

**IN WHO'S BEST INTEREST?  
A CRITIQUE OF THE BAN ON HOMOSEXUALS FROM ADOPTING CHILDREN  
UNDER KENYAN LAW**

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## **DECLARATION**

I, Sharon Owindo, do hereby declare that this is my original work and that this work has not been submitted for the award of a degree in any other university.

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This thesis has been submitted for examination with my approval as the University supervisor.

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## **DEDICATION**

*This thesis is dedicated to my parents for their love, support and inspiration. This thesis is equally dedicated to all homosexuals who continue to face prejudice and differential treatment.*

## **ACKNOWLEDGEMENT**

First and foremost, I acknowledge God, for consistently giving me the strength and the courage to complete my thesis.

I thank my parents, Mr. and Mrs. Okello. Thank you for the confidence you have shown in me. I am also thankful for the support, both financial and psychological.

I am equally grateful to my supervisor, Dr. Seth Wekesa for his wise supervision and patience.

## **ACRONYMS AND ABBREVIATIONS**

ANC	African National Congress
ACHPR	African Charter on Human and People's Rights
CEDAW treatment	International Convention on the Elimination of all forms of Differential against Women
CRC	International Covenant on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
KHRC	Kenya Human Rights Commission
LGBTQI	Lesbian, Gay, Bisexual, Transgender, Queer and Intersex
NCGLE	National Coalition for Gay and Lesbian Equality
UDHR	Universal Declaration of Human Rights
UN	United Nations

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### **Kenya**

1. Children Act No. 8 of 2001
2. Penal Code, Chapter 163, Laws of Kenya

### **South Africa**

1. Aliens Control Act
2. Sexual Offences Act of 1957
3. Child Care and Guardianship Act

## **REFERENCE LIST FOR CONSTITUTIONS**

1. The Constitution of Kenya, 2010
2. The 1993 Interim Constitution of South Africa,
3. The 1996 Constitution of South Africa

## **REFERENCE LIST FOR CONVENTIONS**

### **International**

1. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;
2. Convention on the Rights of the Child
3. International Covenant on Civil and Political Rights
4. International Covenant on Economic, Social and Cultural Rights
5. Universal Declaration of Human Rights

### **Regional**

1. African Charter on Human and Peoples' Rights
2. American Convention on Human Rights

## REFERENCE LIST FOR CITED CASES

### Domestic

1. *Apollo Mboya v Attorney General and 2 Others* [2018] eKLR
2. *Centre for Rights Education Awareness and Another v John Harun Mwai and Another* Civil Appeal 82 of 2012
3. *Eric Gitari and 8 Others v Attorney General* Petition Number 150 of 2016 consolidated with Petition Number 234 of 2016
4. *Eric Gitari v Non-Governmental Organisation Board & 4 Others* [2015]eKLR
5. *John Harun Mwau & 3 Others v Attorney General & 2 Others* Petition No 65 of 2011 [Consolidated with] Petitions No's 123 of 2011 and 185 of 2011[2012]:
6. *Law Society of Kenya v KRA* Civil Appeal 74of 2017
7. *NGO Organisation Coordination Board v Eric Gitari and 5 Others* Civil Appeal No.145 of 2015
8. *Olum and Anothe v Attorney General* [2002]EA
9. *Samuel H. Momanyi v Attorney General and Another* [2016] eKLR

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1. *The Queen v Big M. Drug Mart Ltd* 1986 LRC(Const.)332

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1. *Willis v The United Kingdom*, No. 36042/97, ECHR 2002 IV

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1. *Du Toit and Another v Minister of Welfare and Population Development and Others*
2. *Fourie v Minister of Home Affairs and Others* 2003 (2) SA 198 (CC)
3. *National Coalition for Gay and Lesbian Equal v Minister of Home Affairs and Others* 1999 (2) SA 1(CC)
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3. *Oloka Onyango and 9 Others v Attorney General*, Constitutional Petition No. 08 of 2014

## **United Nations Commission on Human Rights**

1. *Fedotova v Russian Federation* U.N.Doc. CCPR/C/106/D/1932/2010 (Nov. 20, 2012)
2. *Toonen v Australia* 488/1992 U.N Doc CCPR/C/50/D/488/1992/1994
3. *Villianatos and Others v Greece* (29381/09 & 32684/09)[2013] ECHR (7 November 2013)
4. *Young v Australia* U.N. Doc. CCPR/C/89/D/1361/2005 (2007)

## **USA**

1. *Board of Education of Kiryas Joel v Grumet* [1994]
2. *Everson v Board of Education* 330 US, 15,16
3. *United States of America v Windsor* (570, U.S. 744, 2013)

# CHAPTER ONE

## BACKGROUND TO THE STUDY

### 1.1 Introduction

Human rights are legal entitlements that accrue to one simply virtue of them being human. Many instruments, both international and regional agree with this finding.<sup>1</sup> As such, they are universal, and they apply to everyone everywhere and at all times. Human rights are also inter-related, meaning that the denial of one right often translates to the denial of other rights.

The universal right of homosexuals to receive equal treatment and protection before the law, purely by virtue of them being human has been a subject of debate for many decades. Those who promote for the rights of homosexuals have relied on the principle of universalism to argue their point while those who do not believe homosexuals should be treated equally have relied on the principle of cultural relativism to argue out their position. They have cited culture and religion as limiting factors. This has resulted in homosexuals being denied basic rights including the right to life, health, education, family, privacy, employment and even the right to receive dignified treatment and respect, among many other rights.<sup>2</sup>

Homosexuality has been considered a mental illness, a perversion and a choice. While countries such as South Africa have made progressive advancements, others such as Uganda have attempted retrogressive advancements.<sup>3</sup> Kenya, on the other hand has maintained the

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<sup>1</sup> See UDHR, ICCPR and its two optional protocols and ICESCR

<sup>2</sup> KHRC *the Outlawed Amongst Us: A Study of the LGBTI Community's Search for Equality and Non-differential treatment in Kenya*, 2011

<sup>3</sup> In the year 2009, a Ugandan MP, David Bahati, brought before the house the Anti-Homosexuality Bill. The Anti-Homosexuality Bill sought to further expand same-sex related offences. The Bill proposed death as the suitable punishment for an offence it referred to as "aggravated homosexuality". Aggravated homosexuality, according to the Bill was defined as same-sex with a person who: is less than eighteen years; is HIV positive; is the parent or guardian of the victim; by someone who has authority of whichever kind over the victim; in cases where the victim suffers from a disability; a person who is has been convicted severally or is committed by a person who administers a drug or anything intended to overpower/ incapacitate the victim. The Head of State Yoweri Museveni signed this Bill into law in 2014. The same was however challenged. See "*Anti-Homosexuality Bill Could Mean a Death Sentence for LGBT people in Uganda*", Transparency International

*status quo*, despite having a progressive constitution that advocates for the equal treatment of all, without distinction of any kind.<sup>4</sup>

Homosexuals in Kenya have been denied the most basic right of all, the right to love.<sup>5</sup> The right to love and to express this love not just to the people they are attracted to, but also to children, within a family setting. Majority of the rights homosexuals are fighting for are rights which heterosexuals take for granted. Granting these rights to homosexuals will not in any way result in the taking away of such rights from homosexuals.

## **1.2 Statement of the Problem**

The Kenyan Constitution promotes non-differential treatment<sup>6</sup> and equal treatment.<sup>7</sup> Laws that promote differential treatment and unequal treatment of homosexuals however persist.<sup>8</sup> By banning lesbians and gays from adopting children for reason of their sexual orientation and without giving any regard to their suitability as adoptive parents or the child's interests, section 158 (3) c of the Children Act promotes unequal treatment and legitimises the differential treatment of persons who identify as homosexuals. The same also excludes homosexuals from social participation. They are denied the joy of parenthood, a privilege available to heterosexuals. Additionally, the ban does not promote the best interests of the child *per se*. Instead, the ban prevents children in need of adoptive parents from growing up in loving homes.

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available at <https://www.amnestyusa.org/anti-homosexuality-bill-could-mean-a-death-sentence-for-lgbt-people-in-uganda/> accessed on 28/02/2019

<sup>4</sup> The Kenyan High Court's recent decision in the case of *Eric Gitari and 8 Others v Attorney General* wherein the High Court refused to repeal sections 162-165 of the Penal Code.

<sup>5</sup> Onyango Oloka, "*Love, Human Rights and identity Politics in East Africa: A Socio-Legal Explanation*" , 2015, African Human Rights Law Journal, 29

<sup>6</sup>Article 27 (4)

<sup>7</sup>Article 27 (1)

<sup>8</sup> Sect. 162 to 165 of the Penal Code Chapter 163, Laws of Kenya criminalizes homosexual acts and sect. 158 sub-section (3)c of the Children Act No. 8 of 2001 has banned homosexuals from adopting children under Kenyan law.



### **1.3 Justification of the Study**

This study herein is justified on the following basis;

It contributes to the pool of knowledge available on the question of the rights of the LGBTI Community. While there exist several literatures on the rights of homosexuals, very few tackle the question of adoption of children by homosexuals from a Kenyan perspective. This study is therefore justified because it fills an academic gap in matters concerning adoption of children by homosexuals under Kenyan law.

This study is also justified because it recommends legislative and policy reforms that will ensure realisation of article 27 of the Constitution on top of ensuring that children grow up in family-like environments. To that end, the findings of this study may be adopted by non-State and State actors alike, in advocating for the rights of persons who identify as homosexuals and children.

### **1.4 Statement of Objectives**

#### **1.4.1 General Objective**

1. To examine the ban on homosexuals from adopting children under Kenyan law.

#### **1.4.2 Specific Objectives**

1. To examine the basis for the ban on homosexuals from adopting children under Kenyan law.
2. To investigate the constitutionality of the ban on homosexuals from adopting children under Kenyan law.
3. To investigate how South Africa has dealt with the question of the rights of Homosexuals.
4. To make recommendations on what needs to be done to advance the best interest of the child without violating the rights of homosexuals.

## 1.5 Research Questions

1. What is the basis for the ban on homosexuals from adopting children under Kenyan law?
2. What is the constitutionality of section 158 (3c) of the Children Act No. 8 of 2001?
3. How has South Africa tackled the question of the rights of homosexuals?
4. What lessons can be borrowed from this Study to ensure the promotion of the best interest of the child principle and the protection of homosexuals from differential treatment?

## 1.6 Theoretical Framework

This study is founded upon the following theories;

### 1.6.1 Queer Theory

Though previously used in negative light,<sup>9</sup> the term queer has been reclaimed and now signifies a movement led by scholars and activists, focused on transforming the phrase into a positive and accepted portrayal of self, particularly to those individuals who fall outside “hetero” identities.<sup>10</sup>

The phrase “queer theory” was coined by Teresa de Lauretis, feminist of Italian origin and a film theorist in 1990, in her work titled “*Queer Theory: Lesbian and Gay Sexualities*”. Queer theory is considered a school of thought, a political perspective, a self-identifying quality and an accumulation of practice.<sup>11</sup> Queer theory generally concerns three concepts: the rejection of heterosexuality as a yardstick for sexual formations; the challenging of the belief that homosexual studies constitutes one single entity; and investigation into the multiple ways’

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<sup>9</sup> The phrase was previously used to silence shame and suppress sexual identities that fell outside the accepted and recognized “hetero” identity. It later evolved and was used to refer to that which is odd and strange and therefore not normal in terms of identities, values and acts.

<sup>10</sup> Pinar, W. “*Queer Theory in Education*” (Routledge, 2012)

<sup>11</sup> C.J. Nash. and K. Browne “*Queer Methods and Methodologies: An Introduction*”, 3. available at [www.gender.can.ac.uk/mphil/students/browne](http://www.gender.can.ac.uk/mphil/students/browne) accessed on 27/04/19

different factors such as race shapes sexual bias. Queer theory endeavours to disrupt the persistent use of groupings and labels that stereotype and marginalise individuals in sexually minority positions and instead promotes a fluid notion of gender and sexuality.<sup>12</sup> Queer theory rejects the binary male and female identities as the only identities and instead prefers a concept of identity that's more fluid.

Queer theory is central to this Study as it supports the claim made in this Study that heterosexual identity is not the only form of sexual identity and that those who do not fall into the "hetero" category are not abnormal or ill, mentally or otherwise. By affirming that there are categories of sexualities besides heterosexuality, this theory provides the foundation to this Study and it is upon this foundation that arguments such as homosexuals are just as capable of raising children are made.

## **1.6.2 Sociological School of Jurisprudence**

Sociology is "a branch of the science of human behaviour that seeks to discover the causes and effects that arise in social relations among persons and in the intercommunication and interaction among persons and groups."<sup>13</sup> This school of jurisprudence creates a link between sociology and the law. This school of thought has been advanced by scholars such as Rudolph von Jhering, Emile Durkheim, Eugene Ehrlich, Roscoe Pound and Max Weber, to mention a few. Proponents of a sociological approach to law reject the static nature of law as promoted by natural law thinkers and instead advocate for a more flexible approach to the law, based on the needs of society at any particular point in time.<sup>14</sup> They argue for a union between social reality and the law and reject law divorced from natural reality and conditions,

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<sup>12</sup>Teresa de Lauretis, T "*Queer theory: Lesbian and gay sexualities. Differences: A Journal of Feminist Cultural Studies*", [1991] 3(2), iii-xviii

<sup>13</sup> Sofroniou Andreas, *Concepts of Social Scientists and Great Thinkers*, (Lulu.com, 2013) at 344 available at <http://www.lulu.com/shop/andreas-sofroniou/concepts-of-social-scientists-and-great-thinkers/ebook/product-21178639.html> accessed on 14/04/2019

<sup>14</sup> Freeman Michael, "*Llyoid's Introduction to Jurisprudence*", 9<sup>th</sup> Edition, (Sweet and Maxwell, 2014)

as inadequate and incomplete.<sup>15</sup> To sociologists such as Jhering, the function of the law is to serve the needs of society.<sup>16</sup> A sociological approach to the law encourages the influence of other disciplines such as sciences and sociology in the enactment and application of the law. Sociologists agree on the changing nature of law and posit that the law has to conform to the ever fluctuating needs of society.<sup>17</sup> Hume for instance considered law to be a “developing social institution which owed its origin not to man’s nature but to social convention.”<sup>18</sup> The sociological school of thought examines the effects of law within a society and consider its influence on legal and social institutions within a particular society.

The sociological school of thought is central to this study because it embraces the idea of looking outside the law and into other disciplines for guidance when formulating and applying the law. According to this school of thought, the law ought to be informed by various factors, including other disciplines. The theory also advocates for the amendment of laws to conform to the needs of the society at any particular point in time.

## **1.7 Research Methodology**

This project will utilise desk study as the mode of research.

The study will involve an in-depth analysis of legislation, reports, journal articles, case law and constitutions of various countries among many other sources. The study will take a comparative approach, comparing the state of Kenya and South Africa, a country the researcher considers best practice in terms of laws that safeguard and promote the rights of homosexuals.

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<sup>15</sup> Paul Omony J. “*Key Issues in Jurisprudence: An In-depth Discourse on Jurisprudence Problems*” (Law Africa, 2006)

<sup>16</sup> W. Seagle, Rudolf Von Jhering: “*Or Law as a Means to an End*”, The University of Chicago Law Review, 74 available at <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2396&context=uclev> accessed on 14/04/2019

<sup>17</sup> Ibid at 30

<sup>18</sup> “*Treatise on Human Nature*” (1740) as cited in FREEMAN, supra note 14

The research will cut across various disciplines including politics, religion, ethics, biology and psychology among other disciplines in an endeavour to answer the research questions raised.

## **1.8 Literature Review**

While a lot of literature exists on the topic of the rights of homosexuals, very little has been written concerning the ban on homosexuals from adopting children from an African or Kenyan perspective. Under this segment, I endeavour to provide an overview of selected literature on the legal status of homosexuals.

In his thesis, Seth Wekesa considers the question of decriminalization of homosexuality in Africa from a constitutional view.<sup>19</sup> He argues in length generally against the differential treatment of homosexuals and specifically against the decriminalization of homosexual acts in Kenya and Uganda advising that judicial activism will be crucial in this regard and noting also that judicial activism will depend largely on the social and political temperatures of these countries. He looks at the status of LGBT group in South Africa and the history behind the insertion of the phrase “sexual orientation” in the 1993 interim and the 1996 final constitutions of South Africa and the subsequent effect the inclusion has had on the decriminalization of sodomy. He however does not look into the ban on homosexuals from adopting children.

Nancy Baraza equally advocates for the rights and the liberties of sexual minorities in Kenya in her thesis.<sup>20</sup> She contends that the heteronormative culture present in Kenya impacts negatively on the rights and liberties of sexual minorities and that despite the progressive

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<sup>19</sup> Seth Muchuma Wekesa, “*A Constitutional Approach to the Decriminalization of Homosexuality in Africa: A Comparison of Kenya, South Africa and Uganda*” submitted to the University of Pretoria, 2016 available at [https://repository.up.ac.za/bitstream/handle/2263/56992/Wekesa\\_Constitutional\\_2016.pdf?sequence=1](https://repository.up.ac.za/bitstream/handle/2263/56992/Wekesa_Constitutional_2016.pdf?sequence=1) accessed on 2/3/2018

<sup>20</sup> Nancy Baraza, “*The Impact of Heteronormativity on the Human Rights of Sexual Minorities: Towards Protection Through the Constitution of Kenya*”, 2010 submitted to the University of Nairobi, 2016 available at the Parklands School of Law Library, University of Nairobi

outlook of the Constitution, the legislature and the judiciary are yet to protect sexual minorities by challenging the heteronormative culture. Although she questions the banning of homosexuals from adopting children under Kenyan law, she does not delve into the same.

Osogo Ambani focuses on the ACHPR and considers whether the charter may be construed to safeguard the rights and liberties of sexual minorities in Africa. Like others before him, he acknowledges that the ACHPR does not make reference to LGBTI rights although it contains provisions on non-differential treatment, equality before the law and equal protection before the law. The author writes of a feature unique to the African Charter, a limitation provision that confines the enjoyment of liberties and rights to those of other human beings, morality, collective security, and to common good. He fears that arguments in favour of non-differential treatment and equality may not be strong enough to endure counter-arguments grounded on morality and common interests because same-sex intercourse and orientation has been argued to be contrary to African culture, Christian and Islamic teachings. Another drawback he considers in the fight for equality and non-differential treatment of LGBTQI in Africa is the Charter's heavy emphasis on protection of the family, family values and society.<sup>21</sup> This article is relevant to my study because it provides a realistic outlook of the position most African countries are in.

In *Reflections on Sexuality and Equality in Africa*, Claude Ndemeye rightly puts it that no other human rights issue has given rise to such controversy as that concerning sexual orientation.<sup>22</sup> He attributes the lack of protection to liberty of sexual orientation and differential treatment of sexual minorities to the lack of an explicit framework geared towards the safeguarding of sexual minorities and more so the absence of the phrase "sexual

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<sup>21</sup> John Ambani Osogo "Sexual Minority Right Conundrum in Africa: Contextualizing the Debate following the Coalition of African Lesbians' Application for Observer Status Before the African Commission" [2016] Vol.2 Strathmore Law Journal, 181

<sup>22</sup> Ndemeye Claude, "The Right to Sexual Orientation in the African Context: the Obligation of States Party Under the African Charter on Human and Peoples' Rights" as appears in "Reflections on Sexuality and Equality in Africa" [2015] Vol. 1 The African Men for Sexual Health and Rights, Johannesburg South Africa

orientation” in international and regional treaties. The authors of the report have a strong inclination towards sodomy laws, their main focus of study and while they mention other forms of differential treatments and inequities suffered by sexual minorities, they do not delve into the issue of adoption of children.

Homosexuality is often viewed in Kenya and Africa at large as un-African and contrary to African culture and religion. Advocates of this opinion argue that homosexuality was actually introduced to Africa by Europeans during colonisation and or by Arabic traders. Stephen O. Murray disproves this by giving numerous accounts of regions in Africa where homosexuality took place prior to colonisation.<sup>23</sup> He further states that in some communities, impotent men were culturally allowed to engage in this kind of lifestyle.<sup>24</sup> On this basis, and with the additional arguments that homosexuality is “evil” and that the homophobic mindset was largely influenced by Europeans when they introduced their anti-sodomy laws to Africa during colonisation, Sylvie Namwase, Adrian Jjuuko and Ivy Nyarango agree that depicting homosexuality as un-African is inaccurate and contrary to facts.<sup>25</sup>

Bernard Matolino acknowledges the rejection and homophobic attitude of many Africans and seeks to determine the basis for this. He rejects the argument of religion as unpersuasive on the basis that Christianity and Islam are not authentic African religions. He attributes the rejection of homosexuality to communitarianism. Communitarianism, he states advances the opinion that community forms the individual and makes the individual what he is. According to him, the individual owes his existence to the community and has an obligation to show loyalty to the community, which incorporates both the living and the dead.

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<sup>23</sup> Will Roscoe and Stephen Murray (ed), *“Boy Wives and Female Husbands: Studies in African Homosexuals”* [1998] Palgrave

<sup>24</sup> *ibid*

<sup>25</sup> Adrian Jjuuko Sylvie Namwase *“Protecting the Human Rights of Sexual Minorities in Contemporary Africa”*, [2017] Pretoria University Law Press

This loyalty is displayed in understanding that the will of the individual will constantly be subordinate to the needs of the community. This forces the individual to maintain community standards and values and reject anything that threatens the already established community. He argues that homosexuality is not accepted because it threatens the order of community, in the sense that it does not result in procreation and thus threatens the life of the community.<sup>26</sup> While the study is highly relevant to my study, in the sense that it considers the cultural relativists point of view, the effects of this view in terms of legal effects are not considered. Nicholas Kahn Fogel looks into the liberalist approach adopted by western States in their attempt to get African States to accept and recognise homosexuality. The author is concerned that despite the fact that this approach has been successful in majority of the western States, the approach may not yield much fruit in Africa. He attributes African resistance partly to Africa's communitarian philosophy. He opines that although many African States have adopted liberal constitutions, African culture tends to emphasise group welfare and maintenance over individual rights. He adds that western imposition of universality over culture has also contributed to the rejection of homosexuals.<sup>27</sup> This article is relevant to my study because it provides deeper insight into why homosexuality is currently not widely accepted in Africa.

Scott Long, Widley Brown, Gail Cooper and the Human Rights Watch approach the query of whether homosexuality is un-African slightly differently.<sup>28</sup> They start by defining sexual orientation as the way a human-being's sexual and emotional desires are directed and later on say that seeing as homosexuality is a human and not geographical condition, it cannot be

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<sup>26</sup> Bernard Matolino *"Being Gay and African: A View from an African Philosopher"* [2007] Vol.18 University of South Africa Press, 59

<sup>27</sup> Nicholas Khan-Fogel *"Western Universalism and African Homosexuals"* [2013] Oregon Review of International Law, 315

<sup>28</sup> Long Scott et al *"More Than a Name: State Sponsored Homophobia and its consequences in Southern Africa"*, [2003] Human Rights Watch Organization



considered un- African.<sup>29</sup> What the above authors fail to acknowledge is the question of cultural relativism, which is clearly at play in the African continent whenever it comes to accepting sexual minorities and granting them, what the world supposes is their universal right.

Donnelly distinguishes between strong cultural relativism from weak cultural relativism.<sup>30</sup> He opines that strong cultural relativism considers culture as the principal validity of moral rights/rules.<sup>31</sup> Strong cultural relativism he argues does not acknowledge the universality of rights. Such rights are always measured against culture and it is solely on this basis that they are either acknowledged or disregarded.<sup>32</sup> Weak cultural relativism on the other hand he argues considers culture to be a key source of the legitimacy of moral rights/rules though it does not regard culture as the yardstick for moral rights.<sup>33</sup> There is a slight relaxation when it comes to matters universally accepted.<sup>34</sup>

Philip Alston and Ryan Goodman warn that cultural relativism opposes the basic premise of the human rights regime.<sup>35</sup> The council also opine in equal measure that universalisation of norms is likely to lead to the destruction of diverse cultures.

There is therefore a need to bridge cultural relativism as argued by those unwilling to grant similar rights to sexual minorities and the rights of sexual minorities not just in Kenya but in Africa as a whole. The danger of cultural relativism in matters of human rights, Gideon Uchechukwu argues is that societies tend to take what culture says as the truth even when the

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<sup>29</sup> *ibid*

<sup>30</sup> J. Donnelly, “*Cultural Relativism and Universal Human Rights*” [1984] Vol. 6 *Human Rights Quarterly*, 400

<sup>31</sup> *ibid*

<sup>32</sup> *ibid*

<sup>33</sup> *ibid*

<sup>34</sup> *ibid*

<sup>35</sup> Philip Alston and Goodman R., “*International Human Rights*” (Oxford University Press, 2013)

result does not benefit the community.<sup>36</sup> He envisions this as building up and resulting into world chaos and suggests the need to move towards universal acceptance of human rights without reservations.

In an article drafted prior to the legal recognition and acceptance in all US states, Jeff LeBlanc correctly observes that homosexuals are fighting for rights and privileges that the greater population have taken for granted- the right to provide homes for children in need. He notes that before anything, adoption safeguards the child's best interest and that it is unfortunate that some jurisdictions have a prejudiced and old-fashioned view of homosexual parents as detrimental or damaging to the needs of the child. The author notes that under the best interest of the child principle, courts ought to base the outcome of an adoption primarily on the child's best interest. He concludes that children in need face numerous hurdles and as such, they deserve to be placed in loving homes. He posits that their homes should not be based purely on the sexual orientation of the prospective adoptive parent but that the parent's sexual orientation ought to be one of the many independent factors that should to be considered when the suitability of a home for a child is questioned.<sup>37</sup> Although I agree with majority of the Author's findings, the study is not written in an African setting.

Differential treatment against homosexuals is robbing children in need of loving homes the opportunity of growing up in a home where their needs are catered for. Langemak agrees with this conclusion.<sup>38</sup> He opines that that by categorically banning any and all homosexuals from ever being parents and thereby providing homes for wanting children, the legislature is systematically reducing the chances of parentless children of ever being adopted. He disregards the claim that homosexual parents will somehow make their children

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<sup>36</sup> Uchechukwu Gideon, *"The Universality of Human Rights and Homosexuality: A Focus on Gender Issues in Africa"* [2016] Canadian Research and Development Centre of Sciences and Culture, 43

<sup>37</sup> LeBlanc J. *"My Two Moms: An Analysis of the Status of Homosexual Adoption and the Challenges to its Acceptance"* [2006] *Journal of Juvenile Law*, 96

<sup>38</sup> Langemak H.J., *"The Best Interests of the Child, Is the Categorical Ban on Homosexuals an Appropriate Means to this End?"* [2000], *Marquette Law*

homosexuals. He relies on research that show the frequency of same sex orientation among children of homosexuals happens as randomly and in the same proportion as among children in the overall populace and as children grow up, they adopt sexual orientations independent from their parents. While his research is quite detailed on the subject, the same is based largely on western findings and does not reflect an African society.

Charlotte J. Patterson attempted to debunk the myth surrounding children raised by homosexual parents. The Author relied on research conducted to disprove the myth that a child raised by homosexuals will not grow up to as healthy as a child raised by heterosexual parents. The Author provides the results of quite a number of studies, majority of which she was involved in, that show that children born by or adopted by lesbians earlier in life exhibited similar behaviour to those born or adopted by heterosexual parents. The author further adds that such children prefer same-gender playmates and activities, much like those of other children around their ages who were raised by heterosexual parents.<sup>39</sup> The results of this study agree with most of my findings. The study is however scientific and lacks a legal angle.

Eileen P. Huff agrees that refusal to grant custody to a homosexual does not in any way advance the child's best interest.<sup>40</sup> She contends that on several occasions, judges purport to be acting in the child's best interest yet they impose their moral values on the families involved. She further states that courts should not differentiate homosexual parents from heterosexual purely as a result of their sexual orientation because homosexual parents relate with their children not as homosexuals but as parents. Her works are however based solely on American jurisprudence and do not reflect the position of other regions.

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<sup>39</sup> Charlotte Patterson "*Children of Lesbian and Gay Parents*" Vol. 15 [2005] Association of Psychological Science

<sup>40</sup> E. P. Huff, "*The Children of Homosexual Parents: The Voices Courts are Yet to Hear*" Vol.9 [2001] Journal of Gender, Social Policy and Law

## 1.9 Scope and Limitation

The term homosexual as used in this study refers to men and women who identify as gays or lesbian. While it is acknowledged that the term homosexual is an out-dated derogatory term, the same is used throughout this study only to the extent that the Children Act section 158 3(c) refers to gays and lesbians as homosexuals.

The study will focus on adoption of children by homosexuals in Kenya. Following the moratorium on international adoptions currently in place,<sup>41</sup> this Study will be limited to adoption of children by Kenyan nationals. The Study will rely on recorded data and studies conducted in other jurisdictions to debunk the various myths surrounding adoption of children by homosexuals. The Study will look into how other countries have dealt with the question of adoption of children by homosexuals. Owing to the undeniable connection between adoption of children by homosexuals and the question of differential treatment of the unequal treatment of homosexuals simply because of their sexual orientation, this Study will touch on other aspects of differential treatment of homosexuals.

## 1.10 Hypothesis

This study is commenced on the following premise;

Section 158 3(c) of the Children Act is unconstitutional because it promotes differential treatment on the basis of one's sexual orientation contrary to article 27 (4) of the Constitution.<sup>42</sup>

Adoption of children by homosexuals does not violate the child's best interest *per se*.

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<sup>41</sup> The moratorium was effected on 26 November 2014. According to the Standard Media Group, the move was informed by the UNODC's Global Report on Trafficking Persons which listed Kenya as a source, transit and destination in human trafficking see Thiong'o Mathenge and Rawlings Otieno, "Kenyan Government Bans Adoption of Children by Foreigners", Standard Digital, available at "<https://www.standardmedia.co.ke/article/2000142876/kenyan-government-bans-adoption-of-children-by-foreigners>" accessed on 21/3/2019

<sup>42</sup> See *Toonen v Australia*

## **1.11 Chapter Breakdown**

### **1.11.1 Chapter One: Introduction**

Chapter one is an introduction to the Study. It is divided into: background to the Study, statement of the problem, justification of the Study, statement of objectives, research questions, theoretical framework, research methodology, literature review, scope and limitation, scope and limitation, hypothesis and chapter breakdown.

### **1.11.2 Chapter Two: The Basis for the Ban on Homosexuals from Adopting Children**

Chapter two provides an investigation into the reasons why homosexuals are banned from adopting children under Kenyan law. The chapter also attempts to debunk the myths surrounding homosexuals and concludes that such myths have no basis, scientific or otherwise.

### **1.11.3 Chapter Three: The Constitutionality of the Ban on Homosexuals from Adopting Children**

Following the findings of chapter two, Chapter three considers whether the ban on homosexuals from adopting children is constitutional. It provides a comparison of the provisions of section 158 3(c) of the Children Act and the provisions of the Constitution and probes whether section 158 3 (c) is aligned the spirit and letter of the Constitution.

### **1.11.4 Chapter Four: Homosexual Rights under South African Law**

Chapter four provides an in-depth investigation into homosexual rights under South African law. The Chapter considers the events that resulted in the insertion of the phrase “sexual orientation” in South Africa’s Constitution and the effects the same has had on the liberties and rights of homosexuals in South Africa, including their legal ability to adopt children.

### **1.11.5 Chapter Five: Conclusion and Recommendations**

The Study concludes by determining lessons learnt from the research and makes recommendations on how to protect and promote the best interests of children in adoption cases without promoting the differential treatment of homosexuals.

# CHAPTER TWO

## THE BASIS FOR THE BAN ON HOMOSEXUALS FROM ADOPTING CHILDREN UNDER KENYAN LAW

### 2.1 Introduction

Despite the rhetoric pronouncement of the Constitution that every human being is entitled to equivalent protection and benefit of the law<sup>43</sup> and further that none should suffer differential treatment on any basis including sex,<sup>44</sup> homosexuals in Kenya continue to be discriminated against and to be stigmatised nonetheless.<sup>45</sup> This differential treatment has found its way into the family setting in the form of outright exclusion from adopting children under the law.<sup>46</sup> This form of social exclusion is based purely on their sexual orientation.

This chapter investigates the factors that have informed the continued differential treatment and exclusion of homosexuals in Kenya and in Africa as a whole. These factors are known to inform the law and largely contribute to the overall differential treatment of homosexuals. Generally, these factors fall can be categorised as: religious; cultural; legal; political; the politics of gender; and social. These factors have promoted heteronormativity in Kenya and

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<sup>43</sup> Article 27 (1) of the Constitution of Kenya, 2010

<sup>44</sup>*Toonen v Australia* (“488/1992 U.N Doc CCPR/C/50/D/488/1992/1994”) The UN Human Rights Committee interpreted sex as a ground for non-differential treatment under article 2 of the ICCPR to include sexual orientation.

<sup>45</sup>The Penal Code criminalizes homosexual acts (Section 162-164). It has been argued that this legal disposition legitimizes violence, differential treatment and stigmatization of homosexuals *see Osogo Ambani* supra note 21. Currently in some Kenyan schools, students suspected of homosexuality are expelled *see “Five form four students from St. Georges’ Girls Secondary School were expelled over allegations of practicing lesbianism within the school (Daily Nation online, Thursday May 28<sup>th</sup> 2015 <http://www.nation.co.ke/counties/nairobi/lesbianism-claim-students-sue-st-georges-school/1954174-2732084-aojh89z/index.html> accessed on 7/3/2018”*. Cases of landlords evicting tenants because of their actual or perceived homosexual orientation are also on the rise the report by the KHRC “*The Outlawed Amongst Us*” provides an account of how such a tenant was evicted from his house on such basis supra note 2. The court battle between the *NGO board and Eric Gitari* over the refusal to register an NGO because the people whose rights the NGO sought to protect are gays and lesbians depicts the attitude of state bodies towards homosexuals *see Gitari Eric v Non-Governmental Organization Board & 4 Others [2015]eKLR*

<sup>46</sup> Children Act No. 8 of 2001 Sect. 158 3(c)

have resulted in the rejection and for the most part denial of the possibility of any other form of sexual orientation.

Though not discussed in detail in this chapter, the media also determines in how homosexuals are portrayed. The depiction of homosexuality as an illness, a perversion or a crime instead of a biological manifestation which one has no control over generally influences the relationship between homosexuals and the general public. Failure by the media to provide any visibility to homosexuals is equally dangerous. Such absence alienates homosexuals from social inclusion and provides breeding room for stereotyping.

## **2.2 Religious Factors**

### **2.2.1 The Influence of Religion in Formulation of Laws**

The role of religion in the formation and shaping of states, laws and ideologies is undisputed.<sup>47</sup> At different points in time, religion has been a central political and legal phenomenon worldwide,<sup>48</sup> in certain parts of the world more than others. Classical natural law theorists such as Cicero and have argued that God is the source of law.<sup>49</sup> Contemporary natural law theorists such as Lon Fuller have taken on a more relaxed view on the source of law and have argued that even in the absence of God, the law would still exist.<sup>50</sup>

What is however not disputed, is the influence that religion has had in shaping laws. Having determined that religion has had a hand in the formulation of discriminatory laws, especially laws that discriminated based on sexual orientation, the query that this section seeks to

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<sup>47</sup> Gad Barzilai, *Law and Religion* (Ashgate Publishing Limited 2007)

<sup>48</sup> *ibid*

<sup>49</sup> According to Cicero, we are all governed by one unchanging law, authored by God. To alter or try to alter his law is a sin and man is not allowed to repeal or abolish this law. The legislature cannot free anyone from adhering to this law and in its interpretation, judges are not needed because man only ought to look into himself to find interpretation. He added that whoever chooses to disobey this law will endure the worst punishments, even if such person evades what is ordinarily considered punishment.

<sup>50</sup> Lon Fuller rejected the Christian doctrines of natural law and contends “that the function of any legal system is to enact rules that govern behaviour and that are in line with the moral objectives of the society in question, which he calls the inner morality of the law internal to the system as they are a necessary intrinsic application of the morality behind it”.



answer is whether religion should have such a strong sway in the legislation of a diverse society where different people ascribe to different religions quite outside the mainstream religion and where others have ought rightly denied association with any form of religion.

Disapproval to homosexual lifestyles worldwide is mostly driven by cultures that have a dominant Christian and Muslim presence<sup>51</sup> although studies shows that even Buddhist countries like Myanmar actively discriminate against homosexuals and other groups of people who flout gender assigned roles.<sup>52</sup> Homosexuality is interpreted as sin in both Christianity<sup>53</sup> and Islam,<sup>54</sup> the two dominant religions in Kenya. Several arguments against granting homosexuals any rights often stem from religious beliefs. Religious leaders from both religions have been quoted condemning the practice and in some occasions, condemning the homosexuals.<sup>55</sup>

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<sup>51</sup> F. Kerrigan, “*Getting to Rights: The Rights of Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Africa*”, (The Danish Institute for Human Rights, 2013)

<sup>52</sup>ILGA “*State Sponsored Homophobia 2017: A world survey of sexual orientation laws: criminalisation, protection and recognition*” available at [https://ilga.org/downloads/2017/ILGA\\_State\\_Sponsored\\_Homophobia\\_2017\\_WEB.pdf](https://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf) accessed on 13/4/19

<sup>53</sup> Genesis 19:1-11 recounts the story of Lot and the Angels and the men of Sodom who insisted on having sex with the male Angels who came to visit Lot. Other accounts on the prohibition of homosexuality are found in the following texts: Leviticus 18:22 states, “*Do not have sexual relations with a man as one does with a woman, that is detestable*”, Leviticus 20:13 “*If a man lies with a man as one lies with a woman, both of them have done what is detestable. They must be put to death: their blood will be on their own heads*”. Romans 1:26- 27 states “*Because of this, God gave them over to shameful lusts. Even their women exchanged natural sexual relations for unnatural ones. In the same way, their men also abandoned natural relations with one another and were inflamed with lust for one another, men committed shameful acts with other men and received in themselves due penalty for their error,*” 1<sup>ST</sup> Corinthians 6:9 “*Or don’t you know that wrongdoers will not inherit the kingdom of God? Don’t be deceived: Neither will the sexually immoral, nor idolaters, nor men who have sex with men.*” 1<sup>ST</sup> Timothy 1: 8-10 “*We know that the law is good if one uses it properly. We also know that the law is not made for the righteous but for the rebels, the ungodly and sinful, the unholy and irreligious, for those who kill their mothers and fathers, for the murderers, for the sexually immoral, for those practicing homosexuality, for slave traders, for liars and perjurers- and whatever else is contrary to the sound doctrine*” (New International Version)

<sup>54</sup> Javid Rehman and Polymenopoulou “*Is Green a Part of the Rainbow? Sharia, Homosexuality and LGBT Rights in the Muslim World*” Vol. 37 Issue 1 [2003] Fordham International Law Journal Islamic condemnation of homosexuality is based on the story of Lut as told by Prophet Muhammad in the following Surahs of the Quran, 7:80, 11:77, 15:59, 21:71, 26:161, 27:55, 29:26, 37:133, and 54:33

<sup>55</sup> In the year 2010, religious leaders, both Christian and Muslim led a group of armed mob to the KEMRI centre in Mtwapa demanding its closure. They claimed that the institution was offering counselling services to homosexuals whom they referred to as “criminals” Galgola Bocha, “*Mob attacks gay ‘wedding’ party,*” *The Daily Nation*, February 12, 2010, available at: <http://humanrightshouse.org/noop/page.php?p=Articles/13391.html&d=1> accessed on 13/04/19

While anti-sodomy laws were formulated during the colonial period, the subsequent banning of homosexuals from adopting children was formulated during the post-independence period.

### **2.2.2 The Significance of Religious-directed Legislations in Kenya post 2010**

Following the promulgation of the Constitution, the question on the place of religion in directing the formulation of laws has emerged. The implication of Article 8 which provides that “*there shall be no State religion*” has remained un-weighed in a country where more than 80% of her population profess the Christian faith and approximately 10% profess Islam faith.<sup>56</sup> However, in countries where the role of religion in directing the State and legislations has been questioned, Courts have held that “*the government should not prefer one religion to another or to irreligion*”<sup>57</sup> This statement speaks to the objectivity that is required when formulating, implementing and interpreting laws.

### **2.2.3 Separation of Church and State**

The phrase “separation of Church and State” has its roots in the USA although the concept traces back to the seventeenth century, in the works of John Locke.<sup>58</sup> John Locke argues that while the State can control the behaviour of its citizens through the imposition of penalties, the State cannot control the inner thoughts and beliefs of its citizens.<sup>59</sup> He expresses his fears that in the event the State imposes religious beliefs on its citizens and the citizens follow blindly without question or exercising reason, the citizens will be shut out from heaven.<sup>60</sup>

The concept has been adopted by various countries across the world. In effect, the concept is two-fold; on one hand, it guarantees citizens’ religious liberties and on the other hand, it

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<sup>56</sup> Those who profess Hinduism are about 1% and close to 2% do not ascribe to any religion see “[http://globalreligiousfutures.org/countries/kenya#/?affiliations\\_religion\\_id=0&affiliations\\_year=2020&region\\_name=All%20Countries&restrictions\\_year=2016](http://globalreligiousfutures.org/countries/kenya#/?affiliations_religion_id=0&affiliations_year=2020&region_name=All%20Countries&restrictions_year=2016)” accessed on 25/04/2019

<sup>57</sup> *Board of Education of Kiryas Joel v Grumet* [1994]

<sup>58</sup> J. Locke, “*A Letter Concerning Toleration*” available at “<https://oll.libertyfund.org/titles/locke-a-letter-concerning-toleration-and-other-writings>” accessed on 25/04/2019

<sup>59</sup> *ibid*

<sup>60</sup> *ibid*

safeguards against laws founded on religious values and instead promotes laws based on universality and liberty. USA's Supreme Court articulated the meaning of separation of Church and State in such clear terms in *Everson v Board of Education* when it stated *inter alia*:

*“The establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws, which aid one religion, aid all religions, or prefer one religion to another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance”.*<sup>61</sup>

The adoption of article 8 in the Constitution of Kenya 2010 is arguably an introduction of the notion of separation of Church and State. In its implementation and application, laws that propel beliefs of certain religious groups should thus not be formulated.

## 2.3 Legal Factors

Kenya is a former British colony.<sup>62</sup> Her penal laws have their roots in colonial British. When studying the history of Kenyan laws, it is thus vital to study the history of British laws as well. Criminalization of sodomy under British law traces back to 1533 during the reign of King Henry VIII.<sup>63</sup> During this period, the “Buggery Statute” was enacted.<sup>64</sup> This and the statutes that came after it prescribed death as the punishment for sodomy.<sup>65</sup> In the year 1861, the punishment for the offence of sodomy was amended to life imprisonment.<sup>66</sup> The advent of colonisation saw different versions of these laws adopted in the various British colonies

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<sup>61</sup> 330 US 15, 16

<sup>62</sup> Kenya was first declared a British protectorate in the year 1895 and then a British colony in the year 1920. She remained a British colony until she gained independence in the year 1963.

<sup>63</sup> Human Rights Watch, “*This Alien Legacy: The Origins of Sodomy Laws in British Colonialism*”, December 17, 2008 available at “<https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism>” accessed on 25/04/19

<sup>64</sup> *ibid*

<sup>65</sup> *ibid*

<sup>66</sup> *ibid*

including those in Africa.<sup>67</sup> The Kenyan Penal Code was adopted in the year 1930, during the colonial era. Although several provisions of the Penal Code have since been amended, the provisions limiting the rights of homosexuals continue in place. While it may be argued that the ban on homosexuals from adopting children under Kenyan law is hinged upon sections 162-165 of the Penal Code,<sup>68</sup> the quoted sections and provisions of the Kenyan Penal Code reveal that a homosexual identity or orientation is in fact not criminalized. Instead what has been criminalised is sexual conduct “against the order of nature.”<sup>69</sup>

Generally, records show that resistance towards homosexuality comes more from Anglophone countries than Francophone countries though some African Francophone countries have included anti-sodomy laws in their penal codes post-colonial.<sup>70</sup> African countries that were not directly influenced by colonisation such as Ethiopia and Liberia have nonetheless incorporated anti-sodomy laws into their legislations.<sup>71</sup> Upon gaining independence in the year 2008, South Sudan also criminalised same-sex conduct.<sup>72</sup>

## 2.4 Cultural Factors

The most common phrase when speaking about homosexuality in the African continent has always been “homosexuality is un-African.” These claims were initially promoted by non-

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<sup>67</sup> *ibid*

<sup>68</sup>“Section 162. Any person who - (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years: Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if - (i) the offence was committed without the consent of the person who was carnally known; or (ii) the offence was committed with that person’s consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act. Section 163. Any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for seven years. Section 165. Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.”

<sup>69</sup> *Gitari Eric v Non-Governmental Organisations Coordinations Board and 4 Others* [2015]eKLR

<sup>70</sup> Chad and Burundi are examples of countries that adopted anti-sodomy laws post-colonial.

<sup>71</sup> Liberia adopted the laws in 1978 and Ethiopia in 2004

<sup>72</sup> Section 208 provides, “Whoever, has carnal intercourse against the order of nature with any person and whoever allows any person to have such intercourse with him or her commits an offence, and upon conviction, shall be sentenced to imprisonment for a term not exceeding ten years and may also be liable to a fine”.

Africans who perceived Africans as primitive and incapable of pursuing sexual relations for reasons other than reproduction.<sup>73</sup> Africans who now perpetuate these claims argue that homosexuality was introduced to Africa by either the Europeans or by the Arabs.<sup>74</sup>

This narrative has been promoted by both political and religious leaders in Africa.<sup>75</sup> “Africans are unique people whose culture, morality and heritage totally abhor homosexual and lesbian practices and indeed any other form of unnatural sexual acts”<sup>76</sup> or so the narrative goes. Evidence however shows that existence of homosexuals in the African continent is “neither random nor incidental” but is a “consistent logical feature of African societies and belief systems”<sup>77</sup> thus claims that homosexuality is un-African in essence do not serve to protect African culture but rather to distort it.<sup>78</sup>

What colonialists introduced to Africa was not homosexuality but intolerance towards it.<sup>79</sup>

This was done through legal sanctions and undermining African culture and practices. These

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<sup>73</sup> L. Desiree, “*Representing African Sexualities* in S. Tamale (ed) *African Sexualities*”; A Reeder, (Oxford, Dakar, Cape Town and Nairobi: Pambazuka Press, 2011) 199-216 see also MURRAY et al supra note 23

<sup>74</sup> MURRAY et al supra note 23

<sup>75</sup> “*As a nation and government we will not accept foreign misdemeanour because we have never known same marriages of a man to man or woman to woman and the Bible does not allow. We will not sit back and watch man marrying man, or woman and woman. We will arrest them and deal with them accordingly*”. Zambian President Edgar Lungu, in the year 2013 when he was the Minister for Home Affairs, “*Our men got wind of the wedding and stormed the venue where they arrested 11 young women, including the bride and the groom ... We can't allow such despicable acts to find roots in our society.*” Abba Sufi, the director-general of Islamic law-enforcement agency in the northern region of Nigeria, the Hisbah, when making reference to a raid on a lesbian wedding. (2018), “*I would refuse to go to a homophobic heaven. No, I would say sorry, I mean I would much rather go to the other place.*” Mpho Tutu-van Furth, the daughter of South Africa’s Nobel laureate and anti-apartheid activist Archbishop Desmond Tutu was made to resign from her duties as a priest of the Anglican church when she married a woman in 2016. Available at “<https://www.thesouthafrican.com/homophobia-in-africa-quotes-from-the-continent/>” accessed on 25/04/2019

<sup>76</sup> E. Mittelstaedt, “*Safeguarding the Rights of Sexual Minorities: The Incremental and Legal Approaches to Enforcing Human Rights Obligations*” Vol. 9 [2008] Chicago Journal of International Law, 368

<sup>77</sup> MURRAY et al supra note 23

<sup>78</sup> Msibi Thabo, “*Lies we Have Been Told: On (Homo) Sexuality in Africa*”, Africa Today 58 (1): 55-77 available at “[https://www.researchgate.net/publication/236806687\\_The\\_Lies\\_We\\_Have\\_Been\\_Told\\_On\\_Homo\\_Sexuality\\_in\\_Africa](https://www.researchgate.net/publication/236806687_The_Lies_We_Have_Been_Told_On_Homo_Sexuality_in_Africa)” accessed on 25/04/2019

<sup>79</sup> Bisi Alimi, “*If you say being gay is not African, you don't know your history*”, 9<sup>th</sup> September 2015, the Guardian, available at “<https://www.theguardian.com/commentisfree/2015/sep/09/being-gay-african-history-homosexuality-christianity>” accessed on 25/04/19

sanctions evolved into homophobia and abhorrence towards non-heterosexuals as many Africans slowly forgot that same-sex was at one point part of their culture.

While studies show that same-sex relations were indeed practiced in traditional African societies, the same was different from the western perspective of homosexuality.<sup>80</sup> Western terms applied in the homosexual discourse are not *per se* equivalent to same-sex traditional African practices.<sup>81</sup>

#### **2.4.1 Differences between Western perspective and Traditional African perspective of same-sex relations**

Homosexual, as understood today is a word that was invented by Karoly Maria Benkert, a Swiss doctor in 1869.<sup>82</sup> The term homosexual was coined in a very culture specific context and thus may not fit when describing same-sex relations in other cultures such as the African culture. Among the unique features of African homosexuality include the question of age, defined gender roles and identities, and situational homosexuality.

##### **2.4.1.1 Age**

Age based same-sex relations are recorded among various African communities including Eritrean men and boys.<sup>83</sup> Allowing older men to have sexual relations with younger boys was well accepted and considered a source of additional income for the boys' fathers.<sup>84</sup>

Age difference was however not a common factor in all African societies. Among the Islamic Harari, Galla and Somal, same-sex activities occurred between adult men and between the

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<sup>80</sup> Karoline Borli Siversten, "*Homosexuality in Perspective: A Critical Discourse Analysis of the International Debate on Homosexuality on Uganda*", University of Oslo, Master's Thesis Religion and Society, Faculty of Theology, 2016

<sup>81</sup> *ibid*

<sup>82</sup> S. Nikki, "*A Critical Introduction to Queer Theory*", New York: New York University Press, 2003 see also Sullivan Michael K. "*Homophobia History and Homosexuality*" [2008] *Journal of Human Behaviour in the Social Environment*,

<sup>83</sup> MURRAY et al *supra* note 23

<sup>84</sup> *ibid*

youth without any clear demarcation as to age or even status.<sup>85</sup> Premarital same-sex between adolescents was also allowed in present-day Khartoum and in some communities, these relations continued well into adulthood, even after the men were married.<sup>86</sup>

#### **2.4.1.2 Gender Roles and Identities**

The African society had defined gender roles for men and for women. These gender-specific roles were to be performed exclusively by the assigned sex. Among the Maale of Ethiopia however, some men were allowed to perform traditionally female roles.<sup>87</sup> They were also allowed to dress like women and even have sex with men.<sup>88</sup> Among the Nuer of Sudan, such men were considered as women for all intents and purposes and sexual intercourse with them was not considered same-sex but sex with a woman.<sup>89</sup>

#### **2.4.1.3 Situational Homosexuality**

In some communities in Africa, for example among the Zande who occupied present day south-eastern Congo, south-western Sudan and Central African Republic, it was not considered inappropriate for men to have sexual intercourse with boys whenever women were absent or whenever it was considered a taboo to sleep with women.<sup>90</sup>

### **2.5 Political Factors**

A majority of African countries have criminalised same-sex conduct.<sup>91</sup> While the same is not always easy to prove in court and as such not many have been convicted of the offence,

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<sup>85</sup> ibid

<sup>86</sup> ibid

<sup>87</sup> ibid

<sup>88</sup> ibid

<sup>89</sup> ibid

<sup>90</sup> ibid

<sup>91</sup> Homosexual conduct is currently criminalized in a total of 35 African countries namely; Botswana, Cameroon, Gambia, Ghana, Sao Tome & Principe, Guinea, Kenya, Sierra Leone, , Sudan Liberia, Libya, Malawi, Mauritania, Somalia, South Sudan Mauritius, Namibia, Morocco, Algeria, Angola Nigeria, Seychelles, Senegal, Swaziland, Tanzania, Togo, Burundi, Tunisia, Uganda, Comoros, Eritrea, Ethiopia Zambia and Zimbabwe see “<https://www.amnesty.org.uk/lgbti-lgbt-gay-human-rights-law-africa-uganda-kenya-nigeria-cameroon>” accessed on 26/04/2019

homosexuals have continued to face differential treatment and ill-treatment. A majority of African political and religious leaders have been recorded speaking about these issues. While others have out rightly condemned homosexuals, some have failed to acknowledge their existence and importance.

The President of Kenya, Uhuru Kenyatta, while responding to a question asked during a press conference within the period when the former president of the USA Barrack Obama visited the country, said “*for Kenya today, the issue of gay rights is really a non-issue. We want to focus on other areas that are day-to-day living for our people.*”<sup>92</sup> Uhuru Kenyatta decided to stand on the side-lines on the issue of the rights of homosexuals when he declared that at that particular point in time, the country was not ready to deal with such issues. While one may argue that this is the safer route to take in a homophobic country, the result of such a stance is maintenance of the *status quo*, which *status quo* is currently anti-homosexual.

This gives no room for discussion on the rights of homosexuals and no hope for the subsequent repeal of laws that promote such differential treatment. The direct avoidance of the real issue has also been applied by Ugandan courts that have been faced with questions of the rights of homosexuals (although the executive and the legislature seem to take a direct approach to the issue). In the Ugandan case of *Mukasa and Another v Attorney General*,<sup>93</sup> Police raided the house of a well-known activist, Victor Mukasa and arrested her room-mate. They subjected her to an array of inhumane treatment, sexual harassment and intimidation. In finding that various human rights some of which included the right to protection from inhuman treatment, right to privacy and right to human dignity had been infringed upon, the Ugandan court was emphatic that the matter before it was purely a question of human rights

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<sup>92</sup> E. Dove, “Obama, Kenyatta clash on gay rights in Kenya,” Politico, July 25, 2015, available at “<http://www.politico.com/story/2015/07/obama-kenyatta-clash-on-gay-rights-in-kenya-120621>” accessed on 13/04/19

<sup>93</sup> 2008 (AHRLR) 248 (UgHC 2008)



and had nothing to do with the rights of homosexuals thus severing the rights of homosexuals from the broader human rights. The case challenging the Anti-Homosexual Act of Uganda is another example of an occasion where Ugandan courts had the opportunity to speak on the rights of homosexuals but chose not to.<sup>94</sup> In this case despite the fact that questions were raised concerning the various provisions of the Ugandan Anti-Homosexual Act, the Anti-Homosexual Act was declared unconstitutional purely on the basis of a technicality; there was no quorum in parliament when the law was being passed.<sup>95</sup>

Support of homosexual rights in several parts of Africa is considered political suicide. A majority of political leaders or those seeking elective positions have as a result spoken negatively about homosexuals in order to garner political support. Some have advanced to the masses that their opponents are not worthy of election because they support the rights of homosexuals. Moderate political leaders put in such situations may thus feel the need to disassociate themselves with support for homosexual rights out of fear of not being elected. The danger associated with this school of thought is that it not only extinguishes hope of enactment of laws that will promote the rights of homosexuals, it is also an indirect way of inciting the public against homosexuals. Former President of Zimbabwe, Robert Mugabe and the incumbent President of Uganda, Yoweri Museveni have perfected the art of political mobilisation of homophobia. The government of Namibia under the leadership of Sam Nujoma was also intolerant towards homosexuals. In the year 2000, the then Minister of Home Affairs for Namibia Jerry Akandjo while speaking to a group of Police Officers, urged them to “*eliminate...[gays and lesbians] from the face of Namibia....*”<sup>96</sup> Such strong negative and inciting statements from country leaders endanger the lives of homosexuals in these countries.

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<sup>94</sup> *Onyango Oloka and 9 Others v Attorney General*, Constitutional Petition No. 08 of 2014

<sup>95</sup> *ibid*

<sup>96</sup> See “[http://www.afrol.com/Categories/Gay/backgr\\_legalstatus.htm](http://www.afrol.com/Categories/Gay/backgr_legalstatus.htm)” accessed on 07/04/19

It is not rare to see African political leaders dangle the coin of religion in front of the masses in order to garner political support. Politics and religion are intertwined in Africa. In Kenya for example, seeing politicians in church addressing a congregation on the politics of the day is not a rare occurrence. Religious leaders do not condemn this practice as they too occasionally engage in the politics of the country. Thus “political and religious leaders use homophobia and hate-speech to control and redirect public opinion.”<sup>97</sup>

## 2.6 Gender Dynamics

In a highly patriarchal region like Africa, it is no wonder that there is great resistance towards anything that threatens to change the *status quo*. Homophobia is largely driven by gendered power relations. Homosexuality is threat to heteronormativity.<sup>98</sup> The domination of women’s bodies by men is threatened when women have sexual intercourse with one another and societal structures and beliefs are eroded when men have sexual intercourse with each other.<sup>99</sup> Pursuant to a report by the UN Special Rapporteur on violence against women, lesbian women have on various occasions been subjects of violence and on some occasions, murder either at the hands of their families or in the name of honour killings as a result of their defiance of gender roles.<sup>100</sup> Generally, majority of the threats of violence and actual violence suffered by the homosexual community emanates from men in society, ranging from the

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<sup>97</sup> Bret Kennedy, “*Homosexual sin the Periphery: Gay and Lesbian Rights in Developing Africa*” [2006] University of Nebraska, 59

<sup>98</sup> Danai S. Mupotsa, Sylvia Tamale (ed), “*African Sexualities: A Reader*”, [2001] International Feminist Journal of Politics, 438

<sup>99</sup> Oloka Onyango, “*Debating Love, Human Rights and Identity Politics in East Africa: The Case of Uganda and Kenya*” Vol. 15 No. 1 of 2015, African Human Rights Law Journal

<sup>100</sup> UNHRC, “Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk – Addendum: Communications to and from governments (A/HRC/4/34/Add.1) 19 March 2007, para. 633, <https://documents-dds-ny.un.org/>” accessed on 13/04/19

UNHRC, “Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with CHR resolution 2001/49: Cultural practices in the family that are violent towards women, paras. 27–28, (E/CN.4/2002/83, 31 January 2002)” available at “<http://www.refworld.org/docid/3d6ce3cc0.html>” accessed on 13/04/19

victims brothers, fathers, male family members and other men in societies.<sup>101</sup> Any challenge to traditional norms of gender and sexuality, regardless of whether it originates from feminists, homosexuals, bisexuals, transgender, intersex persons or sex workers is always met with a struggle.<sup>102</sup> The argument that the raising of a children by a homosexual parents could interfere with the children's perception of gender identities and roles is highly patriarchal. Such an argument idolises defined gender roles for girls and boys, the very essence of the feminist fight.

## 2.7 Social Factors

In an article published prior to the legal recognition and acceptance of homosexuals by all states in the USA,<sup>103</sup> Eileen P. Huff suggested reasons why courts do not grant custody to homosexuals.<sup>104</sup> She listed these *inter alia* as;

- The child will be teased or ostracised his/ her peers
- The child will grow up to become a homosexual
- The homosexual parent is likely to molest the child

While she is quick to note that these grounds are not factual, the grounds paint a clear picture of the reservations many have towards homosexuals when it comes to raising children. The general perception of homosexuality as immoral and unnatural pre-empts any considerations based on a potential adoptive parent's ability to cater to the needs of the child. The remaining part of this chapter looks into these reservations/ myths and debunks them on the basis of recorded research. Attitudes towards homosexuals have improved greatly in majority of

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<sup>101</sup> International Alert, "When Merely Existing is a Risk: Sexual and Gender Minorities in Conflict, Displacement and Peacebuilding", February, 2017 available at "<https://www.international-alert.org/publications/when-merely-existing-is-a-risk>" accessed on 13/04/2019

<sup>102</sup> S. Budhiraja, et al "Spelling it out from alphabet soup to sexual rights and gender justice" in Amy Lind (ed) "Development, Sexual Rights and Gender Governance" ( New York and London: Routledge, 2010) 132

<sup>103</sup> On 26<sup>th</sup> June 2015, the United States Supreme Court in the case of *United States of America v Windsor* (570, U.S. 744, 2013) declared unconstitutional the law restricting marriages to male and female and thus permitted and recognized same-sex marriages in all 50 states.

<sup>104</sup> Eileen Huff, "The Children of Homosexual Parents: The Voices Courts are Yet to Hear", Vol.9 [2001] Journal of Gender, Social Policy and Law

western countries. Since research on these various issues exist in western countries more than in any other part of the world, the section that follows relies on research conducted in various western countries between 1980-2016.

### **2.7.1 The child will grow up to be a homosexual**

Generally, studies that seek to either confirm or debunk this myth answer three questions: does the parent's sexual orientation interfere with the child's perception of gender roles? does the parent's sexual orientation interfere with the gender identity of a child? and does the parent's sexual orientation influence the sexual orientation of a child?

In terms of gender roles, what is looked at is whether the child will grow up to follow to the traditionally assigned gender roles associated with their sex as either male or female. The various studies conducted on this issue show no substantial variances between children reared by homosexual parents and those reared by heterosexual parents when it comes to gender roles.<sup>105</sup> These studies show for example that depending on their sex, children prefer to play with toys that are traditionally associated with their sex.<sup>106</sup>

In seeking to answer the question of gender identity, researchers have found out that for the most part, there is no gender identity mix-up among children who have been raised by

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<sup>105</sup> Rutter M. et al "*The Children in lesbian and single-parent households: Psychosexual and psychiatric appraisal*" [1983] *Journal of Child Psychology and Psychiatry*, 551, Gottman J. "*The Children of gay and lesbian parents*" [1989] *Marriage & Family Review* 177, R. Green, "*The Sexual identity of 37 children raised by homosexual or transsexual Parents*" [1978] *American Journal of Psychiatry* 692-697, Green, R., et al "*Lesbian mothers and their children: A comparison with solo parent heterosexual mothers and their children*" [1986] *Archives of Sexual Behavior* 167-184, Hotvedt, M. and Mandel, J. "*Children of Lesbian Mothers*" [1982] In W. Paul, J. et al (Eds.), "*Homosexuality: Social, psychological, and Biological issues*" Beverly Hills: Sage Publications 275-285, Kirkpatrick, M., "*Lesbian mothers and their children: A comparative survey*" [1981] *American Journal of Orthopsychiatry* 545, Schwartz, J., "*An exploration of personality traits in daughters of lesbian mothers*" 1986 (unpublished PhD thesis, California School of Professional Psychology, San Diego), Cook, A et al., "*Heterosexual and homosexual mothers' self-described sex-role behavior and ideal sex-role behavior in children*" [1982] *Sex Roles*, 967 Hoeffler, B. *Children's acquisition of sex-role behavior in lesbian-mother families* [1981] *American Journal of Orthopsychiatry* 536-544 as they all appear in Fitzgerald Bridget, "*Children of Lesbian and Gay Parents: A Review of the Literature*", Vol. 29(1) [1999] *Marriage and Family Review*

<sup>106</sup> Fitzgerald Bridget, "*Children of Lesbian and Gay Parents: A Review of the Literature*", Vol. 29(1) [1999] *Marriage and Family Review*

homosexual parents.<sup>107</sup> Research reveals that such children for example preferred to play games traditionally associated with their sex and that in terms of play-mates they preferred to play with children of their own sex thus resulting in the conclusion that a parent's sexual orientation does not have significant detrimental effects on the child's gender identity.

The third dimension of the study investigates the nexus between the parent's and the child's sexual orientation. One the greatest fears concerning a child raised by a homosexual parent is that the child will become a homosexual.<sup>108</sup> Research conducted reveals that parents who are as homosexual are just as likely to produce heterosexual children as parents who identify as heterosexual<sup>109</sup> concluding that sexual orientation is not taught by a parent or a care-giver.<sup>110</sup>

However, what these studies revealed was that children who are reared by homosexual parents are generally more accepting towards homosexuals when compared to children raised by heterosexual parents.<sup>111</sup>

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<sup>107</sup> Golombok, S, et al "*Children in lesbian and single-parent households: Psychosexual and psychiatric appraisal*" [1983] *Journal of Child Psychology and Psychiatry* 551 Green, R., "*Sexual identity of 37 children raised by homosexual or transsexual Parents*" [1978] *American Journal of Psychiatry* 692, Hotvedt, M. et al, "*Children of Lesbian Mothers*" in W. Paul, J. et al (Eds.), "*Homosexuality: Social, psychological, and Biological issues*" (Beverly Hills: Sage Publications 1982), 275-285 Kirkpatrick, M. et al "*Lesbian mothers and their children: A comparative survey*" *American Journal of Orthopsychiatry* [1981] 545-551, as they all appear in Fitzgerald Bridget, "*Children of Lesbian and Gay Parents: A Review of the Literature*", Vol. 29 (1) [1999] *Marriage and Family Review*

<sup>108</sup> Norman Anderssen et al "*Outcomes for Children with Lesbian and Gay Parents: A Review of Studies from 1978-2000*" [2000] *Scandinavian Journal of Psychology*, 335

<sup>109</sup> Bailey, J. et al "*Sexual orientation of adult sons of gay fathers*" [1995] *Developmental Psychology* 124, Golombok, S. and Tasker, F., "*Do parents influence the sexual orientation of their children? Findings from a longitudinal study of lesbian families*" [1996] *Developmental Psychology*, 32 3 Huggins, S., "*A comparative study of self-esteem of adolescent children of divorced lesbian mothers and divorced heterosexual mothers*" [1989] *Marriage and Family Review* 123 J. Gottman, "*Children of gay and lesbian parents*", [1989] *Marriage and Family Review*, 14 (3-4), 177-196. Green, R., "*Sexual identity of 37 children raised by homosexual or transsexual Parents*" [1978] *American Journal of Psychiatry*, 692. Green, R. et al "*Lesbian mothers and their children: A comparison with solo parent heterosexual mothers and their children*" [1986] *Archives of Sexual Behavior*, 167, Miller, B. "*Gay fathers and their children*" [1979] *Family Coordinator*, 28, 544-552, J. Schwartz, "*An exploration of personality traits in daughters of lesbian mothers*", 1986, (unpublished PhD thesis, California School of Professional Psychology, San Diego) as they all appear in Fitzgerald Bridget, "*Children of Lesbian and Gay Parents: A Review of the Literature*", Vol. 29(1) [1999] *Marriage and Family Review*

<sup>110</sup> Marciano, T.D. "*Homosexual marriage and parenthood should not be allowed*" in H. Feldman and M. Feldman (Eds.), "*Current controversies in marriage and family*", (Beverly Hills: Sage Publications 1985) in as they all appear in Fitzgerald Bridget, "*Children of Lesbian and Gay Parents: A Review of the Literature*", Vol. 29(1) [1999] *Marriage and Family Review*

<sup>111</sup> Saffron, L., "*What about the children? Sons and daughters of lesbian and gay parents talk about their lives*". 1990, New York: Cassell in as they all appear in Fitzgerald Bridget, "*Children of Lesbian and Gay Parents: A Review of the Literature*", Vol. 29(1) [1999], *Marriage and Family Review*

### 2.7.2 The child will be teased by his/ her peers

Children raised by homosexual parents run the risk of being stigmatised because homosexuals represent a stigmatised group of people. Studies conducted before the year 2000 in Scandinavian countries revealed that children of homosexual parent(s) were teased more than children reared by heterosexual parents.<sup>112</sup> The relationships that these children had with their friends suffered a great deal by reason of their parent's sexual orientation.<sup>113</sup> The attitude received from children varied depending on their ages with the age of 10-11 years being the most difficult for these children.<sup>114</sup>

More recent studies conducted in western countries however reveal that the attitudes of children towards children with homosexual parents have improved significantly owing to the recognition and acceptance of homosexuals.<sup>115</sup> Recognition and acceptance notwithstanding, studies reveal that in more tolerant countries such as the Netherlands, children of homosexual parents are more open about their families when relating to friends and are less likely to be stigmatised than in intolerant countries.<sup>116</sup>

The question that follows then is it fair to put a child in such a situation and how will such teasing interfere with the child's development? The reality about children in most occasions is that they tease each other over various reasons. Furthermore, studies show that such teasing does not affect the child's self-esteem or development any more than teasing a child with heterosexual parents for any other reason would affect that child.<sup>117</sup> What is advised in these

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<sup>112</sup> *ibid*

<sup>113</sup> Hack Moller and Mohl, "*Children of Lesbian Mothers*" [1984] *Dansk Psykolog* 316

<sup>114</sup> *ibid*

<sup>115</sup> Charlotte J. Patterson and Goldberg A.E, "*Lesbian and Gay Parents and their Children*", Vol.1 [2016] National Council on Family Relations

<sup>116</sup> Bos, H et al "*Children in planned lesbian families: A cross-cultural comparison between the United States and the Netherlands*" [2008] *American Journal of Orthopsychiatry* 211

<sup>117</sup> S.L. Huggins. "*A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers & Divorced Heterosexual Mothers*" [1989] *Journal of Homosexuality*, 123

situations is that the parent takes time to explain to the child the dynamics of homosexual orientation.<sup>118</sup>

### **2.7.3 The homosexual parent will molest the child**

There is no scientific study that links homosexuality to paedophilia.<sup>119</sup> In a study conducted in the USA, out of 269 cases of sexual abuses involving children, 267 offenders were heterosexual.<sup>120</sup>

## **2.8 Conclusion**

This chapter sought to provide a basis for the differential treatment and prejudice suffered by homosexuals. It is noted that homosexuals are discriminated against and their differential treatment has been justified based on the belief that homosexuality is either un-African or immoral and against religion. This Chapter has debunked the various myths surrounding the understanding of homosexuals and concluded that homosexuals do not pose any inherent danger simply because of their homosexual orientation.

In conclusion, instead of focusing on factors that are not scientifically proven and that do not have any bearing on the development of the children, the conversation should shift to matters that have actually been proven to affect the development of children for example self-esteem, self-management, adjustment and equipping children to handle the challenges of this life.<sup>121</sup>

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<sup>118</sup> “National Information Clearinghouse; National Clearinghouse on Child abuse and Neglect , Gay and Lesbian Adoptive Parents: Resources for Professionals and Parents, 2000 available at [http://naic.acf.hhs.gov/pubs/f\\_gay/index.cfm](http://naic.acf.hhs.gov/pubs/f_gay/index.cfm)” accessed on 20/04/19

<sup>119</sup> ibid

<sup>120</sup> ibid

<sup>121</sup> B. Fitzgerald, “The Children of Lesbian and Gay Parents: A Review of the Literature” Vol. 29(1) [1999] Marriage and Family Review.

# CHAPTER THREE

## THE CONSTITUTIONALITY OF THE BAN ON HOMOSEXUALS FROM ADOPTING CHILDREN

### 3.1 Introduction

From the onset, the Constitution of Kenya declares itself supreme.<sup>122</sup> It follows therefore that laws that contravene the Constitution are void to the extent of their contravention.<sup>123</sup> The Constitution places upon everyone the duty to “respect, uphold and defend” it.<sup>124</sup> The same also binds every person, State organ and State officer.<sup>125</sup>

In investigating the constitutionality or otherwise of section 158 (3c) of the Children Act No. 8 of 2001,<sup>126</sup> this Chapter will rely on the pre-eminence of the Constitution as the supreme law of Kenya and measure the ban against various constitutional provisions including: Article 2,<sup>127</sup> Article 20,<sup>128</sup> Article 24,<sup>129</sup> Article 27,<sup>130</sup> Article 45<sup>131</sup>, Article 53(2)<sup>132</sup> and Article

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<sup>122</sup> Article 2: “(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government. (2) No person may claim or exercise State authority except as authorised under this Constitution. (3) The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ. (4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”

<sup>123</sup> Article 2(4)

<sup>124</sup> Article 3(2)

<sup>125</sup> Article 10

<sup>126</sup> Which provides in part: “An adoption order shall not be made if the applicant or, in the case of joint applicants, both or any of them- (c) is a homosexual.”

<sup>127</sup> “(5) The general rules of international law shall form part of the law of Kenya. (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”

<sup>128</sup> “(1) The Bill of Rights applies to all law and binds all State organs and all persons. (2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. (3) In applying a provision of the Bill of Rights, a court shall— (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom. (4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote— (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights”

<sup>129</sup> “(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including— (a) the nature of the right or fundamental freedom; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does



259.<sup>133</sup> Though Article 8<sup>134</sup> is not looked at in detail in this chapter, it is recognised and acknowledged that because the Constitution provides that there shall be no State religion in Kenya, all arguments that homosexuality is against any religious group, must therefore fail.<sup>135</sup>

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*not prejudice the rights and fundamental freedoms of others; and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. (2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—*

*(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation; (b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and (c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.”*

<sup>130</sup> *“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms. (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. (4) The State shall not discriminate directly or indirectly against any person 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. (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4). (6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past differential treatment.”*

<sup>131</sup> *“(1) 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. (2) Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties. (3) 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. (4) Parliament shall enact legislation that recognises— (a) marriages concluded under any tradition, or system of religious, personal or family law; and (b) any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such marriages or systems of law are consistent with this Constitution.”*

<sup>132</sup> *“(2) A child’s best interests are of paramount importance in every matter concerning the child.”*

<sup>133</sup> *“(1) This 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 the development of the law; and (d) contributes to good governance.”*

<sup>134</sup> *“There shall be no State religion.”*

<sup>135</sup> Kenya is a cosmopolitan society with her people practicing various religions and some opting to be irreligious. The freedom of religion, thought, conscience and expression guaranteed under Article 32 of the Constitution permits this. Article 8 of the Constitution having considered the non-homogenous nature of Kenya in terms of religion and irreligion, thus stated as does. Arguments that “Christian and Islamic values will be obliterated” (see *NGO Organization Coordination Board v Eric Gitari and 5 Others Civil Appeal No.145 of 2015*) do not stand the veracity of the test of constitutionality because they are hinged on the state supporting and/ or endorsing one religion over another or religion over irreligion. Such arguments also seem to impose the religious values of those who subscribe to these religions contrary to Article 32. Freedom of religion can also be interpreted as “the right not to subscribe to any religious beliefs, and not to have the religious beliefs of others imposed on one.” (see para. 122). In the case of *NGO Coordination Board v Eric Gitari*, Justice Lenaola submitted himself as follows: *“In Kenya, the Constitution is supreme, and it requires conduct to be justified in terms of laws that meet the constitutional standard. The state has to act within the confines of what the law allows and cannot rely on religious texts or its views of what the moral and religious convictions of Kenyans are to justify the limitation of a right. The Attorney General and the Board may or may not be right about the moral and religious views of Kenyans, but our Constitution does not recognise limitation of rights on these grounds. The Constitution is to protect those with unpopular views, minorities and rights that attach to human beings – regardless of a majority’s views. The work of a Court, especially a Court exercising constitutional jurisdiction with regard to the Bill of Rights, is to uphold the Constitution, not popular views or the views of a majority.”*(see para. 123) While the Children Act fails to provide a reason for the ban, any argument that may be made on the basis of religion will be unconstitutional by virtue of Article 8.

## **3.2 Principles Applied when Determining the Constitutionality of Statutes**

The Courts apply various principles when determining the constitutionality or otherwise of statutes. Some of these principles, which are discussed below include the presumption that a statute or its provisions are valid and the purpose and effect of the statute.

### **3.2.1 Presumption that a Statute is Valid**

Stemming from the constitutional conferment to parliament and legislative assemblies in county governments to exercise sovereign power<sup>136</sup> and the oath of office/ affirmation taken by Legislators when they assume office wherein they undertake to “obey, respect, uphold preserve, protect and defend”<sup>137</sup> the Constitution, there is a rebuttable presumption that the laws enacted by legislative bodies are in line with the Constitution. As the main constitutional court, the High Court has original jurisdiction to hear and decide on the question of constitutionality of statutes.<sup>138</sup> The onus is on the person claiming non-compliance with constitutional provision to rebut this presumption.

As the grundnorm, the Constitution is considered the “will of the people” while a statute, as the creation of a few elected representatives is the “will of the legislators.” If the “will of the legislators” is contrary to the “will of the people”, then the will of the people must prevail.<sup>139</sup>

### **3.2.1 Purpose and Effect**

Another key principle in determining the constitutionality or otherwise of statutory provisions is to look at their purpose and effect.<sup>140</sup> The Cambridge online dictionary defines purpose as

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<sup>136</sup> Article 1 (2) “The people may exercise their sovereign power either directly or through their democratically elected representatives. (3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution— (a) Parliament and the legislative assemblies in the county governments;”

<sup>137</sup> “Third Schedule, Constitution of Kenya, 2010 Oath/ Affirmation of Member of Parliament (Senate/ National Assembly)”

<sup>138</sup> Art. 165 (3) (d) I, ii

<sup>139</sup> *Supreme Court Advocates on Record v Union of India* AIR 1994 SC 268

“an intention or aim; a reason for doing or allowing something to happen”.<sup>141</sup> The same dictionary defines effect as “the result of a particular influence; something that happens because of something else”.<sup>142</sup>

In the case of *Olum and Another v Attorney General*,<sup>143</sup> the Court determined that in order to establish whether a section of a statute or Act of Parliament is constitutional, it is the Court’s duty to consider the effect and purpose of the impugned statute or section. In the event that the purpose of the legislation does not interfere with a right or liberty outlined in the Constitution, the Court has a duty to further scrutinise the effects of application of such statute or Act of Parliament. If either the purpose of such legislation or its effect infringes on a right that has been outlined in the Constitution, then the Court must declare the impugned statute or section unconstitutional.

In the case of *the Queen v Big M. Drug Mart Ltd*,<sup>144</sup> the Supreme Court of Canada held that “Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realised through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation’s object and thus validity.”

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<sup>140</sup> Law Society of Kenya v KRA Civil Appeal 74 of 2017, see also *Centre for Rights Education Awareness and Another v John Harun Mwai and Another* Civil Appeal 82 of 2012, see also *Samuel H. Momanyi v Attorney General and Another* [2016] eKLR

<sup>141</sup> “Cambridge Dictionary, Cambridge University Press, 2019 available at <https://dictionary.cambridge.org/dictionary/english/purpose>” accessed on 27/09/19

<sup>142</sup> “Cambridge Dictionary, Cambridge University Press, 2019 available at <https://dictionary.cambridge.org/dictionary/english/effect>” accessed on 27/09/19

<sup>143</sup> [2002]EA

<sup>144</sup> 1986 LRC (Const.) 332

The purpose of legislation is determined by establishing the mischief the legislation sought to remedy.<sup>145</sup> Understanding the background, both social and historical and context within which the legislation was formulated is therefore key in this regard.

The long title of the Children Act describes it as *inter alia* “An Act of Parliament to give effect to the Principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child...” both the CRC and the ACRWC have the best interest of the child as a central theme. The Children Act was therefore enacted in essence to ensure the operation of the best interest of the child. The presumption to be drawn from this therefore is that the ban on homosexuals from adopting children under Kenyan law is in the child’s best interest. The resulting effect of the ban is the blanket arbitrary differential treatment of homosexuals as a result of their sexual orientation contrary.

### **3.3 Right to Equality, Non-differential treatment and Equal Benefit of the Law**

All major global and regional instruments on human rights recognise the right to equality, non-differential treatment and equal benefit of the law.<sup>146</sup> The Kenyan Constitution boasts of a robust Bill of Rights that seeks to protect everyone without giving regard to any differences that may exist.<sup>147</sup> The Constitution provides a long list containing grounds for non-differential treatment. The list of grounds for non-differential treatment as provided for under Article 27 (4) however fails to explicitly categorise sexual orientation as a ground for non-

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<sup>145</sup> *Apollo Mboya v Attorney General and 2 Others* [2018] eKLR

<sup>146</sup> “Article 7 of the Universal Declaration of Human Rights; Article 2(1) and Article 26 of the International Covenant on Civil and Political Rights; Article 2(2) of the International Covenant on Economic, Social and Cultural Rights; Article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Article 2 of the Convention on the Rights of the Child; Article 2 and Article 19 of the African Charter on Human and Peoples’ Rights and Article 1 (1) of the American Convention on Human Rights”

<sup>147</sup> Article 27

differential treatment. Notwithstanding this intentional omission,<sup>148</sup> the list provided under Article 27 (4) is indicative rather than exhaustive, due to the use of the phrase “The States shall not discriminate directly or indirectly on any ground including” thus creating a possibility for challenge by those suffering differential treatment on grounds not explicitly listed under Article 27.<sup>149</sup> This stance was reiterated by the High Court in the case of *Eric Gitari v NGO Board*.<sup>150</sup> The Court in this case further added that even in the absence of the phrase “on any ground including”, keeping with the constitutional principles of non-differential treatment, equality and dignity, a holistic interpretation of the Constitution would still result in the same conclusion.<sup>151</sup>

The principle of equality demands that people who are similarly situated be subjected to similar treatment. Any distinction between such persons, in terms of the treatment they receive or the rights and liberties they enjoy, if based on one or more of the forbidden grounds constitutes differential treatment. Differential treatment may also be defined as “a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available members of society”,<sup>152</sup> Differential treatment may be justified on certain grounds.

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<sup>148</sup> See “*Gay and Lesbian Coalition of Kenya, Memorandum to the Committee of Experts on the Constitution*, 11 December 2009”, available at: [http://galck.org/index.php?option=com\\_content&view=article&id=50:const&catid=18:constitution&Itemid=18](http://galck.org/index.php?option=com_content&view=article&id=50:const&catid=18:constitution&Itemid=18) accessed on 03/06/19

<sup>149</sup> Jim Fitzgerald “*The Road to Equality? Kenya’s New Constitution*” Vol.5 [2010] the Equal Rights Review, 56

<sup>150</sup> See paragraph 132

<sup>151</sup> See paragraph 133

<sup>152</sup> *Willis v The United Kingdom*, “No. 36042/97, ECHR 2002 IV”

In the Kenyan case of *Eric Gitari and 8 others v Attorney General*<sup>153</sup> the High Court of Kenya rejected the argument that sections 162 to 165 of the Penal Code discriminate against homosexuals. The Court reasoned that since the Penal Code uses the terms “any person” in section 162 and “any male person” in section 165, the Penal Code is not targeting any particular group of people.<sup>154</sup> In holding as it did, the High Court failed to consider the indirect differential treatment perpetuated by the impugned sections in terms of its effect on homosexuals. Because of their same-sex sexual attraction, homosexuals are more likely to engage in what the Penal Code refers to as “indecent practices” compared to heterosexuals. Thus in consequence, the impugned provisions do in fact differentiate between homosexuals and heterosexuals as a result of their sexual orientation.

The differential treatment perpetuated by section 158 (3) of the Children Act is not indirect. The Children Act expressly differentiates between homosexuals and heterosexuals. Such differential treatment presupposes a limitation to the right to equal treatment or permitted differential treatment.

### **3.3.1 Interpretation of Constitutional Right to Equal Treatment and Non-differential treatment**

The Kenyan Constitution demands that it is interpreted in a manner that “promotes its purposes, values and principles; advances the rule of law, and human rights and fundamental liberties in the Bill of Rights; permits the development of law and contributes to good governance.”<sup>155</sup>

In order to fully realise Article 27, there is need to interpret it in a manner that recognises every person as capable and deserving of enjoying the rights it confers regardless of their

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<sup>153</sup> Petition Number 150 of 2016 consolidated with Petition Number 234 of 2016

<sup>154</sup> See paragraphs 296, 297

<sup>155</sup> Article 259

sexual orientation and public opinion regarding who should and who should not enjoy certain rights. Equal treatment and non-differential treatment of homosexuals is a topic that has provoked opinion from many. In the Kenyan case of *John Harun Mwau & 3 Others v Attorney General & 2 Others*,<sup>156</sup> the Court pronounced itself on the query of public opinion as the basis of interpretation of laws as follows:

*“This case has generated substantial public interest. The public and politicians have their own perceptions of when the election date should be. We must, however, emphasize that public opinion is not the basis for making our decision. Article 159 of the Constitution is clear that the people of Kenya have vested judicial authority in the courts and tribunals to do justice according to the law. Our responsibility and the oath we have taken require that we interpret the Constitution and uphold its provisions without fear or favour and without regard to popular opinion... our undertaking is not to write or rewrite the Constitution to suit popular opinion. Our responsibility is to interpret the Constitution in a manner that remains faithful to its letter and spirit and give effect to its objectives”.*

While public opinion is a vital pillar of the Constitution, the Bill of Rights exists in part to protect the minority from the tyranny of the majority. Hinging decisions on the need to uphold public interest without paying regard to the rights and liberties of the minorities compromises their rights.

### **3.3.2 Is a homosexual’s Right to Non-differential treatment and Equality Limited?**

The Constitution recognises that liberties and rights are not absolute. There may be instances where these liberties and rights are limited.<sup>157</sup> The rationale for limiting rights is often to ensure a balance of rights. In an attempt to mitigate against the arbitral limitation of rights, the Constitution has set out conditions to be met whenever rights and liberties limited. As

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<sup>156</sup> Petition No 65 of 2011 [Consolidated with] Petitions No’s 123 of 2011 and 185 of 2011[2012]:

<sup>157</sup> The Constitution of Kenya 2010,

such limitation has to be by law, justifiable, reasonable and in line with the principles and values applicable in democracy.<sup>158</sup>

In the Ugandan case of *Kivumbi v Attorney General*, the Constitutional Court of Uganda laid down the criteria for limiting guaranteed rights and liberties as: “(1) the legislative objective on which the limitation is designed to promote must be sufficiently important to warrant overriding a fundamental right; (2) the measures designed to meet the objective must be rationally connected to it and not arbitrary, unfair or based on irrational considerations; and (3) the means used to impair the right of liberty must be more than necessary to accomplish this objective.”

In *National Coalition for Gay and Lesbian Equal v Minister of Justice and Others*, the South African case that decriminalized sodomy, the South African Constitutional Court likened the limitation of rights to a scale and held that since there was no right to be placed on the other side of the scale,<sup>159</sup> the offence of sodomy was discriminatory and in breach of the equality clause in the South African Constitution.<sup>160</sup>

In the case of *Gitari Eric v NGO Board*, the board purported to justify its refusal to register a non-governmental organisation whose name and objective revealed that the people the organisation sought to protect are homosexuals by relying on the argument that sections 162-165 of the Penal Code limits rights of homosexuals.<sup>161</sup> The Court rejected this argument and determined that sections 162-165 of the Penal Code cannot in fact limit constitutionally conferred rights because what is prohibited under the Penal Code is “acts against the order of nature” and not homosexual identities.<sup>162</sup> The Court also rejected the board’s argument that

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<sup>158</sup> *ibid*

<sup>159</sup> CCT 11/98

<sup>160</sup> See paragraph 27

<sup>161</sup> *Eric Gitari v Non-Governmental Organizations Board and 4 Others* [2015]eKLR

<sup>162</sup> See paragraph 114



Article 45 limits the homosexuals' right to associate and affirmed that the right to associate is not linked to the right to marry.<sup>163</sup>

While it is undisputable doing things in the best interests of children may warrant the limitation of the rights of homosexuals, it is questionable as to whether the decision to ban homosexuals from adopting children is a proper means to achieve the best interest of children. The Constitution demands that any limitation of rights takes into account the link between the restriction and its purpose and prefer less restrictive means to realise the purpose.<sup>164</sup> In this case, there are indeed less restrictive measures to ensure the promotion of the principle of the best interests of a child without curtailing the homosexuals' right to equality and non-differential treatment. As was demonstrated in chapter two of this study, there is no inherent danger, mental, physical, sexual or otherwise when it comes to homosexual parent(s) raising children. Claims that a parent's homosexual orientation will affect a child's mental, physical or sexual development have been debunked as pure conjecture.

### **3.4 Right to Family**

A family is the basic unit of the society and it consists of people related by blood, marriage or adoption. While the composition of a family has changed drastically over time,<sup>165</sup> the benefits

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<sup>163</sup> Article 45 (2) "Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties".

<sup>164</sup> *Eric Gitari v NGO Board*, para 118

<sup>165</sup> While initially a family consisted of a mother, a father and children or a husband and wife, or a husband wives and children in the case of polygamous marriages or a wife, husbands and children in the case of a polyandrous marriage. Families also consisting of a mother and children or a husband and children, either out of choice or a otherwise are also present and currently on the rise in Kenya and in the rest of the world. In Kenya for example, in 2017, 45% of children were living in single headed families see Christine Mungai, "single parenthood crisis is here with us but it is not what you think", 11<sup>th</sup> February 2017, Standard Digital available at "<https://www.standardmedia.co.ke/article/2001228992/single-parenthood-crisis-is-here-with-us-but-it-is-not-what-you-think>" accessed on 02/10/19 With the recognition of homosexual marriages in certain countries, there are families that consist of two husbands or two wives with or without children have emerged.

associated with belonging in a healthy family have not changed.<sup>166</sup> The right of one to start their own family, however constituted, is one of the most basic rights.

The law acknowledges that the family is the “natural and fundamental unit of society”.<sup>167</sup> The right to family incorporates the right to constitute and belong to a family. Various international legal instruments also recognise the right to family.<sup>168</sup> While Kenyan law does not recognise a homosexual’s right to marriage,<sup>169</sup> the changing landscape of what constitutes a family supports single-parent families. In *Villianatos and Others v Greece*, the European Court of Human Rights determined that when considering who constitutes a family, stated that courts ought to consider the changes and developments that taken place in society especially with regard to the perception of “civil status and relational issues” as well as the fact that there are different ways and choices that could be made in the “sphere of living and leading one’s family or private life”.<sup>170</sup>

Children are considered an important part of any family, though there are families that function well even in the absence of children. Children bring immense joy to families and to individuals. In understanding that not all adults can have children and that not all adults want to raise children, the law devised a way to enable those who want children but are unable to have them or those who give birth to children but are unable to raise them find happiness through adoption.

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<sup>166</sup> Some of the benefits of belonging to a healthy family include: The development of a strong moral character. The members of the family motivate each other to continually strive to be better people and to constantly pursue their individual interests while staying true to the family’s belief system; Improved overall physical health. Healthy families often exhibit healthy eating and exercising habits. By eating together, families are able to spend time together and monitor each other’s eating habits; and Promotion of independence and self-sufficiency. Healthy families encourage independence and self- sufficiency through guidance available at “<https://www.livestrong.com/article/147185-the-benefits-of-healthy-families/>” accessed on 02/10/19

<sup>167</sup> The Constitution of Kenya, Article 45 (1)

<sup>168</sup> See “Article 16 (3) of the UDHR, Article 23 (1) of the ICCPR, Article 10 (1) of the ICESCR, the International Convention on the Protection of the Rights to All Migrant Workers and Members of their Family, the preambles to the CRC and the CRPD” among others

<sup>169</sup> Article 45 (2) of the Constitution of Kenya reserves the right to marry to adults of opposite sex.

<sup>170</sup> *Villianatos and Others v Greece* “(29381/09 & 32684/09)[2013] ECHR (7 November 2013)” page 84

Adoption is a concept that is well accepted and embraced. The benefits of adoption are well recorded. Adoption allows children who would otherwise not grow up in loving homes to grow up feeling love and accepted. It also allows persons who are unable to give birth to their own children or who choose not to give birth become parents. In light of recent studies that have revealed the dangers of institutionalisation of children, adoption has gained more importance as an alternative alongside foster care, kinship and group homes.<sup>171</sup> Although marriage may be considered an element of the right to family, the right to family and the right to marriage are not mutually exclusive rights. A family that comprises of a mother and children or a father and his children is well recognised. This recognition may have informed the provisions of section 158 (1) of the Children Act which permits sole applicants to apply for adoption orders.

The right to family is not just a right to be enjoyed by prospective parents in this regard, but also by children. The CRC recognises the benefits of a child growing up in a family environment.<sup>172</sup> In the unfortunate circumstance that the child is unable to be raised by his/her family, then it is recommended that he/she is raised in a family-like environment.<sup>173</sup> Available forms of child alternative care that offer a family-like environment include adoption, kinship care, foster care and guardianship. Institutionalisation, which was and still is a very common form of alternative child care has recently come under fire for its disadvantages.<sup>174</sup> The alternatives available are not enough for the many children in need of family-like environments. The CRC places upon States the obligation to ensure that children

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<sup>171</sup> H. Marinus et al “*Children in Institutional Care: Delayed Development and Resilience*” available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4130248/> accessed on 03/05/2019

<sup>172</sup> The Preamble of the CRC provides in part “Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding”

<sup>173</sup> Research shows that the most suitable environment a child can grow up in is a family environment see Schore, A.N “*Effects of a Secure Attachment on Right Brain Development, Affect Regulation and Infant Mental Health*” [2001] *Infant Mental Health Journal*

<sup>174</sup> Some of these disadvantages include the disproportional care-giver child ratio, unskilled staff, physical, emotional and even sexual abuse, deprivation of parental care, emotional deprivation and non-consistent care givers.

alienated from their parents are placed in alternative care.<sup>175</sup> In line with the spirit and letter of the CRC, such alternative care should above all else, promote the child's best interest.

### **3.41 Is a Homosexual's Right to Family Limited?**

The Constitution of Kenya permits the limitation of rights in certain situation.<sup>176</sup> The same Constitution however also provides that such limitation should not limit the right or liberty so far that it derogates from its core.<sup>177</sup> The Constitution already limits the homosexual right to marry.<sup>178</sup> The ban from adopting children further limits their right to family to a point where it may be argued derogates from its content.<sup>179</sup> In the event that the homosexual had wished to become a parent through adoption, their right to family becomes completely obliterated by the ban.

The Constitution demands that any restriction of human rights is "reasonable and justifiable in an open society based on human dignity, equality and liberty".<sup>180</sup> Arguments that homosexuality is immoral or against religion are not justifiable in democratic civilizations founded on liberties, dignity and equality. Morality and religion are not recognised by the Constitution as sources of law. Additionally, the Constitution guarantees liberty of conscience, religion, belief and opinion.<sup>181</sup>

### **3.5 International Law and Treaties**

Pursuant to Article 2 of the Constitution, general rules of international law and treaties that have been ratified constitute Kenyan law. No international human rights instrument so far adopted by the United Nations General Assembly explicitly contain the term sexual

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<sup>175</sup> Article 20

<sup>176</sup> Article 24

<sup>177</sup> Article 24 (2) c

<sup>178</sup> Article 45 (2)

<sup>179</sup> Although it is well acknowledged that the homosexual could adopt other methods of becoming a parent such as surrogacy and artificial insemination, these methods may not always be convenient for them or even work for them.

<sup>180</sup> Article 24 (1)

<sup>181</sup> Article 32

orientation.<sup>182</sup> Although some States may want to construe the silence to mean that sexual minorities are not protected under international human rights law,<sup>183</sup> international law does in fact recognise and calls for recognition and protection of the LGBTQI. The UN Office of the High Commissioner for Human Rights determined that “the protection of people as a result of sexual orientation and gender identity does not require the creation of new rights or special rights for LGBT people. Rather, it requires the enforcement of the universally applicable guarantee of non-differential treatment in the enjoyment of all rights.”<sup>184</sup> Several international human rights instruments already acknowledge the right to equivalent protection of the law,

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<sup>182</sup> Although several attempts have been made to introduce international law protection to sexual minorities. The first attempt was made in 2003 through the introduction of the “Resolution on Human Rights and Sexual Orientation to the 59<sup>th</sup> Session of the United Nations Human Rights Committee” (see “H.R. Comm., 59th Sess., Promotion and Protection of Human Rights, Austria, Belgium, Brazil, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Liechtenstein, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden and United Kingdom of Great Britain and Northern Ireland: Draft Resolution, U.N. Doc. E/CN.4/2003/L.92 Apr. 17, 2003”). While the Resolution merely sought to affirm the position that the ICCPR applied uniformly regardless of sexual orientation, it was greatly opposed particularly by Sub-Saharan and Islamic states. Discussions on the Resolution were postponed to 2004 before being dropped in 2005 without ever being put to a vote. Despite the fact that the Resolution failed to progress beyond its introduction to Member States, it has been argued that it raised awareness on issues of sexual minorities and mobilized the engagement of NGO’s in U.N processes thus contributing to the Yogyakarta Principles in 2007 (see Michael O’Flaherty & John Fisher, “*Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*” Vol 8 Issue 2 [2008] Human Rights Law Review 207. “The Yogyakarta Principles could be considered the second attempt to introduce issues of sexual minorities to the international forum. The Yogyakarta Principles are a set of twenty-nine principles drafted by a group of twenty-nine experts in international human rights law. The Yogyakarta Principles constitute “soft law” under international law since they are not binding on Member States although they affirm human rights standards with which States must comply. The Principles also explicitly identify rights and protection that apply to sexual minorities including the right to form a family through adoption and the right to enter into legally recognized unions such as marriages (Principle 24). The Yogyakarta Principles have however been rejected by States who claim that the Principles were formulated and adopted by individuals who conducted the exercise on their own behalf and not on behalf of any State. A third attempt to introduce the protection and recognition of sexual minorities in international law was in the form of the U.N Declaration on Sexual Orientation and Gender Identity. The Declaration was introduced before the 63<sup>rd</sup> U.N General Assembly in 2008 by France and the Netherlands. At the time of its introduction, the Declaration enjoyed the support of 66 Member States. The Declaration condemns all forms of human rights violations against sexual minorities and calls upon States to institute measures aimed at ensuring that sexual orientation is not the basis for criminal sanctions. The Declaration is however not binding. In 2011, the U.N Human Rights Council passes the Resolution on Human Rights, Sexual Orientation and Gender Identity, thus becoming the first body of the U.N to pass a resolution on sexual orientation and gender identity. Through the Resolution, the U.N Human Rights Council expressed concern over the various acts of violence that have been directed towards sexual minorities and requested the Office of the High Commissioner for Human Rights begin a study and document such acts and laws that legitimize violence against sexual minorities”. This Resolution however failed to explicitly identify the rights of sexual minorities under international law.

<sup>183</sup> Kerstin Braun, “*Do Ask Do Tell: Where is the Protection Against Sexual differential treatment in International Human Rights Law*” Vol. 29 [2014] American University International Law Review, 872

<sup>184</sup> “Office of the High Commissioner for Human Rights, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, United Nations, September 2012”.

equality and non-differential treatment.<sup>185</sup> Applying these rights to all, without regarding distinctions such as sexual orientation will ensure the realisation of basic rights by sexual minorities.

### **3.5.1 Decisions of the UN Human Rights Committee**

The UN Human Rights Committee in *Toonen v Australia*<sup>186</sup> held that Tasmanian law that criminalised homosexual conduct between two consenting adults violated ICCPR provisions on anti-differential treatment and privacy and further that “sex” reflected in Article 2 of the ICCPR includes sexual orientation.

In *Young v Australia*<sup>187</sup>, the UN Human Rights Committee determined that sexual orientation is a protected ground for non-differential treatment as per Article 26 of the ICCPR under the “other status” category.

In the case of *Fedotova v Russian Federation*,<sup>188</sup> the United Nations Human Rights Committee held that the Russian Federation violated Fedotova’s right to non-differential treatment under Article 26 of the ICCPR. In this case, Fedotova was arrested and later charged with the offence of engaging in a public act aimed at spreading propaganda to minors after she displayed a poste declaring “homosexuality is normal” and “I am proud of my homosexuality” next to a secondary school.

From the above cases, it is clear that while international legal instruments do not explicitly contain the term sexual orientation, sexual orientation is nonetheless a ground for non-

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<sup>185</sup> See Article 2 of the UDHR, Article 2 of the ICCPR, Article 26 of the ICCPR, Article 2 of the ICESCR and Article 2 of the CRC among others.

<sup>186</sup> “H.R. Comm. Commc’n 488/1992, *Toonen v Australia*, 50<sup>th</sup> Sess., U.N. Doc. CCPR/C/50D/488 (Dec. 25, 1992)”

<sup>187</sup> “H.R. Comm. Commc’n 941/2000, *Young v Australia*, 78<sup>th</sup> Sess., U.N. Doc. CCPR/C/89/D/1361/2005 (2007)”

<sup>188</sup> “H.R. Comm. Commc’n 1932/2010, *Fedotova v Russian Federation*, U.N.Doc. CCPR/C/106/D/1932/2010 (Nov. 20, 2012)”

differential treatment. Drafters of international instruments for human rights intentionally left the grounds for non-differential treatment open by using the phrase “other status”.<sup>189</sup>

Following the decisions of the UN Human Rights Committee on the sexual orientation and gender identity as a ground of non-differential treatment under international law, various UN Committees mandated with monitoring implementation of various categories of rights have included gender identity and sexual orientation as prohibited grounds for differential treatment; these Committees include CEDAW,<sup>190</sup> CESCR,<sup>191</sup> CRC<sup>192</sup> and CAT.<sup>193</sup> The Committee has recommended that signatory States ensure equal rights to all their citizens, notwithstanding their sexual orientation.<sup>194</sup>

### 3.6 The Best Interest of the Child

The Constitution,<sup>195</sup> international,<sup>196</sup> regional,<sup>197</sup> and national<sup>198</sup> legal instruments recognise that in all matters involving children, their best interest is paramount. The best interest of the child principle is a legal principal that is internationally recognised and based on the

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<sup>189</sup>ARC International, the International Bar Association and the International LGBTI Association, “*Sexual Orientation, Gender Identity and Expression, and Sex Characteristics at the Universal Periodic Review*”, November 2016

<sup>190</sup> CEDAW, “General Recommendation 28 on the core obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women’ (2010) UN Doc CEDAW/C/GC/28, para 18. CEDAW. General recommendation 27 on older women and protection of their human rights (2010) UN Doc CEDAW/C/2010/47/GC.1, para 13”

<sup>191</sup> CESCR, “General Comment 22: Right to sexual and reproductive health’ (Art 12) (2016) UN Doc E/C.12/GC/22, para 9. CESCR, General Comment 20: Non-differential treatment in economic, social and cultural Rights (Art 2, para 2) (2009) UN Doc E/C.12/GC/20, para 32. CESCR, General Comment n 19: Right to Social Security (Art 9) (2008) UN Doc E/C.12/GC/19, para 29. CESCR, General Comment n 15: Right to Water (Arts 11 and 12) (2002) UN Doc, E/C.12/2002/11, para 13. CESCR, General Comment n 14: Right to the highest attainable standard of health (Art 12)’ (2000) UN Doc E/C.12/2000/4, para 18. CESCR, General Comment 18: Right to Work (Art 6) (2006) UN Doc E/C.12/GC/18, para 12”.

<sup>192</sup> CRC, “General Comment 13: Right of the child to freedom from all forms of violence (2011) UN doc CRC/C/GC/13, para 72. CRC, General Comment 4: Adolescent health and development in the context of the Convention on the Rights of the Child (2003) UN Doc CRC/GC/2003/4. CRC, General Comment n 3: HIV/AIDS and the rights of the child (2003) UN Doc CRC/GC/2003/1”.

<sup>193</sup>CAT, “General Comment no. 3 (Art 14)’ (2012) UN Doc CAT/C/GC/3, para 8.

<sup>194</sup>HR Committee Concluding observations on Chile (CCPR/C/CHL/CO/5, para 16), San Marino (CCPR/C/SMR/CO/2, para 7), and Austria (CCPR/C/AUT/CO/4, para. 8)”.

<sup>195</sup> Article 53 (2)

<sup>196</sup> The United Nations Convention on the Rights of the Child art. 3

<sup>197</sup> The African Charter on the Rights of the Child art. 4

<sup>198</sup> The Children Act sect. 4

recognition that any decision made by an adult on behalf of a child is made solely because the child lacks the capacity, in terms of judgment and experience.<sup>199</sup> The Committee on the Rights of the Child considers the principle of the best interest of the child in three ways; the assessment and consideration of the principle as the primary consideration in all matters involving children, the interpretation of the best interest of the child as a legal principle and the adoption of the principle as a rule of procedure that demands an inquiry into how the decision is may impact on the child.<sup>200</sup>

In practice, there is no predetermined list of what is considered the child's best interest. What constitutes the child's best interest often varies on a case to case basis depending on the child in question. While it is recognised that nobody has the right to adopt a child, the goal of adoption is, or should be to make sure the child is placed in the care of someone who has the capability to take care of the child and always in the child's best interest. In matters of adoption, the welfare of the child should therefore be the principal consideration irrespective of the right to equality, equal treatment and non-differential treatment of homosexuals.

The ban on homosexuals from adopting children *per se* without considering whether such adoption would be in the child's best interest violates the best interest of the child principle. It pre-empts the opportunity to consider adoption applications based on the child's best interest and other factors including the ability to provide for, to protect and to love the child in question and instead, gives preference to the sexual orientation of the prospective parent as opposed to the child's best interest, which should be the key consideration in such matters. Denial of adoptive placement on such trivial grounds that do not have any bearing on the best

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<sup>199</sup> "The Best Interest of the Child, Literal Analysis, Function and Implementation, Working Report, 2010, Institut International Des Droits De L'enfant available at [https://www.childsrights.org/documents/publications/wr/wr\\_best-interest-child2009.pdf](https://www.childsrights.org/documents/publications/wr/wr_best-interest-child2009.pdf)" accessed on 15/07/2019

<sup>200</sup> UN Committee on the Rights of the Child (CRC Committee), "General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, available at: <http://www.refworld.org/docid/51a84b5e4.html>, para. 6" accessed on 02/10/19



interests of the child denies children in need of families the opportunity to grow up in loving families. As stated earlier, children thrive best in family environments, curtailing the adoption of children as a result of one's sexual orientation keeps children in institutions. Eliminating the ban in favour of individual assessment of potential adoptive parents with the child's best interest as the underlying principal will produce better results.

### **3.7 Conclusion**

In open democratic societies guided by the constitutional principles of human rights, human dignity, equality, liberties and non-differential treatment, it is shocking that a section of society is excluded from social participation. It is even more shocking that such exclusion does not advance the child's best interest; it violates it. As the grundnorm, the Constitution sets out the tone of laws in the country. Compliance with constitutional principles is a key determinant of the constitutionality of laws.

## CHAPTER FOUR

### HOMOSEXUALS RIGHTS' UNDER SOUTH AFRICAN LAW

#### 4.1 Introduction

This chapter delineates South Africa as best practice in the area of legal recognition and legal protection of homosexuals and provides a comparative study of the same. This Chapter looks into the South Africa's history and determines why and how the phrase "sexual orientation" as a ground for non-differential treatment made its way into the 1993 Interim Constitution of South Africa and the 1996 Constitution of South Africa. This Chapter also investigates the consequences of such inclusion on the rights of homosexuals, including their legal ability to adopt children under South African law.

South Africa is considered best practice for two reasons. The first reason is that it was the first country in the world to unequivocally entrench the right to be protected from differential treatment based on sexual orientation.<sup>201</sup> The second reason is that like Kenya, culture and religion holds great sway over the beliefs and practices of the people of South Africa. It is therefore interesting to see the impact of legal protection and recognition *vis a vis* culture and religion.

#### 4.2 Towards the Recognition of Homosexuals as Potential Adoptive Parents

##### 4.2.1 Constitutional Recognition and Protection

While the equality clauses as contained in the Kenyan<sup>202</sup> and South African<sup>203</sup> constitutions are somewhat similar, there is a fundamental difference between these equality clauses that

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<sup>201</sup> 1996 Constitution of South Africa Section. 9 provides "*The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, **sexual orientation**, age, disability, religion, conscience, belief, culture, language and birth*". (emphasis mine)

<sup>202</sup> Constitution of Kenya 2010 Article 27 supra note 130

<sup>203</sup> Constitution of South Africa, 1996 Section 9 supra note 201

puts the two countries on opposite ends in the fight towards equality and equal treatment of homosexuals. Whereas the Constitution of South African specifically delineates sexual orientation as a ground for non-differential treatment, the Kenyan Constitution does not contain the phrase sexual orientation.<sup>204</sup> The insertion of sexual orientation as a ground for non-differential treatment under the South African Constitution is credited to her unique history and eventual victory over apartheid.

#### **4.2.2 Apartheid and the Fight to Freedom of Sexual Orientation**

South Africa was under an apartheid system of governance for several decades.<sup>205</sup> Apartheid, an Afrikaans word that means separateness refers to the system of policy and governance that was introduced to South Africa in 1948 after the National Party, an Afrikaans predominant party emerged victorious against the United Party.<sup>206</sup> The consequence of apartheid in South Africa was a system wherein the white minorities' enjoyed privileges as a result of the systematic seclusion of non-white populations.<sup>207</sup>

In 1990, F.W De Klerk, the leader of the then ruling National Party announced that Nelson Mandela would be released from prison and that the ANC was unbanned, thereby commencing a chain of events that eventually resulted in the adoption of a progressive and

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<sup>204</sup> It however delineates sex as a ground for non-differential treatment and sex, as a ground for non-differential treatment has been interpreted under international law to include sexual orientation see *TOONEN V AUSTRALIA*

<sup>205</sup> Gustavo Gomes da Costa Santos, “Decriminalizing Homosexuality in Africa: Lessons from the South African Experience, Human Rights, Sexual Orientation and Gender Identity”. In: “Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalization and Change”. Institute of Commonwealth Studies, School of Advanced Studies, University of London, 313 available at “<https://sas-space.sas.ac.uk/4812/>” accessed on 05/08/2019

<sup>206</sup> Although records show that racial segregation in South Africa was not a 1948 phenomenon. Prior to 1948, laws and practices in South Africa pointed towards a racially segregated country. The 1913 Natives Lands Act for example provided that Africans could only buy lands located in reserves. In practice, certain jobs and residential areas were reserved for white people see Welsh D “*The Rise and Fall of Apartheid: From Racial Domination to Majority Rule*” (Johannesburg, Johannesburg Ball Publishers, 2010)

<sup>207</sup> Welsh D, “*The Rise and Fall of Apartheid: From Racial Domination to Majority Rule*” (Johannesburg, Johannesburg Ball Publishers, 2010). The National Party also sought to impose upon South Africans an exclusive version of Christianity which inter alia banned business activities and entertainment of Sundays and on Christian holidays, prohibited Islamic and Hindu marriages on the basis that they were not in line with Christian doctrines and banned sexual relations between men see David Bilchitz, “*Constitutional Change and Participation of LGBTI Groups: A Case Study of South Africa, International Institute for Democracy and Electoral Assistance*”, Stockholm, Sweden, 2015

democratic Constitution<sup>208</sup> that saw South Africa transition from an apartheid government characterised by racial segregation and “rigid patriarchal norms expressed in dominant, violent and authoritarian forms of masculinity” to a non-racial democratic government founded on respect for fundamental human rights and equality, at least in theory.<sup>209</sup>

In the years leading up to the transition, organisations advocating for and promoting the rights of the LGBT community rose. The Gay Association of South Africa (GASA) was established in 1982.<sup>210</sup> The goal of GASA was to unite homosexuals by providing spaces for socialisation. The organisation, consisting mostly of white conservative males was adamant that it was not a political movement and as such, it had no political objectives.<sup>211</sup> Instead, GASA focused on providing support and social services to its members.<sup>212</sup> Due to its non-political stance, GASA did not make significant strides towards the gay movement in South Africa.<sup>213</sup>

Following the fall of GASA in 1986, three different kinds of activists’ organisations sprung up in South Africa; the National Law Reform Fund (NLRF), the Organisation of Lesbian and Gay Activists (OLGA) and the Gay and Lesbians of Witwatersrand (GLOW).<sup>214</sup> NLRF like GASA, was unconcerned about apartheid and it only fought for the decriminalization of sodomy. OLGA, founded in 1987 and consisting mostly of white activists and middle-class

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<sup>208</sup> David Bilchitz, “*Constitutional Change and Participation of LGBTI Groups: A Case Study of South Africa, International Institute for Democracy and Electoral Assistance*”, Stockholm, Sweden, 2015

<sup>209</sup> Eric C. Christiansen, “*Substantive Equality and Sexual Orientation: Twenty Years of Gay and Lesbian Rights Adjudication Under the South African Constitution*” Vol. 49 [2016], Cornell International Law Journal, see also Adam Rosenbloom, “*LGBT Differential treatment in South Africa*”, Vol. 5 Issue 2 Kaleidoscope Journal, see also Vincent Louise and Bianca Camminga, *Putting the T into South African Human Rights: Trans equality in Post-apartheid Order, Sexualities*” Vol.12 [2009] Sexualities 678 available at “[https://www.researchgate.net/publication/249719950\\_Putting\\_the\\_'T'\\_into\\_South\\_African\\_Human\\_Rights\\_Transsexuality\\_in\\_the\\_Post-Apartheid\\_Order/link/00b4952f214c91c87c000000/download](https://www.researchgate.net/publication/249719950_Putting_the_'T'_into_South_African_Human_Rights_Transsexuality_in_the_Post-Apartheid_Order/link/00b4952f214c91c87c000000/download)” accessed on 16/8/2019

<sup>210</sup> GUSTAVO GOMES DA COSTA SANTOS *Supra* note 205

<sup>211</sup> At a time when apartheid was flourishing, their decision not to speak into political issues such as apartheid is unfortunate. Their silence however spoke volumes regarding which side they supported when Simon Nkoli, a member of the organization and an anti-apartheid activist was arrested in 1986 alongside other anti-apartheid activists. As a result of their silence on the arrest of Nkoli, GASA was banished by IGLA

<sup>212</sup> DAVID BILCHITZ, *supra* note 207

<sup>213</sup> *ibid*

<sup>214</sup> GUSTAVO GOMES DA COSTA SANTOS 205

intellectuals, fought for both the right to racial equality and liberty of sexual orientation. GLOW was founded in the year 1988 by a black South African man, Simon Nkoli, and it consisted mostly of black activists.

GLOW's fight for equality in South Africa cut across different basis for differential treatment and was not just limited to racial differential treatment. In the words of their leader and anti-apartheid activist, Simon Nkoli, one cannot be free as a black man they are not free as gay men.<sup>215</sup> Insertion of sexual orientation in South Africa's equality clause is to a certain extent attributed to the fact that homosexual rights were included in the broader fight for non-differential treatment, equality and social justice.<sup>216</sup> Gay organisations and movements ensured their voices were heard. Although OLGA and GLOW were formed largely along ethnic lines, they represented the changing landscape in the right to overall equality in South Africa.<sup>217</sup> Strategic links and associations with political movements and parties also played a role in the insertion of the phrase sexual orientation as a ground for non-differential treatment in South Africa.<sup>218</sup> Although some members of the ANC had initially dismissed homosexual rights as a non-issue in the greater fight against apartheid,<sup>219</sup> ANC later on emphasised its vision to remove all forms of differential treatment and agreed to include sexual orientation as a prohibited ground for non-differential treatment in the 1993 interim Constitution of South Africa.<sup>220</sup> The same was also found its' way in the Final Constitution of South Africa,

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<sup>215</sup> Simon Nkoli, During the first ever Gay and Lesbian Pride March in Johannesburg, South Africa, 1990

<sup>216</sup> M. Gevisser and E Cameron, "A Different Fight for Freedom: A History of South African Lesbian and Gay Organizations From the 1959's to 1990's" in M. Gevisser and Camron's "Defiant Desire: Gays and Lesbian Lives in South Africa", (New York, Routledge, 1995)

<sup>217</sup> GOMES DA COSTA SANTOS supra note 205

<sup>218</sup> J. Cock, "Colonels and Cades: War and Gender in South Africa" (Oxford University Press, 1994)

<sup>219</sup> Ruth Mompoti, a member of ANC's National Executive Committee once commented "I cannot even begin to understand why people want lesbian and gay rights. The gays have nice homes and plenty to eat. I don't see them suffering. No one is persecuting them. We haven't heard about this problem in South Africa until recently. It seems to be fashionable in the west". It was her opinion that the gay agenda distracted from the main agenda, which was to end apartheid in South Africa. After her statement, Peter Tatchell went on to petitioned Thabo Mbeki, the then Director of Information for ANC an in their 1992 policy conference, the ANC officially recognized gay rights.

<sup>220</sup> Section 8 (2) of the 1993 Interim Constitution of South Africa provided "No person shall be unfairly discriminated against directly or indirectly and without derogating from the provision on one or more of the

making South Africa the first country to affirm Constitutional protection of homosexuals.<sup>221</sup> The Constitutional Assembly of South Africa adopted the Constitution of South Africa in the year 1996 with an overwhelming 89% win in the Senate and 80% win in the National Assembly.<sup>222</sup> This inclusion had been contested by religious organisations such as Christian organisations who argued that the same was contrary to biblical teachings.<sup>223</sup> Giving regard to the history of South Africa and knowing that the post-apartheid government exuded a zero tolerance for differential treatment and inequality, NCGLE fought for expansion of the equality clause to include sexual orientation by advancing that any differential treatment as a result of sexual orientation would in essence equate the differential treatment that was advanced by the apartheid government.<sup>224</sup> NCGLE also relied on scientific evidence to advance that sexual orientation was not a choice.<sup>225</sup> The insertion of sexual orientation in the equality clause paved way for the advancement of LGBTIQ rights in many other spheres.

### **4.2.3 Decriminalization of Sodomy in South Africa**

The 1993 Interim Constitution of South Africa established South Africa's Constitutional Court.<sup>226</sup> The initial mandate of the Constitutional Court was to ensure that the Final Constitution as enacted by Parliament after the first ever democratic elections in post-apartheid South Africa was in line with the values laid down in the 1993 Interim Constitution.<sup>227</sup>

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*following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language”.*

<sup>221</sup> Section 9 of the 1996 Constitution of South Africa

<sup>222</sup> Jeremy Sarkin, “*The Drafting of the South African Constitution from a Human Rights Perspective*”, Vol. 47, [1999] *The American Journal of Constitutional Law*, 67

<sup>223</sup> CHRISTIANSEN, *supra* note 209

<sup>224</sup> National Coalition for Lesbian and Gay Equality, Submission to the Constitutional Assembly, 8

<sup>225</sup> *ibid*

<sup>226</sup> Section 8 (2)

<sup>227</sup> CODESA, chaired by the then South Africa's Chief Justice, Corbett and Justices Ismail Mohamed and Petrus Schabort commenced meetings on constitutional talks in December 1991. The talks were attended by various political parties including ANC and the NP. The ANC wanted CODESA to draft a minimalistic constitution that would merely guide the 1993 democratic elections. The NP on the other hand wanted a more permanent constitution that would guarantee the constitutional protection of the white minorities. After negotiations and as a compromise, it was agreed that CODESA would draft an interim constitution but that this interim constitution

Since the adoption of the 1996 Constitution, the Constitutional Court has been hearing cases and making determination on the constitutionality or otherwise of actions and legislations and granting remedies thereof. The South Africa's Constitutional Court has interpreted the equality clause in a very broad manner. The Court has even on occasion "read in" certain words into statutes in order to ensure full realisation of the right to non-differential treatment and equality of the LGBTIQ Community. The cases discussed in this chapter do not represent even a fraction of all the equality cases the South African Constitutional Court has decided on. They were however selected because they are considered land mark cases.

While most countries agree that human beings are equal and therefore deserving of all human rights, there appears to be a bit of uncertainty when this statement is extended to members of the LGBTI community.<sup>228</sup> LGBTI rights have for the longest time not been looked at from the human rights lenses and instead they have been looked at as moral, religious and cultural issues, thus limiting their personhood to sex.<sup>229</sup> South African's Constitutional Court has been instrumental in the advancement of the rights of the LGBTI Community in South Africa. The Court has repeatedly acknowledged the dignity and equality of homosexuals in its numerous decisions.

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would contain safeguards in the form of some thirty-four principles that were intended to guide the drafting of the final constitution. The South African Constitutional Court was established under the Interim Constitution to ensure that the final constitution which was to be drafted by the Parliament after the 1993 democratic elections complied with the thirty-four principles (see CHRISTIANSEN, supra note 209 and "The Interim South African Constitution, South Africa;s History Online, towards a people's history" available at "<https://www.sahistory.org.za/article/interim-south-african-constitution-1993>" accessed on 06/10/19

<sup>228</sup> Adrian Jjuuko, *"the Protection and Promotion of LGBTI Rights in the African Regional System : Opportunities and Challenges in Protecting the Human Rights of Sexual Minorities in Contemporary Africa"*, in Sylvie Namwase and Adrian Jjuuko (ed) *"Protecting the Human Rights of Sexual Minorities"* (Pretoria University Press, 2017)

<sup>229</sup> *ibid*

South African's Constitutional Court has rejected alignment with the cultural relativist approach adopted by many African countries and has refused to legally differentiate between homosexuals and heterosexuals in all legal aspects.<sup>230</sup>

#### ***4.3.2.1 National Coalition for Gay and Lesbian Equal v Minister of Justice and Others***<sup>231</sup>

Most commonly referred to as *NCGLE v Minister of Justice*, this case challenged the constitutionality of sodomy laws under South Africa's Constitution.<sup>232</sup> The Constitutional Court unanimously held that of sodomy was unconstitutional, thereby affirming the lower court's ruling.<sup>233</sup> In holding that the same was unconstitutional because it violated the rights to dignity, privacy and equality, the Constitutional Court sought to answer three questions, that have since then formed the basis for determining differential treatment in cases: (1) Does the act discriminate? This question seeks to confirm whether people placed in a similar situation, under similar circumstances are being treated differently under the law.<sup>234</sup> If the answer is yes, then the Court proceeds to ask: (2) is the differential treatment unfair? Any form of differential treatment is considered unfair whenever it is founded on any of the

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<sup>230</sup> "Cultural relativism has been relied on by many African countries whenever the question of the rights of the LGBTIQ has arisen. Cultural relativism, as a concept advances that culture is the principal validity of moral rights or rules (see Donnley, supra note 30). Cultural relativism contradicts the concept of universality of human rights because what is acceptable/ moral and thus considered a right or a rule varies from community to community. The danger of cultural relativism, as argued by Uchechukwu is that communities will often rely on what culture says even when the same does not benefit the community (see UCHECHUKWU, supra note 36). The opposite of cultural relativism and a concept South Africa and a majority of western countries have instead agreed to adopt when it comes to the rights of the greater LGBTIQ community is the concept of universality of human rights. The principal of universality of human rights advances that human rights are inherent and universal. They accrue to one simply by virtue of them being human, thus making all human beings equal regardless of culture, geographical position, history, gender and any other factor that could be argued".

<sup>231</sup> CCT 11/98

<sup>232</sup> Sexual Offences Act of 1957, Section 20A (1) provides: "A male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or to give sexual gratification shall be guilty of an offence".

<sup>233</sup> *National Coalition for Gay and Lesbian and Others v Minister of Justice and Others* 1998 (C)BCLR (W) see paragraph 2

<sup>234</sup> "The Court of first instance in this matter (the High Court of Witwatersrand) in striking down the common law offence of sodomy determined that the offence of sodomy criminalizes acts committed by a man or between men which, if committed by a woman or between women or between a man and a woman, would not constitute an offence" see *National Coalition for Gay & Lesbian Equal. & Others v. Minister of Justice & Others* 1998 (6) BCLR 726 (W") at paragraph 2



ground listed under Section 9 of the Constitution of South Africa i.e. it is founded on race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.<sup>235</sup> If the Constitutional Court determines that indeed the differential treatment is not fair, then question that follows is whether the unfair differential treatment is justified. Although unfair, differential treatment may be justified by relying on the limitation clause.<sup>236</sup>

Application of the limitation clause requires the Court to place on the other side of the scale competing rights. These competing rights may include the rights of others, State rights or even the interests of the child as discussed in chapter three of this Study. If there is no justification for the unfair differential treatment, then the Court must declare the differential treatment unconstitutional.<sup>237</sup> In the case in question, the Constitutional Court determined that there were no competing interests to be placed on the other side of the weighing scale thus making the unfair differential treatment unjustified and unconstitutional.<sup>238</sup> The landmark decision in the NCLGE has been instrumental in cases that followed.

## **4.2.4 Right to Family**

### **4.2.4.1 Recognition of Permanent Relationships and the Right to Marriage**

Following the decision in NCLGE v Minister of Justice, the Constitutional Court of South Africa has repeatedly confirmed the right of gays and lesbians to receive treatment that is equal to that accorded to heterosexual couples.<sup>239</sup> Some of these land mark decisions that

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<sup>235</sup> As sodomy laws only targeted sexual activities between men, the differential treatment was unfair.

<sup>236</sup> Section 36(1) of the 1996 Constitution provides as follows: “*The rights of the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality[,] and freedom, taking into account all relevant factors, including— (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose*”

<sup>237</sup> CHRISTIANSEN supra note 209

<sup>238</sup> See paragraph 27

<sup>239</sup> *National Coalitional for Gay and Lesbian Equal v Minister of Home Affairs and Others* 1999 (2) South Africa 1(CC) a

have equalled the playing field for homosexual and heterosexual permanent relationships are discussed below:

#### ***4.2.4.1 National Coalition for Gay and Lesbian Equal v Minister of Home Affairs and Others***<sup>240</sup>

The case challenged the constitutionality of section 25(5) of the South African Aliens Control Act 96 of 1991. The contention with this section was that it afforded certain benefits to spouses but failed to afford similar benefits to homosexual partners in permanent relationships. The Constitutional Court declared the section unconstitutional on grounds of marital status and sexual orientation. The Constitutional Court opined that the message communicated as a result of the omission of the word “partners” in same-sex life partnerships was that homosexuals did not have the inherent humanity to have their families protected and/ or respected the same way heterosexual relationship were protected and/ or respected. Section 25 of the Aliens Control Act violated the equality clause in the South African Constitution in a way that was not justifiable in “an open and democratic society based on human dignity, equality and freedom”.<sup>241</sup>

In concluding, the Constitutional Court considered the nature of homosexual relationships and homosexuals as being “capable of constituting a family, whether nuclear or extended, and of establishing, enjoying[,] and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses”.<sup>242</sup>

After making its determination that the said section was unconstitutional, the Constitutional Court faced difficult question of how to remedy the unconstitutionality, given the strict and

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J and B 2003 (5) South Africa 621 (CC)

<sup>240</sup> 1999 (2) SA 1 (CC)

<sup>241</sup> Section 9 of the 1996 South African Constitution

<sup>242</sup> See paragraphs 44, 45, 46.

clear lines of separation of powers that exist in open democracies such as South Africa. The Constitutional Court considered two options: (1) to strike down the provision altogether; or (2) to “read in” the same benefits available to heterosexual spouses under that section to permanent same-sex partners as a way to cure the inconsistency. Striking down the provision altogether would have meant that such benefits would not be available to either heterosexuals or homosexuals in permanent unions. Such a move would mean that equality can only be achieved through stripping away otherwise legitimate rights. The Court instead decided to “read in” words into the section, the result of which was whenever the section mentioned “spouses”, the Constitutional Court read in “or partner in a permanent same-sex life relationship”.<sup>243</sup>

#### **4.2.4.2 *Fourie v Minister of Home Affairs***

While the South African Marriage Act of 1961 made no mention of sex when conferring one’s right to marry, it required the officiating officer to ask the parties “Do you, *A.B.*, declare that as far as you know there is no lawful impediment to your proposed marriage with *C.D.* here present, and that you call all here present to witness that you take *C.D.* as your lawful wife (*or husband*)?” after which the parties to the marriage shall hold each other’s right hand and the officiating officer shall pronounce the marriage solemnised by saying: “I declare that *A B* and *C D* here present have been lawfully married”<sup>244</sup> thus implying that parties to a marriage have to be of the opposite sex.

The petitioner and her girlfriend Ms. Cecelia Bonthuys had dated for close to ten years by the time they were seeking legal recognition of their relationship.<sup>245</sup> Pursuant to Section 9 of the South African Constitution, all the nine judges who heard the case determined that the

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<sup>243</sup> See paragraph 28.

<sup>244</sup> Section 30 (1)

<sup>245</sup> *Fourie v Minister of Justice* 2005 (1) SA 524 (CC)

definition of marriage under common law was unconstitutional as it promoted differential treatment on based on sexual orientation, a prohibited ground for differential treatment.

Similar to other cases that have relied on Section 9 of the South African Constitution, the Court held that *“Taking account of the decisions of this court, and bearing in mind the symbolic and practical impact that exclusion from marriage has on same-sex couples, there can only be one answer to the question as to whether or not such couples are denied equal protection and subjected to unfair differential treatment. Clearly, they are, and in no small degree”*.<sup>246</sup>

#### ***4.2.4.3 Du Toit and Another v Minister of Welfare and Population Development and others***<sup>247</sup>

Because of their inability to conceive children naturally, alternative ways of becoming parents (to homosexual couples who wish to become parents) are always welcomed. Child adoption is one of the few alternatives that exist for such couples.

Unlike Kenyan law which from the onset prohibits adoption of children by homosexuals, South African law did not prohibit single homosexuals from adopting children. Prior to the hearing and determination of the Du Toit case, homosexual couples were not allowed to jointly adopt children.<sup>248</sup>

The landmark case of Du Toit and others challenged the ban on unmarried homosexual couples from adopting children on three grounds. The first ground was that the ban unfairly discriminated against the petitioner and her partner based on their sexual orientation and marital status. To this end, the Constitutional Court held that the ban *“perpetuated the fiction or myth of family homogeneity based on the one mother/one father model. It ignored*

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<sup>246</sup> See paragraph 78

<sup>247</sup> 2003 (2) SA 198 (CC)

<sup>248</sup> Child Care Act and Guardianship Act

*developments that have taken place in the country, including the adoption of the Constitution*".<sup>249</sup> The second ground was that the ban violated the petitioner's right to dignity and the third ground was that the ban violated principal of the best interests of the child which the Constitutional Court opined that the ban "defeated the very essence and social purpose of adoption which is to provide the stability, commitment, affection and support important to a child's development"<sup>250</sup> and further that the effect of such prohibitions is the eventual denial of a child off a stable home to grow up in.<sup>251</sup>The petition was unopposed and the Constitutional Court ruled that the ban was unconstitutional on all three bases. To remedy the inconsistency, the Constitutional Court "read in" the words "or permanent same-sex life partner" whenever the words "wife" or "husband" appeared.<sup>252</sup>

### **4.3 Is the Equality Clause Enough for South Africa?**

The above cases and many others not mentioned in this chapter are reflective of the positive impact the insertion of the phrase "sexual orientation" in South Africa's Constitution has had on the evolution of the rights of homosexuals in South Africa. This inclusion has accorded them status equal to those accorded to heterosexuals in all aspects before the law. The above cases are also reflective of the commitment of the South Africa's Constitutional Court to uphold the South African Constitution and to promote equal treatment of all under the law.

The unequivocal inclusion of the phrase "sexual orientation" as a ground for non-differential treatment as opposed to somewhat blanket and umbrella protections in equality clauses in the form of phrases such as "including" as is the case in the Kenyan Constitution show a clear commitment by South Africa to ensure the inclusion and protection of all, notwithstanding their sexual orientation. As seen in this chapter, it is as a result of this inclusion that various

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<sup>249</sup> See paragraph 28

<sup>250</sup> See paragraph 21

<sup>251</sup> See paragraph 22

<sup>252</sup> See paragraph 28

laws have been amended to safeguard the protection and inclusion of the LGBT community at large.

Evert Kroesen, the Coordinator of Equal Rights Project at the Equality Project (formerly NCGLE) rationalised the order of the different cases litigated by NCGLE by stating that before anything, there was need to first ensure the decriminalization of sodomy as sodomy laws were often used as a justification for the unequal treatment of homosexuals. After removal of the sodomy barrier, the next step was to ensure that homosexuals are able to get into legally recognised relationships and last but not least, that homosexuals enjoyed the same economic benefits available to heterosexuals.<sup>253</sup> Legally, there is no doubt that their litigation strategy was successful.

South African stance on the recognition and protection of homosexuals is particularly impressive considering most countries in Africa still criminalise sodomy, with some such as Nigeria issuing death sentences to people found guilty of engaging in homosexual conduct.

Generally, the legal victories recorded by South Africa are remarkable. Studies however show that the victories and liberties are enjoyed, largely in theory. The situation on the ground is slightly different.<sup>254</sup> LGBTs in South Africa, particularly from poorer communities continue to face hostility and violence.<sup>255</sup> The State, as enforcers of legal and constitutional protection has been blamed for failing to adequately ensure the protection of the LGBT community at large, thus resulting in the perpetuation of violence towards the LGBT community.<sup>256</sup>

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<sup>253</sup> “IGLHR interview by Scott Long with Evert Knoesen, Equality Project, Johannesburg, South Africa, November 21, 2001 in Scott Long, A. Widley Brown, Gail Cooper, Human Rights Watch Organization, *More Than a Name: State Sponsored Homophobia and its Consequences in Southern Africa*, (Human Rights Watch, 2003)” 184

<sup>254</sup> ROSENBLOOM, *supra* note 209

<sup>255</sup> WEKESA SETH, *supra* note 19

<sup>256</sup> Human Rights Watch “*We’ll Show You You’re a Woman: Violence and Differential treatment against Black Lesbians and Transgender Men in South Africa*” (Human Rights Watch ,2011)

Similar to Kenya and majority of African countries, homosexuality in South Africa has on various occasions been termed un-African. Culture and religion have a lot to do with this perception, despite studies showing that homophobia and prejudice was a tool used during the apartheid. Legal and judicial progress in the absence of social education has proven ineffective for South Africa. In addition to legal protection, there is need for increased awareness, even in South Africa.

#### **4.4 Lessons Learnt from South Africa**

The key objective of this Chapter was to study the rights of South African homosexuals and see how South Africa has dealt with this community of persons and thereafter make recommendations based on the lessons learnt from South Africa. Among the lessons learnt from South Africa are:

- a) The impact that civil organisations and NGO's can have towards directing a country to safeguard rights of sexual minorities: NCGLE was instrumental in South Africa's fight towards freedom of sexual orientation. They not only mobilised insertion of sexual orientation in South Africa's Constitution, they have also litigated cases that have ensured the realisation of the right to equality and non-differential treatment.
- b) The importance of the unequivocal insertion of sexual orientation as a prohibited ground for differential treatment in a country's Constitution: even with a progressive Constitution, Kenya has thus far been unable to secure the rights of homosexuals. Had the drafters included sexual orientation as a prohibited ground for differential treatment, there would have been a much stronger basis to fight differential treatment of the basis of sexual orientation, although this is not to imply that there is currently no basis to fight for the right to non-differential treatment and equality of homosexuals. South Africa's inclusion can however not be overlooked as it has provided the basis for legislative change in matters concerning homosexuals.

- c) The role of courts in promotion of homosexual rights: South African Constitutional Court has been key in advancing rights of homosexuals. The Court has not shied away from delivering liberal judgements that have seen homosexuals in South Africa enjoy the right to marry and start families. The Court has gone as far as “reading in” words where none existed to ensure South African homosexuals rights and privileges similar to those available to heterosexual couples. The Court has on occasion directed Parliament to adopt legislation that guarantees equal protection and benefits for both homosexuals and heterosexuals.

## **Conclusion**

This chapter provided insights into South Africa. It looked into the history of South Africa and various multiple factors that attributed to the insertion of sexual orientation as a prohibited ground for differential treatment, before looking into the impact of this inclusion in terms of legal consequences and social consequences. Legally, the inclusion has resulted in many victories. The law has however been unable to change attitudes and perceptions.



## **CHAPTER FIVE**

### **CONCLUSION AND RECOMMENDATIONS**

#### **5.1 Conclusion**

Chapter One introduced and laid down the framework for the study. It laid down the statement of the problem and justified the study on the basis that whereas a lot of material exists on the topic of the LGBT community, the question of the ban on homosexuals from adopting children from a Kenyan perspective has never been answered. Chapter One also listed the research questions the study is geared towards answering and attempted a hypothesis for the study. Chapter One outlined the theoretical framework on which the study is based upon. The Chapter equally had a section for literature review and this section revealed that indeed no other human rights issue has given rise to such controversy as that concerning sexual orientation. The Chapter concluded by outlining what is to be expected in the subsequent chapters.

Chapter two investigated the basis of not just the ban on homosexuals from adopting children under Kenyan law but also the basis for the continued differential treatment and prejudice against homosexuals. The Chapter categorises these factors as religious, cultural, legal, political, social and the politics surrounding gender. The role of the media in terms its depiction of homosexuals is also mentioned in passing. The Chapter looks into how religion has influenced society's treatment of homosexuals, not just socially, but also legally. The Chapter questions the place of religion in light of Article 8 of the Constitution of Kenya. Under legal factors, the Chapter investigates the history of sodomy laws and concludes that they were adopted into Kenyan law during the colonial period. The Chapter also looks into cultural factors that have affected the treatment of homosexuals and concludes that while many may term homosexuality as un-African, homosexuality was actually tolerated in

traditional African society and that what is in fact un-African is homophobia. The political factors look at how politics and political leaders have influenced society's perception of homosexuals and contributed to the prejudice suffered by them. The Chapter also looks at how the gender dynamics of patriarchy have contributed to the negative perception of homosexuals. The Chapter concludes by debunking the myth around social factors and in particular, that the child will be made fun of by their peers, that they will grow up to be homosexuals and that the homosexual parent will molest the child.

Chapter three of the study investigated the constitutionality of the ban on homosexuals from adopting children under Kenyan law. The Chapter measured the ban against various constitutional provisions, particularly, the provision conferring the right non-differential treatment and equal treatment, the right to family, the inclusion of international law as part of the laws of Kenya and the provision on the child's best interest. The Chapter concluded that the ban was unconstitutional.

Chapter four delineated South Africa as best practice in the area of legal recognition and protection of homosexuals and provides a comparative study of the same. The Chapter looks into the South Africa's history and considers the factors that resulted in the insertion of the sexual orientation in South Africa's equality clause. The Chapter then looks at the effect this inclusion has had in litigating cases involving LGBT rights. The Chapter concludes by deliberating on the social impact of the insertion of sexual orientation in South Africa's Constitution.

## **5.2 Recommendations**

### **5.2.1 Recommendations to Political Leaders**

Political leaders have in several occasions made negative, and at times inciteful comments against the LGBT community. Political leaders ought to realise how much influence and

sway they have over the citizenry and thus to exercise caution when making public statements that touch on the LGBT.

### **5.2.2 Recommendations to Religious Leaders**

This study recommends that in light of how influential religious leaders are, especially with regard to the attitudes of their followers, religious leaders, like political leaders should stop spreading the messages of exclusion and violence against homosexuals and instead they should preach love, tolerance and acceptance. Without endorsing homosexuality, religious leaders can still promote love, tolerance and acceptance.

### **5.2.3 Recommendations to Legislators**

Repealing sections of the Penal Code that criminalise sodomy may alleviate the differential treatment and prejudice suffered by the LGBT community, at least in part. Repealing section 158(3) of the Children Act will also ensure the homosexual's right to family, albeit in part. It is also recommended that legislation that categorises differential treatment founded orientation as hate crimes be adopted. This will go a long way in safeguarding homosexuals from degrading comments and treatment.

### **5.2.4 Recommendations to Courts**

Applying the nexus test in cases involving child custody where one of the parents is a homosexual will go a long way in showing that sexual orientation does not determine ones parenting skills, styles and abilities.<sup>257</sup>

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<sup>257</sup> The nexus test requires that for sexual orientation to be one of the determining factors in child custody cases, the parent's sexual orientation must adversely affect the child. Some of the harms considered under the nexus test includes; social stigma resulting from the parent's social orientation, exposure to an immoral lifestyle and harm to the child's sexual identity (under the assumption that being raised by a homosexual parent increases the likelihood of a child growing up to be homosexual). See Emily Haney-Caron and Kirk Heilburn "*Lesbian and Gay Parents and Determination of Child Custody: The Changing Landscape and Implications of Policy and Practice*" 2014 Vil. 1 Psychology of Sexual Orientation and Gender Identity

It is also recommended that courts adopt a liberal interpretation of the Bill of Rights as contained in the Constitution of Kenya in order<sup>4</sup> to eliminate the need for a special set of laws that exclusively safeguard the LGBT community. As discussed in chapter three of this study, the protection of people as a result of their sexual orientation requires the enforcement of the right to non-differential treatment and equality.

### **5.2.5 To Media Houses**

It is recommended that media houses do not air shows that display homosexuality as an illness or a perversion but instead, air shows that portray homosexuals as capable as heterosexuals in the different spheres of life including work, school, friendships and family.

It is also recommended that the issues surrounding homosexuals including the different forms of differential treatment are aired fruitful discussions around the issues take place. Media houses should not fail altogether to air not just homosexual issues and stories, but issues and stories surrounding the greater LGBT community.

### **5.2.6 To Human Rights Organisations and Civil Society**

Mobilising the society while relying on science and a legal framework that promotes equal treatment of people and prohibits differential treatment on any basis is a good place to start. Liaising with experts such as psychologists, human rights experts and judges and publishing reports and making them public will help raise awareness on the differential treatment suffered by homosexuals and in lobbying for laws that promote equality and non-differential treatment. This study recognises that during the period in which public opinion was sought prior to the drafting and adoption of the Constitution, calls were made by members of GALCK to include sexual orientation as a ground for non-differential treatment in order to guarantee the protection of sexual minorities in Kenya. Such calls were however ignored.

Mobilising the society towards a preferable end therefore will not be easy. Progressive steps are however recommended.



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