

**RIGHT TO EQUALITY AND NON-DISCRIMINATION:
FREEDOM OF ASSOCIATION OF SEXUAL MINORITIES IN
KENYA**

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Master of Laws Degree

DECLARATION

I, Nadiya Aziz, do hereby declare that this is my original work and 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.

Name: Dr. Seth Wekesa

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DEDICATION

This thesis is dedicated to my wonderful mother for her love, encouragement, guidance and never ending support.

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First and above all, I praise the Almighty Allah for giving me the strength and courage to finish this thesis.

I wish to thank my Mummy for always being there for me and being the strength I needed when all I wanted to do was give up.

I deeply appreciate my supervisor, Dr. Seth Wekesa for all his supervision and guidance. My thesis would not have been what it is without your invaluable comments.

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LIST OF ACRONYMS AND ABBREVIATIONS

APA	American Psychiatric Association
Cap.	Chapter
CAT	The Convention against Torture
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CoE	Committee of Experts
CSO	Civil Society Organizations
ECOSOC	Economic, Social and Cultural Council
HCCC	High Court Civil Case
HIV	Human immunodeficiency virus
HRC	Human Rights Committee
ICCPR	The International Covenant of Civil and Political Rights
ICESCR	The International Covenant of Economic, Social and Cultural Rights
ILO	International Labour Organisation
IPA	Indonesian Psychiatric Association
KHRC	Kenya Human Rights Commission
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
NGO	Non-governmental organization
No.	Number
OHCHR	The Office of the High commissioner for Human Rights
UDHR	The Universal Declaration of Human Rights
Para.	Paragraph
UN	The United Nation
US	The United States of America

ABSTRACT

Sexual minorities continue to face violation of their fundamental rights and freedoms despite significant development in codification of human rights. The primary purpose of this study is to examine the right to equality and freedom from discrimination of sexual minorities in Kenya in relation to their freedom of association. A desk study was carried out where existing literature and laws were examined. The first objective was to look at the underlying reasons for the discrimination that the sexual minorities face including political, religious and cultural views on sexual minorities. The other objective was to scrutinize the international and regional position on the fundamental rights and freedoms of the sexual minority. The last objective was to examine the rights in light of the *Eric Gitari v. Non-Governmental Coordination Board & 4 others* case.¹

The research indicated that the sexual minorities in Kenya are unable to enjoy the constitutionally guaranteed rights and freedoms and continue to face discrimination because of their sexual orientation. The reluctance of the Non-Governmental Organizations Coordination Board to register an association that would allow the sexual minorities to have a platform to deliberate on their situation and advocate for their rights is one such violation. Religion and morals are often used as a justification to continue violations of the rights and freedoms of sexual minorities.

To overcome this dire situation, the Government of Kenya and religious leaders should exercise caution when making statements relating to the LGBTI community. They ought to also inform the public that everyone is entitled to rights and freedoms under the Constitution. Parliament needs to be open to repeal all laws that contravene the Constitution and enact policies and laws that will ensure that the sexual minorities are able to enjoy the rights and freedoms like all other members of society. Courts play a fundamental role in bringing change and advancing jurisprudence. They therefore ought to understand the role they play and make judgements and implement interpretations that most favour the enforcements of rights and freedoms.

¹ Petition No. 440 of 2013 [2015] eKLR.

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CHAPTER ONE

INTRODUCTION TO THE STUDY

1.1 Background to the Study

There has been remarkable development in international human rights law in the recent past. Human rights are described as those rights that are intrinsic in all human beings, i.e. those rights that one has because they are human.² The Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights and the two Optional Protocols³ make up the International Bill of Human Rights.⁴ The International Bill of Rights does not explicitly make reference to lesbian, gay, bisexual, transgender and intersex (LGBTI⁵) rights. Regardless of this, developing notions of universal human rights law comprise a comprehensive interpretation to include the privileges and the protection of the rights of LGBTI community.⁶

Homosexuality is found all over the world including the African continent and there have been major developments in terms of the recognition of rights of the sexual minorities particularly in the western world.⁷ The American case of *Obergefell et Al. v. Hodges* is a recent landmark case where the Court held that the fundamental right to marry is guaranteed to couples of the same-sex by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States (US) Constitution.⁸ Despite this case and increase in worldwide campaigns for LGBTI rights, it has been found that the sexual minorities are still anguished by discrimination and prejudice.

² Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2013).

³ The two Optional Protocols are Optional Protocol to the International Covenant on Civil and Political Rights and the Second Optional Protocol to the International Covenant on Civil and Political Rights.

⁴ Christopher Roberts, *The Contentious History of the International Bill of Human Rights* (Cambridge University Press 2014).

⁵ LGBTI will be used interchangeably with the sexual minorities throughout this thesis.

⁶ 'About LGBT Human Rights' (*Amnesty International*) <<http://www.amnestyusa.org/our-work/issues/lgbt-rights/about-lgbt-human-rights>> accessed 11 April 2016.

⁷ Bisi Alimi, 'If You Say Being Gay is Not African, You Do Not Know Your History' (*The Guardian* 9 September 2015) <<http://www.theguardian.com/commentisfree/2015/sep/09/being-gay-african-history-homosexuality-christianity>> accessed 28 November 2015.

⁸ [2015] 576 US.

The Constitution of Kenya, 2010 (“Constitution”) signaled a new epoch in the Kenyan legal system particularly in the human rights field.⁹ Noting this, engaging in homosexual activities is a criminal offence under the Penal Code.¹⁰ Section 162 criminalizes same-sex sexual activity. It is an offence to have “carnal knowledge of any person against the order of nature” and is punishable by 14 years imprisonment.¹¹ Section 165 is broad and besides criminalizing “acts of gross indecency” between men, it criminalizes the attempt to engage in or arrange homosexual acts in both public and private.¹²

The supreme law of the land, the Constitution guarantees certain rights to all individuals including the right to life;¹³ equality and freedom from discrimination;¹⁴ human dignity;¹⁵ freedom and security of person that comprises safeguarding from cruelty, inhuman or humiliating treatment;¹⁶ privacy;¹⁷ freedom of expression;¹⁸ freedom of association;¹⁹ the uppermost possible standard of health;²⁰ education;²¹ and access to justice.²²

The Constitution also enumerates equality as one of six vital principles on which governance should be founded.²³ Nonetheless, Article 27(4) of the Constitution does not explicitly forbid discrimination on the basis of sexual orientation.²⁴ The list provided for in Article 27(4) is however not exhaustive. Article 259(4)(b) states that the word “includes” which is used in Article 27(4) means “includes, but is not limited to.” Despite this non-discrimination

⁹ Smith Otieno, ‘Transformative Constitutionalism: Contextualizing Human Rights Application under the Constitution of Kenya.’ (2010) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2439158> accessed November 21, 2015.

¹⁰ Cap. 63, Revised Edition 2014 (2012), Laws of Kenya.

¹¹ Penal Code, Section 162.

¹² Penal Code, Section 165.

¹³ The Constitution of Kenya, 27 August 2010 (Constitution of Kenya), Article 26.

¹⁴ *ibid*, Article 27.

¹⁵ *ibid*, Article 28.

¹⁶ *ibid*, Article 29.

¹⁷ *ibid*, Article 31.

¹⁸ *ibid*, Article 33.

¹⁹ *ibid*, Article 36.

²⁰ *ibid*, Article 43(1)(a).

²¹ *ibid*, Article 43(1)(1).

²² *ibid*, Article 48.

²³ *ibid*, Article 10 (2)(b); Article 10(2) specifically states that equality is one of the principles of governance that is to be used in applying and construing the Constitution and other laws, and in making or implementing policy decisions.

²⁴ Article 27(4) of the Constitution provides that “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.”

provision which could be argued to include sexual orientation, LGBTI Kenyans get physically, verbally and sexually abused.²⁵

To make matters worse for the LGBTI community, political leaders in Kenya have supported the criminalization of homosexuality. Kenya's former Prime Minister, Raila Odinga in 2010 stated that, "the Constitution is very clear ... If we find a man engaging in homosexuality or a woman in lesbianism, we'll arrest them and put them in jail."²⁶

The LGBTI community in Kenya is left exposed to blackmail and abuse because of anti-sodomy laws and vile views from political leaders. Victims are also discouraged from reporting crimes which gives the authorities the courage to mistreat the sexual minorities. Nonetheless, there is hope for the sexual minorities. In 2012, the former Chief Justice of Kenya – Justice Dr. Willy Mutunga affirmed that: "gay rights are human rights".²⁷ The Chief Justice's statement could be the light at the end of the tunnel that the sexual minorities in Kenya desperately need. Moreover, the High Court in Kenya in 2015 further grounded this affirmation in *Eric Gitari v. Non-Governmental Coordination Board & 4 others*.²⁸

This thesis will critically analyse the freedom of association of sexual minorities in Kenya in light of the right to equality and freedom from discrimination as enshrined in the Constitution. The study will also analyse the *Eric Gitari case* and the impact of the judgement. Although these rights have been protected in the highest law, the sexual minorities in Kenya are facing challenges including loss of life, assault, arrest, prosecution and stigma because of their sexual orientation.²⁹

²⁵ The Kenya Human Rights Commission conducted a series of interviews with 474 LGBT Kenyans aged eighteen to sixty-five to document their experiences of homophobia within the country. Kenya Human Rights Commission Report, 'The Outlawed Amongst Us: A Study of the LGBTI Community's Search for Equality and Non-discrimination in Kenya' (2011) (hereinafter referred to as 'The Outlawed Amongst Us') <https://www.goethe.de/resources/files/pdf31/THE_OUTLAWED_AMONGST_US_1.pdf> accessed 28 November 2016.

²⁶ Aliza I. Kassim and Lillian Leposo, 'Gay, Lesbian Groups Criticize Kenyan Leader's Remarks' (CNN, 30 November 2010) <<http://edition.cnn.com/2010/WORLD/africa/11/30/kenya.gay.reaction/>> accessed 27 November 2015.

²⁷ Andy Towle, 'Kenyan Chief Justice Willy Mutunga: 'Gay Rights are Human Rights' (Towleroad, 1 February 2012) <<http://www.towleroad.com/2012/02/mutunga/>> accessed 4th March 2016

²⁸ Petition No. 440 of 2013 [2015] eKLR (Hereinafter referred to as the "*Eric Gitari case*").

²⁹ Human Rights Watch, The Issue is Violence: Attacks on LGBT People on Kenya's Coast, 28 September 2015 (hereinafter referred to as 'The Issue is Violence') <<http://www.refworld.org/docid/560a35284.html>> accessed 18 November 2015.

1.2 Statement of Problem

The Kenya Human Rights Commission (KHRC) has reported that the sexual minorities in Kenya are unable to enjoy constitutionally guaranteed rights and freedoms.³⁰ One such violation is illustrated in the *Eric Gitari case*. In that case, the Non-Governmental Organizations Coordination Board³¹ declined to register a non-governmental organization (NGO) whose main focus was safeguarding the sexual minorities' rights. The High Court held that the Board had abused the constitutional provisions that guaranteed the freedom of association, the right to equality and freedom from discrimination. This study will seek to explore the reasons for the constant infringement of the rights of the LGBTI community and the impact of the judgement in the *Eric Gitari Case* on the rights of the sexual minorities in Kenya.

1.3 Justification of the study

The Kenyan Penal Code criminalises sodomy notwithstanding the protection accorded to the sexual minorities by the Bill of Rights in the Constitution. Further, the landmark decision in the *Eric Gitari case* while upholding the Constitutional provisions does not appear to have a significant positive impact on the sexual minorities in Kenya as yet. The reasons for this have been discussed.

This study will help policy makers not only recognise the setbacks in laws that are currently in place, but also appreciate Kenya's international obligations as a state party to various conventions. Human rights activists and the civil society will find this study beneficial in advocating for the rights of the sexual minorities. Furthermore, academicians' who intend to carry out similar studies in future regarding this sensitive topic will also benefit from this study.

1.4 Research Objectives

The primary research objective is to analyse the freedom of association in light of the right to equality and freedom from discrimination of the LGBTI community. The study will also revisit the High Court decision in the *Eric Gitari case* and critically explore the opportunities created as well as challenges faced in realizing these opportunities. To achieve this, this study

³⁰ Kenya Human Rights Commission Report, 'The Outlawed Amongst Us' (n25).

³¹ Hereinafter referred to as "The Board".

specifically looks at the political, religious and cultural views on the LGBTI people. It subsequently explores the international and regional instruments that touch on the protection of LGBTI rights. It then critically assesses the *Eric Gitari case* while finally looking at what Kenya and various organs can do to improve the situation of the sexual minorities. It will also examine what the organs can do to help in the realization and recognition of the fundamental rights and freedoms.

1.5 Research Questions

The research questions for this study are:

1. What are the political, religious and cultural views on the sexual minorities and their rights in Kenya?
2. What is the international and regional position on rights of sexual minorities?
3. What are the implications of the *Eric Gitari case* on the rights of the sexual minorities in Kenya?
4. What lessons can be drawn from the study that will assist the sexual minorities to enjoy the right to equality and freedom from discrimination and freedom of association in Kenya?

1.6 Hypothesis

This study is driven by two main hypotheses:

1. The legal, social and religious context of Kenya constrains the enjoyment of constitutionally guaranteed fundamental rights and freedoms by the sexual minorities.
2. It is the mandate of the courts in Kenya to enhance the protection of the fundamental human rights and freedoms of all persons in Kenya including the sexual minorities.

1.7 Literature Review

One of the studies carried out on the rights of the LGTBI community in Kenya was done after the promulgation of the Constitution and focused mainly on repealing the anti-sodomy laws.³² It found that LGBTI Kenyans continue to suffer verbal and bodily harm, sexual

³² Courtney E. Finerty, 'Being Gay in Kenya: The Implications of Kenya's New Constitution for its Anti-Sodomy Laws' (2012) 45(2) Cornell International Law Journal, 431-459
<<http://scholarship.law.cornell.edu/cilj/vol45/iss2/4>> accessed 26 November 2015.

violence, and societal banishment, and are subject to detention on the basis of their sexual orientation.³³ Further, it observed that Kenyan penal laws instil fear, aid cruelty, and inhibit LGBTI Kenyans from realising equality that they are lawfully eligible to.³⁴ It did not however look deeply into the reasons for the discrimination that LGBTI people face, but suggested that Kenya's anti-sodomy laws play a vital part in these abuses. The writer concluded that these laws create situations that make violence conducive and openly infringe the right to equality and freedom from discrimination by sending a general message that LGBTI persons are different from the heterosexual Kenyan society.³⁵

In 'Outlawed Amongst Us', it was found that members of the sexual minorities faced violence because of their sexual orientation.³⁶ The study found that human rights abuses against LGBTI Kenyans are methodical, widespread and usually not remedied by the state.³⁷ Although the study found that the sexual minorities were discriminated against and faced stigma, just like the previous study, it did not delve deeply into why people were discriminating against the sexual minorities, but alluded to the criminalization of same sex sexual practices by Kenyan laws as well as culture as being the most probable reasons.

Both the above studies however agree that human rights activism and retorts by civil societies to human rights exploitations against LGBTI persons have been rare, conservative and deficient in tactical attention. The two studies also agree that the interferences seldom focus on the actual basis of the problem (criminalization) and also do not build on previous reactions.

This study will analyse the various views advanced by publications and research on homosexuality, and the reasoning and evidence behind such views. The analysis will be conducted from a political, religious and cultural standpoint, and will also compare the protection of the right of the LGBTI people in the international, regional and local regimes.

Furthermore, it has been found that the sexual minorities not only face physical violence, but

³³ *ibid.*

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ Kenya Human Rights Commission Report, 'The Outlawed Amongst Us' (n25).

³⁷ *ibid.*

non-violent human rights abuses as well.³⁸ A study conducted in Zimbabwe found that intimidation and blackmail were a prevalent form of abuse meted upon LGBTI people in Zimbabwe.³⁹ Further, the KHRC study recognises that the members of the sexual minorities in Kenya also suffer blackmail and extortion and these cases have not been tabulated and assessed.⁴⁰ The reason for this is that some of the affected persons are in respectable professional occupations and would not like to be associated with the stigma that would potentially follow the reporting of such cases.⁴¹ The study further states that there is therefore lack of information on which violations are more dominant - the physical violent ones or the non-violent ones.

Moreover, a study by the University of Toronto states that members of the LGBTI community get expelled from school, dismissed from work, declined to get medical treatment and also get detached from their family.⁴² A study conducted by Blaine Brownell viewed the above adversities as “oppressions” that have historically been faced by LGBTI people.⁴³ He finds that these oppressions fuelled homophobia and kept the homosexuals invisible for a long time.⁴⁴

The stigma referred to above has been advanced as the main reason that members of the sexual minorities may not be willing to participate in studies.⁴⁵ Further, it has been suggested that this may actually be the reason for the insufficient research of this minority group.⁴⁶ The members of the group believe that participating in studies will expose them, thereby resulting in violence against them. In certain cases it has been found that due to this fear of bias,

³⁸ Gloria Jacques, “‘Coming out’ or coming in? Social exclusion of sexual minorities in Africa: Challenges for Social Work Education and Practice” (2014) 26(1) *Journal of Gay & Lesbian Social Services*, 91-110 <<http://www.tandfonline.com/doi/abs/10.1080/10538720.2013.829396>> accessed 17 January 2016.

³⁹ Oliver Phillips ‘Blackmail in Zimbabwe: Troubling Narratives of Sexuality and Human Rights’ (2009) 13(2-3) *The International Journal of Human Rights*, 345-364 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1698562> accessed 16 January 2016.

⁴⁰ Kenya Human Rights Commission Report, ‘The Outlawed Amongst Us’ (n25).

⁴¹ *ibid.*

⁴² ‘Sexual Orientation and Gender Identity research’ International Human Rights Program (University of Toronto, School of Law).

⁴³ Blaine Brownell, ‘Attitudes Towards Lesbian and Gay Men’ (Chapter two).

⁴⁴ *ibid.*

⁴⁵ Geoffrey A. Jobson and others, ‘Transgender in Africa: Invisible, inaccessible, or ignored?’ (2012) 9(3) *Journal of Social Aspects of HIV/AIDS*, 160-163 <<http://www.ajol.info/index.php/saharaj/article/view/83581/73609>> accessed 22 February 2016.

⁴⁶ *ibid.*

members of the sexual minorities are even afraid of seeking medical help when they need it.⁴⁷ This is a non-violent abuse of the right to health.⁴⁸ In fact, a correlation between LGBTI people who had experienced homophobia and human immunodeficiency virus (HIV) has been established.⁴⁹ The relationship was that the higher the homophobia episodes they experienced, the more the chances that they were HIV positive.

In the cases where LGBTI people actually visit a healthcare facility, disclosing their identity to the health care workers is usually a significant challenge. It was found that only close to a quarter of Swazi homosexual men revealed their sexual orientation to health care workers.⁵⁰ However, only 323 men participated in this study which limits its applicability to all members of the LGBTI community. The findings of the study are still important to show that the homosexual men experienced fear when accessing healthcare facilities.⁵¹ Matebeni et al. focused on the challenges that the sexual minorities face when opening up to health care workers.⁵² They found that the focus was not on the HIV positive status but rather on the sexual orientation.

The study by the University of Toronto identifies the illegalization of homosexuality and religious standards as being at the heart of anti-LGBTI attitudes in Kenya.⁵³ Nonetheless, the study does not explore the presence of homosexuality in Africa in pre-colonial Africa in detail which this study will examine. The study further pointed out that religion influences views on homosexuality in Kenya but it did not probe the specific interpretations of the two major religions in Africa – Christianity and Islam. This study will look at the interpretation of homosexuality by both Christians and Muslims in Kenya and it will also examine the counter views to the traditional religious views.

⁴⁷ Heather Fay and others, 'Stigma, Health Care Access, and HIV Knowledge Among Men Who Have Sex With Men in Malawi, Namibia, and Botswana' (2011) 15(6) AIDS and Behaviour, 1088-1097 cited in Gloria Jacques, "Coming out" or coming in? Social exclusion of sexual minorities in Africa: Challenges for Social Work Education and Practice'.

⁴⁸ Carl Kendall and others, 'Population Size, HIV, and Behavior Among MSM in Luanda, Angola: Challenges and Findings in the First Ever HIV and Syphilis Biological and Behavioral Survey' (2014) 66(5) Journal of Acquired Immune Deficiency Syndromes 544-551 <<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4733005/>> accessed 8 March 2016.

⁴⁹ *ibid.*

⁵⁰ Kathryn Risher and others 'Sexual stigma and discrimination as barriers to seeking appropriate healthcare among men who have sex with men in Swaziland' (2013) 16(3) Journal of the International AIDS Society <<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3833105/>> accessed 15th February 2016.

⁵¹ *ibid.*

⁵² Zethu Matebeni and others, "I thought we are safe": Southern African lesbians' experiences of living with HIV' (2013) 15(1) Culture, Health & Sexuality 39 <<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3696027/>> accessed 12 January 2016.

⁵³ Sexual Orientation and Gender Identity research (n42).

In conclusion, it has emerged from the studies examined that even though it is obvious that the LGBTI community faces discrimination in various forms on a continuous basis, the reasons for the same have not been considerably explored. At best, the studies vaguely suggest that political, religious as well as cultural views against same sex practices could be the cause of the abuse of rights against this minority community. This study therefore aims to look at inter alia the discrimination and palpable inequality faced by the LGBTI community against the back drop of Kenya's legal, social, cultural, political and religious landscape in order to unravel the reasons for the occurrence of the same, notwithstanding the provisions of the Constitution of Kenya, 2010 and the *Eric Gitari case*.

1.8 Theoretical Framework

The rights to equality and freedom from discrimination and the freedom of association are now enshrined in not only the Constitution but in almost every human rights treaty.⁵⁴ One of the oldest declaration of the right to equality was in 431 BC by the Pericles who was an Athenian leader when he stated:

If we look to the laws, they afford equal justice to all in their private differences; if no social standing, advancement in public life falls to reputation for capacity, class considerations not being allowed to interfere with merit; nor again does poverty bar the way.⁵⁵

Noting this, equality has been defined as a “treacherously simple concept”.⁵⁶ Despite this, there are various meanings of the concept of “equality”. When looking at the concept of equality, formal equality and substantive equality in the context of the sexual minorities have been explored.

‘Formal equality’ is the common and traditional approach in a variety of national legal systems.⁵⁷ It can be traced back to the Greek philosopher, Aristotle and his maxim that “things that are alike should be treated alike”. Aristotle construed equality as giving equals the same treatment or treating them equally. Aristotle also stated that there was a connection

⁵⁴ A thorough examination of this has been carried out in Chapter Three.

⁵⁵ Thucydides, *The History of the Peloponnesian War*, (431) B.C.E in Ivan Jureta, *Analysis and Decision of Advice* (Springer 2011).

⁵⁶ Rikki Holtmaat ‘The Fight Against Discrimination in the Daily Practice: The Concept of Discrimination’ (2004) Academy of European Law Conference Paper, 2 <http://www.era.int/web/en/resources/5_1095_2953_file_en.4193.pdf> accessed 2nd March 2016.

⁵⁷ Jarlath Clifford, ‘Locating Equality: from Historical Philosophical Thoughts to Legal Norms’ (2008) 1 The Equal Rights Review, 11-23 <<http://www.equalrightstrust.org/ertdocumentbank/LocatingEquality.pdf>> accessed 22nd April 2016.

between equality and justice. “Just ... is the lawful and the equal, and the unjust is the unlawful and the unequal.”⁵⁸ This means that for Aristotle if differences were recognised and the different groups were treated in an unequal manner because of their differences then injustice would not exist.⁵⁹ Aristotle’s interpretation implies “the notion of proportionality.”⁶⁰ This is enthused by the principle *suum cuique tribuere*.⁶¹ This was one of the three vital principles of law that was formulated by the Roman jurist Ulpian (AD 170-228).⁶² Ulpian also formulated that “justice is the steady and enduring will to render everyone his right”.⁶³

This concept of formal equality although connected with the concept of justice legitimized variance in treatment between people of different ethnicity and sex. This means that *de jure* equality can lead to *de facto* discrimination.⁶⁴ Therefore formal equality leads to discrimination because equal rules for unequal groups can have unequal results.⁶⁵ Formal equality does not cover the demands for some specific substantive treatment for certain groups.⁶⁶ In such an instance, applying laws to all without taking into account of differences that are a result of social construction in itself leads to discrimination.⁶⁷ This means that the laws are beating their purpose.

In relation to formal equality, Anatole France very sarcastically stated that “the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.”⁶⁸ This quote sums the shortcomings of formal equality and its

⁵⁸ The Nichomachean Ethics 1129 b 1 cited in Otto A Bird, *The Idea of Justice* (New York 1968) 133.

⁵⁹ Savitri W. E. Goonesekere, ‘The Concept of Substantive Equality and Gender Justice in South Asia’ (2007) U.N. Development Fund For Women 9-10 <<http://clientdisplay.com/unwomen/assets/The-Concept-of-Substantive-Equality-final-31-12-072.pdf>> accessed 18th April 2016.

⁶⁰ When Bert Vierdag, *The Concept of Discrimination in International Law: With Special Reference to Human Rights* (Springer Netherlands 1973).

⁶¹ “to each his own”.

⁶² Marko Petrak, ‘Plato and Ulpian’s Praecepta Iuris’ (2014) 20(2) UNISA 694-701 <<http://www.scielo.org.za/pdf/funda/v20n2/19.pdf>> accessed 22nd April 2016.

⁶³ Justinian Ulpian, *Digesta seu Pandectae* (D. 1,1,10 pr 1) in Petrak (n62).

⁶⁴ Prof. Annie Patricia G. Kameri-Mbote, ‘Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses,’ (2013) Inaugural Lecture <<http://erepository.uonbi.ac.ke/handle/11295/10057>> accessed 22nd April 2016.

⁶⁵ *ibid.*

⁶⁶ Katharine T. Bartlett, ‘Gender Law’ (1994) 1(1) Duke Journal of Gender Law and Policy 1-20 <<http://scholarship.law.duke.edu/djglp/vol1/iss1/1>> accessed 23rd April 2016.

⁶⁷ Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, Cambridge Massachusetts, 1987) in ‘Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses’]

⁶⁸ Wiecek William M, *Liberty under the Law* (John Hopkins University Press, Maryland 1988) 104 in Savitri W. E. Goonesekere, ‘The Concept of Substantive Equality and Gender Justice in South Asia’ (2009) <http://www2.unwomen.org/~media/field%20office%20eseasia/docs/publications/southasia/reportstudies/05_human%20rights/the-concept-of-substantive-equality-final-31-12-072%20pdf.ashx?v=1&d=20141202T120138> accessed 22 April 2016.

application in actual situations. There are two main criticisms that have been identified in relation to this “majestic equality”. The first is that behaviour that should not be prohibited is prohibited and the second is that there is a prejudicial burden when it comes to compliance to some.⁶⁹

It is also important to also look at the protectionist approach that provides for certain things to be done or not to be done by the vulnerable groups in their own interest. In this approach, supplementary protections are used to safeguard the group instead of using formal equality.⁷⁰ For instance, when it comes to feminism, the protectionist approaches appreciate the distinctions between women and men but constitute these distinctions as flaws or inferiority in women. According to these approaches, the answer then is to control or rectify the women and not to rectify the environment or provide support for women to cope with an unsafe environment. The difference is therefore considered to be naturally ordained and the approach serves to reinforce the subordinate status of women.

‘Substantive equality’ aims at attaining equitable results and equal opportunity, and the need to sometimes treat people differently to attain equal outcomes.⁷¹ In regard to the feminist approaches, Elizabeth Sheehy explains that the law needs to attend to the “historical origins of laws and practices, the interests and values furthered and submerged by the law or practice, the specific context of women’s lives, economically, politically, and socially, and the impact upon women, both quantitatively and qualitatively.”⁷²

The Canadian Supreme Court has acknowledged that it is significant to also take into account past and current weaknesses and recognising and addressing the differential influence that laws and policies have upon them.⁷³ For example, the Supreme Court in *Eldridge v. British*

⁶⁹ Andrew Sepielli, *The Law’s ‘Majestic Equality’*, (2013) 32 *Law and Philosophy* 673-700.

⁷⁰ Barry C. Feld, *Bad Kids: Race and the Transformation of the Juvenile Court* (Oxford University Press, Inc. New York 1999).

⁷¹ Margaret Denike, Sal Renshaw & CJ Rowe, ‘Transgender and Women’s Substantive Equality’ (2003) Discussion Paper, Consultation Paper, Bibliography, Case Law Summaries, National Association of Women and the Law <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKewichvWEg9LMAhUC7CYKHVGhBCoQFggcMAA&url=http%3A%2F%2Fwww.nawl.ca%2Fns%2Fen%2Fdocuments%2FPub_Report_Trans03_en.doc&usg=AFQjCNEwSwcn43E5fgm-6MShEopW6maXhA&sig2=ufTmQDownNffL5X3eiMmuw&bvm=bv.121658157,d.dmo> accessed 22nd April 2016.

⁷² Elizabeth Sheehy, “Equality without Democratic Values? *Canadian Woman Studies Journal* (Summer 1999): 1&2, 6 in Denike et. al (n71).

⁷³ Claire L’Heureux-Dubé, ‘The Changing Face of Equality’ (1999) 1&2 *Canadian Woman Studies Journal* (1999) 30-32 in Denike et. al (n71).

Columbia (Attorney General) held that treating deaf patients ‘the same’ as the rest of the patients is biased.⁷⁴ The Court further held that their particular requirements must be recognised in the delivery of sign language and/or interpreters. If these differences are not taken into account, then the hospital cannot be said to be providing equal services to all.

It has also been found that a corollary exists between equality and non-discrimination.⁷⁵ In Kenya, the sexual minorities are discriminated against and even the constitutionally guaranteed rights and freedoms are not enforceable. The provisions that provide for the equality of opportunities imply that everyone should be given an equal chance of realizing a particular goal.⁷⁶ However, given Kenya’s history as a patriarchal society and the imposition of traditional gender roles, the Constitutional provision merely provides for formal equality as opposed to substantive equality. Formal equality presupposes that there are only legal barriers to the attainment of certain goals.⁷⁷ There are more obstacles that the sexual minorities face in enjoying the Constitutional rights and freedoms, and therefore require substantive equality.

The State therefore must address the circumstances surrounding the opportunities in order to ensure that everyone has the same probability of success. Providing equal opportunity is inadequate. Michel Rosenfeld puts it aptly:

Because an opportunity depends in part on the means and prospects of others, reducing equality of opportunity to the removal of a given obstacle for a class of subjects will lead to equality of opportunity among the members of that class only in the unlikely event they have identical individual circumstances and each possesses exactly the same means and confronts the very same obstacles.⁷⁸

In acknowledging that the provisions of Article 27 may not bring about substantive equality, the Constitution provides for the implementation of affirmative action programmes in Article 27(6) designed to overcome; “any disadvantage suffered by individuals or groups because of

⁷⁴[1997] 3 S.C. R.624 in Margaret Denike, Sal Renshaw & CJ Rowe, ‘Transgender and Women’s Substantive Equality’ (2003) Discussion Paper, Consultation Paper, Bibliography, Case Law Summaries, National Association of Women and the Law.

⁷⁵ Evadre Grant, ‘Dignity and Equality’, (2007) 7(2) Human Rights Law Review, 300; Christopher McCrudden, ‘Equality and Non-Discrimination’ in David Feldman, *English Public Law* (Oxford, 2004).

⁷⁶ Michel Rosenfeld, ‘Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal’ (1986) 74(5) California Law Review 1687-1712, 1687.

⁷⁷ *ibid.*

⁷⁸ *ibid.*, 1695.

past discrimination.”⁷⁹ Affirmative action programmes have to be based on genuine needs of individuals as provided in Article 27(7).⁸⁰ Specific affirmative action is imposed on the State in relation to groups with specific characteristics, including marginalised and minority groups.⁸¹ The term “minority” has not been defined by the Constitution and the sexual minorities could be argued to be part of the minority. The need for substantive equality for the sexual minorities is crucial in Kenya so that they can enjoy rights like all other members of society.

1.9 Research Methodology

The research method used is desk study. This is the use of existing data to get answers to questions within a research that are different from the questions asked in the original research.⁸² The desk-based research comprises the examination of existing literature on sexual minorities. This will help place this current study within the context of existing evidence.

The study will look at diverse information, statutes, case law, the Constitution of Kenya 2010, journal articles, books focusing on anthropological and historical studies, newspaper articles, African leaders’ speeches, counter views on such speeches and literature based on broad research pertaining to sexual minorities’ rights in Kenya and the rest of Africa will mainly guide the study in this work. By looking at the views of the political and religious leaders and counter views, I will be better placed to make an analysis on the objective position.

Multidisciplinary research has been carried out when examining political, religious and cultural views on the sexual minorities. There has been focus on religion, psychology and political science. The topic has therefore been explored in depth from various perspectives.

⁷⁹ The Constitution of Kenya, Article 27 (6).

⁸⁰ *ibid*, Article 27 (7).

⁸¹ *ibid*, Article 56.

⁸² Pamela S Hinds, Raplh J Vogel and Laura Clarke-Steffen, ‘The possibilities and pitfalls of doing a secondary analysis of a qualitative dataset’ (1997) 7(3) *Qualitative Health Research* 408–424.

1.10 Limitation of the Study

Individuals who belong to the sexual minorities are highly stigmatized and few are comfortable enough to share their sexual orientation.⁸³ It would therefore have been difficult, if not impossible to access and study the sexual minorities. It was therefore judicious to use desk study to collect data. However, relying on primary data that has already been collected and analysed bears the disadvantage of having not been obtained directly from the source. Exclusively relying on research conducted by other researchers is a limitation in this study.

Further, the only case law that has been focused on is the *Eric Gitari case*. Other case law have only been examined where relevant. Focusing on only one case has limited the rights and freedoms examined. Sodomy laws under the Penal Code have not been examined specifically and have only been discussed where relevant in relation to international and regional laws.

There were challenges in obtaining local literature on this specific topic. Although there are studies that have been conducted in Kenya, not all perspectives that have been dealt with in this study have been researched on locally. To overcome this limitation, the study has extended beyond Kenya and accordingly explored material globally with specific focus on Africa and where possible, Kenya.

Although there are various groups of sexual minorities, this study has only focused on the LGBTI community. This study did not examine the different concepts of the sexual minorities because this was not the aim of the study. The study has therefore generalised the members of the LGBTI community and the term ‘LGBTI’ has been used interchangeably with sexual minorities. Studies on homosexuals have also been generalised to the LGBTI community.

1.11 Definition of Terms

The terms ‘LGBTI’ and ‘sexual orientation’ have been defined to give the reader a better understanding of the terms as they have been used throughout the research.

⁸³ Ilan H Meyer and Mary Northridge, *The Health of Sexual Minorities: Public Health Perspectives on Lesbian, Gay, Bisexual, and Transgender* (New York Springer 2007).

'LGBTI' is the common abbreviation that refers collectively to people who are lesbian, gay, bisexual, transgender, and/or intersex.⁸⁴ A lesbian is a woman psychologically, physically and/or romantically drawn to other women while a gay person is one psychologically, physically and/or romantically fascinated by others of the same gender (although it is a term usually used in reference to males).⁸⁵ A bisexual person is psychologically, physically and/or romantically fascinated by people of more than one gender while transgender is a blanket word for those whose gender identity varies from the sex allocated biologically and/or whose gender manifestation do not conform to society's prospects in relation to gender roles.⁸⁶ Intersex is used for numerous conditions where a person is born with a reproductive or sexual anatomy that doesn't seem to fit the usual definitions of female or male.⁸⁷

Sexual orientation denotes to the sex of those to whom one is sexually and romantically drawn to.. Research has recommended that sexual orientation is not in specific categories that can be defined and rather happens on a variety.⁸⁸

1.12 Chapters Breakdown

1.12.1 Chapter One – Introduction to the Study

This study is structured in five chapters. Chapter One provides an introduction to the research while specifically looking at the justification of the study. The chapter also provides the research methodology and theoretical framework which focuses in particular on substantive equality. The research questions that have been addressed have been answered in each of the following chapters respectively.

1.12.2 Chapter Two – Political, Religious and Cultural Views on LGBTI

Chapter Two explores the political, religious and cultural views on sexual minorities. The political view has explored the perspectives of African leaders on the LGBTI community and their rights. When looking at religious views, the focus is on Christianity and Islam. Besides the views of the political leaders and the religious texts and religious leaders, the reasons that

⁸⁴ American Psychological Association and National Association of School Psychologists (2015) Resolution on gender and sexual orientation diversity in children and adolescents in schools
<<http://www.apa.org/about/policy/orientation-diversity.aspx>> accessed 22 May 2016.

⁸⁵ *ibid.*

⁸⁶ *ibid.*

⁸⁷ *ibid.*

⁸⁸ Alfred C Kinsey, Pomeroy B Wardell and Clyde E. Martin, *Sexual Behavior in the Human Female* (Philadelphia Saunders 1953).

members of each of these groups hold the views have also been explored. When looking at the cultural views, specific attention has been paid to existence of homosexuality in pre-colonial Africa. Analysing the various views will give a better understanding on why the sexual minorities face discrimination.

1.12.3 Chapter Three – LGBTI Rights under the International and Regional Regime

Chapter Three is an in-depth exploration of the international and regional law on sexual minorities and the rights that they are entitled to in both these regimes. The Chapter has focused on the various conventions and declarations. Besides this, subsequent General Comments and case law have also been looked at.

1.12.4 Chapter Four – Analysis of the Eric Gitari case

Chapter Four provides an analysis of the *Eric Gitari case* focusing on the freedom of association and right to equality and freedom from discrimination in the Constitution. The facts, the arguments by each party and the judgement of the High Court have been studied. The judgement has been examined in light of the freedom of association, the limitation of rights under the Constitution and the right to equality and freedom from discrimination.

1.12.5 Chapter Five – Conclusion, Lessons and Recommendations

Chapter Five is the concluding chapter where the findings from the other chapters have been summed up. The lessons that can be learned have also been explored. Finally, the Chapter ends with recommendations on what can be done in Kenya to ensure that the sexual minorities can enjoy the rights that are guaranteed to them in the Constitution and by international conventions.

CHAPTER TWO

POLITICAL, RELIGIOUS AND CULTURAL VIEWS ON LGBTI

2.1 Introduction

This Chapter explores the political, religious and cultural views on the LGBTI community. This will help in gaining in-depth knowledge on the various perspectives on the LGBTI community and ideologies of various certain groups. This will not only assist in providing an exhaustive analysis on the topic but also assist in giving an objective interpretation to the diverse reasons that the sexual minorities face discrimination.

The political views that have been focused on are mainly from the African set-up. The religions that have also been studied are the two dominant religions in Africa – Christianity and Islam. The cultural views that have been explored are limited mainly to Africa and the existence of homosexuality in various countries in pre-colonial Africa.

2.2 Political Views on LGBTI

A report by the Academy of Science of South Africa finds that anti-sodomy laws have no scientific evidence.⁸⁹ The report recommended that African leaders help in changing the negative belief system about the LGBTI community.⁹⁰ This would remove the idea of Western propaganda.⁹¹ This suggests that most Africans view the sexual minorities' actions as a creation of the West and therefore choose to ignore or violate their rights.

Various political leaders influence the society with their negative views on the sexual minorities by condemning the sexual minorities and calling for their persecution. An example is the Ugandan President Yoweri Museveni who during an interview stated:

⁸⁹ Linda Nordling, 'Africa Academicians Challenge Homophobic Laws' (*Nature*, 10 June 2015) <<http://www.nature.com/news/african-academics-challenge-homophobic-laws-1.17720>> accessed 11 June 2016; The report was prepared by eleven South Africans, one Ugandan and one American.

⁹⁰ Lydia O'Connor, 'Report Attacks African Nations' Justification For Anti-Gay Laws' (*The Huffington Post*, 2 February 2016) <http://www.huffingtonpost.com/2015/06/10/africa-anti-gay-report_n_7557742.html> accessed 11 June 2016.

⁹¹ *ibid.*

They're disgusting. What sort of people are they? I never knew what they were doing. I've been told recently that what they do is terrible. Disgusting. But I was ready to ignore that if there was proof that that's how he is born, abnormal. But now the proof is not there.⁹²

The President's detestation towards the LGBTI community is obvious in his statement to an international news station. The President uses the excuse choosing sexual orientation as a justification for his disgust towards them. The Presidential Scientific Committee on Homosexuality formed by Museveni concluded that homosexuality "is not a disease"; not an "abnormality"; "homosexual behaviour has existed throughout human history, including in Africa"; and homosexuality existed in Africa even before the colonialists came.⁹³ Notwithstanding the conclusions, the President ratified a law that had tough new penalties for homosexual acts.

Gambia's President Yahya Jammeh believes that LGBT stands for "Leprosy, Gonorrhoea, Bacteria and Tuberculosis" all of which he said are harmful to human existence.⁹⁴ Therefore, just like any nation should strive to be clear of deadly diseases, they should also strive to get rid of LGBTI community. Likewise, Kenyan Member of Parliament, Aden Duale compared homosexuality to terrorism and said "... It's as serious as terrorism. It's as serious as any other social evil."⁹⁵ Associating sexual minorities to diseases and terrorism only encourages discrimination and violence that the LGBTI people face because perpetrators of the discrimination would consider their actions to be helping society.

Simon Lokodo, Uganda's Ethics and Integrity Minister also expressed his abhorrence towards the homosexuality by describing kissing a man as: "... Just imagine eating your faeces... Excretion is through the anus, like the exhaust of an engine. The human body

⁹² Elizabeth Landau, Zain Verjee and Antonia Mortensen, 'Uganda President: Homosexuals are disgusting' (CNN, 25 February 2014) <<http://edition.cnn.com/2014/02/24/world/africa/uganda-homosexuality-interview/>> accessed 6 February 2016.

⁹³ Harry Dugmore, 'Why anti-gay sentiment remains strong in much of Africa' (*The Conversation*, 10 June 2015) <<http://theconversation.com/why-anti-gay-sentiment-remains-strong-in-much-of-africa-42677>> accessed 18 March 2016.

⁹⁴ Heather Saul, 'Gambian President Says Gay People are 'Vermin' and Should be Tackled Like Malaria-Causing Mosquitoes' (*Independent*, 19 February 2014) <<http://www.independent.co.uk/news/world/africa/gambian-president-says-gay-people-are-vermin-and-should-be-tackled-like-malaria-causing-mosquitoes-9139119.html>> accessed 5 December 2016.

⁹⁵ James Macharia, 'Leading Kenyan MP says homosexuality 'as serious as terrorism' (*Reuters*, 26 March 2014) <<http://www.reuters.com/article/us-kenya-gays-idUSBREA2P1UD20140326>> accessed 18 December 2015.

receives what it takes from the mouth. They're twisting nature the wrong way...”⁹⁶ The use of very strong words and the comparison to faeces demonstrates how repulsed Lokodo is towards the sexual minorities. He also believes that the sexual minorities make a choice to be who they are.⁹⁷ Ben Carson, an American neurosurgeon also believes that being homosexual is a personal choice and specifically says that “a lot of people go into prison straight, and come out gay.”⁹⁸

Even within the science field, there has been debate about whether homosexuality has biological roots or is a personal choice.⁹⁹ In 1940, a study found that there was no evidence of inheritance of homosexuality and it was a personal choice.¹⁰⁰ Over time, there have been diverse opinions on the matter.¹⁰¹ The Human Rights Campaign Fund in *Romer v. Evans* as *amici curiae* made stated that “although the exact origins of sexual desire are unknown ... sexual orientation per se is not a characteristic over which an individual has had any responsibility in acquiring.”¹⁰²

Moreover, in March 2016, the American Psychiatric Association (APA) condemned the Indonesian Psychiatric Association’s (IPA) classification of homosexuals and transgender people as having a mental disorder.¹⁰³ APA stated that evidence had been found that homosexuality was a result of both biological and environmental contributors and that trying to change such people by using “conversion theory” only caused depression and suicidal tendencies.¹⁰⁴ Homosexuality has also been found among animals, specifically primate animals, birds, marine animals and domestic livestock.¹⁰⁵

In July 2015 while President Obama was visiting Kenya, amidst the excitement came fear

⁹⁶ David Smith, ‘Why Africa is the Most Homophobic Continent’ (*The Guardian*, 23 February 2014) <<https://www.theguardian.com/world/2014/feb/23/africa-homophobia-uganda-anti-gay-law>> accessed 10 February 2016.

⁹⁷ This is by stating that they are “twisting nature the wrong way.”

⁹⁸ Eric Bradner and Alexandra Jaffe, ‘Ben Carson apologizes for comments on gay people’ (*CNN*, 5 March 2015) <<http://edition.cnn.com/2015/03/04/politics/ben-carson-prisons-gay-choice/>> accessed 10th July 2016

⁹⁹ This is the debate of whether homosexuality is part of nature or nurture.

¹⁰⁰ Pomeroy B Wardell, *Dr. Kinsey and the Institute for Sex Research*. (New York: Harper & Row 1972).

¹⁰¹ It has been argued that a neuron group, INAH-3 which is the interstitial nucleus of the anterior hypothalamus is larger in heterosexual than in homosexual people.

¹⁰² [1996] 517 US 620 (No. 94 – 1039)

¹⁰³ Saul Levin, ‘Homosexuality as a Mental Disorder Simply Not Backed Up by Science’ (*American Psychiatric Association*, 10 March, 2016) <<https://psychiatry.org/news-room/apa-blogs/apa-blog/2016/03/homosexuality-as-a-mental-disorder-simply-not-backed-up-by-science>> accessed 10 March 2016.

¹⁰⁴ It has been argued by the APA that the conversion theory has never worked,

¹⁰⁵ George Haggerty, *Encyclopedia of Gay Histories and Cultures* (Taylor & Francis 2000).

that he would promote gay rights in the country.¹⁰⁶ On July 25, 2015 the US President during a joint news conference with the Kenyan President addressed the nation and opined that people should not be discriminated based on their sexual orientation.¹⁰⁷ The Kenyan President responded by saying that issues of gay rights are a “non-issue” which statement received applause from various groups including Christian leaders.¹⁰⁸

Most of the discriminatory statements by African leaders are often made publicly without any hesitation and fuel the hatred against the LGBTI community by legitimizing the discrimination.¹⁰⁹ The leaders choose to ignore the findings of research that proves that homosexuality is not a personal choice and also exists among animals. By discounting such findings, leaders are able to continue victimizing the LGBTI community.

2.3 Religious Views on LGBTI

The Christian and Islamic views on LGBTI community are the focus in this section because most Africans are devotees of the Abrahamic religions.¹¹⁰ It has been found that the laws that the colonialists introduced to Africa and the Christian Church have largely increased and influenced homophobia.¹¹¹ It was found that the risk of intolerance and violence of the sexual minorities is most prevalent in Senegal, followed by Eastern and Southern African countries.¹¹² According to a study conducted by the Human Rights Watch it was concluded that religious leaders have played a part where the LGBTI community in the coastal counties of Kenya has been targeted in occurrences of mob violence.¹¹³

¹⁰⁶ Adriaan Van Klinken, ‘Gay Prayer in Uhuru Park, or Christianity and LGBT Empowerment in Kenya’ (*The Martin Marty Center for the Advanced Study of Religion*, 4 February 2016) <<https://divinity.uchicago.edu/sightings/gay-prayer-uhuru-park-or-christianity-and-lgbt-empowerment-kenya>> accessed 26 May 2016.

¹⁰⁷ Lucy Westcott, ‘Kenyan Leaders Respond to Obama’s Support for LGBT Rights’ (*Newsweek*, 27 July 2015) <<http://europe.newsweek.com/kenyan-leaders-respond-obamas-support-lgbt-rights-330881?rm=eu>> accessed 24 May 2016.

¹⁰⁸ *ibid*; Bishop Rev. Joseph Ntombura was one of the leaders who praised the statement by the Kenyan President.

¹⁰⁹ The statements are either made in public rallies or to the media during interviews.

¹¹⁰ Anthony Chiorazzi, ‘The Spirituality of Africa’ (*Harvard Divinity School*, 7 October, 2015) <<http://hds.harvard.edu/news/2015/10/07/spirituality-africa#>> accessed 8 July 2016; Islam is the major religion in Africa and Christianity is the second most widely practiced religion in Africa.

¹¹¹ Jeremy Seabrook, ‘The Developing World’s Homophobia is a Legacy of Colonial Rule’ (*The Guardian*, 3 July 2004, <<http://www.guardian.co.uk/gayrights/story/0,12592,1253130,00.html>> accessed 28 January 2016.

¹¹² Chukwuemeka Anyamele et al, ‘Sexual Minorities, Violence and AIDS in Africa’ (2005) Africa Region Working Paper Series No. 84 <<http://documents.worldbank.org/curated/en/665071468001786948/pdf/342450PAPER0Sexual0minorities0wp84.pdf>> accessed 28 January 2016.

¹¹³ Human Rights Watch, ‘The Issue is Violence’ (n29).

2.3.1 Christianity

Christianity is a monotheistic religion founded on the teachings of Jesus Christ, who Christians believe is the Son of God.¹¹⁴ The Christian's Holy Book is the Holy Bible.¹¹⁵ The Bible has two sections – the Old Testament and the New Testament; and is used as a guide by Christians for living their lives.¹¹⁶ Numerous anti-gay pastors have used the famous quote “In the beginning, God made Adam and Eve¹¹⁷, not Adam and Steve, nor Eve and Jane” to evidence God's plan for humanity.¹¹⁸ They believe that homosexuality is a personal choice. As discussed, there have been various findings that prove the contrary.

The Holy Bible in the Book of Genesis talks of the cities of Sodom and Gomorrah.¹¹⁹ The Bible states that two messengers who were angels disguised as men visited Prophet Abraham's nephew, Lot. The two angels are presumed to have been male because Lot refers to them as “lords”.¹²⁰ The people of Sodom and Gomorrah were not very welcoming to the angels. All the men, both young and men surrounded Lot's house and wanted to have sexual relations with the guests.¹²¹ The word “*yada*” was used by these men and there have been various debates about whether the Hebrew word means “get to know’ or “have sex with”.¹²² In this study, it will be presumed that the proper meaning is to have sex with.

Lot offered his two virgin daughters to the mob who declined this offer.¹²³ It has been argued that the demands by the men to meet the guests was sexual and hence Lot's offer of his virgin

¹¹⁴ Tim Dowley et al, *Introduction to the History of Christianity* (Fortress Press 2006).

¹¹⁵ ‘What is the Bible?’ (*Got Questions.org*) <http://www.gotquestions.org/what-is-the-Bible.html> accessed 6 May 2016; the word “Bible” comes from the Latin word “book” and the Bible is the fundamental religious text for Christians, regardless of whether they are Catholics, Anglicans, Seventh Day Adventists or Pentecostals.

¹¹⁶ John Drane, ‘The Bible as Library’ (*BBC*, 7 December 2012) <<http://www.bbc.co.uk/religion/religions/christianity/texts/bible.shtml> accessed 5 May 2016> accessed 8 August 2016;

The Old Testament is the original Hebrew Bible while the New Testament was written by Christians in the first century AD; ‘What is the Bible?’ (*The International Bible Society*) <<http://www.biblica.com/en-us/bible/bible-faqs/what-is-the-bible/>> accessed 6 May 2016; The Bible has been described as an anchor on humankind's voyage through life's ocean.

¹¹⁷ Emphasis added.

¹¹⁸ Anthony Ashford, ‘Why Christians Should Embrace Same-Sex Relationships’ (*Religious Tolerance*) <<http://www.religioustolerance.org/ashford01.htm>> accessed 2nd May 2016.

¹¹⁹ Howard Schwartz, Caren Loebel-Fried, Elliot K Ginsburg, *Tree of Souls: The Mythology of Judaism*. (Oxford University Press 2007) 465.

¹²⁰ Bible, Genesis 19:2.

¹²¹ Bible, Genesis 19:5.

¹²² Robert A. J. Gagnon, *The Bible and Homosexual Practice: Texts and Hermeneutics* (Nashville: Abingdon, 2002) 73.

¹²³ Bible, Genesis 19: 8.

daughters.¹²⁴ The demanding boys and men were aggressive and the angels managed to bring Lot into the house and struck the boys and men with blindness.¹²⁵ The angels then ordered Lot to leave the city and God rained “brimstone and fire” “from the Lord out of the heavens.” Upon the cities.¹²⁶ The people of Sodom and Gomorrah did “detestable” acts and the Hebrew word used is *tow’ebah* to forbid homosexual activities: “If a man lies with a male as with a woman, both of them have committed an abomination (*tow’ebah*); they shall surely be put to death; their blood is upon them.”¹²⁷

The New Testament also makes references to the cities of Sodom and Gomorrah.¹²⁸ The reference of Sodom and Gomorrah in both the Old and New Testament and the tale of destruction that followed for the people because of their sins shows the prohibition of homosexuality in Christianity.

Despite this, a study found that homosexual behaviours existed among the early Christians including Biblical figures.¹²⁹ It has been contended that the Holy Bible has examples of same sex relationships like David and Jonathan.¹³⁰ It has been argued that “the soul of Jonathan was knit to the soul of David, and Jonathan loved him as his own soul.”¹³¹ Modern interpretation of the relationship of David and Jonathan is that there was a romantic relationship between the two men.¹³²

Besides the disgust that many Christians have expressed with such views, there have been counter-arguments that the connection between the two was similar to that of spiritual expressions in more open or pre-urban principles.¹³³ Another academician has contended that David and Jonathan had a type of “brotherly love” which was not “stained” by romantic

¹²⁴ Paul Rezkalla, ‘Sodomy Stories and Sodomy Laws: What was the sin of Sodom and Gomorrah?’ (*Biblical Theology*) <<http://www.biblicaltheology.com/Research/RezkallaP02.pdf>> accessed 5 May 2016.

¹²⁵ Bible, Genesis 19:9-13.

¹²⁶ Bible, Genesis 19:24, NIV.

¹²⁷ Leviticus 20:13; *tow’ebah* has also been used in Bible,

¹²⁸ Bible, Gospel of Luke 10:12-13.

¹²⁹ John Boswell, *The Marriage of Likeness. Same-Sex Unions in Pre-Modern Europe* (Fontana 1996).

¹³⁰ ‘Same-Sex Relationships in the Bible’ (*Religious Tolerance*) <http://www.religioustolerance.org/hom_bmar.htm> accessed 2nd May 2016; The Book of Samuels records the friendship of David and Jonathan.

¹³¹ Bible, Samuel 18:1.

¹³² Tom Horner, *Jonathan Loved David: Homosexuality in Biblical Times* (The Westminster John Knox Press Pennsylvania 1978).

¹³³ Pamela C Regan, Darell Jerry, Marysia Narvaez, Donelle Johnson, ‘Public displays of affection among Asian and Latino heterosexual couples’ (1999) 84 *Psychological Reports* 1201–1202.

entanglements.¹³⁴ It has also been argued that claims that the two were homosexual are used as a justification for committing the sin of homosexuality.¹³⁵

It has been argued that religion is used as an excuse and justification to discriminate and harm the sexual minorities.¹³⁶ The anti-gay Christian leaders who preach that the LGBTI people have a choice to be heterosexual influence how their followers view the sexual minorities. Attributing LGBTI peoples' actions as a sin could be argued to increase the intolerance that people have towards the sexual minorities. By disrespecting or violating the LGBTI peoples' human rights, Christians would feel they are disassociating themselves from a deplorable sin.

2.3.1.1 Pro-LGBTI Christian Leaders

There are pro-LGBTI Christians who look at the other side of the coin. Pro-LGBTI, Desmond Tutu, a retired South African Anglican bishop stated in relation to homophobia that:

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... I would not worship a God who is homophobic and that is how deeply I feel about this.¹³⁷

Tutu also supported Gene Robinson, an American gay Christian clergy and stated that the Church leaders should focus on other global problems such as HIV and not homosexuality.¹³⁸ Tutu is not homophobic and does not view LGBTI people as sinners; he stands for equality and freedom from discrimination towards them. Ghanaian Archbishop Yinkah Sarfo criticized this and stated that Desmond Tutu had made the pro-LGBTI statement in his personal capacity and not on behalf of the Anglican Church.¹³⁹ Yinkah Sarfo further stated

¹³⁴ 'David loved Jonathan more than women' (*Would Jesus Discriminate?*) <http://www.wouldjesusdiscriminate.org/biblical_evidence/david_jonathan.html> accessed 22 May 2016.

¹³⁵ Arthur Daniels, 'Homosexuality Today: The Art of Justifying Sin' (*Gospel Answers*) <<http://www.gospelanswers1.com/HomosexualityToday.php>> accessed 24 May 2016.

¹³⁶ 'End the Use of Religion to Discriminate', (*American Civil Liberties Union*) <<https://www.aclu.org/feature/using-religion-discriminate>> accessed 1 July 2016.

¹³⁷ Carl E. Olson, 'Desmond Tutu: 'I'd rather go to hell than worship a homophobic God' (*The Catholic World Report*, 27 July 2013) <http://www.catholicworldreport.com/Blog/2455/desmond_tutu_id_rather_go_to_hell_than_worship_a_homophobic_god.aspx> accessed 22 May 2016.

¹³⁸ Gene Robinson, *In the Eye of the Storm: Swept to the Center by God, Foreword by Desmond Tutu* (Norwich: Canterbury 2008); 'Tutu chides Church for gay stance' (*BBC News*, 18 November 2007) <<http://news.bbc.co.uk/2/hi/africa/7100295.stm>> accessed 25 May 2016.

¹³⁹ Abednego Asante Asiedu, 'Ghanaian Anglican Bishop slams Desmond Tutu over gay comment' (*Joy Online*, 30 July 2013) <<http://edition.myjoyonline.com/pages/news/201307/110382.php>> accessed 22 May 2016.

that church does not support LGBTI practice.¹⁴⁰

In Kenya, the growing eminence of the LGBTI community is evident and the Pembizo Christian Council's endeavour to create "an all-inclusive Church in Africa" is an example of this prominence.¹⁴¹ The Council had its initial session late 2015 where the African Christian leaders discussed the move towards "a just and inclusive church."¹⁴² There have been efforts on the other hand to stop the recognition of homosexual rights. A campaign dubbed "*Zuia Sodom Kabisa*,"¹⁴³ led by The Save Our Men Initiative was kicked off on March 4, 2016.¹⁴⁴

Internationally, in May 2016, over 100 pastors in the US formed a group called Reconciling Ministries Network and wrote a letter to United Methodist Church revealing their sexual orientation and stating that God was merciful and the Church should accept them for who they are.¹⁴⁵ The letter further contended that there were LGBTI people all over in different churches.¹⁴⁶

The pro-LGBTI Christians aim to bring justice to the sexual minorities by ensuring that their fundamental rights and freedoms are not infringed. Having respected members of the society making pro-LGBTI statements is a step in the right direction. However, with a majority of the Church not agreeing with such pro-LGBTI Christians, the pro-LGBTI Christians take one step forward with their views and once majority of the Church disagrees, then two steps are taken back.

2.3.2 Islam

The Holy Qur'an is the principal religious script of Islam and Muslims it is believed to be the book of "divine guidance and direction for mankind."¹⁴⁷ On the other hand *Hadeeth*¹⁴⁸ are

¹⁴⁰ *ibid.*

¹⁴¹ Adriaan Van Klinken, 'Gay Prayer in Uhuru Park, or Christianity and LGBT Empowerment in Kenya' (*The Martin Marty Center for the Advanced Study of Religion*, 4 February 2016) <<https://divinity.uchicago.edu/sightings/gay-prayer-uhuru-park-or-christianity-and-lgbt-empowerment-kenya>> accessed 26 May 2016.

¹⁴² *ibid.*

¹⁴³ Kiswahili for "Stop Sodom now".

¹⁴⁴ Katy Migiro, 'Anti-gay groups in Kenya rally to "prevent Sodom" promoted by West' (*Thomson Reuters Foundation News*, 5 March 2014) <<http://news.trust.org/item/20140305123911-e4i2s/>> accessed 25 May 2016.

¹⁴⁵ '111 LGBTQI Clergy and Candidates Come Out In Love Letter to The United Methodist Church' (*Reconciling Ministries Network*, 9 May 2016) <<https://www.rmnetwork.org/newrmn/calledout/>> accessed 7 June 2016.

¹⁴⁶ *ibid.*

¹⁴⁷ Gray Lambert, *The Leaders Are Coming!* (WestBow Press 2013) 287.

traditional Islamic schools of jurisprudence and are vital tools for interpreting the Qur'an.¹⁴⁹ It is also believed that the Book was revealed over a period of 23 years as God's final revelation to mankind.¹⁵⁰ It is also believed that it is free from corruption.¹⁵¹ The Hadeeth are an important part of Islam and Muslims hold very high regard for Prophet Muhammad (PBUH) and the Qur'an states "Anyone who disobeys God and His Messenger (Prophet Muhammad PBUH) will abide in the fire of hell forever."¹⁵²

Zinā and *Liwat* are both prohibited in Islam. *Zinā* in Arabic means adultery (consensual sexual relations outside marriage) and fornication (consensual sexual relations between two unmarried persons). It has been argued that *Zinā* also prohibits homosexuality.¹⁵³ The sin of *Zinā* is said to be a *hudud* crime.¹⁵⁴ *Liwat* means anal intercourse and has been prohibited in the Qur'an and Hadeeth.

Zinā has been prohibited by the Qur'an and Hadeeth. The Qur'an provides "'Nor come nigh to fornication/adultery: for it is a shameful (deed) and an evil, opening the road (to other evils)." The words "come not near to *Zinā*" connote that nothing close to *Zinā* should be performed. The punishment for *Zinā* as provided for in the Holy Qur'an is "(T)he woman and the man guilty of fornication, flog each of them with a hundred stripes."¹⁵⁵ The Hadeeth also provide the punishment for *Zinā*. It states that "when an unmarried male commits adultery with an unmarried female, they should receive one hundred lashes and banishment for one year, while if a married male commits adultery with a married female, they shall receive one hundred lashes and be stoned to death."

With regard specifically to *Liwat*, the Holy Qur'an provides: "And [mention] Lot, when he said to his people, "Do you commit immorality while you are seeing? Do you indeed approach men with desire instead of women? Rather, you are a people behaving ignorantly." The Qur'an makes mention of "the People of Lut" and their dreadful fate because of

¹⁴⁸ It literally means "report" in Arabic. The Hadeeth is a collection of deeds and words of Prophet Muhammad (peace be upon him), his family and his companions.

¹⁴⁹ Lambert (n147) 287; Muslims believe that Allah revealed the Holy Qur'an to Prophet Muhammad (peace be upon him) (PBUH) through the angel Gabriel (Jibril in Arabic).

¹⁵⁰ Victor Watton, *A student's approach to world religions: Islam* (Hodder & Stoughton 1993).

¹⁵¹ Mir Sajjad Ali, Zainab Rahman, *Islam and Indian Muslims* (Kalpaz Publications 2010) 21 - (Qur'an 15:9 "Indeed, it is We who sent down the Quran and indeed, We will be its guardian.").

¹⁵² Qur'an, 72:23.

¹⁵³ Camilla Adang, 'Ibn Hazam on Homosexuality,' (2003) 25(1) *Al Qantara*, 5-31.

¹⁵⁴ A *hudud* crime is a crime with a fixed Islamic punishment in the Qur'an.

¹⁵⁵ Qur'an, 24:2.

engaging in homosexual activities.¹⁵⁶ The people of Lut were called “a people deep in sin”¹⁵⁷ by the angels who came to destroy them with “a shower of stones of clay”¹⁵⁸. The Qur’an states that Lot stated to his people “Do ye commit lewdness such as no people in creation (ever) committed before you? For ye practice your lusts on men in preference to women: ye are indeed a people transgressing beyond bounds.”¹⁵⁹

The punishment of homosexuality has been provided for in the Qur’an. Some scholars indicate this verse as the prescribed punishment: “If two (men) among you are guilty of lewdness, punish them both. If they repent and amend, leave them alone; for Allah is Oft-returning, Most Merciful.”¹⁶⁰ The punishment for homosexuality has also been provided for in Hadeeth. Abdullah ibn Abbas narrated: “The Prophet said: If you find anyone doing as Lot's people did, kill the one who does it, and the one to whom it is done.”¹⁶¹

Moreover, Prophet Muhammad (PBUH) expressed his disapproval of homosexuality by stating that “Whoever has intercourse with a woman and penetrates her rectum, or with a man, or with a boy, will appear on the Last Day stinking worse than a corpse; people will find him unbearable until he enters hell fire, and God will cancel all his good deeds.”¹⁶² Although *Liwat* and *Zinā* which both have *hudud* punishments do not cover lesbian acts,¹⁶³ the Qur’an states that people are not to come near adultery which is inexcusable where lesbianism would fall.¹⁶⁴ Further, *Sahq* which is an Arabic word meaning “lesbianism” comes from the word “to grind” and qualifies for a lesser punishment than *Liwat*.¹⁶⁵ The punishment in the olden days for lesbianism varied from one jurisdiction to another from some prescribing ten lashes to other not penalizing it at all.¹⁶⁶

¹⁵⁶ Known as Lot in the Old Testament.

¹⁵⁷ Qur’an, 15:58.

¹⁵⁸ Qur’an, 51:33.

¹⁵⁹ Qur’an, 7:80-81.

¹⁶⁰ Qur’an, 4:16.

¹⁶¹ Sunan Abu-Dawood – Book 38 Hadith 4447.

¹⁶² Nicole Kligerman, ‘Homosexuality in Islam: A Difficult Paradox’ (2007) 2(3) *Macalester Islam Journal* 53-64; 54 <<http://digitalcommons.macalester.edu/cgi/viewcontent.cgi?article=1028&context=islam>> accessed 22 June 2016.

¹⁶³ Sahar Amer, *Crossing Borders: Love Between Women in Medieval French and Arabic Literatures* (Philadelphia: University of Pennsylvania 2008).

¹⁶⁴ David W. Machacek and Melissa M. Wilcox, *Sexuality and the World's Religions* (Santa Barbara: ABC-CLIO 2003).

¹⁶⁵ Sahar Amer, ‘Medieval Arab Lesbians and Lesbian-Like Women’ 18(2) *Journal of the History of Sexuality*, 215-236 <<https://muse.jhu.edu/article/262459/pdf>> accessed 25 May 2016.

¹⁶⁶ *ibid*.

2.3.2.1 Pro-LGBTI Muslim Leaders

There are openly gay Imams.¹⁶⁷ One of them is Daayiee Abdulla, an African American gay Imam in Washington.¹⁶⁸ In May 2016, Imam Nur Wahrsage, a Somali was the first Imam in Australia to come out as gay.¹⁶⁹ Nur Wahrsage stated that the “conservative school of thought of Islam” is that homosexuality is a sin and death is the only punishment.¹⁷⁰ This means in his view, there is a contemporary school of thought that does not look at homosexuality as a sin.

Unlike pro-LGBTI Christians who have been around for some time, it is only now that a few of the pro-LGBTI Muslim leaders feel that they can come out as homosexual. The pro-LGBTI Muslim leaders are mostly from the Western world. This could be because they feel that their fundamental rights such as the right to equality and freedom from discrimination would not be infringed, like in developing countries. Such views may not be tolerated in an African setting and could lead to deadly consequences.

2.4 Cultural Views on LGBTI

Cultural rights are a fundamental portion of human rights. It has been argued that everyone hence has the right to express themselves and the right to excellent education that completely “respect their cultural identity and to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms.”¹⁷¹

2.4.1 Existence of Pre-Colonial Homosexuality in Africa

Just like there has been development in the appreciation of the definition of human rights over the years, the views on the sexual minorities have also changed over the years. Some cultures out-rightly disapprove of homosexuality while others have sanctions for such

¹⁶⁷ The word “Imam” is most commonly in the context of a worship leader of a mosque and Muslim community by Sunni Muslims.

¹⁶⁸ Max Rodriguez, ‘Imam Daayiee Abdullah ’95, New LGBT-Friendly Mosque to Host Community Forum’ (*University of the District of Columbia*, 18 April 2013) <<http://www.law.udc.edu/news/122652/Imam-Daayiee-Abdullah-95-Welcomes-Gay-Muslims-to-Worship-Marry.htm>> accessed 20 May 2016.

¹⁶⁹ Shannon Power, ‘Being Gay And Muslim: ‘Death is Your Repentance’ (*Star Observer*, 3 May 2016) <<http://www.starobserver.com.au/news/being-gay-and-muslim-death-is-your-repentance/148975>> accessed 22 May 2016.

¹⁷⁰ Kunal Anand, ‘Australia's First Openly Gay Imam Speaks About LGBT Acceptance, Almost Committing Suicide And Islam's Homophobia’ (*India Times*, 8 May 2016) <<http://www.indiatimes.com/news/world/australia-s-first-openly-gay-imam-speaks-about-lgbt-acceptance-almost-committing-suicide-and-islam-s-homophobia-254743.html>> accessed 23 May 2016.

¹⁷¹ See Article 5 of Universal Declaration on Cultural Diversity (UDCD).

behaviours.¹⁷² In Great Britain, people have become much more tolerant of the sexual minorities.¹⁷³ In the US, the first gay parade was held in 1970 and now there are annual events that attract numerous cosmopolitan people.¹⁷⁴

Modern academics strongly warn against applying contemporary Western norms about sex and gender to other places and also to other times.¹⁷⁵ This is because what may appear to be “same-sex” or “sexual” in the Western world may be accepted elsewhere.¹⁷⁶ It has been contended that the present understanding of sexuality is specific to the West.¹⁷⁷ An example of this is the Bugis culture of Sulawesi (in Indonesia) where a woman who wears masculine attire and marries another female is seen to belong to a third gender.¹⁷⁸ Similarly, in New Guinea, a group referred to under the pseudonym of 'Sambia' boys consume ejaculation from older men to help in gaining maturity.¹⁷⁹ These two examples illustrate the difficulty in interpreting homosexuality in various cultures.

Edward Gibbon made one of the primary significant observations on the absence of homosexuality in Africa in a 1781 study by stating: “I believe and hope, that the Negroes in their own country were exempt from this moral pestilence.”¹⁸⁰ As recently as 1982, there was an assumption that the African society was fully heterosexual.¹⁸¹ It has been claimed that those who are against homosexuality and want to forbid it as a deviant act refer to notion of the absence of homosexuality in pre-colonial Africa.¹⁸²

However, historians, anthropologists and sociologists have found evidence that there were

¹⁷² Stephen Murray, *Homosexualities* (University of Chicago 2000).

¹⁷³ *ibid.*

¹⁷⁴ *ibid.*

¹⁷⁵ Michael George Schofield, *Society and Homosexuality* (Gordon Westwood Greenwood Press 1985).

¹⁷⁶ *ibid.*

¹⁷⁷ *ibid.*

¹⁷⁸ Sharyn Graham, ‘Sulawesi’s Fifth Gender’ (*Inside Indonesia*, April - June 2001) <<http://www.insideindonesia.org/sulawesi-fifth-gender-2>> accessed 20 May 2016

¹⁷⁹ Sambia Herdt, *Ritual and Gender in New Guinea* (New York: Rinehart and Winston 1987); consumption of the ejaculation is not viewed as a sexual act.

¹⁸⁰ Stephen Murray & Will Roscoe, *Boy-Wives and Female Husbands: Studies of African Homosexualities* (New York: St. Martin’s Press 1998).

¹⁸¹ David Lamb, *The Africans* (New York: Random House 1982) in Ben Anderson, ‘The Politics of Homosexuality in Africa’ (2007) 1(1) *Africana Journal* <http://www.africanajournal.org/PDF/vol1/vol1_6_Ben%20Douglas.pdf> accessed 22 November 2016.

¹⁸² Paul Germond & Steve Gruchy (Eds.), *Aliens in the Household of God: Homosexuality and Christian Faith in South Africa* (David Philip Publishers 1997) 295-315.

same-sex relationships in pre-colonial Africa.¹⁸³ It has been argued that homosexuality is a “consistent and logical feature of African societies and belief systems.”¹⁸⁴ The foremost incident of homosexuality was reported in Egypt in Africa in 2400 BCE between Khnumhotep and Niankhkhnum and was illustrated by pictorial representations of the two men standing nose to nose and embracing each other.¹⁸⁵ However, there have been arguments that the two were as close as brothers and not lovers.¹⁸⁶

Studies have found evidence that support the claim that 16th century European missionaries, explorers and officials documented homosexuality Africa.¹⁸⁷ Andrew Battell in particular, an English traveller in the 1590s wrote that the Imbangala of Angola had men in women's attire, whom they kept among their wives.¹⁸⁸ These adventurers strengthened the views that African societies needed Christian cleansing.¹⁸⁹ 2000 year old *Khoisan* (bushmen) rock paintings in Zimbabwe show men having sex with each other and this has been argued to be proof enough that homosexuality existed long before colonialism.¹⁹⁰ The Pangwe people of current Gabon and Cameroon were also found to have practiced same sex sexual activities.¹⁹¹ With regard to Zande, a Sudanese tribe an anthropologist finds that “Homosexuality is indigenous. Zande do not regard it as at all improper, indeed as very sensible for a man to sleep with boys when women are not available or are taboo... Some princes may even have preferred boys to women.”¹⁹² It was further noted that men did not only sleep with other men when the women were unavailable but also when the men liked other men.¹⁹³

In Kenya, among the Meru, a religious governance role called *mugawe* that comprises wearing female's clothes and hairstyle and where men sometimes marry men has been

¹⁸³ Siegfried Frederick Nadel, *The Nuba* (London: Oxford University Press 1947); Henri Junod, *Life of a South African Tribe* (London: MacMillan 1927); Marc Epprecht, *Hungochani: The History of a Dissident Sexuality in Southern Africa* (Montreal: McGill-Queen's University Press 2004).

¹⁸⁴ Murray & Roscoe (n180).

¹⁸⁵ Stern Keith, *Queers in History Dallas* (Texas BenBella Books 2009).

¹⁸⁶ Lorna Oakes, *Pyramids Temples and Tombs of Ancient Egypt: An Illustrated Atlas of the Land of the Pharaohs* (Hermes House: Anness Publishing Ltd 2003).

¹⁸⁷ Murray & Roscoe (n180).

¹⁸⁸ *ibid.*

¹⁸⁹ Bernardine Evaristo, ‘The Idea That African Homosexuality was a Colonial Import is a Myth (*The Guardian*, 8 March 2014) <<http://www.theguardian.com/commentisfree/2014/mar/08/african-homosexuality-colonial-import-myth>> accessed 25 November 2015.

¹⁹⁰ Epprecht (n183).

¹⁹¹ *ibid.*

¹⁹² Edward Evans-Pritchard, *The Azande* (Oxford: Clarendon Press 1971).

¹⁹³ *ibid.*

reported.¹⁹⁴ In Mombasa, the *mashoga* have to date been found to engage in homosexual activities for money.¹⁹⁵ In Uganda, the Langi had the *mudoko dako* who were men were treated as females.¹⁹⁶ In Ethiopia, there exist accounts of sodomy amongst the Semitic Harari people.¹⁹⁷

Various researchers have found that the Westerners introduced anti-sodomy laws, which set the foundation for homophobia in Africa. Peter Tatchell while saying that homosexuality existed in Africa even before the colonialists arrived said that colonialists “did not introduce homosexuality, but homophobia.”¹⁹⁸ Moreover, it has been argued that Africans discriminate and hold negative positions about LGBTI people because of the colonial influence and their introduction of religion in Africa.¹⁹⁹ It has been argued that same-sex practices in Africa are not overseas nuisances, but rather, that homophobia, in the Western sense of the word, was an imposition.²⁰⁰ It has further been argued that colonial patriarchal laws and policies have sought to marginalize sexual minorities to strip them of their self-worth and legal capacity.²⁰¹ These contentions show that homosexuality is not a phenomenon introduced by the West but has rather been part of the African culture.

The absence of words that describe homosexuality in various African languages is proof that such activity was not looked down upon.²⁰² Such people were looked at as “boy-wives” or “female-husbands.”²⁰³ It has been contended that colonial and post-colonial African figures had been sensitised by missionaries and education by the colonialists of the unacceptability of

¹⁹⁴ Rodeny Needham, *The Left Hand of the Mugwe: An Analytical Note on the Structure of Meru Symbolism* (Chicago: University of Chicago Press 1973).

¹⁹⁵ Murray & Roscoe (n180).

¹⁹⁶ Jack Herbert Driberg, *The Lango: A Nilotic Tribe of Uganda* (T. Fisher Unwin Ltd., London 1923)

¹⁹⁷ Murray (n172).

¹⁹⁸ *ibid.*

¹⁹⁹ Michael Mumisa, ‘It is homophobia, not homosexuality, that is alien to traditional African culture’ (*The Guardian*, 19 February 2014) <<https://www.theguardian.com/commentisfree/2014/feb/19/homophobia-homosexuality-traditional-african-culture>> accessed 27th April 2016.

²⁰⁰ Kendall, K. (1998). “When a Woman Loves a Woman” in Lesotho: Love, Sex, and the (Western) Construction of Homophobia in Murray & Roscoe (n180).

²⁰¹ Margaret Denike, Sal Renshaw & CJ Rowe, ‘Transgender and Women’s Substantive Equality’ (2003) Discussion Paper, Consultation Paper, Bibliography, Case Law Summaries, National Association of Women and the Law <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKewichvWEg9LMAhUC7CYKHVGhBCoQFggcMAA&url=http%3A%2F%2Fwww.nawl.ca%2Fns%2Fen%2Fdocuments%2FPub_Report_Trans03_en.doc&usg=AFQjCNEwSwcn43E5fgm-6MShEopW6maXhA&sig2=ufTmQDovNffL5X3eiMmuw&bvm=bv.121658157,d.dmo> accessed 22nd April 2016.

²⁰² *ibid*

²⁰³ *ibid.*

homosexuality and they were accordingly hesitant to discuss homosexuality.²⁰⁴ African authors adopted the myth of African heterosexuality to regain ethical high ground, and consequently memories of same-sex sexuality were neglected and forgotten.²⁰⁵

Homosexuality was not only present in Africa in pre-colonial times but is also prevalent in modern Africa. It has been stated in relation to Ivory Coast as recently as 1980 that “In every village there are some men who, for neurotic reasons, do not have sexual relations with women. A number of them are known to practice occasional reciprocal masturbation with boys.”²⁰⁶ In Benin, same-sex practices among boys are to date looked at as a rite of passage. Among the Fon, “boys are allowed to enjoy close sexual friendships among each other to ease the sex drive.”²⁰⁷

There are numerous LGBTI activists whose job is to advance LGBTI rights either by political change or legal action. The African activists include Kenyan Eric Gitari, Cameroonian Alice Nkom and South African Zachie Achmat. Numerous LGBTI activists have been murdered including Eudy Simelane, David Kato and Xulhaz Mannan and activists are therefore not safe.²⁰⁸ A case of a Kenyan man marrying his American Professor showed up on the Kenyan headlines and the reaction of The International Christian Centre was that it is a sin.²⁰⁹ Such views from the Church and people on various social media platforms demonstrate the negative attitudes towards LGBTI people even in the modern world.

Although it is very difficult to estimate the population of LGBTI people in Africa because of the stigma that they face and because of the number of studies that have been carried out, there are various movements that are taking place to advocate for their rights. It has been argued that Africans need to get rid of the myth that homosexuality is “un-African.”²¹⁰ They

²⁰⁴ Busangokwakhe Dlamini, ‘Homosexuality in the African Context’ (2006) 67 *Agenda*: 128-36.

²⁰⁵ Epprecht (n183).

²⁰⁶ Paul Parin (1980) in Murray (n172).

²⁰⁷ Thabo Msibi, ‘The Lies We Have Been Told: On Homosexuality in Africa’ (2011) 58(1) *Africa Today* 55-77.

²⁰⁸ Saad Hammadi, ‘Founder of Bangladesh’s First and Only LGBT Magazine Killed’ (*The Guardian*, 25 April 2016) <<https://www.theguardian.com/world/2016/apr/25/editor-bangladesh-first-lgbt-magazine-killed-reports-say-roopbaan>> accessed 8 June 2016; Xan Rice, ‘Ugandan Gay Rights Activist David Kato Found Murdered’ (*The Guardian*, 27 January 2011) <<https://www.theguardian.com/world/2011/jan/27/ugandan-gay-rights-activist-murdered>> accessed 7 June 2016; David Smith, ‘South Africa Gay Rights Activists Warn of Homophobic Attacks After Murder’ (*The Guardian*, 3 May 2011) <<https://www.theguardian.com/world/2011/may/03/south-africa-homophobic-attacks>> accessed 7 June 2016; The murder of the LGBTI activists elucidates the very dangerous situation on the ground.

²⁰⁹ Ben Mutua Jonathan Muriithi, ‘Kenyan marries another man in USA’ *Daily Nation* (Kenya, 23 May 2016) <<http://www.nation.co.ke/news/Kenyan-marries-another-man-in-USA/1056-3214636-7i0swg/index.html>> accessed 22nd April 2016.

²¹⁰ Catherine M. Cole and Takwiyaa Manuh, *Africa After Culture?* (Indiana University Press 2007).

also need to accept that homosexuality existed in the continent long before the colonialists came to Africa.²¹¹

2.3.4 Conclusion

Most religions tend to classify behaviours associated with homosexuality as “unnatural”, “ungodly”, and “impure”.²¹² Homosexuality is considered a sin in both Christianity and Islam.²¹³ The Bible itself also prescribes the punishment for homosexuality as “If a man practices homosexuality, having sex with another man as a woman, both men have committed a detestable act. They must be put to death, for they are guilty of a capital offense.”

Pro-LGBTI religious leaders like Desmond Tutu believe that God loves everybody including homosexuals and they should not be treated with contempt and hatred. He compared the discrimination they face to apartheid and feels that Jesus would not support the persecution of people based on their sexual orientation.

The negative attitudes towards homosexuals are often manifested in people’s behaviours towards the sexual minorities.²¹⁴ In Kenya this includes “physical violence, blackmail and extortion, denial of housing or evictions.”²¹⁵ The anti-sodomy laws in many countries including Kenya and hate speech by both political and religious leaders against the sexual minorities make the environment conducive for such negative behaviour.²¹⁶ Moreover the

²¹¹ Katy Migiro, ‘Drop the hypocrisy: gays are as African as wife-beating’ (*Thomson Reuters News Foundation*, 25 June 2013) <http://news.trust.org/item/20130624172600-fnqwe/> accessed 26 May 2016;

²¹² Manuel Malamba, ‘The Controversy of Homosexuality: A Critical Look At The Issues That Make Legalizing Homosexuality In Malawi Difficult’ (Master in Human Rights Practice, University of Gothenburg, 2012) <<http://munin.uit.no/bitstream/handle/10037/5109/thesis.pdf;jsessionid=5540F7AD655DA1EA79B52F43D2F5D582?sequence=2>> accessed 22 June 2016.

²¹³ In the Bible, Timothy 1:10 it is stated that “these laws are for people who are sexually immoral, for homosexuals ... and for those who do anything else that contradicts the right teaching.”

²¹⁴ Gregory M. Herek, ‘Stigma, Prejudice, and Violence Against Lesbian and Gay Men’ in John C. Gonsiorek and James D. Weinrich, *Homosexuality: Research Implications for Public Policy* (Newbury Park CA: Sage 1991) 60-80.

²¹⁵ Kenya Human Rights Commission Report, ‘The Outlawed Amongst Us’ (n25) 7; The sexual minorities face both violent and non-violent abuse of their human rights.

²¹⁶ The National Cohesion and Integration Act, No. 12 of 2008 defines hate speech in Section 13 as “A person who - (a) uses threatening, abusive or insulting words or behaviour, or displays any written material; (b) publishes or distributes written material; (c) presents or directs the performance the public performance of a play; (d) distributes, shows or plays, a recording of visual images; or (e) provides, produces or directs a programme, which is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behavior commits an offence if such person intends thereby to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred is likely to be stirred up.”

belief that it is the Westerners who introduced homosexuality to Africa make matters worse for the sexual minorities.

The perpetrators of discrimination rely on either the political leaders views, the religious views that majority of the leaders of both Christianity and Islam have or the fact that being part of the sexual minorities is not part of the African culture to justify what they do. They either want to get rid of the sexual minorities because they believe that they are like diseases or because they do not want to promote a sin. It may be time for Africans to accept that homosexuality has existed in the continent far longer than Christianity and Islam. This change in attitude could mean that there is a brighter future for the sexual minorities not only in Kenya, but all over Africa.

CHAPTER THREE

LGBT RIGHTS UNDER THE INTERNATIONAL AND REGIONAL REGIME

3.1 Introduction

Human rights are entitled to all humans equally and are inalienable, interdependent and indivisible.²¹⁷ They are absolute because one cannot lose these rights; they are indivisible because one cannot be deprived of them because they are less significant or non-essential and interdependent because all human rights are part of a complementary framework.²¹⁸ Although the term “human rights” has recent origin, the history of humanity has firmly been associated with the struggle against inequality, exploitation and condescension.²¹⁹

It is important to outline the development and evolution of human rights to be able to better understand the journey that the oppressed have had over the years. The various instruments and their interpretation will be studied to better appreciate the LGBTI rights and the limitations that the LGBTI people have in enjoying these rights.

This Chapter will begin by looking at the Magna Carta and the Four Freedoms after which the international framework including the United Nations Charter and the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights will be studied. The regional framework focuses on the African Charter on Human and People’s Rights, European Court on Human Rights, the Inter-American Court on Human Rights and the Inter-American Commission on Human Rights.

3.1.1 Magna Carta and the Four Freedoms

One of the first most vital advances of the recognition of human rights is the Magna Carta. This is one of the earliest documented evidence of the recognition of human rights. It was drafted in 1215.²²⁰ It was revolutionary because it recognized the fact that individuals had

²¹⁷ Theo van Boven, ‘Human Rights and Rights of Peoples’ (1995) 6 EJIL 461-476 <<http://www.ejil.org/pdfs/6/1/1307.pdf>> accessed 8 August 2016.

²¹⁸ *ibid.*

²¹⁹ Shajimon K. Mathews, ‘Human Rights in India: With Special Reference to the Role of the Kerala State Human Rights Commission’ (Doctor of Philosophy, Mahatma Gandhi University 2005) <<http://www.mgutheses.in/page/?q=T%201338>> accessed 8 June 2016

²²⁰ *ibid.*; it was drafted to make peace between the detested King and dissident barons, access to instant justice, and confines on medieval payments to the Crown.

certain rights which could be claimed against the state.²²¹ This document led to the Bill of Rights of the United Kingdom in 1689 which laid down both civil and political rights of everyone.

More recently, during World War II, United Kingdom, US, France and the Soviet Union (the Allies) adopted the Four Freedoms which were goals laid down by President Roosevelt who believed that freedom of speech, freedom of religion, freedom from fear, and freedom from want were freedoms that everyone ought to have enjoyed.²²² Although the Four Freedoms were adopted, the atrocities of the Second World War were so grave that there was need to protect the human rights of humanity and this led to the drafting of the United Nations Charter.

3.2 International Framework

3.2.1 The United Nations Charter and the Universal Declaration of Human Rights

The UN Charter has various provisions that touch on human rights and has set forth goals and binding directives. One of the goals is to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large or small...”²²³ Article 1, paragraph 3 lays down one of the purposes of the UN as achievement of global co-operation in endorsing respect for human rights and fundamental freedoms.²²⁴ Further, Article 55 enables the UN to support universal respect for, and adherence of human rights and fundamental freedoms for all minus exclusion because of sex, race, language or religion.²²⁵ Although the UN Charter contains provisions which are of a general nature in regards to human rights, it does contain a specific charter on human rights and this led to the drafting of the Universal Declaration of Human Rights (UDHR).²²⁶

²²¹ *ibid.*

²²² David M. Kennedy, *Freedom From Fear: the American people in depression and war, 1929–1945* (Oxford: Oxford University Press 1999) 386.

²²³ Preamble, United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, <<http://www.refworld.org/docid/3ae6b3930.html>> accessed 21 September 2016; The UN currently has 193 member states with Kenya being admitted on 16 December 1963.

²²⁴ UN Charter, Article 1(3).

²²⁵ *ibid.*, Article 55.

²²⁶ Shajimon K. Mathews, ‘Human Rights in India: With Special Reference to the Role of the Kerala State Human Rights Commission’ (Doctor of Philosophy, Mahatma Gandhhi University, 2005) <<http://www.mgtheses.in/page/?q=T%201338>> accessed 8 June 2016.

From the inception of the UDHR, many scholars viewed human rights as a universal phenomenon.²²⁷ René-Samuel Cassin, one of the drafters of UDHR orated that the importance of the "universalization" of human rights is anchored on the events leading up to and shortly after the World War II which included "exploitation of women, mass hunger, disregard for freedom of conscience and for freedom of speech, widespread racial discrimination."²²⁸ According to him they were "far too prevalent to be overlooked."²²⁹

The UDHR was adopted by the UN General Assembly in Paris on 10 December.²³⁰ Although the Declaration was not binding, most of the rights recognised in the Declaration were incorporated into the national laws of most countries.²³¹ Despite this, two covenants were proclaimed to give the Declaration legal force.²³²

Article 1 of the UDHR provides that "all human beings are born free and equal in dignity and rights" while Article 5 provides for the prohibition against "torture, inhuman or degrading treatment or punishment."²³³ The rights and freedoms set out in the UDHR have become international customary law through state practice and *opinio juris*.²³⁴ This view was expressed as early as 1965 by late Judge Waldock.²³⁵

While the UDHR does not unequivocally list sexual orientation as a protected group, the addition of "other status" affords safeguards to the LGBTI community. The Human Rights Council has adopted three resolutions on 17 June 2011 and 26 September 2014 namely Human Rights, Sexual Orientation and Gender Identity; and 30 June 2016 on "Protection against violence and discrimination based on sexual orientation, and gender identity."²³⁶ The 2014 resolution asked for the High Commissioner for Human Rights to revise a report issued on 15 December 2011 that looked at violence and discrimination that was faced by people

²²⁷ They apply to all people in all places at all times.

²²⁸ Frederick Haberman, *Nobel Lectures in Peace*, (World Scientific 1998) 391.

²²⁹ *ibid.*

²³⁰ Universal Declaration of Human Rights, 1948 Preamble.

²³¹ Mary Ann Glendon, 'The Rule of Law in the Universal Declaration of Human Rights' (2004) 2(1) *Northwestern Journal of International Human Rights* <<http://gluna.wildapricot.org/resources/Human%20Rights%20Day%202014/The%20Rule%20of%20Law%20in%20the%20Universal%20Declaration%20of%20Human%20Rights.pdf>> accessed 14 June 2016.

²³² These are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) which will be discussed later.

²³³ UDHR, Articles 1 and 5.

²³⁴ Alina Kaczorowska-Ireland, *Public International Law* (Routledge 2010).

²³⁵ Richard B. Lillich, 'The Growing Importance of Customary International Human Rights Law' (1996) 25 *Ga. J. Int'l & Comp. L.* 1. <http://digitalcommons.law.uga.edu/gjicl/vol25/iss1/2> accessed 22 August 2016.

²³⁶ A/HRC/RES/27/32; A/HRC/RES/17/19; A/HRC/32/L.2/Rev.1 respectively.; The third Resolution was a result of shooting in a gay night club in Orlando.

due to their sexual orientation.. The revised version would then be used as a guide by other countries on how to treat the sexual minorities. Kenya was among the countries that were against the 2014 resolution.

As per the 2014 Resolution, in 2015, the Report was revised and laid down recommendations of measures to protect individuals from human rights violations including violent abuse and harassment.²³⁷ The Report found that besides hate-motivated violence against LGBTI people being prevalent and infiltrated with impunity, the law is also used to punish LGBTI people. The Report explicitly stated that States are legally bound to respect, protect and fulfil human rights of all persons within their jurisdiction without any exception. This finding of the Report means that states are to ensure that the sexual minorities in their jurisdiction are not faced with any discrimination and are treated equally to all the other citizens.

The 2016 Resolution mandated the selection of an expert in this field and made recommendations that sexual orientation and gender identity are included in non-discrimination provisions of human rights treaties.

3.2.2 The International Covenant on Economic, Social and Cultural Rights

The ICESCR was implemented by the UN General Assembly in 1966 and came into force in 1976. Articles 6 to 15 of the ICESCR recognize various rights including the right to health²³⁸ and participation in cultural rights.²³⁹ Article 2 of the same Covenant requires these rights to be recognised without discrimination as to “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²⁴⁰ In General Comment No. 20, The Committee on Economic, Social and Cultural Rights (CESCR) highlighted that “other status” comprises sexual orientation.²⁴¹ The General Comment paid

²³⁷ UN Human Rights Council Report: Discrimination and Violence against Individuals Based on their Sexual Orientation and Gender Identity, <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwji7uz23czNAhVTnRQKHxNACpkQFgglMAE&url=http%3A%2F%2Fwww.ohchr.org%2FEN%2FHRCBodies%2FHRC%2FRegularSessions%2FSession29%2FDocuments%2FA_HRC_29_23_en.doc&usg=AFQjCNHLuRX5P3DD4cs6e9aZ4g6y8418vQ> accessed 17 June 2016.

²³⁸ ICESCR, Article 12.

²³⁹ *ibid*, Article 15.

²⁴⁰ ICCPR, Article 2(2).

²⁴¹ The CESCR was established under ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the Economic, Social and Cultural Council (ECOSOC); UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, <<http://www.refworld.org/docid/4a60961f2.html>> accessed 21 July 2016;

special attention to vulnerable minority groups that require protection and provided that states are to eliminate both formal and substantive discrimination to enable everyone enjoy the rights.²⁴²

Article 2(2) of the ICESCR that provides for non-discrimination has been defined as an ‘immediate effect’ duty while Article 2(1) provides for a more progressive realisation standard.²⁴³ Article 2(1) would therefore entail states revising their laws and policies to eliminate *de jure* discrimination while Article 2(2) entails states implementing temporary measures that are targeted to specific groups to negate permanent effects of past and to get rid of diminish conditions which perpetuate discrimination.²⁴⁴ For a state to achieve substantive equality, a state is required to invest more resources and pay more attention. This is supposed to result in the elimination of *de facto* discrimination.

3.2.3 The International Covenant on Civil and Political Rights

The ICCPR was implemented by the UN General Assembly in 1966 and came into force in 1976. Subsequently, there were two Optional Protocols on Civil and Political Rights which came into force on March 23, 1976 and the second protocol came into force on July 11, 1991 respectively.²⁴⁵ These gave the UDHR which is one of the “most important documents of the 20th Century” a life of its own.²⁴⁶

The ICCPR in Article 2 has a similar clause on non-discrimination as the ICESCR.²⁴⁷ Article 26 of the ICCPR also provides that every person is entitled to equal safeguard of the law minus discrimination.²⁴⁸ The ICCPR founded the Human Rights Committee (HRC) as the judicial monitoring body. The HRC in the revolutionary case of *Nicholas Toonen v. Australia* confirmed that by implication, sexual orientation was encompassed as a ground for no discrimination.²⁴⁹ The HRC followed the jurisprudence of the European Court of Human

²⁴² *ibid.*

²⁴³ *ibid.*

²⁴⁴ *ibid.*, *supra* note 9.

²⁴⁵ Shajimon K. Mathews, ‘Human Rights in India: With Special Reference to the Role of the Kerala State Human Rights Commission’ (Doctor of Philosophy, Mahatma Gandhhi University, 2005) <<http://www.mgutheses.in/page/?q=T%201338>> accessed 8 June 2016.

²⁴⁶ Richard B. Lillich, ‘The Growing Importance of Customary International Human Rights Law’ (1996) 25 Ga. J. Int’l & Comp. L. 1. <<http://digitalcommons.law.uga.edu/gjicl/vol25/iss1/2>> accessed 22 August 2016; Claude Welch, ‘The Universal Declaration of Human Rights at Sixty’ (2008) 13(1) eJournal USA, 3 <<http://photos.state.gov/libraries/kuwait/63599/PDF/Human%20Rights.pdf>> accessed 19 June 2016.

²⁴⁷ ICCPR, Article 2.

²⁴⁸ ICCPR, Article 6.

²⁴⁹ Communication No. 488/1992 [1994] 1(3) Privacy Law & Policy Reporter 50.

Rights in *Jeffrey Dudgeon v. UK* where the Court found that sodomy laws in Northern Ireland were an interference to private life.²⁵⁰

The HRC found for the first time that no individual could be denied the enjoyment of rights due to their sexual orientation. The Tasmanian Criminal Code further held that had specific provisions criminalizing same-sex sexual relations was an arbitrary intrusion with the complainant's right to privacy.²⁵¹ The HRC also called for the repeal of the offending law and it was scrapped in April 1997.²⁵² After this finding, other Treaty Bodies including the CESCR and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) have urged states parties to ensure that such discrimination is avoided or eliminated.²⁵³

The notion that discrimination based on sexual orientation is an abuse of the ICCPR was supported by the HRC in *Young v Australia* where the Court held that gay couples must be rendered equal rights as those rendered to opposite sex couples.²⁵⁴

3.2.4 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) came into force on 26 June 1987. Kenya acceded to CAT in 1997. The definition of torture as provided for under this Convention states that it excludes pain and suffering that arises from lawful sanctions.²⁵⁵ It could be argued that because anti-sodomy laws exist, then the discrimination and violence that is suffered by LGBTI people does not fall within the definition of "torture". To avoid such ambiguity, the Special Rapporteur of the

²⁵⁰ Application No. 7525/1976 [1981] ECHR 5.

²⁵¹ The right to privacy was guaranteed under Article 17 (1) together with the prohibition of discrimination under Article 2 of the ICCPR.

²⁵² New Matilda, '20 Years Since Toonen Changed the World' (*newmatilda.com*, 11 April 2014) <<https://newmatilda.com/2014/04/11/20-years-toonen-changed-world/>> accessed 23 April 2016.

²⁵³ 'The Human Rights of Lesbian, Gay, Bisexual and Transgender People: A primer to working with the United Nations Treaty Monitoring Bodies and the Special Procedures of the United Nations Commission on Human Rights' (*Amnesty International*, March 2005) <<https://www.amnesty.org/en/documents/ior40/004/2005/en/>> accessed 22 April 2016.

²⁵⁴ Communication No. 941/2000 [2003] 5 IHRR 747.

²⁵⁵ The term "torture" has been described as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

Commission on Human Rights determined that discrimination on the basis of sexual orientation backs the dehumanization of LGBTI persons, which is a condition required to torture.²⁵⁶

3.2.5 Convention on the Rights of the Child

The UN Convention on the Rights of the Child (UNCRC) entered into force on 2 September 1990.²⁵⁷ The UNCRC provides that States parties have the duty to guarantee that all human beings under 18 enjoy all the rights provided in the Convention without discrimination, comprising “race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”.²⁵⁸

The Committee on the Rights of the Child has made remarks on ‘transsexual’ young peoples’ rights and commended that the United Kingdom government deliver satisfactory data and care to young people from the sexual minorities.²⁵⁹ One of the Committee’s concerns is that such persons have no access to the suitable data, care, and essential safeguard to allow them to live as members of the sexual minorities.²⁶⁰ The Committee urges the State party to guarantee full safeguard against discrimination on the grounds of” ethnicity, disability, religion or belief, or sexual orientation.”²⁶¹

3.2.6 Convention on the Elimination of All Forms of Discrimination against Women

CEDAW was adopted in 1979 by the UN General Assembly. Article 2 of the Convention obligates States to “condemn discrimination against women in all its forms and agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.”²⁶² Article 1 defines discrimination as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying

²⁵⁶ Special Rapporteur of the Commission on Human Rights, Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment, 21, GAOR.

²⁵⁷ It is an agreement between different countries designed specifically to meet the needs of children.

²⁵⁸ UNCRC, Article 2.

²⁵⁹ Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child regarding the United Kingdom, 9 October 2002, UN Doc CRC/C/15/Add.188, 23 February 2000.

²⁶⁰ Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child regarding the United Kingdom*, 9 October 2002, UN Doc CRC/C/15/Add.188, 11.

²⁶¹ Committee on the Rights of the Child, Concluding Observations: Slovakia, UN Doc CRC/C/SVK/CO/2, June 8, 2007.

²⁶² CEDAW, Article 2.

the recognition, enjoyment or exercise by women...of human rights and fundamental freedoms.”²⁶³

General Recommendation No. 28 clarified that “discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity.”²⁶⁴ It highlights that States have to condemn “all forms of discrimination, including forms that are not explicitly mentioned in the Convention or that may be emerging.”²⁶⁵ It also expounds on the State obligation to adopt policies to this end. In this regard, the General Recommendation calls on States to devote resources “to ensuring that human rights and women's non-governmental organizations are well-informed, adequately consulted and generally able to play an active role in the initial and subsequent development of the policy.”²⁶⁶

3.2.7 Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity

The Yogyakarta Principles were established at a seminar of the International Commission of Jurists, the International Service for Human Rights and human rights experts from 25 countries representing all geographic regions and the document comprises 29 principles adopted universally by the experts, government commendations, regional diplomatic organisations, civil society, and the UN.²⁶⁷ The Yogyakarta Principles are a quasi-judicial instrument.²⁶⁸ The Principles objective is to uphold previously obligatory legal standards and

²⁶³ *ibid*, Article 1.

²⁶⁴ Committee on the Elimination of All Forms of Discrimination against Women, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/2010/47/GC.2, 5

<<http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW-C-2010-47-GC2.pdf>> accessed 10 July 2016.

²⁶⁵ *ibid*, 4.

²⁶⁶ *ibid*, 6-7.

²⁶⁷ Paula L. Ettlbrick and Alia Trabucco Zerán, ‘The Impact of the Yogyakarta Principles on International Human Rights Law Development’ A Study of November 2007 – June 2010 <http://www.ypinaction.org/files/02/57/Yogyakarta_Principles_Impact_Tracking_Report.pdf> accessed 16 August 2016.

²⁶⁸ Christine Chinkin, A Gendered Perspective To The International Use Of Force’ (1989) 12 Australian Year Book of International Law, 279-293 <<http://www.austlii.edu.au/au/journals/AUYrBkIntLaw/1989/13.html>> accessed 22 August 2016.

this has been stated in the introduction of the Principles.²⁶⁹ It is the obligation of the states to understand the significance of the principles and accept them fully.²⁷⁰

Unsurprisingly, the Yogyakarta Principles are backed by NGOs, Western and Latin American States governments and professional bodies within the UN system.²⁷¹ By and large, African countries have been hush on the Principles which therefore undermines their importance.

3.2.8 State Reporting

When a treaty is ratified by a State, it not only assumes legal duty to implement the rights recognized in that treaty but also has a duty to submit periodic reports to the relevant treaty body.²⁷² The relevant human rights treaties and the state reporting obligations are illustrated in the table below.²⁷³

Treaty	Initial report due (following ratification) within:	Periodic reports due thereafter every:
ICESCR	2 years	5 years
ICCPR	1 year	4 years
CEDAW	1 year	4 years
CAT	1 year	4 years
UNCRC	2 years	5 years

²⁶⁹ Yogyakarta Principles, Preamble.

²⁷⁰ S.J. Rombouts Stefanie Jansen, 'How could the Yogyakarta Principles help improve the situation of transgender people, when examined in the framework of existing bodies of international non-discrimination norms?' (International and European Public Law, Human Rights Track, University of Tilburg, 2012) <<http://arno.uvt.nl/show.cgi?fid=127432>> accessed 7 September 2016.

²⁷¹ 'International: The Role of the Yogyakarta Principles' (*Outright Action International*) <<https://www.outrightinternational.org/content/international-role-yogyakarta-principles>> accessed 9 September 2016.

²⁷² Anne F. Bayefsky, 'The UN Human Rights Treaty System: Universality at the Crossroads' (2001) <<http://www.bayefsky.com/report/finalreport.pdf>> accessed 8 September 2016; State reporting was modeled to after the reporting procedure developed under the Constitution of the International Labour Organisation (ILO) adopted within the framework of the 1919 Peace Treaty of Versailles (end of World War I creating the League of Nations).

²⁷³ Navanethem Pillay, 'Strengthening the United Nations human rights treaty body system' A report by the United Nations High Commissioner for Human Rights (2012) <<http://www2.ohchr.org/english/bodies/HRTD/docs/HCTDReportTBSStrengthening.pdf>> accessed 7 August 2016

State reporting is a system of international scrutiny of the efforts a State has put in place to implement obligations it has undertaken under a treaty.²⁷⁴ Although it is non-confrontational, there are various challenges that are faced in the human rights treaty scheme which include deferrals in compliance, lack of reporting, and replication of reports amongst treaty bodies.²⁷⁵ This then makes it the weakest of the treaty body methods for the enforcement of treaty provisions.

States often replicate reports because of the numerous multiple reporting obligations under each of the treaties that they have ratified.²⁷⁶ Besides replication, States often request for more time to submit reports and it has been stated that treaty bodies only survive because of unpaid experts.²⁷⁷ Due to these constraints, treaty bodies have had to take steps to improve efficiency which include reducing the time for State reviews and reducing the use of interpretation and documentation.²⁷⁸

Concluding Observations which are country-specific recommendations resulting from the Committee's assessment and engagement with the State concerned are then given.²⁷⁹ They indicate the positive steps the State has made in its efforts to realise the relevant treaty and the difficulties the State is facing in the realisation of the relevant rights.²⁸⁰ They also give recommendations to the State on how to respond to the noted challenges and to improve the overall implementation of the relevant treaty.²⁸¹ Further, the relevant Committee can elaborate general comments in relation to issues that are commonly affecting the States in the realisation of specific rights.²⁸²

²⁷⁴ Philip Alston and Ryan Goodman, *International Human Rights* (Oxford University Press, 2008) - State reporting entails a system of introspection & inspection. Introspection requires that the State undertakes a thorough & honest assessment of the legislative, policy, programmatic, judicial, administrative and practical measures it has taken to realise the relevant rights. Inspection entails a constructive dialogue between the State and the relevant treaty body based on the report submitted by the State. This dialogue is open to the public.

²⁷⁵ 'Enhancing the human rights treaty body system', <<http://www2.ohchr.org/english/bodies/treaty/CCD.htm>> accessed 7 August 2016.

²⁷⁶ 'Strengthening the United Nations human rights treaty body system'.

²⁷⁷ *ibid.*

²⁷⁸ *ibid.*

²⁷⁹ Michael O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies' (2006) 6 (1) *Human Rights Law Review*, 27-52 <<http://hrhr.oxfordjournals.org/content/6/1/27.abstract>> accessed 7 September 2016.

²⁸⁰ *ibid.*

²⁸¹ *ibid.*

²⁸² *ibid.*

Based on a report updated on 14 December 2015 it is evident that most of the States that did not submit their reports on time were from Africa and South America.²⁸³ The lack of reporting or submitting reports could mean that either the states do not want to report on the human rights status in their respective countries or simply find it cumbersome. The value of state reporting is definitely lacking because there are no punitive measures that are taken against States that do not report on time. Further, most human rights violations are either committed or endorsed by the State and therefore having an objective report from the State is very unlikely.

3.3 Regional Framework

3.3.1 African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (The Banjul Charter) approved in Nairobi on 27 June 1981 and entered into force on October 21, 1986.²⁸⁴ Kenya consented to the Charter on 23 January 1992 and is bound by the terms of the Charter.²⁸⁵ All African states have unanimously ratified the Charter. The Charter created the quasi-judicial body which is the Charter's oversight body, the African Commission on Human and Peoples' Rights (the African Commission).²⁸⁶ The Banjul Charter describes right holders as "everyone"; "every human being" and "every individual".²⁸⁷ Article 2 further states that there is no ground on which anyone might be denied protection of the Charter.²⁸⁸ Article 27 of the same Charter provides that the rights may be limited by 'due regard to rights of others, collective security, morality and common interest'.²⁸⁹ It could be contended that by Article 2 of the Charter protects the LGBTI persons.

Article 3 of the African Charter goes on to state that every person shall be equal in the eyes of the law and eligible to equal safeguard of the law. Article 11 of the African Charter states that

²⁸³ Database of the United Nations Office of the High Commissioner for Human Rights, Treaty Bodies Database, December 2015
<http://www.ohchr.org/Documents/Issues/HRIndicators/Reporting_Compliance_Dec2015_map.pdf> accessed 7 August 2016.

²⁸⁴ Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), <<http://www.refworld.org/docid/3ae6b3630.html>> accessed 21 September 2016.

²⁸⁵ *ibid.*

²⁸⁶ *ibid.*, Article 45.

²⁸⁷ *ibid.*, Articles 2 – 17.

²⁸⁸ *ibid.*, Article 2.

²⁸⁹ *ibid.*, Article 27.

every person shall have the right to assemble liberally with others. The enjoyment of this right shall be limited by a provision in the law.

Despite this protection, the African Commission has dealt with the matter of discrimination on the ground of sexual orientation only once in 1994 when in *William A. Courson v. Zimbabwe* a complaint was filed against Zimbabwe for outlawing consensual same-sex sexual contacts between adults.²⁹⁰ This suit was later withdrawn by William. The African Commission did not see need in continuing with it. In 2002, in *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, the African Commission affirmed that the non-discrimination principle contained in Article 2 was to “ensure equality of treatment for individuals” irrespective inter alia of “sexual orientation.”²⁹¹

Notwithstanding the affirmation by the African Commission in 2002, the African Commission in May 2010 rejected the application for observer status by Coalition of African Lesbians (CAL) which is a network of organisations committed to lesbian equality and visibility.²⁹² It was recognised that the Commissioners each had their ideology and homophobia that emanated from their religion and led to their decision that CAL’s purposes were not in harmony with the African Union Constitutive Act and the African Charter; and further that the Charter did not explicitly recognise sexual orientation as one of the grounds for non-discrimination.²⁹³

CAL then lobbied other NGOs and supported general resolutions, including one to end violence against women and another supporting the fight against HIV/Aids. CAL achieved success in April 2015 at the 56th Session of the ACHPR that held in Banjul, the Gambia when it was granted observer status. Pacifique Manirakiza, a commissioner from Burundi, specifically commended members to keep up with the times and stated that “Homosexuality is a reality in our countries and we cannot set this issue aside.”²⁹⁴

Resolution 275 which is on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity, is

²⁹⁰ Communication 136/94: William A. Courson v. Zimbabwe, Communication 136/1994 [2000] AHRLR 335.

²⁹¹ Communication 245/02, Zimbabwe Human Rights NGO Forum v. Zimbabwe, Communication 245/2002 [2006] AHRLR 128.

²⁹² About Us (*Coalition of African Lesbians*) <<http://www.cal.org.za/>> accessed 27 June 2016.

²⁹³ Frans Viljoen, *International Human Rights Law in Africa* (Oxford 2012).

²⁹⁴ Dicta Asiimwe, ‘African Union rights agency gives gay lobby observer status’ (The East African, 2 May 2015) <<http://www.theeastafrican.co.ke/news/African-Union-rights-agency-gives-gay-lobby-observer-status-/2558-2703782-opip1w/index.html>> accessed 3 September 2016.

one of the significant steps to the recognition of protection of the human rights of LGBTI people all over Africa. The Resolution:

strongly urges States to end all acts of violence and abuse, whether committed by State or non-state actors, including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims.²⁹⁵

The difference in the ideology and mind-set of the court is evident. The question that crops up is “what next?”

3.3.2 European Convention on Human Rights

The European Court on Human Rights is an international court created by the European Convention on Human Rights.²⁹⁶ The Convention put up a mechanism for the implementation of the duties for contracting States. The institutions that were delegated this duty were the European Commission of Human Rights, the European Court of Human Rights and the Committee of Ministers of the Council of Europe. In November 1998, Protocol No. 11 came into force and substituted the standing, ad hoc Court and Commission by a solitary, permanent Court.

Unlike the African Commission, the European Court on Human Rights has addressed various sexual orientation cases. However, it is important to look at the journey of the Commission to date to better understand the current position. *Dudgeon v. UK* was the first successful decision in relation to homosexuality. Prior to 1981, the Commission had received numerous complaints from homosexual men and rendered them all inadmissible.²⁹⁷ The applicants’ allegations were made under Articles 8 and 14 on respect for private life and non-

²⁹⁵ African Commission on Human And Peoples’ Rights Adopts Resolution Condemning Violence And Discrimination Against LGBTI Persons, Resolution No. 275 (*International Justice Resource Center*) <<http://www.ijrcenter.org/2014/06/10/african-commission-on-human-and-peoples-rights-adopts-resolution-condemning-violence-and-discrimination-against-lgbti-persons/>> accessed 10 September 2016.

²⁹⁶ The Convention for the Protection of Human Rights and Fundamental Freedoms was opened for signature in Rome on 4 November 1950 and entered into force in September 1953.

²⁹⁷ All the men were from Federal Republic of Germany and had brought complaints based on their national laws that criminalized homosexual activities.

discrimination respectively.²⁹⁸ ‘Sex’ was the only basis of discrimination that was invoked. The Commission disallowed the submissions stating that the illegalisation was justified as it safeguarded health and ethics. The period from 1955 to 1981 has therefore has been termed as “sleeping beauty years” for the Commission.²⁹⁹ The Commission was reluctant to find that discrimination that emanated because of sexual orientation was protectable under the Convention until 1981. This is the reason that the *Dudgeon* case was revolutionary.

The Court also ruled in *Identoba & Others v. Georgia* that the peaceful demonstration in Tbilisi to mark International Day against Homophobia which ended up becoming violent was a violation of prevention of inhuman and degrading treatment; prohibition of discrimination; and violation of freedom of assembly and association.³⁰⁰ The Court in *M.C. and C.A. v. Romania* similarly held that the applicants who were attacked after attending a gay parade had their rights to the prohibition of discrimination violated.³⁰¹

3.3.3 Inter-American Convention on Human Rights

The American Convention on Human Rights is an international human rights instrument that came into force on 18 July 1978. The organisations accountable for supervising obedience with the Convention are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The two bodies are organs of the Organization of American States. The Inter-American Court of Human Rights made a pioneering judgement in case of *Atala Riffo and Daughters v. Chile*.³⁰² The Inter-American Commission referred the issue to the Inter-American Court of Human Rights which had to deal with an LGBT rights case for the first time. In 2010, the Court found that Atala who was stripped off custody of her daughters based on her sexual orientation had been discriminated against in ways incompatible with the Pact of San José. Further, in 2012 the court bestowed damages of

²⁹⁸ Art.8 ECHR provides as follows: “1) Everyone has the right to respect for his private and family life, his home and his correspondence. 2) There shall be no interference from public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of the others.”; Art.14 ECHR provides as follows: “The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

²⁹⁹ J. Frowein, ‘European Integration Through Fundamental Rights,’ Michigan Journal of Law Reform 18, 1984 5-28 at 8 in Paul Johnson and Paul R. Johnson, *Homosexuality and the European Court of Human Rights* (Routledge, 2014).

³⁰⁰ Application No. 73235/2012 [2015] ECHR; European Convention on Human Rights, Articles 3, 11 and 14.

³⁰¹ Application No. 12060/12 [2016] ECHR 359.

³⁰² Case 12.502 [2012] Inter-Am. Ct. H.R.

USD \$50,000 damages and \$12,000 in court costs. Teodoro Ribera who was the s Chilean Minister of Justice had stated that Chile would respect the judgement.

3.4 Conclusion

The various international instruments that protect the sexual minorities have been examined. Of most importance is the European Court on Human Rights and the journey to 1981. The situation that the Court was in from 1955 to 1981 is the same position that the African Court on Human and Peoples Rights is in today. It could be reasoned that the decision of granting observer status to CAL is equivalent to the *Dudgeon* case in 1981. It should be appreciated that it took 7 years for CAL to be successful but it eventually was.

The shift in ideology and mind-set is not an overnight affair and requires foot-in-the-door technique. Small successes by applicants like CAL should serve as stepping stones for future applicants.

CHAPTER FOUR

ANALYSIS OF THE CONSTITUTION OF KENYA, 2010 AND THE ERIC GITARI CASE

4.1 Introduction

In this Chapter, the Constitution of Kenya, 2010 (“the Constitution”) has been examined before the assessment of the decision in the *Eric Gitari case*. Because a country’s national Constitution is the highest commandment of that nation, it becomes important to look at the specific provisions that impact the freedom of association and right to equality and freedom from discrimination. The Bill of Rights and the domestication of international obligations are the two main areas of focus.

After the examination of the Constitution, the facts and judgement of the *Eric Gitari case* have been analysed in relation to the Constitutional provisions. Various local, regional and international case law have also been examined.

4.2 Constitution of Kenya, 2010

4.2.1 Introduction

The Constitution of Kenya, 2010 was promulgated on 27 August 2010.³⁰³ The Constitution of Kenya Review Act of 2008 started the process of promulgation of the Constitution.³⁰⁴ It identified four ‘organs’ for the review of the Constitution: a Committee of Experts (CoE); a Multiparty Parliamentary Committee; the National Assembly and a referendum.³⁰⁵ The CoE was established in February 2009 and first identified the ‘contentious’ issues as the system of government; the form devolution should take; and how to implement a new constitution.³⁰⁶ It was later found that these were not the only contentious issues and that the right to life,

³⁰³ "Institutional Reform in the New Constitution of Kenya", International Center for Transitional Justice (ICTJ) (2010) <<https://www.ictj.org/publication/institutional-reform-new-constitution-kenya>> accessed 22 August 2016.

³⁰⁴ Waruguru Kaguongo, ‘Introductory Note on Kenya’ http://www.icla.up.ac.za/images/country_reports/kenya_country_report.pdf accessed 8 September 2016.

³⁰⁵ The Preliminary Report of the Committee of Experts on Constitutional Review, http://katibainstitute.org/Archives/images/17-11-2009_Preliminary_Report.pdf accessed 8 September 2016.

³⁰⁶ Committee of Experts on Constitutional Review, “Final Report of the Committee of Experts on Constitutional Review” (Nairobi, Kenya, October 11, 2010), 45.

sexual orientation, land rights and the Kadhi's courts were also contentious.³⁰⁷

The Constitution has intensified protection of individual rights and further amplified acknowledgement that discrimination on grounds of sexual orientation abuses universal human rights. The Constitution offers a robust structure for contending that Kenya's anti-sodomy laws are unconstitutional. In the Preamble to the Constitution, Kenyans affirm a pride in Kenya's traditional, folk and spiritual diversity and confirm the willpower to live in harmony as one united nation.³⁰⁸ Having this as the backbone of the Constitution and the discussion of the rights under the Constitution is important.

The Constitution incorporates three changes from the previous legal regimes that together have momentous implications for the sexual minorities in Kenya. First, the Constitution boasts a wide Bill of Rights and provides for a positive onus on the State to uphold and accomplish the rights in the Constitution. Secondly, it includes global laws into Kenya's national law.³⁰⁹ Thirdly, under Articles 2 and 4, "any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid."³¹⁰ The first two changes will be the main subjects of discussion in this Chapter.

4.2.2 The Bill of Rights

The Bill of Rights has extensive rights and freedoms that are guaranteed to all persons and has both vertical and horizontal application. Typically, Bills of Rights have vertical application because of the unequal relationships among citizens and the state. It is therefore unconventional for a Constitution to have horizontal application. It has been stated that:

The state is far more powerful than any individual... State authority allows the state to enforce its commands through the criminal law. If not protected by a bill of rights against abuse of the state's powers, the individual would be in an extremely vulnerable position.³¹¹

Article 20 provides that the Bill of Rights "binds all state organs and all persons."³¹² The Court confirmed this position in *Purity Kanana Kinoti v. Republic* where a police officer

³⁰⁷ *ibid.*

³⁰⁸ Constitution of Kenya, Preamble.

³⁰⁹ Constitution of Kenya, Articles 2, 5 and 6.

³¹⁰ *ibid.*, Articles 2 and 4.

³¹¹ Iain Currie and Johan de Waal, *The Human Rights Handbook* (Wetton: Juta 2005) 43.

³¹² Constitution of Kenya, Article 20.

who was found to have violated the human rights of an accused person was ordered to compensate the victim.³¹³ It is therefore not only the State but all persons who are bound by the Constitution.³¹⁴ This is beneficial to the LGBTI community because the State ought to punish human rights perpetrators which would serve as a deterrent.

This Chapter will focus on Article 27 and Article 36 of the Constitution in relation to the sexual minorities. Other relevant provisions of the Constitution will be discussed where applicable. Article 27(1) provides that for equality before the law.³¹⁵ Equality in Article 27(2) has been defined to include “full and equal enjoyment of all rights and fundamental freedoms.”³¹⁶ It further provides in Article 27(4) that there shall be no direct or indirect discrimination against any person on “any ground including”. Although sexual orientation is not listed as a prohibited grounds of discrimination, Article 27(4) ought to be read with Article 259 (4)(b) which defines the word including as meaning, “includes but not limited to.”³¹⁷ This means that the sexual minorities could argue that discrimination that they face because of their sexual orientation is a breach of Article 27 (4) of the Constitution. This Article is referred to later in this Chapter when analysing the *Eric Gitari case*.

The Constitution in Article 36 provides for freedom of association. Article 36(1) provides that “every person has the right to freedom of association, which includes the right to form, join or participate in the activities of any kind.”³¹⁸ This definition of every person does not create different classes of people who are entitled to enjoy the rights. This means that LGBT people also have the right to associate under the Constitution. A person has been defined in Article 260 to include “a company, association or other body of persons whether incorporated or unincorporated.” It does not give an exception that the LGBTI persons do not qualify as persons. An analysis of whether the freedom of association is absolute or not is done later in this Chapter when analysing the *Eric Gitari case*.

4.2.3 Domestication of International Obligations

Prior to the promulgation of the Constitution, Kenya took a dualist style to the application of

³¹³ Criminal Application No. 752 of 2010 [2011] eKLR.

³¹⁴ Article 260 of the Constitution describes a person to include a company, association or other body of persons whether incorporated or unincorporated.

³¹⁵ *ibid*.

³¹⁶ Constitution of Kenya, Article 27 (2).

³¹⁷ *ibid*, Article 259(4)(b).

³¹⁸ *ibid*, Article 36 (1).

international law.³¹⁹ The Constitution of 2010 changed this position with the inclusion of Article 2(5) and 2(6) which provide respectively that the: "general rules of international law shall form part of the law of Kenya"³²⁰ and "any treaty or convention ratified by Kenya shall form part of the law of Kenya."³²¹ This shift demonstrates an acknowledgement in the Constitution that among other legal obligations, human rights obligations as enshrined in international treaties form a portion of Kenyan law.

In *Re The Matter of Zipporah Wambui Mathara* the Court held that Article 2(6) imported international treaties provisions that Kenya has ratified as sources of Kenyan law.³²² The Court did not however analyze the nexus between international and national laws. Further confirmation of the changed situation was evidenced by the Supreme Court of Kenya *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Supreme Court of Kenya*.³²³

4.2.4 Relationship between National and International Law

Having recognized that treaties that have been ratified by Kenya form part of domestic law, the question of whether international treaties take precedence over local laws is now important. It has been argued that the Constitution does not create a mechanism that can be used to determine clashes between national legislation and international law.³²⁴ Before the promulgation of the Constitution, courts relied on the position in *Okunda v. R.*³²⁵ It held that the obligations under treaty law could not supersede national laws.³²⁶ After the promulgation of the Constitution, there are two differing views on the supremacy of international laws over national laws – the views of Justice Koome and those of Justice Majanja.³²⁷

Some writers have criticized the views of Justice Koome expressed in *Re The Matter of Zipporah Wambui Mathara* that national law is inferior to international law.³²⁸ Justice

³¹⁹ A treaty or international convention which Kenya had ratified would only apply nationally if parliament domesticated the particular treaty or convention by passing the relevant legislation.

³²⁰ Constitution of Kenya, Article 2(5).

³²¹ *ibid*, Article 2(6).

³²² *David Ndungu Maina v. Zipporah Wambui Mathara*, Bankruptcy Cause No. 19 of 2010 [2010] eKLR.

³²³ Supreme Court of Kenya Advisory Opinion Application 2 of 2012 [2012] eKLR.

³²⁴ Maurice Oduor, 'The Status of International Law in Kenya' (2014) 2(2) Africa Nazarene University Law Journal, 97-125 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326135> accessed 6 August 2016

³²⁵ [1970] KLR 457.

³²⁶ *ibid*.

³²⁷ The Status of International Law in Kenya.

³²⁸ (2010) eKLR, Bankruptcy Cause 19 of 2010.

Majanja stated in an article, before he was appointed a Judge, that Justice Koome should have looked at the statute and the rule of international law holistically to determine which of the two took precedence.³²⁹ He further stated that a treaty held the status of an Act of Parliament.³³⁰ Subsequently, Justice Majanja, after he became a judge in *Beatrice Wanjiku and Another v. Attorney General and Others* stated that rules of international law are “subordinate to and ought to be in compliance with the Constitution”.³³¹ The Judge further stated that where rules of international law and national law are contradictory, they should be read together and the interpretation that best suit the enforcement of a right ought to be adopted.³³² He determined that the question of superiority is a non-issue.

Taking the two views into consideration, when it comes to international human rights, Article 20(3) of the Constitution gives the Court the mandate to “develop the law to the extent that it does not give effect to a right or fundamental freedom; and adopt the interpretation that most favours the enforcement of a right or fundamental freedom.”³³³ The Court therefore has wide discretion when it comes to matters under the Bill of Rights. The Court therefore ought to jealously protect the rights of the sexual minorities.

4.3 The Eric Gitari Case

4.3.1 The Facts of the Eric Gitari case

The Petitioner, Eric Gitari, a lawyer applied to the Board to register an NGO with the objective of progression and safeguarding of the LGBTIQ community’s human rights.³³⁴ The Petitioner attempted to reserve with the names “Gay and Lesbian Human Rights Council; Gay and Lesbian Human Rights Observancy and Gay and Lesbian Human Rights Organization” with the Board.³³⁵ The Board directed that the names were improper and needed revision.³³⁶ On March 19, 2013, besides the Petitioner resubmitting the names “Gay and Lesbian Human Rights Commission; Gay and Lesbian Human Rights Council and Gay and Lesbian Human Rights Collective” to be reserved, he also wrote a letter demanding for a

³²⁹ David Majanja, ‘Debtors and the Law: A Delicate Balance of Different Legislations’ (2010) 1(3) Nairobi Law Monthly 94 in *ibid*.

³³⁰ Justice Njagi in *Diamond Trust Ltd v. Daniel Mwema Mulwa*, HCCC No. 70 of 2002 [2010] eKLR.

³³¹ Petition No. 190 of 2011 [2012] eKLR.

³³² *ibid*.

³³³ Constitution of Kenya, Article 20(3).

³³⁴ Eric Gitari case, para. 1.

³³⁵ *ibid*, para. 10.

³³⁶ *ibid*, para. 10

justification to the rejection of the application.³³⁷ The Board maintained that it rejected the request because the Penal Code outlawed gay and lesbian relationships.³³⁸ The Board backed this by Regulation 8(3)(b) of the NGO Regulations of 1992 which gives the Director of the Board the discretion to reject an application to reserve a name if “such name is in the opinion of the director repugnant to or inconsistent with any law or is otherwise undesirable”.³³⁹

The Board further specified that sexual orientation was not enumerated as a forbidden basis of discrimination in anti-discriminatory clause of the Constitution. Moreover, they stated that the Constitution does not protect same sex marriage like heterosexual relationships which are safeguarded in Article 45(2).³⁴⁰ On 17th June 2013, the Petitioner sent the objects of the NGO to the Board and also clarified that the NGO wanted to protect Constitutional rights.³⁴¹ The Board did not reply but the Petitioner contended that his Advocate was instructed to seek direction from the Courts.³⁴² That triggered the petition in the High Court.

4.3.2 Submissions by Petitioner (Eric Gitari)

The Petitioner submitted that according to ‘Outlawed Amongst Us’, it was evident that the sexual minorities faced discrimination including death threats and stigma from state officials including the police and their families because of their sexual orientation.³⁴³ The Petitioner’s focus was therefore on the violation LGBTIQ community’s rights by targeted advocacy and litigation solely or with human rights groups, and by issuing yearly human rights reports on the conditions of the sexual minorities.³⁴⁴

The petitioner grounded his case on the provisions of Articles 20(2), 31(3), 27(4), 28 and 36 of the Constitution.³⁴⁵ Consequently by the Board denying the registering of the NGO, his right to freedom of association, dignity, equality and non-discrimination had been violated.³⁴⁶ He further stated that by establishing the NGO, he would be able to address the predicament of the sexual minorities. He argued that Article 36 imbeds liberty to associate for “every

³³⁷ *ibid*, para 11

³³⁸ Eric Gitari case, para. 11.

³³⁹ *ibid*, para 12.

³⁴⁰ *ibid*, para. 16.

³⁴¹ *ibid*, para. 17.

³⁴² *ibid*, para. 17.

³⁴³ *ibid*, para. 20; The report has previously been discussed in Chapters One and Two.

³⁴⁴ *ibid*, para. 23.

³⁴⁵ *ibid*, para. 24.

³⁴⁶ *ibid*, para. 26.

person” and there is no classification of people.³⁴⁷ The Petitioner maintained that the Board had assumed that the NGO would promote criminal activities.³⁴⁸

The Petitioner sought judicial interpretation that “every person” in Article 36 of the Constitution comprises each person in Kenya irrespective of their sexual orientation. He also sought a declaration that the Respondents have infringed Article 36 of the Constitution by not according equal treatment to the sexual minorities. Further, he prayed for a declaration that the Petitioner is permitted to enjoy the freedom to associate as every other Kenyan. He also prayed for an order of mandamus directing the Board to obey its legitimate obligation under Articles 27 and 36 of the Constitution. Finally, he prayed for a declaration that by the Respondents failure to obey their constitutional obligations under Article 36, there was violation of the rights of marginalised and minority groups which include the sexual minorities; and costs of the petition.³⁴⁹

4.3.3 Submissions by the 1st Respondent (NGO Board)

The 1st Respondent, the Board contended that the Petition was impulsive and the Petitioner had not satisfied the reliefs provided for in the NGO Act before approaching the Court. It further stated that there was no violation of the Eric’s right to associate and any violation of the Eric’s rights was defensible.³⁵⁰ The Respondent stated that the NGO sought to promote criminalised activities, therefore being the ground for denial of the application.³⁵¹

The Board also relied on Article 45 which restricts marriage to heterosexual people.³⁵² It relied on Article 16 of the UDHR that provides for the right to heterosexual marriage.³⁵³ It further relied on *Joslin v. New Zealand*.³⁵⁴ The Court in this case found that the UNHRC held that marriage as provided in the Convention is restricted to same-sex couples.³⁵⁵ The

³⁴⁷ *ibid*, para. 26.

³⁴⁸ *Ibid*, para. 27.

³⁴⁹ *ibid*, para. 29.

³⁵⁰ *ibid*, para. 30; The Respondent relied on Section 19(1) of the NGOs Co-ordination Act which provides for the right of appeal to the Director’s decision.

³⁵¹ *ibid*, para. 31.

³⁵² *ibid*, para. 33.

³⁵³ *ibid*, para. 33.

³⁵⁴ (Communication No. 902/1999) (17th July 2002).

³⁵⁵ Eric Gitari Case, para. 33.

Board also relied on Articles 17(3), 27 and 29(7) of the ACHPR.³⁵⁶ It then contended that the Petitioner’s NGO would conceivably contribute to obliterating the cultural values of Kenyans and the NGO would support forbidden acts contrary to public interest; and that advancement of morals justified the rejection, on the basis of safeguarding the public interest.³⁵⁷ The Board relied on religion, stating that both the Bible and the Qur’an prohibit homosexual acts.³⁵⁸ It therefore prayed for the petition to be dismissed.³⁵⁹

4.3.4 Submission by the 1st and 2nd Interested Parties (The Attorney General and Audrey Mbugua Ithibu)

The root of the Attorney General and Audrey Mbugua’s submissions were that a distinction existed between Lesbian, Gay and Bisexual persons (LGB), and Transgender and Intersex persons (TI).³⁶⁰ The parties contended that ‘LGB’ refer to sexual orientation of the individuals, while ‘TI’ refer to medical conditions of the persons.³⁶¹

They submitted that Eric Gitari already enjoyed the right to associate because he was part of an NGO that existed from 2012.³⁶² The Parties concluded that there was no violation of Article 36 because there was no proof of an application for registration.³⁶³ The interested parties’ also agreed with the Board that the petition was premature.³⁶⁴

4.3.5 Submissions by the 3rd Interested Party (Kenya Christian Professional Forum)

The 3rd interested party fully relied on the Board’s submissions and further contended that the drafters of Constitution did not use the word “sexual orientation” in Article 27 but only used “sex”; therefore sexual orientation cannot be a ground for discrimination.³⁶⁵

³⁵⁶ *ibid*, para. 34; ACHPR recognizes, at Article 17(3), that “the promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.” Article 27 states that “the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interests.” Further Article 29(7) provides that “...every individual has the duty to preserve and strengthen positive African Cultural Values and to contribute to the moral wellbeing of society.”

³⁵⁷ *ibid*, para. 35.

³⁵⁸ *ibid*, para. 36.

³⁵⁹ *ibid*, para. 37.

³⁶⁰ *ibid*, para. 38.

³⁶¹ *ibid*, para. 38.

³⁶² *ibid*, para. 41.

³⁶³ *ibid*, para. 41.

³⁶⁴ *Ibid*, para. 41.

³⁶⁵ *ibid*, para. 43.

4.3.6 Submissions by the Amicus Curiae (Katiba Institute)

Katiba Institute submitted that the Board had not satisfied the court as to the reasons that the rights could be limited under Article 24.³⁶⁶ Further, they contended that the Board had infringed the right to “fair administrative action” provided in Article 47 by not informing Eric of the rejection and reasons of this rejection.³⁶⁷ Katiba argued that this notice would have afforded the Petitioner an opportunity to offer a clarification or alleviate against the hostile verdict.³⁶⁸ Katiba stated that because the Board had not relied on Article 24, the Court ought to order the Board to reconsider its decision.³⁶⁹

The Amicus lastly contended that the NGO’s purposes did not contain carnal knowledge among members.³⁷⁰ It contended that there should be a systematic analysis of Article 24 because once registration is rejected the right to associate has been infringed.³⁷¹

4.3.7 Issues to be determined

The two issues that the Court had to deal with were whether LGBTIQ people have a right to form associations; and whether the rejection of the Board to register an NGO that sought to advocate LGBTIQ peoples’ human rights infringed on the LGBTIQ persons’ freedom of association.³⁷²

4.3.8 The Judgement of the Court

The Court held that Article 36 of the Constitution provides every individual the right to form an association of any kind and can only be declined on reasonable grounds.³⁷³ Additionally, the Court recognized that the freedom of association is particularly documented in international treaties that Kenya has ratified.³⁷⁴

The Court held that sexual orientation does not remove one from Constitutional protection.³⁷⁵

³⁶⁶ *ibid*, para. 47.

³⁶⁷ *ibid*, para. 48.

³⁶⁸ *ibid*, para. 48.

³⁶⁹ *ibid*, para. 51.

³⁷⁰ *ibid*, para. 53.

³⁷¹ *ibid*, para. 54.

³⁷² *ibid*, para. 57.

³⁷³ *ibid*, para. 72.

³⁷⁴ *ibid*, paras. 77, 78 and 79. The international conventions include Article 20 of the UDHR, Article 22 of the ICCPR, and Article 10 of the ACHPR.

³⁷⁵ *ibid*, para. 80.

The Court further held that the Board had denied Eric's request to form an association by rejecting the proposed names since the names represented groups whose benefits the Board considered should not be rendered the right to associate as others.³⁷⁶ The Court affirmed that by simply implementing the Constitution, a State was limited from opting which beliefs and ethical decisions were tolerable.³⁷⁷ The Court held that the right to associate as provided in the Constitution is not selective.³⁷⁸ It viewed that the right to associate is a guaranteed right applicable to every individual, irrespective of whether the opinions of certain groups are detested to those not in the groups.³⁷⁹

The Court held that it was called upon by the Constitution to interpret the law minus fright, favour or bias.³⁸⁰ The Court held that the NGO sought to protect human rights of the LGBTIQ community and the purpose of the proposed NGO was reinforced by the acknowledgement of the UN that it is essential to safeguard the rights of every person.³⁸¹

The Court held that as a human rights defender of the Kenyan sexual minorities, the Petitioner had a Constitutional right to form, join and contribute in NGOs.³⁸² It viewed that the only restriction to that right was particularly stated in the Constitution and that was that the association's undertakings ought to be in harmony with the law. Moreover, the Board had failed to demonstrate that the NGO was going to encourage any unlawful acts.³⁸³ According to the Court, however reprehensible the sexual minorities' sexual orientation is, they must be rendered constitutionally guaranteed human rights to safeguard their dignity.³⁸⁴ Consequently, the Court found that by the Board's decision, the Board had infringed the right to associate guaranteed by Article 36.³⁸⁵

The Court held that to rationalize the restriction of the Eric's right to association, the Board had to prove that there existed laws that permitted the restriction of that right on grounds of

³⁷⁶ *ibid*, para. 88.

³⁷⁷ *ibid*, para. 88.

³⁷⁸ *ibid*, paras. 89 and 95.

³⁷⁹ *ibid*, para. 95.

³⁸⁰ *ibid*, paras. 92 and 98; The Court recognized that the duty of the Court was to examine the actions of the Board and determine whether they were in accordance with the Constitution, and if not, to uphold the Constitution.

³⁸¹ *ibid*, para. 100.

³⁸² *ibid*, para. 103.

³⁸³ *ibid*, para. 104.

³⁸⁴ *ibid*, para. 104.

³⁸⁵ *ibid*, para. 107.

their sexual orientation.³⁸⁶ The Court firmly stated that relying on the Penal Code was flawed because the provisions does not outlaw homosexuality, or the state of being homosexual, but only specific sexual acts “against the order of nature.”³⁸⁷ The Court held that the Penal Code does not outlaw peoples right of association because of their sexual orientation, nor does it restrict the peoples freedom of association on grounds of their sexual orientation.³⁸⁸

The Court found that the Board had acted unconstitutionally and illegally therefore amounting to an exploitation of power.³⁸⁹ The Court decided that the Board could not opt to register NGOs that had names that concurred with the officials’ individual opinions and beliefs on sexual orientation.³⁹⁰ The Court further held that the Board had a legitimate obligation to defend the constitutionally guaranteed rights and freedoms and focus on the exposed groups’ needs.³⁹¹ The Court considered that by rejecting to register the NGO because it challenged the name, or because it believed it would encourage behaviours not ethically tolerable in Kenya, then the Board had claimed the influence to control who was entitled to statutory safeguard.³⁹²

The Court permitted the petition and made a declaration that the Board had violated the provisions of Article 36 by refusing to give unprejudiced treatment to the sexual minorities living in Kenya who sought to register an association of their choice.³⁹³ In addition, the Court also held that the Board had abused Eric’s right to non-discrimination.³⁹⁴ The Court also declared that the petitioner was eligible to exercise the freedom of association guaranteed under the Constitution. It issued an order of Mandamus directing the Board to firmly obey its constitutional responsibility under Articles 27 and 36 of the Constitution and the applicable provisions of the Non-Governmental Organizations Co-ordination Act.³⁹⁵

³⁸⁶ *ibid*, para. 112.

³⁸⁷ *ibid*, para. 114; In the Court’s view, the fact that the State does not set out to prosecute people who confess to be lesbians and homosexuals in this country is a clear indicator that such sexual orientation was not necessarily criminalized.

³⁸⁸ *ibid*, para. 115.

³⁸⁹ *ibid*, para. 119.

³⁹⁰ *ibid*, para 121.

³⁹¹ *ibid*, para. 127.

³⁹² *ibid*, paras. 123, 127, 129 and 136.

³⁹³ *ibid*, para. 145.

³⁹⁴ *ibid*, para. 147.

³⁹⁵ *ibid*, para. 148.

4.4 Assessment of the Eric Gitari Case

4.4.1 Freedom of Association

Freedom of association is a significant right that is vital to the enjoyment of other rights.³⁹⁶ The UN Special Rapporteur provided that this freedom serves as a vehicle for the exercise of other rights including economic, political and civil rights. This shows its interdependence and interrelatedness with other rights.³⁹⁷ The HRC in *Djavit An v. Turkey* stated that besides the duty of states to safeguard this right, they ought to desist from unreasonably limiting this right.³⁹⁸ Similarly, in *Civil Liberties Organization v. Nigeria*, the African Commission on Human and Peoples' Rights found that the freedom of association is an individual right and is most importantly an obligation of the State to desist from prying with the development of associations.³⁹⁹

The Court in the *Eric Gitari case* found that every person under Article 36 has the freedom of association. Further, Article 259 indicated that the Constitution must be construed in a way that develops human rights and fundamental freedoms.⁴⁰⁰ Nothing suggests that in Article 36 when referring to "person", the drafters of the Constitution intended to create various classes of persons that excludes members of the sexual minorities. The Court held that the right to association was contravened by failing to accord equal treatment to the sexual minorities in Kenya who sought to register an NGO.

International conventions such as Article 20 of the UDHR provide for the freedom of association. Further, Article 22 of the ICCPR adds that no limits may be included in the enjoyment of right besides those set by law and those essential in a democratic society in the interests of "national security, public order, the protection of public health or morals or the protection of the rights and freedoms of others."⁴⁰¹ The African Charter in Article 20 also indicates that every person shall have the right to free association on condition that that they abide by the law.

Articles 5 of the UN Declaration on the Right and Responsibility of Individuals, Groups and

³⁹⁶ *ibid*, para. 81.

³⁹⁷ UN Human Rights Council, Resolution 15/21, Preamble.

³⁹⁸ Application No. 20652/92, para. 56 [2003]

³⁹⁹ [2000] AHRLR 243.

⁴⁰⁰ *ibid*, para. 138.

⁴⁰¹ ICCPR, Article 22 in the Eric Gitari case, para. 78.

Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (1998) specifies that for endorsing and safeguarding human rights, every person has the form, join and participate in NGO's. The UN Human Rights Council Resolution 21/16 (2012) further provides that States have the obligation to protect the freedom of association of all individuals while the ACHPR Resolution 5/1992 on the Right to Freedom of Association specifically states that state parties ought to ensure that they do not contravene freedoms and rights guaranteed by the constitution and international standards. The reference to international standards is important as the duty of the State to respect human rights not only arises from national law, but also from international law.

The NGO sought to promote rights of those that the Board considered were engaging in acts that were a sin and immoral. The Court pointed out that the freedom of association is essential in a democratic society.⁴⁰² Society is said to be healthy where all citizens are able to participate in the democratic process and the HRC in *Viktor Korneeko and Others v. Belarus* acknowledged this when it stated that:

The existence and operation of associations, including those which peacefully promote ideas not necessarily favourably received by the government or the majority of the population is a cornerstone of a democratic society.⁴⁰³

The freedom of association is important to the sexual minorities because as individuals it would be hard or close to impossible to be able to express their views and share the stories of the violations of their rights. Coming together and forming an association would enable the LGBTIQ community to have a platform to get collective insights and pave a way forward on advocating for their constitutional rights. The freedom of association would therefore allow the individuals of the LGBTIQ community bridge to collective action. By allowing such members to enjoy the freedom of association, there is contribution and sustenance of pluralism which will help in not only the identification of the problems but also the solutions.

4.4.2 Right to Equality and Freedom from Discrimination

The Court held that the Board's contention that sexual orientation is not provided for under the Constitution was flawed. In *Law v. Canada*, the Court held that an equality provision is

⁴⁰² Eric Gitari case, para. 86.

⁴⁰³ Communication No. 1274/2004 [2006], para. 73

important to “prevent the violation of human dignity and freedom.”⁴⁰⁴ As discussed earlier, Article 27(4) should be read with Article 259 (4)(b) which defines the word including as meaning, “includes but not limited to.”⁴⁰⁵ The High Court in *John Kabui Mwai & 3 others v. Kenya National Examination Council and 2 others* stated that the drafters of the Constitution did not anticipate to proclaim the categories in Article 27(4) to be restricted.⁴⁰⁶ Furthermore, the Human Rights Committee in *Toonen v. Australia* also confirmed that by implication, sexual orientation was included as a ground for non-discrimination under the ICCPR. Further, General Comment No. 20 of the Economic, Social and Cultural Council emphasized that “other status” comprised sexual orientation.

The concepts of equality and non-discrimination are profoundly protected under Article 27(1) which provides that “(e)very person is equal before the law and has the right to equal protection and equal benefit of the law.”⁴⁰⁷ This clause prohibits direct or indirect discrimination by any person against any person and the use of the word “every person” suggests that there is no hierarchy between humans. This statement is in line with the universal application of the Constitution. The concept of equality under universalism was advocated by Justice Ackermann of the Canadian Supreme Court in *Vriend v. Alberta* when he stated thus:

It is easy to say that everyone who is just like ‘us’ is entitled to equality. Everyone finds it more difficult to say that those who are ‘different’ from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any . . . group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of . . . society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy.⁴⁰⁸

The High Court in the *Eric Gitari case* stated that the Board had a duty to defend and focus on the vulnerable groups needs provided for under Article 21(3). These include “members of minority and marginalised groups.”⁴⁰⁹ According to Article 260, a marginalized group comprises those people who due to laws or practices before, on, or on the promulgation date

⁴⁰⁴ [1999] 1 SCR 497.

⁴⁰⁵ Therefore, the list in article 27(4) is an indicative and not exhaustive list.

⁴⁰⁶ Petition No. 15 of 2011 [2011] eKLR.

⁴⁰⁷ Constitution of Kenya, Article 27(1).

⁴⁰⁸ [1998] 1 SCR 493, para. 27

⁴⁰⁹ Constitution of Kenya, Article 21(3).

were or are underprivileged by discrimination under Article 27(4). Cultural, ethnic, linguistic and religious differences have been a source of inequality, exclusion, and subordination in the pre-constitutional age where Western/Christian norms prescribed moral standards, and legal rights; and ethnicity was manipulated to entrench discrimination.⁴¹⁰ In these circumstances, the Constitution imagines a country that embraces diversity and affirms difference as a positive source of individual and collective identities within the new democracy.⁴¹¹

The sexual minorities as the Petitioner stated, have been historically marginalized. As a result, there are adequate grounds for classifying the sexual minorities as vulnerable and marginalized groups who are regularly hassled or mistreated by the policemen, held in custody and not updated of the offences that they have been charged with and charged falsely because of their sexual orientation.⁴¹² They are also threatened, physically and sexually assaulted including raped.

The Board submitted that the enforcement of rights is dependent on public opinion. This contention is without merit. In *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, the Court held that:

the impact of discrimination on gays and lesbians is rendered more serious and their vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favourable legislation for themselves. They are accordingly almost exclusively reliant on the Bill of Rights for their protection.⁴¹³

The Court emphasized that the substantive right to equality is the response to the end of discrimination. This case has been referred to in succeeding South African cases, which have further embedded the prohibition of discrimination on the basis of sexual orientation. One such example is the case of *Du Toit and Another v. Minister of Welfare and Population Development and Others* where the Court allowed same-sex couple to adopt a child.⁴¹⁴ Other cases are *Minister of Home Affairs and Another v. Fourie and Another* and *Lesbian and Gay Equality Project and Others v. Minister of Home Affairs and Others* where the Court

⁴¹⁰Catherine Albertyn “Cultural Diversity, “Living Law,” and Women’s Rights in South Africa” in Daniel Bonilla Maldonado, *Constitutionalism of the Global South: the Activist Tribunals of India, South Africa and Colombia* (Cambridge University Press, 2013) 167.

⁴¹¹ *ibid*; The idea of diversity in the Constitution takes account of religious, linguistic, and cultural difference and acknowledges the variety of cultural diversity, especially as it is manifest.

⁴¹² *ibid*.

⁴¹³ (CCT 11/98) [1999] (1) SA 6, para. 25

⁴¹⁴ CCT40/01 [2002] ZACC 20.

provided that homosexual couples have the right to marry under the Constitution.⁴¹⁵

This provision of the Bangalore Principles bespeaks a Universalist approach that seeks to defend the privileges of everyone in the application of laws. It requires the adherence to universal norms, whether or not the domestic law has ratified the international rule. It has been stated that the Universalist theory proclaims that the fundamental rights in the international conventions are the basic absolute rights of all people, irrespective of the religious, cultural, economic, or political characteristics of the societies in which they reside.⁴¹⁶

The various Constitutional rights and freedoms have been examined in light of the *Eric Gitari case*. The various provisions that guarantee rights and freedoms should be read with Article 20(3) and (4) of the Constitution which stipulate that courts shall implement the interpretation that most favours the enforcement of a right or fundamental freedom and encourages the morals that motivate an open and democratic society based on human dignity, equality, equity and freedom. Further, Article 10(2) lists inclusiveness, non-discrimination and equality as national standards of power. These provisions exemplify the position that in order to have a just and democratic society, the right to equality and non-discrimination must be respected.

Article 21(4) further provides that it is the obligation of the state to enact and implement legislation that fulfils the obligation that the country has by virtue of conventions that it has ratified.⁴¹⁷ This would mean that since Kenya has acceded to various international conventions that as discussed have clarified the safeguarding of the sexual minorities, it is the obligation of Kenya to enact legislation to protect this vulnerable group.

The freedom of association is vital for the sexual minorities especially in Kenya. A Human Rights Watch report noted that almost every time LGBT activists in sub-Saharan Africa are discovered or identified, they are attacked by the government, media and religious figures who have moral panic attacks.⁴¹⁸ To avoid such attacks, the minorities need their freedom of

⁴¹⁵ CCT 60/2004 [2005] ZACC 19; [2005] ZACC 19.

⁴¹⁶ Nancy Baraza, 'Lost Between Rhetoric and Reality: What Role for the Law and Human Rights in Redressing Gender Inequality?' 2 (2008- 2010) <<http://kenyalaw.org/kl/index.php?id=1917>> accessed 29 June 2016.

⁴¹⁷ Constitution of Kenya, Article 21(4).

⁴¹⁸ Human Rights Watch (2009) Together Apart: Organising around Sexual Orientation and Gender Identity Worldwide (New York: Human Rights Watch) <<https://www.hrw.org/sites/default/files/reports/lgbt0509web.pdf>> accessed 8 September 2016.

association endorsed by the Courts. The High Court was therefore instrumental in holding that the Board's actions were illegal and amounted to exploitation of power. This is because the right to equality and non-discrimination ought to be respected and sexual orientation is a ground for non-discrimination.

This bold judgement by the Court can be compared to the victory that the sexual minorities had in India in *Naz Foundation v. Government of NCT of Delhi and Others* that challenged the constitutionality of anti-sodomy law in Section 377 of the Indian Penal Code.⁴¹⁹ Closer to home, it can be compared to The Lesbians, Gays & Bisexuals of Botswana which is a Botswana human rights advocacy group with the primary objective of seeking legal and social rights for the LGBT community in Botswana. The group attained a positive finding in the High Court in November 2014, and in the Court of Appeal in March, 2016 and the organisation was finally registered after years of official antagonism.⁴²⁰

4.4.2 Limitation of Rights under the Constitution

The High Court held that the freedom of association is not unconditional and may be restricted by Article 24 "only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."⁴²¹ International human rights also permits limitation of rights as long as the restrictions are defined by law; serve a valid purpose and are essential in a democratic society.⁴²² As per Article 24(3) and the rule in *Regina v. Oakes* the onus of justifying the restriction rests with the State.⁴²³

When it comes to the sexual minorities in particular, Eric demonstrated that members of the sexual minorities were being tortured among other atrocities. Taking this into account, it becomes palpable that the sexual minorities must be permitted to exercise their freedom of association in order to work towards equality. In fact, the Court needs to bear in mind the injustices that this group of people suffers and work towards substantive equality.

⁴¹⁹ [2009] WP(C) No.7455/2001.

⁴²⁰ 'Botswana: Groundbreaking Judgment By Botswana Court of Appeal On Freedom of Association and LGBTI Rights' (*Pambazuka*, March 21, 2016) <<http://www.pambazuka.org/gender-minorities/groundbreaking-judgment-botswana-court-appeal-freedom-association-and-lgbti-rights>> accessed 8 September 2016.

⁴²¹ Constitution of Kenya, Article 24.

⁴²² African Commission on Human and Peoples' Rights, 'Report of the Study Group on Freedom of Association and Assembly in Africa' <http://www.icnl.org/research/resources/ACHPR%20English%20REPORT%2021.05.2015.pdf> accessed 6 August 2016.

⁴²³ [1986] 1 SCR 103.

Article 25(a) states that one of the fundamental freedoms that shall not be restricted is the “freedom from torture and cruel, inhuman or degrading treatment or punishment.”⁴²⁴ The sexual minorities in Kenya, as previously seen are victims to numerous crimes including blackmail and sexual harassment. The treatment that they are frequently facing could be described as cruel, inhuman or even degrading. Further, as discussed the Special Rapporteur of the Commission on Human Rights concluded that discrimination on the grounds of sexual orientation plays a part in the dehumanization of LGBTI persons that is a condition necessary to torture.

In *Kivumbi v. Attorney General* the Court held that the standard against which every restriction on the exercise of fundamental rights and freedoms is predicated, should be an unbiased one.⁴²⁵ This assumes that universal independent principles exist which every democratic civilisation observes. Courts ought to be directed by the principles crucial to a free and democratic society.⁴²⁶

Further, in *Martha Karua v. Radio Africa Limited T/A Kiss FM Station and Others* the Court held that in ascertaining what is justifiable in an open and democratic society, it is significant to consider the needs or purposes of the democratic society in relation to the right or freedom in question.⁴²⁷ The importance of understanding the needs is founded on the fact that the restriction essentially ought to support the needs of the society. The goal is to have a “realistic, open, tolerant society and this necessarily involves a delicate balance between wishes of the individual and the utilitarian good of the majority.”⁴²⁸ However, democratic societies approach the issue from the position of the significance of the person and the undesirability of limiting their freedom.

Based on this, the Constitution recognizes national principles of government which include “human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized” as the guiding values and principles of the Constitution.⁴²⁹ Further, Article 20(4) of the Constitution places a duty on the courts in construing the Bill of Rights to guarantee that they encourage the values of an open and

⁴²⁴ Constitution of Kenya, Article 25(a).

⁴²⁵ Constitutional Petition No. 9 of 2005 [2008] 1 EA 174.

⁴²⁶ Eric Gitari case, para. 110.

⁴²⁷ HCCC No. 288 of 2004 [2006] eKLR.

⁴²⁸ *ibid.*

⁴²⁹ Constitution of Kenya, Article 2(2)(b).

democratic society. I agree with the Court in that the Constitution and the right to associate are not selective. Human rights are guaranteed under the Constitution and apply to everyone. It matters not if certain groups are unpopular or unacceptable.⁴³⁰ If only people with acceptable views were permitted to associate with others then the possibility not only to enjoy political rights as envisaged by the Judges would be limited, but also the possibility to enjoy civil and social rights would be hindered.⁴³¹ It has been held that the limitation of rights should constantly be strictly scrutinized.⁴³²

There is no law that criminalizes the exercise of right of association by the sexual minorities. The provisions of the Penal Code, which the Board relies on, only criminalize “carnal knowledge...against the order of nature”⁴³³. Further Section 163 criminalizes the endeavour to commit any of the offences detailed in Section 162. Thus sexual orientation is not criminalized in itself but certain sexual conducts which were not the matters in issue before the court. The debate on Sections 162 and 165 of the Penal Code was brought up in *Eric Gitari v. Attorney General & another* where the Petitioner sought that the provisions be struck out in accordance with Article 23(3) (d) of the Constitution.⁴³⁴ Justice Lenaola recognising that the issues were weighty and needed thorough deliberation referred the matter to the Chief Justice for it to be determined by a Bench in line with Article 165 (4) of the Constitution.

In *Kasha Jacqueline and Others v. Rolling Stone Ltd and Another* the Ugandan High Court found that “Section 145 of the Penal Code Act does not render every person who is gay a criminal under that section of the Penal Code Act.”⁴³⁵ The Scope of section 145 is narrower than gayism generally. One has to commit an act prohibited under Section 145 in order to be regarded as a criminal”. Further, on whether a section of Penal Code that prohibits same sex conduct also prevents people from associating, it was ruled in a Botswana Court of Appeal of Botswana in *Kanane v. State* that sections of the Penal Code that criminalizes homosexual conduct did not preclude such persons from associating.⁴³⁶

The limitation of the petitioner’s right to form an association was not reasonable and

⁴³⁰ Eric Gitari case, para. 88.

⁴³¹ Eric Gitari case, 15.

⁴³² *Attorney-General v. Unity Dow*, [1992] BLR 119.

⁴³³ Section 162 of the Penal Code.

⁴³⁴ Petition No. 150 of 2016 [2016] eKLR.

⁴³⁵ Miscellaneous Case No. 163 of 2010 [2010] unreported.

⁴³⁶ [2003] 2 BLR 67 (CA).

justifiable in an open and democratic society as it led to discrimination based on sexual orientation. The Board rather relied on religious and moral convictions to justify discrimination against persons of a different sexual orientation. As discussed in Chapter two, religious and cultural views on sexual minorities' fuel the discrimination and this is an example of how religious and cultural views can hinder the group from enjoying their rights and freedoms. However, despite the moral and religious views, as evidenced by the above cases, they must not be the basis for limiting rights. This is because by adopting the Constitution, the State is constrained from deciding which beliefs and ethical decisions are bearable. Furthermore, the High Court had from the get-go stated that the petitioner's case was not on same-sex marriage and was also not based on a question of morals.⁴³⁷

It often becomes difficult for a Judge to separate morality from the law, in considering issues before the court.⁴³⁸ There are two possible likelihoods when the Judge is faced with such a case: the first is where society generally has similar views on the particular issue and this poses no practical problem; the second which is more provocative is where there is divergence on the particular issue, just like the current issue of the sexual minorities' rights.⁴³⁹ In the second likelihood, in whichever way the Judge rules, the Judge will always be seen as having either conformed to or violated the moral value. Judges can either make superficial legal arguments that mask moral judgements, straight forward moral arguments or make judgements that do not match their moral arguments.

The European Court has previously found that even appalling or alarming ideas are permitted under the freedom of association. In *Bączkowski v. Poland* and *Alekseyev v. Russia* this court found that rejecting a request by LGBT groups to assemble peacefully not only dishonoured the freedom of assembly guaranteed by the Convention but also abused the freedom from discrimination because of sexual orientation.⁴⁴⁰ In the *Eric Gitari case*, although the Court at the outset pointed out that the issue was not on morality, it later stated that it was not the intention of the Court to impose some of the beliefs on every single individual within the state.⁴⁴¹ This position by the Court is commendable as it attempted to

⁴³⁷ Eric Gitari case, para. 56.

⁴³⁸ Susanna Mancini and Michel Rosenfeld, 'The Judge As Moral Arbiter? The Case Of Abortion' <http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/paper/0103_mancini_rosenfeld.pdf> accessed 7 August 2016.

⁴³⁹ *ibid.*

⁴⁴⁰ Application No. 4916/07, 25924/08 and 14599/09.

⁴⁴¹ Eric Gitari case, para. 91.

consider the substance of the rights without engaging in the moral debate.⁴⁴²

4.5 Implications of the Eric Gitari Case in Kenya

The impact of the judgement can be viewed from two paradoxical lenses – from the views of the LGBTI community in Kenya and the other from the views of the society.

For the LGBTI community, having a High Court judgement that holds that they are guaranteed the Constitutional rights and freedoms just like everyone else is a triumph. Although the Board appealed to the High Court decision and the matter is currently in the Court of Appeal, having the High Court judgement gives the LGBTI community the confidence that they need to stand up for their rights. The High Court judgement therefore serves as a foundation for other applications and petitions that will be made to the courts for recognition of rights and also for repealing of laws that are contradictory to the Constitution.

On the other hand, the society that is largely intolerant of the LGBTI community now has to come to terms with the fact that the sexual minorities also have rights and freedoms like the rest of society, and further that these rights need to be respected. Majority of the religious leaders' and politicians' views that have been discussed are now inconsistent with what the High Court has held. Having the High Court deal specifically with the right to equality and freedom from discrimination and the freedom of association of the sexual minorities shows the shift in ideology of the judiciary – the Judges did not let their personal religious and cultural views get in the way of making a landmark decision.

4.6 Conclusion

The Constitution and various international covenants provide for the right to equality, freedom from discrimination and freedom of association. The Constitution just like the international conventions does not explicitly list sexual orientation as a basis for non-discrimination. Despite this, it can be argued that given the fact that the international bodies interpreted the position under international law and added discrimination on the basis of sexual orientation as a ground for abuse of the freedom from discrimination, this interpretation can be applicable in Kenya. As a party to the conventions providing for

⁴⁴² The Judges in the Eric Gitari case relied on *Patrick Reyes v. The Queen Privy Council* Appeal No. 64 of 2001, paragraph 26.

equality, non-discrimination and association, the state has certain obligations which it ought to respect including the obligation to respect the right to human dignity. This is more so because Articles 2(5) and 2(6) of the Constitution provide for international law to form part of the law in Kenya.

The Constitution has no meaning if the Courts cannot interpret the drafters' true intentions. In *Tinyefuza v. Attorney General of Uganda*, the Court decided that the Constitutional provisions must be read in its entirety, without any one specific provision abolishing another, rather each supporting another.⁴⁴³ It is therefore vital to read the Constitution as a whole and to respect the rights of the LGBTI community in Kenya because their right to equality and freedom from discrimination and freedom of association must not be limited by virtue of their sexual orientation.

As discussed in Chapter Two, it is important to separate issues of morality and religion with issue of guaranteed rights and the Court emphasized this. The Court's decision was therefore a step in the right direction and a light at the end of the tunnel for the sexual minorities in Kenya.

⁴⁴³ Constitutional Petition No. 1 of 1997 [1997] UGCC 3.

CHAPTER FIVE

CONCLUSION, LESSONS AND RECOMMENDATIONS

5.1 Introduction

The purpose of this Chapter is to summarize the findings of the study and suggest research and policy recommendations for further analysis. The first section of this Chapter addresses the conclusions to the three research questions enumerated in Chapter One. The three research questions have been examined under Chapters Two, Three and Four respectively. Specific themes drawn out of each of the previous chapters will be focused on. The final two sections of this Chapter focus on identifying and addressing the lessons that Kenya can learn from other jurisdictions on realisation of rights for the sexual minorities and finally, the recommendations to various groups.

5.2 Conclusion

Chapter One laid the framework for the study. From the literature reviewed, it can be concluded that although Kenya like many other jurisdictions provides for equality and non-discrimination, these provisions do not guarantee that equality has been achieved for the sexual minorities. It can also be concluded that the Kenyan Penal Code is a source of repression of sexual minorities' rights. It is not a tool for equality. Further, formal equality alone is insufficient to deal with the discrimination that the sexual minorities face. Substantive equality needs to be secured in law. This can be done by the courts and legislators contextualizing their decisions and their policies to reflect the reality faced by LGBTI people.⁴⁴⁴

Chapter Two delved into the political, religious and cultural views on LGBT. It was found that the African political leaders who include Heads of State and senior political leaders fuel the violation of human rights of the sexual minorities. Moreover, extensive research shows homosexuality is not necessarily always a choice, but also has biological roots. This shows that members of the sexual minorities do not choose to be born as members of the sexual minorities. When looking at the religious views, it was found that although the Holy Bible and Holy Qur'an both prohibit same-sex sexual relations, there are religious leaders from both the religions who prescribe to the school of thought that the sexual minorities should not

⁴⁴⁴ John Fisher, 'Outlaws or In-laws?: Successes and Challenges in the Struggle for LGBT Equality' (2004) 49 McGill L.J. 1183 <<http://lawjournal.mcgill.ca/userfiles/other/449577-4fishe.pdf>> accessed 10th September 2016.

be discriminated against. However, majority of Christians and Muslims still consider engaging in these acts as a sin. In terms of cultural views on LGBTI people, it can be concluded that colonialists did not introduce homosexuality. They introduced homophobia. Homosexuality was generally accepted in numerous African set-ups and it was only after the white man came to Africa that the disapproval of such people was witnessed. Africans therefore need to be open to appreciate that the colonialists brought with them laws and religions that have been used to discriminate against the sexual minorities.

Chapter Three examined the various international and regional instruments that prohibit human rights violations against the LGBTI community. In relation to the international conventions, it was found that although discrimination on grounds of sexual orientation was not initially explicitly included as a ground in the various conventions, subsequent cases and general comments from treaty bodies have included sexual orientation as a ground. In Africa, the LGBTI community got their first regional win when CAL was granted observer status. This could be the start of greater wins to come for the LGBTI community. By Kenya being a member of the human rights treaties, it has an obligation to respect the treaties and decisions by treaty bodies.

Chapter Four started with the examination of the Constitution and then examined the *Eric Gitari case* specifically in relation to the right to equality and freedom from non-discrimination and the freedom of association. It was found that while the High Court judgement is a stepping-stone for the LGBTI community, it must be acknowledged that the society has been negatively impacted by the judgement. This is because for majority of society, what the LGBTI community do is morally wrong, a sin and unacceptable.

All in all, Africa is where Europe was in the 1980's. The first successful decision of *Dudgeon v UK* was made in 1981 and today, almost thirty five years later, the LGBTI community in most of Europe have their rights not only protected, but also respected. There may be a slow realisation of rights but the small wins that the LGBTI community get will eventually assist in them realising all their rights and freedoms. Judgements such as those in the *Eric Gitari case* allow the LGBTI community to gather courage and seek redress in court from violations against them.

The Constitution of Kenya guarantees rights and freedoms that need to be enjoyed by all regardless of their sexual orientation. Members of the sexual minorities have been unable to enjoy these rights because of the torture, violence and discrimination against them. This is fuelled by politicians, religious leaders and also by what is considered as acceptable in the African culture. Culture and religion are very important to Africans and in Kenya, they are both protected by the Constitution. The Board in the *Eric Gitari case* was also influenced by religion and morals and the Court held that these views cannot be “imposed on ... society.”⁴⁴⁵ Because of the importance of these

Besides, political leaders make matters worse by making derogatory comments about the LGBTI community. The leaders compare the LGBTI community to illnesses and terrorism. This makes it fine for society to discriminate and look down upon such people. The religious and political leaders also choose to ignore that homosexuality is a combination of nature and nurture and discriminating someone because of their sexual orientation is as bad as discriminating someone because of their race. This is because race and sexual orientation are both beyond the control of the people. The sexual minorities therefore need to substantive equality ensured to them.

Further, although the treaty bodies of the human rights conventions that Kenya is a party of have condemned any violence and abuse of rights of members of the sexual minorities, sodomy laws are still present in the Penal Code. The revolutionary High Court *case of Eric Gitari* is the first in Kenya where the sexual minorities’ rights that have been guaranteed by the Constitution have been acknowledged. The NGO Board has appealed against the High Court decision and the Court of Appeal ruling on this issue will either be a very big win for the LGBTI community in Kenya or a devastating loss.

5.3 Lessons

The overall study has established that although the Constitution of Kenya, 2010 has an impressive Bill of Rights, the LGBTI people still have their guaranteed rights violated because of their sexual orientation. It is therefore critical to look at what can be done to ensure that the incidents of discrimination against the sexual minorities are reduced and they are treated equally with the rest of society.

⁴⁴⁵ Eric Gitari case, para. 91.

The LGBTI community in South Africa has struggled for recognition and realization of their rights for the longest time. The accomplishments that they have achieved have come in phases. The two most important phases were when the Court decided that the crime of sodomy was discordant with the constitutionally guaranteed rights to equality and privacy.⁴⁴⁶ Secondly, was when the Constitutional Court held that it was illegal for the State to deny same-sex couples the right to marry.⁴⁴⁷ Parliament was given a year to correct the position and the Civil Union Act came into force on 30 November 2006 that permits same-sex marriage.

In the case of *National Coalition for Gay and Lesbian Equality v. Minister of Justice* the Court held that the heterosexist discrimination causes psychological harm to members of the LGBTI community and affects their dignity and self-esteem. The Court also held that criminalizing sodomy legitimizes blackmail. It was found that discrimination is unfair and consequently infringes on the constitutional right to equality. It was held that the sexual minorities' right to dignity was infringed by allowing prosecution of acts that were engaging in as part of their experience of being human. The Court finally held that the sodomy offences ceased to be operational the day the Constitution came into force.

The legislators and courts ought to respect the Constitution as the Supreme Law of the Nation. This includes repealing all laws that vary with the Constitution and also those that hinder the full realisation of the rights and freedoms guaranteed under the Constitution. People are always afraid of change but as Chinua Achebe illustrated in his book *Things Fall Apart*, “change is inevitable, and those unable to adapt to new circumstances are left behind”.⁴⁴⁸ Sometimes, beliefs need reconstruction and if one is adamant to change, then society cannot progress.

⁴⁴⁶ S v. Kampher [1997] 4 SA 460 (C); and *National Coalition for Gay and Lesbian Equality v. Minister of Justice* [1999] (1) SA 6.

⁴⁴⁷ ‘Parliament ordered to allow gay marriage’. (*Mail & Guardian*, 1 December 2005). <<http://mg.co.za/article/2005-12-01-parliament-ordered-to-allow-gay-marriage>> accessed 10 September 2016.

⁴⁴⁸ Chinua Achebe, *Things Fall Apart* (New York: Ballantine Books, 1991).

5.4 Recommendations

Despite the recommendations by various committees to state parties to eliminate discrimination, there are still human rights violations against LGBTI persons globally.⁴⁴⁹ The report by the UN Secretary General on Legal Empowerment of Poor and Eradication of Poverty found that in many developing countries, organisations and policies do not provide equal opportunity or safeguarding to a large part of the population which is mainly comprised of women, minority and disadvantaged groups.⁴⁵⁰ This section will therefore provide specific recommendations to various groups.

5.4.1 Recommendations to the Government

The Government needs to make subtle moves to make the society more acceptable of the sexual minorities. Making any outright statements may not be taken respectfully by society. Members of the Government also need to exercise caution when making any statements in relation to the sexual minorities. This is because any anti-LGBTI statement could influence society to discriminate against the LGBTI community.

Further, the Government could appoint an openly homosexual person as a Government official. Tim Wilson who is openly gay and also advocates for same-sex marriage was appointed as Australia's Human Rights Commissioner between February 2014 and February 2016. This appointment will serve as an example for everyone that members of the sexual minorities deserve equal opportunity.

5.4.2 Recommendations to Parliament

The Penal Code, as it stands criminalizes homosexuality. Repealing the relevant sections in the Penal Code would reduce discrimination against LGBTI people and would ensure that the law is in line with the Constitution. The society would be forced to embrace the diversities of various sexualities. Further, laws and policies can be enacted that promote substantive equality for the sexual minorities.

⁴⁴⁹ Isidora Stacic, 'Homophobia and Hate Speech in Serbian Public Discourse: How Nationalist Myths and Stereotypes Influence Prejudices against the LGBT Minority' (Master in Human Rights Practice, School of Global Studies, University of Gothenburg, 2011) <http://www.equalrightstrust.org/ertdocumentbank/ERR7_isidora.pdf> accessed 15th April 2016.

⁴⁵⁰ United Nations General Assembly Report on the Secretary General Legal Empowerment of the Poor and Eradication of Poverty (A/64/133, 2009) in Sandra Fredman, 'The Role of Equality and Non-Discrimination Laws in Women's Economic Participation, Formal and Informal,' <http://www.ohchr.org/Documents/Issues/Women/WG/ESL/RoletEqualityandNonDiscriminationLawsinWomenEconomic.docx> accessed 23rd April 2016.

5.4.3 Recommendations to the Courts

The interpreters of the law have a vital role in safeguarding the rights to equality and freedom from discrimination. It has been argued that courts have become mainly prominent grounds within which the battles over these concerns are being fought.⁴⁵¹ In Kenya, discrimination is forbidden *de jure* but this law is not adequately enforced. The lack of “democratic processes” within the Judiciary could be a major cause of this.⁴⁵²

Formal equality is illustrated in *Plessy v. Ferguson* where the Court declined to abolish public transport law that provided for segregation between blacks and whites.⁴⁵³ The Court used the Aristotle ideology in coming to this decision stating that there were distinct but alike facilities for each group. This decision accentuated the notion of sameness of treatment but did not take into account the different conditions that one could face when put in different situations and treated in the same manner. In 1955, in *Brown v. Board of Education* the Court overturned the decision of *Plessy v. Ferguson* and concluded “...that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal...”⁴⁵⁴

Similarly, when dealing with issues that affect the LGBTI community, legislators and courts need to take cognizance of the fact that the LGBTI community are guaranteed the right to equality *de jure* but for this right to be realised *de facto*, contextualization is important.

Courts as interpreters of the law have a role in advancing jurisprudence. They also have a right to all the citizens to ensure that the Constitution is respected and promoted. The courts also have an obligation to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.⁴⁵⁵ By virtue of Article 2(5) and 2(6) of the Constitution, general rules of international law and any treaty or convention ratified by Kenya shall form part of Kenyan law. And courts should therefore expose themselves to international precedents and general rules that would favour the enforcement of a right or fundamental

⁴⁵¹ Joe Oloka-Onyango, ‘Debating love, human rights and identity politics in East Africa: The case of Uganda and Kenya,’ (2015) 15 African Human Rights Law Journal 28-57 <<http://dx.doi.org/10.17159/1996-2096/2015/v15n1a2>> accessed 2nd March 2016.

⁴⁵² Sebastian Maguire, ‘The Human Rights of Sexual Minorities in Africa’ (2004) 35(1) International Law Journal <<http://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1159&context=cwilj>> accessed 3rd March 2016.

⁴⁵³ [1896] 163 US 537.

⁴⁵⁴ [1954] 347 US 483.

⁴⁵⁵ As per Article 20(3)(b) of the Constitution of Kenya, 2010.

freedom. All in all, the Judiciary should take advantage of their ability to develop the law through “judge made law”. Courts ought to take cognizance of the pivotal role they play in ensuring that certain minorities are able to enjoy the rights and freedoms without any discrimination.

5.4.4 Recommendations to Members of the LGBTI Community

It is important for the members of the LGBTI community to provide emotional support to one another as per the Kiswahili proverb, *Umoja ni nguvu, utengano ni udhaifu* that translates to unity is strength, division is weakness. The Community should also keep working with the civil societies in challenging all anti-constitutional laws and policies. Further, members of the community should make complaints of any violence and other crimes committed against them.

5.4.5 Recommendations to the Civil Society and NGOs

Civil societies are necessary and vital to economic and jurisprudential development. Civil societies usually have the funding to work with experts on various subjects. Getting experts especially jurists and lawyers who have previously been involved in cases that promoted the rights of the sexual minorities can be beneficial. The expertise will help when petitioning the court and also when making submissions. The civil society should also lobby Parliament to repeal laws that are offensive to LGBTI people and replace them with more favourable laws.

In relation to the negative political sentiments against the LGBTI community, there is need for collaboration with, and continuous support of, national NGOs and other actors undertaking advocacy and mobilisation of government officials and other State officials to ensure fair dialogue that is supportive of the needs of sexual minorities.

5.4.6 Recommendations to Religious Leaders

All religious leaders should encourage their congregation to accept everyone as they are. They need not explicitly mention the LGBTI people like the Pope did by saying “*If someone is gay and he searches for the Lord and has goodwill, who am I to judge?*”⁴⁵⁶ Giving blanket speeches on acceptance is important. Besides doing this, the leaders also need to exercise caution when making statements about the LGBTI community.

⁴⁵⁶ Lizzy Davies, ‘Pope Francis signals openness towards gay priests’ (The Guardian, 29 July 2013) <https://www.theguardian.com/world/2013/jul/29/pope-francis-openness-gay-priests> accessed 4 September 2016.

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