comment No.14 on the ‘The right to the highest attainable standard of health’.

4.8: Transformative decision making and jurisprudence in some national Courts

The philosophy of Wolfenden Report has been felt in court decisions in a number of countries. For instance, in 1985, the gay rights movement took a major stride forward when, for the first time, a justice of the Supreme Court indicated that gay individuals may qualify for suspect status.

²⁶⁸ Tiffany Mugo, Supra Note 229 above, p 13.

Dissenting from the denial of certiorari in *Rowland v Mad River Local School District*,²⁶⁹ which concerned a school district's decision to dismiss a bisexual teacher solely on the basis of her disclosure of her sexual orientation, Justice William Brennan wrote:

First, homosexuals constitute a significant and insular minority of this country's population. Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is "likely . . . to reflect deep-seated prejudice rather than . . . rationality." State action taken against members of such groups based simply on their status as members of the group traditionally has been subjected to strict, or at least heightened, scrutiny by this Court.²⁷⁰ Justice Brennan concluded by stating that the rights of gay, lesbian, and bisexual Americans were "an issue that cannot any longer be ignored."²⁷¹ At that time, there was no question that the prevailing attitude toward gays and lesbians remained "one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment."

Justice Brennan concluded by stating that the rights of gay, lesbian, and bisexual Americans were "an issue that cannot any longer be ignored."²⁷² At that time, there was no question that the prevailing attitude toward gays and lesbians remained "one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment."²⁷³ The following section examines the normative and institutional mechanisms and sexual minorities in international and African regional human rights law.

One of the recent and very significant decisions in the history of sexual minorities is the United States Supreme Court decision in the case of *Lawrence v. Texas*, in 2003. According to Randy E. Barnett, *Lawrence* is a constitutional revolution, with implications reaching far beyond the

²⁶⁹ 470 US 1009 (1985) (denying certiorari)

²⁷⁰ *Ibid* at 1014 (Brennan dissenting from denial of certiorari) (emphasis added)

²⁷¹ *Ibid* at 1018

²⁷² *Ibid*

²⁷³ Richard A. Posner. *Sex and Reason*, (Harvard University Press, 1992).

“personal liberty” at issue in the case.²⁷⁴ The case echoes the Warren Court ethos in which Chief Justice Warren led his court down a socially progressive road that would change the nature of National High Court decision making forever.²⁷⁵ The United States Supreme court (USSC) had suffered a legitimacy crisis with a string of bad racial discrimination cases reflected in the infamous *Dred Scott vs. Sandford*²⁷⁶ and continuing with *Plessy vs. Ferguson*.²⁷⁷ *Dred Scott* was a slave in St. Louis in the early 1800’s who filed suit against his owner, Irene Emerson, for his freedom. A slave who could neither read nor write, Scott petitioned the Court for his freedom with financial help from his original owners, the Blow family, and after eleven years of complex litigation, the Supreme Court of the US finally passed down a decision on March, 6th, 1857.²⁷⁸ The Court’s majority opinion, authored by Chief Justice Roger B. Taney, not only denied Scott’s freedom but went a step further and claimed that as a slave and a personal property, Scott was not an American citizen therefore he did not possess the right to file suit in federal court.²⁷⁹ *Plessy vs. Ferguson* developed the “separate but equal” doctrine.

The case is a clear departure from the American Supreme Court’s philosophy prior to the *Lochner* era,²⁸⁰ when Supreme Court of the United States applied the rationality requirements of

²⁷⁴ Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence vs. Texas*. CATO Supreme Court Review. Available at <http://cholarhsip.law.georgetown.edu/facpub>. P 21 (Accessed on 4th March, 2016).

²⁷⁵ Bonnie Androkovich-Farries, *Judicial Disagreement on the Supreme Court of Canada*. Thesis for MA Degree, University of Lethbridge, Alberta, Canada, p 11.

²⁷⁶ *Dred Scott vs. Sandofrd* 60 U.S. (19 How.) 393 (1857).

²⁷⁷ *Plessy vs. Ferguson* 1163 U.S. 537, 552 (1896).

²⁷⁸ Bonnie Androkovich-Farries, *supra* note 272 above, p 11.

²⁷⁹ *Ibid*

²⁸⁰ In the most groundbreaking of these cases, *Lochner v. New York* (1905), the Court ruled that a state law setting a daily ten-hour limit on the working hours of bakers was an unreasonable interference with the freedom of workers and employers to enter into contracts.

both the Equal Protection and Due Process Clauses in a manner that has been so lenient as to render them virtually meaningless.²⁸¹ The Court[s] position then was that:

"State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws results in some inequality," the Court said in 1961, in a fairly typical formulation. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."²⁸²

The Lawrence case is steeped in the jurisprudence of "strict scrutiny" for certain claims which it thought warranted this standard of scrutiny that followed the lenient approach period. Two kinds of claims warranted "strict scrutiny": claims that legislation infringed on a "fundamental right," such as the right to vote, the right to interstate travel, or the right to appeal in a criminal case; and claims that legislation had created a "suspect classification." A classification was "suspect" if it was based on a group's race, ethnicity, or religion—essentially the "discrete and insular minorities" of the *Carolene Products* footnote. In 1938, a footnote in an otherwise unremarkable case called *United States v. Carolene Products Co.* laid the groundwork for much of the Supreme Court's later elaboration of the Equal Protection Clause.²⁸³ Justice Harlan Fiske Stone, writing for the Court, observed that a more searching equal protection review might be appropriate when

legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments." Similarly, the Court might want to take a harder look at "statutes directed at particular religious . . . or national . . . or racial minorities."²⁸⁴

Discrimination premised on these characteristics, the Court said, was so unlikely to be related to a legitimate state objective that it was in effect presumed to be the product of prejudice and hostility. The theory behind this approach was that the Court might need to step in when the

²⁸¹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

²⁸² *Ibid*

²⁸³ *United States v. Carolene Products Co.* 304 U.S. 144, 58 S. Ct. 778, 82L. Ed. 1234 (1938).

²⁸⁴ *Ibid*

ordinary political process was not adequate to ensure justice-either because the legislation interfered with rights that were central to that process, or because it discriminated against "discrete and insular minorities" who were likely to be victims of prejudice and lacked sufficient power to protect their rights in the political arena.²⁸⁵

The case *arose* in the context of two men who suffered an invasion of their privacy due to anti-sodomy laws.²⁸⁶ The petitioners were adult males engaged in homosexual sex when the police broke into their apartment place them under arrest and charged them with sodomy.²⁸⁷ Under Texas law at the times, sodomy was a class C misdemeanor- a minor crime punishable by a maximum fine of \$500, but with no possibility of incarceration. Although the petitioners were fined a mere \$200, they decided to challenge the law.²⁸⁸ Justice Anthony Kennedy wrote the majority opinion which Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer joined. The Court held that homosexuals had a protected liberty interest to engage in private, sexual activity; that homosexuals' moral and sexual choices were entitled to constitutional protection; and that moral disapproval did not provide a legitimate justification for Texas's law criminalising sodomy.²⁸⁹ Kennedy wrote:

The petitioners [Lawrence and Garner] are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.²⁹⁰

Justice Kennedy reviewed the assumption the court made in *Bowers*, using the words of Chief Justice Burger's concurring opinion in that case, that "Condemnation of [homosexual practices] is firmly rooted in Judeo-Christian moral and ethical standards." He reviewed the history of

²⁸⁵ Ibid

²⁸⁶ Tiffany Mugo, supra note 229 above, p 45.

²⁸⁷ Ibid

²⁸⁸ Ibid

²⁸⁹ Lawrence v. Texas, supra note 281 above p 571.

²⁹⁰ Ibid

legislation that criminalised certain sexual practices, but without regard for the gender of those involved. He cited the Model Penal Code's recommendations since 1955, the Wolfenden Report of 1963, and a 1981 decision of the European Court of Human rights.²⁹¹

The interpretation of the Due process principle sets this case apart, from the preceding constitutional jurisprudence of the American Supreme Court, signaling purposive and discerning reasoning in a case involving sexual minorities. Overturning its decision in *Bowers v. Hardwick*²⁹² from just seventeen years earlier, the Supreme Court ruled that the Texas statute did not comport with the Due Process Clause of the Fourteenth Amendment to the U.S Constitution.²⁹³ He endorsed the views Justice Stevens had outlined in his dissent in *Bowers* and wrote: "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled." The majority decision also held that the intimate, adult consensual conduct at issue here was part of the liberty protected by the substantive component of the Fourteenth Amendment's due process protections. Kennedy said that the Constitution protects "personal decisions relating to marriage, procreation, contraception, family relationships, [and] child rearing" and that homosexuals "may seek autonomy for these purposes."²⁹⁴ Holding that "the Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual", the court struck down the anti-sodomy law as unconstitutional. Kennedy underscored the decision's focus on consensual adult sexual conduct in a private setting:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not

²⁹¹ *Ibid*

²⁹² *Bowers vs. Harwick*, 478 U.S 186 (1986).

²⁹³ *Ibid*

²⁹⁴ Michael Hollander, *supra* note 194 above, p 22.

involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.²⁹⁵

As argued by Hollander, the Court echoed many of the philosophical points previously raised by many international and foreign court decisions.²⁹⁶ Eric Tennen notes that the decision in the Lawrence case illustrates the innovativeness that the Supreme Court of the United States has exercised in order to protect insular minorities. Tennen rightly observes that Lawrence was the first substantive due process case that did not rely on the existence of any specific fundamental right but, rather, categorised the conduct at issue - homosexual sodomy - as falling under the general umbrella of protected sexual intimacy.²⁹⁷ Had there been a fundamental right at stake, the government could not have infringed on that right “unless the infringement is narrowly tailored to serve a compelling state interest.” On the other hand, because the right at issue was not fundamental, the government needed only show “a reasonable relation to a legitimate state interest to justify the [regulation].²⁹⁸

According to Randy Barnett, Lawrence is a constitutional revolution, with implications reaching far beyond the “personal liberty” at issue in the case.²⁹⁹ In his view, the Lawrence majority did not protect a “right of privacy.” Instead, quite simply, they protected “liberty.” Breaking free at last of the post-New Deal constitutional tension between the “presumption of constitutionality,” on one hand, and “fundamental rights,” on the other.³⁰⁰ Justice Anthony Kennedy and the four justices who joined his opinion did not begin by

²⁹⁵ Ibid

²⁹⁶ Ibid

²⁹⁷ Eric Tennen, Is the Constitution in harm’s way? Substantive Due Process and Criminal Law, (2008) .*Berkeley criminal Law, Vol. 8 Issue No. 1* p 2

²⁹⁸ Ibid

²⁹⁹ Randy E. Barnett, Justice Kennedy’s Libertarian Revolution: Lawrence vs. Texas. CATO Supreme Court Review. Available at <http://scholarship.law.georgetown.edu/facpub>. P 21 (Accessed on 4th March, 2016).

³⁰⁰ Ibid

assuming the statute was constitutional. But neither did they call the liberty at issue “fundamental,” which the modern Court would have been expected to do before withholding the presumption of constitutionality from the statute. Instead, the Court took the much simpler tack of requiring the state to justify its statute, whatever the status of the right at issue.³⁰¹ It is also clear that the majority decision took into account the contemporary circumstances of fundamental freedoms. In Kennedy’s view, progress in a gay rights context means acknowledging the contemporary cultural compact that gay people exist as a class and as such must benefit from the expansion of civil freedoms over time.

Another transformative decision is the case of *Romer v. Evans*,³⁰² the gay rights movement in the US made another crack at the Supreme Court, challenging the sodomy laws in Arkansas. In this case, various Colorado municipalities passed ordinances banning discrimination based on sexual orientation in housing, employment, education, public accommodations, health and welfare services, and other transactions and activities. Colorado voters adopted by statewide referendum “Amendment 2” to the State Constitution, which precludes all legislative, executive, or judicial action to any level of state or local government designed to protect the status of persons based on their “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.”³⁰³ In a 6-3 decision by Justice Anthony Kennedy, the Court concluded that the amendment violates the equal protection clause because it imposes a disability on homosexuals without a legitimate state interest. The Court reasoned that the purpose of the amendment “seems

³⁰¹ Ibid

³⁰² *Romer v. Evans*: 517 U.S. 620 (1996).

³⁰³ Ibid

inexplicable by anything but animus toward the class it affects”, thus lacking a rational relationship to legitimate state interests.³⁰⁴

Romer v. Evans marked the first major substantive gay rights victory in a Supreme Court. In this case, the court voted 6-3 to declare unconstitutional an anti-gay amendment to the Colorado constitution that had been approved in a referendum of Colorado voters. Known as amendment 2, it provided that neither the state nor any of its subdivisions could recognise a discrimination claim based on person’s homosexual or bisexual orientation or conduct. Writing for the Court, Justice Anthony Kennedy found that Amendment 2 violated the Equal Protection Clause in a fundamental way, making lesbians and gay men unequal to the other citizens of Colorado for no reason other than “*animus*” against them.

In *United States v. Windsor*, the Court considered whether the Defense of Marriage Act (DOMA) violated the Equal Protection Clause by denying to legally married same-sex couples federal benefits that attach to marriage.³⁰⁵ On June 26th 2013, the Supreme Court of the United States of America issued its opinion in a 5-4 decision authored by Justice Anthony Kennedy, in which it held that section 3 of the (DOMA) is unconstitutional.³⁰⁶ The Supreme Court, among other things, defined the nature of rights and the role of the state in regulation of marriage. The Supreme Court struck down Section 3 of the federal Defense of Marriage Act (“DOMA”), which defined marriage as exclusively between a man and a woman for purposes of federal law.³⁰⁷ A close reading of Justice Kennedy’s opinion indicates that DOMA’s intrusion on state prerogatives affected the equal protection. The Court rejected Congress’ primary interest – to

³⁰⁴ Ibid

³⁰⁵ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

³⁰⁶ Ibid

³⁰⁷ Ernest Young, *United States v. Windsor and the Role of the State law in defining Rights claims. Virginia Law Review, Vol. 99 No. 1 (2013)*, p 40.

preserve the traditional definition of marriage – as an interest that the national government simply does not have. According to Young, what is important about this decision is that it clarifies the concept of nature of rights. While it is true that we sometimes think of rights as universal, existing apart from particular societies and their institutions, this is hardly the case or even the most plausible view. The classical conservative position, for example, sees rights as inevitably tied to the institutional context and traditions of a particular society.³⁰⁸ The Court said that under the American constitutional scheme, the contours of marriage are questions for the states in the first instance, and that Congress needs a particularly good reason to interfere with a state’s resolution of such questions. The right of “recognition” in Windsor was not some untethered judicial creation, but rather an entitlement to federal recognition of state law rights created in the democratic exercise of the state’s reserved powers. That right is utterly familiar and fundamental.³⁰⁹

Perhaps in one of the most revolutionary decisions that has completely whitewashed the traditional concept of marriage as a union between one man and one woman, the Supreme Court of the United States of America is the recent case of Obergefell v Hodges³¹⁰ These cases came from Michigan, Kentucky, Ohio and Tennessee, States that define marriage as a union between one man and one women. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. They claimed that the respondents, who are state officials responsible for enforcing the laws in question, violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another state, given full recognition. Under the Due Process Clause of the Fourteenth Amendment, no State shall “deprive any person

³⁰⁸ Ibid

³⁰⁹ Ibid p 47

³¹⁰ Obergefell v. Hodges, Director , Ohio Department of Health et al, 576 U.S (2015)

of life, liberty, or property, without due process of law.”³¹¹The Fundamental liberties protected by this clause include most of the rights enumerated in the Bill of Rights.³¹²In addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.³¹³The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution.³¹⁴

The Court pronounced itself on four major principles. First, that the fundamental liberties protected by the Fourteenth Amendment’s due process Clause extend to certain personal choices’ central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs.³¹⁵ The court noted that Courts must exercise reasoned judgement in identifying interests of the person so fundamental that the state must accord them its respect. History and tradition guide and discipline the inquiry but do not set its boundaries. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.³¹⁶

A second principle in this court’s jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. Same sex couples have the same rights as opposite sex couples to enjoy intimate association, a right extending beyond mere freedom from laws making same-sex intimacy a criminal offence. A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childbearing, procreation and education. Without recognition, stability, and predictability marriage offers, children suffer the stigma of knowing

³¹¹ See the Due Process Clause of the Fourteenth Amendment of the U.S Constitution.

³¹² See *Duncan v. Louisiana*, 391 U.S. 145, 147-149 (1968)

³¹³ See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)

³¹⁴ See *Obergefell et al v. Hodges*, supra note 310 above.

³¹⁵ *Ibid* p 12-23

³¹⁶ *Ibid*

their families are somewhat lesser. They also suffer significant material cost of being raised in unmarried parents, relegated to a more difficult and uncertain family life. The laws at issue thus harm and humiliate children of same-sex couples.³¹⁷

Fourthly, because marriage is essential to our “social order”, marriage enhancing laws, like marriage equality, are in the state’s interest.³¹⁸ States have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order. There is no difference between same-sex and opposite-sex couples in respect of this principle.³¹⁹ The decision revealed the purposive approach to Constitutional interpretation and the recognition that the Constitution is a living document. Justice Kennedy stated:

The nature of injustice is that we may not always see it in our own times...The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.³²⁰

In Canada, Wolfenden allowed Canadian state formation to be moved away from the extending criminalisation of homosexual acts approach and aligned it more clearly with the legal developments in England and Wales. Pierre Trudeau, then Justice minister and soon-to-be Prime minister, stated in response to the Klippert decision both supporting sexual law reform proposals and borrowing from the Wolfenden approach that ‘there is no place for the state in the bedrooms of the nation’.³²¹ Everett George Klippert was sentenced as a dangerous sexual offender to indefinite detention for a series of consensual same-sex sex acts. He and his lawyers appealed this all the way to the Supreme Court of Canada. The Supreme Court majority, in a liberalist

³¹⁷ Ibid P 15

³¹⁸ Ibid P 16

³¹⁹ Ibid

³²⁰ Justice Kennedy in *Obergefell v. Hodges* supra note 310 above.

³²¹ Gray Kinsman, *Wolfenden in Canada: within and beyond official discourse in law reform struggles*. In *Human rights, Sexual Orientation and Gender Identity*. Available at sa-space-sas-ac.uk/48224/16/06Kinsman_WolfendeninCanada.pdf. (Accessed on 17th March, 2016) p186

reading of the dangerous sexual offender section, decided that since Klippert was likely to engage in further homosexual acts, he was a “dangerous sexual offender”. The Subsequent Supreme Court decision in the case of *Vriend v. Alberta*³²² witnessed a transformative departure from the Klippert case.³²³ *Vriend v. Alberta* demonstrates the progressive positions that Canada has adopted in recent times. The Canadian Supreme Court took perhaps the largest step towards recognising LGBT rights as a human right on par with other anti-discrimination rights based on race, gender, religion or age. Canada removed its anti-sodomy laws in 1969, relatively early compared to the rest of the developed world. However, despite its early decriminalisation of sodomy, the Canadian Parliament failed to include sexual orientation as an impermissible basis for discrimination its individual Rights Protection Act of 1973 (IRPA). Although the Act was amended on numerous occasions over the next several decades, the legislation never included sexual orientation as an impermissible category of discrimination. Under the IRPA at the time, impermissible grounds for discrimination include: race, religious, beliefs, colour, gender, physical disability, mental disability, age, ancestry and place of origin.

Delwin Vriend was brought by a lab coordinator who was dismissed from his position at King’s College, a private college in Alberta because of his sexual orientation. Vriend attempted to bring a complaint under IRPA, but the Alberta Human Rights Commission ruled that this was not possible because sexual orientation was not protected ground that could give rise to complaint. In response, Vriend brought suit for declaratory relief, alleging that IRPA violated Section 15 of the Canadian Charter of Rights and Freedoms (Canadian Charter) for not including sexual orientation 168 section 15 (1) of the Canadian Charter states:

³²² *Vriend vs. Alberta*, (1997), 31 C.H.R.R. D/1 (S.C.C.)

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.³²⁴

The Court concluded that the individual Rights Protection Act (IRPA) by reason of the omission of sexual orientation as a protected ground, clearly violated section 5 of the Canadian Charter of Rights and Freedoms.³²⁵ The court further stated that the (IRPA) in its under-inclusive state created a distinction which resulted in the denial of equal benefit and protection of the law on the basis of sexual orientation, a personal characteristic which had been found to be analogous to the grounds enumerated in section 15.³²⁶ Furthermore, the court stated that such denial of equal benefit and protection was sufficient to conclude that discrimination was present and therefore was a violation of section 15.³²⁷ Similarly in the case of *Egan v. Canada*, a case on legal recognition of the same-sex couples, the court ruled that the exclusion of same-sex couples from eligibility for spousal allowance under the old security Act amounted to a violation of section 15 of the Canadian Charter of Rights and Freedoms because the denial of the benefit was rooted in an irrelevant distinction based upon sexual orientation which was an analogous ground of discrimination. Further, the impugned legislation was not justified under section 1 of the Charter.³²⁸

In Africa, South Africa has gone a long way to affirming the human rights of sexual minorities using the international human rights principles. In the cited case of *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, Constitutional Court of South Africa held that the sodomy laws reinforced existing social prejudices and had a severe impact, “affecting the

³²⁴ Ibid p 169

³²⁵ Tomothy Macklem, 'Vriend vs. Alberta: Making the Private Public Available' atlawjournal.mcgill.ca/documents/44.1.Macklem (visited on 30th May, 2012)

³²⁶ Ibid

³²⁷ Equality Provision of the Individual Rights Protection Act (IRPA) of Canada.

³²⁸ Ibid

dignity, personhood and identity of gay men at a deep level”.³²⁹ Furthermore, the laws had “no purpose than to criminalise conduct which fails to conform to the moral or religious views of a section of society. Therefore the discrimination was unfair. The main argument was that sodomy laws were inconsistent with the right to equality. The Court also considered the right to dignity, protected by Sec 10 of the Constitution of South Africa which is the equivalent of article 28 of the Constitution of Kenya. The constitutional protection of dignity required the court “to acknowledge the value and worth of all individuals as members of our society”.³³⁰

The Court held the view that sodomy laws punished “a form of sexual conduct which is identified by our broader society with homosexual and its symbolic effect is to state that in the eyes of our legal system all gay men are criminals.”³³¹ But the harm was not just symbolic. Gay men were at risk of arrest, prosecution and conviction for engaging in “sexual conduct which is part of their experience of being human”. The court found that punishing sexual expression “denigrates and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution. The Court found that statutory provision and common law offences prohibiting sodomy were incompatible with section 8 (right to equality) and section 9 (prohibiting of discrimination, including on grounds of sexual orientation) of the South African Constitution.³³² In that decision, Ackermann J. said:

³²⁹ International Commission of Jurists: Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook. *Publisher*, International Commission of Jurists (*ICJ*), P 16.

³³⁰ *Ibid*

³³¹ *Ibid*

³³² See National coalition for gay and Lesbian Equality and Another v. Minister of Justice and others 1999(1) SA 6 (CC);1998 (12) BCLR 1517 (CC)

The way in which we give expression to our sexuality is the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.³³³

Whilst acknowledging that the view that sexual expression should be limited to marriage between women and men with procreation as its dominant role could be held for “nuanced religious reasons,” the court found that no justification could be found to limit the right to homosexual activity.³³⁴ Sachs J. rendering a concurring opinion in the same judgment emphasised the importance of equality under the South African Constitution:

The present case shows that equality should not be confused with uniformity; in fact uniformity can be the enemy of equality. Equality means equal concern and respect across difference... Equality therefore does not imply a leaving or homogenization of behaviour but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be basis for exclusion, marginalisation, stigma and punishment.³³⁵

Turning to immigration, the Constitutional Court of South Africa has ruled that the principle of equality enshrined in that country’s post-apartheid constitution mandates that the government recognise committed same-sex partners for purposes of immigration rights in South Africa.³³⁶

The South African Court noted that many other countries had extended recognition to same-sex partners in various contexts, citing cases from Canada, Israel, the United Kingdom, and New York’s *Braschi* decision. Justice Ackerman’s opinion took particular note of how Canadian courts tied together the concepts of equality and human dignity when dealing with anti-gay

³³³ Ibid, para 32. The equality provision in South Africa’s Constitution includes a clear prohibition on discrimination based on orientation, making South Africa the first country in the world which explicitly protects gay men and lesbians in its justifiable Bill of Rights.

³³⁴ Donnelley Non-Discrimination and Sexual Orientation: Making a Place for Sexual Minorities in the Global Human Rights Regime. In Peter Baehr, Cees Flinterman, and Mignon Senders (eds.), *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights*. Amsterdam: Royal Netherlands Academy of Arts and Sciences, 1999, pp. 93-110, p 411.

³³⁵ Ibid

³³⁶ Arthurs. Leonard, *The Impact of International Human Rights Developments on Sexual Minority Rights*. *New York Law School Law Review* Vol. 49 p 525.

discrimination, concepts which the South African Constitution explicitly embraces in Sections Nine (Equality) and Ten (Human Dignity). Justice Ackerman stated:

This discrimination occurs at a deeply intimate level of human existence and rationality. It denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, which at this point are closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays.³³⁷

The Fourie case which recognises same-sex marriage in South Africa is another progressive decision that departs from the precious common position in that country. The complainants in the case made a complaint that the law excludes them from publicly celebrating their love and commitment to each other in marriage. They contended that the exclusion comes from the common law definition which defined marriage as the legally recognised voluntary union for life in common of one man and one woman to the exclusion of all others while it lasts.³³⁸

In a unanimous decision, the Constitutional Court declared that the common law definition of marriage and section 30(1) of the Marriage Act, which excluded same-sex marriages, were inconsistent with sections 9(1) and 9(3) and section 10 of the Constitution that deal with the right to equality and the right to human dignity respectively.³³⁹ Referring to the equality jurisprudence that had emanated from the Constitutional Court over the last decade and which included judgements protecting the minority disadvantaged group of gay and lesbian people, Justice Cameron stressed that all persons have the same inherent worth and dignity as recognised in the

³³⁷ National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs, 1999 (2) SA 1 (CC).

³³⁸ Joan Church, Same-sex Unions Revisited: The Concept of Marriage in Transformation. P 4. Available at uir.unisa.ac.za/bitstream/handle/10500/3663/Church.kongres.pdf. (Accessed on 6th March, 2016).

³³⁹ Ibid

Constitution and that same-sex partners were as entitled to found their relationship in a secure manner as were opposite-sex partners. The capacity to marry enhanced the dignity of a couple choosing to spend their life together.³⁴⁰

Justice Albie Sachs highlighted that South Africa has a multitude of family formations and as such it was held to be inappropriate to enforce any one particular form as the only socially and legally acceptable one.³⁴¹ The Court emphasised that the exclusion of same-sex couples from an institution which should serve and protect a secure intimate relationship was not only discriminatory but resulted in material deprivation and injury.³⁴² It further noted that in an open and democratic society contemplated by the Constitution there must be mutually respectful co-existence.³⁴³ It was found that excluding same-sex marriage is an indication that homosexuals are to be considered “outsiders”. In the words of Justice Sachs: “To penalise people for being who and what they are is profoundly disrespectful of human personality and violators of equality. Equality means equal concern and respect across difference”.³⁴⁴

The Constitutional Court once again adopted practical reasonableness in its purposive decision-making, influenced by the changing circumstances of marriage as a concept of marriage and also by the approach that other jurisdictions around the world had decided. In fact, the debated preceding the Fourie decision touched on the issue of changing circumstances around the issue of marriage. Sinclair and Heaton point out that a cursory glance at some of the major changes in Western societal attitudes and behaviour, several of which have been translated into reform of family law, reveals a growing number of different lifestyles that call for a more flexible approach

³⁴⁰ Ibid

³⁴¹ Ibid

³⁴² Minister of Home Affairs and Others vs. Fourie and Others, [2005] ZACC 19.

³⁴³ Ibid

³⁴⁴ Ibid

to the definition of the so-called Christian marriage.³⁴⁵ The progressive approach taken in the Fourie decision contrasts with that of the majority decision in the earlier *Volks vs. Robinson*, where the majority of the Court was not prepared to recognise co-habitation as akin to marriage for purposes of a claim to maintenance by the survivor in a permanent life partnership.³⁴⁶

In Uganda, the Supreme Court, in the case of *Yvonne Oyoo and Juliet Mukasa v The Attorney General*, the Uganda Supreme Court also struck down anti-sodomy law of Uganda contained at section 145 of the country's Penal code.³⁴⁷ In making its judgment, the Supreme Court declared that "...Human rights must be respected. It has been found that the actions of the officials that molested Victor Mukasa and Oyoo were unconstitutional, inhuman and should be condemned".³⁴⁸ Victor Mukasa and Juliet Oyoo had brought this case against the Attorney General of Uganda when government officials illegally raided Victor's home without a search warrant, seizing documents related to Victor's work as a Human Rights Defender for people who are transgender, lesbian, gay, bisexual and intersex. The officials illegally arrested a guest at Victor's home, Oyoo and treated Victor and the guest in an inhuman and degrading manner amounting to sexual harassment and indecent assault. The Court upheld the provisions of the Ugandan constitution relating to the rights to personal liberty; respect for human dignity and protection from inhuman treatment; right to privacy of person, home and property. In a country considered extremely hostile to homosexuals, the critical approach that the Supreme Court adopted is commendable.

³⁴⁵ Ibid

³⁴⁶ *Volks vs. Robinson* (2005] 5 BCLR 446 (CC).

³⁴⁷ *Yvonne Oyoo and Juliet Mukasa v Te Attorney General*, Misc. Application No. 247 of 2006; Civil case: application under Article 50 of the Constitution of Uganda for the enforcement of fundamental rights and freedoms guaranteed in Articles 20-45 of the Constitution of Uganda.

³⁴⁸ Ibid

4.9: LIMITATIONS OF INTERNATIONAL LAW IN ADDRESSING THE HUMAN RIGHTS OF LGBT PEOPLE

There is no doubt that much progress has been made towards protection of the human rights of sexual minorities under international law. The Wolfenden Report opened avenues for transformative legislative and judicial decision making, resulting in the recognition and protection of the human rights of sexual minorities. However, queer theorists rightly warn against uncritically taking international human rights assumptions as being the panacea for protection of sexual minorities because they have serious limits which must be interrogated if meaningful solutions are to be sought.

It is important to note that decriminalisation of homosexual activities around the world following the recommendations of the Wolfenden Report, it has not erased violence and victimisation of sexual minorities even in countries that have done so. As rightly pointed out by Phillips, decriminalisation alone does not guarantee discrimination and victimisation of LGBT individuals.³⁴⁹ Decriminalisation of consensual homosexual acts between adults might have been expected to engender an increase in reporting of blackmail to the police. However, a research carried out by Donald West suggests that any such decline was countered by the continuation of police strategies to obtain confessions of guilt based on harassment and intimidation of gay men, including the failure to investigate their complaints of criminal victimisation, and threats to disclose their sexual orientation to family or employer.³⁵⁰ Furthermore, Les Moran presents evidence from as late as the 1990s to show that blackmail persists in England 'in forms similar to

³⁴⁹ Oliver Phillips, Blackmail in Zimbabwe: troubling narratives of sexuality and human rights. *The international journal of Human Rights*, Vol. 13, Nos. 2-3, April – June 2009, 345-364, p 352.

³⁵⁰ Donald James West, Sexual Victimization: Two recent Researches into Sex Problems and their Social Effects (London: Gower, 1987), 126-27. In Oliver Phillips, Blackmail in Zimbabwe: troubling narratives of sexuality and human rights. *The international journal of Human Rights*, Vol. 13, Nos. 2-3, April – June 2009, 345-364 p 352

those practiced before the Wolfenden review'.³⁵¹Phillips further notes that the failure of English law reform in 1967 to ensure these practices disappeared is undoubtedly related to the fact that the reform was limited to decriminalising consensual sexual acts in private between men over the age of 21.³⁵²It did not go far enough to stem the problem.

Another shortcoming of the aftermath of the Wolfenden breakthrough is that several countries including Kenya still retain the laws. According to the Human rights watch, more than 80 countries around the world today still criminalise consensual homosexual conduct between adult men and often between adult women.³⁵³It is worth noting that the former British colonies, especially in Africa, generally kept the prohibition of “sodomy” after decolonisation in the 1950s and 1960s. Governments’ former African colonies said they would not contemplate following Britain’s footsteps and repeal criminalising laws, on grounds such as “the population is not ready” and “Reform of this subject is not a priority”.³⁵⁴ These countries in fact demonstrate more intransigence as years go by. This occurs even as Britain has not just repealed these laws but gone ahead to apologies for the human rights breaches that the law caused to sexual minorities. In May, 2007, foreign Office Minister of Britain Ian McCartney made a statement to the UN Human Rights Council:

The Foreign and commonwealth Office is developing a strategy for promoting and protecting the human rights of LGBT overseas. This year sees the 40th Anniversary of the Sexual Offences Act in the UK which began the decriminalisation of homosexuality. We can mark this milestone by speaking up for those millions around the world who are branded as criminals simply for being

³⁵¹ Les Moran, *the Homosexual(ity) of Law*, (Routledge (15 Aug. 1996), p 58.

³⁵² *Ibid* p 35.

³⁵³ Human rights Watch, *This alien Legacy: the Origins of ‘Sodomy’ laws in British colonialism*. In *Human rights, Sexual Orientation and Gender Identity*,(2008), P 86.

³⁵⁴ *Ibid*

who they are...These will be difficult issues to raise, but we must speak up for those who cannot speak for themselves...³⁵⁵

In November 2011, Nigeria's Senate voted to criminalise gay marriage, gay advocacy and same-sex displays of affection. The implications of this law are that couples who marry face up to 14 years each in prison.³⁵⁶ In August 2007, 18 men were arrested in Bauchi state and charged with belonging to an unlawful society, committing indecent acts and criminal conspiracy because, according to the charge sheet, at the time of the arrest "the suspects were all dressed in female attire organising a gay wedding with contravenes section 372 subsection 2 (e) of the Islamic Sheria penal code."³⁵⁷ The Human Rights Watch observes that;

The Nigeria's 2006 Bill which criminalised all aspects of lesbian and gay identity and life culminated the arc that Macaulay's Indian Penal Code began. It all-embracing provisions renders the law uniquely sever among the world's anti-gay laws and its trajectory from punishing acts to repressing a whole class of persons is most complex.³⁵⁸

In Uganda, the recent anti-gay law has made it more dangerous for sexual minorities that country.³⁵⁹ The attendant violence against gay people in Uganda as a result of the criminalizing laws is a frightening reality. A recent incident in which a Ugandan gay rights activists, David Kato was murdered is illustrative. Kato was severely beaten in his home with a hammer and died on his way to hospital.³⁶⁰ The police detained two people involved in connection with the attack but ruled out homophobia as a motive; however, Kato's friends and colleagues though the murder was motivated by Kato's sexual orientation and human rights advocacy.³⁶¹ In April 2010,

³⁵⁵ Douglas A. Sanders,³⁷⁷ and the Unnatural Afterlife of British colonialism in Asia. *Asian Journal of Comparative Law*. (2009). Volume 4, Issue 1, p 30.

³⁵⁶ Ibid

³⁵⁷ Dispatch from Bauchi, Nigeria. 15 February 2008, International Gay and Lesbian Human Rights Commission, <http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=831>. (accessed on 20th June, 2015)

³⁵⁸ This alien legacy supra note 352 above, P 114

³⁵⁹ Ibid

³⁶⁰ The Communities Under Siege: LGBTI Abuses in Uganda <http://www.humanrightsfirst.org/about-us>. (Accessed on 20th March, 2015) p29

³⁶¹ Ibid

a gay man was detained and taken to a medical center, heavily medicated and declared mentally ill; that man has since disappeared as well. In December 2009, a lesbian and a transgender man were beaten and attacked, most likely because of their sexual orientation and gender identity.³⁶²

In Kenya, there is a move by retrogressive anti-human rights crusaders to introduce a law similar to the Ugandan one to introduce more stringent measures against gay people in the country.³⁶³ It is apparent that what was indeed British culture is now taken more as African culture than the British themselves do. More striking is how judges, public figures and political leaders have, in recent decades, defended those laws as citadels of nationhood and cultural authenticity. Homosexual, they now claim, comes from the colonising West.³⁶⁴ Extreme and extraordinary, however, have been the law's defenses from sub-Saharan Africa. Zimbabwe's President Robert Mugabe launched the long ferocity in the early 1990s, vilifying lesbians and gays as 'un-African- and 'worse than dogs and pigs'.³⁶⁵ The decision from Botswana in 2002 is illustrative of this trend. In this case, the High court Judge Mwaikau was of view that "the application [of the sections of the Penal Code criminalising homosexuality essentially concerns the place and extent of public morality or moral values in the criminal law of a given society."³⁶⁶ In the learned judge's view;

The criminal law has its basis the public morality or moral values or norms as cherished by members of the society concerned, and is influenced by the culture of the moment of such society. Such moral values regulate the conduct of individual members of society for the good of society and provide a conducive environment for the exercise and enjoyment of the individual rights and freedoms of members of such society.³⁶⁷

³⁶² Ibid

³⁶³ Ibid

³⁶⁴ Ibid

³⁶⁵ Human Rights Watch/International Gay and Lesbian Human rights Commission (2003), p 23

³⁶⁶ Ibid

³⁶⁷ Ibid

It is clear from the foregoing that law is a panacea for the discrimination that they face. Indeed as Jonathan Goldberg-Hiller points out, it can be tricky to employ law as an independent variable against which to measure social change.³⁶⁸ In his view, the dichotomy between law and society can work to obscure the variegated economic, political, juridical and global contexts in which rights operate, and to miss the ways the pursuit of rights produces unexpected political subjectivities.³⁶⁹ Shannon Winnubst³⁷⁰ also rightly argues that while legal mobilisation for attaining equality rights may seek possibilities of liberation, an interlocking analytic excavates some of the limitations, hierarchies and exclusions that are entrenched or masked by a legal victory.³⁷¹ Brenda Cossman in a critical analysis of victories for lesbian and gay rights in Canada notes that the achievement of formal equality and ‘inclusion’ in the law is also at once a process of exclusion that operates to police and discipline the borders of “respectable” sexuality.³⁷²

Apart from the dangers of inclusion into law becoming a tool for further exclusion of sexual minorities, international human rights law itself is fraught with problems that limit its effectiveness in the protection of sexual minorities. First and foremost, the fact that there is no specific treaty that addresses the human rights of sexual minorities is a problem. Secondly, laws that protect sexual minorities are clearly a necessary condition – but not necessarily a sufficient one. As discussed herein below, the presence of domestic and international laws protecting gay rights is not enough to change peoples’ attitudes and actions toward the LGBT community and poses a great challenge to their enjoyment of rights in many countries, including Kenya. Indeed

³⁶⁸ Jonathan Goldberg-Hiller, *The Limits to Union: Same-sex Marriage and the Politics of Civil Rights* (Ann Arbor: The University of Michigan Press, 2004) p 223. In Suzanne Judith Lenon, *A White Wedding? The Racial Politics of Same-sex Marriage in Canada*. PhD Thesis, University of Ontario, (2008). P 12

³⁶⁹ *Ibid*

³⁷⁰ Shannon Winnubst, *Queering Freedom* (Indiana University Press: Bloomington and Indianapolis, 2006) p 18

³⁷¹ Suzanne Judith Lenon, *A White Wedding? The Racial Politics of Same-sex Marriage in Canada*. PhD Thesis, University of Ontario, (2008) p 13

³⁷² Brenda Cossman, “Sexing Citizenship, Privatising Sex”, (2002), *Citizenship Studies*, Vol. 6, No. 4, 2002, 483-506.

as argued by Mittelstaedt, there is a clear chasm between the aspirational, lofty language of international human rights treaties and the domestic laws of their signatories – not to mention official statements made by signatory nations’ leaders. To note a few examples of this disparity, Zimbabwe signed the international Covenant on Civil and Political rights (ICCPR), pledging that its own Law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination.”³⁷³

As noted by Mittelstaedt, in 2006, Zimbabwe passed legislation that make it a crime for two people of the same sex to kiss, hug, or hold hands³⁷⁴ - and Zimbabwe’s President Robert Mugabe, has publicly stated that gays are “worse than dogs and pigs”³⁷⁵ and has urged members of his party to tie up homosexuals and bring them to the police to be arrested.³⁷⁶ Even in nations where both international treaties and domestic laws protect the rights of sexual minorities, violent hate crimes and other forms of discrimination still occur with shocking regularity.³⁷⁷ South Africa provides a particularly graphic example; it was the first African nation to adopt a constitution providing for, among other things, sexual minority rights³⁷⁸ and the first African nation to legalise same sex marriage.³⁷⁹ Despite these measures – or perhaps, as suggested by Mittelstaedt, as a result of these measures- violent attacks against openly lesbian, gay, bisexual and transgender South Africans continue, with “corrective rape” occurring with

³⁷³ International Covenant on Civil and Political Rights, art 26, General Assembly Res No 2200 A.

³⁷⁴ Larry Buhl, New Laws in Africa Further Restrict Gays, Planet Out Network (July 20, 2006), in Emma Mittelstaedt, Safeguarding the Rights of sexual Minorities: The Incremental and Legal Approaches to Enforcing International Human Rights Obligations. Chicago Journal of International Law, Vol. 9 No. 1 p 354

³⁷⁵ Gay Zimbabweans Win Fights for Book-Fair Booth, NY Times A4 (Aug 2, 1996) In Ibid Mittelstaedt

³⁷⁶ Ibid

³⁷⁷ Ibid p 354

³⁷⁸ For Historical overview of South Africa’s Constitution, See Eric Christiansen, Note, Ending the Apartheid of the Closet: Sexual Orientation in the South Africa Constitutional Process, 32 NYU J Int’l L & Pol 997 (2000).

³⁷⁹ Minister of Home Affairs v. Furie and Another, ICCT 60/04) [2005] ZACC 19.

some frequency.³⁸⁰ The international human rights community though, generally sees changing laws as the necessary first step towards changing attitudes. Where treatment of and attitude toward sexual minorities violate international human rights obligations, international human rights organisations have moved to aggressively to advocate for change in domestic laws, with an eye to ultimately transforming attitudes and beliefs toward the LGBT community.³⁸¹

In essence, human rights discussions relating to sexuality highlight several key tensions which have a significant bearing to its realistic application to sexual minorities. This study finds the problems of international human rights at several levels. The first level is what it considers to be the external pressure on the concept of human rights and specifically its claims to universality; the second one has to do with what the study considers to be the internal structure of the human rights themselves, specifically relating to the language of the human rights treaties. At this level, the source of contention may be traced to a qualification to many human rights expressed in the relevant treaties that include explicit exceptions for measures taken by the state to maintain public morals and welfare.³⁸² The third one has to do with interpretation of the human rights principles which this study argues, has the potential of exposing them to subjectivity to the detriment of sexual minorities.

4.8.1: The Problem of Universality vs. Cultural Relativism

The external problematic of human rights mantra is the universality/relativist debate, which dogs successful and uniform application of human rights. Individuals who accept the universality of certain standards are then faced with the difficult task of implementing those standards within

³⁸⁰ “Corrective rape” is the term used to describe the practice of raping African women and girls thought to be lesbians with the claimed purpose of turning them into “real African women” – the underlying belief being that homosexuality is a “disease” imported by the white colonial empire. (See Mittelstaedt Above)

³⁸¹ Emma Mittelstaedt, Safeguarding the Rights of Sexual Minorities: The Incremental and Legal Approaches to Enforcing International Human Rights Obligations, *Chicago Journal of International Law*, Vol. 9 No. 1 p 355

³⁸² Ibid

divergent societies.³⁸³ According to An-Naim, Universality is one of the essential characteristics of human rights. By definition, human rights are rights that apply to all human beings and are therefore universal.³⁸⁴ All human beings are holders of human rights, independent from what they do, where they come from, where they live and from their national citizenship, their community among others. The universality of human rights is embedded in and also influenced by the other characteristics of human rights: human rights are categorical, egalitarian, individual and indivisible.³⁸⁵ Cultural relativism is often put forward to try and give voice to marginalised peoples and to combat the threat of Western moral imperialism, but it may have the opposite effect:

Discrediting of indigenous aspirations for social change as nothing more than Western contamination or as an aberrant foreign import, merely because these aspirations run counter to some entrenched cultural practices of the majority in power, seems to show singularly bad judgment.³⁸⁶

Indeed Cultural relativism has been invoked severally to the detriment of sexual minorities has displayed itself before. This is when, Brazil's 2003 resolution, "Human Rights and Sexual Orientation", represented the first time that a sweeping resolution specifically addressing sexual orientation had been proposed in the U.N.³⁸⁷ U.N. member states polarised, with Canada and European nations supporting the bill³⁸⁸, and the Organisation of the Islamic Conference and Vatican states uniting to oppose the bill. In particular, among the resolution's greatest critics were Pakistan, Saudi Arabia, Egypt, Libya and Malaysia, who urged the removal of the words

³⁸³ Sebastian Maguire, The Human Rights of Sexual Minorities in Africa. *California Western International Law Journal*, Vol. 35, No. 1.

³⁸⁴ A.A. An-Na'im. The Cultural Mediation of Human Rights, in: Bauer J. R./Bell D.A. (ed.), *The East Asian Challenge for Human Rights*, (Cambridge 1999) p 147-168.

³⁸⁵ Ibid

³⁸⁶ Zechenter in Sebastian Maguire, supra note 383 above, p 334.

³⁸⁷ Ibid

³⁸⁸ Ibid

“sexual orientation” from the resolution. After intense debate, twenty-four member states voted to postpone the vote until the following year.³⁸⁹

By 2004, after member states repeatedly tabled the resolution, Brazil withdrew its efforts. Islamic critics voiced opposition to the resolution, maintaining that homosexuality is inconsistent with Islamic religious tenets.³⁹⁰ Generally, Muslims believe there is a divine order in nature that mandates that humans use their God-given features to fulfill a purpose on earth. Homosexual relationships run contrary to the rule of nature because in these relationships human beings use their bodies for a purpose that God did not intend.³⁹¹ The Vatican aligned with the Organisation of Islamic states to contest the passage of the U.N. resolution. Unlike the Quran, the Bible specifically prohibits homosexuality. As such, the Catholic Church views homosexuality as contrary to its religious principles. Within Catholicism, however, there is still a wide array of beliefs regarding homosexuality. Under the religion, human beings are equipped with intellect, reason, and free will. “Natural law” entails humans using reasoning to do what is good in concrete situations. Basic goods of life include the sexual unions of males and females according to physical nature, procreation.³⁹²

4.8.2: Normative and interpretive challenges in International and regional human rights law

Although international human rights instruments mandate that human rights standards be applied without discrimination. Nevertheless, none of these documents explicitly outlaws discrimination on the basis of sexual orientation. Sexual minorities continue to fear the overwhelming threats of state-sanctioned persecution, and stronger international protections for gays and lesbians are

³⁸⁹ Ibid

³⁹⁰ Ibid

³⁹¹ Ibid

³⁹² Ibid

necessary to achieve the most fundamental human rights.³⁹³ As noted by Donnelley, since the adoption of the UDHR, there has been immense progress that has been made in the development of multilateral norms and institutions, national and transnational activity by human rights NGOs, and bilateral human rights policies, but there have also been notable shortcomings.³⁹⁴ At the national level, all internationally recognised human rights are implemented unevenly in different countries, and often within particular countries as well. Internationally, multilateral institutions generally lack coercive enforcement powers.³⁹⁵ These shortcomings have been manifest especially in the interplay between international human rights and protection of sexual minorities.

Maguire notes that although the ICCPR's framework provides proponents of LGBT rights a legal basis in which to advance their arguments, the effectiveness of this scheme has not been maximised. For instance, in the case of Trinidad and Tobago, the nation's government responded to the UN Human Rights Committee's recommendation regarding its sodomy laws by declaring that since the Covenant does not explicitly outlaw discrimination on the basis of sexual orientation, the state would continue to adopt a more conservative approach and would not repeal laws criminalising homosexuality.³⁹⁶ Maguire also notes that although 85 nations criminalise same-sex relations, the Committee has only issued recommendations to improve state practices to the United State, the UK, Colombia, Sudan, Cypress, Zimbabwe, Ecuador, Austria, Chile, Lesotho, Poland, Romania, Hong Kong, Trinidad and Tobago, El Salvador, Sweden, Egypt, Argentina, and the Philippines under the ICCPR. The Committee's recommendations tend to be

³⁹³ Ibid

³⁹⁴ Jack Donnelley, *supra* note 334 above, p 411.

³⁹⁵ Ibid

³⁹⁶ UN Human Rights comm..., Comments by the Government of Trinidad and Tobago on the concluding Observations of the Human Rights committee: Trinidad and Tobago, p 34, U.N. Doc CCPR/CO/70/TTO/Add.1/2001 (Jan. 15, 2001). Available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/6526d484e7ea46a4c1256a4c125a15004c191a?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/6526d484e7ea46a4c1256a4c125a15004c191a?Opendocument).

general in nature. For instance, the Committee recommended that Sudan do provide information on the number of death penalty executions were carried out. Sudan failed to respond to the Committee's recommendations. Still, the Committee did not specify any action that it would take if Sudan failed to comply.³⁹⁷

Donnelley also notes that in most countries, sexual orientation is not an accepted ground for discrimination in employment, housing, or access to public facilities and social services. With a few recent exceptions, same-sex couples are denied civil status, resulting in discrimination in inheritance, adoption, and social insurance. Evan Wolfson summarises the contemporary American situation for sexual minorities in America as follows:

Our society forbids gay people to marry, denies us equal pay for equal work, throws us off the job, forbids us from serving our country in the armed forces, refuses us health insurance, forces us into the closet, arrests us in our bedrooms, harasses our daily associations, takes away our children, beats and kills us in the street and parks, smothers images of ourselves and others like us, and then tells us we are irresponsible, unstable, and aberrant.³⁹⁸

Discrimination against sexual minorities even has an international dimension. Many countries even deny entry to homosexuals as threats to public health or morals.³⁹⁹ For instance, Qatar recently moved to deport foreign homosexuals, reportedly even using forced rectal examinations as "proof." And only recently have a few countries begun to recognise sexual orientation or behaviour as a ground of asylum, which in international law requires establishing that one has a well-founded fear of persecution were one to be returned home.⁴⁰⁰ Donnelley further notes that the most distressing feature of contemporary practice with respect to sexual minorities is that gay

³⁹⁷ UN Human Rights Comm., Concluding Observations of the Human Rights Committee, p 8, UN Doc. CCPR/C/79/Add. 85/1997 (Nov. 19, 1997), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/bc310a747155dff8802655300537fae?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/bc310a747155dff8802655300537fae?Opendocument).

³⁹⁸ Evan Wolfson, "Civil Rights, Human Rights, Gay Rights: Minorities and the Humanity of the Different," *Harvard Journal of Law and Public Policy* 14 (Winter 1991): 21-39, p 31-33. In Jack Donnelley, *Ibid*, p 12.

³⁹⁹ *Ibid*.

⁴⁰⁰ *Ibid*

men and lesbians in every country of the world, even where their behaviour, orientation or identity are neither illegal nor a common motive for violent assault, are subject to civil disabilities and pervasive social discrimination.

According to Fraser, heterosexist norms skew entitlements and delimit understandings of personhood in, for example, marital, divorce, and custody law; the practice of medicine and psychotherapy; legal constructions of privacy, autonomy, and equal opportunity; immigration, naturalisation, and asylum policy; popular culture representations; and everyday social practices and patterns of interaction.⁴⁰¹ As a result, gays and lesbians suffer sexually specific status injuries. Denied the full rights and protections of citizenship, they endure shaming and assault; exclusion from the rights and privileges of marriage and parenthood; curbs on their rights of expression and association; the absence of sexual autonomy; demeaning stereotypical depictions in the media; harassment and disparagement in everyday life; and exclusion or marginalisation in public spheres and deliberative bodies.⁴⁰² In her view, these harms are injustices of recognition. And these are not the only injustices that LGBT people suffer. They also suffer serious economic injustices: they can be summarily dismissed from civilian employment and military service, are denied family-based social-welfare benefits, and are disadvantaged in tax and inheritance law.⁴⁰³

Donnelley points out that the depth to which official discrimination runs is perhaps, best illustrated by Fiji, which soon after it became only the second country in the world to prohibit discrimination on the basis of sexual orientation in its constitution, introduced legislation

⁴⁰¹ Nancy Fraser, *Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation*. 1996 The Tanner Lectures on Human Values p 13. Delivered at Stanford University, April 30-May 2. Available at tannerlectures.utah.edu/_documents/a-to-z/f/Fraser98.pdf. (Accessed on 22nd January, 2016).

⁴⁰² *Ibid*

⁴⁰³ *Ibid*

banning same-sex marriages.⁴⁰⁴ Negative social attitudes against sexual minorities, even in countries that have included sexual orientation as a ground of discrimination in their constitutions, is another example of the shortcomings of international human rights principles and standards to curb discrimination against sexual minorities.⁴⁰⁵ Mittelstaedt rightly notes that even in nations where both international treaties and domestic laws protect the rights of sexual minorities, violent hate crimes and other forms of discrimination still occur with shocking regularity. South Africa provides particularly graphic example; as stated elsewhere in this thesis, South Africa is the only nation on the continent to adopt a constitution providing for, among other things, sexual minority rights⁴⁰⁶ and the first African nation to legalise same-sex marriage.⁴⁰⁷ Despite these measures, violent attacks continue, with “corrective rape” occurring with some frequency.⁴⁰⁸ The case of Semelane comes to mind.⁴⁰⁹ Kenya too, is a signatory to all international human rights instruments as well as a being a member of the African Charter. Yet the attitude of leaders towards same-sex relationships is negative and contrary to the State’s international human rights obligations. Daniel Arap Moi, the former president of the Republic of Kenya is on record as having declared homosexuality un-African.⁴¹⁰

Actions of government officials reflect this negative attitude. For instance, a former nominated Member of the Kenyan Parliament was expelled from the country’s Parliament by an angry Deputy Speaker and members for stating that fifteen per cent of Kenyan parliamentarians were

⁴⁰⁴ Ibid p 11

⁴⁰⁵ See the case of Semelane in South Africa, in Tiffany Mugo, supra note 226 above, p 23

⁴⁰⁶ See C. Christiansen, *Ending the Apartheid of the Closet: Sexual Orientation in the South African Constitutional Process*, 32 NYU J Intl L & Pl. 997 (2000).

⁴⁰⁷ See *Minister of Home Affairs v. Fourie and Another* (CCT 60/04) [2005] ... 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005).

⁴⁰⁸ The term “Correctional Rape” is the term used to describe the practice of raping of African women and girls thought to be lesbians with the claimed purpose of turning them into ‘real African women’ 0 the underlying belief being that homosexuality is a “disease” imported by the white colonial empire.

⁴⁰⁹ The case of Semelane I Tiffany Mugo, supra note 226 above, p 23.

⁴¹⁰ See the statement of Daniel Arap Moi in Tiffany Mugo, supra note 226 above, p 46.

gay.⁴¹¹ The country's former Prime Minister is on record warning that people found engaging in homosexual acts will face the full force of the law asserting that homosexuality is illegal.⁴¹² A former Kenyan Minister for Education threatened to ban a secondary school set book for containing words that were believed to contain gay connotations. The minister is reported to have said

...It is news to me that such a book was selected. I don't care how intelligent the writer is, I will get it removed since Kenya is not ready for such a curriculum, at least not under my watch.⁴¹³

After harassing persons who were suspected of planning to conduct a same-sex marriage in Mtwapa, a Coastal town in Kenya, a former member of Kenya's Parliament, addressed a mob gathered outside a police station saying that:

Homosexuality must be stopped and every means used to make that happen". He told the crowd "they should not even bother to bring the homosexuals they find to the police station but should take care of the issue themselves."⁴¹⁴

Another shortcoming is that the UN does not have the power to take action against states that fail to comply with the Committee's recommendations unless those states threaten international peace and security.⁴¹⁵ The Convention Against torture mandates that states provide training to law enforcement authorities on torture prevention.⁴¹⁶ The Convention also mandates that states investigate allegations when its officials have committed torture.⁴¹⁷ The Convention also provides that statements obtained under torture cannot be used against suspects at trial. In many

⁴¹¹ On 15 June 2011, Millie Odhiambo was ordered out of Parliament for alleging that 15 per cent of the MPs were gay. See "The Star" of 16 June 2011.

⁴¹² In late 2010 at a rally in the Kibera area of Nairobi, Prime Minister Raila Odinga stated that "[the] Constitution is very clear [that] men or women found engaging in homosexuality will not be spared...If we find a man engaging in homosexuality or a woman in lesbianism, we'll arrest them and put them in jail.

⁴¹³ Mutula Kilonzo, the then Kenyan minister for education. In Daily Nation, Tuesday, January, 8th, 2013.

⁴¹⁴ Reported in Daily Nation, 20th February, 2014, p 3.

⁴¹⁵ See UN Charter, arts. 41 and 42.

⁴¹⁶ See The Convention Against Torture and Other cruel, Inhuman and Degrading Treatment or Punishment

⁴¹⁷ Sebastian Maguire, supra note 383 above, p 334.

developing nations, the police participate in the persecution of sexual minorities. In 2004, Human Rights Watch exposed torture of sexual minorities in Uganda by government officials.⁴¹⁸ In 2005, police in Saudi Arabia detained and flogged 100 men for dancing and “behaving like women.” The U.N. Committee on Torture and the U.N. Working Group on Arbitrary Detention recently condemned Egypt’s gender-neutral “debauchery” law⁴¹⁹ as constituting discrimination on the basis of sexual orientation.⁴²⁰

At the regional level, The African Charter on Human and Peoples' Rights ("African Charter")⁴²¹ affirms in broad terms the equality of all people before the law and the right to freedom from discrimination. Article 28 incorporates the parts of the ICCPR that address nondiscrimination, stating that "[e]very individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance." The African Charter, however, has been only somewhat effective in enforcing human rights, particularly in the LGBT rights context. The African Charter's lack of success in enforcing sexual minority rights has been attributed to several factors, including the structure of the Charter itself; reluctance among its signatories to advance human rights; and a lack of resources, both human and financial. First, the African Charter contains clawback clauses that have allowed signatories to avoid their obligations under the treaty. For example, Article 6 provides that "[n]o-one may be deprived of his freedom except for reasons already set down by law."⁴²²

States have attempted to use Article 6 and other clawback clauses⁴⁸ in the African Charter to circumvent its human rights provisions in favor of pre-existing discriminatory domestic laws.

⁴¹⁸ Ibid

⁴¹⁹ Ibid

⁴²⁰ Ibid

⁴²¹ Ibid

⁴²² Ibid

The African Commission on Human and Peoples' Rights ("ACHPR"), the organisation charged with enforcing the African Charter, has recently responded by unambiguously stating that "the Commission's jurisprudence has interpreted the clawback clauses as constituting a reference to international law, meaning that only restrictions on rights that are consistent with the Charter and with State Parties' international obligations should be enacted by the relevant national authorities."⁴²³

Article 11 of the ECHR and Article 160 of the ACHR contain virtually identical language." This same exception qualifies the right to privacy, as in Article 8 of the ECHR, although none of the other major international human rights instruments contains a similar explicit exception to privacy. A single major human rights instrument - the European Charter of Fundamental Rights and Freedoms of the European Union (European Charter) - grants explicit rights to nondiscrimination based on sexual orientation or sexual minority status. Sexual minorities get cold comfort even from this concession; the European Charter applies only to the limited membership of the EU⁴²⁴ and is not legally binding even there. At best, it may be used as an interpretive resource for other EU sources of law. Nonetheless, together, the norms of free intimate association, privacy, family life, and nondiscrimination might be thought to suggest that states bear a heavy burden to justify singling out a specific class of persons and regulating their private sexual behavior, or basing legal and political restrictions or advantages on specific sexual or gender characteristics.⁴²⁵

Although several African Constitutions recognise the right to privacy, there is a lack of jurisprudence defining the boundaries of the right. Privacy provisions in African constitutions tend to focus on the state's intrusion into the home but this indicates nothing about the right of

⁴²³ Ibid

⁴²⁵ Ibid

individuals within families or vis-à-vis other individuals. Privacy rights (zonal, personal, and familial) may have a different meaning in African societies⁴²⁶ than they do in the United States, for example.⁴²⁷ Maguire further argues that taken alone, the privacy approach is problematic for its disparate impact on different groups within the general category of sexual minorities. Economic realities and social regulations shape the boundaries of privacy in a particular community. Thus, poorer or more marginalised individuals may be left unprotected. Moreover, the right to privacy often focuses on familial and zonal aspects of the rights i.e., protecting the sanctity of the home and familial structure to the detriment of protecting privacy of personal relations.⁴²⁸

Many scholars have written critiques about the African Charter and the defects that make it difficult for it to deliver on its ideals. According to Makau Mutua, Article 160 ACHPR borrows heavily from the ICCPR which allows states to restrict the exercise of association by any laws that "are necessary in a democratic society in the interests of national security or public safety, public order (or republic), the protection of public health or morals or the protection of the rights and freedoms of others."⁴²⁹ Mutua further notes that although the charter makes a significant contribution to the human rights corpus, it creates an effectual system.⁴³⁰ One such weakness is presence of the "clawback" clauses, the potential abuse of the language of duties, and the absence of an effective protection mandate for the African Commission.⁴³¹ Mutua further notes

⁴²⁶ See Reproductive law and Policy & International Federation of women Lawyers (Kenya Chapter) FIDA-K, *Women of the World: Laws and Policies Affecting their Reproductive Lives*, Anglophone Africa (1997). Available at www.reproductiverights.org/pub_bo_wowafica.htm (last visited on 14th November, 2015)

⁴²⁷ *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding that a state statute prohibiting the distribution of contraceptives to married couples violated the implicit right to privacy in the US constitution).

⁴²⁸ See focus on the home in the privacy provisions of constitutions highlights this concern. See e.g. Namibia Constitution. Article 13 (1990),

⁴²⁹ *Ibid*

⁴³⁰ Makau Mutua, *The African Human Rights System: A Critical Evaluation*, available at hdr.undp.org/sites/default/files/mutual.pdf (accessed on 12th November, 2015) p 1

⁴³¹ *Ibid*

the normative weaknesses in the Charter, and what he calls the general impotence of its implementing body, the African Commission.

The most serious flaw in the Charter is the “clawback” clauses which permit African States to restrict basic human rights to the maximum extent allowed by domestic law.⁴³² This, according to Makau, is significant because most domestic laws in Africa date from the colonial period and are therefore highly repressive and draconian.⁴³³ This is true of oppressive anti-Sodomy laws that remain in statute books such as the Penal Code of Kenya. Further the Charter does not have a general derogation clause and this omission is all the more serious because the charter in effect permits states through the “clawback” clauses to suspend, de facto, many fundamental rights in their municipal laws.⁴³⁴ Another controversial and equally significant question to issues of the rights of sexual minorities in the charter is in its language of duties.

The Charter takes the view that individual rights cannot make sense in a social and political vacuum, unless they are coupled with duties on individuals. In other words, the charter argues that the individual egoist is not the center of the moral universe. Thus, it seeks to balance the rights of the individual with those of the community and political society through the imposition of duties on the individual. Individuals owe duties to the “family and society, the state and other legally recognised communities.”⁴³⁵ Furthermore, each individual has “a duty to respect and consider his fellow beings without discrimination.”⁴³⁶ More significantly, every individual has a duty to “preserve the harmonious development of the family and to work for the cohesion and

⁴³² See Makau Mutua, “The African System in a Comparative Perspective,” *3 Rev. Afr. Comm. Hum. & Peoples’ Rts.* 5, 7 (1993).

⁴³³ Arthur E. Anthony, “Beyond the Paper Tiger, the Challenge of a Human Rights Court in Africa,” (1977). *32 Tex. Int’l L. J.* 511, p 518.

⁴³⁴ Makau Mutua, *supra* note 430 above, p 4.

⁴³⁵ Art. 27 (1) of the African Charter on Human and Peoples’ Rights.

⁴³⁶ *Ibid* art. 28

respect of the family; to respect his parents at all times, to maintain them in case of need.” These provisions raise the questions of the Charter to communities such as LGBT.

The “family” provisions have been thought to condone and support repressive and retrogressive structures and practices of social and political ordering.⁴³⁷ This provision in the Charter can therefore be justly interpreted as entrenching oppressive family structures which marginalise and exclude sexual minorities from most spheres outside the home. This thesis also finds that the veneration of African culture has the potential to reinforce gender oppression as well as people who engage in non-conventional sexual practices such as homosexuality which is viewed as being un-African.

Implementation of international jurisprudence by local institutions is another shortcoming of the positive progress of international human rights standards and principles. In this regard, Anagnostou and Mungiu-Pippidi rightly point out that domestic implementation of human rights court rulings is an especially demanding and obtrusive kind of state observance of international norms.⁴³⁸ It involves the efforts of national authorities to redress detected violations and to bring existing laws and practices in line with the underlying standards and principles. In this process, the violating states, including established democracies, display various forms and degrees of compliance with international norms and judicial rulings, raising significant questions about the factors accounting for such differences.⁴³⁹ The extent to which states successfully and

⁴³⁷ Article 18 of the Charter refers to the family as the “natural unit and basis of society; and requires the state to a “assist the family which is the custodian of morals and the traditional values recognized by the community.”

⁴³⁸ Dia Anagnostou and Alina Mungiu-Pippidi, Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter. *Eur J Int Law* (2014) 25 (1): 205-227. doi: 10.1093/ejil/chu001 First published online: April 7, 2014 p

⁴³⁹ Ibid

expeditiously implement human rights judgments is crucial for the credibility and legitimacy of the international protection and adjudicatory mechanisms that issue them.⁴⁴⁰

There is little doubt that progress in the recognition and protection of sexual minorities since the adoption of the UDHR has been impressive, but there is also little doubt that implementation of international human rights standards and principles is characterised by many problems. These have witnessed several drawbacks in the protection of sexual minorities from discrimination and oppression. However, international human rights law provides a reasonable framework within which protection options for sexual minorities can be further interrogated and renegotiated.

4.9: CHAPTER SUMMARY

Human rights violations on the grounds of sexual orientation and gender identity appear at various levels within the work of the UN treaty bodies and special procedures of the former commission on human rights and its successor, the UN Human rights Council. Regional Courts and bodies have made an important contribution towards the protection of rights of persons with different sexual orientation or gender identity as well as developing legal arguments based in international law. In recent years, the issue of sexual orientation and gender identity has been taken into account and incorporated in new legal instruments and legal standards, both universal and regional. Political bodies of intergovernmental organisations, both United Nations and regional, have adopted resolutions raising the question of human rights violations committed on the basis of sexual orientation and gender identity. Traditional arguments - from religious and moral perspectives as well as from 'scientific' perspectives regarding sexual minorities have been challenged and/or rejected by international jurisprudence and in numerous courts throughout the world. The chapter establishes that movement towards protection of sexual minorities by judicial

⁴⁴⁰ Ibid

and legislative bodies has been critical, transformative and deconstructive in the sense of queering their approaches, a clear departure from conservative positions previously held by some of these bodies. They can be said to have exercised Finnis's principles of practical reasonableness in their decision making.

CHAPTER FIVE

LGBT AND THE CONSTITUTION OF KENYA 2010: AN OPPORTUNITY FOR TRANSFORMATIVE LEGISLATIVE AND JUDICIAL DECISION MAKING

5.0: INTRODUCTION

Whether individuals subject to the jurisdiction of the State enjoy human rights in reality depends on a range of factors, including the nature and content of substantive human rights protections applicable within the domestic system, the role of political and legal institutions in the implementation and enforcement of rights, the resources available to ensure the fulfillment of rights and the availability of remedies for violations of rights among others.¹ An international treaty seldom stipulates how the state should implement its provisions, leaving it to each State to decide how that obligation will be executed on the domestic plane.² However, the freedom to choose some methods of implementation is guaranteed in Article 2 of the ICCPR.³

National Constitutions have therefore become important instruments in the implementation of international human rights law. For instance, when a Constitution incorporates a procedure of enforcement in courts of law, this institution becomes a major actor in bringing international human rights into domestic law. Secondly, standard setting on human rights at the international level and the focus on harmonisation of international law and domestic law by treaty bodies and other agencies has sometimes motivated legislative and administrative reform in regard to

¹ Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran and Davis Harris, *International Human Rights law*. (Oxford University Press, 2010), P 459.

² U.N. International Norms and Standards Relating to Disability: Part 1. National Frameworks. 2/5. Available at www.un.org/esa/socdev/enable/comp101.htm. (Accessed on 2nd February, 2016) p 1.

³ Article 2 of the ICCPR states: “Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the Present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant”.

putting the norms in place and their enforcement.⁴ This task falls on institutions such as Parliament. The judiciary plays an important role in breathing life into the human rights guaranteed by the constitution through interpretive decision making. It is generally accepted that a democratic government that is constrained by strong institutions and a constitution will be less likely to commit human rights abuses against its citizens.

This chapter examines the historical evolution of the Constitution of Kenya 2010 as basis for its enactment. It further examines the nature and content of substantive human rights protections in the Constitution of Kenya 2010 and the available remedies for violations. The chapter also discusses the legislature and the judiciary as political and legal institutions in the implementation and enforcement of the substantive human rights guaranteed in the constitution. This section is concerned with the application of principles of practical reasonableness and queer methods in decision making by legislators and judges. The chapter further notes how effective these two institutions have been in this regard. It also notes the limitations that these institutions face in their decision making actions in respect of protection of the human rights of sexual minorities.

5.1: Human rights violations and the struggle for a new Constitution in Kenya

Kenya, like most colonies inherited a raft of laws whose *raison d'être* was to subjugation of the colonised people.⁵ Lumumba argues that the clamour for decolonisation in Kenya, as elsewhere, was informed by the people's desire to regain their independence and dignity.⁶ As well covered in chapter three of this thesis, British colonialists in Kenya, as elsewhere, were not interested in advancing the cause of human rights of the natives and more so that of sexual minorities. They found an already rather fragile human rights situation in the pre-colonial societies, but went

⁴ Ibid

⁵ Patrick L.O. Lumumba, Foreword to Human rights and democratic governance in Kenya: A post- 2007 appraisal. (Pretoria university Law Press, (2015) p vi.

⁶ Ibid

ahead to compound this situation.⁷ They transplanted the anti sodomy laws into the colonies which they used to suppress LGBT people. The independence Constitution which they crafted for the former colonies was lean on human rights generally but worse off for LGBT people since it did not recognise them and indeed completely submerged them into invisibility. The independence Constitution's idea of 'minorities' did not include sexual minorities.⁸ Like all other Kenyans, LGBT people were subjected to political regimes that sought to define and implement governance within the context of violence, intimidation, corruption and the general lack of transparency and accountability.⁹ According to Asaala & Dicker, successive post-independence Kenyan governments, under presidents Kenyatta, Moi and Kibaki, have engaged in , condoned or overlooked the commission of gross human rights violations as well as other crimes, with impunity. Such criminal acts have included political assassinations; torture; inter-ethnic violence sanctioned and allegedly incited by the state; arbitrary arrests and detentions; extra-judicial police killings; banning of opposition parties; irregular allocation of land; and various other economic crimes.¹⁰ Asaala & add that where such human rights violations have enjoyed impunity for their acts, - impunity then incentivising further violations.¹¹

Normatively, the Bill of rights in the independence Constitution had several shortcomings that inhibited application for protection of the minorities, the oppressed and the marginalised. While chapter V of the independence constitution contained provisions relating to the protection of fundamental rights and freedoms and the circumstances for derogation, these entitlements were

⁷ See Courtney Finerty, Being Gay in Kenya: The Implication of Kenya's New Constitution for its Anti-Sodomy Laws. *Cornell International Law Journal Vol. 45 p 436-438, p 450.*

⁸ 'Minorities' in Kenya's Independence Constitution referred to Whites in the context of land ownership and were to be recognized as such for purposes of protection of their property.

⁹ Morris K. Mbondenyei, Human rights and democratic governance in Kenya: A post- 2007 appraisal. (Pretoria university Law Press, 2015),

¹⁰ Evelyn Asaala & Nicloe Dicker, Transitional justice in Kenya and the UN Special Rapporteur on Truth and Justice: Where to From Here? *African Human Rights Law Journal, (2001).*

¹¹ Ibid

limited to the traditional civil and political rights and did not expressly encompass other fairly important genres of rights such as socio-economic rights, women's rights, rights of sexual minorities, children's rights, rights of persons with disabilities or even concerns such as non-discrimination of persons with HIV/AIDS.¹² Judicial tribunals did not play a critical role in their enforcement using the international instruments ratified by the state.¹³ Hansungule had commented quite rightly about Kenya's old constitution as follows:

The current [independence] Constitution is not exactly 'human rights friendly'. Since 1963, Kenya has ratified or acceded to a number of international and regional human rights instruments which have increased the range of human rights standards designed to benefit the people. For example, there are now specific protections for women's rights as well as those of children in international conventions and declarations, which are not captured in the post-colonial constitution of Kenya. In theory, at least, Kenya has a Bill of Rights just like any other country with a written constitution. However, in practice, the Bill, far from reflecting the interests of the ordinary Kenyans, represents the parochial interests of the ruling class.¹⁴

According to Adar, the judicial system at this time could not protect human rights. The British Judges who had continued to serve in Kenya as part of the British overseas development aid were more susceptible to the manipulation of the executive than their Kenyan counterparts because they were seconded on contracts.¹⁵ Under the terms of the agreement between Kenya and the United Kingdom, the renewal of contracts was at the discretion of the Kenya government.¹⁶ A former British expatriate judge in Kenya, Eugene Cotran, openly stated that in cases in which the president had direct interest, the government applied pressure on the expatriate judges to make rulings in favour of the state.¹⁷ It was as a result of similar circumstances, that two

¹² Ibid p 3.

¹³ Ibid p 20.

¹⁴ M. Hansungule 'Kenya's unsteady march towards the lane of constitutionalism' (2003), *1 University of Nairobi law Journal* 43.

¹⁵ Africa Watch, Kenya: Taking Liberties. Washington DC: An African Watch Report, p 151. July 1991. "Hannan Lucy, Bias and Judicial Outrage". *New Law Journal (London)* 14 (1991): 900-901 And "Constitutional law According to Mr Justice Dugdale" *Nairobi law Monthly*, 34 (1991): 15-16).¹⁹

¹⁶ Ibid p 148.

¹⁷ Ibid p 151-152.

expatriate judges, justices Derik Schofield and Patrick O'Connor, resigned because of what they called a judicial system "blatantly contravened by those who are supposed to be its supreme guardians".¹⁸ Another British judge, justice Edward Torgbor's contract ended after he found in favour of the opposition leader, Kenneth Matiba, whose rights had been violated.¹⁹

Regarding implementation of international human rights standards, a report on Kenya submitted to the United Nations in 1993, the committee on Economic, social and Cultural Rights (CESCR) stated that although Kenya had been a party to the Convention since 3 January, 1976, it had not submitted a single report as stipulated under articles 16 and 17 of the covenant.²⁰ The Committee also observed that there was no institutional mechanism in Kenya responsible for the enforcement of human rights, with the High Court performing no constitutional role in this regard.²¹

Kenya's independence constitutional dispensation also fell far below the 'equal protection' threshold in at least three cardinal respects: First, although the Constitution prohibited discrimination on a number of grounds, differentiation (especially on grounds of gender) was permitted in matters of personal law such as adoption, marriage, divorce, burial and devolution of property on death.²² The old Constitution also did not list exhaustively the grounds upon which discrimination was proscribed. Glaringly omitted from this constitution were exclusions on the grounds of disability, health status, sexual orientation, to list but a few.²³

¹⁸ Ibid

¹⁹ Ibid

²⁰ Korwa G. Adar, Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978-2001, p 10. Available at www.csbsju.edu/Documents/Peace%20Studiespdf/Human%20Rights. (Accessed on 12th July, 2016).

²¹ Ibid p 10

²² Mbondenyi supra note 9 above, p 21

²³ Ibid

Another important aspect that undermined the rule of law and respect for human rights in post independence Kenya was the vicious amendments that the ruling class made to the nascent independence Constitution. While the independence Constitution sought to establish a feasible constitutional order, it became susceptible to numerous amendments. These were carried out in a manner that defaced the document that would otherwise have defined a democratic dispensation for Kenya.²⁴ Lumumba & Francheschi note that the political class seemed more content to a defaced Constitution that best served their interests than the practice of Constitutional principles.²⁵ There were numerous changes to ensure maximum control of political power, the eradication of any check systems and accountability mechanisms.²⁶

The most far-reaching amendments to the independence constitution are those which dismantled the multiparty democracy and ushered in a one party state and later the reversal of that system and the reintroduction of a multi-party political system in the 1990s.²⁷ The amendments ended the democratic protections entrenched at independence and resulted in the consolidation of power in the office of the President, who became both head of state and head of government. Other amendments abolished the bicameral legislature and entrenched a one-party system. In the view of Okoth-Ogendo, there was much focus on the Constitution as a document while the practice of Constitutionalism was completely disposed of. Thus, he wrote:

²⁴ Ibid p 26

²⁵ Patrick L. O. Lumumba & Louis Fancheschi. *The Constitution of Kenya, 2010: An Introductory*. (Strathmore University Press, 2010), p 30.

²⁶ Ibid

²⁷ Grace Maingi, *The Kenyan Constitutional Reform Process: A Case study of the Work of the Federation of Women Lawyers in Kenya (FIDA Kenya) in Securing Women's Rights*. *Feature Article in Vol. 64 p 65 Feminist Africa 15*.

The paradox lies in the simultaneous existence of what appears as a clear commitment by African political elites to the idea of Constitution and an equally clear rejection of the classical or any rate liberal democratic notion of constitutionalism.²⁸

Yash Pal Ghai, writes that between 1963 and 2005, the Constitution was amended many times that it could no longer be classified as rigid.²⁹ Most of the amendments were not intended to improve the quality of the Constitution but to entrench an authoritarian and undemocratic administration. Other amendments were intended to solve political problems facing the government from time to time. Most amendments were carried out by a Parliament dominated by members of one political party.³⁰ The destruction of checks and balances and the centralisation of power in the presidency created a tyrannical system that had little regard for human rights, compounding the already precarious situation occasioned by inadequate recognition of all human rights in the independence Constitution.

The years ranging from the 1980s to 2010 were marked by a sustained struggle by Kenyans for a new Constitutional dispensation. This struggle was underpinned by the desire for a new political, economic and social dispensation, capable of eradicating poverty, inequality and marginalisation.³¹ The long struggle by the people of Kenya was underpinned by the desire for a new political, economic and social dispensation, capable of eradicating poverty, discrimination, inequality and marginalisation.³² Although LGBT people did not openly join the struggle as did LGBT as did the South African LGBT people in the struggles against apartheid, they, in their silence and invisibility, took part as other Kenyans did. LGBT cut across the social, economic

²⁸ Hastings Wilfred Opinya Okoth-Ogendo, *Constitutions without Constitutionalism: Reflections on an African Political Paradox*, A working Paper prepared for the American Council of Learned Societies Comparative Constitutionalism Project. 1998, p 66. In Lumumba & Fancheschi, *supra* note 25 above, p 30.

²⁹ Yash Pal Ghai, *History of Constitution-making in Kenya*, Available at www.kas.de/wf/doc/kas_32994-1522-2-30.pdf?1210201115057 p 11

³⁰ *Ibid*

³¹ Nicholas Wasonga Orago, *The 2010 Kenyan constitution and the hierarchical place of international law in the Kenyan domestic legal system: a comparative perspective*. *African Human Rights Law Journal*, (2-013) 13 *HLJ* 415-440.

³² *Ibid*

and political divides, with concerns of poverty, disempowerment, discrimination affecting them.³³

Following many failed attempts at a new Constitution, on the 4th of August 2010, Kenyans exercised their sovereign right by overwhelmingly adopting the new constitution. It came against the backdrop of majoritarian tyranny and oppression of the weak, the minorities and vulnerable.³⁴ The exercise marked the end of a long perilous journey towards a new constitutional dispensation for Kenyans who desired fundamental changes in political, social and economic governance.³⁵

5.1.1: Human rights and the Constitution of Kenyan 2010

In their wisdom the Kenyan people decreed that past to reflect a status quo that was unacceptable and unsustainable through...a modern Bill of Rights that provides for economic, social and cultural rights to reinforce the political and civil rights giving the whole gamut of human rights the power to radically mitigate the status quo and signal the creation of a human rights State and society in Kenya...³⁶

Kenya's Chief Justice Willy Mutunga's caption captures the moral character and democratic architecture of the Constitution of Kenya 2010.³⁷ As a departure from the independence Constitution which was handed down to Kenyans, the 2010 constitution is a peoples' Constitution, an outcome of what is rightly rated the most participatory process of constitution-making in the entire world.³⁸ The highly participatory process that preceded the Constitution confirms Gordon's views that Constitutions, laws, and institutions are best created from the

³³ LGBT people and the struggle against apartheid in South Africa in Gustavo Gomes da Costa Santos, Decriminalising homosexuality in Africa: lessons from the South African experience. Human rights, Sexual orientations and Gender Identity. Available at sas-space.sas.ac.uk/4824/11/11GomesdacostaSantos_Decriminalising_homosexuality_in_Africa_lessons_from_the_South_African_experience. (Accessed on 27th July, 2016).

³⁴ Ibid

³⁵ Ibid p 61

³⁶ Willy Mutunga, The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme court Decisions. Available at www.constitutionnet.org/files/mutunga_-_theory_of_interpreting_ke. (Accessed on 10th March, 2016), p 1.

³⁷ Nicholas Wasonga Orago, supra note 31 above, p 430.

³⁸ Ibid

bottom up rather than the top down. At the bottom of a culture are the complex norms and relationships that bind people together, and through which they function as a society. It is at this level that we should begin to grow any institution.³⁹

Animated by the pervasive fear of tyranny of the majority and oppression that characterised the previous constitutional order, the Kenyan Constitution is sculpted in a manner that provides for checks and balances between the branches of government, and is entrenched against simple majoritarian change, and serves as the supreme law against which the validity of government action can be measured.⁴⁰ Kenya's Constitution is positive law in the sense that it does not merely set forth and structure the exercise of power.⁴¹ Rather, it establishes and imposes on the polity a set of rules and norms. Moreover, it designates enforcement mechanisms against both its subjects and its implementers.⁴²

The Constitution of Kenya performs four vital and overlapping functions. The document is descriptive, aspirational, structural, and checking.⁴³ The descriptive Constitution sets forth the aspirations and purposes of the country's constitutional regime. The structural constitution sets up the processes of government. And the checking Constitution preserves the democratic process through the super-majoritarian limitation on majority rule, especially through an extremely progressive Bill of rights devolved system of government and other provisions that protect the vulnerable, the marginalised minorities, the weak and the poor through recognition of social and economic rights.⁴⁴ Thus, the Constitution of Kenya 2010 has been rightly hailed as being

³⁹ Ibid

⁴⁰ Martin H. Redish and Mathew Heins, Pre-modern Constitutionalism. Northwestern Law, Law and Economics Series. Electronic copy available at <http://ssrn.com/abstract=2637977>

⁴¹ Ibid p 20

⁴² Ibid

⁴³ Ibid

⁴⁴ Ibid

transformative and its transformative aim has been affirmed by the High Court of Kenya in the case of *Satrose Ayuma and Others vs. The Attorney General and Others* as follows:

The crave for the new constitution in this country was by people's expectations of better lives in every aspect, improvement of their living standards and just treatment that guarantees them human dignity, freedom and a measure of equality.⁴⁵

The new Constitution fundamentally alters the defective governance framework through various far reaching reforms. The Constitution establishes the framework for restoration of constitutional democracy in Kenya. Migai Akech argues that the new constitution strengthens the likelihood of accountability for past human rights abuses and of guarantees that they will not reoccur.⁴⁶ The Constitution is significant in many ways. According to Murray, the Constitution does the formal work a Constitution is usually expected to do, establishing institutions, determining their mandates and their relationships and prescribing the limits of their powers. However, on a positive note and in stark contrast to the old Constitution, these provisions are set in an explicit normative framework which commits Kenya to constitutionalism and the rule of law and which assert social justice and inclusiveness as national values.⁴⁷ Article 10 (2) of the Constitution states that:

This constitution is the supreme law of the Republic and binds all persons and all State organs...Any law...that is inconsistent with this constitution is void...and any act or omission in contravention of this Constitution is invalid...and The national values and principles of justice include...participation of the people...human dignity, equality, social justice, inclusiveness, equality...

⁴⁵ *Satrose Ayuma and 11 Others vs. The Attorney General and 2 Others* High Court Petition No. 65 of 2010 22(Kenya). In Nicholas Wasonga Orago, *supra* note 21 above, p 39.

⁴⁶ Migai Akech, *Institutional Reforms in the new Constitution*, International Centre for Transitional Justice, 2010 of Kenya p5. Available at www.ictj.org/sites/default/ICTJ-Kenya-Institutional-Reforms.20(Accessed on April 3rd .2015)

⁴⁷ Christina Murray, *Kenya's 2010 Constitution*. Available at http://www.iapo.uct.ac.za/usr/public_law/staff/Kenyas%202010%20Constitution.pdf *Supra* note above p 11.

Rochmann observes that the Constitution endeavors to create a more equal society and provides a concrete foundation for achieving this goal. A strong commitment to the principles of equality and non-discrimination is evident throughout the Constitution; the bill of rights provides a strong set of protections from discrimination in both the public and private spheres, together with commendable enforcement mechanisms and remedies and key provisions elsewhere in the Constitution provide the basis to tackle some of the critical problems which perpetuate systemic *de facto* inequalities.⁴⁸ Scholars of constitutionalism have rated Kenya's constitution 2010 as transformative with huge democratic potential. One of such scholars is Karl Klare who states, "Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law." Such transformative constitutions as the ones of India, South Africa, Colombia, Kenya and others reflect this vision of transformation.⁴⁹

The positive aspects of the constitution have been well received by the citizens, human rights proponents, civil society organisations and the reformed political class as one of the most transformative and progressive constitutions in a modern democracy.⁵⁰ Most importantly, the Constitution sets out values for a new stage in Kenya political life. It ambitiously provides an ethical framework within which the state must operate and seek to describe an inclusive nation. More than anything else, in the constitution, these provisions reflect the concerns and aspirations of the many Kenyans who participated in the constitution-making process over the past 20 years.⁵¹ The country's new supreme law, which was endorsed by an overwhelming majority, is the foundation for ushering in the changes that Kenyans have been clamouring for decades,

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Ibid

⁵¹ Ibid p 2

including restructuring of governance and expansion of the Bill of Rights. Having a Bill of Rights is not an end in itself; the text is in ensuring that Kenyans have effective exercise of their human rights.⁵²The following section discusses the concept and significance of Bills of Rights.

5.2: Substantive human rights guarantees under the Constitution of Kenya, 2010

The dominant view holds that human rights are those entitlements which become due to every human person at the commencement of life. Thus, the only qualification for earning them is the act simply of being human. It follows that rights are not granted by governments but accrue to human beings naturally. Law and governments only affirm this reality.⁵³Because of their centrality to human worth and dignity, rights have become an important subject and pillar of contemporary constitutions. The issue of their recognition, promotion and protection is generally given center-stage.⁵⁴

Mutakha Kangu observes, most countries claim to be founded upon a jurisprudence and culture of protection and promotion of fundamental rights and freedoms.⁵⁵ Constitutions are therefore judged based on how effectively they secure fundamental human rights and liberties. Bills of rights have become an important tool for entrenching human rights and indeed, it has rightly been argued that in the modern society, it is becoming increasingly difficult to fathom a constitution without a Bill of Rights.⁵⁶Kenya's Bill of Rights in the constitution 2010 has been described as a pillar of constitutionalism. It is the anchor of the human rights of people. The following section discusses the Bills of Rights.

⁵² Occasional Report, Kenya National Commission on Human Rights, October, 2011 at xiii

⁵³ John Osogo Ambani & Morris Kiwinda Mbondenyei, A New Era in Human Rights Promotion and Protection in Kenya? An Analysis of the Salient features of the 2010 Constitution's Bill of Rights. In Human Rights and democratic governance in Kenya: A Post-2007 appraisal. (Pretoria University Law Press (PULP), 2015), p 17

⁵⁴ Ibid

⁵⁵ John Mutakha Kangu, 'The Theory and design of Limitation of fundamental rights and freedoms' (2008), 4 *The Law Society of Kenya Journal 1*.

⁵⁶ Ibid

5.2.1: The Bill of Rights and the guarantee of individual rights

One of the most profound innovations in the Constitution of Kenya 2010 is its Bill of Rights, contained in chapter four of the Constitution. This is recognition of the importance of a Bill of Rights in a modern democratic constitution. It has rightly been argued that Bills of Rights are important as symbols of the values that a country stands for. It contains the Principles of human rights which are a key “countervailing force to the exercise of totalitarian, bureaucratic and institutional power – widely identified as the greatest threats to the liberty of the individual and democratic freedoms”.⁵⁷

A Bill of Rights can be an important element in the movement towards creating a culture of constitutionalism, “Constitutionalism enshrines respect for human worth and dignity as its central principle, fostering conditions for political participation and legitimating substantive restraints on governmental power, even in cases where action purportedly mirrors the popular will.”⁵⁸ So crucial are human rights that in Kenya’s context the problems of the Bill of Rights in the repealed constitution were a prominent reason why the people opted for a review of the Constitution.⁵⁹ There were several accounts why the preceding Bill of Rights was invariably considered retrogressive and obsolete. One explanation is that the Chapter on the Bill of Rights was replete with limitations; whose enormity rendered the enjoyment of human rights peripheral. A writer noted of the repealed Bill of Rights thus:

⁵⁷ Sir Anthony Mason, “A Bill of Rights for Australia” 5 Australia Bar Review (1989) 79 at 79-80. In Occasional Report, Kenya National Commission on Human Rights, above p2

⁵⁸ Mac Darrow ad Philip Alston, “Bills of Rights in Comparative Perspective, p 490. In Occasional Report, Kenya National Commission on Human Rights, October, 2011 p 4.

⁵⁹ Osogo Ambani and Mbondenyi, supra note 53 above, p 18.

Indeed one of the biggest problems with fundamental human rights in Kenya stems from the issue of limitation of rights. The Kenyan Bill of Rights has even been described as a bill of exceptions rather than rights.⁶⁰

Under the Constitution of Kenya 2010, the Bill of rights is presented as an integral part of Kenya's democracy and the framework for social, economic and cultural policies. It thus has both juridical and extra-juridical utility.⁶¹ According to Osogo & Mbondenyei, applied in the later form, the Bill of Rights runs beyond the precincts of the law and judicial tribunals to be the thread that weaves through national policies and agenda. The two rightly argue that compared to the Bill of Rights in the repealed constitution or those in many other contemporary jurisdictions, the Bill of Rights in the 2010 Constitution is unique in a number of critical respects.⁶² It exhibits the following salient features – it has an exhaustive catalogue of entitlements, contains the different genres of human rights; provides for an expansive 'non-discrimination clause'; expresses regard for substantive equality (affirmative action); reserves certain rights from derogation; among others. Most importantly, it opts for a centralised limitation clause as opposed to multiple internal limitation clauses; and has both vertical and horizontal implications. It also comes with viable enforcement apparatuses.⁶³

The Bill of Rights comprises articles covering civil, political, economic, social and cultural rights. While the Constitution is clearer on the rights due to Kenyans, their realisation requires significant policy, legal and administrative changes. The inclusion of economic, social and cultural rights in the Bill of Rights will require specific and deliberate legislative and policy interventions on the part of the State if progressive realisation is to be achieved as envisaged in

⁶⁰ Ibid p 17.

⁶¹ Ibid p 22

⁶² Ibid

⁶³ Ibid

the Constitution.⁶⁴ These principles are entrenched in constitutions around the world to provide citizens with protection from unwarranted interference from the state and to offer a legal basis upon which to challenge government action that violates them. A Bill of Rights is particularly important to protect the rights of religious, ethnic, linguistic and other minorities, whose interests can be easily ignored by the numerical majority and overruled by democratically elected governments.⁶⁵

As argued in chapter three of this thesis, this omission is a serious draw-back to the realisation of human rights by sexual minorities.⁶⁶ Others argue that failure to recognise sexual orientation as a ground of discrimination, may not, if the Constitution is purposively interpreted, be fatal. Finerty argues that although the Constitution does not explicitly name sexual minorities as a “vulnerable groups,” it includes “members of minority or marginalised communities’ within this category. In this view, given the societal oppression, stigmatisation and abuse that LGBT individuals currently experience in Kenya, they may qualify for this status and corresponding protections under the new Constitution.⁶⁷

5.2.3: Individual rights and fundamental freedoms relevant to sexual minorities

A remarkable aspect of the Constitution is that the Bill of Rights outlaws both direct and indirect discrimination, an approach that reflects a deep appreciation of the invidious manner in which discrimination is manifest, both consciously and unconsciously. The Bill of Rights contains a general commitment to equality before the law and equal protection under the law. Under the Bill of Rights, every individual under Kenya’s jurisdiction has the following rights and

⁶⁴ Kenya National Commission on Human Rights Occasional Report, October, 2011, p 1.

⁶⁵ Ibid p 3.

⁶⁶ See Chapter 3 section on limitations of international human rights law.

⁶⁷ Courtney Finerty, *supra* note 7 above, p 450.

fundamental freedoms, among others: the right to life,⁶⁸ equality and freedom from discrimination,⁶⁹ human dignity,⁷⁰ freedom and security of person – which includes protection from torture and cruel, inhuman or degrading treatment,⁷¹ privacy,⁷² freedom of expression,⁷³ freedom of association,⁷⁴ the highest attainable standard of health,⁷⁵ right to education,⁷⁶ right of access to justice.⁷⁷

Elaborating on the right to freedom from discrimination, the constitution prohibits discrimination on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language, or birth.⁷⁸ In addition, the Bill of Rights recognises that sometimes these grounds of discrimination overlap, and therefore incorporates protections against intersectionality of different grounds of discrimination.⁷⁹ One glaring shortcoming of the Bill of Rights, however, is its failure to recognise sexual orientation as a ground of discrimination. Although the Constitution does not explicitly list sexual orientation as a prohibited ground of discrimination, the rights and fundamental freedoms set forth in the Bill of Rights must apply to LGBT individuals in Kenya under its “on any ground” catchall provision.⁸⁰ The Constitution also creates fundamental freedoms that cannot be limited regardless of any other provision in the Constitution:⁸¹ freedom

⁶⁸ Constitution of Kenya Article 26

⁶⁹ Constitution Article 27

⁷⁰ Ibid Article 28

⁷¹ Ibid Article 29

⁷² Ibid Article 31

⁷³ Ibid Article 33

⁷⁴ Ibid article 36

⁷⁵ Ibid Article 43 (1) (a).

⁷⁶ Ibid Article 43 (1) (1)

⁷⁷ Ibid Article 48.

⁷⁸ Courtney Finerty, *supra* note 60 above, p 449.

⁷⁹ Kenyan Constitution, art 27

⁸⁰ Ibid

⁸¹ See Constitution of Kenya, Article 25.

from torture and cruel, inhuman or degrading treatment or punishment,⁸² freedom from slavery and servitude,⁸³ the right to fair trial⁸⁴ the right to an order of habeas corpus.⁸⁵ By having a Bill of Rights, Kenya has accepted the idea of international human rights as universally applicable and relevant to Kenyan society.⁸⁶

However, the ability of the Executive, Legislature and Judiciary to effect change depends somewhat on the perceived relevance of the Bill of Rights to Kenyan society. State organs will only be willing to provide a robust interpretation of Rights and its associated jurisprudence, if they perceive the Bill of Rights as legitimate and a reflection of values widely held in society.⁸⁷ The rights in Kenya's Bill of Rights are very progressive – they contain not only civil and political rights, but for the first time, contain numerous social, economic, and cultural rights. The recognition of socio-economic and cultural rights in the Constitution is a welcome step in the country's effort to alleviate the social and economic conditions of those marginalised in society, the fact that their realisation is progressive and depends on availability of resources is problematic as this may render their realisation a mirage. It is appreciated that the obligation of placed on the state is the implementation of economic, social and cultural rights is to take steps to the maximum of their available resources with a view to achieving progressively, the full realisation of the rights.

However, as argued by Abidioun Dada, if human rights are declared to be inter-dependent and interrelated, the dichotomy between civil and political rights and socio-economic rights in terms of implementation must be dismantled. This has become particularly important and urgent

⁸² Ibid Article 25 (a).

⁸³ Ibid Article 25 (b).

⁸⁴ Ibid Article 25 (c).

⁸⁵ Ibid Article 25 (d).

⁸⁶ Ibid

⁸⁷ Ibid p 4

because the civil and political rights cannot be meaningfully enjoyed in a state of economic and social deprivation.⁸⁸ As Justice Bhagwati incisively noted:

Both categories of human rights are equally important. There is a close inter-linkage between the two categories of human rights because all human rights and fundamental freedoms are indivisible and interdependent and each category of human rights is indispensable for the enjoyment of each other. Hence, it is axiomatic that the promotion of respect for enjoyment of one category of human rights cannot justify the denial of the other category of human rights.⁸⁹

5.2.3: Significance of the incorporation of international human rights into the Constitution

From an international human rights perspective, the Constitution of Kenya embraces international law in several ways. As stated above, the Constitution's comprehensive Bill of Rights is drawn entirely from several human rights instruments, including the Universal Declaration of Human Rights, the ICCPR, and the ICESCR.⁹⁰ Implicit in this comprehensive embrace of rights is the notion that rights are interdependent, and that civil and political rights reinforce social and economic rights, and vice-versa.⁹¹ According to Penelope Andrew this recognition eschews a bifurcated or hierarchical approach to rights, in favour of one that views all rights as integral to the pursuance of dignity and equity.⁹² This is good news for sexual minorities in the country in the sense that treaties such as ICCPR whose provisions have influenced international jurisprudence in the recognition and protection of sexual minorities around the world are now directly applicable in Kenya.

⁸⁸ Jacob Abiodun Dada, Human Rights under the Nigerian constitution: Issues and Problems. *International Journal of Humanities and Social science* Vol. 2 12 [Special Issue – June 2012] p 10

⁸⁹ In Chidi Anselm Odinkalu, Back to the future: The Imperative of Prioritising for the Protection of Human Rights in Africa: (2003) *JALI* – 37, p 1.

⁹⁰ Penelope E. Andrews p 840.

⁹¹ Ibid

⁹² Ibid

Apart from incorporating international principles into the Constitution, some scholars argue that Kenya has undertaken constitutional reforms that have strengthened the role of international law in its domestic legal system.⁹³ Through Article 2 (5) and (6), the Constitution has, albeit in a not so clear manner, changed the country's approach to international law and practice. The country's Constitution includes a role for international law within the country. The most important provisions are articles 2 (5) and 2(6) of the constitution. Article 2(6) deals with the application of international agreements and states that "[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."⁹⁴ Under this Article, international agreements apply as part of Kenya's domestic law provided that they have been ratified.⁹⁵

Ratification of international agreements, in turn, is regulated by the Treaty Making and Ratification Act No. 45 of 2012. Under the Act, which applies to all multilateral and some bilateral treaties, the national executive is responsible for initiating treaty-making processes as well as negotiating and ratifying treaties.⁹⁶ However, the cabinet and parliament must approve all treaties before they are ratified.⁹⁷ Once an agreement is ratified, it has a dual effect: the agreement binds Kenya in relation to other state signatories, and its provisions become authoritative law within the country. Scholarly arguments have arisen as what exactly this provision means.

Oduor for instance, observes that contrary to what it may appear to suggest, the Act merely provides for the process of ratification and does not purport to give parliament the power to

⁹³ Justice Alfred Mavedzenge, Comparing the Role of International law in South Africa and Kenya. *Cornell International Law Journal Online*. P 1

⁹⁴ See Art. 2 (6) of the Constitution of Kenya 2010.

⁹⁵ Ibid

⁹⁶ See The Treaty Making and Ratification Act No. 45 of 2012. S 3(2), 4 (10 (Kenya).

⁹⁷ Justice Alfred Mavedzenge supra note 93 above, p 2.

‘domesticate’ treaties once ratified.⁹⁸ With the Constitution, and the statute, it would prima facie appear that Kenya has fully embraced monism insofar as domestic effect of international law is concerned. However, having regard to the apparently varied conceptions of the term ‘monism’, coupled with the jurisprudence on article 2(6) of the Constitution, it becomes apparent that the issue is not one that can be easily disposed of.⁹⁹ He notes other areas of concern. For instance, while the Treaty Making and Ratification Act is expressed to apply to treaties made after its commencement, the position is not clear with respect to those that were ratified before. In his view, it may be argued that those treaties have already been ratified and need not be subjected to any further process. Indeed courts have taken it for granted that those treaties having already been ratified are enforceable locally without the necessity of further procedures.¹⁰⁰

Article 2(5) of Kenya’s Constitution provides that “the general rules of international law shall form part of the law of Kenya.”¹⁰¹ However, the exact meaning of this provision is yet unclear. There are two competing schools of thought on how to interpret “general rules.”¹⁰² One school holds that it refers to the rules of customary international law.¹⁰³ The other holds that “general rules” means the general principles of international law, which could refer to customary law, to the general principles of law under Article 38(1) (c) of the Statute of the International Court of Justice, or more generally to any logical proposition that is an extension of preexisting international law and based on judicial reasoning.¹⁰⁴ Others argue that the spirit of Article 2(5)

⁹⁸ Maurice E. Oduor, The Status of International law in Kenya. *Africa Nazarene University law Journal*, 2 Part 2 (2014), P 101.

⁹⁹ Ibid p 102

¹⁰⁰ For instance in the case of *Re The Matter of Zipporah Wambui Mathara*, Bankruptcy Cause No. 19 of 2010, of Kenya (2010) eKLR.

¹⁰¹ See Constitution of Kenya Art. 2 (5) (2010) (Kenya)

¹⁰² See Oluoch Asher, Incorporating Transnational Norms in the Constitution of Kenya: The Place of International Law in the Legal System of Kenya. 3 *Int’l L. J. Human & Soc. Sci.* 266, 267 (2013).

¹⁰³ Ibid

¹⁰⁴ Ibid

and (6) of the Constitution is well-meaning but it is drafting confusion, thus not giving a clear indication as to whether Kenya is dualist or monist, thus putting into doubt the exact position of international law in Kenya's domestic legal system. Oluoch argues that the wording of Article 2 (5) of the Constitution of Kenya creates ambiguity as to whether customary international law applies and if it does, whether it takes precedence over domestic statutes.¹⁰⁵ Justice Alfred Mavedzenge argues that this is an anomaly in Kenya's Constitution which does not add value to its constitutional scheme.¹⁰⁶

According to Maurice Oduor, the expression of international law as forming part of the law of Kenya, while deceptively simple, is not without its ambiguities, especially in relation to the local effect of international legal norms.¹⁰⁷ From the cases so far decided, it is clear that determining the correct place of international law in Kenya has not been an easy task, with courts sometimes reaching different positions. While some courts have contemplated a very robust role for international law domestically, others have ordained a status that is hardly different from that of local statutes.¹⁰⁸ Oduor attributes this divergence of opinion to the inelegance in drafting of the Constitution, which failed to specify where international law falls in the hierarchy of norms; the Constitution has sown the seed of interpretive confusion in the courts.¹⁰⁹ These two provisions

¹⁰⁵ Ibid

¹⁰⁶ Justice Alfred Mavedzenge, *supra* note 93 above, p 4.

¹⁰⁷ Ibid

¹⁰⁸ Maurice E. Oduor, *supra* note 98 above, P 98.

¹⁰⁹ Oduor argues that the *travaux pre'paratoires* seem to indicate this intention going by the many versions of the draft Constitution that were presented to Kenyans. For example, the Proposed New constitution that was rejected during the 2005 referendum provided for the recognition of international law. That document was an apparently watered down version of a draft ('Bomas Draft') that had been presented by the constitution of Kenya Review Commission (CKRC); a body that was seen as more in touch with the interests of Kenyans. In fact, what happened was that the Government took the constitution that had been proposed by the CKRC, removed those parts that it did not agree with, presented the document as the Proposed New constitution ('Wako Draft') then asked Kenyans to vote for it. It was defeated. But even this draft that was deemed to safeguard the political interests of the then leaders was very robust and radical in its treatment of international law. For instance, clause 3 (g) stated that '[t]he laws of Kenya comprise...[the] Constitution and each of the following laws to the extent that it is consistent with ...[the] Constitution – customary international law, and international agreements applicable to Kenya'. See Proposed

have brought with them uncertainty as to whether Kenya is still a dualist state or has transitioned to a monist state. Case law on this issue is unhelpful with judges appearing to misunderstand the two provisions. In the case of *Zipporah Wambui Mathara*¹¹⁰ Justice Koome stated that

By virtue of the provisions of Section 2(6) of the Constitution of Kenya 2010, International Treaties, and Conventions that Kenya has ratified, are imported as part of the sources of the Kenyan Law. Thus the provision of Article 11 of the International Covenant on Civil and Political Rights which Kenya ratified on 1st May 1972 is part of the Kenyan Law.

In the case of *David Njoroge Macharia v Republic*, the CA does not appear to take a firm position on the import of Art 2.6, only concluding that the position *may have changed* with the adoption of the Constitution of Kenya, 2010. In this regard, the Court of Appeal stated that

Kenya is traditionally a dualist system, thus treaty provisions do not have immediate effect in domestic law nor do they provide a basis upon which an action may be commenced in domestic courts. For international law to become part and parcel of national law, incorporation is necessary, either by new legislation, amended legislation or existing legislation. However, this position may have changed after the coming into force of our new Constitution.

Article 2(6) seems to suggest that the country moved to a monist state as much as it also defines the relationship between Kenya's national laws and international law. To this extent, the Court of Appeal asserted that:

By virtue of Article 2(5) and 2(6) of the Constitution, international treaties and covenants to which Kenya is a party, as well as the rules of international law form part of our law. We wish to state from the outset that while international instruments and the norms of international law do form part and parcel of our law, they do so only in so far as they are not inconsistent with the Constitution...¹¹¹

Oduor further argues that by itself, the Constitution does not shed light on the issue of treaty making. While Article 2 (6) provides that all treaties 'ratified' become law, article 94(5)

New Constitution of Kenya, Kenya Gazette Supplement 63 of 2005. See also Consecution Net, 'Kenya: Country Constitutional Profile', available at [http://www. Constitutipnnnet.org/country/kenya-country-constititional-profile](http://www.Constitutipnnnet.org/country/kenya-country-constititional-profile). (Accessed on 30th January, 2016).

¹¹⁰Zipporah Wambui Mathara, Bankruptcy Cause No. 19 of 2010. In the Matter of Bankruptcy Act, eKLR.

¹¹¹Joseph Njuguna Mwaura & 2 Other v Republic (2013) eKLR.

reserves the power of making law to Parliament in the edict that '[n]o persons or body, other than Parliament, has the power to make provision having the force of law in Kenya except under the authority conferred by ...[the] Constitution or by legislation. While this point has not been clear among commentators, it would appear that for a treaty to 'have the force of law' and hence become part of the law of Kenya', either the ratification process must be brought within the legislative ambit of Parliament or a treaty once ratified must again be approved by Parliament.¹¹² The latter scenario seems inimical to the spirit and intention of the drafters whose intention, in view of the then prevailing jurisprudence, may have been to allow a clean break from the traditional dualistic approach to international law.¹¹³

Others like Mavedzenge argue that by virtue of Article 2 (5) and (6) of the constitution, Kenya has now adopted a monist approach to international relations and practice.¹¹⁴ As compared to the South African Constitution which requires domestication of ratified international agreements thus retaining a dualist approach, Kenya's Constitution requires only ratification¹¹⁵ which in his view gives Kenya monistic approach to international law and further giving the country greater consistency between its stance on domestic and international issues and a simplified procedure for applying international law.¹¹⁶ In view of the cited ambiguity and confusion regarding the meanings in Article 2 (5) and (6) of the Constitution, all is not lost. Article 2 (5) would require judicial interpretation indicating what really general rules of international law are and clarifying methods of ascertaining these rules. The decision in *Re The Matter of Zipporah Wambui Mathara*,¹¹⁷ attempts to do this. The inclusion of international treaties and customary law into the

¹¹² Maurice E. Oduor, *supra* note 98 above, p 58.

¹¹³ *Ibid*

¹¹⁴ *Ibid*

¹¹⁵ *Ibid*

¹¹⁶ *Ibid*

¹¹⁷ *Re The Matter of Zipporah Wambui Mathara* *supra* note 108 above.

Constitution signals a paradigm shift in Kenya's approach to application of international law and practice. It not only signals the country's move away from the time-wasting debates between monism and dualism, but it also signals Kenya's new commitment to upholding international human rights standards and principles. It also signifies Kenya's new commitment to international enforcement standards.

The new obligation that Kenya has committed itself through a departure from the strictly dualist posture that has guided the country marks a new dawn in Kenya's international relations. As rightly noted by Tom Ginsburg, constitutionalising particular treaty commitments is a very strong form of signal as it raises the cost of exiting the treaty and thus communicate a high level of domestic commitment to foreign parties.¹¹⁸ Indeed Ginsburg argues that treaty-making structures have been regularly modeled as a signal to communicate credibility of commitment to foreign countries.¹¹⁹

Further, this move also communicates to Kenyans as domestic audience that the treaties are fundamental and unlikely to be exited lightly by the country. The introduction of Article 2 (6) also avoids situations where the country signs a treaty more as a ceremonial gesture than because of real commitment to the tenets of the treaty and thereafter shelves its implementation.¹²⁰

Kenya is certainly embracing the current global trend which imperceptibly yet intensely (directly or indirectly) dictates an international legal pattern of behaviour to the States; a certain minimum level of international standards concerning the promotion and protection of human rights and fundamental freedoms. This trend in turn, suggests taking positive measures by sovereign states to bring municipal legislation to conformity with the internationally established human

¹¹⁸ Tom Ginsburg, *Commitment and Diffusion: How and Why National constitutions Incorporate International Law*, HeinOnline – 2008 U Ill. L. Rev. 202 (2008), p 226

¹¹⁹ Ibid

¹²⁰ Ibid p 11

rights.¹²¹In this field, the main sphere of government bodies' activities lies in the implementation of internationally recognised measures in accordance with the strategy of legal reform, which in practice amounts to legislative, administrative, judicial, educational and other activities taking into account the requirements of the basic principles and norms of modern international law and legal traditions of the respective states.¹²²

To highlight the difficulty of dualist approaches by most Common-law countries – Kenya included, Jacob Abiodun Dada argues that the courts have tended to adopt a conservative role in regard to creating jurisprudence on treaty incorporations.¹²³ Richard Frimpong Oppong notes that this debate has been held at the expense of the substance of the norms at issue and instead concentrated on the source or pedigree of norms.¹²⁴ Oppong rightly argues that;

By creating a dichotomy between norms on the basis of their sources, we risk being blinded from assessing the merits of the contents of the norms at issue.¹²⁵

This controversy is for example reflected in the classic case of *Mabo vs. Queensland (No, 2)*, in which Justice F.G, Brennan explained the unacceptability of the former statement of the Australian common law by reference to universal principles of human rights law.¹²⁶He stated that:

[The ICCPR] brings to bear pm the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of common law, especially when international law declares the existence of

¹²¹ Aslan Abashidze, *The Relationship Between International Law and Municipal Law: Significance of Monism and Dualism Concepts*. P 24. Available at www.intlaw-rudn.com/research-en/library/publications/ponyatie-me. (Accessed on 28th January, 2016).

¹²² *Ibid* p 25

¹²³ Jacob Abiodun Dada, *supra* note 88 above, P 10.

¹²⁴ Richard Frimpong Oppong, *Re-imagining international law: An examination of Recent Trends in the Reception of International law International Legal Systems in Africa*. *Fordham International Law Journal*, Vol. 30 p 298.

¹²⁵ *Ibid*

¹²⁶ *Mabo vs. Queensland (No, 2)*, (1992) 175 CLR

universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.¹²⁷

James Allan and Grant Huscroft, who express significant skepticism about the citation of foreign and international law, primarily on the basis that these sources lack the democratic credentials of domestic legal sources:

It is one thing – and perhaps in itself a difficult thing – to justify the power handed to domestic judges to interpret a domestic bill of rights adopted after debate and disagreement and some sort of head counting exercise sometime in the nation’s past. It is a significantly different thing --to try to justify giving a role to the decision of foreign courts and international tribunals to gainsay elected ...legislators.¹²⁸

The controversy that has dogged application and adoption of foreign judgments in domestic regimes is not just confined to commonwealth countries. The issue has bothered no lesser Court than the Supreme Court of the USA as well. This has been demonstrated in the case of *Lawrence v. Texas*. On June 26, 2003, the Supreme Court of the USA in this case overruled the earlier one of *Bowers vs. Hardwick* in which presiding Justice Kennedy’s opinion was devoted to explaining why *Bowers* was wrong at the time it was decided.¹²⁹ After pointing out flaws in Justice White’s historiography, Justice Kennedy noted developments in England and under the European Convention, specifically citing *Dudgeon*, to make the point that there was, even in 1986, an emerging international view that such laws violated basic human rights.¹³⁰ Justice Kennedy said that the *Dudgeon* decision was “at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilisation.” This drew an angry response from Justice Antonin Scalia in dissent. He said:

¹²⁷ Ibid

¹²⁸ James Allan and Grant Huscroft, ‘Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts’ (2006) 43 *San Diego Law Review* 1, 58.

¹²⁹ Arthurs Leonard, The Impact Of International Human Rights Developments On Sexual Minority Rights. *New York Law School Law Review*, Vol. 49 p 525

¹³⁰ Arthurs Leonard, The Impact Of International Human Rights Developments On Sexual Minority Rights. *New York Law School Law Review*, Vol. 49, p 525

The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta.... Dangerous dicta." ...since 'this Court should not impose foreign moods, fads, or fashions on Americans.

He quoted from Justice Clarence Thomas's statement concerning a certiorari petition in another recent case.¹³¹ Was the Court's decision imposing "foreign moods, fads, or fashions on Americans?" Were the references to the European Court of Human Rights and English law reform "meaningless dicta?" But Justice Kennedy used European Convention terminology as part of his rhetoric when he wrote: "The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."¹³² Clearly, Justice Kennedy and the justices who agreed to sign his opinion were comfortable with importing a concept from an international human rights source into their interpretation of the boundaries of "liberty" protected by the Due Process Clause.¹³³

Kenya as a commonwealth country, has always primarily followed a dualist approach which requires that domesticating legislation be enacted by parliament for ratified international law treaties to have application in the domestic legal system. Before the 2010 Constitution, the Kenyan courts had developed an inconsistent practice in relation to international law, with the courts generally shying away from directly applying international law. This inconsistency is

¹³¹ Ibid Justice Thomas's opinion was not an opinion by the Court, but rather a comment concurring with a denial of certiorari and thus of no precedential significance *Foster v. Florida*, 537 U.S. 990 n.* (2002), quoted in *Lawrence*, 539 U.S. at 598. Justice Scalia's parenthetical reference to countries that retain sodomy laws fails to specify the countries, of course, because they are mainly theocratic dictatorships, usually of Islamic background. All of the major western democracies have abolished laws against consensual sodomy

¹³² Arthur Leonard, *supra* note 1287 above p 525

¹³³ Also signing the Court's opinion were Justices Souter, Breyer, Ginsberg and Stevens. Justice O'Connor concurred in a separate opinion on other grounds. See *Lawrence*, 539 U.S. 558.

reflected in identified two cases: the case of *Okunda v. Republic public*,¹³⁴ and the latter case of *Rono vs. Rono*.¹³⁵

In the *Okunda* case, the issue in question was the supremacy of East African Community ("EAC") law over Kenyan law was in issue. Two persons were being prosecuted under the Official Secrets Act 1968 of the EAC without the consent of the counsel for the community. Under Section 8(1) of the Act, such consent was necessary.¹³⁶ The question was whether the Attorney General of Kenya could institute that proceeding without such consent. Resolving this issue involved examining the relationship between the community law and Section 26(8) of the Kenyan Constitution, which provided that, in the performance of his duty, the Attorney General shall not be subject to the "direction or control of any person".¹³⁷

Counsel for the Community submitted that the conflict between the two provisions should be resolved in favor of Community law. He argued that, under the Treaty for East African Co-operation, the members undertook to take all steps within their power to pass legislation to give effect to the Treaty, and to confer upon Acts of the Community the force of law within their territory.¹³⁸ Further, under Article 4 of the Treaty, the members were enjoined "to make every effort to plan and direct their policies with a view to creating favourable conditions for the development of the Common Market and the achievement of the aims of the Community." In the view of counsel, by these provisions, member States agreed to "surrender part of their sovereignty."¹³⁹ The Court stated that:

¹³⁴ See *Okunda v. Republic*, 9 I.L.M. 556 (1970) (Kenya)

¹³⁵ *Rono vs. Rono* (2005) AHRLR 107 (KeCA 2005)

¹³⁶ Richard Frimpong Oppong, *supra* note 124 above, p 298.

¹³⁷ *Ibid*

¹³⁸ *Ibid*

¹³⁹ *Ibid*

if we did have to decide a question involving a conflict between Kenyan law on the one hand and principles or usages of international law on the other...and we found it impossible to reconcile the two, we, as a municipal court, would be bound to say that Kenya law prevailed.

Recent cases have, however, established the prevailing judicial position on the applicability of international law in the Kenyan domestic legal system prior to the enactment of the 2010 Constitution.¹⁴⁰ The Court of Appeal's celebrated case of *Rono vs. Rono* is such a case is a good example of the new paradigm shift in Kenya's treatment of international law by its local courts.¹⁴¹ *Rono vs. Rono* is a succession matter relating to the estate of Stephen Rono Rongoei Cheron who died intestate. He was a farmer in Uasin Gishu county of Kenya. At the time of his death he left a sizeable number of properties, both moveable and immoveable. He was also survived by two wives and nine children (six daughters and three sons).¹⁴² Upon application by the survivors of the deceased's estate, the High Court granted Letters of Administration to the two widows and the eldest son without objection from other members of the family.¹⁴³

Disputes however soon arose about the distribution of the assets and liabilities of the estate and *viva voce* evidence was recorded for determination of the distribution by the court. Ultimately Lady Justice Roselyn Nambuye (now a justice of the Court of Appeal), determined the distribution, giving a bigger share to the first house which had both sons and daughters but gave a lesser share to the second house, which had only daughters. The rationale for giving a bigger share to the first house and to the male children was because the land was bought and improvements were made, before the second house came into existence, and because in her learned view, the girls of the family had an option of getting married and leaving the home. At

¹⁴⁰ Nicholas Wasonga Orago, *supra* note 31 above, p 416

¹⁴¹ *Ibid* *Rono vs. Rono* p 416.

¹⁴² *Ibid*

¹⁴³ *Ibid*

all events, according to Keiyo traditions, girls have no right to inheritance of their father's estate.¹⁴⁴

The High Court in its judgement noted that the pattern of inheritance was patrilineal, and that in polygamous households, distribution was by reference to the house of each wife irrespective of the number of children in it. Daughters receive no share of inheritance. The superior court also referred to the Kenyan Law of Succession Act sections 27, 28, 40(1) and (2) relating to distribution to dependents and division to houses according to the number of units, adding the widow as an additional unit. In the end, the learned Judge took into consideration the wishes of the parties and of written law that the girls should also inherit. But she found that the possibility of the girls getting married and inheriting further property from their new families would give them an unfair advantage over the other family members. She held:

The situation prevailing here is rather peculiar though not uncommon in that one house has sons while another has only daughters. Statute law recognises both sexes to be legible [eligible] for inheritance. I also note that it is on record that the deceased treated his children equally. It follows that all the daughters will get equal shares and all the sons will get equal shares. However, due to the fact that daughters have an option to marry the daughters will not get equal shares to boys. As for the widows if they were to get equal shares then the second widow will be disadvantaged as she does not have sons. Her share should be slightly more than that of the first widow whose sons will have bigger shares than daughters of the second house.¹⁴⁵

This High court decision was late overturned in unanimous decision of the Court of Appeal, terming it a violation of international human rights, most specifically the International Convention of the Elimination of all forms of Discrimination Against women (CEDAW). In upholding the appeal lodged by the second household, the Court of Appeal asked itself if

¹⁴⁴ Ibid

¹⁴⁵ Ibid

international law was of relevance for consideration in the case at hand. The court answered this question in the affirmative, noting that

...as a member of the international community, Kenya subscribes to international customary laws and has ratified various international covenants and treaties. In particular, it subscribes to the international Bill of Rights, which is the Universal Declaration of Human rights (1948) and two international human rights covenants: the Covenant on Economic, Social and Cultural rights and the Covenant on Civil and Political Rights (both adopted by the UN General Assembly in [1966]). In 1984 it also ratified, without reservations, the Convention on the Elimination of All Forms of Discrimination Against Women, in short, 'CEDAW'. Article 1 thereof defines discrimination against women as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. In the African context, Kenya subscribes to the African Charter of Human and Peoples' Rights, otherwise known as the Banjul Charter (1981), which it ratified in 1992 without reservations. In article 18, the Charter enjoins member states, *inter alia*: 'ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions'.¹⁴⁶

The Court noted that by recognising sex and gender as grounds of discrimination in the old constitution, the country was moving in tandem with emerging global culture, particularly on gender issues. Of relevance to this discussion is that the courts noted the previously raging debates in the courts' jurisprudence about the application of international laws within the domestic context¹⁴⁷ acknowledging that Kenya subscribed to the common law view that international law is only part of domestic law where it has been specifically incorporated.¹⁴⁸ They noted that things have since changed and the current thinking on the common law theory is that both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation.¹⁴⁹ The court

¹⁴⁶ Ibid

¹⁴⁷ Ibid

¹⁴⁸ Ibid

¹⁴⁹ Ibid

cited Principle 7 of the Bangalore Principles on the Domestic Application of International Human Rights Norms states:

It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

The court also noted that that principle, amongst others, has been reaffirmed, amplified, reinforced and confirmed in various other international fora as reflecting the universality of human rights inherent in men and women. In *Longwe v. International Hotels*¹⁵⁰ in which Justice Musumali stated:

... ratification of such (instruments) by [a] nation state without reservations is a clear testimony of the willingness by the state to be bound by the provisions of such (instruments). Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international (instrument), I would take judicial notice of that treaty convention in my resolution of the dispute.

In reaching its decision, the court foreshadowed the impending change in the situation of international law in Kenyan domestic legal system through the adoption of a new constitutional dispensation by pointing to the then Draft Constitution of Kenya which clearly provided for international customary and treaty law to form part of the laws of Kenya.¹⁵¹ The court then proceeded to make its finding by relying on both national law and relevant ratified international human rights and especially CEDAW, even when it had not been incorporated into Kenyan domestic law.¹⁵² The post 2010 period has seen Kenya's courts demonstrate their appreciation for application of international human rights standards in a number of domestic cases. Several scholars term the break from the dualist/monist debates and the post-colonial shackles in

¹⁵⁰ *Longwe v. International Hotels* 1993 (4 LRC 221).

¹⁵¹ Nicholas Wasonga Orago, *supra* note 31 above, p 416.

¹⁵² *Ibid*

jurisprudence as a breakthrough for African jurisdictions. Frimpong Oppong, for instance, rightly argues that:

Africa is becoming more "international law-friendly"; the initial hostility or ambivalence of the post-colonial towards inter-national law is giving way to increased participation in international law processes, both in terms of institutional participation and in the development of norms. Indeed, it has been suggested that an "African international law" has emerged.

The new Kenyan jurisprudence seems to be reflective of the new position that international law is occupying in domestic jurisdictions. As rightly observed by Oppong, what is most remarkable and arguably a characteristic of this new African jurisprudence is a trend towards making international law supreme over and directly or automatically applicable within the domestic legal system.¹⁵³ Oppong notes that while in theory this trend may not be radical in civil law countries, it is for common law countries, as both from a theoretical and practical perspective. The Supreme Court of Kenya has, in fact acknowledged the need for the judiciary to borrow jurisprudence from other jurisdictions, stating that:

The decolonising jurisprudence of social justice does not mean being insular and inward looking. The values of the Kenyan constitution are anything but. We can and should learn from other countries. ...indeed the quality of our progressive jurisprudence would command respect in these distinguished jurisdictions. After all, our Constitution is the most progressive in the world.¹⁵⁴

5.3: The legislature and judiciary as implementers of International Human Rights

Kenya's Constitution 2010, as discussed above, has incorporated individual rights and fundamental freedoms, together with socioeconomic and cultural rights, all of which are justiciable. Legislation, judicial and other administrative and human rights commissions have become strategies to provide remedies and investigations into violations. The legislature and the

¹⁵³ Richard Frimpong Oppong, *supra* note 124 above, p 298

¹⁵⁴ *Re Interim Independent Election Commission* [2011] eKLR, para[86]: The Bench of Chief Justice Willy Mutunga, (RTD) Deputy Chief Justice Nancy Baraza, Justice J.B. Ojwang, Justice Njoki Ndungu, Justice Mohamed Ibrahim, Justice Phillip Tunoi and Justice Smokin Wanjala.

judiciary are central to the realisation of the ideals of the constitution and especially the Bill of Rights. It has rightly been noted that constitutions that provide effective safeguards to curtail government excess and create democratic space for citizens can play an important role in the protection of human rights both domestically and internationally.¹⁵⁵ Separation of powers and rule of law must guide the exercise of governmental power; thus, the Executive, Legislature, Judiciary and related institutions must be committed to governance by established laws. Without independent and effective institutions of governance to implement the Bill of Rights, it is impossible to entrench or enforce the protections that are included therein.¹⁵⁶

This section considers ways in which the legislature and the judiciary as domestic mechanisms for implementation international human rights can critically use their constitutional decision making powers to protect the human rights of sexual minorities. The study agrees with Maguire in his arguments that the effectiveness of legal protections depends on the willingness and ability of lawmakers and judges to help affected groups realise their rights.¹⁵⁷ This is more so when these rights concern people considered to be “insular minorities” such as LGBT people, whose need for protection calls for more critical decision making actions in a strongly heteronormative atmosphere such as Kenya’s. Indeed the generous content of individual rights and fundamental freedoms in the Bill of Rights can remain mere paper aspirations if they are not implemented by the relevant bodies for the benefit of the people who need protection. The study limits its discussion on the role of the legislature and the judiciary in the implementation of international human rights, but acknowledges the role of other institutions such as the National commissions on human rights.

¹⁵⁵ Ibid

¹⁵⁶ See Okoth-Ogendo, *supra* note 28 above, p 80.

¹⁵⁷ Sebastian Maguire, *The Human Rights of Sexual Minorities in Africa*. California Western International Law Journal, Vol. 35, issue No. (2004), p1. Available at <http://scholarlycommons.law.cwsl.edu/cwilj/vol135/issi/2>, (accessed on 3rd December, 2013), p 9

The Following section examines the role of institution of the legislature and the judiciary and how through critical decision making, they can protect sexual minorities. It also notes their successes and limitations in this regard.

5.3.1: International human rights obligations on legislatures and their limitations

The extent to which a legislature is able to implement international human rights principles depends of its nature and capacity. The first and foremost characteristic of a legislature is its intrinsic link to the citizens of the nation or state...representation. As John Stuart Mill wrote in 1862, in a representative democracy the legislature acts as the eyes, ears and voice of the people.

[t]he proper office of a representative assembly is to watch and control the government: to throw the light of publicity on its acts, to compel a full exposition and justification of all of them which any one considers questionable; to censure them if found condemnable...In addition to this, the Parliament has an office...to be at once the nations' Committee of Grievances, and its Congress of Opinions.¹⁵⁸

Nielson Polsby, a renowned scholar of the U.S. Congress separates legislatures into two basic types: arena legislatures and transformative legislatures. Other scholars add the rubber-stamp¹⁵⁹ as well as the emerging types of legislatures,¹⁶⁰ to the Arena and transformative types. According to Polsby, arena legislatures are forums for discussion of ideas and policies. “[T]hey serve as formalised settings for the interplay of significant political forces in the life of a political system; the more one the regime the more varied and the more representative and accountable the forces that find a welcome in the area”.¹⁶¹ According to Mrimba, An arena legislature is a place where societal differences are represented and articulated. Public policies are debated from different

¹⁵⁸ Norman Ornstein, *The Role of the Legislature in Western Democracies*. Washington, D.C.: American Enterprise Institute for Public Policy Research, 1981.

¹⁵⁹ *Ibid*

¹⁶⁰ An emerging legislature is the process of change from one type to another. The most frequent path is for a legislature without much internal structure and capacity to try and develop more of the things necessary to play a larger role in governing a society.

¹⁶¹ Fred I. Greenstein and Nielson Polsby. *A Handbook of Political Science. Volume 5: Governmental Institutions and Processes*. (Reading, Massachusetts: Addison-Wesley, 1975)

perspectives and actions of government are assessed by different criteria. It is a place, in short, of speech and debate. The best known example is the British House of Commons.¹⁶²

Transformative legislatures both represent and lead.¹⁶³ To do so requires an internal structure capable of channeling conflict and reconciling differences, as well as information capacities up to the task of initiating and perfecting policies. Transformative legislatures, is the uncommon type of legislature, which actually change policy.

Polsby argues that transformative legislatures actively translate the ideas into laws: “[T]hey possess the independent capacity, frequently exercised, to mold and transform proposals from whatever source into laws. The act of transformation is crucial because it postulates a significance of the internal structure of legislatures, to be internal division of labour, and to the policy preferences of various legislators.”¹⁶⁴ According to Mrimba, transformative legislatures are legislative bodies capable of both representing and shaping societal demands.¹⁶⁵ They both articulate diverse societal preferences and serve as an independent shaper of the policies that emerge. Typically, executive branches of government have an easier time shaping policies because they are hierarchically organised and by their nature represent a narrower more professional set of concerns than do legislatures.

According to Johnson, transformative legislatures have the powers to shape budget and policies and even to initiate policies on its own. Jonson adds that such parliaments are the most expensive, have highly complex internal structures (including strong committee systems, great

¹⁶² Ibid

¹⁶³ Ibid

¹⁶⁴ Ibid

¹⁶⁵ Vincent Oduor Mrimba, Kenya Parliament: From rubberstamp to transformative legislature, Master’s Thesis. The University of Bergen, 2012., p 5

information needs, and depend heavily on highly trained professional staff).¹⁶⁶The U.S. Congress is a good manifestation of a transformative legislature in the sense that it is on the other hand, is a much more activist legislature. Conflict, compromise, and individualism can all be found in the U.S. legislature. There is constant give-and-take at work, as inputs from throughout the political system are transformed into legislative output.

Several scholars note that human rights protection is a joint project in which various actors – executive, legislative and judicial – each have their own credentials, competencies and claims to legitimacy.¹⁶⁷ In their own right, Parliaments play a crucial role in the implementation of international law. They are key institutional elements of domestic human rights systems.¹⁶⁸ This is because international norms often contain ‘gaps’ that need to be filled by domestic law-making.¹⁶⁹ They evaluate the needs of implementation in their jurisdictions and they also play an important role in the protection and realisation of the rule of law and human rights, which provide a basis for parliaments to fulfill their obligations through legislative scrutiny and monitoring of the government’s compliance with international or regional treaty obligations.¹⁷⁰ In this regard, Conrad and others rightly argue that parliament as a domestic actor uses normative arguments and political mobilisation to pressure governments to honour their international commitments.¹⁷¹ Treaty ratification, as an act of delegation, provides parliament the authority to

¹⁶⁶ John Jonson, *The Role of Parliament in Government*, World Bank Institute, (2009). in Vincent Oduor Mrimba, *supra* note 1079 above, p 19

¹⁶⁷ *Ibid*

¹⁶⁸ Ramute Remesaite, *The International Human Rights Judiciary and National Parliaments*. PluriCourts – Centre for the study of the Legitimate Roles of the Judiciary in the Global Order. Available at www.jus.uio.no/pluricourts/english/blog/guests/2015-12-11-remezaite. (Accessed on 12th March, 2016).

¹⁶⁹ Alexanra Hansen, *International Law and Domestic Law Making Processes*. *AjV - Workshop*

¹⁷⁰ Ramute Remesaite, *supra* note 177 above, p 2

¹⁷¹ Courtney Conrad, *Divergent Incentives for Dictators: domestic Insitutions and (International Promises Not to) Torture*. *Journal of conflict resolution*. (2014), 58 (1): 34-67; Martha Finnemore and Kathryn Sikkink, *International Norm Dynamics and Political Change*. International Organisation. (1998) 52 (4): 887-917; Margaret Keck and Kathryn Sikkink . *Activists beyond borders: Advocacy Networks in International Politics*. Ithaca, NY: Cornell University Press, 1998); Beth Simmons, *Moblising for Human Rights: International Law in Domestic Politics*. (Princeton, NJ: Princeton University Press, 2009).

enforce the government's promises. Hence, national parliaments are in a strong position to promote international human rights standards to better implement its shared human rights obligations.¹⁷² Parliaments may interpret, apply and respect human rights in the laws they make, and when holding the executive to account.¹⁷³

In meeting their obligations, legislatures face various challenges, some related to the nature and typology of the legislature and some, and more specifically in respect of implementation of international human rights, to the complexity of the obligation. The different types of legislatures have different needs and demands. Because demands on them are few, rubber stamp legislatures, for instance, need little internal structure or expert staff and should not need long legislative sessions. The Duma of the former Soviet Union and the Mexican Congress during the decades of PRI dominance could be considered rubber stamp legislatures. "Rubber stamp" legislatures generally connote non-democratic, but it could also describe bodies such as the American US Electoral College, whose delegates are expected to vote according to the dictates of those who sent them, and not according to personal opinion. Rubber stamp legislatures are the least expensive to operate.¹⁷⁴

Arena legislature information needs are greater than those of rubber stamp legislatures: they need sufficient internal capacity to organise debate; a committee system adequate for channeling the business of the house; and capacity to analyse proposals in order to comment on them critically, and to make some technical amendments. A useful analogy for an arena legislature is a thermometer. As thermometers take accurate readings of the temperature around them but do not

¹⁷² Ibid

¹⁷³ Andrew Moravcsik, *The Origins of Human rights Regimes: Democratic Delegation in Postwar Europe*. International Organisation (2000), 54 (2): 217-52.

¹⁷⁴ John K. Johnson, *The Role of Parliament in Government*. World Bank Institute Washington, D.C p 4

change the temperature, so arena legislatures accurately reflect the “political temperature” with regard to the issues before them.¹⁷⁵

Transformative legislatures not only represent diverse societal interests, but they shape budgets and policies. They amend legislation and budgets received from the executive branch, initiate their own policy proposals, reach out to citizens, and conduct public hearings. Transformative legislatures can be likened to a thermostat. As thermostats change the room temperature by activating heat or air conditioning, transformative legislatures change policies and budgets proposed by government, and even initiate policies of their own. Not surprisingly, transformative legislatures are the most expensive to operate. They have highly complex internal structures (including strong committee systems); great information needs, and depend heavily on highly trained professional staff. The US Congress is probably the best example of a transformative legislature.¹⁷⁶

Emerging legislatures are under significant stress, as parliament’s managers and staff struggle to meet the growing demands. Staff and resources that were sufficient for a less assertive legislature are no longer adequate. Emerging legislatures need new kinds of staff, more professional staff, better information systems, additional office space, and other capacities to help them carry out their representation, lawmaking, and oversight roles more effectively. MPs demand more of Parliamentary staff members, who must respond more quickly, work faster, and do more than they have in the past.¹⁷⁷

Implementation of international human rights has become a central role of legislatures as part of the domestic implementation instruments. While the role of parliament in international human

¹⁷⁵ Ibid

¹⁷⁶ Ibid p 5

¹⁷⁷ ibid p 6

rights law has been historically neglected, this is beginning to change for two reasons: first is the growing concern about the effectiveness of the international human rights machinery and its national implementation, and the need to address the gap arising when states do not effectively implement the internationally agreed standards they have committed themselves to.¹⁷⁸ Second, is to increase the democratic legitimacy of those standards, by having more debates in parliament between elected politicians about what the state's human rights and rule of law obligations require.¹⁷⁹ Such discussion and debate helps to democratise the rule of law and human rights by encouraging elected politicians to take more ownership of these fundamental values, and to properly consider applicable international human rights and rule of law standards in their work.¹⁸⁰

The UN Human Rights Council has recently considered the role of parliaments in relation to its work, particularly as regards the Universal periodic Review Process. In its Resolution 22/15 of 10 April, 2013 on the Contribution of parliaments to the work of the Human Rights Council and its universal periodic review, it highlighted the role of parliaments in “translating international commitments into national policies and laws. Oversight of implementation and enforcement of law is an important responsibility of parliament. The separation powers provides legislators with considerable scope to both advance and monitor civil, political, economic and social rights through oversight of the development and implementation of laws.”¹⁸¹ Indeed, legislators have many opportunities to reinforce the adherence to international human rights treaties and monitoring their actual implementation, particularly through the creation of special

¹⁷⁸ Brian Chung, Reassessing the role of Parliament in law and human rights. Centre for comparative and Public Law, University of Hong Kong. Available at www.law.hku.hk/ccpl/Docs/Annual%20Report%202011%20-202. (Accessed on 20th March, 2016).

¹⁷⁹ Ibid

¹⁸⁰ Ibid

¹⁸¹ Ibid p 27

Parliamentary Human Rights Committees and the establishment of statutory human rights commissions or offices of ombudspersons.¹⁸² Another advantage that Parliament enjoys, as opposed to, for example, Judiciary is proposed by Dixon, in his comments on Human Rights Parliamentary (Scrutiny) (HRPS) Act argue that in matters of considering international and comparative sources, Parliament is in a better stead.¹⁸³ Dixon notes that:

MPs...will generally face quite different time and resource constraints to judges, and thus be quite differently placed in terms of their capacity to engage with [international and comparative] sources. How far MPs should go in considering such sources under the [HRPS Act], therefore, should also be considered a largely open question.¹⁸⁴

Although legislatures now occupy a central position in the implementation of international human rights, most legislatures face several challenges due to the complexity and density of the duties. For instance, it has been rightly noted that domestic law-making has become more complicated, because of the increase both in a number and in regulatory density of international legal norms, the sometimes unclear provisions and the interaction between the different national and international actors.¹⁸⁵ In this regard, it is necessary for legislatures to have legal advisers with expertise in international human rights law to address “scrutiny gaps” in national parliaments.¹⁸⁶

Although parliaments are well-placed to evaluate the needs of implementation in their jurisdictions, they can be hampered in this role by lack of resources, lack of independence from the executive, domestic local pressures, and knowledge as the key reasons for the weak involvement of parliaments in the implementation, despite the existence of important points of

¹⁸² Ibid

¹⁸³ Dixon in Shawn Rajanayagam, Does Parliament Do Enough? Evaluating Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act. UNSW Law Journal, Vol. 38 (3)

¹⁸⁴ Ibid p75

¹⁸⁵ Ibid

¹⁸⁶ Ibid

connection between the international judiciary and the parliaments.¹⁸⁷ Kristen Roberts names domestic political pressures, lack of independence from the executive, and lack of sufficient resources and knowledge as the key reason for the weak involvement of parliaments in implementation, despite the existence of important points of connection between the international judiciary and the parliaments.¹⁸⁸ Alice Donald stresses that parliaments need to have necessary information and expertise, combined with sufficient powers, structures and processes in order to enable them interact with other institutional actors at key stages in the implementation process.¹⁸⁹ This has been a challenge to most legislatures.

Evans and Evans, in an article outlining their methodology for assessing the human rights performance of legislatures, take the view that judicial ruling ‘cannot resolve the moral, political and philosophical disagreements at the heart of many rights issues’.¹⁹⁰ They suggest that this is the role of Parliament and indeed they state that an evaluation of Parliament’s human rights performance should not focus solely on compliance, but also the process by which legislatures engage with rights questions. In particular, the assessment should consider whether a given legislative procedure leads to ‘deliberative processes that give proportionate attention to human rights issues.’¹⁹¹

¹⁸⁷ Ibid p 1

¹⁸⁸ Ibid p 2

¹⁸⁹ Ibid

¹⁹⁰ Carolyn Evans and Simon Evans, ‘Evaluating the Human Rights Performance of Legislatures’, *Human Rights Review* 545, 563-9 . In Shawn Rajanayagam, *Does Parliament Do Enough? Evaluating Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act*. *UNSW Law Journal*, Vol. 38 (3)

¹⁹¹ Ibid

5.3.3: Kenya's legislature and its role in implementation of international human rights

At independence, Kenya inherited a British model of government, and soon became a one-party presidential state headed by a strong popular leader.¹⁹² In other ways, however, Kenya is unique.¹⁹³ The Kenyan Assembly performed a wide range of functions within the political system, both formal and informal. The lawmaking function is not where the Assembly exerts its greatest influence. The cabinet had the primary responsibility for policymaking and lawmaking, and the president and his key officials had little trouble pushing their legislative agenda through the Assembly.¹⁹⁴ Legislation is often presented to the Assembly as a *fait accompli*, allowing little if any opportunity for legislative review or analysis. In some cases where the Assembly tried to assert its independence on legislative matters, usually through the mechanism of a select committee, members disloyal to the government have been punished, pressured, or even removed from their seats.¹⁹⁵

Moreover, the legislature had no authority over budgetary or spending policy, which reduces its overall influence even further. The real power and influence of the Assembly came through the exercise of its informal powers. The most important informal function the legislature performed was to provide legitimacy to government actions. This in turn promoted support among the populace for the regime. The legitimising function is vital in light of the revolts and bouts of instability that have plagued other nations in the region. By accommodating cultural and historical realities, the Kenyan Assembly allowed for opposition and dissent within the system,

¹⁹² Ibid

¹⁹³ Ibid

¹⁹⁴ Ibid

¹⁹⁵ Ibid

yet also provided stability. As a result, the populace feels at ease about the strength and legitimacy of the system; at the same time, it feels it has some say in the political process.¹⁹⁶

Regarding its role in implementing international human rights, the legislature was weak and its subservience to the executive meant that it did little to restrain the executive from protecting citizens from human rights violations, with the government itself being the greatest violator of individual rights and fundamental freedoms. It lacked the political support to perform this role. Migai Akech rightly notes that the exponential increase of powers of the president which gave him powers to control other governmental agencies led to their emasculation with countervailing power such as the legislature and the judiciary.¹⁹⁷

Migai Akech notes that since independence, Kenya has experienced periods of human rights violations including land clashes, massacres, arbitrary arrests, and extrajudicial executions, detentions without trial, torture, electoral violence, grand corruption, and economic crimes. Common to this constitutional order was the marginalisation and discrimination against women, ethnic minorities and sexual minorities who were literally erased from any discourse. Such discrimination and marginalization went hand in hand with severe human rights violations. Most of these were directly or indirectly attributable to a constitutional order that concentrated power in the presidency and emasculated other arms of government and civil society.¹⁹⁸ The rationale for such control is found in the concept of regime maintenance, which refers to the efforts of political regimes to ensure their survival in the face of competition from rival political groups

¹⁹⁶ Ibid

¹⁹⁷ See Migai Akech, *Institutional Reform in the New Constitution of Kenya*. International center for Transitional Justice, (2010) p 14

¹⁹⁸ Ibid p 5

and populations that do not accept their claims to legitimacy.¹⁹⁹ As a result, public servants, including parliamentarians, were not accountable to the president; they did not think that they were accountable to the public for the exercise of their powers.²⁰⁰ Public officials and politicians who disobeyed the law, committed human rights violations were never punished so long as the president shielded them from facing the law.

It is no wonder that that despite ratifying the International Covenant on Economic Social and Cultural Rights, the State hardly took any deliberate legislative steps to wholly domesticate its obligations under the treaty. Socio-economic rights were neither contained in the former Constitution nor in a separate Bill of Rights. Moreover, judicial tribunals did not play a critical role in their enforcement using the international instruments. Undemocratic and anti-human rights colonial legislations such as the sodomy laws in the penal code were never interrogated by this legislature, while laws of marriage, children adoption continued being un-aligned to international human rights principles.

5.3.4: Kenya's Legislature after 2010 and its role in implementation of human rights

The legislature, also known as Parliament is established under Article 93 of the Constitution of Kenya, 2010. The legislature is composed of two Houses; the National Assembly and the Senate. Parliament derives its legislative authority from the people.²⁰¹ This means that Parliament cannot make decisions which go against the mandate granted by the people and exercises that power for the benefit of the people. The National Assembly is the legislative organ of Parliament, with membership drawn from constitutionally defined units (constituencies) in addition to

¹⁹⁹ Ibid p 20

²⁰⁰ Ibid

²⁰¹ Article 94 of the Constitution of Kenya, 2010

representation of special interests. For its part, the Senate represents the counties and protects their interests [the counties] and their governments. Articles 95 and 96 provide for the roles of the National Assembly and the Senate respectively. The legislature in the constitution of Kenya 2010 is a clear departure from the preceding one, in the sense that it is a more robust, yet complex legislature. Mrimba argues that the Kenyan legislature is a transformative legislature. With powerful committee system, and like the US Congress, it has sophisticated information needs and depends heavily on highly trained professional staff. It is also extremely autonomous.²⁰²

Mrimba points out that Kenya's legislature is arguably one of two most significant national legislatures on the African continent.²⁰³ It is the most independent in terms of degree of formal and real autonomy it enjoys from the executive branch and also the most active with respect to the deliberation and amendment of legislation.²⁰⁴ Parliament in Kenya also initiates legislation. Mrimba notes that as opposed to the Parliament under the old Constitution which had lost most of its powers of oversight and legislation, and which had been reduced to a Parliament that rubberstamps legislation with legislators reduced to performing only constituency service, the Parliament under the [2010] Constitution is robust and empowered that holds the executive and other actors accountable.²⁰⁵

Kenya's Parliament is becoming more autonomous than it was under the former constitution through financial autonomy and the independent management of its staff and other requirement. The constitution has also taken from the President, the exclusive power to convene, prorogue and dissolve parliament. It has expanded the formal powers in several areas making it a powerful

²⁰² Ibid p 39

²⁰³ Ibid

²⁰⁴ Ibid

²⁰⁵ Vincent Oduor Mrimba supra note 165 above, p 16.

institution. It also takes over the role of budget allocation from the executive among other roles, the committee system of Parliament is strengthened and the power of committees hold will help constrain the executive.²⁰⁶

The main role or mandate of Parliament is to enact legislation. Parliament is mandated by the Constitution to deliberate and resolve issues of concern to the people from whom they derive their legislative authority. One way of doing this is through enacting legislation as is provided under Articles 95(3) and 96(2) of the Constitution. Article 94(5) of the Constitution specifically grants the legislature the authority of enacting legislation. It states that “No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation”.

In Kenya, citizens, through a process, have been empowered under the Constitution to initiate bills for legislation in Parliament. Any proposed legislation must also have public participation and input. Barkan points out that legislatures legislate, but at two levels: at minimum they pass laws, in some cases merely rubber-stamping legislation handed down by the executive, while in other cases, legislatures shape public policy by crafting legislation-in partnership with or independent of the executive branch and then passing the legislation into law.²⁰⁷

Being a transformative legislature and taking into account its complexity, the Kenyan legislature requires a lot of capacity, both in terms of finances and human resources. It has adopted a very complex committee system, making committees the sites at which important legislative decisions are made. The complexity of the committee system requires members of parliament who are functionally competent and be able to exercise what Finnis calls practical reasonableness in their

²⁰⁶ Ibid p 12

²⁰⁷ Ibid

actions. They should be in a position to understand their obligations under international human rights law and their role vis-à-vis the judiciary in matters of human rights implementation. Murray Hunt has argued that parliamentarians often mistakenly think that it is solely for the judiciary and lawyers to interpret human rights law.²⁰⁸ They therefore do not seize the opportunity to play an interpretive role, thus needing guidelines on the role of parliamentarians in the protection and realisation of the Rule of law and Human rights, which provides a basis for parliaments to fulfill their obligations through legislative scrutiny and monitoring of the government's compliance with international or regional treaty obligations.²⁰⁹ This duty points to the importance of the role of legal advisers with expertise in international human rights law to address 'scrutiny gaps' in national parliaments, if this role is to be effectively met.²¹⁰

Parliamentarians themselves should have the capacity to engage in critical thinking, not just to understand international human rights but also be able to critique the traditional assumptions of international human rights, which, as argued by queer theorists, submerge some categories of LGBT people. They should be in a position to understand the many rules and procedures that govern their operations and those of the system. As stated above, the members of the legislature have to be in a position to exercise rational and reasonable decision-making which means that they have to be well versed in critical thinking, analyses and methodology. Alice Donald also notes that parliamentarians need to have necessary information and expertise, combined with sufficient powers, structures and processes in order to enable them to interact with other institutional actors as key stages in the implementation process.

²⁰⁸ See generally Murray Hunt, Hayley Hooper and Paul Yowell, *Parliaments and Human rights: Redressing the democratic deficit*. AHRC Public Policy Series, No. 5. Arts & Humanities Research Council. Available at www.ahrc.ac.uk/documents/project-reports-and-reviews/ahrc.public. (Accessed on 3rd April, 2016).

²⁰⁹ *Ibid*

²¹⁰ *Ibid*

For the purposes of this study, they not only need to be well versed in international human rights law and what the Constitution requires of them in order to make decisions on them, they also have to understand queer and critical methods and the fact that these are of great influence if they have to make legislation that protects sexual minorities and which reflect the dictates of international human rights principles and emerging trends in protecting sexual minorities.

Article 21 (4) of the Constitution provides that the “State shall enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms.” What is the implication of the provision?²¹¹ As both the fundamental protector of the rights of its citizens, and the entity most able to commit grave violations of human rights, the State is crucial in the protection of human rights.²¹² Parliament is a crucial component of the State structure, responsible for ensuring the adoption of legislation and monitoring and controlling overarches of the executive. As such, they are in a unique position to oversee the protection of human rights within the state.²¹³

As discussed above, by virtue of Articles 2(5) and 2(6) of the Constitution, international customary law and treaties or covenants ratified by Kenya forms part of our laws so long as it is not inconsistent with the Constitution. Parliament’s need to involve itself in the prior ratification process is merely a formality of the internal process because once a treaty is ratified, it does not need to go through the legislative process to form part of the law. Parliament’s role in implementing international law is further grounded in the Treaty Making and Ratification Act

²¹¹ Ibid

²¹² Janet L. Hiebert, Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights: Int’l J Con Law, Vol. 4, No. 1 (January 2006).

²¹³ Ibid

No. 45 of 2012.²¹⁴ This law provides the procedure for making and ratification of treaties. In doing so, Parliament is expected to consider two essential things; public interest and constitutional provisions. In essence, Parliament is required to put national interest before their own interests and compromises. The Constitution is clear that Parliament derives its legislative authority from the people and therefore in making and ratifying treaties, this should be done with the people's interests in mind. Secondly, in ratifying treaties Parliament should be guided by constitutional provisions because the Constitution is supreme and anything that contravenes the provisions of the supreme law is invalid.²¹⁵

Another role that Parliament plays in implementing international human rights law is the oversight. Parliament has the mandate to oversee the implementation of human rights laws by various constitutional institutions as provided by the Constitution. These institutions include:

- 1) The Office of the President: Article 132 (1) (c) (iii) obligates the President to 'submit a report for debate to the National Assembly on the progress made in fulfilling the international obligations of the Republic'. This is to be done annually. Ratifying international law means that Kenya binds itself to international obligations contained in various treaties including international human rights law treaties.
- 2) Constitutional Commissions: These include Kenya National Commission on Human Rights, Gender and Equality Commission and the Commission on Administrative

²¹⁴ The preamble of the Treaty Making and Ratification Act No. 45 of 2012 provides that this is a legislation that gives effect to Article 2 (6) of the Constitution by providing the procedure for making and ratification of treaties.

²¹⁵ Section 6 (1) of the Treaty Making and Ratification Act states that the authority negotiating a treaty should be bound by the values and principles of the Constitution.

Justice.²¹⁶ Article 254 provides that Parliament may at any time require these commissions to submit a report on any particular issue, including human rights issues.²¹⁷

- 3) Article 119 of the Constitution also obligates Parliament to legislate petitions from the public. This is a right granted to the public by the Constitution. It states that ‘Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation. To this extent, Parliament can legislate to expand Article 27(4) of the Constitution to include sexual orientation and gender identity.

5.3.6: Kenyan legislature’s score-card in implementing international Human Rights

Has the Parliament of Kenya has acted with practical reasonableness in protecting sexual minorities as envisaged under international human rights law? Have legislators in this regard, divorced themselves from contexts such as culture and religion in addressing the rights of sexual minorities and /or have they taken actions that are in consonance with the ideas of human rights and fundamental freedoms prevailing as norms being practiced around the world?

This study argues that the human rights situation of sexual minorities in Kenya remains precarious even with the guarantee of substantive human rights and institutions of justice which have been given powers enough to be transformative in implementing the human rights. It is important to note that presently, there is no law that protects sexual minorities in Kenya. The oppressive British anti-sodomy laws remain alive in the Penal Code. To make matters worse, some members of parliament, contrary to their constitutional mandate, have threatened to scuttle

²¹⁶ These commissions are created under Chapter Fifteen of the Constitution of Kenya, 2010.

²¹⁷ See also sections 53 (1) (b) and 53(3) of both the Kenya National Commission on Human Rights Act, 2011 and the National Gender and Equality Commission Act, 2011.

any action that may result in a law that protects sexual minorities. For instance, only recently, the Leader of Majority in the Kenyan Parliament arrogantly boasted that since 2010 to March 2014, the Kenyan state had prosecuted 595 cases of homosexuality and that there was “... need to go and address the issue the way we want to address terrorism. It is as serious as terrorism and as any other social evil.”²¹⁸ Such an attitude by a leader in the legislature does not auger well for enactment of legislation to protect and promote the human rights of sexual minorities.

Parliament’s failure to legislate to protect sexual minorities could be explained by the fact that Kenya has reserved and guarded beliefs on matters lesbians, gays, bi-sexual, transgender persons. As a country that is enshrined in religious and strict moral beliefs, it is not surprising that the time to accept this group of minorities has not yet come. Sexual minorities are not expressly provided for under the Constitution. However, the nature of the Kenyan Constitution that it is a progressive and all inclusive constitution. Purposive interpretation of Article 27 which makes provisions for equality and freedom from discrimination, sexual minorities can be protected and should be protected under this Article. Further, although sexual orientation or gender identity is not explicitly included, it can be argued using international authorities that they are included in the term “sex”.²¹⁹

The above view was further demonstrated by the African Commission on Human and Peoples Rights in *Zimbabwe NGO Human Rights Forum v. Zimbabwe* where the Commission stated that

Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under Art. 2 of the Charter provide the foundation for the enjoyment of all human rights. . . . The aim of this principle is to ensure equality of treatment for individuals

²¹⁸ Hansard Report 26th March, 2014 <http://www.parliament.go.ke/plone/national-assembly/business/hansard/wednesday-26th-march-2014-1/view>

²¹⁹ The United Nations Human Rights Committee which has authority to interpret international human rights instruments stated in the case of *Toonen v. Australia* that prohibition based on ‘sex’ encompasses the prohibition of discrimination on the grounds of sexual orientation.

irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.²²⁰

Sub-article 6 further provides that the State ‘shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups...’ to realise the rights accorded by this article. It has been four years since Kenya promulgated the new constitution.²²¹

Perhaps due to the foregoing reasons, the Kenyan Parliament has had a few pluses and many gaps in fulfilling its role, especially towards the protection of sexual minorities. For instance, it is yet to align several pieces of legislation to reflect the international human rights law and the Constitution. It has been four years since Kenya promulgated the 2010 Constitution.²²² There is no legislation or policy framework that allows for the realisation of article 27 in relation to sexual minorities. Although as observed above, the Constitution of Kenya 2010 has several counter-majoritarian provisions that can address issues of marginalisation and discrimination of sexual minorities, the same Constitution contains provisions which out rightly discriminate against sexual minorities and which parliament in exercising its obligation to implement international human rights standards ought to have scrutinised and amended and/or repealed. As discussed in above, the fact that Article 27 (4)²²³ which identifies grounds upon which no individual should be discriminated against, it does not recognise sexual orientation as a ground of discrimination, although the Constitution has been enacted in times when there is a greater movement around the world to recognise and protect sexual minorities.

²²⁰Communication 245/2002, Zimbabwe Human Rights NGO Forum v Zimbabwe. Decided at the 39th ordinary session, 21 May 2006, Activity Report, ACHPR, 2006. Also available at www.achpr.org/files/sessions/39th/.../245.02/achpr39_245_02_eng.pdf (Accessed on 14 September 2014)

²²¹ The Constitution of Kenya came into effect on August 27, 2010

²²² The Constitution of Kenya came into effect on August 27,2010

²²³ Article 27 of the Constitution of Kenya.

The absence of sexual orientation as a ground of discrimination is a major setback for their fight against discrimination. It is a reminder that the country is not ready to recognise, protect and promote the human rights of sexual minorities, thus exposing them to the vagaries of heterosexism. As posited by Donnelley, the internationally recognised human right to nondiscrimination prohibits invidious public (or publicly supported or tolerated) discrimination that deprives target groups of the legitimate enjoyment of other rights.²²⁴ Inclusion of sexual orientation as a ground of discrimination could have gone a long way in affirming this important principle for sexual minorities.

Another conflicting provision in the Constitution that discriminates against sexual minorities is Article 45. The Article states, *inter alia*, that the family is the natural and fundamental unit of society and the necessary basis of social order and shall enjoy the recognition and the protection of the state. It further states that every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.²²⁵ It also behooves Parliament to enact legislation which recognises marriages concluded under any tradition or system of religious, personal or family law and...to the extent that any such marriages or systems of law are consistent with the Constitution.²²⁶ This Article entrenches the heterosexist conception of marriage, clearly discriminating against same-sex marriages. By requiring that all marriages adhere to marriages, whether traditional or religious, to be consistent with the constitution rules out non-heterosexual marriages, a clear discrimination against sexual minorities.

²²⁴ Jack Donnelley, *Non-Discrimination and sexual Orientation: Making a Place for sexual Minorities in the Global Human Rights Regime*. In Peter Baehr, Cees Flinterman, and Mignon Senders (eds.), *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights*. Amsterdam: Royal Netherlands Academy of Arts and Sciences, 1999, p 93-110.

²²⁵ Art. 45 (2)

²²⁶ Art. 45 (3) (b)

These two articles which are central to the family life of all human beings, seems to be in contradiction with Article 27 which outlaws discrimination and guarantees equality of all. The same Constitution makes express provisions that run counter to those that may favour sexual minorities. Another challenge is that presently, the Constitution is at variance with some laws which out rightly discriminate against sexual minorities and contradict the spirit of the Constitution. One such piece of legislation is the Penal Code, Chapter 63 of the Laws of Kenya. The anti-sodomy provisions in this legislation are perhaps one of the most enduring Judeo-Christian legacies of British colonisation of Kenya.

The sodomy provisions of the penal code remain some of the most enduring legacies of colonisation in the post-colonial state. Sections 162,163 and 165 of the Penal Code criminalise carnal knowledge, it is treated as felony and the maximum sentence is fourteen years corporal punishment can be ordered for cases of attempt sodomy. Aggravating factors include sex without consent and sex with someone under the age of 14. Section 162 criminalises the homosexual acts, even those involving consenting adults in private. It terms such as unnatural. The section creates the offence of “sodomy” which is punishable by a jail term of up to fourteen years (without any option of a fine).The sections state as follows:

Section 162:

Any person, who permits any other to have carnal knowledge of him or her against the order of nature, is guilty of an offense and is liable to imprisonment for a term not exceeding seven years.

Section 163 of the Penal Code states as follows:

Any person who attempts to commit any offences specified in section 162 above is guilty of a felony and is liable to imprisonment for seven years with or without corporal punishment.

Another problematic area for sexual minorities in Kenya is the constitutional provisions on marriage and the family, which clearly are incongruent to the equality and non-discrimination provisions of article 27 of the Constitution. Article 45 of the Constitution of Kenya defines family, its obligations and benefits. It mirrors article 16 of the UDHR and like the UDHR, it boldly gives relevance to marriage as the trigger of the “family” institution, which is defined as the “natural and fundamental unit of society and the necessary basis of social order.” Thus, marriage exists in and for the family.²²⁷

Article 45 provides that the family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the state.²²⁸ It further provides that every person has the right to marry a person of the opposite sex, based on the free consent of the parties.²²⁹ Regarding rights and obligations, the article provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.²³⁰ Of further significance is that the article recognises marriages concluded under tradition or system of religious, personal or family.²³¹ During the discussions leading up to the Constitution 2010, a contentious issue was whether the Constitution should provide for same-sex unions under the marriage umbrella. The issue did not go further and in the final drafting it is clear that marriage is placed under the foundational tenets of the concept of family as the natural and fundamental unit of society. By setting the foundations of marriage on

²²⁷ Lumumba & Francheschi, *The Constitution of Kenya 2010: An Introductory commentary*. (Strathmore University Press, (2014), p 207.

²²⁸ Art. 45(1) of the Constitution of Kenya.

²²⁹ Art. 4(2)

²³⁰ Art. 45(3)

²³¹ Art 45 (4)

the family in terms it was done, and then the only recognised type of marriage in Kenya is one that involves the union of two people of the opposite sex.²³²

According to Lumumba & Francheschi, Kenya's Constitutional article 45's definition of family contains three fundamental concepts: the family is natural, which means it is founded on the anthropological reality of the sexuality of the human being. The natural aspect makes it also the fundamental unit of society in and for the family.²³³ They further argue that the definition of marriage in the UDHR imports the tenet of gender, which based on the person's anthropology of gender promote equality between man and woman, respecting each other and enhancing the role of motherhood and fatherhood within the familiar scope.²³⁴ Defining family as a "natural" unit also refers to natural law: the family as an essential and natural part of a society made up by human beings.²³⁵ This definition of family is a direct translation of the anthropological theorisation of kinship: it emphasises the structural aspect of family, no matter when or where it is being studied. This definition synthesises the biological and sociological dimensions of family.²³⁶

Article 45 of the Constitution recognises two fundamental institutions: the family and marriage. However, it places no criteria on determination of this family and problems are bound to arise from this broad conceptualisation. With new reproductive technologies, such as in vitro fertilisation, have opened the door to previously unknown types of families where both the biological fact and the statutory one will no longer exist. This technology has a lot of relevance to homosexual couples who can now become biological parents. Secondly and of relevance to this study, the

²³²Lumumba & Francheschi supra note 227 above, p 206.

²³³Ibid p 338.

²³⁴Ibid

²³⁵Ibid

²³⁶Ibid

emergence of homosexual couples, with or without children, poses the question of the categorisation of this concept of marriage. Indeed, Richard Pring rightly observes, the homogenising tendency of universalist conception of family, advocates for an egalitarianism that homogenises the man and the women, ignoring any differences between the sexes, including biological differences, and whose most harmful consequence is the emptying of meaning maternity, paternity and family.²³⁷

Another piece of legislation that has significant implication of the human rights of sexual minorities is the Children's Act of 2001. The Act forbids adoptions of children by homosexuals. Section 3 of the Act read: "An adoption order shall not be made if the applicant or, in the case of joint applicants both or any of them....is a homosexual."²³⁸ Further, the Act is meant to ensure protection of the child and give effect to the principles of the Convention on the Rights of the Child²³⁹ The African Charter on the Right and Welfare of the Child notes in its preamble that it is best suited for the African child due to the unique factors in the social, economic and cultural spheres facing Africa. It agrees with the CRC on its emphasis on the importance of shielding human rights, the dignity and worth of the person and non-discrimination on the grounds of sex and the need of appropriate legal protection of the child.²⁴⁰

The children's Act obliges the government to utilise the maximum available resources for the full realisation of a child's rights as set out in the Act and the aforesaid international and regional conventions. These include: giving priority to the best interest of the child in all actions undertaken by public institutions and these include courts of law, administrative authorities or

²³⁷ In Richard Frimpong Opong, *The common School and the comprehensive Ideal: A Defense*. Haydon Graham (ed.). (Wiley-Blackwell, 2008) p 280.

²³⁸ See Kenya's Children's Act, 2001.

²³⁹ See generally the Convention on the Rights of the Child (CRC).

²⁴⁰ See section 7 of the Kenyan Children's Act, Article 11 of the African Charter on the Rights and Welfare of the Child.

legislative bodies.²⁴¹ Requiring that the institutions while performing their duties should have the best interest of the child principle in and so as to safeguard and promote the rights and welfare of the child.²⁴² The Act further requires that every child has a right to a name and nationality and if a child is deprived of an identity, the government should provide assistance and protection with a view to establishing an identity.²⁴³ Further, they should be registered immediately after birth.

The Births and Deaths Registration Act too discriminates against sexual minorities. This piece of legislation was created for sole purpose of notification of registration of births and deaths and other matters incidental to it.²⁴⁴ The Act states that every registrar must keep a register of births and deaths and particulars of every birth and death notified to him.²⁴⁵ Such particulars include the names, birth and places of birth and most importantly the sex of the child.²⁴⁶ The registration of the birth of a child is compulsory upon its birth of which any person notifying the birth must to the best of their knowledge and ability give the prescribed particulars which shall be recorded in the register by the registrar and such a person shall certify the correctness of the entries made by either signing or affixing his mark to the registrar.²⁴⁷ This is however, not possible for an intersex or transgender child because the person registering the birth of a child will fill in duplicate a birth registration form.²⁴⁸ This form contains in it two small boxes identified as male and female of which the person registering the birth of a child is to mark. There is no third box for children who may not fall within the male/female binary. This law has caused transgender persons in the

²⁴¹ Kenya's Children's Act section 4 and Article 4 of the African Charter on the Rights and Welfare of the Child; articles 3 and 4 of the CRC.

²⁴² Ibid

²⁴³ Section 11 of the Children's Act; Article 6 of the African Charter on the Rights and Welfare of the Child; Articles 3 and 4 of the CRC

²⁴⁴ The Births and Deaths Registration Act, Chapter 149 of the laws of Kenya

²⁴⁵ Ibid section 7

²⁴⁶ Ibid section 2 (a)

²⁴⁷ Ibid section 10

²⁴⁸ The form is known as Form No.1

country a lot of problems as demonstrated in the recent cases of Audrey Mbugua Ithumbi²⁴⁹ and the case of baby 'A'.²⁵⁰

The Basic Education Act, Act No. 14 of 2013²⁵¹ is also discriminatory to sexual minorities. This legislation is meant to actualise the constitutional provision at Article 53.²⁵² It enumerates the values and principles that shall guide the implementation of its provision. Among them the rights of every child to free and compulsory basic education, protection of every child against discrimination within or by an education department or education or institution on any ground whatsoever, ensuring human dignity and integrity of persons engaged in the management of basic education and elimination of gender discrimination.²⁵³ The age of a child is determined on the basis of a birth certificate issued under the provisions of the Births and Death Registration Act for purposes of admission into school. Alternatively, one can use other documents as the basis and apply for the child's admission at the age of four a school person is not allowed to discriminate against any child seeking admission on any ground including gender or sex unless a school is only registered for a particular gender.²⁵⁴

It is the government's responsibility to provide free and compulsory basic education for every child, ensure that children belonging to marginalised, vulnerable or disadvantaged groups are not discriminated against and prevented from pursuing and completing basic education and ensures compulsory admission, attendance and completion of basic education by every pupil.²⁵⁵ The strict non-requirement of a birth certificate for purposes of school enrolment at the primary school

²⁴⁹ Audrey Mbugua. High Court Judicial Review (JR) Application No.147 of 2013

²⁵⁰ High Court Petition No. 266 of 2013

²⁵¹ Both cases Available at www.kenyalaw.org

²⁵² Article 53 of the Constitution of Kenya, 2010.

²⁵³ Section 4

²⁵⁴ Education Act, section 34(2).

²⁵⁵ Ibid section 39

level, it becomes a compulsory requirement when the child has to proceed to secondary school.²⁵⁶

Another discriminatory piece of legislation is the Prisons Act²⁵⁷ provides, inter alia that any prison officer under section 11 of the Act is authorised to search any person being brought into prison whether male or female. Such provision can be used as a toll and can be abused. The Act does not describe the form of search to be done and does not give the intersex or transgender person the right to raise any objection for fear of victimisation or humiliation. Further, in any prison where a female prisoner is imposed, there shall be a female officer to take care of her.²⁵⁸ Prisoners sleep in communal cells or separate cells and male and female prisoners are confined in completely different buildings.²⁵⁹ The wards, cells and yards of the women prisoners are secured by locks different from those securing the same in the male wards.²⁶⁰

The women prisoners are only to be attended to by female officers and any male prison officer who wants to access the female prison shall do so only on duty and in the company of a female prison officer.²⁶¹ It is quite clear those specific needs of intersex and transgender persons were not envisaged in the act. The case of Richard Muasya is illustratable of the humiliation and human right breached that such person face whenever they fall afoul with the law.²⁶² Of relevance too, is the Registration of Persons Act.²⁶³ This legislation makes provisions of the registration of persons and for the issue of identity cards and any other connected purposes. Considering that

²⁵⁶ Ibid

²⁵⁷ The Prisons Act, Chapter 90 of the Laws of Kenya. Available at www.kenyalaw.org.

²⁵⁸ Ibid section 28

²⁵⁹ Ibid section 32 (2) (a)

²⁶⁰ Ibid section 32 (2) (c)

²⁶¹ Ibid section 32(2) (d)

²⁶² Richard Muasya High Court Petition No. 705 of 2005

²⁶³ The Registration of Persons Act, Chapter 107 of the laws of Kenya. Available at www.kenya law.org

intersex and transgender persons are not recognised for purposes of issuance of identity cards upon registration, the Act is discriminatory to sexual minorities.

5.3.6: Positive legislation by Parliament since 2010

Despite Parliament's inertia in acting on laws that run counter to the Constitution in respect of sexual minorities, the institution has in a few cases embraced the Constitution's spirit of transformative legislative action. As observed by Mutunga, the Kenyan Parliament, in enacting the Supreme Court Act 2011, has in the provisions of Section 3 of that Act reinforced the aspect of constitutional pre-occupation in its theory of interpretation.²⁶⁴ The Supreme Court Act sets out a theory of interpretation of the Constitution. Section 3 of the Supreme Court Act provides that:

The object of this Act is to make further provisions with respect to the operation of the Supreme Court as a court of final authority to, among other things, develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth.²⁶⁵

Further, in 2011 Parliament enacted The Ratification of Treaties Act No. 45 of 2012 which enables domestication of international treaties. It passed the Kenya National Commission on Human Rights Act, 2011, which, among other things, should undertake promotion, protection and observance of human rights in public and private institutions²⁶⁶ as well as monitor, investigate and report on the observance of human rights in all spheres of life in the Republic.²⁶⁷ Further, the commission is mandated to receive and investigate complaints about alleged abuses of human rights and in that regard take steps to secure appropriate redress where human rights have been violated; on its own initiative or on the basis of complaints investigate or

²⁶⁴ Willy Mutunga, *supra* note 36 above, p 9.

²⁶⁵ Section 3(c) of the Supreme Court Act of Kenya 2011

²⁶⁶ *Ibid* section.7

²⁶⁷ *Ibid*, section 8.

research matter in respect of human rights, and make recommendations to improve the functioning of State organs.²⁶⁸

Parliament also enacted The Commission on Administrative Justice Act, No. 23 of 2011 whose functions are to consider necessary for the promotion of the principle of equality and freedom from discrimination; the functions of the Commission shall be to, among others, provide advisory opinions or proposals on improvement of public administration, including review of legislation, codes of conduct, processes and procedures.²⁶⁹ The commission is also required to publish periodic reports on the status of administrative justice in Kenya and promote public awareness of policies and administrative procedures on matters relating to administrative justice.²⁷⁰ It is further mandated to take appropriate steps in conjunction with other State organs and Commissions responsible for the protection and promotion of human rights to facilitate promotion and protection of the fundamental rights and freedoms of the individual in public administration, as well as work with the Kenya National Commission on Human Rights to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration.²⁷¹

Parliament also enacted the National Gender and Equality Act 2011 whose mandate is to, among other things, promote gender equality and freedom from discrimination in accordance with Article 27 of the Constitution and to monitor, facilitate and advise on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws,

²⁶⁸Ibid, section 9.

²⁶⁹Ibid

²⁷⁰Ibid

²⁷¹Ibid

and administrative regulations in all public and private institutions.²⁷² It is mandated to act as the principal organ of the State in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interest groups including minorities and marginalised persons, women, persons with disabilities, and children; co-ordinate and facilitate mainstreaming of issues of gender, persons with disability and other marginalised groups in national development and to advise the Government on all aspects thereof.²⁷³ Further, Parliament played a positive role in the revision of the country's Constitution in 2010 and enacted enabling legislation including the Police Act,²⁷⁴ and brought them in line with international human rights. It also enacted the Judicial Service Act, 2011, which creates the Judicial Service Commission which guarantees the independence of the Judiciary which is necessary if decisions that are controversial and offensive to elected bodies such as parliament are to be made by the Judiciary.

5.4: Challenges to for legislature in transformative decision-making

According to Mrimba, Parliament is not effective in serving the electorate if it does not confront the issue of capacity and a major means of increasing Parliamentary effectiveness has been through building the institutional capacity of the Parliament. The problem of institutional capacity is seen partly in terms of the availability of resources, lack of requisite expertise and staff, and lack of facilities necessary for Parliamentary work. Such facilities include office space for MPs, library or research areas, staff etc. Infrastructure requirements are necessary if Parliamentarians are to expand their representation, oversight and lawmaking functions

²⁷² Kenya National Human Rights Commission's Report titled 'The Annual Progress Report: An Assessment by Stakeholders of Government's Performance in Implementation of UPR Recommendations- 2011'

²⁷³ Ibid

²⁷⁴ National Police Service Act, No. 11A of 2011 (Kenya).

effectively. Mrimba notes that most African legislatures are weak, thus offering weak disincentives to members to perform the three core and collective functions. These elements are: Africa's demographics particularly the fact that most African societies are poor, agrarian, plural, and unevenly developed societies; the colonial legacy, especially the formal rules (e.g. constitutions, standing orders) that established the basis for today's legislatures in the run-up to independence.²⁷⁵ Salah contends that African Parliaments operate as the pulse of society representing not only the modern forces (public, civil society, and party); they are also slaves of African ethnicity, regional interests and patronage. African Parliamentarians often undertake more burdensome functions, such as managing local conflicts and participating in social events, from marriage ceremonies to death celebrations.²⁷⁶

Mrimba finds that the Parliamentary Service Commission (PSC) has ensured that all members of parliament has one personal staff and in the Parliamentary service, employed experts in all policy areas who are at the disposal of all MPs irrespective of party affiliation. Another area where the Kenyan Parliament has benefited is in capacity-building programs and support staff.²⁷⁷ Kenyan PMs are also some of the best paid in the world, making an MPs job one of the most appealing, drawing many of Kenya's brightest, most ambitious, and mostly highly educated citizens.²⁷⁸ MPs earn a good salary yet in recent times, they have made selfish moves that have seen them move amendments to the finance Bill to raise their severance allowance of all members of the National assembly from Ksh. 300,000 per year to Kshs.744,000 per year for the entire time they have

²⁷⁵ Ibid p 2

²⁷⁶ Mohammed Salih, *Institution and Actors in Legislative Decisions in Africa: Analysing Institutional contexts and Veto Players in Legislative Decisions in Malawi*. PhD Thesis in International Development Studies at the Institute of Development Research and Development Policy, *Rur-Universitat* Bochum, Germany, 2005 p 260.

²⁷⁷ Ibid

²⁷⁸ John K. Johnson, *The Role of Parliament in Government*, World Bank Institute, (2009), p 243

served as PMs.²⁷⁹ Following the increases, MPs are also eligible for life-long pensions and other retirement benefits.

Mrimba notes that on the whole, PMs are well remunerated to make them less amenable to executive manipulation. However, they have fallen prey to executive manipulation all the same, in being made to pass the Finance Bill by sneaking in the amendments to drop their quest for interest rate caps after offering them a gratuity of sh. 3.72 million each payable at the end of their five-year term. The MPs passed the Bill in record less than 5 minutes.²⁸⁰ Capacity building has included making management and infrastructure improvements. Better equipping members and staff, and building new capacities, such as budget offices.

In spite of the Parliament being transformative with a number of members of parliament able to implement its transformative agenda, most of the members are not. 60% of the study interviewees stated that most of the MPs are of average or low educational standard, which is a major hindrance to their understanding their role and executing it. They also cited lack of political will to support legislative initiatives, more so those ones that go against the popular grain such as the human rights of sexual minorities. Although there is a strong Parliamentary Human Rights caucus of Parliament which has impressively pressed for human rights legislations, it operates in a highly heteronormative environment which makes it hard for unpopular topics such as human rights for sexual minorities to be initiated and debated. Hon. Augustino Neto, the Chairman of the human rights caucus had this to say:

To be honest, most of the members of parliament do not oppose the rights of sexual minorities. In private, they never voice any hostile views to LGBT people. In fact, this is demonstrated by the action of the Constitutional and Legal committee of Parliament, when it rejected the Bill to enhance the sentence against homosexuals. They, however, cannot stand in open plenary to

²⁷⁹ Kenya's Parliamentary Hansard, 2011: 83-90

²⁸⁰ Vincent Oduor Mrimba supra note 170 above, P 94.

support the human rights of sexual minorities because most of them came to Parliament through the support of Christians, who consider homosexuality immoral.

He was of the view that parliament may not be strong enough to push an agenda for legislation that protects sexual minorities against the majoritarian attitude both inside parliament and outside, since they respond to their outside constituency which is steeped in heteronormative culture. They stated that although there is a legal department as part of staff capacity building, it is not sufficient for all the members of parliament. There is no framework for building the personal and individual capacities of most members of parliament, some of whom have very low levels of education. Lack of reading culture on their part is another hindrance, so that understanding complex issue so of international human rights standards and principles is a major huddle for them.

To confirm the views of the Chairman of the Human rights Caucus, another key informant was the then minister of Justice and Constitutional affairs of the Republic of Kenya, when asked what he knows about sexual minorities in Kenya and if, as the minister in charge of Justice and Constitutional affairs, if he thought they should be protected. He admitted that sexual minorities are a reality in Kenya but denied they are discriminated against. In his view, the fact that no one in the country singles them out, for instance when persons are being interviewed for jobs, nobody is asked whether they are gay or lesbian, demonstrated that they are not discriminated against. He added as follows:

First and foremost, I am a politician. Can you imagine what will happen to my career if I openly supported gays and lesbians? Disaster! However, as the minister for Justice and constitutional affairs, I am satisfied that LGBT individuals are not harassed in this country. As government, we do not single them out for harassment. We do not ask anybody whether they are gay or lesbian before we deliver services to them. This is good enough. This was also the message of government to the UN Human rights committee in Geneva when I last presented the Government report.

A senior officer in the Office of the Attorney General, when asked if it is not the duty of government to protect sexual minorities as its obligation under the Constitution and international human rights law responded that “some things should be left alone”. He stated that the country is not ready to support sexual minorities yet and that perhaps in future, it will do so. There is no doubt that majoritarian considerations dictate the nature and pace of legislation that the Kenyan legislature undertakes.

Yet acting in self-interest, or merely responding to the normative standards, or getting influenced by corruption in legislative decision making, does not amount to application of practical reasonableness as envisaged by Finnis. According to Sartor, effective decision-making in legislation cannot be reduced to the implementation of a normative model or to the dialectics of opportunistic interests; it instead requires the integration of both aspects, the tension towards a normative standard and the opposite pressures to depart from it.²⁸¹ Legislators like judges and administrators, should not reason from their private perspective.²⁸² When serving as members of a legislative body, they should instead act in the name and for the common good of the polity they are representing, and should make their choices integral to the decisional process of that polity.²⁸³ To demonstrate this point, Sartor argues as follows:

When evaluating the teleological rationality/reasonableness of the determinations adopted by the legislature, the reference point should not be the particular private objectives the individual members of a legislative body might pursue, but rather the political goals they adopt according to their vision of the public good, combined with the constitutional values the legislature has to take into account.²⁸⁴

²⁸¹ Giovanni Sartor, A Sufficentist Approach to Reasonableness in Legal decision-making and Judicial Review. European University Institute, Florence, Department of Law. EUI Working Paper, LAW 2009/07 p1

²⁸² Ibid

²⁸³ Ibid p 25

²⁸⁴ Ibid

Hence, for instance, when considering the question of the human rights issues of sexual minorities in Kenya, any new law designed to deal with the problem of marginalisation should aim to better protect equality of persons and the rights to privacy among others. In Sartor's view:

A constitutional right primarily operates, with respect to the legislature, as a guide for the legislator's teleological reasoning: the legislature has the goal-duty to take into advance the corresponding value (freedom of speech, freedom of assembly, privacy, participation in science and culture, etc.) taking it into account in legislative determinations. And so, where judicial review is concerned, rights operate as criteria values for assessing the reasonableness or proportionality of legislative choices.²⁸⁵

Kenyan legislators are duty bound to enact legislation that resonates with the provisions of the Constitution on individual rights and fundamental freedoms, which they so far have not done, most likely because they are not favourable to the majority of the members of Parliament or the general population outside Parliament.

5.5: ROLE OF JUDICIARY IN IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS

Human rights agreements, once ratified and incorporated into domestic law, delegate enforcement to domestic political institutions. Leaders nonetheless have incentives to violate human rights, particularly to weaken the opposition, but the process of domestic legalisation can

²⁸⁵ Ibid

be an important constraint on such leaders.²⁸⁶ One key mechanism for domestic lock-in of international human rights commitments is enforcement by independent courts.²⁸⁷

5.5.1: Kenya's Judiciary in the 2010 Constitution

In Kenya's Constitution 2010, by the inclusion of an insulated judiciary armed with the power of judicial review with which it can, as discussed elsewhere in this chapter, authoritatively interpret the Constitution.²⁸⁸ The Judiciary has the power, through judicial review mechanisms to review executive and administrative conduct or actions of the state, state organs, state departments and state officials. Judicial review commonly refers to the authority of the court both to review the constitutionality or validity of legislative acts to pass upon the constitutionality or validity of executives and administrative acts and disregards or direct the disregards of such acts as are held to be unconstitutional or as violate of applicable statutes. Further, it explicitly prescribes the judiciary's power of interpretation of the Constitution and statutes which gives the leeway to judges to be transformative in their approach to interpretation.²⁸⁹ Indeed as noted by Mutunga, the courts, and specifically the Supreme Court does not have to grapple with defining its

²⁸⁶ Courtney Conrad and Emily H. Ritter, Tenure, Treaties, and Torture: The Conflicting Domestic Effects of International Law. *Journal of Politics*, (2013); Christian Davenport, Multi-Dimensional Threat Perception and State Repression: An Inquiry into why states Apply Negative Sanctions. *American Journal of Political Science*, (1995), p 39 (3): 683-713; Will H. Moore, Repression and Dissent: Substitution, context and Timing, (1998) *American Journal of Political Science*, 43 (3): 851-73; Will H. Moore, The Repression of Dissent: A Substitution Model of Government coercion, (2000). *Journal of Conflict Resolution*44 (1): 107-27; Emily H. Ritter, Policy Disputes, Political Survival, and the Onset and Severity of state Repression. (2014), *Journal of conflict Resolution* 58 (1): 143-68.

²⁸⁷Linda Keith, Judicial Independence and Human rights Protection around the World. *Judicare*, (2002) 85 (4): 195-200; Linda Keith, Neal Tate and Steven C. Poe, Is the Law a Mere Parchment Barrier to Human rights Abuse? (2009), *Journal of Politics* 71 (2):622-60.

²⁸⁸ Ben Sihanya, The role of the Judiciary in the accountability and governance of the developed Government structure: A paper present to the Institute of Certified Public Accountants of Kenya (ICPAK)20th Economic Symposium,Nairobi,February,24,2012 p 2

²⁸⁹ Dudley Ochiel, The Constitution of Kenya 2010 and Judicial Review: Why the Odumbe Case Would be Decided Differently Today.- See more at: <http://kenyalaw.org/kenyalawblog/the-constitution-of-kenya-2010-and-judicial-review-odumbe-case/#sthash.xAUBtWQ4.dpuf>

parameters in matters of judicial review as did the American Supreme Court, through the case of *Marbury v. Madison*.²⁹⁰ The following section examines the meaning, nature, relevance and importance of the power of judicial review.

5.5.2: Judicial review: some historical antecedents

Judicial review provides a mechanism by which the judiciary can effect the implementation, contours, and the formulation of policy. As such, it provides a possible avenue of access to a variable 'open' state.²⁹¹ Literally the concept of judicial review means revision of the decree or sentence of an inferior court by a superior court. However, judicial review has a more technical significance in public law, founded on the concept of limited government.²⁹² In this case, judicial review means that Courts of law have the power to test the validity of legislative as well as other governmental action with reference to the provisions of the constitution.²⁹³

Judicial review has roots in the natural law theories of the ancient and medieval times. However, it started to take definite shape in the age of enlightenment.²⁹⁴ The nineteenth century was heavily influenced by positivist thought, which feared any attempt by the judiciary to impose higher or constitutional standards on ordinary legislation. The popular legislature was seen as the only source of law, and its statutes were to control all cases brought before the courts.²⁹⁵ Prior to the seventeenth century, the English judicial tradition often tended to assign a subordinate role to the legislative function of King and Parliament, holding that law was not created but

²⁹⁰ *Marbury v. Madison* 5 U.S. 137 (1803) In Mutunga, Human rights States and societies. Transnational Human rights law Review, Vol. 2 (2015), p 86.

²⁹¹ Mauro Cappelletti, Judicial Review in Comparative Perspective. California Law Review Vol. 58:1017 P 1018

²⁹² *Ibid*

²⁹³ *Ibid*

²⁹⁴ *Ibid*

²⁹⁵ *Ibid*

ascertained or declared.²⁹⁶ Common law was fundamental law, and, although it could be complemented by the legislator, it could not be violated by him. Hence law was largely drawn from arbitrary interventions of King and Parliament.²⁹⁷

This was the tradition Coke inherited and used as a weapon in his struggle against the exercise of arbitrary power of King James I.²⁹⁸ The King claimed to be endowed with reason equal to that of the judges, his “delegates,” and consequently claimed to be able to exercise the judicial power personally.²⁹⁹ The Glorious Revolution of 1688 was a victory of Parliament against the Crown, and it is as such that it is primarily remembered; importantly, it was also a victory of Parliament against the judiciary. The judiciary in pre-1688 Britain had often constructed the common law so as to hold that “the King could not, on the basis of his powers and prerogatives as a monarch, make any change in the general law of the land without the support of Parliament” and soon found that punishable acts could only be defined by Parliament.³⁰⁰ Coke, however, replied that only judges could exercise that power, for only they were learned in the difficult science of law “which requires long study and experience, before that a man can attain to the cognisance of it” It was against the law making powers of both the King and the judiciary that the 1688 Bill of Rights “proclaimed loudly that proceedings in Parliament ought not to be questioned or impeached in any court or any other place”.³⁰¹

²⁹⁶ Ibid

²⁹⁷ Ibid

²⁹⁸ See von Mehren, *The Judicial Conception of Legislation in Tudor England*, in *Interpretations of Modern Legal Philosophies* 751 (P. Sayre ed. 1947). Ibid p 1027

²⁹⁹ Ibid

³⁰⁰ Ruu Koopmans, / Jessica Erbe, (2003): *Towards a European public sphere? Vertical and horizontal dimensions of Europeanised political communication*. Paper presented at the international Conference “Europe and Europeanisation of public sphere? Political mobilisation, public communication and the European Union. WZB, 20-22 June 2003, p 17

³⁰¹ Kenneth D. Ewing. *The Human Rights Act and Parliamentary Democracy*. *The Modern Law Review*, vol. 62, No. 1 (1999), p 79

The development of Parliamentary sovereignty in the late 17th and its consolidation throughout the 18th century was later to be paralleled by a retreat of supervisory review in the 19th and early 20th centuries, as courts became increasingly deferential to the executive and curtailed their review of administrative decision-making and executive actions.³⁰² The period also entailed a growth in the power of Parliament and the other a growth in the discretion of the executive, the fusion of powers and the growing dominance of cabinet government which ultimately meant that these two processes were two sides of the same coin.³⁰³ They both entailed the growth of the power of government and the dominant faction within Parliament, vis-à-vis the judiciary and the common law, and the supervisory review that did occur was increasingly founded on the doctrine of *ultra vires*, which reaffirmed the sovereignty of a Parliament controlled by disciplined political parties under the control of the Cabinet, and therefore the retreat and changes of supervisory review and the denial of statutory review should both be considered in terms of expansion of governmental power against the judiciary.³⁰⁴

Over the years, Britain developed the concept of Parliamentary sovereignty that is central to the Westminster system shared in its broad outlines by all former British colonies, including Kenya, as well as the doctrine of *ultra vires*, which according to Bateman, was ubiquitous in the development of judicial review.³⁰⁵

The essence of the Westminster model is majority rule and amongst its core features is the absence of statutory judicial review and the supremacy of Parliament. The courts do not have the power of [statutory] judicial review. Parliament is the ultimate, or sovereign, authority. Parliamentary sovereignty is vital ingredient of the majoritarianism of the Westminster model,

³⁰² David Bateman, *Judicial Review in Kingdom and Dominions: The historical foundations of judicial review in the UK, Canada and New Zealand*. Available at www.polisci.upnn.edu/ppec/PPEC%20People/bateman/LSA%20pdf. (Accessed on 24th March, 2016).

³⁰³ *Ibid*

³⁰⁴ *Ibid* p 17

³⁰⁵ *Ibid* p 10

because it means that there are no formal restrictions on the power of the majority of the House of Commons”.³⁰⁶

The classic formulation of this doctrine was that of Albert Venn Dicey, and was outlined during the period in which the practical reality of Parliamentary supremacy had reached its apotheosis and was most closely aligned with its theoretical formulation: the sovereignty of Parliament “means neither more nor less than this, namely, that Parliament...has under the British constitution, the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.”³⁰⁷

The other foundation of judicial review is based upon the role of the court as the guardian of the rule of law. This version of judicial review is found in American constitutional system. In fact, it has rightly been argued that statutory judicial review is the most distinctive feature of the constitutional system in the United States of America which is in contrast with the British constitutional system which, as discussed above, lacks judicial review of legislation.³⁰⁸ Although there is no express provision in the American Constitution for judicial review, the Supreme Court made it clear that it had the power of judicial review. This duty and jurisdiction of the Judiciary is memorably etched in the words of Marshall J in, “It is, emphatically, the province and duty of the judicial department to say what the law is”.³⁰⁹ Judicial review facilitates self-government and enables potentially disaffected minorities to win recognition of their grievances

³⁰⁶ Arend Lijphat, *Democracies; patterns of majoritarian and consensus government in twenty-one countries*. (New Haven: Yale University Press, 1984), p 9. In Bateman supra note 1278 above, p 12

³⁰⁷ Albert Venn Dicey, *The Law of the Constitution*. (London: Macmillan and Co. 1885) p 36. In Bateman supra note above p 12

³⁰⁸ Allan R. Brewer-Carias, *Judicial Review in Comparative Law*. (Cambridge: Cambridge University Press, 1989), p 1. In Bateman supra note above p 12

³⁰⁹ *Ibid*

without resort to civil disobedience, rebellion, or other forms of lawless self-help.³¹⁰ In the case of sexual minorities, they mostly resort to a life of invisibility and stigma, and low self-esteem.

The American version of judicial review was the logical result of centuries of European thought and colonial experience which had made Western man generally willing to admit the theoretical primacy of certain kinds of law and had made Americans in particular ready to provide a judicial means of enforcing that primacy.³¹¹ Thus, judicial invalidation of legislation in America had been a feature of the pre-Revolution era, and even prior to the 1787 Constitution State Supreme courts had exercised this power against statutes enacted by the new State legislatures.³¹²

5.5.3: Minorities and Judicial Review

Minorities have been defined in international law as groups that have a common element of dominating significance, observable in social structure and social processes as they affect politics.³¹³ They share certain characteristics: they are isolated in the social structure; they occupy positions relatively resistant to change (particular, resistant to the solvent shifting interest alignments); and they are vulnerable to attack by others.³¹⁴ The purpose of judicial review as stipulated in footnote four[of the Caroline case], is to exert more scrutiny on laws or legislation that are made or sustained because the political processes that are ordinarily supposed to repeal

³¹⁰ Louis Lusky, *By What Right?: a commentary on the Supreme Court's Power to Revise The Constitution* 38-39 (1975).

³¹¹ *Ibid*

³¹² In 1786 the Supreme Court of Rhode Island “held that a statute of the legislature which purported to make a penalty collectible on summary conviction, without trial by jury, gave the court no jurisdiction, i.e. was invalid., the colonial charter, which was then still in force as the Constitution of the State, having secured the right of trial by jury in all cases”.

³¹³ *Ibid* p 1299

³¹⁴ *Ibid*

them or bring them about are defeated and convoluted by majoritarian forces.³¹⁵ In other words, Freidman argues that:

The footnote acknowledges that those representatives enjoying office, its power, and its prerequisites may conspire to entrench themselves and to defeat the very majoritarian processes that render the acts of legislatures presumptively more legitimate than the acts of judges.³¹⁶

One of the most central obsessions of modern constitutional scholarship is the role of the judiciary in a situation of counter-majoritarian difficulty.³¹⁷ Barry Freidman correctly points out that while academics have struggled to resolve the tension between judicial review and majoritarian governance, the counter-majoritarian difficulty has had profound effect on judicial decision-making.³¹⁸ Some such effects have been in the area of protection of the human rights and individual freedoms of what Freidman has called “the discreet insular Minorities”³¹⁹ where courts, through judicial review, have overruled legislation enacted by the majority through their elected members of legislative bodies.³²⁰

Normative accounts of judicial review in separation of powers systems often emphasise the role that courts may play in protecting the rights and liberties of political minorities, who, are often

³¹⁵ Ibid

³¹⁶ Barry Friedman, The history of the Counter-Majoritarian Difficulty, Part one: The Road to Judicial Supremacy The Yale Law Journal, Vol. 91: 1297, (1982). P 1291

³¹⁷ According to Freidman, the fixation is so great the proposition hardly requires citation. See Bruce Ackerman, the Storrs Lectures: Discovering the Constitution, Yale L.J. 1013, 1016 (1984), Erwin Chemerinsky, foreword: The vanishing Constitution, 103 Harv. L. Rev. 32, 63 (1993); Louis Michael Seidman Ambivalence and Accountability, 61 S. Cal. L. Rev. 1571, 1573 (1988); Mark V. Tushnet, Anti formalism in Recent Constitutional Theory, 83 Mich. L. Rev. 1502, 1502 (1985); Morton J. Godwits, Foreword: The Constitution of Change: Legal Foundationalism, 107 Harv. L. Rev. 32, 63 (1993). In Barry Friedman, The history of the Counter-Majoritarian Difficulty, Part one: The Road to Judicial Supremacy p 7

³¹⁸ Barry Friedman, supra note 1292 above, Supremacy p 7

³¹⁹ Ibid

³²⁰ See The Supreme Court of America’s declarations of legislation as being unconstitutional when they violate the fundamental freedoms of individuals in cases such as Roe v. Wade, Lawrence v. Texas among others.

racial, ethnic, religious or sexual minorities as well.³²¹ Twinomugisha argues that the judiciary, more than any other organ of government, has an immense constitutional duty to safeguard the integrity of democracy, particularly, through protecting fundamental rights and freedoms.³²² In a constitutional democracy, the judiciary is empowered to determine whether the executive and the legislature conduct their duties in compliance with the constitution. According to Nyarango, judicial power is the authority granted courts to interpret and declare the law, which serves as a deterrent to the abuse of constitutional rights.³²³

The judiciary must employ this power to stop excesses by the executive and the legislature in order to promote fundamental rights in a democratic, free and just society. This it does through judicial review by which it evaluates laws, and legislative and executive acts for compliance with the constitution.³²⁴ The power of judicial review is particularly important in the protection of minority rights, including those of LGBT individuals.³²⁵ This aspiration has played a prominent role in the development of constitutional jurisprudence in the United States, where “prejudice against discrete and insular minorities” is considered a “special condition” that allows heightened judicial scrutiny of legislation aimed at “particular religious...national...or racial minorities”.³²⁶ As argued ably by Friedman, one famous answer to the counter-majoritarian difficulty focuses on the idea of “discrete and insular minorities”.³²⁷ He states that there may be some groups such

³²¹ James R. Rodgers, The Majoritarian Basis of Judicial Countermajoritarianism. A Paper presented at the meeting of the Western Political Science Association, Portland, Oregon, March 22-24, 2012, p 2. Available at wpsa.research.pdx.edu/meet/2012/rogersandra.pdf. (Accessed on 23rd march, 2016).

³²² Ben Kiromba Twinomugisha, ‘The role of the Judiciary in the promotion of democracy in Uganda’ (2001) 9 African Human Rights Law Journal, 3. In Ivy Irene Kwamboka Nyarango, The Role of the Judiciary in the Protection of Sexual minorities in Kenya. A n LLM dissertation, Faculty of Law, Universidade Eduardo Mondlane, 2011 p 23.

³²³ Ivy Irene Kwamboka Nyarango, The Role of the Judiciary in the Protection of Sexual minorities in Kenya. A n LLM dissertation, Faculty of Law, Universidade Eduardo Mondlane, 2011 p 23.

³²⁴ *Ibid*

³²⁵ *Ibid*

³²⁶ *United States v. Carolene Products Co*, 304 U.S. 144 (1938).

³²⁷ Barry Friedman, The history of the Counter-Majoritarian Difficulty, Part one: The Road to Judicial Supremacy, p 7.

as sexual minorities that are excluded from the give and take of democratic politics. Some groups may be so unpopular and/or the victims of such extreme prejudice as are sexual minorities that they almost always are the losers in the democratic process.³²⁸

Chapter three of this thesis demonstrates that the evolution and enactment of the British sodomy laws was motivated by Judeo-Christian and other existing cultural and moral prejudices against the minority homosexuals and such law continues to be sustained by the intolerance, malice and prejudice of dominant forces against sexual minorities in former British colonies, including Kenya.

Much inspiration can be drawn from examples in other jurisdictions on the issue of counter-majoritarian difficulty and the position of the Courts in such instances. For example, in 2008, Judge John E. Jones III, a Republican serving on the United States District Court for the Middle District of Pennsylvania stated that Article Three of the United States Constitution “is counter-majoritarian,” adding that;

The judicial branch protects against the tyranny of the majority. We are a bulwark against public opinion. And that was very much done with a purpose, and I think that it really has withstood the test of time. The judiciary is a check against the unconstitutional abuse and extension of power by the other branches of government.³²⁹

The aspiration that courts play an important role in the protection of the rights and fundamental freedoms of minorities, which has metamorphosed into the contemporary basis for protection of sexual minorities has roots in the case of *United States vs. Carolene Products Co.*, in which in what is now the famous foot note four, Justice Stone suggested that there “may be narrower scope for operation of the presumption of constitutionality” when courts are called upon to determine the validity “of statutes directed at particular religious...or national...or racial

³²⁸ Ibid

³²⁹ Ibid

minorities.”³³⁰ In such cases, he explained, “prejudice against discrete and insular minorities may be special a condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”³³¹

This caution is in recognition of the fact that legislation bears heavily upon the interests of minority and this has come to be widely regarded as a reason for subjecting it to closer judicial scrutiny.³³² The concern has been that a political majority cannot be trusted to respect rights that the Constitution affirms for all, majority and minority alike.³³³ Consequently, judicial review is often seen as a corrective for this deficiency of democracy: since the constitution is paramount law, judges can enforce the limitations that it imposes upon legislative authority.³³⁴ The argument is that since judges are trained in the traditions of the law and relatively insulated from popular pressures, they are more likely than legislators to respect those limitations.³³⁵

Judicial review has been variously attacked as an affront to democracy. According to Bickel and others, judicial review is ‘a deviant institution’ because it allows unelected judiciaries to countermand pronouncements of majoritarian legislatures’.³³⁶ Bickel argues that giving such powers to the judiciary leads to interference with the democratic ideal of distribution of authority between courts and the legislature. This is more so if it is subjected to the judgements of politically irresponsible judges concerning the rightful boundaries of the political process.³³⁷

³³⁰ Terrance Sandalow, *Judicial Protection of Minorities*. (Michigan Law Review, 1162 1976-1977, P 1165

³³¹ *Ibid*

³³² *Ibid*

³³³ *Ibid*

³³⁴ *Ibid*

³³⁵ *Ibid*

³³⁶ Alexander Bickel, ‘The least dangerous branch: The Supreme court at the Bar of politics (1962) 21

³³⁷ *Ibid* p1166

The counter-majoritarian difficulty is rooted in the structural theory of majoritarian governance and popular sovereignty.³³⁸ The theory is in turn premised on the belief that important pronouncements must never be divorced from the electorate or from the body representing the electorate. Hence, according to the opponents of judicial review, appointed judges must not be allowed to declare unconstitutional decisions of elected persons or officers controlled by elected persons³³⁹. Such minorities have reason to fear that the bond of community kinship, which leads legislators to identify with most of their constituents and take full account of their needs in fashioning legislation, is attenuated in their case.³⁴⁰ The danger is that they will not accept the legislative compromises as binding on them if they perceive the law to treat them less favorably than others and, despairing of relief through the political process, will be driven toward lawless self-help. The consequent threat to the openness of the society has already been mentioned.³⁴¹ According to Professor Kramer, “in a system of popular constitutionalism, the role of the people is not confined to occasional acts of constitution-making, but includes active and ongoing control over the interpretation and enforcement of constitutional law. He argues that:

The assumption that final interpretative authority must rest with some branch of the government belongs to the culture of ordinary law, not to the culture of popular constitutionalism. In a world of popular constitutionalism, government officials are regulated, not the regulators, and final interpretive authority rests with the people themselves.³⁴²

However, Chemerinsky in countering Kramer’s views rightly observes that opposing judicial review in the name of an abstract faith in the public as authoritative interpreter of the Constitution risks that the diffuse, diverse public will express its constitutional will through

³³⁸ Ivy Irene Kwamboka Nyarang’o, *supra* note 323 above, p 29.

³³⁹ *Ibid*

³⁴⁰ *Ibid*

³⁴¹ *Ibid*

³⁴² Larry D. Kramer, *The People Themselves: Popular constitutionalism and Judicial Review*, (2004). In Erwin Chemerinsky, *In Defense of Judicial Review: a Reply to Professor Kramer*. In *California Law Review*, Vol. 92:1013 p 1014.

mechanisms with substantial pitfalls.³⁴³ In his view, legislatures are heavily influenced by vested, special interests and by eliminating judicial review of legislative acts, Constitutional interpretation would be transferred from an institution largely insulated from political pressure to one that is highly majoritarian. Checks and balances would be lost, most tragically in instances where the legislature simply chooses to ignore the Constitution at the expense of unpopular groups.³⁴⁴ Another fear expressed by Chemerinsky is that elimination of judicial review as proposed by Professor Kramer is that it would literally mean that other branches and levels of government get the last word, meaning that the judiciary, including the Supreme Court, could speak, but other branches would be free to ignore the courts and functionally overrule their decisions. He argues that:

To be clear, this would mean that Southern States should have been free to interpret the Constitution for themselves and disobey judicial desegregation orders. Congress should have been accorded authority to overturn *Miranda v. Arizona* by statute.³⁴⁵

Notwithstanding these oppositions to judicial review, there is a lot of merit in it, especially on issues that concern the rights and freedoms of sexual minorities who are insular, unpopular and in most cases too few can never get enough numbers to push through legislation that protects their interests.³⁴⁶ In any event, laws that differentiate people on statuses such as sexual orientation, race and sex often reflect flawed democratic deliberations, and accordingly, judicial review of such laws ameliorates democratic deficits instead of undermining deliberative democracy.³⁴⁷

³⁴³ Erwin Chemerinsky, In Defense of Judicial Review: a Reply to Professor Kramer. In *California Law Review*, Vol. 92:1013 p 1015.

³⁴⁴ *Ibid* p 1016

³⁴⁵ *Ibid* p 1017

³⁴⁶ *Ibid* p 23

³⁴⁷ Evans Brems, (Ed.). *Diversity and European Human Rights: Rewriting judgments of the ECtHR*. (Cambridge University Press, 2013) p 248.

In an article published several years ago, Professor Ronald Dworkin argued that because controversies about the meaning of the Constitution involve disagreement between a majority and a minority, fairness requires that they be decided by the courts.³⁴⁸ In doing so, he explicitly rejected the contention that democratic values require the resolution of such controversies through the political process.³⁴⁹ In *The Federalist* No. 78, Alexander Hamilton observes that not only can the judiciary protect a minority against majority oppression, but the judiciary can also act as “an intermediate body between the people and the legislature that is, the judiciary can protect popular majorities from corrupt or oppressive majorities.”³⁵⁰

LGBT people fall squarely within the category of “discrete and insular minorities” created by foot note number four. This study argues that the “discreteness and insularity” LGBT people in Kenya makes them characteristically helpless, passive victims the political processes and objects of prejudice. Further, as demonstrated above, Kenya’s legislature has displayed a number of weaknesses which disentitle it from being the final voice on legislation. First, legislators are prisoners of popular public opinions and religious constituencies and cannot therefore protect sexual minorities. Secondly, they have demonstrated self-interest in legislative making to the extent that they are oftentimes a danger to both the majorities and the minorities alike. Accusations of corruption during elections and in the legislature against some legislators render the legislative institution unsuitable to exercise even its own majoritarian constitutional power.³⁵¹

³⁴⁸ Ronald Dworkin, *The jurisprudence of Richard Nixon*, *New York Review of Books*, May, 4, 1972 p 27, 31-32. In Terrance Sandalown supra note 330 above, P 1165.

³⁴⁹ Ibid p 1166.

³⁵⁰ James R. Rodgers, *The Majoritarian Basis of Judicial Countermajoritarianism*. A Paper presented at the meeting of the Western Political Science Association, Portland, Oregon, March 22-24, 2012, p 2. Available at wpsa.research.pdx.edu/meet/2012/rogersandra.pdf. (Accessed on 23rd march, 2016).

³⁵¹ In a story carried out by the Star, one of the daily newspapers in Kenya, by the Anti-Corruption Commission CEO Halakhe Waqo, there is a lot of corruption in the Kenyan Parliament. It stated: “Some members of parliament

The shortcomings of the legislature make it imperative for courts to exercise powers of judicial review to protect sexual minorities. LGBT people fall squarely within the category of “discrete and insular minorities” created by foot note number four. This study argues that the “discreteness and insularity” LGBT people in Kenya makes them characteristically helpless, passive victims the political processes and objects of prejudice. It cannot therefore, be expected that we trust the operation of those political processes ordinarily to be relied upon to protect minorities. The power of judicial review will enable a more searching judicial scrutiny of the legislative processes and outcomes in respect of sexual minorities.

5.5.4: Judicial Review under the Constitution of Kenya 2010

One of the legacies of British colonialism in Kenya is the British legal system foundational theory of judicial review in which the courts’ judicial review jurisdiction is justified by the notion that this procedure merely enforces the will of Parliament, by ensuring that public bodies do not exceed the powers given to them by the legislature.³⁵² This theory (‘*ultra vires*’), as stated above, elevates the power of Parliament over the judiciary. *Ultra vires* has been described as ‘the juristic basis of judicial review.’³⁵³ Kenya inherited the Westminster Model of Parliamentary supremacy, with curtailed powers of judicial review. The Constitution of Kenya 2010 has, however, altered this situation, and provided for the power of judicial review as being central to the functions of the judiciary. According to Chief Justice Mutunga, the principle of the

in office are paid yet they neither attend parliamentary sittings nor carry out any related activities,. Some have been signing up for allowances for absent colleagues, he also reported, saying loopholes in the PSC have to do with system weaknesses. Waqo also said the Ethics and Anti-Corruption Commission found that members of the Parliamentary Service Commission have been fueling their cars using taxpayers money. "They ask for money claiming they travelled over the weekend yet they did not," he said and recommended fuel cards. "We have launched a probe into the graft in Parliament and will name all individuals involved. We will not spare anybody engaged in this practice

³⁵² James R. Rodgers, *supra* note 349 above, p 2.

³⁵³ (Articles 23(3)(d) and 165(3)(d)).

possibility of judicial review of legislation established by the United States Supreme Court in the case of *Marbury v. Madison*, is [now] enshrined in the Constitution of Kenya 2010.³⁵⁴

Mutunga argues that a close examination of these provisions shows that the 2010 Constitution requires the Kenyan courts to go even further than the U.S. Supreme Court did in *Marbury v. Madison*, (herein referred to as *Marbury*).³⁵⁵ In *Marbury*, the U.S. Supreme Court declared its power to review the constitutionality of laws passed by Congress. By contrast, the power of judicial review in Kenya is found in the Constitution. Article 23(3) gives the High Court powers to grant appropriate relief ‘including’ meaning that this is not an exhaustive list: A declaration of rights; An injunction; A conservatory order; A declaration of invalidity of any law that denies violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights; An order for compensation; An order for judicial review.

Article 165(3) (d) makes it clear that that power extends well beyond the Bill of Rights when it provides that the High Court has jurisdiction to hear any matter relating to any question with respect to interpretation of the Constitution

including the determination of (i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention, of this Constitution; (iii) any matter relating . . . to the constitutional relationship between the levels of government.

These provisions make clear that Kenyan courts have a far-reaching constitutional mandate to ensure the rule of law in the governance of the country. Prior to the promulgation of the Constitution of Kenya, 2010 judicial review took place along the common law grounds mainly derived from the British legal system such as ‘proportionality’, ‘legitimate expectation’,

³⁵⁴ Willy Mutunga, supra note 31 above, p 9.

³⁵⁵ Ibid

'reasonableness' and principles of natural justice. The Constitution of Kenya has however now given the judiciary the broad jurisdiction to rule on the constitutionality of legislative and administrative actions through the power of Judicial Review. The High Court has jurisdiction, under Article 23(1), to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.³⁵⁶

The Supreme Court of Kenya in *Communications Commission of Kenya v Royal Media Service* recognised that the principle of judicial review, and at the same time the key place of the courts in upholding of the Constitution, is enshrined in our Constitution - Articles 23(3)(d) and 165(3)(d). The court held that whereas the American Court in *Marbury* declared its power to review the constitutionality of laws passed by Congress, by contrast, the power of judicial review

³⁵⁶ Thereafter the court is empowered—"In any proceedings brought under Article 22, a court may grant appropriate relief, including—(a) a declaration of rights;(b) an injunction;(c) a conservatory order;(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;(e) an order for compensation; and(f) an order of *judicial review*." Again, Article 47 of the Constitution provides:

"47. Fair administrative action: (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.(3)Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and(b) promote efficient administration. "The jurisdiction under Article 23³⁵⁶ is to be exercised in accordance with Article 165 which is a comprehensive catalogue on the jurisdiction ambit of the High Court—

"3. Subject to clause (5), the High Court shall have—(a) unlimited original jurisdiction in criminal and civil matters;(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—(i) the question whether any law is inconsistent with or in contravention of this Constitution;(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and(iv) a question relating to conflict of laws under Article 191; and(e) any other jurisdiction, original or appellate, conferred on it by legislation....(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

in Kenya is found in the Constitution. Hence the concept of judicial review before Kenyan courts has evolved from a common law foundation to a constitutional principle with five major dimensions – fairness in administrative action under Article 47; protection of the constitutionally guaranteed fundamental rights and freedoms in the Bill of Rights; judicial review of the decisions of tribunals appointed under the Constitution to consider the removal of a person from office; jurisdiction on questions of legislative competence and the interpretation of the constitution; supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.

Also, justice Odunga of the High Court of Kenya has recently recognised that “Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision”.³⁵⁷ However, no court, apart from the Supreme Court has fully explored and developed the concept of judicial review in Kenya as a constitutional supervision of power. The time is ripe for the Constitutional and Human Rights Division of the High Court to develop the law on this front. All decisions of the Supreme Court, including that on the constitutional foundation of judicial review espoused in the CCK case are binding upon the High Court. The court must develop its judicial review jurisprudence alongside the mainstreamed “theory of a holistic interpretation of the Constitution”

The entrenchment of the expansive power of judicial review in the Constitution of Kenya creates an opportunity for the courts to make law or strike down legislation that oppresses sexual minorities. It is an opportunity for the courts to queer their decision making actions and apply practical reasonableness to transform their jurisprudential outcomes in favour of sexual minorities. Indeed as discussed below, some of the courts have begun to do so.

³⁵⁷ Republic v Commissioner of Customs Services Ex parte Imperial Bank Limited [2015]eKLR

5.5.5: The judicial power of interpretation

It is unusual for a constitution to be as pre-occupied by the question, scope, methodology of its own interpretation as Kenya's 2010 Constitution. The Kenya Constitution is also unusual in setting out a theory of interpretation.³⁵⁸ Article 259 of the Constitution provides:³⁵⁹This Constitution shall be interpreted in a manner that-(a) promotes its purposes, values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;(c) permits development of the law; and(d) contributes to good governance....(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking...³⁶⁰

Methodologically, in exercising the power of judicial review, the courts are required to use certain elements of their institutional authority more creatively to promote genuine justice.³⁶¹In Finnis' principles of practical reasonableness, judges as decision-makers should be able to purposively apply interpretative mandates as well as invoke their remedial authority to advance justice. In Finnis' theory, judges cannot afford to merely think logically or analytically but need to engage rationality and with objectivity. It demands of decision-makers to be skilled in asking questions about alternative possibilities in order to reliably achieve some objective.³⁶² For the purposes of this study, decision-makers must be able to defend their decisions either to protect sexual minorities or not to protect them vis-à-vis the many challenges that they may face in majoritarian societies such as Kenya where the morality and values of the majority do not

³⁵⁸ Mutunga, Human Rights States and Societies. *Transnational Human rights law Review*, Vol. 2 (2015) p 86

³⁵⁹ Ibid

³⁶⁰ Ibid

³⁶¹ Eric C. Christiansen, Transformative Constitutionalism in South Africa: Creative Uses of Constitutional court Authority to Advance Substantive justice. *The Journal of Gender, Race & Justice*, Vol. 13 (2010). P 576-77

³⁶² Giovanni Sartor, A Sufficientist Approach to Reasonableness in Legal decision-making and Judicial Review. European University Institute, Florence, Department of Law. EUI Working Paper, LAW 2009/07 p1

support non-heterosexual sex and gender identities. They need to ask critical questions such as what the Constitution of Kenya requires of them in order that the country achieves its egalitarian and inclusive mission envisaged by the Constitution. Judicial review calls for cognitive reasonableness and rationality on the part of judges within the context of the prevailing culture. Presently, the prevailing culture internationally is the support for protection of the human rights of sexual minorities.

However, this culturally dependent idea of reasonableness must be distinguished from the trivial assertion that the beliefs of a person about what is reasonable may be influenced by the surrounding culture. For example, judges cannot be said to be reasonable if their decisions are influenced by the cultural or religious beliefs about sexuality and gender identity. The requirement of consonance does not concern what is (possibly mistakenly) believed to be reasonable: it concerns what is reasonable in a context.³⁶³ Such a requirement is violated when between a legal determination and general opinion there is a distance that cannot be overcome with the cognitive resources available to the people.³⁶⁴ Sartor rightly argues that consonance with general opinion may entail a certain conservatism, but it corresponds to the idea that the legal decisions should be taken in the name of the people, namely, of the legal community: though a legal decision-maker may take his decision on the basis of views such views when opportune, a certain proximity should be retained between the law and the opinions of the community it is supposed to govern.³⁶⁵ In this regard, judges should not be influenced by their cultural or religious beliefs, but the prevailing requirements of the Constitution.

³⁶³ Ibid

³⁶⁴ Ibid p3

³⁶⁵ Ibid

Mutunga argues that the Kenyan Constitution is unusual in setting out a theory of interpretation, which theory shuns staunch positivism and accepts the fact that judges make law.³⁶⁶ It allows judges to invoke non-legal phenomena thereby making the judiciary “an institutional political actor”.³⁶⁷ It is a merger of paradigms that problematise, interrogate, and historicise all different outlooks in the building of a radical democratic content that aims to be transformative of the state and society.³⁶⁸ It is a theory that values a multi-disciplinary approach to the implementation of the Constitution. It is neither insular nor inward looking, and seeks its place in global comparative jurisprudence, equality and participation, development, and influence.³⁶⁹ As noted above, the Constitution also embraces judicial enforcement of socio-economic rights by placing responsibilities on the state to ensure the enjoyment of these rights and provides for their enforcement in article 21.

Article 21 allows for a very broad interpretation of standing, giving persons the right to “approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened,” so those who are acting on their own behalf, acting on behalf of someone who is unable to act, acting as a member of a group; acting in the public interest, or an organisation acting on behalf of its members.³⁷⁰ In enforcing the Bill of Rights, the judiciary is expected to protect the liberties, rights and interests of minorities and the marginalised people. Further, the judiciary is expected, while interpreting the constitution to ensure its supremacy is not

³⁶⁶ Ibid

³⁶⁷ Ibid

³⁶⁸ Ibid p 87

³⁶⁹ Ibid

³⁷⁰ Article 21 of the Constitution of Kenya

compromised and further to declare any legislation or conduct that is consistent with the constitution.³⁷¹

Apart from its normative nature, the Constitution has inbuilt mechanisms for its interpretation which clearly is in sync with Finnis's Principles of practical reasonableness, that favour broad, purposive and approaches, a welcome departure from the previous Constitution. The interpretative principles in the Constitution underpin its transformative nature. The judiciary's expansive power to advance substantive justice comes from institutional characteristics as much as from the generous enumeration of socio-economic rights. The Judiciary, through the high court and the Supreme Court, has very broad jurisdiction over constitutional matters and has far-reaching, discretionary remedial powers.³⁷²

Additionally, access to the courts is multi-form and generally permissive. These procedural characteristics form a critical aspect of the power and authority of the judiciary and the courts. The central role of the court is to oversee the interpretation of the constitution by lower courts and review constitutionality of the acts of the other governmental bodies and state actors.³⁷³ With provisions on expansive dignity and equality protections as well as the comprehensive values of the Constitution, the judiciary is in a position to create jurisprudence of substantive justice as well as give impetus to the Constitution's commitment to the nation's justice-oriented ideology.³⁷⁴ The South African Judiciary and especially its Constitutional Court, which is very similar to Kenya's has been able to do so. According to Eric C. Christiansen, the South African Constitutional court has been able to creatively use certain elements of its institutional authority

³⁷¹ Ibid

³⁷² Willy Mutunga, *supra* note 31 above, p 4.

³⁷³ Ibid

³⁷⁴ Ibid

to promote genuine justice.³⁷⁵ Several decisions of the Court demonstrate how purposive interpretation and creative application of a court's jurisdiction and remedial authority can advance justice.³⁷⁶

The expansion of both the judicial review and rule-making powers of the Kenyan Supreme Court typifies what Desierto calls the "active re-direction of the Court's role, away from the passivity under the standard political question doctrine"³⁷⁷ that had predominated under the old Constitution.³⁷⁸ This reconceptualised with sensitivity towards the Court's use and understanding of its powers, roles, and practices under the Constitution³⁷⁹ creates an opportunity for the Kenyan courts to create a paradigm shift for protection of the human rights of sexual minorities in the country. The essence of purposive approach to judicial interpretation by the Kenyan courts was captured by the Kenyan Chief Justice Mutunga in the case of *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* where he observed as follows:

There is no doubt that the Constitution is a radical document that looks to a future that is very different from our past, in its values and practices. It seeks to make a fundamental change from the 68 years of colonialism, and 50 years of independence. In their wisdom, the Kenyan people decreed that past to reflect a status quo that was unacceptable and unsustainable, through: provisions on the democratisation and decentralisation of the Executive; devolution; the strengthening of institutions; the creation of institutions that provide democratic checks and balances; decreeing values in the public service; giving ultimate authority to the people of Kenya which they delegate to institutions that must serve them, and not enslave them; prioritising integrity in public leadership; a modern Bill of Rights that provides for economic, social and cultural rights to reinforce the political and civil rights, giving the whole gamut of human rights the power to radically mitigate the status quo and signal the creation of a human-rights State in Kenya; mitigating the status quo in land that has been the country's Achilles heel in its economic and democratic development. These instances, among others, reflect the will and deep

³⁷⁵ Eric C. Christiansen, Transformative Constitutionalism in South Africa: Creative Uses of Constitutional court Authority to Advance Substantive justice. *The Journal of Gender, Race & Justice*, Vol. 13 (2010). P 576-77

³⁷⁶ *Ibid*

³⁷⁷ *Ibid*

³⁷⁸ *Ibid* p 117

³⁷⁸ *Ibid*

³⁷⁹ *Ibid* p 116

commitment of Kenyans, reflected in fundamental and radical changes, through the implementation of the Constitution.³⁸⁰

Writing on constitutional interpretation, Professor Githu Muigai, in a seminal paper on constitutional interpretation in Kenya, captured the key issues in judicial interpretation. He stated;

First, the fact that the Constitution is both a political charter and a legal document makes its interpretation a matter of great political significance, and sometimes controversy. Second, the court's interpretation of the Constitution by way of judicial review is equally controversial as it is essentially counter-majoritarian. A non-elected body reviewing and possibly overruling the express enactments and actions of the elected representatives of the people would raise the issue of legitimacy. Thirdly, however defined, the Constitution is an intricate web of text, values, doctrine, and institutional practice. It lends itself to different interpretations by different, equally well-meaning people. Fourthly, the Constitution contains conflicting or inconsistent provisions that the courts are called upon to reconcile, and at other times the Constitution implicitly creates a hierarchy of institutions or values and the courts are called upon to establish the order of importance. Fifthly, at times, the Constitution is vague or imprecise or has glaring lacunae and the courts are called upon to provide the unwritten part.³⁸¹

Contrary to the current Constitution, Kenya's former Constitution did not provide for the manner in which the Constitution was to be interpreted. This was largely left to the judge to discern its meaning primarily from the words and thereafter adopt a philosophy which he considered suitable to give the words content. In deed the judges expressed a basic conservative position that in constitutional adjudication and interpretation the Constitution was to be construed in the same way as any other legislative enactment.³⁸² Thus under the old constitutional dispensation, the judiciary failed to meaningfully confront an un-egalitarian society in which civil, political and socio-economic rights were denied to the majority of Kenyans. The old judiciary was unable to comprehend the importance of human rights and in the few rulings that it attempted to

³⁸⁰ Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2013]eKLR at para. 89.

³⁸¹ Githu Muigai, "The Judiciary in Kenya and the Search for a Philosophy of Law: The Case of Constitutional Adjudication" in International Commission of Jurists, Constitutional Law Case Digest Vol II, Nairobi, 2005, p 159.

³⁸² Muthomi Thiankolu, "Landmarks for El Mann to the Saitoti Ruling; Searching a Philosophy of Constitutional Interpretation," [2007] Vol. 1 KLR 188.

adjudicate on issues of human rights claims, it the outcome was anti-human rights. The Constitution of Kenya 2010, which is an explicitly moral document, binds the judiciary (along with the legislature, the executive and all organs of state) to upholding constitutional values. The judiciary is expected to ‘promote the values that underlie an open and democratic society based on human dignity, equality and freedom’ and it is required always to ‘promote the spirit, purport and objects of the Bills of Rights.’³⁸³

The Constitution of Kenya, 2010, apart from looking and considering the plain meaning of the words of the Constitution, provides tools for interpretation and application which must all be taken into account when construing it. These provisions include the preamble which provides the foundational basis of the Constitution; the Constitution must be promoted in a manner that promotes its purposes, values and principles;³⁸⁴ in a manner that advances the Rule of Law and the human rights and fundamental freedoms in the Bill of Rights;³⁸⁵ permits the development of the law³⁸⁶; contributes to good governance;³⁸⁷ according to a set of comprehensive national values and principles of governance which bind all state organs, state officers, public officers and all persons in making or implementing public policy decisions.³⁸⁸

According to Chief Justice Mutunga, the Kenyan constitution is unusual in setting out a theory of interpretation. This theory shuns staunch positivism and accepts the fact that judges make law.³⁸⁹

It allows judges to invoke non-legal phenomena thereby making the judiciary “an institutional

³⁸³ Section 39(1)(a) and (2) of the Constitution.

³⁸⁴ Article 259(1) (a) of the Constitution of Kenya, 2010.

³⁸⁵ Article 259(1) (b) of the Constitution of Kenya, 2010.

³⁸⁶ Article 259(1) © of the Constitution of Kenya, 2010.

³⁸⁷ Article 259(1) (d) of the Constitution of Kenya, 2010.

³⁸⁸ Article 10 of the Constitution of Kenya, 2010.

³⁸⁹ Willy Mutunga, *supra* note 355 above, p 86

political actor”.³⁹⁰It is a merger of paradigms that problematise, interrogate, and historicise all different outlooks in the building of a radical democratic content that aims to be transformative of the state and society.³⁹¹It is a theory that values a multi-disciplinary approach to the implementation of the Constitution. It is neither insular nor inward looking, and seeks its place in global comparative jurisprudence, equality and participation, development, and influence.³⁹²

Article 232 of the Constitution provides that values and principles of public service include the involvement of people in the policy making process; and the application of treaties which Kenya has ratified and general principles of international law.³⁹³This approach to interpretation has been well demonstrated in the South African case of *S v Zuma*,³⁹⁴ in which the Constitutional Court laid down the approach to be adopted in the interpretation of a fundamental right in the Constitution. The Court proposed that a right must be interpreted in a manner that seeks to realise the objectives of the right. It held that:

The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter’s protection.³⁹⁵

³⁹⁰ Ibid

³⁹¹ Ibid p 87

³⁹² Ibid

³⁹³ Article 2(5) and (6) of the Constitution of Kenya, 2010.

³⁹⁴ *S v Zuma* 1995 2 SA 642 (CC).

³⁹⁵ Ibid.

5.5.6: Implications of Judicial Review for sexual minorities in Kenya

In its new constitutional order, Kenya as a nation is committed not only to democratic governance but also to preservation of the values of an open society - a society in which personal autonomy can be and is maximised and where everyone accepts the law as morally binding.³⁹⁶

By including the power of judicial review, the Constitution of Kenya 2010 recognises the extent to which disadvantage attaches to minorities and others that face discrimination on the basis of gender, and other group characteristics. It expressly prescribes a regulatory framework for both procedural and substantive equality.³⁹⁷

However, whereas judicial review is being vibrantly exercised by the Kenyan Courts it has tended to involve cases which do not concern sexual minorities few, though, as is demonstrated in this chapter, have concerned LGBT people. The reason for this could be that the number of litigants who belong to the sexual minority genre has been low, due to the fear of exposing themselves in the courts. This brings into question the role of National Human rights commissions and non-governmental organisations in their monitoring roles through which they can engage in public interest litigation on behalf of sexual minorities.³⁹⁸ Kenya's judiciary has an important role to robustly interpret counter-majoritarian provisions of the constitution as well as strike down laws such as the sodomy laws in the Penal code that were made maliciously with the specific aim to prejudice sexual minorities to satisfy the majoritarian demands of Judeo-Christian culture.

The international jurists argue strongly and rightly stated that all human beings are persons before the law regardless of their sexual orientation or gender identity, and are entitled to rights

³⁹⁶ Willy Mutunga, *supra* note 31 above, p 86.

³⁹⁷ *Ibid*

³⁹⁸ The Constitution of Kenya 2010 encourages public interest litigation at Article 48.

and freedoms deriving from the inherent dignity of the human person as well as to the equal protection of the law without discrimination.³⁹⁹ The Judiciary holds the supra-position that enables it to uphold the dignity of all human beings equally and without discrimination and without fear of any sort, especially arguments of the morality of the majority.⁴⁰⁰ This new and transformative ethos of the judiciary is aimed at a movement away from the positivist approach that the Kenyan courts have hitherto taken in respect of the human rights of insular minorities. The textual, literal and positivist approach is well captured in the case of *Muasya* in which the judges failed to breathe life into the law when confronted with the case of an intersex persons seeking human rights protection from it. The judges stated as follows:

An argument was raised that intersexuals should be brought within the category of “other status” included in Article 2 of the Universal Declaration of Human Rights and Articles 26 of the International Covenant on Civil and Political Rights. Such inclusion, it was argued, would accord intersex persons a specific right against discrimination. We find that the invocation of the provisions of the international instruments to provide for another category of “other status” is not necessary because intersex persons are adequately provided for within the Kenyan Constitution as per the ordinary and natural meaning of the term sex. Moreover, issues of sexuality are issues which cannot be divorced from the social-cultural attitudes and norms of a particular society. To include intersex in the category of “other status” would be contrary to the specific intention of the Legislature in Kenya. It would also result in recognition of a third category of gender which our society may not be ready for at this point in time. We therefore reject the argument that we should adopt the criterion of “other status” included in the international instruments. Therefore the Petitioner as an intersex person is adequately covered by the law and has suffered no discrimination or lack of legal recognition.”⁴⁰¹

This study argues that Judges as guarantors of human rights for all persons bear the essential duty to protect the rights and freedoms of persons with different sexual orientation or gender identity. Sufficient case law and jurisprudence has been cited and if they have to depart from this jurisprudence, they must take care to explain why their jurisdiction has particular requirements

³⁹⁹ Ibid

⁴⁰⁰ Ibid

⁴⁰¹ Richard Muasya, High Court, Petition No. 705 of 2007 (Kenya).

(of positive law or social necessity, for example) which justify a different outcome in spite of the commonality of human dignity at stake.⁴⁰²

Finnis understands competence to mean that judiciaries as decision making bodies do not remain insular but have the capacity to look beyond their borders in order to borrow jurisprudence that can enrich their decision making actions. Kenyan judges can learn from the wise words of the Court of Final Appeal of Hong Kong, in a case in which the judiciary declared unconstitutional a legal provision allowing criminalisation of homosexuality. The Court declared that the courts have the duty of enforcing the constitutional guarantee of equality before the law and of ensuring protection against discriminatory law.⁴⁰³ The equality provisions in the Kenyan constitution do not exclude sexual minorities. Judges also bear the duty of understanding the implications of their actions of interpretation, especially in matters that touch on the human rights of individuals and their wholesome well-being.

It has been argued quite correctly that judicial review is legitimate when it serves to protect the interests of “discrete and insular minorities” against oppressive actions by democratic majorities.⁴⁰⁴ It is precisely in situations where political leaders may have difficulty withstanding populist pressures, and where human dignity is most at risk, that it becomes an advantage that judges are not accountable. It is at these moments that the judicial function expresses itself in its

⁴⁰² Carozza, 'The Universal Common Good and the Authority of International Law supra note 1193 above p28.

⁴⁰³ Ibid P3

⁴⁰⁴ The famous “Footnote Four” of the United States Supreme Court’s decision in the *Carolene Products* case can serve as the germ of an answer to the counter-majoritarian difficulty.

purest form. The judges, able to rely on the independence guaranteed to them by the Constitution, ensure that justice is done to all without fear, favour or prejudice.⁴⁰⁵

According to Albie Sachs, faced with counter majoritarian difficulty situations, the question is not whether unelected judges should ever take positions on controversial political questions but rather it is to define in a principled way the limited and functionally manageable circumstances in which the judicial responsibility for being the ultimate protector of human dignity compels them to enter what might be politically contested terrain.⁴⁰⁶ Sachs observes that it makes it incumbent on the courts to see to it that basic respect for the dignity of every person is maintained at all times. In his view, the Bill of Rights is there not simply to protect the vested interests of those who have, but to secure basic dignity for those that have not. Sachs, in typical Finnis' philosophy understands dignity to be that value which emphasises the importance of the community as well as of the individual and in his view, one gets dignity from a relationship with other people, but also from the importance of the right to be oneself. Sachs stresses the indivisibility and interrelatedness of fundamental rights - the dignity rights, material rights, bread rights, litigation rights, voting rights, freedom rights. They are all part and parcel of the character of the society.

To bolster his argument about the role of the Judges and the issue of human rights and human dignity, Sachs rightly argues that the phrase that "all human rights are universal, interrelated, and indivisible", is vital to finding the right answers to the questions that people and for purposes of this study, sexual minorities ask: Why am I born? What does it mean to be born? What basic

⁴⁰⁵Albie Sachs, The Judicial Enforcement of socio-economic Rights: The Grootboom Case. *AM. U. INT'L L. REV.* 22:673

⁴⁰⁶ *Ibid*

rights do I have as a person on this *earth*?⁴⁰⁷ In Sach's view, judges, in trying to answer these questions must take responsibility as well as moral accountability by fulfilling their oath of office, and do justice to all, without fear, favour or prejudice.⁴⁰⁸ It is the argument of this thesis that in light of the Constitution, the Kenyan Supreme Court occupies a privileged position in shaping public political-social discourses in the country. From the standpoint of judicial power, the Supreme Court has been vested with constitutional authority to determine its own parameters of justiciability with respect to constitutionally-textualised rights, such as socio-economic rights and the rights of marginalised persons.⁴⁰⁹ The Court is in a position to relax justiciability constraints in cases of threshold constitutional importance such as rights for sexual minorities.⁴¹⁰

It is also important for national parliaments and courts to complement/enable control and respect each other in fulfilling these obligations. However, there is a potential problem that can be caused by judicial direction that is either too vague or too specific. Judicial prescriptiveness may stimulate stagnant legislative processes, but may also backfire given the Court's limited knowledge of domestic legal, political and social context.

5.6: EMERGING TRANSFORMATIVE JURISPRUDENCE IN KENYA

As stated above, the Kenyan judiciary, to some extent, has risen to its task to embrace purposive, human rights and social-justice approaches to decision-making. The Supreme Courts philosophy of transformative interpretation of the Constitution is reflected in a number of its decisions. For instance in its first case that sought its Advisory opinion, it pronounced itself as follows:

⁴⁰⁷ Ibid p 694.

⁴⁰⁸ Ibid P 700.

⁴⁰⁹ Which provisions on the Supreme Court?

⁴¹⁰ Diane A. Desierto, Justiciability of Socio-Economic Rights: Comparative Powers, Roles, and Practices in the Philippines and South Africa. *Asian-Pacific Law & Policy Journal*, Vol. 11.1. p 116.

The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights that envisions a human rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust patriotic and indigenous jurisprudence for Kenya...⁴¹¹

This decision demonstrates a clear response to the Supreme Court's Constitutional mandate to guarantee the supremacy of the constitution and implement transformative constitutionalism, the Supreme Court of Kenya has recognised the fact that progressive and transformative Constitution, if implemented, will put Kenya in a social democratic trajectory, sustainable development and prosperity; and that to implement the country's constitution its jurisprudence must reflect social justice.⁴¹²

Since *Rono vs. Rono*,⁴¹³ more recent cases demonstrate the new paradigm shift in the application of international law by Kenyan courts. The fruits of the entrenchment of SERs in the 2010 Constitution are, to some extent, being realised through judicial interpretations. For instance, the right to housing has been implicated in several cases. In an application for conservancy orders against the forced eviction of people living in informal settlements built on road reserves, the High Court deplored the fact that the applicants were only given one or two days' notice to vacate the land, the lack of reasons for this decision, and the subsequent forceful evictions and demolitions that took place.⁴¹⁴ The Court reiterated the State's responsibility to provide

⁴¹¹ Supreme Court of Kenya Advisory Opinion No 1. Re Interim Independent Election Commission [2011] eKLR

⁴¹² Willy Mutunga, *supra* note 31 above, p 20. Also see Elijah Oluoch Asher, Separation of Powers in Kenya: The Judicial Functions and Judicial Restraint; Whither Goeth the Law? *Journal of Law, Policy and Globalisation*, Vol. 35 (2015).

⁴¹³ *Rono and Rono*, AHRLR 107 (KeCA 2005)

⁴¹⁴ *Susan Waithera Kariuki & Others vs. The Town Clerk, Nairobi City Council & Others*, Petition Case 66 of 2010 [2011] eKLR (Kenya).

alternative housing to those facing evictions, and the necessity of developing a policy around evictions that takes account of the rights and dignity of those subject to evictions.⁴¹⁵

The Court has on another occasion ordered the return of petitioners to land from which they were evicted and the rebuilding of reasonable accommodation, including the amenities that existed before the evictions or such as are mutually agreed upon.⁴¹⁶ The High Court, in a case which challenged the definition of counterfeit in the Anti-Counterfeit Act as being too broad as to include generic medicines, thus threatening the right to health, found that the State had the responsibility to promote conditions in which people can lead a healthy life. The State also has a negative duty not to interfere with existing access to essential medicines, such as legislation that would render such medicines affordable.⁴¹⁷

The Court found that it would be a violation of the petitioner's right to health – which includes the right to access to affordable essential drugs and medicines, including generic medicines for HIV and AIDS – ‘to have included in legislation ambiguous provisions subject to the interpretation of intellectual property holders and customs officials when such provisions relate to access to medicines essential for petitioner's survival.’⁴¹⁸ The Constitution also protects the following civil and political rights: the right to life⁴¹⁹ freedom and security of the person, the right against slavery, servitude and forced labour, the right to privacy, freedom of religion, belief, expression, opinion, assembly, movement, association, and a range of property and labour rights. In addition, the Constitution incorporates the right of access to information, to due process, the

⁴¹⁵ Ibid

⁴¹⁶ Ibrahim Sangor Osman vs. Minister of State for Provincial Administration & Internal Security, High Court at Embu, Petition No. 2 of 2011 [2011] eKLR (Kenya)

⁴¹⁷ Ibid

⁴¹⁸ Ibid

⁴¹⁹ Ibid

right to fair trial and access to the courts. All these rights derive from those incorporated in the UDHR, and the ICCPR.

However, purposive interpretation of similar provisions under the ICCPR, as demonstrated in chapter four of this thesis, shows that failure to include sexual orientation as a ground of discrimination is not fatal. More importantly, the Constitution imposes an affirmative duty on the State and state organs to “observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of rights. The constitution also provides that State organs and public officers have a duty to address the needs of vulnerable groups within society. The progressive nature of this provision is made more so by the fact that the language in the constitution permits the rights enumerated in the Bill of Rights to be applied both vertically and horizontally.⁴²⁰ This means that under certain circumstances, some rights may also bind private institutions and actors with regard to civilians, meaning that the rights in the Bill of Rights do not just bind the state with regard to its citizens.

Contrasting the Constitution of Kenya 2010 and the old Constitution, Osogo and Mbonyeni argue that the Bill of Rights in the repealed Constitution was littered with ‘claw-back’ clauses which often defeated the very essence of guaranteeing human rights. Hiding behind the internal limitations assigned specific rights as well as the general limitation clause entailing that rights would be restricted for greater public interests. For example, of public safety, security and health, state authorities tended to restrict rather than promote and protect human rights. Due to these limitation clauses, the Bill of Rights ended up taking away rights more than it guaranteed

⁴²⁰ Article 22 of the constitution of Kenya states that: [a] provision of the Bill of Rights binds a natural or a juristic person, if, and to the extent that, it is possible, taking into account the nature of the right and the nature of any duty imposed by the rights.

them.⁴²¹ The ‘claw-back’ clauses also found favour in the manner in which the repealed Constitution was interpreted. The Judiciary, which was entrusted with the task of protecting fundamental rights and individual liberties, had adopted a very restrictive approach to human rights litigation and constitutional interpretation.⁴²² In one instance, the High Court dismissed an applicant’s pleadings on the technical ground simply that he did not identify which constitutional provision had been contravened.

In *Koigi wa Wamwere vs. Attorney General*,⁴²³ the Court held that section 72 of the Constitution protected the fundamental right to liberty but did not specify the manner in which arrests could be made, or where such arrests could be effected.⁴²⁴ The tribunal declined to concern itself with extradition or the manner in which police officers carry out their duties. Regarding the general approach to constitutional interpretation, in *Republic vs. Elman*,⁴²⁵ the High Court early on set the precedent that the Constitution is to be taken as any other piece of legislation and ought to be interpreted in a strict, rigid, legalistic and conservative manner which was to the detriment of human rights.⁴²⁶ However, the immediate period preceding 2010, there were many other progressive judicial precedents although it was still difficult to establish a trend. One such case is that of *Roy Richard Elirema and Another vs. Republic*,⁴²⁷ in which a superior court of record held, *inter alia*, that the right to fair trial means that one must be prosecuted by a competent

⁴²¹ Osogo and Mbondenyi, *The New Constitutional Law of Kenya: Principles, Government and Human Rights*. (LawAfrica Publishing Ltd, 2013), p 18.

⁴²² This practice was endemic under the reign of CJ Cecil Miller (1986-1989) and championed vigorously by Justice Norbury Dugdale. See, Vaquez, ‘Is the Kenyan Bill of Rights Enforceable after 4th July 1989?’, in 2: *Nairobi Law Monthly* (1990), p. 7-8. Also see, Ghai Y., “The Kenyan Bill of Rights: Theory and Practice,” in Alston, P., (Ed.) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives*, Oxford University Press, (2000), p 221-222.

⁴²³ *Koigi wa Wamwere vs. Attorney General*. Misc. Application NC No. 574/90 (Kenya)..

⁴²⁴ *Osogo Ambani and Mbondenyi* supra note 421 above, p 19.

⁴²⁵ *Republic vs. Elman* (1969) EA 357 (Kenya).

⁴²⁶ *Osogo Ambani and Mbondenyi* supra note 419 above, p 19.

⁴²⁷ *Ibid* p 19.

person. In *George Ngothe Juma and two others vs. Attorney General*,⁴²⁸ the High court held that an accused person had the right to access prosecutions' information relating to the charge in advance, especially witness statements to be able to adequately prepare his/her defense.⁴²⁹

Recognising its central position in the interpretation of international human rights law, the Constitution of Kenya 2010 constructs what Sihanya terms a politically, administratively and juridically empowered and independent judiciary.⁴³⁰ One would consider it an insulated judiciary: insulated from executive interference and parliamentary majoritarianism and public accountability in its decisions. As noted by Redish & Heins, it is only by including an entirely insulated judicial branch can any democracy be protected from itself.⁴³¹ In this view, without a counter majoritarian judiciary armed with the power of judicial review, the entire enterprise of the constitution would fall.⁴³² The two further argue that without the insulated judiciary authoritatively interpreting the Constitution, the structural Constitution would create the appearance of counter-majoritarian checking against majoritarian impulses that, would amount to nothing more than illusion.⁴³³

Its main role is to authoritatively and independently implement and defend the Constitution. In this role, the judiciary is instrumental in adjudicating the constitutionality and legality of the exercise of state power.⁴³⁴ The Constitutional provisions creating normative benchmarks for the exercise of state power, for example requires interpretation by the courts, as the process of

⁴²⁸ *George Ngothe Juma and two Others vs. Attorney General Niarib* High court Misc Application No. 34 of 2001 (Kenya). In Osogo Ambani and Mbondenyei supra note 419 above, p 19.

⁴²⁹ Ibid p 19.

⁴³⁰ Ben Sihanya, *The role of the Judiciary in the accountability and governance of the developed Government structure: A paper present to the Institute of Certified Public Accountants of Kenya (ICPAK) 20th Economic Symposium, Nairobi, February, 24, 2012* p2

⁴³¹ Ibid p 8

⁴³² Ibid

⁴³³ Ibid

⁴³⁴ Ibid

implementing the constitution.⁴³⁵ While interpreting the constitution, judges should not make decisions based on personal or societal values but should consider the idealistic values that the Constitution envisages for the country as referred to under Article 10.⁴³⁶ Sihanya rightly argues that the role of the judiciary includes providing informative interpretation of the constitution and the laws and it is also important to note that the constitution reinforces judicial independence to guard against the influence and manipulation of other urgent matters in the implementation process.⁴³⁷ This restructuring is in line with calls for judicial reforms to curb some of the challenges that had faced the judiciary in Kenya since independence in 1963. These included limited human, financial and physical resources, corruption, inefficiency, delays, political⁴³⁸ patronage, ethnicity and nepotism, manipulation and interference and backlog of case among others.⁴³⁹

Further, the Kenyan Constitution itself contains several Counter-majoritarian⁴⁴⁰ provisions and procedures such as those that protect the rights and interests of minorities from infringement by a majority. These provisions are meant to guard against the abuse of power by majorities. Counter-majoritarian procedures include guarantees of basic civil and political rights; limits on government power which it must uphold when Parliament is unwilling to legislate against oppression of sexual minorities. Such is the duty of the Kenyan judiciary to protect and uphold the counter-majoritarian provisions of the Constitution that the same can be interpreted to

⁴³⁵ Ibid

⁴³⁶ Ibid

⁴³⁷ Ibid

⁴³⁸ Ibid

⁴³⁹ Ibid

⁴⁴⁰ In a landmark ruling, Audrey Mbugua, a transgender who stunned the country with her intentions of being recognised as a woman can now celebrate after the High Court ordered the Kenya National Examination Council (KNEC) to comply with her wishes. KNEC now has 45 days to replace Audrey's Kenya Certificate of secondary School Certificate (KCSE) from Andrew Mbugua Ithibu to Audrey Mbugua Ithibu. High Court Judge Justice Weldon Korir ordered that the certificate be printed without a gender mark adding that Audrey meets any extra costs required.

cushion the most “insular” and marginalised minorities and hence strike a blow for protection of the human rights of sexual minorities in the country. In this regard, the recent Constitutional Court judgment in which the Court ordered the Kenyan Examination Council (KNEC) to change the names of a transgender person from Andrew Mbugua to Audrey Mbugua is a step in the right direction.⁴⁴¹

One such case is C.K (A child) through Ripples International as her guardian and next Friend and 10 others vs. the commissioner of police service and 3 others.⁴⁴² In this case, twelve petitioners through a petition to the High Court sought a declaration to the effect that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the first eleven petitioners’ complaints of defilement violates the first eleven petitioners’ fundamental rights and freedoms; to special protection as members of a vulnerable group’; to equal protection and benefit of the law; not to be discriminated against’(d) to inherent dignity and the right to have the dignity protected; to security of the person; not to be subjected to any form of violence from public or private sources or torture or cruel or degrading treatment; and; to access to justice as respectively set out in Articles 21(1),⁴⁴³ 21(3),⁴⁴⁴ 27,⁴⁴⁵28⁴⁴⁶,29⁴⁴⁷,48⁴⁴⁸,50(1)⁴⁴⁹ and53(1) (c)⁴⁵⁰ of the Constitution of Kenya 2010. ⁴⁵¹

⁴⁴¹ Paul Craig Administrative Law. (Sweet &Maxwell, London 2008). In Sihanya supra note 4 above

⁴⁴² Republic of Kenya ,High Court at Meru Petition 8 of 2010,(available at <http://www.kenyalaw.org-Page2/17>)

⁴⁴³ Art. 21 (1) states that “It is a fundamental duty of the State and every State organ to observe, respect, protect, promote, and fulfill the rights and fundamental freedoms in the Bill of ‘rights’”.

⁴⁴⁴ Art. 21 (3) states as follows: “All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority and marginalised communities, and members of particular ethnic, religious or cultural communities.

⁴⁴⁵ Art. 27 guarantees equality and non-discrimination before the law, equal protection and equal benefit of the law

⁴⁴⁶ Article 28 states that “Every person has inherent dignity and the right to have that dignity respected and protected.

⁴⁴⁷ Article 29 guarantees everyone the right to freedom and security of the person.

⁴⁴⁸ Article 48guarantees everyone access to justice.

⁴⁴⁹ Article 50 (1) guarantees every right to fair hearing in any tribunal.

⁴⁵⁰ Article 53 (1) (c) guarantees the rights of children.

Briefly, the facts of the case are that the petitioners herein were on diverse dates between the year 2008 and 2012 victims of defilement and other forms of Sexual violence and child abuse. That the petitioners made reports of the acts of defilement at various police stations within Meru County and the police officers at those various Police Stations neglected, omitted, refused and or otherwise failed to conduct prompt, effective, proper and professional Investigation into the petitioners' complaints or record the petitioners' complaints in the police Occurrence Book or visit the crime scenes or interview the witnesses or collect and preserve evidence or take any other steps or put in motion such other processes of the law as would have brought the perpetrators of defilement and other forms of sexual violence to account for their unlawful acts or took such other legislative, policing and/or administrative measures as would protect the petitioners(in common with other Kenyan Children) from abuse, sexual violence, inhuman and degrading treatment.⁴⁵² That due to neglect, commission, refusal and/or failure on the part of the police the petitioners averred and contended that they have suffered grave unspeakable and immeasurable physical and physiological trauma and that the perpetrators of the aforesaid unlawful acts roam large and free, with impunity and they continue to threaten the physical and psychological wellbeing of the petitioners.⁴⁵³

The Court found that failure of the police to conduct prompt, effective, proper and professional investigations into the petitioners' complaints of defilement and other forms of sexual violence amounted to discrimination contrary to the express and implied provisions of Article 27 of the Constitution of Kenya, 2010 and contrary to Article 244 of the Constitution of Kenya, 2010. Failure of the police to effectively enforce Section 8 of the Sexual Offences Act,

⁴⁵¹ Richard Frimpong Oppong, supra note 124 above, p 299.

⁴⁵² Ibid

⁴⁵³ Ibid

2006, infringed upon the petitioners' right to equal protection and benefit of the law, contrary to Article 27(1) of the Constitution of Kenya, 2010. Failure of the respondents to conduct prompt, effective, proper and professional investigations into the petitioners' complaints of defilement and other forms of sexual violence infringed on the petitioners' fundamental rights and freedoms, under Articles 21(1) and (3), 27, 28, 29, 48, 50(1) and 53(1), (d) of the Constitution of Kenya, 2010 and the general rules of international law, including any treaty or convention ratified by Kenya which form part of the law of Kenya as per Articles 2(5) and 2(6) of the Constitution of Kenya, 2010. These include Articles 2, 3, 4, 5, 6, 7 and 18 of the African Charter on Human and Peoples' Rights, amongst others. The court relied on, among other cases, the South African jurisprudence *Carmichele v Minister Safety and Security and Another* in which the Court held:-

The courts are under a duty to send a clear message to the accused, and to other potential rapists and to the community. We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights. South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights. The police is one of the primary agencies of the state responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime.⁴⁵⁴

The High Court of Kenya made a declaration to the effect that the neglect, omission, refusal and failure of the police to conduct prompt, effective, proper and professional investigations into the petitioner's complaints of defilement violated the petitioner's fundamental rights and freedoms which included right to special protection as members of a vulnerable group; right to equal protection and benefit to the law; right not to be discriminated against; right to inherent dignity and the right to have the dignity protected; right to security of the person. The significance of this case could be better appreciated when contrasted with how courts applying Common Law

⁴⁵⁴ Ibid

have with dealt similar cases.⁴⁵⁵ In *Hill Chief Constable of West Yorkshire*,⁴⁵⁶ the plaintiff sued the police and argued that had it not been for their negligence in conducting proper investigations, a notorious serial killer would not have murdered their daughter. The House of Lords rejected this claim and held that the police did not owe a general duty to care to unidentified members of the public to identify and apprehend unknown criminals. More importantly, the House of Lords also based its decision on a public policy principle that courts should not interfere with the duties of a public entity on grounds including that the public body (in this case the police) had a discretionary mandate that the courts should not question.⁴⁵⁷

The Kenya Court, however, took a different line of reasoning. Its approach hinged on human rights rather than Common law. It found that the petitioners could be heard on the ground of their claim that a constitutional right or fundamental freedom had been infringed. The Court also held the police accountable for their actions or inactions based on the duties and obligations articulated in the Constitution and various legislations.⁴⁵⁸ Further, the Court not only looked at how the police failed in its duties and obligations under the relevant laws, but also how the police mistreated the victims when they reported the crimes. The Court held the police directly responsible for the psychological harm the victims suffered apart from the harm caused by the perpetrators.⁴⁵⁹

⁴⁵⁵ Godfrey Kangaude and Dominic Rono. Available at http://www.law.utoronto.ca/utfl_file/count/documents/reprohealth/lg02_ck_ripples_kenya.pdf

⁴⁵⁶ *Hill Chief Constable of West Yorkshire* [1989] AC 53 (United Kingdom) Ibid

⁴⁵⁷ Godfrey Kangaude and Dominic Rono, supra note 455 above, p 4.

⁴⁵⁸ Ibid p 3

⁴⁵⁹ Ibid

A critical and purposive approach was also adopted by the High Court of Kenya in the case of *Eric Gitari vs. the Attorney General*⁴⁶⁰ in which the petitioner sought to register a non-governmental organisation (hereafter “proposed NGO”), with the 1st respondent. The core objectives of the proposed organisations, according to the petitioner, were the advancement of human rights. Specifically, the proposed NGO would seek to address the violence and human rights abuses suffered by gay and lesbian people.

His application was made to the 1st respondent, the Non-Governmental Organisations Coordination Board (hereafter “the Board”), which, according to the petitioner, rejected his application for registration on the basis that the people whose rights the proposed NGO will seek to protect are gay and lesbian persons. The petitioner then approached this Court by way of his petition dated 2nd September 2013 seeking, inter alia, a determination of the question whether he is a “person” as protected in Article 36, and if so, whether his right to freedom of association has been infringed. In response, the Board, through the office of the Attorney General (AG), which is also enjoined in the proceedings as the 2nd respondent, defended its actions, contending that the petitioner’s right to freedom of association has not been infringed and if limited, such limitation can be justified, inter alia, on the basis of the criminalisation of homosexual intercourse in the Penal Code.

The facts giving rise to the petition are fairly simple and are not disputed. In accordance with the requirements for registration of a non-governmental organisation, on or about 2nd April, 2013, the petitioner sought to reserve with the Board for the purposes of registration of a non-

⁴⁶⁰ *Eric Gitari vs. non- governmental organisations co-ordination board & 3 others*. High Court Petition No 440 of 2013 (Kenya)

governmental organisation, the names Gay and Lesbian Human Rights Council; Gay and Lesbian Human Rights Observancy and Gay and Lesbian Human Rights Organisation. He was advised by the Board that all the proposed names were unacceptable and should be reviewed. On March 19, 2013, the petitioner then lodged the names Gay and Lesbian Human Rights Commission; Gay and Lesbian Human Rights Council and Gay and Lesbian Human Rights Collective for reservation. Together with the names, the petitioner sent a letter to the Board dated March 19, 2013 demanding to know why his application had been rejected. By a letter dated March 25, 2013, the Board wrote to the petitioner's Advocates advising that sections 162, 163 and 165 of the Penal Code criminalises Gay and Lesbian liaisons, and that this was the basis for rejection of the proposed names for the NGO.

The petitioner contented, inter alia, that his right to freedom of association, dignity, equality and right not to be discriminated against have been violated. It is also his contention that the justifications presented by the Board for infringing these rights are ill-conceived. It is his case that a person in Article 36 does not exclude gay or lesbian people. In his view, the allegation by the Board that his actions are "tantamount to circumventing not only the law but also the will of the people" is scandalous and oppressive; that the people of Kenya have never been consulted in circumstances where it is considered that associations pursuing the objectives of the proposed NGO should be barred from registration, and that the will of Kenyans is represented in the Constitution.⁴⁶¹ The petitioner further argued that there is no basis for the allegation that the proposed NGO will perpetrate or promote unlawful acts "as opposed to advocating for the equal rights of minorities". He contends that the Board has been provided with the objectives of the proposed NGO, and there is nothing in the objectives that shows that it seeks to further criminal

⁴⁶¹ Ibid

activities. According to the petitioner, the conflation of sections 162, 163 and 165 of the Penal Code and the activities of the proposed NGO is flawed, and nothing in the proposed activities of the proposed NGO would infringe any law whatsoever. It is also his submission that he seeks the protection and promotion of national values and principles of governance enshrined in Article 10 (2) (b) of the Constitution.⁴⁶² According to the petitioner, the refusal to register the proposed NGO violates his rights and is tantamount to inhuman and degrading treatment as it ostracises the group and looks upon homosexuals as criminals with no right to associate in any manner whatsoever.

The petitioner further alleged that the refusal to reserve and register the proposed NGO is tantamount to a denial of the right to equality before the law, and is a denial of the freedom of expression as well as the freedom to access information irrespective of one's sexual orientation. He therefore asks the Court to grant the following orders.⁴⁶³ After lengthy submissions, the court found that the Board infringed the petitioner's freedom of association in refusing to accept the names he had proposed for registration of his NGO, thereby in effect refusing to contemplate registration of the proposed NGO. The court noted that the reality is that these groups exist. The terms are recognised and generally accepted as the correct terminology to refer to persons of a specific sexual orientation. The court further noted that Board may have difficulties accepting the term and the reality, but the terms refer to persons who, like other citizens, have the right to freedom of association.

The court further found that the Board also violated the petitioner's right to non-discrimination by refusing to accept the names proposed on the basis that the proposed NGO sought to advocate

⁴⁶² Ibid

⁴⁶³ Ibid

for the rights of persons who are not socially accepted. As we observed above, our understanding of the objectives of the proposed NGO is the protection of persons whose sexual orientation is gay or lesbian, as well as persons who are transgender or intersex, from discrimination and other violation of their rights. It is not for the promotion of the sexual acts “against the order of nature” prohibited by the Penal Code, nor is it to advance pedophilia as submitted by the Board, which are criminal offences with respect to which clear penal consequences are provided.⁴⁶⁴ Consequently, the court declared that the words “Every person” in Article 36 of the Constitution includes all persons living within the republic of Kenya despite their sexual orientation. It further declared that the respondents have contravened the provisions of Articles 36 of the constitution in failing to accord just and fair treatment to gay and lesbian persons living in Kenya seeking registration of an association of their choice. It also declared that the petitioner is entitled to exercise his constitutionally guaranteed freedom to associate by being able to form an association.

In the case of Audrey Mbugua vs. Kenyan Examination Council in which the Court, relying on international human rights, ordered the (KNEC) to change the names of a transgender person from Andrew Mbugua to Audrey Mbugua.⁴⁶⁵ This judgment came after a long and protracted struggle by this transgender person to have names in her official documents altered to reflect her preferred gender. In the case of Audrey Mbugua, the Applicant’s case was that he is the holder of Kenya Certificate of Secondary Education (KCSE) No. 1855399 awarded to him by KNEC in 2001 in exercise of its statutory mandate of setting national examinations and awarding

⁴⁶⁴ Ibid

⁴⁶⁵ In a landmark ruling, Audrey Mbugua, a transgender who stunned the country with her intentions of being recognised as a woman can now celebrate after the High Court ordered the Kenya National Examination Council (KNEC) to comply with her wishes. KNEC now has 45 days to replace Audrey’s Kenya Certificate of secondary School Certificate (KCSE) from Andrew Mbugua Ithibu to Audrey Mbugua Ithibu. High Court Judge Justice Weldon Korir ordered that the certificate be printed without a gender mark adding that Audrey meets any extra costs required.

certificates to the candidates. Sometimes in 2008 he was diagnosed and treated for gender identity disorder (G.I.D.) and depression at Mathari Hospital, in Nairobi, Kenya.

To date he is still on treatment for the two conditions. The Applicant said that he changed his name from Andrew Mbugua Ithibu to Audrey Mbugua Ithibu. Thereafter he embarked on changing the particulars on his national identity card, passport and academic papers so as to reflect his changed gender from male to female. On 1st December, 2010 he wrote to KNEC enquiring about the possibility of change of name and gender for persons diagnosed with G.I.D. KNEC responded through a letter dated 10th December, 2010 as follows:

We acknowledge receipt of your letter dated 1st December 2010 on the above matter in which you take issue with the fact that the Kenya National Examinations Council (KNEC) does not allow gender changes to be made on certificates once candidates have sat for an examination. We are glad that you appreciate the need for KNEC to put such stringent measures in place to deter forgery of certificates issued by the Council. While we are strict in enforcing the policy on name and gender changes, we do emphasise (sic) with the plight of individuals who are undergoing or have undergone sex changes. As such, we wish to inform you that KNEC does consider gender changes on certificates of individuals who have sufficient reasons and evidence to proof that their case is genuine. As for the candidates who are undergoing or have undergone sex changes, the Council can consider change of certificates, if the affected individuals present recent medical reports from qualified Medical Practitioners as evidence of their change in gender. We wish you the very best as we all strive to improve the quality of education in Kenya.⁴⁶⁶

The Respondent's case was that it only prints one certificate per candidate for any examination it administers. Further, that KNEC never originates any information regarding candidates but compiles candidates' data furnished by the various examination centers/schools and education officers countrywide and that the records reproduced on the Applicant's certificates are as were furnished it by the Applicant through the head teachers of his former schools.⁴⁶⁷ On the Applicant's medical condition, KNEC submitted that the documents availed by the Applicant are

⁴⁶⁶ Ibid

⁴⁶⁷ Ibid

vague and it is not clear whether the Applicant has transitioned to a female. Further, that it is not clear whether the transition will be achieved and whether the transition is sanctioned by the law or whether a formal structure exists for effecting such a process. It is further argued that the medical report does not indicate what the medical treatment is meant to achieve and is deliberately vague and confusing.⁴⁶⁸

The court issued an order of mandamus to compel KNEC to recall the Applicant's KCSE certificate No. 1855399 issued in the name of Ithibu Andrew Mbugua and replace the said certificate with one in the name of Audrey Mbugua Ithibu. The replacement certificate shall be without a gender mark. This should be done within 45 days from the date of this judgement and will be subject to payment of a reasonable fee, if necessary, by the Applicant.⁴⁶⁹ The significance of these cases can be seen against the backdrop of earlier decisions in which the High court adopted a literal approach to interpretation of the law in matters involving sexual minorities. One such case is that of Richard Muasya in which the judges of the High Court of Kenya in their unanimous decision stated as follows:

[To] include the intersex in the category of "other status" would be contrary to the specific intention of the legislature in Kenya. It would result in the recognition of a third category of gender which our society may not be ready for at this time...Kenyan society is predominantly a traditional society in terms of social, moral and religious values. We have not reached a stage where such values involving matters of sexuality can be rationalised or compromised through science. In any case, rationalisation of such values can only be done through deliberate action on the part of the legislature taking into account the prevailing circumstances and the need for such legislation.⁴⁷⁰

⁴⁶⁸ Ibid

⁴⁶⁹ Ibid

⁴⁷⁰ Ibid

5.7: Challenges to transformative judicial decision making

There is no doubt that the normative provisions of the Constitution, together with an empowered Judiciary are good pre-requisites for transformative adjudication. However, Kenya's judiciary is transitioning from the old undemocratic order which was characterised by positivist thinking and literal and textual interpretation of the law, resulting in decisions in respect of sexual minorities being anti-human rights. With the majority of the judges having been part of the old order, there is genuine fear that they may stall the ethos and spirit of the Constitution, or create a situation of parallel decision-making which reflects old jurisprudence. 60% of the study participants held this fear, that some judges have not yet grasped the new spirit in decision-making, while others have. This brings to light the issue of capacity for judges to be able to be transformative in their approach to decision-making. Indeed the eminent Kenyan Professor James Thuo Gathii has posed the warning that:

The Kenyan judiciary must guard against the development of a two-tracked system of judicial review. One that looks like the old cases influenced by the common law, on the one hand, and cases that are decided under the 2010 Constitution's principles of judicial review [on the other]. Those two tracks are likely to undermine the establishment of a vibrant tradition of judicial review as required by the 2010 Constitution.⁴⁷¹

At the same time, Kwasi Prempeh⁴⁷² has noted that the common law, in its method, substance, and philosophical underpinnings, carries with it elements and tendencies that do not accord with the *transformative* vision reflected in modern bills of rights. Much of the problem, he notes, stems from the basic constitutional and jurisprudential paradigm upon which English common

⁴⁷¹ See Gathii in "The Incomplete Transformation of Judicial Review"; Also see Lawrence Juma and Chucks Okpaluba, Judicial Intervention in Kenya's constitutional Review Process, Washington University Global studies Law Review. Vol. 11 No. 2 (2012); Adem Kassie Abebe and Charles Manga Fombad, The Advisory Jurisdiction of Constitutional Courts in Sub-Saharan Africa. The Geo. Wash. Int'l L. Rev. Vol. 46 (2009); Eric Kibet, The constitution of Kenya, 2010: An Introductory commentary (Book Review. Strathmore Law Journal, (2015).

⁴⁷² Kwasi Prempeh in Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa. Tulane Law Review (2006), p 72.

law is built, namely Austinian positivism and Diceyan parliamentary sovereignty, notions which are incompatible with the *transformative* ideals of the Constitution of Kenya, 2010. For one the “theory of a holistic interpretation of the constitution” trumps the literal and mechanical approaches of English jurists.⁴⁷³ Besides, as observed by Migai Akech and Ochiel, Kenya has transformed from a parliamentary sovereignty into a constitutional democracy where the Constitution, and not Parliament, is supreme as seen in Article 2. In the *Division of Revenue Case, Speaker of the Senate v Attorney General* the Supreme Court held that

...Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours.⁴⁷⁴

What this means is that judicial review in Kenya cannot continue on the notion that it is an exercise in the protection of the will of a sovereign parliament, where the Constitution, and not parliament, is supreme. The British traditional Diceyan approach to judicial review, based exclusively on the British doctrine of parliamentary sovereignty must therefore be treated with caution. Judges cannot afford to routinely cite common-law cases to deny or grant judicial review on the basis of the public-private dichotomy.⁴⁷⁵

Moreover, the incompatibility of the common law with transformative constitutionalism has also been of concern to Davis and Klare . In *Transformative Constitutionalism and the Common and Customary Law*, they express the apprehension that the inbred formalism of the legal culture and the absence of a well-developed tradition of critical jurisprudence may stultify efforts to renovate

⁴⁷³ Wade & Forsyth, *Administrative Law*, 10th Ed, 2009, p3.

⁴⁷⁴ *Speaker of the Senate v Attorney General* [2013]eKLR

⁴⁷⁵ See Migai Akech "Publicising the Global Private Sphere: The Odumbe Case and Judicial Review of the Power of International Sports Organisations." In: Commonwealth Law Conference. Nairobi, Kenya; 2007; also see Dudley Ochiel, *Grounds for Judicial Review in Kenya – An Introductory comment to the Fair Administrative Action Act*, 2015, Kenyalaw.

the legal infrastructure in the way envisaged by the Constitution.⁴⁷⁶ They express the basic assumption underlying transformative constitutions; that the nation cannot progress to social justice with a legal system that rigs a transformative constitutional superstructure onto a common law base inherited from the past. They therefore propose a “transformative methodology” informed by the Bill of Rights and specifically by the constitutional aspiration to lay the legal foundation of a just, democratic and egalitarian social order. The transformative methodology would take a context-sensitive view of the case from the perspective of all pertinent ethical and socio-economic considerations.

Chief Justice Willy Mutunga when recalling the trial of Jomo Kenyatta, the first president of the Republic of Kenya in the infamous ‘Kapenguria trial’ in which he faced treason charges by the colonial government that was resisting any efforts towards independence satirically states:

A masterful display of juristic theatre in which the apparent adherence to the rule of law substantively entrenched the illegitimate political system in power at the time. Colonial mind-sets persisted, in the executive, the legislature and, unfortunately even in the judiciary, even after independence. We continued to yearn for the rule of law.⁴⁷⁷

Although acknowledging the transformative jurisprudence that is coming out of the Kenyan judiciary notes that there is no uniformity in that effort. He opines as follows:

I want also to add that these major strides in the quality of jurisprudence in our courts can be amplified if we improved our collegiality and ability to co-educate each other so that the decisions coming out of our courts will reflect the collective intellect of the judiciary distilled through the common law methods as well as through regular discourses and learning by judicial officers. To be a good judge must involve continuous training and learning and regular informal discourses among judges.⁴⁷⁸

The revamped powers judicial interpretation and judicial review conferred on Kenya’s judiciary, if used critically and for the purposes of this study if queered, can result in transformative

⁴⁷⁶ See Karl Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 SAJHR146

⁴⁷⁷ Ibid

⁴⁷⁸ Ibid

jurisprudence for sexual minorities. Some courts have demonstrated this, while others are yet to catch up with the demands of the constitution. Further, public interest litigation, if scaled up, can have the existing sodomy laws interpreted by the courts but so far, this has not happened.

5.8: CHAPTER SUMMARY

Part one of this chapter has presented the evolution of the human rights protection of sexual minorities through the normative and institutional frameworks of international and regional human rights law. It demonstrates how protection of sexual minorities is a recent phenomenon which has been made possible through critical and transformative legislative and judicial decision-making influenced by the values of the Wolfenden Report as well as international human rights standards and principles. It also notes the limitations that international and regional human rights law faces in addressing the human rights of sexual minorities and warns that law alone may not be a panacea for the human rights violations that sexual minorities endure. Part two examines the normative and institutional framework in Kenya's Constitution 2010 as a mechanism of implementing international human rights standards and principles to protect the human rights of sexual minorities. The chapter demonstrates the transformative potential of the legislature and the judiciary through their enhanced constitutional mandates and the limitations that each faces in availing justice for sexual minorities in Kenya.

CHAPTER SIX

THE REALITY OF HETERONORMATIVITY IN KENYA: THE LIVED EXPERIENCES OF SEXUAL MINORITIES

6.0: INTRODUCTION

This chapter outlines the findings of one of the few studies that have been carried out in Kenya on heterosexism and how it affects the enjoyment of human rights by sexual minorities. The outcomes of the study are based on research and narrative collection primarily focused on the period 2007-2015, although some important narratives preceding this period have been included as well. Due to the difficulty encountered in meeting with participants who fall within the sexual minority category, the study was not done in structured phases as initially intended. They were extremely secretive and elusive due to the stigma and criminalisation that underpins their lives. Hence, desk research and field research were, over the period, simultaneously carried out and in no systematic sequence.

The desk research carried out had two aims: one it focused on the collection and comparative analysis of information and data of a legal nature, mainly legislation, international human rights instruments and *Travaux Préparatoires* to some of the treaties and case law. The second aim was focused on the collection and comparative analysis of narratives of a sociological nature. The aim of the sociological part of the study was to collect narratives about the everyday life of lesbian, gay, bisexual and transgender (LGBT) persons in three cities, namely Nairobi, Mombasa and Mtwapa. This part of the research was conducted by desk research and field visits to the said cities. A total number of 120 individuals were interviewed, twenty being leaders and opinion shapers in the justice system, members of parliament, religious leaders and leaders in the

human rights movement, especially in the NGO sector. 100 are those who considered themselves as sexual minorities. The respondents who view themselves as sexual minorities were of mixed ages, with the majority being young, between ages 22 to 30. A few of them were aged fifty and above. They belonged to diverse socio-economic backgrounds, ranging from the employed, formally and informally, the unemployed, the uneducated and the educated, students, sex workers, men who have sex with men (MSM), men and women married to partners of the opposite sexes, a few professionals with steady incomes and sex workers.

The research and narrative-collection process was undertaken by the author of this study as the sole researcher. Due to the researcher's public human rights work nationally and internationally and spanning over years, her work at the Kenya Law reform Commission and as a judge of the Supreme Court of the Republic of Kenya, most participants felt safe and were cooperative and felt confident to participate in the study. Snowball sampling was used, with most participants being referred to the researcher by the LGBT organisations and by individual references. Observation was another preferred method in cases where the participants demonstrated eagerness to participate but could not be reached a second time for clarification of issues that had arisen during the interviews. Most times, they had changed their phone contacts or even offices and email addresses and could not be reached. Observation and interpretation of such occurrences, and other gestures during the interviews was used.

Further, researcher had opportunity to meet with large numbers of LGBT individuals at three regional and international conferences that had been organised variously in Nairobi, Kajiado and Naivasha towns in Kenya, where these meetings were taking place. During these meetings, focused group discussions were taking place and the researcher sat in and listened to the views during their proceedings. The key questions used to interview participants was what their

experience was like, living in a heterosexist society as a sexual minority; how they navigate through a society that views them negatively and what their views were on how to improve their human rights situation.

During the field visits, semi-structured qualitative interviews were conducted with key stakeholders in society who included religious leaders, the Minister of Justice and Constitutional affairs, representative of the attorney General, members of parliament, Chairperson of the Kenya Law Reform Commission, some judges of the High Court and Court of Appeal, members of the Human rights caucus of Parliament, and members of key Human rights organisations. The relevant stakeholders provided oral statements which gave a broad overview of the issues at stake. Representatives of national authorities, in most instances officials working in the Ministry of Justice, Ministry of Health were met in order to access available official data and statistics. This could include information regarding discrimination on grounds of sexual orientation and gender identity and incidents of homophobia and transphobia as well as information on the relevant national policies, action plans, and “good practice” related to combating discrimination and promoting human rights. These interviews aimed to collect information but also to gauge awareness of the national situation with regard to homophobia, transphobia and discrimination among the interlocutors. Many interlocutors emphasised the usefulness of this study and engaged constructively in the data/narrative-collection process, though on many occasions there were not many statistics or data to share. Public authorities have generally been co-operative in their contribution to the study.

Representatives of LGBT Organisations were also met, as well as human rights non-governmental organisations. Representatives of LGBT organisations provided their perspectives on the information collected and directed attention to further materials. They also provided

connections for accessing individual LGBT individuals to participate in the research as participants. These organisations, having hands-on experience and knowledge of various aspects of the situation for LGBT persons, have been a valuable source of data. This is particularly the case when research and/or official data have been scarce. Furthermore, representatives of national human rights structures (that is, national human rights institutions, such as the Kenya human rights commission FIDA-Kenya and equality organisations such as the Urgent Action Fund) were met during the field trips. Whereas this report shows that not all these structures are currently engaged in combating discrimination based on sexual orientation and gender identity, they are aware of the issues that LGBT people face and their information was useful.

This chapter responds to the first research question and is divided into two sections. The first section deals with responses from participants who belonged to the sexual minority category and the second one focuses on responses from other participants such as representatives of NGOs, government officials, religious leaders among others. The analysis assumes two levels, first, it is carried out at a basic level, meaning that it is descriptive account of the data i.e., what was said and second it is at a latent level of analysis, meaning that it is a more interpretive analysis that is concerned with the responses as well as possible inferences.

6.1: SOCIAL INSTITUTIONS AS STRUCTURING FORCES OF HETEROSEXISM

The study revealed several things. First, that heterosexism is underpinned by strong structuring forces which include the family, religion and religious institutions, schools, education curricula, healthcare institutions, the marriage institution, institutions of higher learning, the media among others. It is entrenched in most social institutions and purveyed in ordinary social narratives. The following section focuses on the institutions that sustain heterosexism.

6.1.1: Religion

The study revealed that Christianity is a major influencing factor in giving messages regarding sexuality in general and Godly sexuality in particular. Commanding an eighty per cent following of the entire Kenya population, Christianity is an important regulator of sexuality in the country. Its impact on how LGBT people understand sexuality and identity is significant as its influence on what amounts to socially accepted sexual behavior. It is thus an important social constructor of sexual identity and behaviour. Almost all religions in Kenya preach against same-sexual relationships and see intersex and transgender as conditions not intended by God but can be helped through necessary mechanisms. It is thus an important social constructor of sexual identity and behaviour.

The respondents cited the Bible readings which are part of Christian foundation and these include the Book of Genesis 1:26 which to them clearly introduce gender distinction, biological differences and the responsibility of procreation and productivity. Further, the Book of Leviticus 18:22 is important as it clearly outlaws same-sex sex.¹ These are the messages that all that go to church are introduced to as part of the Christian dogma. Overall, there is little room for personal choice in sexual expression that departs from biblical standard in the view of most participants.

These views are confirmed by the leader of the Anglican Church of Kenya, who also participated as a respondent. When interviewed, he stated that sexual minorities do exist in Kenya but that Anglicans are vehemently opposed to recognition and protection of non-heterosexual sexual orientation and gender identities. He was of the view that recognising LGBT and protecting them would go against the teachings of the Bible and that even though England called for their

¹ It states that “You shall not lie with a male as a woman. It is an abomination.”

protection, Anglicans in Kenya will not do so. Asked about the stand of the Anglican Church in the mother country, England which protects sexual minorities, He stated as follows:

We were created by god in his own image and our being who were are, whether male or female, is determined by God at the time of our conception. We in the Church do not believe that there are the deviations in maleness or femaleness as stated by yourself. If there are such deviations, this is a condition which needs to be looked at medically. Such people need to seek medical attention and we have many experts who can do that. Those who say they feel they are in wrong bodies should seek psychiatric and counseling services.

As noted in the conceptual framework of this thesis, the reason for this is that marriage is considered as the foundation on which families are built and it constitutes the basic social group [husband, wife and children] that operates most widely and most intensely in the activities of everyday life.² The individual who wishes to obtain a maximum degree of protection by the community in which he lives and obtain influence and prestige in its must aim in securing for himself a prominent place in the elaborate network of kinship relations.³ Further, educational institutions and systems influence marginalisations and stigmatisation of LGBT individuals. Curricula and books and other reading materials LGBTI persons encounter stress in schools, which replete with institutionalised heterosexism and homophobia to produce culture of fear.⁴ A number of other youth have been expelled from schools for being either gay or lesbian and hence face a bleak future.

6.1.2: The Family and marriage Institution

The family in Kenya is a strong structuring force for heteronormativity. Seventy per cent of the study participants revealed that they started learning about “proper” and “improper” sex from early childhood from their parents and other members of the family. The study revealed that LGBT individuals start understanding that their identity or sexual orientation are “abnormal” or

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“deviant” right from the time they are born. All sexual minorities understand themselves differently, as groups and as individuals. The family was the first sources of sexual messages for all the participants. Family was therefore cited as an influential source of messages and a regulator of sexuality. This is where messages of being male and female start and the gender roles ascribed appropriately. One participant had this to say:

Right from when you start understanding anything, you are told to “sit properly”. Do not sit like a man. You are a woman and you have to learn how to close your legs when you sit. You are told how to eat like a woman, not to play with boys because you might start behaving like boys. The idea that there are only men and women, boys and girls is ingratiated in us at that very early age.

This tends to tally with the findings of a study carried out by Dorothy Smith,⁵ in which she found that the standard North American family (or, SNAF) includes two heterosexually-married parents and one or more biologically-related children.⁶ Radical feminists argue that the orthodox conception of marriage, ensconced in the assumption that it is the purveyor of kinship relations, has long been an institution through which to reify social inequalities and sustain political hierarchies.⁷ It is customarily premised on the essentialist foundation of ontological sexual difference. From the Christian viewpoint, marriage is a natural event, part of the human experience from which few-mainly members of the clergy-ought to be exempt.⁸

Marriage therefore is a strictly heterosexual institution which unifies one man and one women through what they delineate to be most sacrosanct of bonds, marriage and God’s law are habitually inflated, thereby situating the institution almost wholly within the realm of religion, and either entirely precluding or relegating as incidental, other ideological variables that have

⁵ See Dorothy Smith, *Texts, Facts and Femininity: Exploring the Relations of Ruling*. (Routledge, 1993).

⁶ Ibid

⁷ Ibid

⁸ See Susan Okin, *Susan, Justice, Gender and the Family*,(New York: Basic Book, 1989), p 37; Also see Catherine MacKinnon. *Toward a Feminist Theory of the State*, (Cambridge, MA: Harvard University Press, 1989).

motivated its endurance.⁹ Marriage manifests itself as an institution for heterosexism from which those who are not heterosexual or do not conform to the accepted gender identity are not accepted. The consequences are prejudicial, which include among other things, the fortification of inequality through the reification of patriarchy and heterosexism, and the unnecessary regulation of human sexual expression.¹⁰

The social and legal meaning of marriage has remained grounded in the allocation of the divine. This is demonstrated in the classic 1886 case over polygamy, *Hyde vs. Hyde*, in which the presiding Judge concluded: "I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others".¹¹ According to Warner, heteronormativity is a regulatory social force that manifests itself in numerous social structures and institutions such as marriage, monogamy and parenting, and it also constitutes the standard for legitimate and prescriptive socio-sexual arrangements.¹²

Heteronormativity has also been cast as "shorthand" for the numerous ways in which heterosexual privilege is woven into the fabric of social life, pervasively and insidiously ordering everyday existence" as a key component of social structure.¹³ Such social privilege, relational configuration and family forms falling outside of compulsory heteronormative parameters are often rendered invisible.¹⁴

⁹ Ibid

¹⁰ Ibid

¹¹ *Hyde vs. Hyde*, (886), p 133.

¹² William Spencer, *Contexts of Deviance: Statuses, Institutions and Interactions*. (Oxford University Press, 2014). P 314.

¹³ Ibid p 108.

¹⁴ Ibid

6.1.3: The media

Media was cited by the majority of interviewees as an important tool that shapes LGBT lives. Seventy per cent of the participants viewed the media as a strong institution that shapes how sexual minorities are perceived by society. Most argued that the prevailing public attitudes towards homosexuality in Kenya for example, are characterised by misinformation and stigmatisation that is encouraged and propagated by the mainstream media. The overall view is that the media discourses problematise homosexuality.

Although the media has over the past few years been more open and encourages open discussion of homosexuality, in most cases, it relays the message of a problem that needs to be understood and dealt with. An example of an article in one of the dailies illustrates this. A writer in an article titled “sex between men on the increase in Kenya” had this to say:

Most African women don't feel threatened when they are certain that their husbands are hanging out with fellow men. After all, no intimate relationship can develop from such a friendship. But rapidly evolving world has not spared morals in our African society. Men's attraction to the opposite sex is fast waning. It is not surprising to hear statements like “not all men are attracted to the opposite sex.”...This does not apply to men in the city or married men. Even the generation of single men has fallen into this disastrous trap. Some could be abstaining from ‘normal’ intercourse but are they safe from infection.¹⁵

Another article published in popular Kenyan Newspaper in August 2010 illustrates the bias toward and lack of understanding of homosexuality in the country. The article reports on “increasing lesbianism among school girls “which is attributed to lack of training in managing...sexuality and lack of self-control”. The article quotes the views of a clinical psychologist who states that homosexuality and lesbianism are “learned behaviours” which can

¹⁵ See article in the Standard of 22nd, June, 2013, p 33.

be “unlearned”. The article compares homosexuality to drug abuse and claims that rehabilitation is necessary.¹⁶

As noted by Plummer, today the Kenyan media, like that in the US, are no longer saturated with homophobic portrayals, the situation has moved to a higher level of subordination and repression. Homophobia has been replaced by heterosexism as the major component in the mainstream media’s discourse about homosexuality and homosexuals.¹⁷ Heterosexism denies an acknowledgement of gays and lesbians in their own distinct reality and diversity. It subsumes difference within a larger heterosexual narrative about identity, personal relations, sexuality, and society. Aspects of gays and lesbian identity, sexuality and community that are not compatible or that too directly challenge the heterosexual regime are excluded. This heterosexism is endemic in all aspects of society and its media.¹⁸

The study findings tend to also agree with the observations of Fred Fejes and Kevin Petrich, who rightly note that images of homosexuality and the gay and lesbian community are often important sources of information and whether the dominant media discourse defines homosexuality as a pervasion, sickness or crime or defines it as a normal expression of human sexuality has a significant impact on how individual gay males or lesbians view themselves and their relationship to society.¹⁹ Indeed the negative stigma attached to homosexuality is reinforced

¹⁶ Dorothy Kweyu ‘The dilemma of lesbian schoolgirls; Daily Nation 10th August, 2010 (A Kenyan local dailies).

¹⁷ Kenneth Plummer, *Speaking its name Inventing a gay and lesbian sties*. In K. Pulmemer (Ed.), *Modern homosexualities: Fragments of lesbian and gay experience* (pp. 3-23). London: Routledge, 1992) p 19. In Fred Fejes and Kevin Petrich supra note 1 above, p 397.

¹⁸ Ibid

¹⁹ Ibid p 397.

through interpersonal contact and the media. For instance, in a study carried out by Pearce in the British press treatment of homosexuality showed a pattern of how it was viewed.²⁰

Of relevance is Savin-Williams observation that LGBT persons as youths or young adults have little or no help in understanding or defining themselves as gay or lesbian.²¹ Sexual orientation being fixed at a very early age, if not at birth, a gay or lesbian youth develops, or “comes out” in an atmosphere offering little or no information or role models.²² Many accounts of homosexuality were constructed as morality tales, with the homosexual the negative reference point in a discourse that reaffirmed society’s sense of normality. Homosexual were easily signified as the “alien other.”

6.1.4: Schools and educational institutions

The study revealed that educational institutions and systems influence marginalisations and stigmatisation of LGBTI individuals. Curricula and books and other reading materials LGBTI persons encounter stress in schools, which replete with institutionalised heterosexism and homophobia to produce culture of fear.²³ They reported being subjected to daily disparaging talk and jokes about gays, Bullying, threats of violence, verbal harassment, vandalism and physical assaults are common. Hence, LGBTI individuals cower in closets, afraid to come out because they fear negative repercussions both real and perceived. School personnel unwittingly or

²⁰ Frank Pearce, How to be immoral and ill, pathetic and dangerous, all at the same time: Mass media and the homosexual. In C. Cohen & J. Young (Eds.), *The Manufacturer of news: Social Problems, deviance and the mass media* (pp. 284-301)/ Beverly Hills, CA: SagePublications.1973

²¹ Savin-Williams, 1990; In Fred Fejes and Kevin Petrich, *Invisibility, Homophobia and Heterosexism:: Lesbians, Gays and the Media, Review of Criticism*, 1993 p 396/ Available at ing14057.weebly.com/uploads/7/6/8/5/7685869/fejes_petrich_invi. (Accessed on 31st December, 2015)

²² Ibid

²³ Ron Mclean. Racial identity and Relationship Satisfaction in African American Gay Men,(2003).*The family Journal*, 11:13.

willingly reinforce myths and stereotypes with regard to LGDTI by not speaking out against the denigrating remarks. Said one lesbian respondent:

I was expelled from school when it was discovered that I was a lesbian relationship. It was a boarding school. Nobody could come to my aid. The school administration was wild. Fellow students called me names, I had nowhere to face. My friend too was expelled from school. We now work as house helps in Nairobi to earn a living because no school can take us.

Another respondent stated that the school curricula are such that there is no teaching about sexuality which is not heterosexual. The human anatomy that we are taught in biology is about a man with a penis and testicles and a woman with a vagina. Said he:

You can imagine the horror I have lived with in silence, when I realized that I am not normal. I have both male organs and female organs. Not even my parents had prepared me for the shock that gripped me. I do not know who I am. I am abnormal.

6.1.5: The Law: Criminalisation of consensual same-sex sex

Those interviewed claim that the law are the biggest impediment to their sexual lives. Kenya's legal system, as are those of former British Empire, is strongly influenced by religious values which value heterosexism. The Penal code (sections 162-165) defines gay sex as a crime. These laws prohibit private sexual acts between consenting adults and their effect is to deny basic civil liberties to LGBT individuals and laws that reinforce the power differential at the heart of stigma.²⁴ with the consequence that they are omitted from equal protection of the law in all aspects. It obliterates transgender and intersex persons from its discourse, hence exposing them to unmitigated human rights abuse. Legal prohibitions [such as the anti-sodomy laws in Kenya Penal code] codify stigma.

²⁴ Courtney Finerty, Being Gay in Kenya: The Implication of Kenya's New Constitution for its Anti-Sodomy Laws, Cornell International Law Journal Vol. 4: 436-438, p 432.

The law enforcement agents, especially the police are given by what Finerty call ‘*a carte blanche*’ by this law to punish Kenyans on the basis of their sexual orientation or gender identity.’²⁵ Those interviewed argued that what the anti-sodomy laws do is to give rogue police the cover of legitimacy to arrest them for committing carnal knowledge of a person against the order of nature. “This is the ticket for the police to harass us on all manner of flimsy grounds” said one 90% of those interviewed cited this piece of law as being extremely oppressive and in most cases used by enforcement agents to harass them. Quoted in the Report of the Kenya Human rights commission, one respondent had this to say:

When greedy and corrupt policemen want to extort money from us, all they do is use this law to accuse us of engaging in illegal sex haul us into police stations at night. There, they extort money from us, beat us, humiliate us, sodomise us and then throw us out when they feel so. We have nowhere to report these violations for fear of victimisation. (Sic)²⁶

They said they have no means of adequately responding to the abuse because of the constant threat of imprisonment or other forms of retaliation at the hands of the officials. They dare not disclose what happened to them for fear of victimisation by the very police.²⁷ In any event, the attitude among most police is the same. Their motives for harassing homosexuals are the same everywhere. They are left with few options to find redress said a participant who believes in the humanity of homosexuals. Joshua Hepple notes that criminalisation of homosexual conduct has a hugely detrimental effect on homosexuals not just within the legal sphere but also socially.²⁸ In his view, because the State has identified this group of individuals as criminals, it creates state-

²⁵ Diane Papalia & Sally Olds, *Human development*.(New York: Mc Graw-Hill 1995) p 5.

²⁶ The Kenya Human Rights Commission conducted a series of interviews with 474LGBT Kenyans aged eighteen to sixty-five to document their experiences of homophobia within the country. Kenya Human Rights Commission, *The Outlawed Amongst Us: A Study of The LGBTI Community’s Search For Equality and Non-discrimination In Kenya* 19 (2011), P 22.

²⁷ *Ibid*

²⁸ Joshua Hepple, *will sexual Minorities Ever Be Equal? The Repercussions of British colonial “Sodomy “Laws, The Equal rights Review*, vol. Eight (2012) p 51. Available at www.equalrightstrust.org/ertdocumentbank/ERR8_Joshua_Hepple. (Accessed on 20th December, 2015).

sponsored homophobia that is quickly passed down to members of society who feel that, in certain situations, this gives them the right to discriminate, and quite often bully and harass homosexuals.²⁹

Criminalisation makes homosexuals feel isolated and deviant in the face of the law. They are not able to be themselves without fear of being arrested by the authorities purely because of their sexuality, or harassed by their peers.³⁰ According to Hepple, criminalising homosexuality also has an adverse effect on the treatment of HIV/AIDS as hospitals and medical professionals may be less likely to treat homosexuals who have the disease, compared to their heterosexual counterparts.

Gay men and other members of sexual minorities are frequently denied essential lifesaving treatment that they are entitled to, on an equal basis with others.³¹ According to Maguire, the law criminalising same-sex sexual conduct serves as a justification for action against sexual minorities, both within and without the law.³² This is generally true whether the law is vague or gender-neutral, which means it is technically applicable to opposite-sex couples.³³ Victorian era British sodomy laws still in force describe prohibited conduct as “carnal knowledge against the order of nature” or “gross indecency.”³⁴ The impact of these laws extends beyond their direct applicability to the criminal justice system. Their presence gives legitimacy to the anti-homosexual campaigns African leaders have launched in the recent past, thus encouraging

²⁹ Ibid

³⁰ Ibid

³¹ Ibid

³² Sebastian Maguire, *The Human Rights of Sexual Minorities in Africa*. California Western International Law Journal, Vol. 35, issue No. (2004), p1. Available at <http://scholarlycommons.law.cwsl.edu/cwilj/vol135/issi/2>, (accessed on 3rd December, 2013), p 2.

³³ Ibid

³⁴ Ibid

violence perpetrated by both state and non-state actors such as community and family members.³⁵

6.1.6: Myths, stereotyping, discourse and narratives

There are a lot of assumptions that everybody is heterosexual. Some participants who are gay complained of being harassed and confronted with questions such as “when are you going to get a wife? Are you not getting late for children? Or when are you going to get us grandchildren?

One participant had this to say:

I fear visiting my relatives in the village actually no longer visit them. This is because of the many questions that am confronted with, my grandmother virtually becomes distraught because at my age (30) years. I am not yet married and she feels she is missing out on seeing her grandchildren.

Such heterosexist couched questions give the assumption that the participants are all heterosexual. Other narratives are like “do you have any problem-can we help get you a wife?” Kombo, aged 35 is a gay and has engaged in gay relationships since he was eighteen. He says that Gay life in Kenya is very hard and also keeping a friend is hard as well.

In Kenya, sexual practices between male persons, even if it is consensual and undertaken in private is criminal offence. Further, actions such as prohibiting same-sex marriages, having no policies that prevent employers from sacking people on account of their sexual orientation or gender identity, allowing landlords the right to prohibit same-gender couples from cohabiting or creating an environment through lack of polices and legislation that enables landlords to evict such people and using sexual orientation as a factor in making restrictive custody decision in common Kenya. About sixty per cent of study participants who said they were in gay relationships said that upon their sexual orientations.

³⁵ Ibid

6.2: Impact of heterosexism on the human rights of sexual minorities

The overarching impact of heterosexism is the human rights abuses that sexual minorities endure in their daily lives. They are denied individual rights and fundamental freedoms which heterosexual counterparts get as a matter of course. The consequences of heterosexism are the grave human rights faced by LGBT individuals. These include but are not limited to: interference with their safety and security, access to adequate or appropriate healthcare, education, housing, violence, both physical and psychological, abuse by state agents, economic deprivation leading to massive poverty, food and right to work among others. The entire human rights situation of LGBT individuals is grim and pathetic. The following story of Jamin, a gay lawyer and a leading LGBT human rights defender captures the dilemma that LGBT individuals in Kenya face. Jamin gave his experience of living as a gay person as follows:

For me, the most devastating thing was the violent reaction that I got from my immediate family, friends, relatives, and workmates once I “came out”. My mum could not imagine that I may never marry a woman in order for me to give her grandchildren. She got so stressed that she developed high blood pressure. I assured her that this is the way I am and the sooner she comes to terms with it, the better for her and for me. I will one day change my mind and get married and see children. Regarding friends and relatives most of them distanced themselves from me and have little to do with me since then. I have lost two jobs because of my sexual orientation. Now I am working with human rights NGO dealing LGBT issues as a programme officer. It is hard life because both my partner and I cannot socialise freely because we are openly known to be gay. We cannot enjoy a drink at the pub because we are spotted and harassed. We cannot socialise in a place more than once; we keep shifting to avoid being targeted for harassment. Matters are not any better when it comes to housing; landlords keep chasing us away once they discover that we are gay. Our phones are tapped and our offices monitored. We keep changing our contacts to evade being cracked down. As an organisation that deals with LGBT issues, we keep relocating from one place to another due to harassment. Even some landlords have refused to take our rent once they got to know the nature of our work as an organisation. Police use criminal provisions against homosexual activities to harass gay people and more often than not for purposes of extortion. We lead lives full of fear and uncertainty. Right now we are going through a difficult time since President Museveni of Uganda passed the new law with stiffer penalties against Gays. Already some members of parliament and church are mobilising very hard to have the Kenyan parliament pass similar laws. So many of our colleagues from Uganda have fled to Kenya because of the persecution. We hope that we will not take that route as a country. What, however, disappoints me most is the realisation that I can never demonstrate my affection to my partner

openly. What are you when you know you are not understood; when what your family to you is not a family?

6.2.1: Access to Health care

Several inequalities related to sexual orientation and gender identity were reported by the participants. Eighty per cent of the participants revealed that they face homophobia from healthcare providers whenever they need treatment. The quality of healthcare given is wanting due to inadequate understanding of gays and therefore be in a position to their issues adequately. For instance, accessing treatment for sexuality transmitted infections (STIs), counseling and testing for HIV and transgender persons is difficult because they are often afraid of honestly responding to medical interviews because honesty could lead to rebuke, arrest or both.³⁶ With regard to transgender persons, the study found no medical provisions or policies for persons who choose to undergo reassignment therapy, with the satisfactory and complete report of a medical practitioner trained in matters of gender identity change. Ndundu, a gay person narrated his experience when he sought treatment in one of the major hospitals in Nairobi as follows:

I developed sores around my anus. They became so painful that I had to go to hospital to seek treatment. I did not know what my ailment was. Before I could be referred to the Doctor, clinical persons took the preliminary observations and when he noticed the sores around my anus, he asked me if I am gay. The he rebuked me, saying that I am a disgrace to humanity and the sores could be a manifestation of a bad disease which afflicts sinners like me. The Doctor did not have any kind words for me. It was terrible. I had to switch to a private medical institution to get counseling and treatment.

Another gay respondent stated as follows about the experiences of MSM individuals at the hands of health providers:

An identified MSM or lesbian will be arrested, denied treatment and suffer humiliation at the hands of healthcare providers.

³⁶ Kenya Human rights Commission Report, supra note 26 above.

These findings resonate with outcomes in similar studies which have found that LGBT individuals experience poorer health outcomes than their heterosexual peers. In a study carried out by the Missouri Foundation for Health, these outcomes are due in part to differential access to health insurance coverage; limited availability of health care services that are culturally competent and compassionate; and the impact of stigma, harassment and systemic discrimination. Nationally, sexual and gender minorities experience differences in their access to clinical, dental, and preventive care compared to their heterosexual and gender conforming counterparts. 2, 3 When seeking care, sexual and gender minorities report discrimination and harassment from providers. These are experiences that impact an individual's willingness to seek future medical care. According to CV Johnson, MJ Mimiaga, & J Bradford, Lesbians, gay men, and bisexual individuals are more likely than heterosexual individuals to delay or avoid seeking health care and more likely to delay filling prescription medicines.³⁷

Krehely notes that LGBT individuals are less likely than heterosexual persons to have a regular source for basic healthcare; they are also more likely to receive health care services in emergency rooms (24% compared to 18%) Discrimination and stigmatisation in the workplace and health care settings negatively impact the health of sexual and gender minorities.³⁸ The study also found that Health factors such as social and economic influences have been found to impact both physical and mental health outcomes.³⁹

³⁷ Collin V Johnson, Matthew James Mimiaga, & Johnson Bradford, "Health care issues among lesbian, gay, bisexual, transgender and intersex (LGBTI) populations in the United States: Introduction," *Journal of Homosexuality*, 54, 3, (2008):213-224. In MFH – Health Policy Publication

³⁸ John Krehely, "How to Close the LGBT Health Disparities Gap: Disparities by Race and Ethnicity," Center for American Progress, 2009, Ibid

³⁹ Institute of Medicine (IOM), "The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding," The National Academies Press, 2011, Ibid

JM Madera notes that although self-identification as LGBT is not a risk factor for suicide, but experiences of stigma and discrimination are associated with depression and anxiety, low self-esteem, and social isolation.⁴⁰ These are considered risk factors for suicidal ideation. LGB adults are more likely to experience psychological distress and more likely to need medication for emotional support than their heterosexual counterparts. LGBT individuals are more likely to report suicidal ideation than non-LGBT community members. Gay men are 4.5 to 7.6 times more likely to experience depression than their heterosexual peers, according to a 2004 study.⁴LGB youth are more than three times as likely to report suicide attempts as non-LGB youth (35% compared to 10%). When examining mental health outcomes transgender individuals are significantly more likely to report suicidal ideation (50%) than LGB community members (5%) and non-LGBT individuals (2%).¹A 2002 study found that 12 percent of gay men had attempted suicide, compared to 3.6 percent of their heterosexual counterparts.⁴¹

6.2.2: Forced medical procedures

A number of respondents reported being subjected to practices such as forced HIV testing, forced anal and rectal examination by police, hormonal, shock or psychological therapy and or religious exorcism to correct an LGBTI identity without the consent of the person. Most therapists are forced upon the respondents by parents or family hoping for curative effects which often fails.

The police took me to hospital for examination .The doctors told me to kneel on the bed and bend over. They inserted cold painful objects in my anus. It was intrusive and demeaning.....

⁴⁰ Ibid. Juan M. Madera*, “The cognitive effects of hiding one’s homosexuality in the workplace,” *Industrial & Organisational Psychology*, 3, 1, (2010):86-89,

⁴¹ See Missouri Foundation for Health Publication MFH – Health Policy Publication p Available at <https://www.mffh.org/mm/files/LGBHealthEquityReport.pdf>

Another one reported being subjected to practices such as forced HIV testing forced anal and rectal examination by police, hormonal, shock or psychological therapy and or religious exorcism to correct an LGBT identity without the consent of the person. Most therapies are forced upon the respondents by parents or family hoping for curative effects which often fails.

6.2.3: Harassment by State agents

One of the most recurring experiences among the majority of the participants is harassment by police and other law enforcement agents. This is aggravated by the fact same-sex sexual practices criminalised in Kenya.⁴² Sixty percent of the interviewed participants stated that they are routinely harassed by the police and such harassment includes being held in remand houses beyond the constitutional period without charges being preferred against them; or being presented in court on trumped- up charges.⁴³ Corrupt police officials routinely extort and blackmail LGBT persons with the threat of arrest and imprisonment if they do not give those bribes. Finerty observes that:

LGBT Kenyans are routinely harassed or abused by the police, held in “remand houses” beyond the constitutional limit without being informed of the charges against them, and brought into court on false charges...A group of corrupt police officers extort and blackmail LGBT individuals with the threat of arrest and imprisonment if they do not pay those officers bribe money....other Kenyan citizens physically and sexually assault LGBT Kenyans.⁴⁴

Some stated that most are sexually violated by the police officers once they are detained. They face trumped up charges, mostly of “being found in possession of bhang (cannabis sativa). This experience by interviewees reflects some of the findings of the Report of the Kenya National commission, in which it is noted that most of the trumped up charges that LGBT individuals face

⁴² Courtney Finerty, *supra* note 24 above, p 432.

⁴³ *Ibid*

⁴⁴ *Ibid*

at the hands of law enforcers are possession of narcotic drugs where reports were received of police “planting” rolls of bhang (cannabis sativa) on the suspects.⁴⁵

Namzombe who is openly gay had this to say:

I am a gay. There are specific places where gays meet and socialize. The police know where to truck us, especially on Fridays. They use the prevailing criminal law against gay sexual activities to arrest us, throw us into remand, only to demand for bribes from us. Half of the money we earn is to pay the heavy bribes demanded from us by the police to avoid prosecution. Those who fail to pay bribes face physical violence and sometimes they are sexuality molested by the very police officials. The saddest thing is that we are hardly taken to court and we have nowhere to report these violations.

6.2.4: Stigma and discrimination

Eighty per cent of respondents stated that stigma and discrimination is their biggest problem. Stigma starts at home, from family members, who once their sexual orientation is known, are ostracised, abused, shamed and in many cases driven out of home. Where they go to is not a concern of their family. Many said that their waking nightmare is their sexual orientation ever being discovered by their family members. Thirty per cent of mostly young participants reported having been thrown out of their homes by their families once their sexual orientation became known. Maggie (not her real name) age 23 is a lesbian and has been so since age fifteen. She had been in a long relationship with a girlfriend with whom they had a satisfying intimate relationship. However, when parents of her friend discovered their relationship, they became very violent, threatened their daughter and even threw her out of their family home. Her friend went into depression and committed suicide, she says she heartbroken and leads a tormented life. Nobody seems to understand the misery and dilemma that people like her go through. Soji, a lesbian respondent had this to say:

⁴⁵The Kenya Human Rights Commission Report, supra note 26 above, P 22.

I am twenty eight years old, doing odd jobs to survive. I am a lesbian. I have never dated a man in my entire life. I used to live with my parents until they discovered from a close friend of mine that I am a lesbian. They were shocked and became violent. They shouted at me, accusing me of bringing shame to them. They forced me to go for counseling, and eventually took me to a psychiatric hospital for an ECT to be done. When I told them that their efforts may not yield much fruit because I am not sick, they threw me out of our home and completely disowned me. I had not got any training for a job yet, so I was almost rendered homeless. Friends within the LGBT community learnt about my plight and offered me a job in one of our organisations. I do not earn much money but that is how I manage to maintain myself. Most of my relatives and friends have disowned me and I lead a very lonely life.

Nambo is a twenty one year old who describes herself as lesbian. She stated that she has had three attempted suicides previously and experiences high degrees of depression and hopelessness. She said that she knew she was lesbian at an early age of sixteen and she was expelled from by her family from their family home upon discovery of her sexual orientation at the age of twenty. She gets support from a few friends who take her to Mathare mental hospital in Nairobi, whenever she is unable to cope with her situation.

Through various researches, stigma has been found to lead to suicide and mental health challenges. Herek *et al* in one such study found that through stigma, society discredits and invalidates homosexuality relative to heterosexuality and institutions embodying stigma results in heterosexism, and heterosexual individuals internalising stigma results in prejudice.⁴⁶ Most religious denominations continue to condemn homosexuality as sinful and provide a rationale for marginalising LGBT people.⁴⁷ Researchers suggest that this social environment puts stress on LGBT people that elevate the risk of substance abuse, depression, anxiety, and other emotional

⁴⁶ Gregory Herek, Regina Chopp, & Darryl Strohl, Sexual stigma: Putting Sexual Minority health issues in context (2007). In A Report prepared by the Suicide Prevention Centre for the Center for Mental Health Services, Substance Abuse and Mental Health Services Administration, US Department of Health and Human Services, 2008 P 21. Available at <http://www.sprc.org/library/SPRC LGBT Youth.pdf>. (Accessed on 30th December, 2015)

⁴⁷ A Report prepared by the Suicide Prevention Centre for the Center for Mental Health Services, Substance Abuse and Mental Health Services Administration, US Department of Health and Human Services, 2008 P 21. Available at <http://www.sprc.org/library/SPRC LGBT Youth.pdf>. (Accessed on 30th December, 2015)

problems. A study in the USA by Mays and Cochran found growing evidence that experiences of discrimination can result in mental health and general health disorders.⁴⁸

6.2.5: Extortion and blackmail

Extortion and blackmail is prevalent among LGBT individuals. Fifty per cent of those interviewed especially gay men confirmed that they are faced with blackmail and extortion not only from law enforcement agents but also from fellow criminally inclined LBGTs. Several scholars have discussed the crimes of extortion and blackmail and its impact on its victims. The crime of extortion involves obtaining money, property or services from another person through, for example, intimidation or threats of physical harm. The crime of blackmail is similar, but involves threats to disclose information that a person believes to be potentially damaging to their reputation or safety.⁴⁹

The story of Jamin describes how police officers use the anti-sodomy law to harass them and actually extort money from them. Said Jamin:

Movements of gay people are monitored closely by security agents and policemen. Our phones are tapped and offices monitored. We keep changing our contacts to evade being cracked down. As an organisation that deals with LGBTI, keep on relocating from one place to another due to harassment. Police use criminal provisions against homosexual activities to harass gay people and more often than not for purpose of extortion. We lead lives full of fear and uncertainty.

Respondents who are educated professional reported being often blackmailed by a cartel of colleagues at work, security agents that work in courts with other LGBT persons who know the professional's sexual orientation. There were reports of blackmail with the community especially where same-sex partners broke up and one of them would blackmail the other to offer him/her a

⁴⁸ Ibid

⁴⁹ Ryan Thoreson and Sam Cook, *Nowhere to Turn: Blackmail and Extortion of LGBT People in Sub-Saharan Africa*. International Gay and Lesbian Human Rights commission. Available at www.iglhrc.org/sites/default/files/484-1.pdf. (Accessed on 26th December, 2015), p 5.

substantive amount of money or other favour in exchange for their silence on the other's sexual orientation. A respondent revealed that his sexual orientation was disclosed on social media.

The crimes of blackmail and extortion thrive on the ideas that same-sex activity is illegal, immoral, and un-African. They are problems that profoundly affect LGBT people in their depth and breadth.⁵⁰ According to Thoreson, blackmail and extortion destroys relationships, encourage greed, illegality, and suspicion, and illustrate how the criminalisation of sexuality begets criminality in the form of spying, libel, slander, theft, violence, and murder.⁵¹ At the core, both blackmail and extortion exploit a victim's vulnerability to place them in an impossible position and restrict their options.⁵² According to Ryan Richard Thoreson, it is difficult to overstate the terror and helplessness that these types of threats evoke for their victims. In places where it is illegal, stigmatising or dangerous to identify as LGBT or to engage in same-sex activity, keeping one's sexuality a secret may be, quite literally, a matter of life or death.⁵³ He argues that the prevalence and severity of blackmail and extortion are exacerbated by the fact that these are arguably among the most difficult violations to deal with through the legal system.⁵⁴

Although blackmail and extortion are criminal, in practice, the law typically offers little protection for LGBT people who are its victims - particularly in places where police are complicit or even responsible for these violations. Where same-sex activity is criminalised,

⁵⁰ Ibid p18

⁵¹ Ibid

⁵² Ibid p 7

⁵³ In a particularly alarming case in late 2009, a website called "Project SEE" (for "Stop Exporting Evil"), Was launched to target human rights defenders working for LGBT and reproductive rights in Kenya. The websites features "Not Wanted" posters of the most prominent human rights defenders – including their photographs and contact details – and encourages its visitors to print them out and post them around their neighbourhoods and towns. Nominally the goal of the campaign is to have these activists arrested under laws that criminalise same-sex activity and abortion in Kenya. In Ryan Thoreson and Sam Cook, Nowhere to Turn: Blackmail and Extortion of LGBT People in Sub-Saharan Africa. International Gay and Lesbian Human Rights commission. Available at www.iglhrc.org/sites/default/files/484-1.pdf. (Accessed on 26th December, 2015). P4

⁵⁴ Ibid p 5

victims often fear that they will be arrested if the police are alerted to the situation. Moreover, the fact that the state is not the only or even the primary perpetrator makes it difficult to employ a human rights framework.⁵⁵ Phillips notes that what makes these attempts at extortion particularly difficult to challenge is the fact that they involve intimate sexual relationships that are against the law and their acceptability is being constantly and publicly reiterated.⁵⁶ Phillips, in his study in which he considers the extent to which both the criminal law and the surrounding socio-political context facilitate vulnerability to blackmail, argues that the law against homosexual acts is ‘the easiest, clearest and surest way of blackmail’.⁵⁷

Regardless of whether the allegations leveled against him are false or not, the victim accused of homosexual act is therefore discredited from the beginning and invariably has to start from a position where his guilt is presumed.⁵⁸ Extortion and blackmail have a wide variety of harmful effects on their victims and the society at large. For the individual victims, blackmail and extortion are psychologically, financially, and often physically traumatising.⁵⁹ They often feel they have nobody to turn to, and are intimidated and disempowered at the same time they are stripped of their money and possessions. The strain that blackmail and extortion put on individuals as well as their relationships with others exacerbates the financial and material loss that these offences so frequently involve.⁶⁰

⁵⁵ In Ryan Thoreson and Sam Cook, *Nowhere to Turn: Blackmail and Extortion of LGBT People in Sub-Saharan Africa*. International Gay and Lesbian Human Rights Commission. Available at www.iglhrc.org/sites/default/files/484-1.pdf. (Accessed on 26th December, 2015). P5

⁵⁶ Oliver Phillips, *Blackmail in Zimbabwe: troubling narratives of sexuality and human rights*. *The international journal of Human Rights*, Vol. 13, Nos. 2-3, April – June 2009, 345-364 p Ibid, p 352

⁵⁷ Ibid p 346.

⁵⁸ Ibid

⁵⁹ Ibid p 8

⁶⁰ Ibid

6.2.6: Violence and Hate Crimes

The Federal Bureau of Investigations defines a hate crime as “crime motivated by preformed, negative bias against persons, property, or organisations based solely on race, religion, ethnicity/national origin, sexual orientation, or disability.⁶¹ A hate crime or bias-motivated crime occurs when the perpetrator intentionally selects the victim because of who the victim is. While an act of violence against any individual is always a tragic event, violent crimes based on prejudice have a much stronger impact because the motive behind the crime is to terrorise an entire group or community.⁶² Violence against individuals because of real or perceived sexual orientation is one of the most prevalent hate-motivated violence in Kenya LGBT respondents reported having been subjected to verbal harassment based on sexual orientation at some point in their lives. This violence is also directed to people who associate with or support LGBT people. Violence takes both verbal and physical forms. Harassment, threats, intimidation, vandalism, physical assault and homicide are some of the forms of violence directed at LGBT individual.⁶³

Of those interviewed, 30 per cent of gay men and 23 percent of lesbians admitted to having been victims of hate crimes, although most said they did not report to the police or any other authority because they did not think they would get the necessary assistance and/ or they feared being “outed” in the process of reporting, and therefore aggravating danger to themselves. This seems to be confirmed by Michelle A. Marzullo and Alyn J. Libman in their research on Hate crimes and violence against lesbian, gay, bisexual and transgender people in the US.⁶⁴ They argue that

⁶¹ US Department of Justice, 1996, foreword).In Michelle A. Marzullo and Alyn J. Libman, Hate crimes and violence against lesbian, gay, bisexual and transgender people. A Report of the Human Rights campaign foundation,. Available at Dixie.edu/titleixcleryact?File/Hate%20Crimes%20andv%20Violence. P 6 (Accessed on 25th December, 2015).

⁶² Michelle A. Marzullo and Alyn J. Libman, Hate crimes and violence against lesbian, gay, bisexual and transgender people. Ibid

⁶³ Ibid

⁶⁴ Ibid

some victims do not report sexual orientation-motivated hate crimes because they do not want to be identified (“outed”) in police reports as lesbian, gay, bisexual and/or transgender. More over sexual orientation and gender identity based hate crimes may not be perceived as bias-motivated by responding officers because of their inexperience, lack of education or their own biases.⁶⁵

The hate crimes are intended to inflict physical injury, emotional suffering, or property damage to LGBT people and in most cases, these intentions are met. Respondents in this study reported having personally been physically and verbally assaulted or knowing persons have been assaulted. Some reported knowing persons who have be deliberately pushed out of moving vehicles and died because they are gay. To the public, these look like ordinary accidents or reported as such, yet they are cases of intentional killing. Benjamin, who is gay stated as follows:

I know of persons who have been deliberately pushed out of moving vehicles to their death because they are gay or suspected of being gay. Yet, no serous investigations are ever carried out to establish this fact.

Hate crimes victimisation take a serious toll on LGBTI victims. In addition to the physical harm hate crimes inflict on victims, they also appear to create greater psychological trauma than other kinds of violence crimes.⁶⁶ The study found that victim who experience hate crimes tend to be prone to depression. This seems to be a common occurrence among the youth show how suicidal tendencies or even commit suicide.

Sinwanwa aged 31 and gay he has engaged in gay sex for many years. He said he receives many verbal abuses, text messages abuses from those who know that he is gay. He says that some even spit when he passes near them, causing him a lot of embarrassment, anger and distress. He said

⁶⁵ Ibid

⁶⁶ Ibid

many more of gay people are victims of such hate crimes but withdraw into the shadows into invisibility. Some commit suicide and fight back out of danger. Many of his friends have engaged in brawls with those who commit such crimes against them out of danger. Said He:

I know a number of my friends who have committed suicide because they are either unable to deal with their sexuality or they cannot stand abuse any more. They get depressed and because they have no form of support and no one to turn to, they kill themselves. Some fight back out of anger and get injured in the process; It is hard life for them.

6.2.7: Violation of Right to Housing

Sixty per cent of the respondents are forced to move house very often because one their sexual orientation or identity is discovered, neighbours do not want to have them around. One such respondent who “outed” on TV said that he has not been able to get stable accommodation because no landlord is willing to let his or property to him. Others just have to keep moving .The story of Domitilla aged 23 and a lesbian demonstrates this, is a lesbian and in an active lesbian relationship. This is what she said:

I am in a relationship with my friend and we have had a lesbian relationship ten years. It started when we were in school and we have been together since then, we do not live together but we spend a lot of time together, mostly during weekends. However, neighbours in the apartment in which I lived suspected that we were lesbians and that was the beginning of trouble for me. I was made to vacate the apartment. My Landlady asked me to leave immediately and I had to park and go. The neighbours very hostile, saying that I would infect their children with bad sexual habits. I could not be seen near the children. I was horrible. I was ordered out like a dog. I had to look for another apartment elsewhere. My girlfriend also lost her job once it was discovered that she is a lesbian. One has to keep moving from place to place to evade being discovered.

6.3: CHAPTER SUMMARY

This is the findings chapter. It has presented the study findings in line with the research questions in chapter one. It has established that heterosexism in the norm in Kenya and heteronormativity the culture within which the human rights of people in the country are protected. Heterosexism manifests itself in two main ways, cultural and psychological. The chapter established that due to

their perceived sexual and gender difference; sexual minorities are subjects of discrimination and oppression, leading to severe human rights abuses. It has captured their own stories about how they experience heterosexism. In their lived lives, they encounter discrimination, violence and other forms of abuse in all social institutions in the country, ranging from religious institutions, hospitals, schools, families, marriage and media among others. They experience it differently, some get depressed, others commit suicide and others live fake lives to appear 'normal.' They thus try to cope with the effects of heterosexism differently. It lays basis for the next chapter, which examines the adequacy or otherwise of the application of international human rights standards and principles in Kenya for protection of sexual minorities.

CHAPTER SEVEN

THOUGHTS ON IMPROVED HUMAN RIGHTS PROTECTION FOR SEXUAL MINORITIES IN KENYA

7.0: INTRODUCTION

Although the international community has woken up to address the human rights of sexual minorities upon the realisation that they face discrimination and in spite of Kenya having enacted a Constitution that echoes the spirit of international human rights standards and principles, Kenya is yet to make any effort of ensure protection of sexual minorities whose human rights face threats. As a consequence, they remain discriminated against, oppressed and invisible. This study was set out to explore the nature and extent of heterosexism in Kenya, what its structuring forces are and how it impacts on the human rights of sexual minorities. The study also sought to know how international human rights standards and principles have been used to address discrimination against sexual minorities and hence improve their protection and how Kenya can benefit from international human rights standards and principles to improve protection of her sexual minorities. The study was particularly interested in knowing what legal and non-legal mechanisms can flow from these standards and principles to address discrimination against sexual minorities in the country. The general theoretical literature on this subject and specifically in the context of Kenya is scarce and inconclusive on several vital question of how the Constitution of Kenya can be used to address the question of protection of the human rights of sexual minorities.

The study set out to test four hypotheses: that Kenya is deeply heterosexist and as a consequence, sexual minorities are marginalised and oppressed; that international human rights standards and

principles have evolved over time to protect sexual minorities; that Kenya has in place a progressive constitution that not only embraces international human rights standards and principles but also creates institutions of Parliament and the Judiciary that can be used to promote the human rights of sexual minorities.; that both legal and non-legal mechanisms are needed to address marginalisation and oppression of sexual minorities in Kenya. The following section illuminates the answers to the tested hypotheses.

7.1: EMPIRICAL FINDINGS AND IMPLICATIONS FOR LAW AND POLICY

Hypothesis one

Hypothesis one was proved affirmatively. Heteronormativity is very entrenched in Kenyan and permeates all social institutions, with far-reaching impact on the human rights of sexual minorities. Heteronormativity is sustained and given succor by all social institutions, including important institutions of marriage, the family, schools and other educational institutions, health institutions, religion, the law and legal institutions, the media and the general discourses and narratives in the country. These institutions are sources of stigma and homophobia, which result in prejudice and discrimination against sexual minorities.

The overarching impact of heterosexism is consistent and systematic marginalisation of LGBT individuals. It inhibits their enjoyment of individual rights and fundamental freedoms. The LGBT individuals have less access than heterosexuals to the benefits afforded by those institutions. Unlike their heterosexual counterparts, LGBT individuals are legally or in practice, denied most individual rights and fundamental freedoms. These include but are not limited to: interference with their safety and security, access to adequate or appropriate healthcare, education, housing, violence, both physical and psychological, abuse by state agents, economic deprivation leading to massive poverty, food and right to work among others. Due to state

sanctioned discrimination, sexual minorities do not enjoy their basic human rights and fundamental freedoms. All their socio-economic rights are violated, including rights to housing, shelter, food, healthcare and rights to fair labour practices, among others.

Regarding right to health, MSM suffer discrimination and abuse when they seek medical services, which makes them sometimes to completely shun seeking medical attention in the health institutions to avoid humiliation and stigma from healthcare providers. This exposes them to higher risks of dying of diseases such as HIV/AIDS and other STDs. With regard to transgender persons, there are no policies or medical provisions to enable them undergo reassignment therapy. Their rights to privacy and equal protection by the law are violated, and they are more often than not victims of physical and psychological violence, extortion by state law enforcement agents and private individuals. Due to their criminalised state, they carry the burden of criminality, which impacts of their freedoms of association, movement, assembly and conscious.

LGBT persons are routinely harassed by the police because of the existence of laws criminalising homosexual sex. The harassment includes being held in remand houses beyond the constitutional period without charges being preferred against them; presented in court on trumped-up charges. Corrupt police officials routinely extort and blackmail LGBT individuals with the threat of arrest and imprisonment if they do not give those bribes.¹ Some of them are sexually violated by the police officers once they are detained. LGBT individuals and especially gay men are faced with blackmail and extortion not only from law enforcement agents but also from fellow criminally

¹ See The Kenya Human Rights Commission conducted a series of interviews with 474 LGBT Kenyans aged eighteen to sixty-five to document their experiences of homophobia within the country. Kenya Human Rights Commission, *The Outlawed Amongst Us: A Study of The LGBTI Community's Search For Equality and Non-discrimination In Kenya* 19 (2011), P 22.

inclined Kenyans. They face hate crimes. The hate crimes inflict physical injury, emotional suffering, or property damage to LGBT people and in most cases, these intentions are met.

Hate crimes victimisation take a serious toll on LGBT victims. In addition to the physical harm hate crimes inflict on victims, they also create greater psychological trauma than other kinds of violence crimes. Victims of hate crimes suffer from higher levels of depressive symptoms, traumatic stress symptoms and anxiety. Due to stigma, most - especially the youth, become victims of depression and mental health challenges and loneliness. In some cases, this leads to suicides. As a consequence, sexual minorities lead a difficult life, seeking strategies of survival in order to navigate through the heterosexist society, placing an unnecessary extra burden on them that a society that their heterosexual counterparts do not have to shoulder.

Hypothesis number two

Hypothesis number two was also proved affirmatively. Increasingly, there is growing agreement within the international community that discrimination on the basis of sexual orientation and gender identity runs contrary to fundamental human rights principles and international law. Although international human rights standards and principles are not sufficient to protect the human rights of sexual minorities, their application at international, regional and some national arenas has seen marked improvement in the recognition and protection of sexual minorities. This has been achieved through the UN and its treaty bodies as well as regional human rights instruments such as the African Charter on Human and Peoples' Rights, measures have been put in place in form of standards and principles to guide states on protection and promotion of the human rights of sexual minorities.

The most important principles of international and regional human rights law that have been used to protect and promote the human rights of LGBT individuals are equality and non-

discrimination, as well as rights to privacy and fundamental freedoms of association and assembly, protections from torture, inhuman and other degrading treatment on account of sexual orientation or gender identity among others. Further, these principles have been applied by various jurisdictions and regional human rights courts, as well as some of the UN treaty bodies such as the UN human rights Commission to interpret create jurisprudence that has struck a blow for protection of the human rights of sexual minorities.

However, although the study started off with the assumption that international human rights could be the magic wand for protection of sexual minorities, it has turned out that indeed human rights law itself is faced with a myriad of challenges and limitations, which render them inadequate to address the human rights violations of sexual minorities face. These limitations include the normative nature of the human rights corpus itself and the problems of interpretation. Others include the difficulty that arises in the enforcement process of international jurisprudence, and the vexing issue that to date, there is not a single treaty that addresses the human rights of sexual minorities. Further, the present assumptions that international human rights principles are universal is a fallacy in the sense that some sections of people, such as the numerous versions of sexualities and gender identities are not covered under the application of these principles, as rightly warned by queer theorists. It was also proved that the UN treaty bodies, African commission on Human rights as well as assorted national jurisdictions have queered as well as applied principles of practical reasonableness to effect transformative decision making in implementing international human rights principles to challenge heteronormative norms and protect the human rights of sexual minorities.

Hypothesis number three

Hypothesis number three was also confirmed in the affirmative. The recently enacted Constitution of Kenya 2010 is progressive in nature, having an elaborate Bill of Rights that embraces the principles of equality and non-discrimination. It places emphasis on socio-economic rights as well as cultural rights in addition to the traditional civil and political rights, hence laying a good basis for arguing for protection of sexual minorities. Additionally, the Constitution contains many counter-majoritarian provisions which can be interpreted in favour of protection of sexual minorities. The institutions of Parliament and the Judiciary have enhanced and liberal mandates, as decision-making bodies, to legislate and interpret the law purposively to reflect the spirit of the Constitution. It places standards of interpretation and the remedies that are available to those whose human rights are breached. Regarding the Judiciary, the Constitution of Kenya has conferred the power of judicial review as well as inbuilt interpretation mechanisms which call for inclusive, critical and transformative approaches, which include queering interpretation. As regards the legislature, the Constitution has created a transformative legislature with powers to critically and in a transformative manner, engage in the role of oversight, law making as well oversight and responding to the larger Kenyan population. These new powers and mandates of the Legislature and judiciary call for improved human capacity on the part of the legislators and judges, as well as support/research staff if they are to meet the demands of these mandates.

However, there exist in the statute books laws that run counter to the Constitution in the sense that they discriminate against sexual minorities and whose repeal and/or amendment could face challenges from heterosexist Parliament and majoritarian constituencies that members of parliament represent. The Constitution therefore, holds the key to the emancipation of sexual

minorities from abuse. It imposes limits on state powers and in limiting and regulating the exercise of state power, the Constitution aims at: freeing and empowering all citizens from the tyranny and coerciveness of the state, police brutality, arbitrary imprisonment, suppression of freedom of movement, speech, association among others. Further, the Constitution obligates observance of national values and principles of governance which comprise of inter alia: the rule of law, democracy, sustainable development, integrity, transparency and accountability. The intention of the Constitution is that in observing the rule of law, equality before the law and fair procedure will result in formal and substantive justice for all people including sexual minorities.

Hypothesis 4

Hypothesis number four posed a problem. Although it was proved affirmatively, of interest however, is that the development of law and legal institutions alone is no panacea to the human rights plight of sexual minorities. Countering and neutralising heteronormativity needs more than just the law. A need for both legal and non-legal approaches is necessary. Viewed from a queer perspective, the diverse nature of human rights abuses, the abusers and the varied experiences that LGBT people experience human rights violations calls for a multi-faceted approach to recognise and protect sexual minorities. There is need both legal and non-legal mechanisms if human rights violations that LGBT people in Kenya face are to be combated.

7.2: RECOMMENDATIONS

The findings of this study illustrate how political, economic, social and legal institutions influence the lives of LGBT individuals. The study indicates that sexual minorities and their human rights status is determined by not a single factor but by a wide array of variables. For instance, the sodomy law emanating from a common law system as indeed does the Kenyan one

is not the variable to increase discrimination against LGBT individuals. The Judeo-Christian religious principles also play a role in influencing social attitudes, even the law. This being the case, the need to address the human rights of sexual minorities demands multidisciplinary approaches to find solutions. The study itself was grounded by theories in law and other sociological approaches. Sexual minorities themselves reveal multiplicity and inter-sectionalities that cannot be understood or addressed purely as a legal subject. The study therefore recommends both legal and non-legal remedies as explained hereunder.

7.2.1: Legal reforms

The Constitution of Kenya 2010 is a promising framework for protection and promotion of the human rights of sexual minorities. However, as demonstrated in chapter six of the thesis, several articles such as article 27(4) and article 45 of the same constitution contradict the equality and non-discrimination principles. Further, several pieces of legislation exist which are discriminatory to sexual minorities and are at variance with the spirit and letter of the Constitution. They pose the biggest impediment to protection of sexual minorities. The following section enumerates them and makes recommendations on what should be done by the legislature.

7.2.1.1: Need to Repeal Sections 162, 163 and 165 of the Penal Code

There is need to repeal sections 162, 163 and 165 of the Penal Code which criminalise same-sex sex and therefore align such law with the Constitutional provisions of equality, non-discrimination and respect for human dignity. Repealing this criminalising provision in the Penal Code will signal Kenya's affirmation of human rights and human dignity and it will also confirm the fact that the legacy of colonialism should no longer be confused with cultural authenticity or national freedom. As revealed in the literature review, same-sex sexual relations did exist in pre-

colonial Africa and non-conventional gender identities were common, without such people incurring the severe discrimination that is occasioned by anti-sodomy laws.

7.2.1.2: Need to amend other discriminating legislation

The family laws, specifically the marriage Act 2014 assumes heteronormative genders in its definition of marriage which is a consensual union between a man and a woman. This definition fails to recognise same-sex unions and is therefore discriminatory and unconstitutional. It should be reviewed to include non-heterosexual marriages. The Children's Act of 2001 has implications on the rights of same-sex oriented persons, intersex children as well as transgender persons. The Act forbids adoption of children by gay couples, even when there is no proof that gay couples cannot be suitable and loving parents. The Act is therefore discriminatory and unconstitutional to that extent and it should be reviewed. Registration of Persons Act, Chapter 107 of the Laws of Kenya makes provisions for the registration of persons and for the issue of identity cards and any other connected purposes. The Act Chapter 90 of the laws of Kenya needs to be amended, so does Act No. 14 of 2013 to remove their heteronormative assumptions.

7.2.1.3: Need to adopt comprehensive equality legislation

There is need to adopt a comprehensive equality legislation, to take the path of a single, comprehensive equality Act, which should prohibit discrimination on a conditionally open list of protected grounds which should incorporate at least all of the grounds set out in Article 27 of the Constitution, together with the additional grounds of sexual orientation, gender identity. It should prohibit all forms of discrimination and should cover areas of life and should provide for the development and implementation of positive action measures. Enact comprehensive national legislation on non-discrimination and include sexual orientation and gender identity among the prohibited grounds of discrimination.

7.2.1.4: Screen national legislation to detect and correct possible inconsistencies

There is need to screen national legislation to detect and correct possible inconsistencies with non-discrimination legislation in force to prevent discrimination on grounds of sexual orientation and gender identity, eliminate discriminatory criminalisation of same-sex sexual conduct as this is still in Kenya's statute books.

7.3: NON-LEGAL MECHANISMS

Law is certainly an important area to target. However, putting in place legal mechanisms such as amendment of the law and repealing oppressive criminal laws alone is not sufficient. Indeed, examples of countries where there are constitutional and legal provisions that protect the human rights and human dignity of LGBT people such as Uganda and South Africa have not saved sexual minorities from extreme violence that has resulted in deaths. As observed in chapter three of the thesis, the case of Eudy Simelane, the Banyana Banyana national female football star is instructive, so is the case of gay activist David Kato in Uganda.

7.3.1: Empowering the Judiciary

Kenya's judiciary is emerging from many years of inertia in matters of interpretation of human rights. It had been characterised with failures to interpret individual rights and fundamental freedoms in favour of citizens. It is more known for interpreting rights in favour of the state, even in matters where the state had been viciously aggressive against the people and exercised its coercive powers arbitrarily and to the detriment of citizens. Many judges and magistrates are part of the old judicial regime, with little knowledge about human rights and their interpretation. Interpretation of human rights of sexual minorities is a new phenomenon in the Kenyan Judiciary and also the

new Constitution gives new and expanded judicial review powers to the Courts, there is need to carry out intensive sensitisation and training of Judges in these aspects in order for them to appreciate their new role. Queer, Critical decision making is new to the judiciary and this needs to be imparted on judges as part of their capacity building.

There is need to empower the Judiciary Training Institute to take a lead in retraining judges on international human rights principles and standards and their interpretation. Scholars and judges from other jurisdictions that have given life to the rights of equality, non-discrimination, and respect for human dignity should be invited as guest capacity builders for the nascent judiciary. It also calls for different approach by the Judiciary in interpreting the Bill of rights and the rights of sexual minorities to ensure their protection. The Bill of rights would be of little effect if there is no adequate machinery and intention in the judiciary for enforcement of such rights, and if remedies when granted, are not supervised to ensure compliance. There is need therefore, to develop the judiciary's professionalism and technical capacity to recognise and deal with violations of human rights and fundamental freedoms. The judiciary needs to be educationally and otherwise highly equipped to deal with the complex human rights situations constantly arising, including adjudication in situations of competing rights and interests. This involves developing human rights jurisprudence, publishing judgments, reaching out to citizens.

7.3.2: Empowering Parliament

Parliament and the Judiciary which are important in the implementation of the Bill of Rights According to Article 21(4) of the Constitution, the State has an obligation to enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms. Although Parliament has made a few positive legislations since the adoption of the constitution, it needs to do much more through amendments and/or repeals in

order to align them to the spirit of the constitution. There is need to empower Parliament, through sensitization, training and capacity building of its members in international human rights standards and principles in order for them to understand their role in that regard.

7.3.3: Need to scale up Public interest litigation

Litigation on human rights is important because it affirms the legal nature of the rights and the right to an effective remedy as enshrined in the UDHR. Kenya's Constitution is revolutionary in the sense that it introduces socio-economic rights for the first time and through article 22, it destroys the problems of *locus standi* seen in the years under the old constitution by extending it beyond just the persons directly affected by the threat, violation, denial or infringement of the rights. In the interests of ensuring justice, the rules of procedure for cases that touch on human rights require minimal formalities, even allowing for informal documentation, proceedings to commence without payment of a fee, and encouraging expertise through the appearance of individuals or organisation as friends of the court. Already these provisions are being put to use. Individuals and human rights organisation can take advantage of these provisions to bring public interest litigation on behalf of sexual minorities who in most cases are afraid to expose themselves for fear of social reprisals. Indeed public interest litigation in countries such as India and South Africa has seen socio-economic rights gain protection through broad judicial interpretation of their Constitutions. This has enabled the courts to overcome the handicap of non-justiciability of socio-economic safeguards and now the rights to health, food, water, shelter, education and social security are regularly litigated. Most of the cases on ESRs are brought to court in the form of public interest litigation. This public interest spirit can be replicated in Kenya.

7.3.4: Need to set up Committee to look into human rights abuses of sexual minorities

There is a lot of societal ignorance about sexual minorities, with many not making any differentiation between transgender persons, intersex persons and gay persons. There is a lot of homophobia which results in stigmatisation of sexual minorities and this leads to violence, both physical and psychological. Religious leaders and politicians link non-heterosexual sexual orientation and gender identity to foreign culture and claims that they are un-African are the norm. To bring about understanding of sexual minorities, the government of Kenya should start by appointing a Committee like the 1954 Wolfenden Committee comprising of well known human rights people to start a country-wide exercise of collecting views from Kenyans on what measures the country should take to protect and promote their human rights.

This Committee should open its doors to everybody to ventilate their views about homosexuality in this country. Once the Committee gives its report, immediate reforms should commence, with the government leading the way by pledging to respect its obligations under international human rights law.

7.3.5: Need to recognise the role of religious leaders in reforms

Religious leaders are on the forefront in opposing recognition and protection of the rights of sexual minorities. This is not unique to Kenya. This was also witnessed in England during the Wolfenden Committee debates, the church can also be a catalyst for reforms in matters of sexual freedom. Notable in the Wolfenden debates was the strong position taken by the Anglican Church of England to clearly separate matters of morality from matters of law to give the much needed impetus to reforms.

Reforms therefore need to target this sector of society and through reasoning and education; the Christians and Muslims could be an important avenue through which reforms can be effected. The early initiative in Britain for example, was to enlist the support of liberal members of different religious groups. Their voices became important sources of appeals for reason and opposition to the application of the harsh criminal laws. Leading Church leaders in England from early days supported the Wolfenden proposals. They include Bishop John Robinson, the Bishop of Woolwich, Canon John Collins and eventually the Archbishops of Canterbury and York.

Many of these religious supporters of reform adhered to traditional understandings of scripture as it has been taught in the past before knowledge became available of scientific data on the existence and distribution of human sexual diversity. However, religious leaders moved away from the assertion that it was necessary, or appropriate to enforce those understandings by criminal sanctions. In more recent times, Archbishop emeritus Desmond Tutu in South Africa has become a strong proponent of the need for reform of African Church and popular vies on this subject. Kenyan religious leaders too, should be involved as change agents for any reforms in the country to support protection of the human rights of sexual minorities.

7.3.6: Public Education and sensitisation about sexual minorities

It is evident that most Kenyans, including the government itself, are ignorant about sexuality in general and sexual minorities in particular. Homophobia that grips the country is fuelled mostly by ignorance based mainly by lack of information and disinformation. Whereas a lot of research elsewhere has been undertaken to understand non-heterosexual sex and gender identity, such information is lacking from the public domain in Kenya. There is need for intensified public education by the Government as part of its international human rights obligations to sexual minorities Most Kenyans are ignorant about sexual minorities and much of their attitudes

towards them are informed by ignorance. It is important that the country takes the initiative to put in place programs that will educate Kenyans on issues of sexual minorities and the implications of international human rights law and the Constitution of Kenya 2010 on the human rights of sexual minorities.

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7.3.7: Need to involve sexual minorities in legislative and policy formulations

This study has argued that regulation of sex is best carried out through a symbiotic combination of both legal and non-legal mechanisms and policy formulations. Further investigation into the nature of the normative and policy formulations, which develops them, and their effectiveness as regulatory mechanisms could constitute a fruitful line of research. Involvement of LGBTI individuals themselves could be useful. This investigation should also focus on the application of the laws and policies to ensure efficacy. This may also give good insight into other regulatory mechanisms that inhibit the efficacy of normative mechanisms.

7.3.8: Scientific approaches

The Wolfenden committee approach showed that involvement of people from all disciplines is important. These must include medical experts, psychiatrists, psychologists, social workers, criminologists among others, should be brought into law reform to bring more general notice awareness about the harm of stigmatisation and violence caused by the laws that criminalise same-sex sexual relationships and failure to protect transgender and intersex children. Invoking sound scientific research concerning the causes, features and prevalence of sexual variation among human beings is an important factual foundation to correct the assumption that such variations are “foreign” or “Western” aberrations. Silence because of fear was also present in Western societies before the Kinsey, Hooker and Wolfenden reports. In particular, the appeal to medical and psychological data can help to dispel the confusion that surrounds the subject.

7.3.9: Involvement of the Legal profession

Kenyan Lawyers have in several occasions played an important role in transforming society. They fought hard to ensure the end of totalitarian rule and they fought hard to restore democracy. They are largely responsible for the adoption of the new constitution that entrenches values that respect human rights and human dignity. They are therefore committed to a society that respects the rule of law and human rights. They can replicate the role that lawyers in England played who saw from close up the oppression and injustice of the enforcement of the old anti-sodomy laws and the harm they caused to persons involved.

7.3.10: Investment in Academic Research

Due to homophobia, academics and other researchers have not been keen on studying sexuality in Kenya. Yet the only way that the society will be able to appreciate the nature of non-heterosexual sexual practices and gender identities and the impact of discrimination it is necessary to engage with scientists concerned in the care of members of sexual minorities. Invoking sound scientific research concerning the causes, features and prevalence of sexual variation among human beings is an important foundation to correct the assumption that such variations are 'foreign' or "Western" aberrations. Because of legal or religious sanctions, the more difficult it is to persuade members of those sexual minorities to reveal themselves openly to fellow citizens, and even with their families and friends. Medical practitioners, psychologists, social workers and others can be brought into the law reform movement to bring more general notice awareness about the harm and stigmatisation (or even violence) caused by the laws against homosexual offences.

7.4: CONCLUSION

In examining the impact of heteronormativity on the human rights of sexual minorities, this study started from the premise that all people, irrespective of the gender identity or sexual preference, ought to enjoy their individual rights and fundamental freedoms. From the overall exploration of how society and the law treats sexual minorities, what emerged is that sexual minorities are marginalised, discriminated against and their enjoyment of individual rights and fundamental freedoms is compromised. It also emerged that there is hope at the end of the tunnel for sexual minorities, in light of international human rights principles and standards and the Constitution of Kenya 2010 which embraces them in addition to its creation of a vibrant legislature and judiciary with potential to turn around the fortunes of sexual minorities through critical and transformative approach to decision making.

The aim of this long journey of research has been to show that through a recognised relationship of human beings with nature and society, we can make 'visible' marginal identities and recognise their plight of living in conditions of neglect, squalor, insecurity and vulnerability, and most importantly, lives devoid of human dignity. The hope of this study is that one day, LGBT people who are legitimately citizens of Kenya will experience freedom - the freedom as understood by John Finnis which makes it possible for them to lead lives that can be said to be worthwhile. Indeed as it ought to be known, "freedom is a process never fully realised in the context of the ontology of fragility". This study is only but a little step in a complex journey.

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APPENDIX A

Consent to participate in the Inquiry on “Heteronormativity, Sexual Minorities and the Constitution of Kenya: Towards improved Human Rights Protection through critical and transformative legislative and judicial decision making”.

You have been asked to participate in this research. The purpose of this study is to establish how international human rights principles and standards and the Constitution of Kenya 2010 can be implemented in a better manner so as to improve the human rights situation of sexual minorities in the country. Your response to the research questions may be cited using your name unless you wish to remain anonymous. If you prefer anonymity, a suitable pseudonym may be used.

Your participation in this interview is voluntary, and you may have every right to decline to sign this consent form or to answer all or any questions put to you. If you opt to participate in the inquiry, you may withdraw at any time during the interview. In addition, you have the right to have your data withdrawn from the study after the research is conducted.

Date:

Name:

Occupation

Signature

APPENDIX B

QUESTIONNAIRE

My name is Nancy Makokha Baraza, a Doctorate student at the University of Nairobi, School of law. I am seeking to find out whether sexual minority persons in Kenya are recognised and whether the law provides them any protection. I appreciate you taking your time to fill out this questionnaire. Your responses will be kept strictly confidential.

Part 1

Gender: Male Female
Age: 20-30 31-40 41-50 51 and above
Employer: Government NGO International Organization
Any other (please specify)

1. Do you know who an LGBTI or a sexual minority person is?
2. If your response in (1) is 'YES' what is your view on them?
3. What is your interaction with sexual minorities?
4. Do you believe they face any challenges? If yes, state briefly some of the challenges you believe they have encountered.
5. In your view what needs to be done to improve their situation in the country?

Questions 6 and 7 are for respondents who are representing various advocacy groups; human rights organisation's and lawyers dealing the rights of sexual minorities only.

6. Have you conducted or supported any programmes or cases involving the intersex in Kenya? Briefly state which programmes or cases, what was the outcome of such projects.
7. Have you face any challenges? If yes, state briefly some of the challenges you have encountered.

Questions 8 and 9 to be answered by Government officials and Religious respondents

8. What are the government's or your religion's views about sexual minorities?
9. What in your view should be the position of sexual minorities in society?

Questions 10 and 11 to be answered by all the respondents

10. In your opinion, what would accelerate the realisation of the rights and freedoms of the sexual minorities?
11. Is there any other information you would like to provide pertinent to this research?

**END OF QUESTIONNAIRE
THANK YOU**

APPENDIX C

INTERVIEW QUESTIONS

1. When did you discover you were transgender/gay/lesbian?
2. What was your reaction?
3. What gender do you identify with?
4. Why?
5. Have you opened up about your condition to anyone else?
6. Please explain your answer above.
7. If your response in (6) above is 'No', what are the reasons for not doing so?
8. What has been your experience as an LGBT?
9. How do you feel as an LGBT?
10. How has the law treated you?
11. Is there any way you feel the law can be helpful to you?

