

**SEXUAL ORIENTATION AND THE LAW: A CASE STUDY OF HOMOSEXUALS IN
KAMPALA DISTRICT**

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DECLARATION

I **Achieng Mirriam** do hereby declare that this is my original work. Where other people’s works have been quoted, they have been duly acknowledged. I further declare that this work has never been submitted before to any institution whatsoever and for any academic award of any kind.

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Date:

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Prof Sylvia Tamale (Supervisor)

Date:

DEDICATION

This dissertation is dedicated to my father, James Okoth, my mother Rosemary Okoth, my brothers: Andrew Okoth, Richard Otieno and Godfrey Ogweno and to my sisters: Doreen Reacher, Christine Akinyi and Moureen Arwa.

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LIST OF ACRONYMS

ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
ACHPR	African Charter on Human and Peoples' Rights
UDHR	Universal Declaration of Human Rights
HURINET	Human Rights Network
FARUG	Freedom and Roam Uganda
SMUG	Sexual Minorities Uganda
RLP	Refugee Law Project
NAWOU	National Association of Women Organisations in Uganda
EHARDP	East and Horn of Africa Human Rights Defenders Project
HURIPEC	Human Rights and Peace Centre
FIDA	The Uganda Association of Women Lawyers
SANDF	South African National Defence Force
STD	Sexually Transmitted Diseases
UNHCR	United Nations High Commissioner for Refugees
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersexuals
IGLHRC	International Gay and Lesbian Human Rights Commission
UN	United Nations

LIST OF CASES

1. *R v Angel* [1968] Criminal LR 342.
2. *Magaji v The Nigerian Army* [2008 – Supreme Court].
3. *Bowers v Hardwick* [1986] 478 US 186.
4. *Victor Mukasa and Yvonne Oyo v Attorney General High Court of Uganda (civil division)* Misc Cause No.247/06.
5. *Kasha Jacqueline, Pepe Onziema & David Kato vs. Giles Muhame and the Rolling Stone Publication Ltd* High Court Miscellaneous Cause No.163 of 2010.
6. *Toonen V Australia UN Human Rights Committee, Communication* No.488/1992:Australia.CCPR/C/50/D/488/1992,4 April (1994).
7. *Dudgeon v UK* Ser. A, No.45, 4EHRR 149 (1998).
8. *Lawrence Garner v State of Texas* 539 U.S 558 (2003).
9. *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and others* CCT 11/98 (1998).
10. *Charles Onyango Obbo and another v Attorney General* Constitutional Appeal No.2 of 2002 (SC).
11. *Minister of Home Affairs v Fourie* 2005 ZACC 19.
12. *Naz Foundation v Govt. of NCT of Delhi* 160 Delhi Law Times 277 (Delhi High Court).
13. *Satchwell v President of the Republic of South Africa* 2001 12 BCLR 1284 (T).
14. *Langemaat v Minister of Safety and Security* 1984 4 BCLR44 (T).

LIST OF STATUTES

International Instruments

African Charter on Human and People's Rights (ACHPR, 1979)

International Covenant on Civil and Political Rights (ICCPR, 1966)

International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966)

Universal Declaration of Human Rights (UDHR, 1948)

The Yogyakarta Principles, March 2007

UN Convention on the Rights of Persons with Disabilities

Domestic Legislation

The Constitution of Uganda, 1995

The Penal Code Act, Cap 120

The Anti- homosexuality Bill, 2009

The Equal Opportunities Act, 2005

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ABSTRACT

The study examines Sexual Orientation and the Law. The general objective of this study was to investigate the Legal and Constitutional framework for the protection of homosexuals in Uganda. In this respect, the researcher embarked on establishing and analyzing human rights abuses suffered by homosexuals; establishing the contradictions that exist between Uganda's human rights commitments and obligations and its treatment of homosexuals; making a comparative analysis between South Africa and Uganda regarding the protection of homosexuals and advancing proposals and practical solutions to ensure equality and change.

The study adopted the snowball sampling procedure in selecting some of the respondents on the basis of the rare characteristic they possess to participate in the study. This is a non – probability sampling technique where the existing study subjects recruit future subjects from among their associates. Purposive sampling technique was also adopted in selecting some respondents due to their perceived knowledge in relation to the problem under investigation. The study population comprised: Homosexuals (25) and Human Rights Activists (15). Primary data was collected using an interview guide to conduct in-depth interviews whereas secondary data was collected through review of relevant documents in the libraries and the internet. Utmost confidentiality was observed while handling the data given the sensitivity of the topic under investigation and as such pseudo names are used to protect the subjects. A descriptive and qualification method of data analysis was used.

The key findings of this study reveal that homosexuals do not enjoy the legal and constitutional liberties provided for in the constitution. Homosexuals have suffered human rights abuses at different levels namely: i) Discrimination within religious institutions (ii) Discrimination in schools (iii) Discrimination from family and friends (iv) Discrimination in employment (v) Discrimination in sports clubs (vi) Discrimination in health facilities and (vii) Discrimination in the public arena. Uganda is a party to numerous International and Regional human rights mechanisms and has got a comprehensive bill of rights in its constitution and a legal frame work for the protection of minorities. The findings reveal that there is a contradiction between Uganda's human rights commitments and obligations and its treatment of homosexuals. A comparative analysis undertaken between South Africa and Uganda regarding the protection of homosexuals discloses that Uganda and South Africa lie at the extreme opposite ends of the

human rights spectrum. South Africa's constitution contains a prohibition against discrimination based on sexual orientation. While Uganda is still struggling with archaic penal laws that criminalize consensual sexual conduct in private, the South African constitutional court made a landmark decision in the case of *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* CCT11/98 (1998). The court unanimously overturned as unconstitutional the law prohibiting homosexual conduct between two consenting adults in private. While South Africa takes a stage of progress with regard to the protection of homosexuals, Uganda retrogresses with the introduction of the Anti-Homosexuality bill, 2009 which if enacted, would broaden the criminalization of homosexuality and further violate several fundamental human rights.

Considering the discrimination that homosexuals suffer, perpetuated by the law and homophobia that still rides high in Uganda, proposals and solutions to ensure equality and change have been advanced. The recommendations include: (i) Decriminalization of homosexuality (ii) The inclusion of homosexuals in all programmes by the government (iii) The complete withdrawal of the Anti-Homosexuality bill from parliament (iv) Implementation of clear policies to address the current impunity for torture (v) Police should be held accountable for their acts (vi) Sensitization of the general public about the existence of LGBT rights in the international culture of human rights through media, seminars, workshops and in schools by the government (vii) A framework should be put in place by the government to implement International Human Rights provisions in order to protect and support sexual minorities in Uganda (viii) The amendment of the 1995 constitution to clearly, in ascertainable words include homosexuals under the minorities (ix) The preservation of the identity of sexual minorities by the state by abstaining from policies that negatively impact on LGBT people (x) Outlawing State discrimination on the basis of sexual orientation (xi) Culture should not be used as a yardstick to condemn homosexuality (x) Discouragement of religious inspired homophobia by pastors/priest/bishops/pope.

CHAPTER ONE

1.1 Introduction to the study

The issue of same sex relations has generated a lot of debates and controversy. While that interest is global, the situation in Uganda with regard to homosexuals represents an interesting local African dimension that is at the core of a clash of perspectives. A number of discourses on homosexuality point to sexuality. Key among these is Tamales's synthesis of what this is all about as seen in the following;¹ (i) which people are permitted to have sexual relations, with whom and how; (ii) morality: whether same-sex practices are or (should be) acceptable in Uganda; (iii) privacy: whether the state should have a role in determining the legality or otherwise of what is essentially a relationship between two adults of sane mind; (iv) religious doctrine: what do the holy books say about same-sex relations and are the interpretations of the texts correct and acceptable in a modern democracy?²

Homosexuality was defined in the case of *R v Angel*³ to mean sexual activity with members of one's own sex. Sexual orientation is an enduring emotional, romantic, sexual or affectional attraction to another person. A person's sexual orientation indicates whether in deciding with whom to engage in "emotional sexual conduct" they are emotionally or sexually attracted to persons of the opposite sex (heterosexual), persons of both sexes (bisexual) or person of the same sex (homosexuals).⁴

Homosexuality in Uganda is an offence. The Penal Code Act⁵ provides that any person who has carnal knowledge of any person against the order of nature is guilty of an offence and is liable to imprisonment for life. S.145 does not mention homosexuality specifically, but it is considered to fall under this offence because it involves people of the same sex hence considered to be "against the order of nature" since the law, culture and religion only recognize sexual relations between heterosexual couples. The Anti-homosexuality bill 2009 proposes to re-criminalize homosexuality. Clause 2 of the bill defines and punishes the 'offence of homosexuality.' This

¹Sylvia Tamale (ed.) *Homosexuality: Perspectives from Uganda* (Kampala: Sexual Minorities Uganda (SMUG), 2007), p.ix.

² *Ibid.*

³ [1968] 2 ALL.E.R 607

⁴ Robert Wintemunte, *Sexual Orientation and Human Rights* (New York: Oxford University Press 1995), 6.

⁵ Penal Code Act, Cap 120, Section 145.

provision largely replicates the existing prohibition on consensual sex between individuals of the same sex in section 145 of the Penal Code (an offence punishable by life imprisonment). Both the current law, clauses 2 and 14 of the bill (the latter on the failure to disclose offences) constitute prima facie violations of a number of human rights including the rights to equality and non-discrimination, privacy, liberty and security of the person, freedom of expression, freedom of thought, conscience and religion and health.

The criminalization of consensual same-sex conduct is discriminatory. It violates the Uganda constitutions' guarantee of equality and freedom from discrimination. All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.⁶ It also violates Uganda's obligations under the International Covenant on Civil and Political Rights (ICCPR),⁷ the African Charter on Human and Peoples' Rights (ACHPR) and other human rights treaties to which Uganda is party.

The ICCPR recognizes the right to equal protection of the law and the right to freedom from discrimination.⁸ In *Toonen v Australia*,⁹ the UN Human Rights Committee, which monitors states' compliance with the ICCPR, confirmed that sexual orientation is a prohibited ground of discrimination under these articles. The UN Human Rights Committee has since urged states not only to repeal laws criminalizing homosexuality but also to enshrine the prohibition of discrimination based on sexual orientation into their constitutions or other fundamental laws.

Article 2 of the African Charter¹⁰ provides that individuals are entitled to the rights under the African Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or any status.

⁶ The Constitution of Uganda 1995, Article 21.

⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 herein after "ICCPR".

⁸ The Constitution of Uganda 1995, Articles 2 and 26.

⁹ *Toonen v Australia*, Communication No.488/1992, UN Doc CCPR/C/50/D/488/1992(1994).

¹⁰ African Charter on Human and People's Rights (adopted June 27, 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force 21 October, 1986 and herein after "African Charter".

Article 3 of the Charter provides for ‘every individuals’ right to equality before the law and equal protection before the law.

All the non-discrimination provisions in International Human Rights Law end with reference to ‘other status’, which has repeatedly been interpreted to include sexual orientation. The UN Human Rights Committee, the UN Committee on Economic, Social and Cultural Rights, and the UN Committee on the Elimination of Discrimination against Women have all called for the repeal of laws criminalizing consensual same-sex conduct, and also to enshrine the prohibition of discrimination based on sexual orientation into the constitutions or other fundamental laws of states parties.¹¹

1.2 Background to the study

Sexuality and gender play a significant role in maintaining power relations in our societies.¹² Both are creatures of culture and society and they give each other shape and any scientific inquiry of the former invokes the latter.¹³ Gender provides the critical analytical lens through which any data on sexuality must logically be interpreted. Whatever impacts on gender relations also influences the sexual lives of men and women.¹⁴

Patriarchy uses sexuality as a device to create and sustain gender hierarchy in African societies by enclosing it in secrecy and taboos.¹⁵ Besides that, it also uses the law to prohibit sex outlaws in the social ghettos of society.¹⁶ Homosexuals are among the sex outlaws that have historically resisted and subverted dominant cultures. Patriarchy silences the voices of homosexuals by maintaining a tight grip on certain activities that they engage in hence making it extremely difficult for them to organize and fight for their human rights.¹⁷

¹¹ UN Committee on Economic, Social and Cultural rights (art 2, para 2) E/C 12/GC/20.

¹² Sylvia Tamale, “Researching and Theorizing Sexualities in Africa,” *In African Sexualities: A Reader*, edited by Sylvia Tamale, (Oxford: Pambazuka Press, 2011).

¹³ *Ibid.*, 1.

¹⁴ *Ibid.*

¹⁵ Sylvia Tamale, “Out of the Closet: Unveiling Sexuality discourses in Uganda,” *Feminist Africa 2* (2003): 42-49.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

Social cultural norms and religious beliefs constitute the screws that keep the clamp of sexual repression firmly in place. Contrary to what people believe, homosexuality in Uganda existed before colonialism and other forms of subjugation.¹⁸ Historically homosexual practices were neither fully condoned nor totally suppressed. Political, cultural and religious fundamentalisms have played a crucial role in suppressing and stifling sexual pluralism in Uganda. Sexuality therefore becomes a critical site for maintaining patriarchy and reproducing African women's oppression. Any variation in sexual activity and sexual partners from heteronormativity is considered "pathological" "deviant" "unnatural" and condemned in the strongest possible terms.¹⁹

Sexual activity and passivity, sexual domination and submission, sexual prowess and availability defines hegemonic, ruling or dominant configuration of masculinity in some parts of Africa (and thus, contrastingly, what has been referred to as emphasized femininity).²⁰ In contrast, the prevalent style of heterosexual womanhood is defined by expressing passivity, submission and availability to men as shown by how one dresses, sits, satisfies her man, and the power of her male partner. The prevailing configuration of masculinity in Africa is heterosexual masculinity. This would basically imply that as far as masculinity is concerned in most societies, a "real" man needs to have sex with beautiful women. Ultimately the struggle around sexuality is a political struggle, to be aimed at power structures, social practices, in addition to widespread psychological theories that support ordering of men's and women's sexual relations on a ladder-like structure, and that sexuality has to do with men's power over other men and women.²¹

Men and women who have sexual preferences other than heterosexual ones generate anxiety and disorder in the dominant order of masculinity.²² This is more so since they identify around acts other than those that uphold the order of gendered sexualities, hence complicating the picture of sexual relations of men to women. In short, any discussion of manhood would obviously be

¹⁸ Stephen Murray and Will Roscoe, *Boy-Wives and Female Husbands: Studies of African Homosexualities* (New York: St. Martin's Press, 1998).

¹⁹ See Tamale, "Out of the Closet," supra note 15.

²⁰ Heike Becker, "I am the man": Rethinking masculinities in Northern Namibia, in *Rethinking masculinities, violence and AIDS* edited by D Gibson and A Hardan (Amsterdam: Het Spinhuis, 2005), 19-43.

²¹ *Ibid.*

²² Kopano Ratele, "Analyzing Males in Africa: Certain Useful Elements in Considering Ruling Masculinities," *Africa and Asian Studies* 7, no.4 (2008): 8.

inadequate if it does not include same-sex male desires.²³ Discussing men who have sex with men is important because the simple (but violently resisted) point that all forms of sexual desires exist needs to be reiterated until such time that critical numbers of people acknowledge this fact without getting all knotted up.

It is important to acknowledge the existence of male-male sexual love because the desires of African males are part of the larger world where such desires exist.²⁴ Many African countries prohibit men having sex with other men because it undermines the naturalized socio-sexual order. Female sexuality is generally associated with violence/death and not much is said about pleasure or desire or enjoyment-certainly not female desire.²⁵ It is clear that for sexualities to be fully appreciated, they must be seen in the context within which they are expressed.

The law seems to be more preoccupied with male on male sex which it criminalizes as intercourse “against the order of nature.” Generally the dominant phallogentric culture does not count sex that is not penetrative as real sex and holds the stereotype of women as the passive recipients of penetrative male pleasure. Ugandan women’s sexuality is often reduced to their conventional mothering role and conflated with their reproductive capacities.²⁶

The idea of intimate same-sex relationships where a dominating male is absent and where women’s sexuality can be defined without reference to reproduction threatens patriarchy.²⁷ Homosexuality threatens to undermine male power bases in the Ugandan ‘private’ sphere as well as in public discourses. Homosexuality presents a challenge to the deep-seated masculine power within sexual relations and disrupted to the core of the heterosexists social order.²⁸ However, it should be noted that there are many other sexual acts, ideas, preferences, lifestyles, identities indicative of the heterogeneity of sexual life. There is no singular, stereotypical African

²³ *Ibid.*, 8.

²⁴ *Ibid.*

²⁵ Signe Arnfred (Ed.), *Re-thinking Sexualities In Africa* (Uppsala: The Nordic Africa Institute, 2004), 6.

²⁶ See Tamale, “Out of the Closet,” supra note 15.

²⁷ *Ibid.*

²⁸ *Ibid.*, 2.

sexuality. Heterosexuality may be the dominant form of sexual practice, in the sense of having many more subscriptions and structural support, but it exists alongside many other practices.²⁹

It can be argued that there are naturally multiple forms of female sexual desires in Uganda, some of which are permitted by power and others forbidden and thus largely invisible. Suggestions that indicate that certain types of sexualities are “unAfrican” are absurd and baseless.³⁰ In other words, there is nothing essentially uncommon about sexual desires and practices of Ugandans, with any apparent sexual distinctiveness that can be traced to the historical and contemporary social developments that have shaped Uganda. Given that Ugandan men and women are not naturally different in the sexual feelings they have for others, the hostility for the existence of homosexualities and bisexualities can only mean that such sexualities disturb the dominant shape of African masculinity and hence the need to suppress them.

The case of South Africa totally paints a different picture on the perception and treatment of same-sex relations from other African countries. Important to note is that South Africa has undergone a great transition on the issue of lesbian, gay, bisexual and transsexual equality (LGBT). The LGBT in South Africa had no legal protection until the decade of 1994-2004 when 35 items of legislation changed. Prior to this, sexual acts between two consenting adult men in private were criminalized.³¹ One profound change is seen in the constitution which now guarantees the right to be free from discrimination by the State or Legal and Natural persons, on the ground of sexual orientation. The constitution now places sexual orientation on a par with gender and race as protected categories.³²

Homosexuality predates colonial Africa and was present as a way of life during the pre-colonial times.³³ Sexual identity has only recently become an important factor in Ugandan society and

²⁹ See, “Analyzing males in Africa,” supra note 22 at 9.

³⁰ *Ibid.*

³¹ Robinson, BA, “End of the World Predictions,” Ontario Consultants on Religious Tolerance. <http://www.religioustolerance.org/end_wrlld.htm> (accessed June 11, 2007)

³² Section 9 of the Constitution South Africa

³³ Udoka Okafor, “How to Approach the Issue of LGBT Rights in Africa.” | www.huffingtonpost.com/.../lgbt-rights-in-africa_b_4098958.html. (accessed April 23, 2014)

politics as the issue has become politically mobilized by a range of actors.³⁴ Identity politics is a very effective tool for political mobilization. It is difficult to find a more effective mobilization platform than the development of an ‘us vs them’ discourse, particularly if the ‘other’ is an exotic minority about which little is known. This discourse distracts attention from other political issues. Kristof Titeca argues that in current circumstances putting pressure behind the scenes is much more effective than open attacks that predominantly lead to further polarization and strengthening of the political position of the people currently in power. The Gay right agenda is perceived in Uganda as an imperialistic, neo-colonial western agenda. Picking a fight with donors over this ‘invasion’ is politically very productive and unites many Ugandans.³⁵

This research is meant to put forward a reasoned and cogent argument for homosexuals as human beings with the same human rights and social responsibilities as heterosexual Ugandan citizens. What is not right is for anyone to hate someone to the detriment of their human rights. Just like South Africa decriminalized consensual same sex conduct, this research is meant to advocate for the repeal of laws criminalizing homosexuality and enshrine the prohibition of discrimination based on sexual orientation into the constitution and other laws.

³⁴ African arguments by Kristof Titeca
<africanarguments.org/.../ugandas-anti-homosexuality-bill-looking-beyond-a-single-explanation-by-kristof-titeca>
(accessed April 23, 2014)

³⁵ *Ibid.*

1.3 Statement of the problem

Uganda is a party to numerous international and regional human rights treaties. Embedded in her constitution is a comprehensive Bill of Rights and a legal, policy and institutional framework for the protection of minorities. However, Uganda's commitment to human rights and fundamental freedoms is questionable on the issue of sexual minorities and the current unpopular policy against homosexuality. This has been evidenced by the brutal police attacks of the private homes of suspected homosexuals and the uncompromising official statements against homosexuals by the executive.

The Anti-Homosexuality bill tabled in parliament in October 14, 2009 to strengthen the already existing law against homosexuality proposes draconian steps to further victimize Ugandans of that sexual orientation. Although this apparent persecution has attracted demonstrations and dissenting voices both nationally and internationally, homosexual practices have remained largely underground, a situation that is mired in serious human rights ramifications. Whether, and to what extent the prohibition of homosexual practices has impinged upon the personal liberties of some Ugandans, remains an unresolved question. In sum, it must be established whether homosexuals in Uganda enjoy the legal and constitutional liberties enjoyed by other citizens. Otherwise, there is a risk of having a country with an impressionistic human rights record that ironically breeds a sizeable gagged and oppressed citizenry.

1.4 General objective of the study

To investigate the legal and constitutional framework for the protection of homosexuals in Uganda.

1.5 Specific objectives

- a) To examine the legal and institutional framework that impacts homosexuality in Uganda.
- b) To establish and analyze human rights abuses suffered by homosexuals in Uganda.
- c) To make a comparative analysis between South Africa and Uganda regarding the protection of homosexuals.

- d) To provide proposals and practical solutions for dealing with the issue of homosexuality in Uganda.

1.6 Research Questions

- a) Do homosexuals in Uganda enjoy the legal and constitutional liberties enjoyed by heterosexual citizens?
- b) What are the human rights abuses suffered by homosexuals in Uganda?
- c) What contradictions exist between Uganda's human rights commitments and obligations and its treatment of homosexuals?
- d) What proposals and solutions can be advanced to ensure equality and change?

1.7 Theoretical framework

A number of studies have been conducted on African sexualities that are sensitive to the complexities that arise in this subject. It is important to note that the bulk of the body of knowledge and published scholarship emanates from the global north.³⁶ While it is important to develop home grown theories of African sexualities, the validity of foreign-grown theories of sexuality may not be rejected in total. However, theories that are constructed from the global north to explain African societies must be used critically.³⁷

Western theoretical perspectives define the underlying rationale and practices of the legal regime governing sexualities in Africa to a certain extent. This is because much of the contemporary sexual morality codes and most sex laws in the statute books of post-colonial countries are rooted in the history and tradition of the former colonizing European nation. Hence existing theoretical frameworks e.g., Michel Foucaults' conceptualization of sexuality in terms of power relations or David Evans' concept on sexual citizenship and Rights or Gayle Rubin's concept of sexual hierarchy can be extremely useful in analyzing sexualities in Africa. As long as this is done with the continental specificities in mind and a view to improve upon them.³⁸

³⁶ See Tamale, "Researching and Theorizing Sexualities In Africa," supra note 12 at 11.

³⁷ *Ibid.*

³⁸ *Ibid.*, 12.

Governmentality is a concept credited to French philosopher Michel Foucault. Basically, the concept is understood in the broad sense of technologies and procedures for directing human behavior.³⁹ Although the concept of governmentality originates from the West, it is an important analytical tool for scholars of African sexualities because it facilitates the analysis of the locus and dynamics of power in sexual relationships and sexual cultures. Governmentality allows the examination of the interactions between external regulation and self-control of sexual conduct.⁴⁰

In explaining how individuals within cultural groups learn acceptable behavior, socialization relies on imparting normative behavior into individuals (who are usually new initiates into a particular social cultural context), so that they govern their own conduct as well as that of others. These individuals are expected to then align their behavior, attitudes and actions to socially accepted standards. The main aim of socialization is similar to that of governmentality of the self, i.e., ‘the shaping of citizens with a certain mode of self-reflection and certain civilized techniques of self-government.’ Thus the relevance of governmentality in studying culture becomes imperative because culture in itself, then, could be analysed as a set of technologies for governing habits, morals and ethics – for governing subjects.⁴¹

Michel Foucault explores the ways that government has claimed ever greater control over and enforcement of ever more private aspects of our lives.⁴² In particular he explores the transition of what he terms a “culture of spectacle” to a carceral culture.” He states that whereas in the former punishment was effected on the body in public ways of torture, dismemberment and obliteration, in the latter punishment and discipline become internalized and directed to the constitution and when necessary, rehabilitation of social subjects.⁴³ One of the techniques/regulatory modes of power/knowledge that Foucault cited was the Panopticon, an architectural design put forth by Jeremy Bentham in the mid-19th Century for prisons, insane

³⁹ Nikolas Rose, Pat O’Malley and Mariana Valverde. *Governmentality*, Sydney Law School: Legal Studies Research Paper No.09/9, 2009.

⁴⁰ Thomas Lemke Foucault, governmentality and critique. Paper presented at the ‘Rethinking Marxism’ Conference, University of Amherst, and 21-24 September 2000. Available at <<http://www.andosociology.net/resources/Foucault%2C+Governmentality%2C+and+Critique+IV-2.pdf>> (Accessed November 22, 2009).

⁴¹ See Malley and Valverde, “Governmentality”, supra note 39 at 5.

⁴² Michel Foucault, *Discipline and Punishment: The Birth Of Prison* (New York:Vintage Books 1977), 201

⁴³ *Ibid.*, 202

asylums, schools, hospitals and factories.⁴⁴ Instead of using violent methods, such as torture and placing prisoners in the dungeons that were used for centuries in monarchial states around the world, the progressive modern democratic state needed a different sort of system to regulate its citizens. The Panopticon offered a power the progressive modern democratic state needed a different sort of system to regulate its citizens. The Panopticon offered a powerful and sophisticated internalized coercion, which was achieved through the constant observation of prisoners, each separated from the other, allowing no interaction, no communication. This modern structure would allow guards to continually see inside each cell from their vantage point in a high central tower, unseen by the prisoners. Constant observation acted as a control mechanism; a consciousness of constant surveillance is internalized.

One of the effects of this new model of organisation is rehabilitation rather than cruel and unusual punishment. Foucault however questions the subsequent emphasis on the "normal," which entails the enforcement of the status quo on ever more private aspects of our lives (for example, sexuality). As he puts it, the judges of normality are present everywhere. It is on them that the universal reign of the normative is based; and each individual, wherever he may find himself, subjects to it his body, his gestures, his behaviour, his aptitudes, his achievements.⁴⁵

Sexual citizenship and Rights is a concept that is attributed to David Evans (1993) who, based on a neo-Marxist perspective, challenged social construction theorizations of sexuality to consider and include the material foundation of sexualities.⁴⁶ The concept focuses on the multi-stranded interactions between politics and erotics. At the heart of the concept is a critique of classical theories of citizenship because they tend to focus on a narrow definition of the citizen principally as a male adult operating in a free market. In this approach, the citizen has neither sexuality nor embodiment.⁴⁷ Sexual citizenship on the other hand broadens the scope of the conceptualization of citizenship to include cultural, ethnic, gendered and sexual aspects which all interact with politics.⁴⁸

⁴⁴ *Ibid.*, 203

⁴⁵ *Ibid.*, 304

⁴⁶ Stella Nyanzi, "Unpacking the [Govern] Mentality of African Sexualities," in *African Sexualities: A Reader* edited by Sylvia Tamale (Oxford: Pambazuka Press, 2011).

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

Sexual rights extend international human rights protection to the terrain of sexuality.⁴⁹ However, the concept of sexual rights is ambivalent. Various stakeholders on the sexual and reproductive health and rights scene have different interpretations for sexual rights.⁵⁰ While claims for sexual rights in Europe are mainly motivated in relation to sexual orientation, in the African context the lack of sexual rights often results from poverty and gender inequalities particularly in sexual relationships. Cultural, religious, political and social diversities within Africa also introduce layers of differentiating meanings attributed to sexual rights.⁵¹ Sometimes sexual rights claims necessitate challenging existent legal regimes that criminalize some sexual preferences.⁵²

For those Africans opposed to sexual rights, the main justifications are based on religious fundamentalism, patriarchal subjugation of women, societal claims of communal rights taking predominance over individual rights claims, that this was a Western-driven agenda and that African priorities centered around development.⁵³

Sexuality rights – how to define them and how to achieve them – is another prickly question in much of Africa. Not only is there a problem of perception, whereby leading advocates of broad definitions of sexual rights in Africa or female empowerment are coming from the West, often with a missionary or colonizing tone in their voice that alienates potential African allies.⁵⁴ There is also the problem that even narrow definitions of sexual rights pose profound challenges to hegemonic, heteropatriarchal culture. Thus although sexual rights can be an empowering platform from which to operationalize social justice, advocacy and activism for sexual diversities and citizenship, they are also shrouded with complexities, ambivalences and ambiguities.⁵⁵

Rubin shows how American society classifies sexual behaviour into a sexual value system in which good, normal, natural and privileged sexuality (located in what she refers to as the

⁴⁹ Diane Richardson, Constructing sexual citizenship: theorizing sexual rights. *Critical social Policy* (2000).

⁵⁰ *Ibid.*

⁵¹ Barbara Klugman, “Sexual rights in Southern Africa: a Beijing discourse or a strategic necessity?” *Health and Human Rights* 4, no.2 (2000): 144 – 173.

⁵² *Ibid.*

⁵³ Lynn Freedman, “Reflections on emerging frameworks of health and human rights,” *Health and Human rights* 1 no.4 (1995): 144 – 173.

⁵⁴ See Stella Nyanzi, “Unpacking the [Govern] Mentality of African Sexualities,” supra note 46 at 11.

⁵⁵ *Ibid.*

‘charmed circle’ of sex) must be heterosexual, married, monogamous, procreative, non-commercial, in pairs, in a relationship, same generation, in private, bodies only and vanilla.⁵⁶ Outside the “charmed circle” and on the “outer limits,” is “bad, abnormal unnatural and damned sexuality.” Characteristics of the latter include “homosexual, unmarried, promiscuous and non-procreative.”⁵⁷

Most of the elements in Rubin’s hierarchical model resonate with the experiences in many African societies.⁵⁸ However there are certain elements that clearly differ. Theorizing African sexualities would differ from the western ones in nuanced specificities because of certain ideologies and practices unique to the continent, e.g., one cannot ignore those aspects of cultural ideology that are widely shared among Africans.⁵⁹ It is also important to make the philosophical link between institutionalized, state-inspired homophobia to Africa’s autocratic and dictatorial regimes by constantly attacking homosexuals, attention is conveniently diverted from the national issues that the population is suffering from.

Sexuality and gender cannot be separated. They both play an important role in maintaining power relations in our societies. Whatever impacts on gender relations also influences the sexual lives of men and women. Sexuality is deeply embedded in the meanings and interpretations of gender systems.

Hence, feminist theory is my overall guidance in analyzing the research problem.

⁵⁶ Gayle Rubin, “Thinking sex: Notes for a radical Theory on the politics of sexuality” in *Pleasure and Danger: Exploring Female sexuality*, edited by Carole Vance (London: Routledge and Kegan Paul, 1984): 267-319.

⁵⁷ *Ibid.*

⁵⁸ See Tamale, “Researching and Theorizing Sexualities in Africa,” supra note 12 at 13.

⁵⁹ Jo Helle-Valle, “Understanding Sexuality in Africa: Diversity and Contextualised Dividuality,” in *Rethinking Sexualities in Africa*, edited by Signe Arnfred, (Uppsala: The Nordic Africa Institute, 2004), 195-197.

1.7 Significance of the study

This information on sexual orientation and the law is required by law makers to legislate, or draft laws which fit the conditions of victims of human rights abuses and amend laws that are hostile to their rights in Uganda. The findings of the study will also benefit the policy makers in Uganda and other countries where the subject is under significant controversy to make policies that will improve on the perception and treatment of categories of people that are marginalized because they are different. Scholars both academicians, sectoral who wish to investigate future incidents of homosexual practice in Uganda can use this information as a guide.

1.9 Definition of terms

For the purpose of this research, the following working definitions have been adopted:

Sexual Orientation	Enduring emotional, romantic, sexual or affectional attraction to another person
Heterosexuality	Sexual attraction between persons of the opposite sex
Bisexual	Somebody who is sexually attracted to both men and women or engages in both heterosexual and homosexual activity.
Patriarchy	A hierarchical system of social organization whereby men hold positions of power over women.
Heteronormativity	Holds that heterosexuality is the normal sexual orientation. It gradates sexual practices from morally good sex to bad sex.
Homonegativity	A negative attitude towards homosexuality or homosexual people.
Heteropatriarchy	Men dominating and de-skilling women in a number of forms
Phallogocentric	Centred on men, especially one held to entail the domination of men by women
Subversion	An attempt to overthrow the established order of a society, structures of power and authority, exploitation, servitude and hierarchy.
Masculinity	Set of qualities, characteristics or generally considered typical of, or appropriate to a man.
Hegemony	It is a power structure in which a single group leads the other groups in a country or society.

Governmentality Art of governing, including the practices of governments and their effects on the people governing.

Subjugation To make submissive or subdue.

1.10 Scope of the study

This study focused on establishing whether or not homosexuals enjoy human rights and freedoms in Uganda. It also focused on examining the legal and institutional framework that impacts homosexuality in Uganda, analyzing human rights abuses suffered by homosexuals and the possible solutions to ensure that they realize their rights. The analysis was informed by South Africa's experience. The geographical area of the study was Kampala. Kampala was specifically chosen because most cases of homosexuality have been in Kampala and human rights activists interviewed for the study reside and operate within Kampala. This study covered the period from 2007-2010 because this is the period when most homosexuals have faced a lot of harassments and persecution and there has been a lot of debate about homosexuality especially with the advent of the Anti-homosexuality bill.

1.11 Methodology

1.11.1 Research Design

The study was cross sectional, employing both quantitative and qualitative methods of data collection because these two methods are compatible and can be used in a single research study. A combination of these methods has complementary strength and non-overlapping weaknesses.

1.11.2 Sampling Procedure

Snowball sampling procedure was followed in selecting some of the respondents on the basis of the rare characteristic they possess to participate in the study. This procedure was particularly viable because the respondents are a hard to reach population and given their secretive nature they would be less willing to identify themselves. Purposive sampling procedure was adopted to some respondents due to their perceived knowledge or experience in relation to the problem under investigation. This perception was as a result of the nature of the office and position they hold.

1.11.3 Data collection and instruments

This study involved library, desk research and unstructured interviews to collect in-depth information. The data was collected from various libraries as well as the Internet and from the field through interviews which were conducted. A checklist was developed and used to collect secondary data from documents in the libraries and the Internet. An interview guide was administered to explore and produce the data to use in this study. The researcher built rapport with the respondents and made every effort to ensure that the respondents are made aware of the purpose of the study and the procedure of data collection. The research ensured quality control of the data collection.

1.11.4 Data analysis

Data analysis involved data entry. A descriptive and qualification method of data analysis was used. This means that all the data collected was edited, and entered into the computer and all the data from other sources was checked to ensure comprehensiveness of the work done.

1.11.5 Limitations

There were some limitations in conducting this study. Some of the respondents deliberately refused to answer questions given the nature of the topic being researched. Some feared being identified since their behavior is secretive. Some respondents were not willing to be interviewed for fear of being arrested and brought 'out of the closet.' All these, made the exercise tedious.

1.11.6 Ethical issues

This study was conducted against a backdrop of fear, uncertainty and dilemmas that surrounded me in the field. Given the sensitivity of the research topic, some respondents (especially homosexuals) perceived me with great suspicion while others were not so sure about their safety. This could be read from their faces and expressions. This problem was dealt with by informing the respondents about the purpose for the research and their consent first obtained before proceeding. The respondents' right of confidentiality was observed so as to control quality of the research. The respondents were assured that the data will be held in strict confidence to protect anonymity. It is for these reasons that pseudo names are used in this report. There were five respondents who refused to be interviewed and were left out. On the whole forty respondents

(homosexuals and human rights activists) were receptive and willing to give information. Some requested me to avail them with a copy of the findings of my study.

1.12 Summary of the chapters

This study is organized into five chapters. Chapter one covers the introduction, the background, statement of the problem, aims and objectives, research questions, significance, scope of the study and methodology. The relevant literature is reviewed in chapter two. Chapter three provides a critical assessment of the constitutional and legal framework governing same sex relations in Uganda. The research findings and data analysis are provided in the fourth chapter. Chapter five covers the conclusion and recommendations of the study.

CHAPTER TWO

ASSESSING THE LITERATURE ON HOMOSEXUALITY

2.1 Introduction

There have been few scholars at the local level who have researched and published on the subject of homosexuality in Uganda. At the International level, there exists a vast and wide ranging body of literature on the subject of homosexuality, yet there is a paucity on the same in the Ugandan perspective. A review of the current literature on the subject discloses the controversies that surround this phenomenon. The literature review covers sexual orientation and the law and is divided into two sub-sections to reflect the main debates and discussions related to this study. The first part discusses the theories that have been advanced that relate to homosexuality and the second examines arguments of various scholars on the issues of law, policy and human rights on the subject matter.

2.2 Theorizing the Prohibition of Homosexuality

The theoretical debates related to the issue of homosexuality fall under two main schools of thought: Biological and Sociological theories.

Biological Theories

Biological theories of homosexuality were attempts not only to explain its causes, but also to maintain the exclusion of homosexuals as the "other." Biological explanations can be categorized as genetic, psychological, hormonal, deviant and reproduction. Sigmund Freud ascribes biological and psychological factors in explaining the principal causes of homosexuality.⁶⁰ He believed that humans were born with unfocused sexual libidinal drives and therefore argued that homosexuality might be a deviation from this. Freud believed that all humans were bisexual, by which he primarily meant that everyone incorporates aspects of both sexes and everyone is sexually attracted to both sexes. In his view, this was true anatomically and therefore also mentally and psychologically. Heterosexuality and homosexuality both developed from this original disposition. As one of the causes of homosexuality Freud mentions

⁶⁰ Freud Sigmund, *Three essays on the theory of sexuality* (London: Hogarth Press, 1953), 123-243.
<<http://www.answers.com/topic/psychosexual-development-2#ixzz2QXmgIhxa>> (accessed April 9, 2013)

the distressing heterosexual experience. Those cases are of particular interest in which the libido changes over to an inverted sexual object after a distressing experience with a normal one.⁶¹

Freud saw homosexuality as pathological during certain periods. However, homosexuals could seldom be convinced that sex with someone of the opposite sex would provide them with the same pleasure they derived from sex with someone of the same sex. According to him, “Patients” often had only superficial reasons to want to become heterosexual, pursuing treatment due to social disapproval, which was not a strong enough motive for change. He argues that some patients might have no real desire to become heterosexual, seeking treatment so that they could convince themselves that they had done everything possible to change leaving them free to return to homosexuality afterwards.⁶² Sigmund Freud’s theories have faced criticisms. Robinson argues that Freud’s theories are built upon their own internal logic which cannot be proved either way.⁶³ They are internally consistent he adds, but externally un-provable; thus being of little or no scientific worth. He also argues that Freud’s theory is not based on a large sample of people, or tested under experimental conditions with control groups. Robinson reveals that Freud’s patients were largely wealthy hysterical Victorian middle-class women in Vienna in the late 1800s. He concludes by asserting that from such a narrow group, the theory is applied universally and presented as an all-encompassing male - centred theory.⁶⁴

Some researchers have theorized that the sexual preferences and behavior of homosexuals may be dictated by the structure of the brain—particularly if the brains of homosexual men, for example, can be shown to resemble those of heterosexual women more than they resemble those of heterosexual men. One highly publicized study that purported to demonstrate this was conducted in 1991 by Simon LeVay, a renowned neuroscientist known for his research on the ways in which the brain structure affects sexual orientation among people.⁶⁵ LeVay studied the

⁶¹ *Ibid.*

⁶² James Strachey, Three Essays on the Theory of Sexuality (1905). *The Standard Edition of the Complete Psychological Works of Sigmund Freud, Volume VII (1901-1905): A Case of Hysteria, Three Essays on Sexuality and Other Works*, 123-246.

⁶³ Paul Robinson, *Freud and His Critics* (Berkeley: University of California Press, 1993).
<<http://ark.cdlib.org/ark:/13030/ft4w10062x/>> (accessed April 15, 2013).

⁶⁴ *Ibid.*

⁶⁵ Jennifer Robertson (Ed.), *Same Sex Cultures and Sexualities: An anthropological reader*, (Berkeley: Blackwell Publishing, 1995), 37.

brains of cadavers, including 18 men known to have been homosexual and one known to have been bisexual. He compared them with the brains of another 16 men and six women whom he presumed to have been heterosexual.

This is what LeVay claimed to have found: “INAH 3 was more than twice as large in the heterosexual men as in the women. It was also, however, more than twice as large in the heterosexual men as in the homosexual men. This finding indicates that INAH is dimorphic with sexual orientation [i.e., shows a difference in structure between homosexuals and heterosexuals], at least in men, and suggests that sexual orientation has a biological substrate.”⁶⁶ Hence, Simon LeVay explains his belief in the idea that sexual orientation is based solely on innate, biological factors within the brain with no impact from the environment. LeVay uses evidence with regard to the manipulation of sex hormones in animals throughout development and homosexual tendencies in the natural world. The author also places forth evidence throughout that there are in fact functional and structural differences between the brains of straight and gay people. LeVay concludes that sexuality is predetermined, even before birth due to biological factors.⁶⁷

LeVay’s study, however, suffered from serious methodological errors, including the failure to adequately identify a control group. LeVay made questionable assumptions regarding the orientation of the “heterosexual” cadavers. He assumed that they were all heterosexual, even though a number of the allegedly “heterosexual” subjects had died of AIDS, a disease that remains far more common among homosexual men than among heterosexuals in California: “Sixteen subjects were presumed to be heterosexual men: six of these subjects died of AIDS and ten of other causes.” LeVay, in fact, admitted that his claim of a *correlation* between this brain structure and sexual orientation could not prove *causation*, or even the direction of influence, noting that “[T]he results do not allow one to decide if the size of INAH 3 in an individual is the cause or consequence of that individual’s sexual orientation, or if the size of INAH 3 and sexual orientation co-vary under the influence of some third, unidentified variable.”⁶⁸

⁶⁶ *Ibid.*

⁶⁷ Simon LeVay, *Gay, Straight and the Reason Why: The Science of Sexual Orientation* New York: Oxford University Press, 2011).

⁶⁸ See Robertson (Eds), “Same Sex Cultures and Sexualities.” Supra note 65 at 40.

Just as LeVay does, Shibley pays great attention to articles which explain in depth the roles of the endocrine system and the brain (specifically the hypothalamus) and how these two biological functions are inextricably linked to one another and the development of a person's sexuality and sexual orientation.⁶⁹ The author has compiled an anthology of many different scholarly articles all of which are written by scientists with a great deal of experience and insight into the biological theory of one's sexual orientation. The works included in the anthology are to prove the hypothesis that a person's sexual orientation is based on biological factors. This anthology also focuses on the role that the studies of twins have on proving this hypothesis. The articles included present information on how the release of hormones or lack thereof can affect a person's sexual orientation in life. This anthology is intended to reach out to those who may believe sexual orientation is a choice, and is therefore discriminatory in many cases. It is meant to raise awareness.⁷⁰

The theory of genes states that people are simply born not bred to be gay.⁷¹ This theory proclaims that homosexuality is determined genetically because identical twins are more apt to both be gay than fraternal twins and identical twins are more genetically similar compared to fraternal twins. The largest twin study was published by Michael Bailey and Richard C. Pillard.⁷² Michael Bailey and Richard C. Pillard claim to have found a higher rate of homosexuality among identical ("monozygotic") and fraternal ("dizygotic") twins than among adoptive siblings. They reported that "of the 7 relatives whose sexual orientation could be rated, 52 percent (29/56) of monozygotic cotwins, 22 percent (12/54) of dizygotic cotwins and 11 percent (6/57) of adoptive brothers were homosexual..." The authors concluded that the pattern of rates of homosexuality by type of relative was generally consistent with substantial genetic influence.⁷³

⁶⁹ Janet Shibley Hyde (Eds.), *Biological Substrates of Human Sexuality* (New York: Oxford University Press, 2005), 20

⁷⁰ *Ibid.*

⁷¹ Donald Faris, *The Homosexual Challenge* (Markham, Ontario: Faith Today Publications, 1993), 22.

⁷² Michael, Bailey J. and Richard, Pillard C., "A Genetic Study of Male Sexual Orientation," *Archives of General Psychiatry* vol 48, no.12 (1991): 1089-1094.

⁷³ *Ibid.*

The findings of Bailey and Pillard, however, are not entirely consistent with a genetic theory. Bailey and Pillard themselves alluded to problems with their sampling method: “The sampling method employed in this study falls short of the ideal genetic epidemiological study, which would involve systematic sampling from a well-specified population. In particular, although all recruiting advertisements stated that [subjects] were desired regardless of the sexual orientation of their relatives, there is no guarantee that volunteers heeded this request.”⁷⁴

Byne and Parsons confirm that Bailey and Pillard did not employ “a systematically ascertained sample of twins.”⁷⁵ Subjects were recruited through advertisements placed in homosexual-oriented periodicals and, therefore, may not be typical of the homosexual population at large.” As Byne and Parsons explain, in Bailey and Pillard’s study,

The concordance rate for homosexuality in non-twin biologic brothers was only 9.2 percent—significantly lower than that required by a simple genetic hypothesis, which, on the basis of shared genetic material, would predict similar concordance rates for dizygotic twins and non-twin biologic brothers. Furthermore, the fact that the concordance rates were similar for non-twin biologic brothers (9.2 percent) and genetically unrelated adoptive brothers (11.0 percent) is at odds with a simple genetic hypothesis, which would predict a higher concordance rate for biologic siblings.⁷⁶

In their analysis, Byne and Parsons point out that the evidence actually suggests an environmental rather than a genetic cause for homosexuality, arguing that they must at least consider the possibility that the higher concordance rate for homosexuality in dizygotic twins compared with non-twin biologic brothers is due to increased similarity of the trait-relevant environment in the former. This is because they say dizygotic twins and full biologic siblings share the same proportion of genetic material. They thus conclude that any difference in the true concordance rates would be attributable to environmental rather than genetic factors.⁷⁷

⁷⁴William Byne & Bruce Parsons, "Human Sexual Orientation. The Biologic Theories Reappraised," *Archives of General Psychiatry*, 1993, no. 50: (228-239).

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

The theory of hormones reflects homosexual men as having below average levels of male hormones while homosexual women have below average levels of female hormones.⁷⁸ Studies, however, have shown no difference hormonally between homosexuals and heterosexuals.⁷⁹ Hirschfeld in 1868 hypothesized that both males and females had sex drives that were not dependent on the partner's biological sex. Moreover, Hirschfeld in 1947 postulated that males and females had sex hormones which controlled the direction, strength and how often one feels sexual desire.⁸⁰ Thus, Hirschfeld believed that the female hormones in a male and the male hormones in the female would cause the individual to have a homosexual identity. A number of investigators have suggested that hormonal alterations during prenatal life may influence sexual preference in humans and use data from rat and guinea pig experiments to support their claim. Some scientists have extrapolated these observations to humans and have theorised that homosexuality may originate due to similar pre-natal hormonal derangements.⁸¹

However, the rodent model of human homosexual behaviour has serious flaws, and extrapolation of rodent behaviour observations to psychological processes in humans is problematic. The rodent behaviours described are mating postures which are under rigid endocrine control and reflex-like, and may be induced, for example, by a touch from a researcher's hand.⁸² Byne and Parson argue that such posturing can be inhibited by blocking certain hormone receptors, and the frequency of such mating postures which a rat may assume over a period of time is related to the level or number of certain hormone receptors. The rat model raises a lot of questions by the fact that motivated sexual behaviours in humans undergo rigid endocrine control. This hormonal theory has been critiqued for not being able to explain the shifts in sexual preferences over time.⁸³ There is no evidence of predisposition to homosexuality in human syndromes involving prenatal male hormone deficiency in males or excess male hormones in females during pre-natal life. In fact Byne

⁷⁸ Heino Meyer-Bahlburg, "Psychoendocrine research on Sexual Orientation: current status and future options," *Progress in Brain Research*, no.61 (1984): 375-398.

⁷⁹ *Ibid.*

⁸⁰ John De Cecco, P., & Michael Shively, "From Sexual Identity to Sexual Relationships: A Contextual Shift," *Journal of Homosexuality* 9, no.3 (1984): 1-26.

⁸¹ *Ibid.*

⁸² See Byne & Parson, "Human Sexual Orientation", supra note 74.

⁸³ *Ibid.*

and Parsons argue that these facts show that in humans, learning and socio-cultural influences play the role and not biologic pre-determinism.⁸⁴

Bailey views some cultures in which attitudes toward homosexuality are linked to those concerning procreation.⁸⁵ He argues that in primitive societies, chronically at war with their neighbours and suffering from a high infant mortality rate, keeping up numbers was essential and non procreative sexuality could be seen as a threat to survival. He critiques such attitudes that are rooted in traditions some of which have their origins in circumstances no longer applicable or long forgotten. In contemporary western societies, the numbers of people involved with homosexual relations on a long term basis are probably not great enough to have a major impact on the birthrate, even with the relaxation in attitudes that has occurred in recent years. Bailey's views have been critiqued for their ethnocentricity.⁸⁶

Although many scientists still support the nature (or biological) view, there have been some that oppose the nature position or are not convinced that only biological factors determine sexual orientation in humans. According to Ruse,⁸⁷ those who support the nature position tend to be reductionists, where they attribute sexual orientation only to biology. She mentions two types of biological scientists; genetic biological scientists and hormonal biological scientists.⁸⁸ Ruse discusses how genetic biological scientists want to prove that their theory is the main unifying theory, and one way this is done is through the Darwinian biological theory. She notes that the Darwinian biological theory proposes that as animals, humans also go through natural selection, the gradual process of evolution. Therefore, sexual orientation she asserts is determined through natural selection, and thus there must be an advantage to humans when the homosexual trait appears. However, the Darwinian biological theory states that the main purpose of natural selection is survival and reproduction of offspring, heterosexuals serve this purpose but

⁸⁴ *Ibid.*

⁸⁵ Derrick S. Bailey, *Homosexuality and the Western Christian Tradition* (London: Longmans, Green, 1955; repr. Hamden, Ct.: Archon/Shoestring Press, 1975).

⁸⁶ David F. Greenberg, *The Construction of Homosexuality*, (London: The University of Chicago Press Ltd, 1988), 2.

⁸⁷ Michael Ruse, "Nature/Nurture: Reflections on Approaches to the Study of Homosexuality," *Journal of Homosexuality* 10, no.3-4 (1985): 141-150.

⁸⁸ Brian Mustanski S., Meredith Chivers L. and Michael Bailey J., "A Critical Review of Recent Biological Research on Human Sexual Orientation," *Annu Rev Sex* 13, (2002): 89-140.

homosexuals cannot reproduce. The Darwinian paradox is how can an anti-productive gene be favorable through natural selection?⁸⁹ Gould, one of Darwin's critics, claims that his criticism of Darwin's theory is that the theory has valid points, though it is incomplete and has many gaps, as it is demonstrated by the Darwinian Paradox.⁹⁰

In addition to the flawed theory used by biological scientists, many studies conducted have been flawed as well. Most studies on sexual orientation, and more specifically homosexuality, have focused on homosexual men and the same conclusions cannot be transferred to homosexual women.⁹¹ Furthermore, it was found that animal models were inadequate in explaining human sexual orientation, for example, homosexual animals have different genitalia compared to heterosexual animals, while human genitalia do not differ between heterosexuals and homosexuals.⁹² Hirschfeld had proposed in the early 20th century, that hormones were responsible for homosexuality; however when it was possible to measure hormone levels, no supporting evidence was found.⁹³ Likewise, the gender differences in the ratio of 2D to 4D finger length that are attributed to early androgen effects, were found to have inconsistent results.⁹⁴ Despite the evidence the nature view has provided, there are still flaws in the theory and the research. Thus, sexual orientation cannot be completely attributed to biological factors; rather biological factors are one aspect of sexual orientation.

Byne and Parsons conclude that the biologic theory remains unproven, and note that the appeal of current biologic explanations for sexual orientation may derive more from dissatisfaction with the present status of psychosocial explanations than from a substantiating body of experimental data. Critical review shows the evidence favoring a biologic theory to be lacking. In an alternative model, temperamental and personality traits interact with the familial and social milieu as the individual's sexuality emerges. Because such traits may be heritable or developmentally influenced by hormones, the model predicts apparent non-zero heritability for

⁸⁹Emmanuelle Jannini et al., "Male Homosexuality: Nature or Culture?" *Journal of Sexual Medicine* Vol 7, issue 10 (2010): 3245-3253.

⁹⁰Stephen Jay G., "Darwinism and the Expansion of Evolutionary Theory," *Science* 216, no.4544 (1982): 380-387.

⁹¹ See Jannini et al., "Male Homosexuality" *supra* note 89 at 8.

⁹² See Meyer, "Psychoendocrine Research on Sexual Orientation," *supra* note 78 at 6.

⁹³ See Jannini et al., "Male Homosexuality: Nature or Culture?" *supra* note 89 at 8.

⁹⁴ *Ibid.*

homosexuality without requiring that either genes or hormones directly influence sexual orientation per se.”⁹⁵

Sociological Theories

The sociological theory states that it is the individual society itself that mainly contributes to the development of homosexuality, unlike what the biological theorists believe. In the eyes of a sociologist, homosexuality is no different than heterosexuality in the sense that they both derive from previous social experiences and only differ in regards to their specific nature.⁹⁶ According to Greenberg's "social constructivist" view, homosexuality is a behavior produced and interpreted in different ways by different societies at different times. He contends that homosexuality is not an essence or condition that some people have and others do not. It is not a minority orientation that, perhaps, 10 percent of the population have and when they discover their condition, become liberated to conform to their true natures. Greenberg maintains that homosexual identity is a social label. He argues that social classification both creates the homosexual phenomenon and contains the evaluative frameworks by which it is judged, whether as deviant, tolerable, approvable or admirable.⁹⁷ The dominant sociological theory in this respect is queer theory which different scholars have expounded.

Queer is by definition whatever is at odds with the normal, the legitimate, the dominant. There is nothing in particular to which it necessarily refers. It is an identity without an essence. Queer demarcates not a positivity but a positionality *vis-à-vis* the normative.⁹⁸ Queer theorist Micheal Warner attempts to provide a solid definition of a concept that typically circumvents categorical definitions: Social reflection carried out in such a manner tends to be creative, fragmentary, and defensive, and leaves us perpetually at a disadvantage. Queer theory's main project is exploring the contesting of the categorization of gender and sexuality; identities are not fixed, they cannot be categorized and labeled because identities consist of many varied components and that to categorise by one characteristic is wrong. Queer theory has two predominant strains: radical

⁹⁵ See Byne & Parsons "Human Sexual Orientation," supra note 74 at 5.

⁹⁶ Carol S. Vance, "Social Construction Theory: Problems in the History of Sexuality in Homosexuality", *Which Homosexuality?* edited by Dennis Altman et al. (Amsterdam: Dekker Schorer, 1989), 13-34.

⁹⁷ See Greenberg, "The Construction of Homosexuality," supra note 86 at 60.

⁹⁸ David Halperin, *Saint Foucault: Towards a Gay Hagiography* (Oxford University Press, 1997), 62, ISBN 0-19-511127-3, retrieved 2010-05-10.

deconstructionism, which interrogates categories of sexual orientations and radical subversion, which disrupts the normalizing tendencies of the sexual order.⁹⁹

Michel Foucault's *The history of sexuality* pioneered queer theory.¹⁰⁰ Foucault argues that we generally read the history of sexuality since the 18th century in terms of the "repressive hypothesis." He writes that the repressive hypothesis supposes that since the rise of the bourgeoisie, any expenditure of energy on purely pleasurable activities has been frowned upon. As a result, Foucault says sex has been treated as a private, practical affair that only properly takes place between a husband and a wife. Sex outside these confines is not simply prohibited, but repressed. That is, there is not simply an effort to prevent extra-marital sex, but also an effort to make it unspeakable and unthinkable. He notes that discourse on sexuality is confined to marriage. The repressive hypothesis explains that there have been certain outlets of confession where improper sexual feelings could be released safely. Foucault suggests that the repressive hypothesis is essentially an attempt to give revolutionary importance to discourse on sexuality. The repressive hypothesis makes it both defiant and of utmost importance to our personal liberation that we talk openly about sex.¹⁰¹

Foucault also observes that there was an element of social control in this. Power relations are to Foucault central to any analysis of society and this is especially true for sexuality.¹⁰² Power relations are formed in all relations where differences exist.¹⁰³ It is something ubiquitous and cannot be thought of as dual, creating division between those dominating and those being dominated.¹⁰⁴ Foucault claims that we have had a juridical view of power in our society and we tend to see it as something negative, oppressing, defining what is not to be done. The "perverse" became a group instead of an attribute. Sexuality became seen as the core of some people's

⁹⁹Michael Warner, "Introduction," In *Fear of a Queer Planet: Queer Politics and Social Theory*, edited by Michael Warner. (Minneapolis, MN: University of Minnesota Press, 1993), vii-xxxii.

¹⁰⁰ David Halperin, *One Hundred Years of Homosexuality: The New Ancient World* (London and New York: Routledge, 1990).

¹⁰¹ Michel Foucault, *The History of Sexuality*, Vol. 1: *An introduction* (New York: Vintage books, 1978).

¹⁰² Michel Foucault "The Subject and Power," in *Essential Works of Foucault 1954- 1984*. Vol.3, edited by James D. Faubion (New York: The New Press, 2000), 326-48.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

identity. Homosexual relations had been seen as a sin that could be committed from time to time, but now a group of “homosexuals” emerged.¹⁰⁵

Foucault argues that in the 19th century the homosexual became a person and an object of study for the medical science.¹⁰⁶ Foucault identifies four reoccurring themes namely; (i) the body of women which became sexualized because of its role as a child bearer; (ii) the pedagogization of the sexuality of children; (iii) the socialization of reproduction; (iv) the importance of sexuality for reproduction is recognized and put into context and the sexuality of adults becomes an object of study and all forms of “perverse aberrations are seen as dangers.¹⁰⁷ Foucault emphasizes that the aim of these new moral codes was not to abolish all forms of sexuality but instead to preserve health and procreation.¹⁰⁸ He notes that now that sexual actions were being identified and their naturalness and healthiness was analyzed, the concept of sexuality was created.

Foucault claims that sexuality and sexual conduct is not a natural category having a foundation in reality. Instead it is a question of social constructions, categories only having an existence in a society and that are probably not applicable to other societies than our own.¹⁰⁹ He concludes by asserting that what we now call homosexuality cannot exist outside our specific cultural context. Sexual intercourse is necessary for procreation but that does not mean that sexuality, comprising and theorizing about all erotic behavior, is a natural or necessary category. Sexuality is more than sexual behavior. The largest part of its meaning lies in its cultural connotations. Foucault’s treatment of power and its relation to the body and sexuality has provided feminist social and political theorists with some useful conceptual tools for the analysis of the social construction of gender and sexuality and contributed to the critique of essentialism within feminism. Foucault’s identification of the body as the principal target of power has been used by feminists to analyze contemporary forms of social control over women’s bodies and minds.¹¹⁰

¹⁰⁵ Danaher, Geoff, Tony Schirato and Jen Webb, *Understanding Foucault* (United States: Paperback publishers SAGE Publication ltd, 2000).

¹⁰⁶ See Michel Foucault, “The History of Sexuality.” Supra note 94 at 10

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ Jane Sawicki, “Feminism, Foucault and “Subjects” of Power and Freedom,” in *The later Foucault: politics and philosophy*, edited by Moss. J, (London; Thousand Oaks: Sage Publications, 1998), 93.

The most commonly cited objections of Foucault's theory center around two issues: his view of subjectivity as constructed by power and his failure to outline the norms which inform his critical enterprise. Fraser argues that the problem with Foucault's claims that forms of subjectivity are constituted by relations of power is that it leaves no room for resistance to power, mere 'docile bodies' shaped by power, then it becomes difficult to explain who resists power.¹¹¹ Thus Fraser finds Foucault's assertion that power always generates resistance incoherent. She argues moreover, that Foucault's refusal to articulate independently justified norms which would enable him to distinguish acceptable from unacceptable forms of power means that he cannot answer critical questions about why domination ought to be resisted. In Fraser's view, Foucault's normatively neutral stance on power limits the value of his work for feminism because it fails to provide the normative resources required to criticize structures of domination and to guide programs for social change.¹¹² Foucault's account of the modern construction of homosexual is itself challenged by Rictor Norton using the Molly House as one counter example of a distinctly homosexual subculture before 1836.¹¹³ He critiques the idea that people distinctly identifying in ways now associated with being gay did not exist before the medical construction of homosexual pathology.¹¹⁴

Judith Butler is a theorist most prominently associated with analyzing the normative effects of dominant understandings of sex and gender. Her theory of gender as a performance proposes segregation between sex, gender and desire to disturb the normative relations that naturalise heterosexuality in a way that disrupt the naturalness and coheres of these categories. In her book "*Gender trouble*," Butler argues that the coherence of the categories of sex, gender and sexuality, the natural seeming coherence is culturally constructed through the repetition of stylized acts in time. These stylized bodily acts, in their repetition establish the appearance of an essential, ontological 'core' gender.¹¹⁵ This is the sense in which Butler famously theorizes gender, along with sex and sexuality, as performative. She locates the construction of the gendered, sexed

¹¹¹ Nancy Fraser, *Unruly practices: power, discourse and gender in contemporary social theory* (Cambridge: Polity Press, 1989).

¹¹² *Ibid.*

¹¹³ Rictor Norton, *Mother Claps Molly House: The Gay Subculture in England, 1700 – 1830* (London: Chalfont Press, 2006).

¹¹⁴ Rictor Norton, *The Myth of the Modern Homosexual: Queer History and the Search for Cultural Unity* (London: Cassell, 1997).

¹¹⁵ Judith Butler, *Gender Trouble, Feminism and the Subversion of Identity* (New York: Routledge, 1990), 33.

desiring subject within what she calls borrowing from “Foucault’s Discipline and Punish “regulative discourses.” These decide in advance what possibilities of sex, gender and sexuality are socially permitted to appear as coherent or ‘natural.’¹¹⁶

Butler’s argument also concerns the role of sex in the construction of “natural” or coherent gender and sexuality. Butler challenges biological accounts of binary sex, re-conceiving the sexed body as itself culturally constructed by regulative discourse.¹¹⁷ In Butler’s theory heterosexuality and its normative status is a central issue. It is on the basis of the construction of natural binary sex that binary gender and heterosexuality are likewise constructed as natural. As a performative effect of reiterative acts, the discursive production of gender naturalizes heterosexuality, in so far as heterosexuality is the proper outcome of normative relations between sex, gender, and sexual desire. Butler claims that without a critique of sex as produced by discourse, the sex/gender distinction as a feminist strategy for contesting constructions of binary asymmetric gender and compulsory heterosexuality will be ineffective. Thus by showing both terms “gender” and “sex” as socially and culturally constructed, Butler offers a critique of both terms even as they have been used by feminists.

Butler’s theory has faced criticisms from different scholars. Susan Bordo has chastised Butler for reducing gender to language, arguing that the body is a major part of gender, thus implicitly opposing her conception of gender as performed.¹¹⁸ Digeser argues that Butler’s idea of performativity is too pure to account for identity. Digeser doubts that pure performativity is possible, suggesting that in viewing the gendered individual as purely performed, Butler ignores the gendered body, which Bordo argues is extremely important. He also argues that neither an essentialist nor a performative notion of gender should be used in the political sphere, as both simplify gender too much.¹¹⁹ Nancy Fraser argued that Butler’s focus on performativity has distanced her from “everyday ways of talking and thinking about ourselves.”¹²⁰

¹¹⁶ *Ibid.*, 171.

¹¹⁷ *Ibid.*, 135.

¹¹⁸ Susan Hekman, “Material Bodies,” in *Body and Flesh: A philosophical Reader*, (Donn Welton: Blackwell Publishing, 2008), 61-70.

¹¹⁹ Peter Digeser. “Performativity Trouble: Post Modern Feminism and Essential Subjects,” *Political Research Quarterly* 47 (1994): 655-673. Accessed through JSTOR On Feb 24, 2008.

¹²⁰ See Fraser “Unruly practices,” supra note 104 at 12.

In “Thinking sex”¹²¹ Gayle Rubin articulates how sex is used as a political agent as a means of implementing repression and creating dominance in today’s western society. She dissects modern culture’s stance on sexuality, exposing the hypocrisy and subjugation that victimizes anyone of a different orientation or sexual inclination. Rubin’s theory follows Foucault’s rejection of libidinal or biological explanations of sexuality in order to think about the way in which sexual identities and behaviours are hierarchically organized through systems of sexual stratification. Rubin argues that sex is institutionalized and shapes societies not due to biological needs, but rather social norms that are formed within different time periods. This references western culture, and how sexuality is something that has been compartmentalized into a monogamous activity solely for the purpose of reproduction.

Calling for the recognition of the political dimensions of erotic life, Rubin demonstrates the way in which certain forms of sexual expression are valorized over others, licensing the persecution of those who fall outside the narrow frame of what constitutes sexual legitimacy.¹²² At the peak of the erotic pyramid are those who are married heterosexuals whose purpose is for reproduction. Below are those who are unmarried but monogamous homosexuals. The lowest caste is those where their erotic desires transgress generational boundaries. Medicine is used here to cure those individuals in the lower castes of their sexual desires as they are believed to be the bi-product of some psychological or physiological disorder. Doctors have worked to discover methods to hetero-ize such members of society. As part of her project of specifying the regulation and stratification of sexuality, Rubin argues against the feminist assumption that sexuality is a derivation of gender.¹²³ While she acknowledges that gender relations have been an important context for the articulation of the sexual system, she argues that sex and gender are not synonymous, and hence the rubric of gender cannot account for sexuality in its entirety.¹²⁴

Tamale argues that much as the elements in Rubin’s hierarchical model resonate with the experiences in most African societies, there are certain elements that clearly differ.¹²⁵ She

¹²¹ Rubin, Gayle, “Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality,” in *The Lesbian and Gay Studies Reader*, edited by Henry Abelove et al., (London and New York: Routledge, 1993), 3-44.

¹²² *Ibid.*, 35.

¹²³ *Ibid.*, 33.

¹²⁴ *Ibid.*, 34.

¹²⁵ See Tamale, “Researching and Theorizing Sexualities In Africa,” supra note 12 at 13.

mentions polygyny as a common practice in most African societies that would replace monogamy in the charmed circle. She also finds cross-generational sex as relatively acceptable in many African societies and hence in the sex value it would move from the outer limits to the inner circle. Tamale further criticizes Rubin's stratification for its failure to show how some individuals that seem to fit into the ideology of the "charmed circle" may simultaneously lose out e.g., through marital rape.

Some sociologists believe that some people, through biological predisposition, are more apt to be interested in others of the same sex.¹²⁶ This does not necessarily mean that homosexuality is caused by biological predisposition considering society, by means of socialization as well as social approval, strongly checks or encourages it. Overall, homosexuality is caused by a combination of both the biological and sociological theories. From the biological stand point, an individual must be born with an inborn tendency to be homosexual, but in order for the tendency to become a reality, an individual, according to this sociological perspective, must be socialized in a certain way, where the behavior is relatively, often unintentionally, approved. Ruse believes that both theories are correct in their own way but give the best explanation when discussed together as a combination.¹²⁷

From the discussion above, it comes out clearly that both the sociological and biological theories are not exhaustive in explaining the existence of homosexuality and the basis for discrimination. These theories are marred by flaws and gaps that leave some questions unanswered. All the theories mentioned above have been advanced by western scholars and now we examine the scholarship pertaining homosexuality in Africa.

2.2.1 Homosexuality in Africa

Many Africans today believe that whites introduced homosexuality to the continent during colonialism, abusing their power and wealth to corrupt the traditional African way of life. But we also know that Africans knew of and practiced and even in some cases honored sexual relations between males or between females long before whites ever arrived. Tamale notes that

¹²⁶Michael Ruse, *Homosexuality: A Philosophical Inquiry* (New York: Oxford University Press, 1988), 84.

¹²⁷Michael Ruse, "Are there gay genes? Sociobiology looks at homosexuality." *Journal of Homosexuality* 6, no.4 (1981): 5-34.

homosexuality in Uganda predates colonialism and other forms of subjugation.¹²⁸ Contrary to popular beliefs, she argues that outside influence played no part in determining their sexuality. The archaeologist Peter Garlake found one bush man painting in a cave in Zimbabwe that show several male engaging in sex acts together.¹²⁹ Same sex practices were certainly a part of traditional Bushman and related Khoi societies in southern Africa in more recent times. The German anthropologist Kurt Falk researched this very question in the most remote regions of Namibia and Angola in the 1920s. He found there are variety of same sex sexual relations and the words to describe them, including cases of women having artificial penises with female partners.¹³⁰ Indeed he found that married bushmen women were very devoted to this kind of sex with each other. The women's sex play with each other may therefore have reflected their awareness of the need to limit pregnancies and avoid births during times of drought and food shortage.¹³¹

The women's lesbian-like sex play may also have reflected their relative freedom from male authority in these communal societies. Falk discovered that men seemed to accept their wives' decisions with little more than a grumble. They simply masturbated each other or had anal intercourse when they did not have access to the women folk. The ancient bushmen of Zimbabwe moved away or intermarried with Bantu speakers who began to arrive in the region. These migrants brought with them wealth which demanded much more labour. Relations between men and women were therefore defined to a large degree through a culture that emphasized a high fertility. The religious beliefs of these new comers reinforced the idea that sexual relations were important not just for immediate economic reasons but also for the spiritual welfare of the people as a whole and for the fertility of the land. Failure to produce children disallowed a person from receiving full burial rites.¹³²

The ancestors of the Shona and Ndebele of today like most Africans clearly placed great emphasis on sex as a means to reproduction. They believed that sex done properly (with procreation mind) connected the individual to the family, to ancestors and ultimately to God.

¹²⁸ See Tamale, "Out of the Closet", supra note 15.

¹²⁹ Marc Epprecht, *Unspoken facts: A history of homosexuality in Africa* (Zimbabwe: GALZ, 2008), 24.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

Sex done properly brought children with direct material benefits to the individual, the extended family and the state. It was a means to good standing in the community and was understood as essential to good health. Sexuality in ancient Zimbabwe as elsewhere in Africa was clearly more complicated than the idealized heterosexuality that contemporary African leaders now claim as African tradition. So strong were the social expectations to do sex properly that breaking from the norm acquired special symbolic power. The deliberate transgression of sexual norms could in fact generate powerful *muti* for good or evil in the eyes of the community. In short, we can say that sexuality in Zimbabwe on the eve of European conquest was both more varied than has usually been recognized, and in a state of change.¹³³

African Sexualities: A Reader provides a critical and groundbreaking mapping of African sexualities. In this anthology, Tamale and other scholars examine dominant and deviant sexualities and analyse the body as a site of cultural and social contestations.¹³⁴ As far as sexuality is concerned, they raise an argument that aggressive heterosexual masculine practices tend to occupy the dominant position in many societies, while other practices such as homosexual, peaceful sexual practices occupy less powerful positions. There are as many African as non-African states including those states usually referred to as developed and non-African social groups around the world that do not like women having sexual relations with women. They believe that the main aim is to discipline female sexuality, to drive females servicing heterosexuality and thus to perpetuate masculine domination. Ratele argues that the fact that as many non-African as African states and groups are homophobic should put to rest the argument that homosexuality is ‘unAfrican.’¹³⁵

Tamale argues that sexuality is a critical site for maintaining patriarchy and reproducing women’s oppression. Any variation in sexual activity and sexual partners from heteronormativity is considered “pathological,” “deviant”, “unnatural”, and condemned in the strongest possible terms. She notes that institutions such as culture, the law and religion are

¹³³ *Ibid.*, 41.

¹³⁴ Sylvia Tamale (Ed.), *African Sexualities: A Reader* (Oxford: Pambazuka Press, 2011).

¹³⁵ Kopano Ratele, “Analysing males in Africa: certain useful elements in considering ruling masculinities,” *African and Asian Studies* 7 (2008): 515-536.

vehicles that states use to perpetuate patriarchy and women's subordination therefore maintaining a regime of compulsory heterosexuality.¹³⁶

Carrigan argues that violent practices and stigmatizing language against women who dare to love women rather than men arise from the fact that patriarchy especially expressed as patriarchal heterosexual masculinity instanced by sexual and marital relations between an older man and a younger woman, cannot abide such freedom to women.¹³⁷ He explains that the most important reason for this oft-violent intolerance to women's sexual and gender freedom is because such women's sexual preference of other women over men is indicative of lack of control of men over women's bodies and lives. That such intolerance is often supported by structures such as the law, media, custom, employment policies, family organization, religious codes and practices and education systems. Women who cannot be subjected to men's social power are dangerous to patriarchal power and masculinity. The organization of desire is the domain of relations power. Carrigan concludes that what is at issue here is power over women.

Explaining the prohibition and often violent refusal to recognize the fact of women who prefer women to men, McFadden argues that a fundamental premise of patriarchal power and impunity is the denial and suppression of women's naming and controlling their bodies for their own joy and nurturing.¹³⁸ She establishes that in all patriarchal societies, women and girls are taught, consistently and often violently that their bodies are often dirty and smelly. The redemption of the pathologised female body is seen to come through males of various statuses like fathers who protect and defend the family honour through them. Mc Fadden notes that the main aim of such denunciation, assaults and vilification is not simply to exorcise society of same sex desires. It is part of societal forces aimed at controlling all female sexuality and at subordinating female bodies and desires to men's commands.¹³⁹ Cock argues that women who are sexually attracted

¹³⁶ See Tamale, "Out of the closet," supra note 15.

¹³⁷ Carrigan, T., Connell, R.W. and Lee, J. "Toward a new sociology of masculinity," *Theory and Society* 14, no.5 (1985): 551- 604.

¹³⁸ Patricia McFadden "Sexual pleasure as feminist choice," *Feminist Africa* 2, (2003): 50-60. Available at: <http://www.feministafrica.org/index.php/sexual-pleasure-as-feminist-choice> (accessed March 15, 2013).

¹³⁹ *Ibid.*

to women are subjected to harassment, violence and medical, psychological or pastoral treatment to reorient them sexually because the gender of their sexuality bothers patriarchy.¹⁴⁰

Edwards argues that for its sustenance, the power of patriarchy and certain forms of masculinity needs the majority of men and women to believe in it and support its ideology and systems. That at a minimum the system of gender domination needs men and women not to mobilize against its structures, to remain acquiescent and not rock the patriarchal boat. He observes that the mere existence of male to male African sexuality makes those who swing that way objects of fear and hate within the dominant sexual system. Where it does not attract overt loathing and phobia, the sexual love of a man for other men almost always makes the man a marginal figure, an outsider within those societies in which patriarchal heterosexual masculinity is normative. Edwards draws a conclusion that men who love other men end up as objects of homophobic rage because such love disturbs a cornerstone of patriarchal heterosexual power in that it shows that men are not of one mind and feeling when it comes to sexuality. Besides this, they also engender a potential crisis in ruling ideas of true masculinity.¹⁴¹

The criminalisation, widespread violence and phobia against men who prefer sexual relations with other men are a result of and perpetuate the fact that there are many shapes of manhood. LeVay argues that many societies are organized to support one predominant form of manhood - heterosexual form.¹⁴² The underside of this organization is that it is forbidden, often with the help of violence, for men to find other men desirable. He purports that in many societies if a man goes against heteronormative masculinity and finds other men desirable he might as well be ostracized, routinely harassed, often jailed, violently assaulted and even murdered. Sexual disgust, hatred and stigma are the end products generated by patriarchal heterosexual structures, integral to the very constitution of patriarchy and heterosexuality. The hostility towards homosexualities can only mean that such sexualities disturb the dominant shape of African masculinity and hence the need to suppress them. LeVay concludes by asserting that without understanding the psychological disorder and social distress that same-sex sexuality generate in

¹⁴⁰ Jacklyn, Cock. "Engendering gay and lesbian rights: the equality clause in the South African constitution", *Women's Studies International Forum* 26, no.1, (2003): 35 – 45.

¹⁴¹ Edwards, T. "Queering the pitch? Gay masculinities", in Kimmel, M.S., Hearn J. and Connell R.W. (Ed.), *Handbook of Studies on Men and Masculinities*, (Thousand Oaks, Sage, 2005).

¹⁴² See LeVay, "Gay, Straight and the Reason Why" supra note 67 at 3.

the ruling African masculinity we miss an important piece in the story of what being a man in Africa is supposed to mean.

Lahoucine ouzgane and Robert Morrell explore what it means for an African to be masculine and how male identity is shaped by cultural forces.¹⁴³ The editors believe that to tackle the important questions in Africa (the many forms of violence and the AIDS pandemic), it is necessary to understand how a combination of a colonial past, patriarchal cultural structures and a variety of religious and knowledge systems creates masculine identities and sexualities. They note that sexuality like masculinity cannot escape its cultural connection and the processes whereby masculinities are constructed are always associated with contestation. It is not automatic that a particular version of masculinity will become dominant.¹⁴⁴

According to Kimmel sexual performance is one of the crucial arenas in which masculinity is socially constructed and enacted. Performance failure can challenge the essence of masculinity and confront men with the possibility that they are not “real” men.¹⁴⁵ This links up with the observations by Connell that a man must stay masculine he should never let his masculinity falter.¹⁴⁶ In attempting to compensate for feelings of inadequacy and despair, Connell observes that men engage in “extra-marital” sexual activity, often with casual partners. According to him this behavior seems to have become a tool to acquire self-esteem, a tool of domination and control over women as well as a legitimate way of manifesting masculinity.

Kandiyoti argues that while men do have relative freedom, compared to women, particularly in sexual and reproductive behaviors, lack of access to income earning opportunities has made men’s role as heads of household and bread winners precarious.¹⁴⁷ He notes that with a majority of men reduced to “figureheads” of households, men’s authority has come under threat and so has their identity and self-esteem. Patriarchy does not mean men have only privileges but also

¹⁴³ Lahoucine Ouzgane and Robert Morrell (Ed.), *African Masculinities: Men in Africa from the late nineteenth century to the present* (Palgrave Macmillan, University of Kwazulu: Natal Press, 2005), 196.

¹⁴⁴ *Ibid.*

¹⁴⁵ Micheal, Kimmel S., “Rethinking ‘Masculinity,’” in *Changing men: New Directions in Research on Men and Masculinity*, edited by Micheal, Kimmel S. (London: Sage, 1987).

¹⁴⁶ Raewyn Connell, *Masculinities* (Cambridge: Polity Press, 1995).

¹⁴⁷ Deniz Kandiyoti, “Bargaining with Patriarchy,” *Gender & Society* 2, no.3 (1988): 274-290.

many responsibilities.¹⁴⁸ Kandiyoti reveals that the increasing poverty, the increasing lack of access to income earning activities, women's agency and their disrespect toward men, provide serious challenges not to say threats to traditional and dominant masculine identities both in Kisii and Dar es Salaam. That many men experience feelings of disempowerment and emasculation, and their inability to fulfil their bread winner role also seems to have profound effects on heterosexual marital relations.

According to Willis, when men are crushed down economically, they suffer from feelings of inferiority. He contends that to build up their ego they need to relax and be comforted. The relaxation and comfort he says are mainly provided by "extra-marital partners" who sometimes are male.¹⁴⁹ It can be asserted that patriarchal ideology may be embodied and expressed in the lives of socially dominant men but this certainly does not mean that all men are successful patriarchs.

Following the above discussion, it can be asserted that sexuality in Africa is characterized by patriarchy where the male dominates and the female is subordinate. Homosexuality is seen as challenging the normative and dominant patriarchal society. Although the main axis of patriarchal power is still the overall subordination of women and dominance of men, the deteriorating material condition have seriously undermined the normative order of patriarchy. This being said with masculinities being socially and historically constructed, masculinities are not constant or static, and domination is not inscribed in men's nature. While men and women have deep-rooted, often unconscious conventional ideas of masculinity and femininity, which cannot easily be reshaped, there is always potentiality for innovation or creative action: masculinities are dynamic and open-ended processes.¹⁵⁰

¹⁴⁸ *Ibid.*

¹⁴⁹ Willis, P. "Youth Unemployment: Thinking the unthinkable." *Youth and Policy* 2, no. 4 (1984): 17-36.

¹⁵⁰ Margrethe Silberschmidt, *Rethinking Men and Gender Relations: An investigation of Men, Their Changing Roles Within the Household, and the Implications for Gender Relations in Kisii District, Kenya*. Research Report. No.16. Center for Development Research, Copenhagen, 1992.

2.3 Law, Policy and Human Rights Issues

Freedom to engage in consensual homosexual relations is felt by some to be as important as freedom to express heterosexuality is to others. In recent decades it has come to be argued by western liberals that this freedom is a basic human right deserving protection by International Law. Several studies have revealed the enormous contrasts that exist between places where detected homosexual behavior attracts severe, sometimes capital punishment and places where many people look upon it as a legitimate form of sexual repression to be regulated no differently from heterosexual behavior.¹⁵¹ Whereas in one nation (the United States) civil law is increasingly concerned with regulating an otherwise permitted form of sex (e.g., unwanted homosexual overtures in the work place), in other places (China and several Islamic states) those engaging in homosexual behavior under any circumstances face criminal conviction and lengthy prison sentences.¹⁵²

For 400 years male homosexuality was a crime in Britain, punishable by years in jail or hanging.¹⁵³ Many reputations and lives were ruined. Arrests and prosecutions for homosexuals had increased since the end of World War II. This and other cases led the Conservative government to set up a Departmental Committee under Sir John Wolfenden, Vice-Chancellor of Reading University, to consider both homosexual offences and prostitution. The Committee published its report in September 1957. The Wolfenden Report (1957) stated the findings of the Committee on Homosexual Offences and Prostitution, which had met for three years to determine whether homosexual behavior should be decriminalized in Great Britain.¹⁵⁴

Disregarding the conventional ideas of the day, the committee recommended that "homosexual behaviour between consenting adults in private should no longer be a criminal offence." The report added;

The law's function is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable because they are young, weak in body or

¹⁵¹ Donald J. West and Richard Greene, *Social Legal Control of Homosexuality: A Multi-Nation comparison* (New York: Plenum Press, 1997).

¹⁵² *Ibid.*

¹⁵³ William Miller, *International Journal of Politics and Good Governance*, Volume 1, No.1.3 Quarter III 2010, ISSN No.0976 – 1195.

¹⁵⁴ *Ibid.*

mind or inexperience. It is not, in our view, the function of the law to intervene in the private life of citizens, or to seek to enforce any particular pattern of behavior.¹⁵⁵

The Wolfenden report attracted a great deal of coverage. It also inspired a famous public debate between proponents and opponents of the reform. Devlin, one of the opponents through his writings argued that the State has the power to legislate morality in order to protect itself against behaviors that may disintegrate society and its institutions.¹⁵⁶ It is not possible to set theoretical limits to the power of the State to legislate against immorality. It is not possible to settle in advance exceptions to the general rule or to define inflexibly areas of morality into which the law is in no circumstances to be allowed to enter. Society is entitled by means of its laws to protect itself from dangers, whether from within or without.

The proponents of reform, through the writings of Professor H.L.A Hart of Oxford University, contended that, so far as purely 'self-regarding' activity was concerned, the law had no legitimate right to criminalise adult, private, consenting conduct. Activities did not become 'other-regarding' simply because they upset individuals in society, without directly and immediately impinging upon their lives.¹⁵⁷ Initially, the Conservative government then in office in Britain announced that no action would be taken to implement the Wolfenden reforms. They suggested that the British community was "not yet ready" to accept the amendments to the criminal law that Wolfenden and his colleagues had proposed.¹⁵⁸ However, many supporters of reform urged that action should be taken. Committees were established throughout Britain to promote both the necessity of reform and the justice of the Wolfenden proposals.

After a decade of debate, the United Kingdom Parliament changed the law for England and Wales.¹⁵⁹ Eventually similar reforming laws were enacted for Scotland and Northern Ireland. The last-mentioned reform was achieved only after a decision of the European Court of Human Rights held that the United Kingdom was in breach of its obligations under the *European*

¹⁵⁵Jeffery Weeks, *Sex, Politics and Society* (Longman, 1980), 240.

¹⁵⁶ Patrick Devlin, *The Enforcement of Morals*, Maccabean Lecture in Jurisprudence of the British Academy (London: Oxford University Press, 1959).

¹⁵⁷Herbert Lionel Adolphus ., *Law, Liberty, and Morality* (Stanford: Stanford University Press, 1963).

¹⁵⁸ Antony Grey, *Quest for Justice: Towards Homosexual Emancipation* (London: Sinclair-Stevenson, 1992), 84.

¹⁵⁹ Sexual Offences Act 1967 (UK).

Convention on Human Rights by continuing to criminalise the adult private consenting sexual conduct of homosexuals in that province.¹⁶⁰ One by one, the old Commonwealth countries followed the Wolfenden lead. This included only Commonwealth countries in the developed world. Reform of the law was achieved in Canada, New Zealand, the States and Territories of Australia and South Africa. Similar reforms were also secured in many of the States of the United States of America and in Ireland which likewise traced its criminal law to Britain. In Australia, the last of the States to be reformed was Tasmania. The change there was achieved only after the stimulus of a decision of the United Nations Human Rights Committee upholding a complaint under the First Optional Protocol that the old offences, in their application to adult, private, consensual conduct, offended the privacy rights guaranteed in the International Covenant on Civil and Political Rights.¹⁶¹ In the Irish Republic, as earlier in Northern Ireland, it took a decision of the European Court of Human Rights to stimulate the reform agenda.

In South Africa, reform came about as a result of a constitutional decision in the case of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*.¹⁶² In this case, the Constitutional Court was called upon to decide whether the common law offence of sodomy and several statutory provisions dealing with the criminalization of homosexual activity were inconsistent with section 9 (3) of the South African Constitution. The court struck down the impugned common law and legislation. In the United States, a decision of the Supreme Court struck down the anti-sodomy law of Texas, holding that it was contrary to the provisions of the federal Constitution.¹⁶³ In effect, all of these court decisions, and the legislative changes that they stimulated, reflected the Wolfenden principle. Some matters of private morality were not the law's business and especially not the proper business of punishment under the criminal law.

The debate on sexual orientation is critical in Africa. Twinomugisha and Mubangizi argue that for a very long time, a culture of silence surrounded the issue of sexual orientation in many African societies until certain African leaders started making deprecating and disturbing

¹⁶⁰ Dudgeon v United Kingdom(1981)4 EHRR 149; see also later Norris v Republic of Ireland (1988) 13 EHRR 186; Modinos v Cyprus (1993) 16 EHRR 485.

¹⁶¹Toonen v Australia [1994] 1 Int Hum Rts Reports 97 (No 3).

¹⁶² [1999] 1 SA 6.

¹⁶³ Lawrence v Texas [2003] US 539.

noises.¹⁶⁴ They note that although Robert Mugabe of Zimbabwe and Sam Nujoma of Namibia are reported to have made the most outrageous remarks against homosexuality, many other African leaders including the former Tanzanian president Julius Nyerere and former Kenyan president Daniel Arap Moi are also known to have denounced homosexuality as a phenomenon alien to Africa and therefore morally unacceptable. It is no wonder then that homosexuality is illegal in 38 of Africa's 53 sovereign states.¹⁶⁵

Makau probes the cultural, social and legal bases for homophobia in Africa and argues for inclusivity of homosexuality in the understanding of sexual orientation.¹⁶⁶ He acknowledges the deep-seated nature of homophobia in Africa, but contends that there is nothing inherently African about it.¹⁶⁷ Evidence suggests that in pre-colonial Africa, the matter of sexual orientation was not generally contentious. In fact the hatred of gay people and homophobia that are exhibited today have virtually no basis in African culture. Makau argues that in Uganda, as in many other African states, homosexuality and related sexual practices were criminalized for the first time by the colonial state.¹⁶⁸ He takes note of the fact that domestic municipal laws have traditionally protected and privileged heterosexuality and heterosexism as it is entrenched in the traditional western or European conception of the family. In many societies, this is the idyllic image that has been constitutionalized. Makau wonders whether the law should protect other forms of sexual orientation apart from heterosexuality.¹⁶⁹

The 2010 Amnesty International Report details how LGBT people in several African countries continue to be harassed intimidated and discriminated against, with some facing arbitrary arrest, detention and unfair trials.¹⁷⁰ It is clear that the attitude towards LGBT people in many African countries is characterized by homophobia, scapegoating and ignorance. In recent times the issue has pre occupied news and discussion in countries such as Nigeria, Senegal, Malawi, Kenya and

¹⁶⁴Twinomugisha K. Ben and John C. Mubangizi, "Protecting the Right to Freedom of Sexual Orientation: What can Uganda learn from South Africa?" *Stellenbosch Law Review Regstydskrif*, vol 22, no 2, 2011.

¹⁶⁵ *Ibid.*

¹⁶⁶ Mutua, Makau. 'It is nonsense to assert that being gay is unafican', *Sunday Nation*, October 31, 2009.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ See Amnesty International "Africa" in Amnesty International Report 2010. <http://thereport.amnesty.org/en/regions/africa> (accessed June 5, 2010)

Uganda where the highly controversial Anti- Homosexuality Bill has been under consideration. Although the reaction to the bill in Uganda has been mixed, its condemnation at the international level has been unmistakable.¹⁷¹ This is partly because international sensibilities are moving in the direction of more, not less recognition of sexual orientation as a human right.

International human rights bodies and treaties now tend to protect the rights of homosexuals, and certainly prohibit discrimination based on sexual orientation. Makau states that it is fair to argue that the protection of other forms of sexual orientation besides heterosexuality, which enjoys protection by virtue of the sanctity of marriage and the traditional family, is an emerging international norm. He believes that this trend is likely to grow as more states acknowledge homosexual rights. It behoves other groups in society to protect gay people even if we find homosexuality morally objectionable because human rights are not about protecting only those people we like. Makau acknowledges that it is safeguarding the rights of people who are socially or politically unpopular and shunned.¹⁷²

South Africa's constitutional position on sexual orientation is seen as a benchmark in Africa.¹⁷³ The constitutional protection of the right to freedom of sexual orientation in South Africa has to be seen in the context of the country's history of inequality and injustice. The central feature of that history was the extensive and systematic discrimination, exclusion and subordination of black people in all aspects of political, social and economic life.¹⁷⁴ Coupled with racial discrimination, but independent of it, was inequality based on other aspects such as gender, disability, culture and sexual orientation. The hallmark of Apartheid was that such inequality and discrimination was entrenched in and supported by law. In the case of sexual orientation the relevant law was the general common law prohibition of male homosexuality, which was later codified by legislation through the Sexual Offences Act 23 of 1957 and other statutes whose provisions made reference to the crime of sodomy.¹⁷⁵ These laws were struck down by the constitutional court subsequent to the adoption of the constitution of the Republic of South Africa Act 200 of 1993 (The interim constitution of South Africa) and the final constitution of

¹⁷¹ See Mutua Makau, "It is nonsense to assert that being gay is unafrikan," supra note 166 at 25.

¹⁷² Mutua Makau, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002).

¹⁷³ See Twinomugisha and Mubangizi, "Protecting the Right to Freedom of Sexual Orientation", supra note 164.

¹⁷⁴ See *Brink v Kitshoff*, no 1996 6 BCLR 752 (CC) para 40.

¹⁷⁵ See, for example, Schedule 1 of the Criminal Procedure Act 51 of 1977 and the Schedule to the Security Offences Act 92 of 1987.

South Africa both of which contained a prohibition against discrimination based on sexual orientation, among other things.

One issue that various human rights activists agree on is that Uganda's sodomy law should be abolished. They are united in fighting homophobia that rides high in Uganda. One outspoken human rights activist who alludes to the above is Sylvia Tamale. She presents her position in one of the commentaries, 'Law and Human Rights.'¹⁷⁶ She argues that the human body provides a practical and medium of social control which is at the disposal of the state. Through legislation on sexuality, the state tries to control the body, and so the desire and the minds of women and men. Tamale notes that the penal laws were direct imports from the colonial British penal laws. She finds prosecution under s.145 particularly problematic as it is difficult to catch people "in the act" of having carnal knowledge. Tamale further argues that the absurdity of this alien, victimless offence is evidenced by the absence of prosecution and conviction records in the Uganda courts' criminal registry. She points out that the wide discretion that section 148 grants judicial officers in determining what amounts to "gross indecency" is open to abuse.

Tamale reveals that in 2003 the offence of gross indecency which targets homosexual acts was erased from the criminal code of the country that Uganda imitated its laws from (England) yet the former colony is holding firmly on such laws. That it may be interpreted to cover a wide range of acts. She notes that the Penal Code does not address sexuality or 'sexual orientation' but focuses narrowly on the sexual acts. The crimes of "carnal knowledge against the order of nature" and "gross indecency" may potentially be committed by homosexuals as well as heterosexuals or even individuals. She concludes by saying that homosexuals are human beings with inalienable rights and freedoms.

Nkalubo also gives his comments in 'Law and Human Rights'¹⁷⁷ and argues that the basis of Uganda's attitudes towards homosexuality is well articulated in the country's constitution and the legal bedrock of those opposed to homosexual activity in Uganda's Penal Code.¹⁷⁸ He criticizes the penal law that criminalizes homosexuality for being amorphous and vague by not

¹⁷⁶ See Tamale, "Homosexuality: Perspectives from Uganda," supra note 1 at 55 -56.

¹⁷⁷ *Ibid.*, 46-47.

¹⁷⁸ Penal Code Act Cap 145, S.145.

defining what amounts to “carnal knowledge against the order of nature.” That by not defining the offence it is constitutionally unenforceable.¹⁷⁹ Nkalubo also echoes that the Penal Code criminalizes the act of carnal knowledge against the order of nature but it does not criminalize the being. The only realistic way of enforcing the sodomy law would be “for the police to rely on eavesdroppers and a peripatetic sex-brigade ready to break down bedroom doors of both heterosexual and homosexual couples to catch offenders in *flagrante delicto*.”¹⁸⁰ This would entail intrusion into the private lives of individuals. Devlin also holds the same view as Nkalubo. He critiques the law criminalizing homosexuality in Uganda and states that it is an infringement on people’s right to privacy which is an inherent right.¹⁸¹

Nkalubo further argues that Uganda’s law is outmoded but that does not render it toothless. It is a symbolic weapon that empowers detractors.¹⁸² Even though the law may not specifically mention them, it is reasonable to assume that the entire law was designed to target homosexuals. The law empowers some sections of society, with tacit approval from the state, to reduce specific citizen’s sexuality to a sex act. Homosexuals remain stigmatized if the only referral point about them is what they are assumed to do in bed. Nkalubo contends that consenting heterosexuals have not historically been prosecuted for anal sex. Only homosexuals who immediately get branded with the scarlet letter of homo-sodomy once their sexuality is revealed. For these scholars (Tamale and Nkalubo), in light of the penal laws, they both agree that they are vague and ambiguous and do not address sexuality but focuses on the sexual acts which may be committed by homosexuals as well as heterosexuals.

Some scholars locate homosexuality within the human rights framework arguing that homosexuals are human beings and they deserve the same rights and dignity as accorded to all people. In her commentary, Tamale argues that the homophobic sentiment expressed by Uganda’s premier law is likely to “legitimize” rights violations of gays and lesbians in the country, including acts such as unjust loss of jobs, expulsions from educational institutions,

¹⁷⁹ The Constitution of Uganda 1995, Article 28 (12).

¹⁸⁰ See Tamale, “Homosexuality: Perspectives in Uganda,” supra note 1 at 47.

¹⁸¹ Patrick Devlin, *Enforcement of Morals* (Britain: The Guernsey Press company ltd, 1965), 86.

¹⁸² See Tamale, “Homosexuality: Perspectives in Uganda.” supra note 1 at 48.

assaults and murder.¹⁸³ She adds that this goes against the spirit of articles 24 and 27 of the same constitution which articulates “Respect for human dignity and protection from inhuman treatment and the right to privacy of person, home and other property respectively.” Tamale argues that rights are integral to one’s enjoyment of non-discrimination and equality. Nkalubo’s arguments on the same are not any different. He argues that the penal laws contravene article 24 of Uganda’s constitution that prohibits any form of torture or cruel, inhuman or degrading punishment and article 27(2) on the right to privacy of person, home and other property.¹⁸⁴

“Aren’t These Emperors Naked?” by Adrian Jjuuko analyzes whether the cultural relativism argument can stand in the face of universal human rights and tries to reveal the nexus between two emperors over the issue of homosexuality.¹⁸⁵ He states that cultural relativists feel too much attached to their societal and cultural values. Jjuuko notes that they recognize the fact that there are individual lives in society. Thus individuals have duties that they owe to the society as a whole and because of this certain rights have to be limited for the good of the society. In the relativist thinking, if the majority in the community do not ascribe to homosexuality then nobody else should. On the other hand, Jjuuko argues that the Universalists maintain that all human beings are equal in rights and dignity. That as such despite their social, economic and political status they do not accept limitations on their rights except if such restrictions are justified on the basis of causing injury to other persons. They thus only accept a balance of interests and rights. They abhor limitations based on what the majority in the society feel. He concludes by saying that the pro-gay activists ought to know where they stop in their agitations in such a culturally sensitive community. That what is necessary is the nexus between the two naked emperors.

Jjuuko also argues that human rights are not absolute and the enjoyment of these rights should be done with due regard to the rights of others. He quotes article 43(2) (c) of the constitution and states that anything that is not justifiable in such a society may be limited. He concludes by saying that homosexuals may not solely depend on the rights above to demand acceptance.¹⁸⁶ They must pass the qualification above. What the author does not realize is that it is not

¹⁸³ *Ibid.*, 56-57.

¹⁸⁴ *Ibid.*, 47.

¹⁸⁵ Adrian Jjuuko, “Aren’t These Emperors Naked?” *Revealing the nexus between Culture and Human Rights over the issue of homosexuality in Uganda*. (Un-published LLB Dissertation, Makerere University, 2008).

¹⁸⁶ *Ibid.*, 82.

justifiable to restrict the enjoyment of a right of two consenting adults who have sex in private not affecting the rights and freedoms of others or public interest just because it is not acceptable by the society. Culture is dynamic so the cultural activists can also change their attitude. Tolerance may not come so easily if the law stands as it is and with the Anti-Homosexuality bill which is advocating for harsher penalties. The law on sodomy needs to be repealed so that the society will have no stepping stone to condemn homosexuals.

In his study, “Protection of the Rights of Sexual Minorities in Uganda: The Homosexual Right to Personal Liberty,”¹⁸⁷ Dalton Odomoch examines the protection of the rights of sexual minorities with specific reference to the right to personal liberty of homosexuals. He presents a critical analysis of the law relating to human rights, the rights to sexual minorities and specifically homosexuals. The analysis focuses on the International Human Rights that establishes the basis of protection of minority rights. He then analyzes the Ugandan domestic legal regime in the context of whether or not it guarantees homosexuals the enjoyment of their liberties. This research also examined the protection of the rights of sexual minorities in Uganda. In part the current study is different from Odomoch’s in that the researcher went an extra mile to make a comparative analysis between South Africa and Uganda regarding the protection of homosexuals. South Africa was chosen as the best practice model since it has experienced the most rapid transformation on the issue of LGBTI. The comparison gave the researcher a great insight on the lessons that Uganda can learn from South Africa’s approach towards the protection of the right to freedom of sexual orientation. These lessons have been incorporated in the recommendations to ensure equality and change.

“Society, Homosexuality and the Law in Uganda” by Nabankema Harriet discusses on the practice of homosexuality and the laws that are applicable to homosexuals in Uganda.¹⁸⁸ She analyzes the causes of homosexuality and whether it is a right to be enjoyed universally or a social evil, laws governing homosexuality and the impact the laws have on people with homosexual orientation. She discusses the role played by religion, religious leaders, moralists

¹⁸⁷ Dalton Odomoch, “*Protecting of the Rights of Sexual Minorities in Uganda*,” (Un- published LLM Dissertation, Faculty of Law ,Makerere University, 2012).

¹⁸⁸ Harriet Nabankema, “*Society, Homosexuality and the Law*,” (Un- published LLB Dissertation, Faculty of Law, Makerere University, 2006).

and foreign influence in either promoting or reducing the act. The research findings of this researcher reveal that she only interviewed religious leaders, professionals and the elderly to find out their perception on homosexuality and the law. She primarily used questionnaires and interview schedule to collect the data from people.

The key people to interview in this kind of research who would best explain the causes of homosexuality and the impact the laws have had on homosexuals would have been homosexuals themselves. Use of questionnaires to collect this kind of data cannot be exhaustive because the respondents' answers are always restricted. In the current research the researcher used an interview guide to collect in-depth information to answer the research problem and also interviewed homosexuals and human rights activists who are key informants on this subject. Nabankema also looked at how the law can be made strict so as to curb the practice of homosexuality and recommended that law enforcement agencies should do their work to ensure that the culprits are brought to book. This varies from the current research which established and analyzed human rights abuses suffered by homosexuals in Uganda and provided proposals and practical solutions for dealing with the issue of homosexuality in Uganda.

2.4 Conclusion

The review of the literature above reveals that most of the research conducted on homosexuality has been dominated by western scholars. Little has come out of Africa and Uganda at that. The study appreciates the works of other scholars on the topic of homosexuality which has informed this study. As noted above, the Wolfenden report led to decriminalization of homosexuality in most western countries and prohibited discrimination on grounds of sexual orientation. In spite of this, oppression, inequality before the law and unjust discrimination still mark the laws of most Commonwealth countries on this subject.

Most African countries still criminalize homosexuality. Despite the constitutional and legislative developments in the protection of the right to freedom of sexual orientation in South Africa, homosexuals still face discrimination in all fronts and are treated as outcasts in the society. They are prejudiced culturally. Genuine liberation requires that all forms of oppressions be fought on all fronts at the same time. This is the normative obligation of those who believe in human rights

and human dignity. The literature has disclosed that scholars have called for the repeal of sodomy laws because such laws are likely to “legitimize” rights violations of homosexuals. Despite their cry, homosexuals in Uganda still suffer discrimination, murder, rejection, suicide and some are forced to seek for asylum in other countries. The recently introduced Anti-homosexuality bill pronounces harsher penalties meaning that the treatment of homosexuals is growing from bad to worse. Despite the fact that Uganda has a legal framework for the protection of sexual minorities homosexuals have still suffered human rights abuses. It is against this background that the researcher deemed it imperative to advance research regarding sexual orientation and the law and fill the lacuna in the existing research in order to ensure that the rights and freedoms of homosexuals are fully recognized on all fronts.

CHAPTER THREE

ASSESSMENT OF THE CONSTITUTIONAL AND LEGAL FRAMEWORK GOVERNING SAME SEX RELATIONS IN UGANDA

3.1 Introduction

Uganda is a party to numerous International and Regional treaties including the International Covenant on Civil and Political Rights (ICCPR),¹⁸⁹ the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁹⁰ and the African Charter on Human and Peoples' Rights (African Charter)¹⁹¹ that advocate for the universal enjoyment of human rights and freedom. These rights are also guaranteed in the 1995 Constitution which is the supreme law of Uganda. Article 2 of the constitution is to the effect that if any other law or any custom is inconsistent with any of the provisions of the constitution, the constitution shall prevail and that other law or custom shall, to the extent of the inconsistency, be void. The constitution has got a comprehensive bill of rights and a legal framework for the protection of minorities. The question as to whether homosexual individuals are protected by the constitutional and legal framework is the subject of this chapter.

3.2 The Legal Regime

By virtue of a 2005 amendment of the constitution single sex marriages were expressly prohibited. Article 31(2) is to the effect that marriage between persons of the same sex is prohibited. This implies that homosexuals cannot found a family. Homosexuality is an orientation and you cannot prohibit an orientation. This particular provision of the Constitution contradicts article 21 of the same constitution which provides for equality of persons before and under the law. This article prohibits discrimination on the grounds of sex, race, colour, ethnic origin, tribe, birth, creed or religion or social or economic standing, political opinion or disability.

¹⁸⁹ See ICCPR, *supra* note 7.

¹⁹⁰ International Covenant on Economic, Social and Cultural Rights (ICESCR), G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

¹⁹¹ See African Charter, *supra* note 10.

The Penal Code Act¹⁹² also criminalizes “carnal knowledge of any person against the order of nature.” Such an offender is liable to imprisonment for life.¹⁹³ Section 145 does not specifically mention homosexuality but it is considered to fall under this offence by the law because it involves people of the same sex hence considered to be against “the order of nature.” There are several common law jurisdictions that have interpreted the phrase “carnal intercourse against the order of nature.” In the case of *Magaji v The Nigerian Army*¹⁹⁴ Niki Tobi J.S.C interpreted the phrase “carnal intercourse against the order of nature” as provided in the Armed Forces Decree:

Section 81 of the Decree provides in part: "(1) A person subject to service law under this Decree who (a) has carnal knowledge of a person against the order of nature, or is guilty of an offence under this section." The Armed Forces Decree does not define carnal knowledge. Section 6 of the Criminal Code Act defines carnal knowledge or the term carnal connection. The term implies that the offence, so far as regards that element of it, is complete upon penetration. While carnal knowledge is an old legal euphemism for sexual intercourse with a woman, it acquires a different meaning in section 81. The section 81 meaning comes to light when taken along with the proximate words "against the order of nature". The order of nature is carnal knowledge with the female sex. Carnal knowledge with the male sex is against the order of nature and here, nature should mean God and not just the generic universe that exists independently of mankind or people. It is possible I am wrong in my superlative extension of the expression. As that will not spoil the merits of the judgment, I leave it at that. Where there is a hole or an opening, there will be the possibility of penetration; penetration being the ability to make a way or way into or through. While the common usage of the word means putting of the male organ into the female sex organ when having sex, it has a more notorious meaning and that is the meaning in section 81. The natural function of anus is the hole through which solid food waste leaves the bowels and not a penis penetration. That is against the order of nature, and again, that is what section 81 legislates against.

When we critically examine the phrase “*any person who has carnal knowledge of any person*” it implies that this offence is not restricted to only homosexuals. The word any person means that it can either be a homosexual or heterosexual who engages in anal or oral sex. This was discussed in the case of *Bowers v Hardwick*¹⁹⁵ where Justice Blackmun had this to say in his judgement:

Georgia has provided that "[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of

¹⁹² Cap 120.

¹⁹³ S.145(b).

¹⁹⁴ [2008 - Supreme Court] [SECTION 81 OF THE ARMED FORCES DECREE NO. 105, 1993: Interpretation of Section 81 of the Armed Forces Decree No. 105, 1993 as to the meaning of the term "carnal knowledge of a person against the order of nature"].

¹⁹⁵ (1986) 478 US 186 106 S.ct. 2841.

another." Ga. Code Ann. 16-6-2(a) (1984). The sex or status of the persons who engage in the act is irrelevant as a matter of state law. In fact, to the extent I can discern a legislative purpose for Georgia's 1968 enactment of 16-6-2 that purpose seems to have been to broaden the coverage of the law to reach heterosexual as well as homosexual activity.

Evidential issues are raised from this provision that criminalizes homosexuality like what evidence would be produced? Would it be direct evidence by an eye witness who was present at the time of penetration or circumstantial evidence would suffice? S. 145 has been used by the police and other law enforcement officials to subject homosexuals in Uganda to arbitrary arrest and detention often resulting in torture, cruel, in human and other ill-treatment.¹⁹⁶ S.148 of the penal code provides that "*any person who whether in public or private commits any act of gross indecency with another person or procures another person to commit any act of gross indecency is guilty of an offence and is liable to imprisonment for seven years.*" This provision is vague and ambiguous. What amounts to gross indecency? The section lacks a clear interpretation.

Homosexuals have been discriminated against on the basis of their sexual orientation in that the penal law criminalizes homosexuality when basically the difference between the homosexual and heterosexuals is their sexuality. The criminalization of matters of sexual orientation increases the social stigmatization of these persons. This in turn makes them more vulnerable to violence and human rights abuses, including death threats and violations of the right to life, which are often committed in a climate of impunity.¹⁹⁷ The criminalization of homosexuality definitely violates human rights as summarized below. Human rights are inherent rights to an individual and ought to be respected.

3.2.1 The right to equality and non-discrimination.

The Universal Declaration of Human Rights (UDHR) is to the effect that everyone is equal before the law and no one should discriminate against another person.¹⁹⁸ The ICCPR recognizes

¹⁹⁶ *Victor Mukasa & Yvonne Oyo v Attorney General* High Court of Uganda (Civil Division) Misc. Cause No.247/06. Police arbitrarily arrested and detained Oyo Yvonne and took her to LC1 Chairman's office where she was subjected to humiliating and degrading treatment by denying her access to the toilet before taking her to the police where she was forced to undress in the gaze of the public in order "to prove that she was a woman.

¹⁹⁷ Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Ms Asma Jahangir, E/CN.4/2001/9, 11 January 2001, para.50.

¹⁹⁸ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), Article 2 and hereinafter "UDHR".

the right to equal protection of the law and the right to freedom from discrimination.¹⁹⁹ Article 2 of the African Charter provides that individuals are entitled to the rights under the charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion.

The 1995 constitution guarantees equality and freedom from non-discrimination. Under article 21(3) the word ‘*discriminate*’ has been defined to mean *giving different treatment to different persons attributable only or mainly to their respective descriptions by sex, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability*. Homosexuality is a natural condition and criminalizing it means treating persons who have a homosexual orientation differently which is unconstitutional because it violates article 21 of the constitution.

In the case of *Kasha Jacqueline, Pepe Onziema & David Kato v Giles Muhame and the Rolling Stone Publication Ltd*²⁰⁰, Hon. Justice V. F. Musoke Kibuka made it clear that the rights in the constitution apply equally to everyone regardless of sexual orientation. He said:

With regard to the right to privacy of the person and home, under Article 27, of the Constitution, court has no doubt, again using the objective test, that the exposure, of the identities of the persons and homes of the applicants for the purposes of fighting gayism and the activities of gays, as can easily be seen from the general outlook of the impugned publication, threaten the rights of the applicants to privacy of the person and their homes. They are entitled to that right.

In *Toonen v Australia*, the UN Human Rights Committee, which monitors state compliance with ICCPR, confirmed that sexual orientation is a prohibited ground of discrimination under the above mentioned articles.²⁰¹ The UN Human Rights Committee has since urged states to enshrine the prohibition of discrimination based on sexual orientation into their constitution or other fundamental laws.

All of the non-discrimination provisions in International Human Rights Law end with the reference to ‘other status,’ which has repeatedly been interpreted to include sexual orientation. The UN Committee on Economic, Social, and Cultural Rights, and UN Committee on the

¹⁹⁹ Article 26.

²⁰⁰ High Court Miscellaneous Cause No.163 of 2010.

²⁰¹ UN Human Rights Committee, Communication No.488/1992:Australia.CCPR/C/50/D/488/1992,4 April(1994).

Elimination of Discrimination against Women have all called for the repeal of laws criminalizing consensual same-sex conduct. The UN Committee on Economic, Social and Cultural Rights recently adopted a general comment interpreting the non-discrimination clause in the ICESCR, in which they specifically address discrimination on the basis of sexual orientation (for example, paragraphs 11 and 32).²⁰² All people, regardless of their sexual orientation or gender identity, are entitled to all human rights described in the UDHR. Affirming human rights as they apply to diverse sexual orientations and gender identities are not claiming new or ‘special rights’. It is demanding that everyone, regardless of sexual orientation is guaranteed the fullest enjoyment of their civil, cultural, economic, political and social rights.²⁰³

3.2.2 *The right to Privacy*

The UDHR provides for the right to privacy it states; “no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”²⁰⁴ The ICCPR under article 17 also provides for the same. The right to privacy is also protected by the Uganda Constitution.²⁰⁵

The right to privacy entails a right to choose the way in which and the people with whom one seeks to pursue intimacy. According to the European commission, the right to privacy includes the right to establish and develop relationships with other human beings. The right to privacy is the top most right whose violation has been claimed by homosexuals. In the case of *Victor Mukasa & Yvonne Oyo v Attorney General*²⁰⁶ agents of the state broke into the residence of the plaintiffs in search for evidence of suspected lesbianism. Court held that the actions were an invasion of the applicants’ privacy regardless of their sexual orientation. The same holding was arrived at in the case of *Kasha Jacqueline, Pepe Onziema & David Kato v Giles Muhame and the*

²⁰² UN Committee on Economic, Social and Cultural Rights General Comment No.20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para.2), E/C.12/GC/20, 25 May 2009.

²⁰³ Sylvia Tamale, “Human Rights Impact Assessment of Uganda’s Anti-Homosexuality Bill,” *East African Journal of Peace & Human Rights* 15, no.2 (2009).

Also available at <<http://www.zeleza.com/blogging/african-affairs/human-rights-impact-assessment-ugandas-anti-homosexuality-bill-sylvia-tam-o>> (Accessed May 9, 2011).

²⁰⁴ Article 12.

²⁰⁵ Article 27.

²⁰⁶ [Misc.Cause No.247 of 2006(HC), Unreported].

*Rolling Stone Publication Ltd*²⁰⁷ where it was held that the publication of the applicants' photographs and calling for them to be hanged was a violation of their rights to dignity and privacy. The ruling in both cases is a landmark in the struggle for the protection of human dignity and the right to privacy irrespective of one's sexual orientation. These decisions firmly establish that constitutionally protected rights belong to all Ugandans. We see 'progressive' decisions amidst a hostile legal environment. Courts are willing to grant protection of homosexuals on the basis of a broad and purposive understanding of such established rights as the right to privacy.

The Human rights committee has had to interpret these rights in regards to homosexuals. This was seen in the case of *Toonen v Australia*.²⁰⁸ A gay rights activist and practicing homosexual complained against Tasmanian laws that criminalized certain acts among consenting males. He said that this violated his right to privacy under article 17 of the ICCPR. The commission held that this was a violation of the right to privacy. It said:

It is undisputed that adult consensual activity in private is covered by the concept of privacy. The committee calls for the repeal of legislation that criminalizes same-sex sexual conduct because such laws amount to a serious infringement of private life. The intrusion of privacy can amount to discrimination where such interference makes distinctions between individuals ability to exercise their right to privacy on the basis of sexual orientation.

The European commission has also thrown more light regionally on the right to privacy. In *Dudgeon v UK*²⁰⁹ a similar complaint against the laws of Northern Ireland was filed. The court held that Dudgeon has suffered an unjustified interference with his right to respect of his private life recognized under article 8 of the European Convention. The right to privacy has been recognised as a right that specifically applies to homosexuals also in individual domestic jurisdictions. In the case of *Bowers v Hardwick*²¹⁰ a resident of Georgia was arrested immediately after engaging in oral sex with another consenting adult male. The supreme court of the US held that the right to privacy did not extend to homosexual activity. However, it is the dissenting judgment of Blackburn J that has attracted most attention. He ruled that the rights

²⁰⁷ Supra, note 200.

²⁰⁸ Supra, note 201.

²⁰⁹ Ser. A, No.45,4 EHRR 149(1998).

²¹⁰ (1986) 478 US 186 106 S.ct. 2841.

claimed for “were the most comprehensive of rights and the rights most valued by civilized men, namely the right to be left alone.” He asserted:

Before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an abominable crime not fit to be named among Christians. Only the most willful blindness could obscure the fact that sexual intimacy is a sensitive key relationship of human existence, central to family life, community welfare and the development of human personality.

The subsequent case of *Lawrence & Garner v State of Texas* 539 U.S 558 (2003) completely did away with sodomy as an offence in the US.

The South African Constitution specifically prohibits discrimination on the grounds of sexual orientation. The South African Constitutional court also held common law offences of Sodomy as being inconsistent with the constitution or they were in breach of the rights to equality, dignity and privacy. This was seen when the Constitutional court of South Africa made a landmark decision in the case of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*.²¹¹ The court unanimously overturned as unconstitutional the law prohibiting homosexual conduct between two consenting adults in private.²¹² This case provides the locus classicus on sexual orientation discrimination and the constitutional rights of homosexuals. It laid a solid foundation for a progressive, potentially emancipating jurisprudence relating to sexual orientation discrimination.²¹³ Important to note is the fact that the legalization of same-sex marriages in South Africa was premised on that very foundation.

3.2.3 *The right to freedom of association and expression*

The ICCPR recognizes the right to freedom of association and expression²¹⁴ and so does the African Charter on Human and People’s Right.²¹⁵ The Ugandan Constitution also guarantees this freedom under article 29 (1) (a). Freedom of expression and association are key to issues of sexual orientation. Laws criminalizing homosexuals on the basis of their sexual orientation make homosexuals fear to express their feelings and also to associate with the persons they

²¹¹ CCT 11/98 (1998).

²¹² “South African Court ends sodomy laws.” New York Times. May 8, 1998.

<http://www.nytimes.com/1998/10/10/south-africa-strikes-down-laws-on-gay-sex.html> (Accessed July 10, 2011)

²¹³ De Vos (2000) SALJ 25.

²¹⁴ Article 19.

²¹⁵ Article 9.

would have loved to associate with. They are forced to act underground. This contravenes their right to freedom of expression and association as provided for in the above mentioned conventions and laws.

According to the special rapporteur on the promotion and protection of the right to freedom of opinion and expression all citizens regardless of their sexual orientation have the right to express themselves and to seek, receive and impart information.²¹⁶ This was also confirmed by the Yogyakarta principles:

Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or person hood through speech, deportment, dress, bodily characteristics, choice of name or any other mean, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights.²¹⁷

Although the Yogyakarta Principles are not legally binding, they are quite influential in International Human Rights law. These principles have not been adopted by States in a treaty but are intended to serve as an interpretive aid to the human rights treaties. The Yogyakarta Principles are derived from a careful study of the central International Human Rights treaties and the interpretation given to those treaties by various authoritative bodies within the United Nations.²¹⁸ As a supplement to the Principles themselves, the document articulates obligations of states to adopt measures in accordance with their legal responsibilities under these treaties, as well as recommendations to virtually all sectors of the international community. A critical indicator of the credibility of the Yogyakarta Principles as an authoritative interpretation of the state of International Human Rights law is their use within the United Nations systems and regional human rights bodies. One development worthy of mention is the frequent adoption of

²¹⁶ Report of the UN Special Rapporteur on the right to freedom of opinion and expression, Ambeyi Ligabo-Addendum Mission to Columbia, UN Doc. E/CN.4/200564/Add.3,26 November 2004, para.75

²¹⁷ Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, March 2007.

<available at <<http://www.yogyakartaprinciples.org/principles>> (Accessed March 12, 2012)

²¹⁸ Paula L. Ettelbrick and Alia Trabucco Zerán, “The Impact of the Yogyakarta Principles on International Human Rights Law Development”, A study of November 2007-June 2010, Final Report. Available at www.asiapacificforum.net/.../yogyakarta-principles/Yogyakarta_Principles_Impact_Human_Rights_Law.pdf - (Accessed in March 13, 2012)

the Principles' definitions of "sexual orientation" and "gender identity" found in the Preamble by a number of authorities and States.²¹⁹

The Yogyakarta Principles have been supported by human rights NGOs, by the governments of Western and Latin American States and by expert or functional bodies within the UN system.²²⁰ There have been some critical commentaries by one or two Western pro-family religious NGOs. The skillful handling of the Yogyakarta meeting and of the multiple 'launches' of the Principles have meant that the document has achieved a quite respectable visibility. On the contrary, there has been silence from developing countries in Africa and Asia.²²¹ Since this is soft law, some states have expressed reservations.

3.2.4 *The right to health*

The right to health is guaranteed by the African charter²²² and the ICESCR.²²³ Uganda being a signatory to the above conventions has the obligation to ensure that people's health is safeguarded. The World Health Organization defines health as a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity. For one to be healthy their mental and physical conditions must be healthy too. Homosexuals in Uganda suffer psychologically from the effects of exclusion, seclusion and non-acceptance.²²⁴ Since they are not recognized in Uganda as minorities they are not at all addressed in the country's health programmes including HIV / AIDS.²²⁵ In some cases the medical personnel does not attend to them insisting that they should first bring their partners.²²⁶

²¹⁹ *Ibid.*

²²⁰ Douglas Sanders, "The Role of the Yogyakarta Principles." Sexuality Policy Watch, August 4, 2008. Available at <sxpolitics.org/wp-content/.../yogyakarta-principles-2-douglas-sanders.pdf> (Accessed in March 13, 2012)

²²¹ *Ibid.*

²²² Article 16.

²²³ Article 12.

²²⁴ Interview conducted with Paul in August 5, 2011 at Ntinda.

²²⁵ Paul Semugoma, Comments on "Science and Health Articles on Homosexuality in the Uganda Press," supra note 1 at 82.

²²⁶ Interview conducted with Micheal in July 20, 2011 in Luwum street.

3.2.5 The right to liberty

The ICCPR under article 9 and the African charter under article 6 guarantee freedom from arbitrary arrest or detention. The arrest and detention on the grounds of sexual orientation or adult consensual same sex conduct contravenes the above provisions on the right to liberty. The UN working group on Arbitrary Detention further clarified on this point by stating that the detention and prosecution of individuals on account of their homosexuality is arbitrary because it violates the ICCPR which guarantees equality before the law and the right to equal legal protection against all arms of discrimination including that based on sex.²²⁷

3.2.6 Job discrimination

Despite the fact that the Ugandan Constitution provides for equality before and under the law and non-discrimination, homosexuals have faced discrimination in different spheres. While they expect to have equal opportunity and to advance in the career of their choice, homosexuals are least welcome in certain service sectors like in the church.²²⁸ Discrimination of homosexuals in the employment sector is not limited to Uganda. In Hong Kong, 36 year old Chan, was a prominent member of a Buddhist organization until officials learned he was a gay activist. They told him to choose between them or his campaign work. He chose activism. Wan Yan Hai, a medical researcher had a similar experience, he was forced to resign from his job at a government institution in 1994 because of his gay activism. He now works for a private company.

Job discrimination against homosexuals is harder to confirm than that against any other disadvantaged group. At least with female, black or disabled applicants, there are objective physical characteristics to cite, quantify and track which are essential in building a legal case against a systematic discrimination. When it comes to sexual orientation however, there are no valid external markers, just a piece of information, stereotypes applied indiscriminately to both gays and those who stereotypically look gay.

²²⁷ Report of the Working Group on Arbitrary Detention, E/CN.4/2004/3, 15 December 2003, para. 73; see also Working Group on Arbitrary Detention, Opinion No.7/2002(Egypt).

²²⁸ Andy Stanley, "Gays in church leadership," Weekly observer, June 14, 2007. Available at www.evangelical.us/homosexuality/church-leadership.html (Accessed in May 10, 2011)

3.2.7 Legal Attempts that Discriminate Against Homosexuals

The Equal Opportunities Commission Act²²⁹ was established in Uganda by virtue of article 32 (2) of the constitution that enjoins the state to take affirmative action in favour of marginalized groups on the basis of gender or any other reason created by history, tradition or custom. Under section 14 (1) of the Act, the commission is empowered to monitor, evaluate and ensure that policies, laws, plans, program, activities, practices, traditions, cultures usages and customs are compliant with equal opportunities and affirmative action in favour of groups marginalized on the basis of among others sex. Homosexuals would have to be protected under this section. However, Section 15 (6) (d) of the Act contradicts or is contrary to the spirit of the Act. This provision is also inconsistent with the constitution. The section provides that the commission in dispensing its powers as a tribunal shall not investigate “any matter involving behaviour which is considered to be immoral and socially harmful or unacceptable by the majority of the cultural and social communities in Uganda.”

This provision aims at exempting homosexuals from being afforded equal opportunities. The record of the Hansard confirms this. In a bid to keep homosexuals out of benefitting from the equal opportunities, all other minorities are also left out hence rendering the commission irrelevant. It can be asserted that the Equal Opportunities Commission Act negatively affects persons of the homosexual orientation and hence it is inconsistent with the provisions of the supreme law²³⁰ thus rendering it void to the extent of its inconsistency.²³¹

Currently we have the Anti-Homosexuality bill that was tabled in parliament on 25th September 2009 which would, if enacted into law *prima facie* violate international human rights law and lead to further human rights violations. This bill has faced criticisms ranging from individuals to institutions, nationally and internationally. The Amnesty International,²³² Civil Society Coalition on Human Rights and Constitutional Law, Human Rights Network (HURINET) have analyzed this bill and have highlighted specific serious concerns the bill raises.

²²⁹ The Equal Opportunities Commission Act, 2007, Acts Supplement No.2 to the Uganda Gazette No.23 Volume C, Dated 18th May 2007.

²³⁰ The Constitution of Uganda 1995, Article 32 (1).

²³¹ The Constitution of Uganda 1995, Article 2 (2).

²³² See Tamale, “Human Rights Impact Assessment of Uganda’s Anti-Homosexuality Bill,” supra note 203.

If this bill is passed, it would promote discrimination against homosexuals who are already facing stigma from the society. As earlier on mentioned, the Uganda Constitution guarantees a number of rights that every citizen must enjoy. The International and Regional Treaties to which Uganda is a party also provide for these rights.²³³ The bill would contravene a number of rights namely; The right to be free from discrimination, right to privacy, right to health, right to life, freedom of expression, freedom of peaceful assembly, freedom of association, freedom of thought ,conscience and religion and right to liberty and security of the person.

According to the preamble to the Anti- Homosexuality Bill, the bill aims at protecting the traditional family by prohibiting any form of sexual relations between persons of the same sex. This objective raises a lot of questions like what is the “traditional family?” The traditional family has not been defined but it can be deduced from this objective that the bill refers to heterosexual family to be the traditional one. The next question to ponder on is whether the “traditional” conception of the African family has stood the test of time. The institution of the family has undergone a great transition with factors such as HIV/AIDS, natural disasters, globalization and internal conflicts that have adversely affected families. The above factors have led to the emergence of families headed by female and children. Should such families be criminalized since they may erode the ‘traditional family?’²³⁴ As Tamale observed:

I do not see how two people who are in a loving relationship and harming no one can pose a threat to the family simply because they happen to be of the same sex. The argument that homosexuality is a threat to the continuity of human kind and that it will lead to the extinction of human beings in the world simply does not hold water because there are too many heterosexuals in the world for that to be a reality.....So, just as the priests nuns and monks who are sworn to a life of celibacy will not cause the extinction of [the family], homosexuals will not either.²³⁵

It is not plausible to say that homosexuals who are the minority are the largest threat to the family. Families are not cast in stone that they cannot change. The bill also aims at protecting the children and youths of Uganda who are made vulnerable to sexual abuse and deviation as a result of cultural changes and increasing attempts by homosexuals to recruit and raise children in homosexual relationships. This is misleading because there are incidents where heterosexual

²³³ International Covenant on Civil and Political Rights (ICCPR), The International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter on Human and Peoples’ Rights (African Charter).

²³⁴ See Twinomugisha K. Ben and John C. Mubangizi, “Protecting the Right to Freedom of Sexual Orientation,” supra note 164 at 343.

²³⁵See Tamale, “A Human Rights Impact Assessment of the Anti-Homosexuality Bill in Uganda,” supra note 203.

men abuse and exploit children and youths through defilement, rape, child sacrifice and child trafficking. Protection of children is covered under child protection laws and the Penal Code as amended in 2007. These protect children, male or female from sexual exploitation. As such protection of children should be through enhancing the existing laws on their protection and adequately implementing them. Ironically, the Bill contains no single provision on protection of children except the provision that makes sex with a child below eighteen years aggravated homosexuality.

The bill defines and punishes the offence of homosexuality under clause 2. The definition of the offence of homosexuality is not clear and hence against the principle of legality which requires that for a person to be convicted of an offence, it should be clearly defined by law.²³⁶ A person who attempts to commit this offence would also be criminalized under clause 4. This broadens and renders the definition ambiguous. It also makes it susceptible to abuse by the public. Under clause 2 (1) c the offence is defined to include touching another person with the intention of committing the act of homosexuality. This provision is not only ridiculous but raises questions like who will testify as having witnessed the touching? Does it mean that heterosexual partners do not stimulate each other by touching? As Twinomugisha and Mubangizi note, ‘the bill ignores the fact that most of the outlined sexual acts can be performed by both heterosexual and homosexual persons.’²³⁷ By targeting homosexuality generally the bill is discriminatory and hence violates the principle of equality before the law as provided for under article 21(1) of the constitution.

This provision (clause 2) is a replica of section 145 of the Penal Code that criminalizes the existing prohibition of sex between individuals of the same sex hence making it redundant and inconsistent with the principle that laws should only be adopted to address a nuisance that has previously not been legislated upon. Criminalizing homosexuality between two consenting adults is discrimination based on sexual orientation which is a violation of the right to be free

²³⁶ Article 28(12).

²³⁷ See Twinomugisha and Mubangizi, “Protecting the Right to Freedom of Sexual Orientation,” *supra* note 164 at 344.

from discrimination as provided for in the constitution²³⁸ and International treaties that advocate for equality of all human beings irrespective of their sexual orientation.

Clause 13 of the bill makes it an offence for someone who promotes homosexuality or aids and abates.²³⁹ The scope of what would be termed as “promotion of homosexuality” is too wide and broad. This provision hinders homosexuals from accessing quality health services hence violating the right to health as provided for in the African Charter²⁴⁰ and ICESCR.²⁴¹ This clause is clearly an attempt to divide and weaken civil society by striking at one of its most marginalized groups. The bill would criminalize the legitimate work of national and international activists and organizations working for the defense and promotion of human rights in Uganda. It would also put major barriers in the path of effective HIV/AIDS prevention efforts. Criminalisation of homosexuality severely limits the ability of homosexuals to go for Voluntary Counseling and Testing which is the entry point for HIV related treatment and care.²⁴² This would hamper the progress of organizations that campaign for the prevention of HIV/AIDS transmission.

Discrimination and punitive laws like this aimed at marginalized groups and at those often among the most affected by HIV drives people underground and does nothing to help slow down the AIDS epidemic. Civil Society groups that are involved in reaching out to homosexuals and educating them on various issues would also be criminalized if this proposed bill becomes law.²⁴³ The International Guidelines on HIV/AIDS and Human Rights provide that states should review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not misused in the context of HIV or targeted against vulnerable groups.²⁴⁴ Also the recommendation of the Global Commission on HIV and the Law is to the effect that countries must ensure that their national HIV policies, strategies,

²³⁸ Article 21.

²³⁹ Clause 7.

²⁴⁰ Article 16.

²⁴¹ Article 12.

²⁴² See Twinomugisha and Mubangizi, “Protecting the Right to Freedom of Sexual Orientation”, supra note 164 at 345.

²⁴³ Supra, note 22 at 7.

²⁴⁴ International Guidelines on HIV/AIDS and Human Rights (2006 Consolidated version), Guideline 4, <<http://data.unaids.org/publications/IRC>> (Accessed August 10, 2010).

plans and programmes include effective, targeted action to support enabling legal environments, with attention to formal law, law enforcement and access to justice. The Global Commission on HIV and the Law urges countries to repeal punitive laws and enact protective laws to protect and promote human rights, improve delivery of and access to HIV prevention and treatment, and increase the cost-effectiveness of these efforts. With regard to sexual diversity the Commission recommends that rather than punishing consenting adults involved in same sex activity, countries must offer such people access to effective HIV and health services and commodities.²⁴⁵

Clause 13 also targets donors and funders who mainly fund a wide range of activities aimed at promoting human rights. It also targets lawyers, counselors, doctors who may come across homosexuals during the course of their work and any attempt of giving them advice based on behavior and sexual orientation could be classified as aiding and abetting homosexuality. It further seeks to punish landlords who in genuine bid to make money and rent premises to the highest bidder may find themselves being accused of promoting homosexuality.²⁴⁶ This clause prohibiting the promotion of homosexuality poses restrictions on the right to freedom of expression in the context of human rights defence work. This provision would forbid the "promotion of homosexuality" – including publishing information or providing funds, premises for activities, or other resources. Conviction could result in up to seven years in prison. Through the banning of the promotion of sexual health and sexual rights messages the organizations that promote this are undermined.

The Ugandan Constitution, the African Charter and the ICCPR all protect rights that are central to the promotion of human rights, including the right to freedom of association with others.²⁴⁷ This clause also contravenes articles 20(1) and 20(2) of the constitution which is to the effect that fundamental rights and freedoms are inherent and shall be respected, upheld and promoted by all organs and agencies of the government. In a democratic country like Uganda freedom of press is key. Citizens must be free to express themselves and advance ideas that are developmental to

²⁴⁵ Global Commission on HIV and the Law (July 2012)

www.hivlawcommission.org/.../Executive-Summary-GCHL-EN.pdf (Accessed April 18, 2014)

²⁴⁶ The Civil Society Coalition on Human Rights and Constitutional Law legal position on the Anti-Homosexuality Bill. www.uganda4rights.org/...11_05_09_final_coalition_submission_to_legal_committee_of_parliament. (Accessed August 15, 2010).

²⁴⁷ Article 29(1) d and e, Article 22 and article 13 respectively.

the society. In the case of *Charles Onyango Obbo and another v Attorney General*²⁴⁸ it was stated that the rights to freedom of the press should be jealously guarded and can only be limited by the limitation clause.

Freedom of thought, conscience and belief which shall include academic freedom in institutions of learning is provided for in the constitution.²⁴⁹ However under this bill, the lecturers/tutors' academic freedom to speak on matters concerning homosexuality would be curtailed because this may be translated as promoting homosexuality. The constitution also guarantees freedom to practice any religion which includes the right to belong and participate in the practice of any religious body or organization in a manner consistent with the constitution.²⁵⁰ If this bill is enacted into law, priests/pastors/sheikhs may not freely interact with their congregation especially homosexuals for fear of being marked as one promoting homosexuality. At the end of the day homosexuals would be discriminated against hence pushing them further underground.

Article 29(1) (e) of the constitution provides for freedom of association which shall include the freedom to form and join associations or unions. Organizations such as Ice breakers, Spectrum Uganda, Freedom and Roam Uganda (FARUG), Sexual Minorities Uganda (SMUG) among others are currently involved in the fight for the rights of sexual minorities in Uganda. By criminalizing "*promoting homosexuality*" the work of such organizations would be halted and rendered useless hence violating the foregoing right.

Under clause 3, the bill creates the offence of aggravated homosexuality punishable with death and names the categories under which aggravated homosexuality is deemed to include:

(a) Person against whom the offence is committed is below the age of 18 years

The Penal Code (Amendment) Act, 2007 criminalizes sexual crimes against children²⁵¹ and imposes the death penalty for homosexuality for aggravated defilement, thereby already

²⁴⁸ Constitutional Appeal No.2 of 2002 (SC).

²⁴⁹ Article 29(1) b.

²⁵⁰ Article 29(1) c.

²⁵¹ Section 129.

addressing what the bill calls aggravated homosexuality. This provision is sufficient and there is no need of creating another law to punish the same crime. This clause is also redundant.

(b) Offender is a person living with HIV/AIDS

The fact that HIV status is an aggravating factor under the Bill, leading to a punishment of death penalty, will have an impact of retarding the prevention of HIV/AIDS among homosexuals, as many will be unwilling to test and get vital information, for fear of the capital punishment. This will be a huge step backwards for HIV prevention, treatment and care initiatives in Uganda.

If this bill becomes law it will hinder the progress of organizations that have come a long way campaigning for the prevention of HIV/AIDS transmission. People living with HIV/AIDS are already stigmatized and so criminalizing them because of their status is discriminatory and it will push them further underground.

UNAIDS (Joint United Nations Programme on HIV and AIDS) has pronounced itself on whether it is justified to punish individuals for transmitting HIV to others. It drew a conclusion that there is no data indicating that the broad application of criminal law to HIV transmission will achieve either criminal justice or prevent HIV transmission. It stated that such application risks undermining public health and human rights. In connection with the above UNAIDS has urged governments to limit criminalization to cases of intentional transmission, where a person knows his or her HIV status, acts with the intention to transmit HIV, and does in fact transmit it.²⁵²

(e) Victim of the offence is a person living with a disability

The bill proposes to introduce the death penalty for a person who engages in consensual sexual relations with an individual of the same sex who is living with a disability, considering such consensual conduct to be a form of ‘aggravated homosexuality’. Whilst it is necessary to protect people living with a disability from sexual violence, the Convention on the Rights of Persons with Disabilities - which Uganda has ratified - includes in its guiding principles, respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and

²⁵²http://data.unaids.org/pub/BaseDocument/2008/20080731_jc513_policy_criminalization_en.pdf.

independence of persons; Non-discrimination; And respect for difference and acceptance of persons with disabilities as part of human diversity and humanity.²⁵³

As a state party to the Convention, Uganda is obligated to provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes. Rather than affirming the individual autonomy and inherent dignity of persons with disabilities, clause 3 of the bill would in fact discriminate against this category of persons.²⁵⁴

(f) Forced HIV testing

Clause 3(3) is to the effect that where a person is charged with the offence under this section that person shall undergo a medical examination to ascertain his or her HIV status. The forcing of individuals to undergo HIV testing is a violation of their right to privacy and right to liberty and security. Amnesty International in their analysis of the bill opposed the introduction and application of such legislation as a means of stemming HIV transmission. They argued that it would be inappropriate, ineffective and incompatible with the right of the individual to privacy, to non-discrimination and to due process. Such legislation would also violate Uganda's obligation to take measures to protect the health of its people, as provided by article 16 of the African Charter and article 12 of the UN International Covenant on Economic Social and Cultural Rights.²⁵⁵

The death penalty is too harsh and severe a punishment as consenting homosexual adults who have repeated sexual intercourse would have to pay for their actions with their life. This is not only a violation of the rights of sexual minorities but also a threat to the very existence of sexual minorities in Uganda. Article 6(2) of the ICCPR is to the effect that the death penalty may only be imposed for the most serious crimes. The UN human Rights Committee has noted that Article 6 is abolitionist in outlook and held that the expression '*most serious crimes*' must be

²⁵³ UN Convention on the Rights of Persons with Disabilities, Article 3, Guiding Principles, paragraphs (a), (b) and (d), respectively.

²⁵⁴ Amnesty International, *UGANDA: Anti-Homosexuality bill is inherently discriminatory and threatens broader human rights*, (London: Amnesty International Publications International Secretariat, 2010). Available at www.amnesty.org (Accessed in Feb 13, 2011)

²⁵⁵ *Ibid.*

read restrictively to mean that the death penalty should be a quite exceptional measure.²⁵⁶ The former UN Special Rapporteur on extrajudicial executions, Asma Jahangir stated that it is unacceptable that in some states homosexual relationships are still punishable by death. He also added that ²⁵⁷ under article 6 of the ICCPR death sentences may only be imposed for the most serious crimes a stipulation which clearly excludes matters of sexual orientation.²⁵⁸ The death penalty violates article 24 of the constitution which is to the effect that no person should be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment. This is a non-derogable right.

Clause 14 creates the offence of failure to disclose the offence of homosexuality. This provision criminalizes a person in authority who being aware of the commission of the offence omits to report the offence within twenty four hours. The circumstances that can be deemed to amount to failure to disclose this offence are too wide and broad hence creating a situation where citizens have to intrude into the private spheres of other citizens hence violating the right to privacy and the right to practice a profession.

Every profession in Uganda is governed by professional ethics and a code of conduct which guides and regulates that particular profession. One profound doctrine is the doctrine of confidentiality where the professional is expected to conceal information received from a client by virtue of the fiduciary relationship that exists between them. This provision that compels professionals to divulge information entrusted to them by their clients destroys the professional – client relationship that is based on utmost trust. By revealing such information, the professional acts in breach of his/her professional duty of confidentiality. As a result the right to practice a profession is violated. Parents would have to report their sons or daughters who are homosexuals, counselors would have to report their clients who have come to seek for counsel and doctors would also have to report to authorities patients who are homosexuals who have come for treatment. This provision makes all Ugandans potential criminals.

²⁵⁶ Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 127 (2003).

²⁵⁷ Article 40 (2).

²⁵⁸ Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Ms. Asma Jahangir, E/CN.4/2001/9, January 2001, para.50.

In sum, I add my voice to the voices of other Human Rights Activists that have criticized the bill by asserting that the Anti-homosexuality bill is unconstitutional, disproportionate and redundant. The limitation of the enjoyment of the rights and freedoms as enunciated in the bill is unacceptable and demonstrably not justifiable in a free and democratic society.²⁵⁹ The Anti-homosexuality bill should be completely withdrawn.

3.3 Conclusion

From the above discussion of the law, it can be asserted that much as Uganda is a party to numerous International and Regional treaties and has got a constitution with a comprehensive bill of rights and a legal framework for the protection of minorities, homosexuals are to a greater extent not protected by the constitutional and legal framework governing Uganda. The introduction of the Anti-homosexuality bill that re-criminalizes homosexuality shows how Uganda is not about to abandon sodomy law offences that are archaic and not justifiable in this modern and democratic society. It is worth noting that the British who imported this law in Uganda abandoned it in England. The criminalization of homosexuality, by condemning into perpetuity an entire class of people, forces them to live their lives in the shadow of harassment, exploitation, humiliation, and cruel and degrading treatment at the hands of the law enforcement machinery; further it denies them moral full citizenship. By providing a comprehensive bill of rights in the constitution to be enjoyed by everyone, the law gives with one hand but again takes away when it criminalizes homosexuality under the Penal Code which definitely violates human rights which are inherent rights to an individual and ought to be respected

²⁵⁹ Article 43(1) c.

CHAPTER FOUR
DISCRIMINATION IN THE DIFFERENT AREAS OF THE LIVES OF
HOMOSEXUALS

4.1 Introduction

The study findings revealed the causes of human rights abuses that homosexuals suffered. The effects of these abuses were far reaching and all the respondents came up with proposals and solutions to ensure equality and change. From the findings it can be said that homophobia is still riding high in Uganda.

In this chapter, the researcher also discusses best practice models for the protection of homosexuals from South Africa.

4.2 Substantive Findings and Analysis

4.2.1 Legal and Constitutional Liberties

The study sought to establish whether homosexuals in Uganda enjoy Legal and Constitutional liberties. All the fifteen (100%) human rights activists interviewed agreed that homosexuals in Uganda do not enjoy the legal and constitutional liberties provided for in the Constitution. This was verified by the findings from homosexuals about the human rights abuses that they suffered.

Twelve out of the fifteen (80%) respondents said that homosexuals are treated as second class citizens while the remaining three out of the fifteen (20%) stated that they do not enjoy the same benefits as other citizens. The law provides for equality and freedom from discrimination but because of homophobia, hatred, discrimination and unequal treatment has been bred by the society. Courts have been quite positive like in the case of *Kasha Jacqueline, Pepe Onziema & David Kato v Giles Muhame and the Rolling Stone Publication LTD*.²⁶⁰ In this case Justice V.F Musoke Kibuuka made it clear that the rights in the constitution apply equally to everyone regardless of their sexual orientation. Courts are trying to uphold the rights of homosexuals but what happens on the ground is totally different. People treat homosexuals like they are sub-human. There are many legal protections that automatically come with marriage, which gays are

²⁶⁰ Unreported High Court Miscellaneous Cause No.163/2010.

not allowed to have.²⁶¹ There are many work places where a homosexual can be fired simply for being gay.²⁶² Many gay couples are torn apart because they fall in love with someone that lives in another country.²⁶³ Since they cannot marry, the foreign partner cannot automatically become a citizen, which would be the case with a heterosexual marriage. Their partners are not covered by insurance plans at work.

All the fifteen (100%) respondents said that homosexuals do not enjoy the legal and constitutional liberties because their sexuality is prohibited by the law under the Penal Code. The legal and constitutional liberties that homosexuals do not enjoy, as revealed in this study, include: the right to privacy, freedom of expression and opinion, freedom from non-discrimination, right to health and freedom of association and assembly.

South Africa has undergone a great transition on the issues of lesbian, gay, bisexual, transsexual equality anywhere in the world. Sexual acts between two consenting adult men in private were criminalized in South Africa prior to 1994. During the decade from 1994 to 2004, some 35 items of legislation changed, including most importantly, the Constitution, which guarantees the right to be free from discrimination by the State or Legal and Natural persons, on the ground of sexual orientation.”²⁶⁴ The South African Constitution now places sexual orientation at par with gender and race as protected categories. South Africa’s treatment of homosexuals separates itself from Uganda’s by a wide margin. As a result of more secure legal protections and quality of life for homosexuals, South African homosexuals are protected. Uganda headlines a hate movement, while South Africa takes a stage of progress.²⁶⁵

One of the most distinguishing features of the South African Constitution was that it contained a Bill of Rights the inclusion of which marked an important break with the past in which the

²⁶¹ Margot Canaday, *The straight State: Sexuality and Citizenship in 20th Century America* (New Jersey: Princeton University Press, 2009).

²⁶² *Ibid.*

²⁶³ *Ibid.*

²⁶⁴ Robinson, BA, “End of the World Predictions,” Ontario Consultants on Religious Tolerance. <http://www.religioustolerance.org/end_wrlld.htm>(accessed June 11,2007).

²⁶⁵ Dorman R.S, “African Affairs,” *Oxford Journals* 3, no.443 (2012): 223-243.

majority of the population was denied the enjoyment of individual fundamental rights.²⁶⁶ Devenish points out that equality is fundamental to the nature and content of a bill of rights and to the maintenance and propagation of human rights in a democratic body politic, particularly in acutely divided society.²⁶⁷ It is no wonder that the right to equality emerges as the first substantive right in the Bill of Rights²⁶⁸ besides being mentioned in the Constitution of South Africa as one of the values on which the Republic of South Africa is founded.²⁶⁹

Section 9 of the constitution of the Republic of South Africa prohibits discrimination and disadvantage on the basis of race, gender, sex, religion and many other criteria including sexual orientation. As Twinomugisha and Mubangizi noted, one of the most philosophical achievements that has been hailed by many commentators was the inclusion of sexual orientation among the listed grounds on which unfair discrimination is prohibited.²⁷⁰ Noteworthy is the fact that South Africa became the first country to include the prohibition in its national constitution. By implication, a host of rights commonly sought by gays and lesbians in other countries were seen to be incorporated by the inclusion. This meant that these rights could now be enforced under the South Africa Constitution.²⁷¹

²⁶⁶ See John C Mubangizi, *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (2004) 58.

²⁶⁷ See George Devenish Commentary on the South African Bill Of Rights (1999) 35.

²⁶⁸ The Constitution of South Africa, S. 9.

²⁶⁹ The Constitution of South Africa, S.1(a).

²⁷⁰ See Twinomugisha and Mubangizi, "Protecting the Right to Freedom of Sexual Orientation", supra note 164 at 334.

²⁷¹ *Ibid.*

Many forms of abuses against Ugandan homosexuals were revealed at different levels and have been summarized below in Table 4.1

Table 4.1 - Social demograhic data of respondents who have suffered human rights abuses in the study

Human Rights Abuses	Number of victims	Percentage
Discrimination within religious institutions	4	16%
Discrimination in schools	8	32%
Discrimination from family and friends	25	100%
Discrimination in employment	15	60%
Discrimination in Sports clubs	6	24%
Discrimination in Health Facilities	5	20%
Discrimination in the public arena	7	28%

The study revealed that all the 25 (100%) homosexuals have faced discrimination at different levels and with different people.

4.2.2 Discrimination within religious institutions

The study revealed discrimination within religious institutions. Four out of the twenty five (16%) respondents stated that they had faced discrimination in their churches because of the way they were dressed and the way their hair was kept. Two gay men said they used to wear earrings, tight jeans and had their hair plaited which made them look like women. Two lesbians reported that they used to adorn baggy trousers and wear their hair in dreadlocks, which made them look like men. They were not comfortable with the way people looked at them and no one wanted to sit next to them at church. Even the sermons preached in church were directed

towards them and meant to accuse them of practicing homosexuality. This stigmatized them further. Eleven out of the twenty five (44%) homosexuals did not bother going to church for fear of being persecuted.

It was quite evident that homosexuals in Uganda do not feel a sense of belonging in relation to the dominant culture and so they have had to reconstruct affirming identities for themselves. This identification among gay men often consists of gestures or mannerisms that repudiate conventional masculinity. Lesbians tend to use mode of dress to distinguish themselves from heterosexual women. Many interpret this as lesbians who desire to be like men.²⁷² Normative gender stereotypes as they relate to dressing can be dangerous when wrongly attributed to group members who do not conform to the mould description. Such stereotypes can be harmful to members of a group with different dressing or traits. Thus sartorial practices can also become tools of discrimination, scape-goating, falsification, injustice and persecution. Some of the lesbians I interviewed were wearing men's shirts, baggy trousers and baseball caps and other forms of "masculine" attire.

It should be noted that homosexuality has been denounced in Uganda on grounds of religion. The Christians base their denunciation on the bible. They claim that the cities of Sodom and Gomorrah in the bible were destroyed because of homosexuality.²⁷³ In the book of Leviticus 18:22-23 and Romans 1:26-27 homosexuality is an abomination. Some conservative religions believe that homosexuals should be totally isolated from church or that such members do not exist in church. The more liberal religions think homosexuals are 'sick' or have misguided behavior. They say homosexuals are to be pitied, prayed for or counseled in the hope that they can be reformed. The most tolerant religions "privatise" homosexuality by urging them to keep what they are doing private and behave like heterosexual couples.²⁷⁴ I had an opportunity to interview one of the retired religious leaders who is also a member of the Civil Society Coalition on Civil and Constitutional Law. Retired bishop Ssenyonjo of St. Paul's Reconciliation Centre

²⁷² See Tamale, "Out of the Closet: Unveiling Sexuality Discourses in Uganda," supra note 15.

²⁷³ Genesis 19.

²⁷⁴ Derrick Fine, *Lesbian and Gay rights*, (Cape Town: Social Justice Resource Project (SJRP) and the Legal Education Action Project (LEAP), 1992), 7.

counsels homosexuals who are stigmatized and feel they have no place here on earth. He also sensitizes people about human sexuality. He said:

As religious leaders we should come out and explicitly say that we love all people including the homosexuals. We are enjoined to love even enemies. We should not nurse any feelings of harming homosexuals.²⁷⁵

The researcher agrees that religion should be a place where people can find solace and refuge. It should be a place open and welcome to anyone. In all Ugandan churches, a homosexual would not be allowed to hold a position in church or even participate in its activities. The reason is clear: they are seen as unholy, unworthy and outcasts. Jesus Christ accommodated all sorts of people including the so-called ‘sinners’ like Zacchaeus.²⁷⁶ In South Africa, prominent religious leaders have voiced their support for the South African homosexuals. Archbishop Desmond Tutu and Dr. Allan Boesak are vocal supporters of homosexual rights in South Africa. Even the conservative Dutch reformed church ruled that gay members should not be discriminated against and could hold positions within the church.²⁷⁷ However, much criticism of the church still exists.

Homosexuality is regarded in Islam to be unnatural, despicable and detested since it is with a person of the same sex and not with a wife. The Quran refers to homosexuality as a fahishah which is more than just a sin – an obscene detested one, “And (remember) Lut, when he said to his people: “Do you commit the fahishah (worst obscene sin) such as none preceding you has committed in the worlds? Verily, you practice your lusts on men instead of women. Nay, but you are a people transgressing beyond bounds (musrifoon).”²⁷⁸ How will homosexuals fulfil their spiritual longings if they fear that their religious communities will respond with condemnation? The constitution provides for freedom to practice any religion which shall include the right to belong and participate in the practices of any religious body. Discrimination within religious institutions is a contravention of the freedom of religion.²⁷⁹

²⁷⁵ 15th June 2011 at his office in Bukoto.

²⁷⁶ Luke 19:1-10

²⁷⁷ Jack Rogers, review of *Jesus, the Bible and Homosexuality*, by David, G. Myers, *A journal of Reformed thought*, Perspectives magazine, June 11, 2010. <<http://www.drjackrogers.com.html>> (Accessed May 12, 2011)

²⁷⁸ [Quran Surah A’araaf 7:80-81].

²⁷⁹ Article 29.

4.2.3 Discrimination in Educational Institutions

The findings also revealed that homosexuals face discrimination in schools. Eight out of the twenty five (32%) respondents faced discrimination right from secondary and university when the school authorities got to know of their sexual orientation. Three out of the twenty five (12%) respondents were expelled from the schools they were in after this discovery. One respondent who was by then a student of Kyambogo University had to quit school when students threatened to burn him in his hostel when he appeared in the media advocating for the rights of homosexuals. He had to flee the country and seek refuge in Kenya and only returned to Uganda two years later.

Studies in England show that the formal education system perpetuates gender stereotypes, heteronormativity and homonegativity. It can be argued that the most effective means of socialization within schools are those which frame the boundaries of acceptable behaviour and are embedded in the fabric of school routines. As institutions that mirror the social hierarchies of the culture of which they are a part, schools often reinforce the normality of heterosexuality through language use and daily routines as well as within the actual curriculum. When school staff members view heterosexuality as the normal and expected sexuality of their students, heterosexuality becomes part of the “hidden curriculum,” which students learn without being aware of the “lesson.”²⁸⁰

From a Foucauldian perspective, heterosexuality as ‘taught’ through the hidden curriculum can be regarded as a logical outcome of the ways in which sexuality constitutes a locus of social control which inevitably reveals itself within the domain of education.²⁸¹ In this sense, the hidden curriculum can be seen as a method of social control, making sexuality another domain in which students’ thoughts and later actions are regulated within the school environment. When one’s expression of sexuality is socially controlled and heterosexuality is taken for granted, it becomes part of one’s unspoken identity, deviation from which is considered abnormal.²⁸² This

²⁸⁰ Ken Plummer “Lesbian and Gay Youth in England,” in *Gay and Lesbian Youth*, edited by Gilbert Herdt (New York: Harrington Park Press, 1989), 195-216.

²⁸¹ See Foucault, “The History of Sexuality,” supra note 101.

²⁸² Debbie Epstein & Richard Johnson, “On the straight and narrow: the heterosexual presumption, homophobias and schools,” in *Challenging Lesbian and Gay Inequalities in Education*, edited by D. Epstein (Buckingham: Open University Press, 1994).

expectation of heterosexuality is damaging within the school culture in particular as it inevitably disenfranchises a sizeable portion of the population: from gay, lesbian, and bisexual students, to staff members, to children of homosexual persons, to those who have homosexual friends or other relatives. This expectation is also damaging for students who are not same-sex attracted and who do not have any notable relationships with persons who are, as the pervasiveness and implications of the heterosexual expectation alienate those students from same sex attracted people within broad society, implicitly teaching students to regard such persons as “other.”²⁸³

One of the ways that adolescents learn about sexuality is through its framing by their peers and their teachers. Young people learn a great deal about a particular concept, object or action through the attitudes that it evokes in the people who they respect, either through their subtle cues or opinions voiced outright. In terms of sexuality, prevailing attitudes within the school environment help shape what is viewed as ‘right’ or ‘wrong’ as far as gender roles, attractions and sexual practices. As such, students learn from their teachers’ attitudes toward same-sex attraction and heterosexuality as agents of socialization, attitudes which have a clear impact on the tenor/climate of the classroom environment towards these topics. Specifically, it seems logical that teachers’ attitudes towards same-sex attraction have a direct impact on their students’ education on the subject which in turn impacts students’ attitudes toward same-sex attraction.

Sexualities other than heterosexuality were regarded by teachers in the classroom as being presented in a reduced form (i.e. male homosexuality). In England, homosexuality was pathologised by teachers as either a mental illness or a precursor to infection and teachers were seen to exhibit prejudice against same-sex attraction which would not be tolerated in the instance of a racial or gender issue.²⁸⁴ In Uganda too teachers show a bias towards same sex attraction and this is evident in their speech. Evelyn reports that while she was still at high school the headmistress used to give serious warnings to students at assembly not to associate with homosexuals. She quotes the words used by the headmistress to pass the warning:

²⁸³ *Ibid*

²⁸⁴ Viv Ellis & High, S., “Something more to tell you: gay, lesbian or bisexual young people's experiences of secondary schooling,” *British Educational Research Journal* 30, no.2 (2004): 213-225.

Homosexuals are sick and abnormal. One of their wires is loose and that is why they are attracted to persons of the same sex because they cannot think right. No one should be seen associating with them unless you want to catch the same disease.²⁸⁵

When the staff members within a school setting hold homophobic attitudes, they are likely to convey certain related values/norms to their students whether or not they are consciously aware of the transmission. The attitudes of adult school staff members toward same-sex attraction also presumably have an effect on their action or inaction when addressing the school-based harassment of same sex attraction to students.

Together these possible outcomes of homophobic attitudes within the school setting constitute a demonstration of heterosexuality as social capital as well as evidence of the “hidden” – or, in some cases, overt – curriculum. Adults who hold negative attitudes towards same-sex attraction have been found to report less physical contact with gays and lesbians and more traditional attitudes regarding sex roles than those with less negative attitudes.²⁸⁶ When adults who hold these types of beliefs are staff members within the school environment, it seems logical that their inability to effectively address the needs of same sex attracted students creates a bias within the educational system and a less than adequate school experience for those students, while perpetuating heterosexuality as the norm.

The findings in this study highlight the lack of visibility of homosexuals in educational institutions and show how bullying and harassment continue to be major problems for homosexual youths. Many homosexuals remained “in the closet” as a coping mechanism. Some are forced to fight back and are referred for disciplinary action or programs for emotional or behavioral disorders. This is because the teachers do not believe that the great number of fights in which they are engaged occur while defending themselves against intolerant heterosexual peers. Some do not perceive mistreatment of homosexuals as wrong. Harassment is often not viewed as violence, but as a “natural” response to homosexuals. Some are insulted by classmates who throw homophobic slurs at them.

²⁸⁵ 30th August 2011, Nsambya.

²⁸⁶ Gregory Herek, “Beyond ‘homophobia’: A social psychological perspective on attitudes toward lesbians and gay men,” *Journal of Homosexuality* 1984, no. 10: 1-2.

Such ill-treatment leads to homosexuals in schools to segregate and isolate themselves, poor academic achievement, school dropout and missing classes because they feel unsafe or uncomfortable. The treatment is also cruel and degrading and contravenes article 44 of the constitution that provides for freedom from torture and cruel, inhuman or degrading treatment. The end result of this is underachievement and school drop-out, low self-esteem, and mental ill health. At the end of the day they miss out on their right to education as provided for in article 30 of the constitution that is meant to shape them into constructive and useful citizens. Through education many myths that are perpetuated within society could be expelled. Suicide was also reported. Tony reported that a one Samuel Odhiambo committed suicide because he could not contain misery anymore.²⁸⁷

4.2.4 Discrimination from Family and Friends

Discrimination against the family takes various forms. Four out of the twenty five (16%) respondents particularly stated that they had been expelled from home. They could no longer attend family gatherings because no one wanted to associate with them. Three out of the twenty five (12%) had to leave their homes because of depression. No one wanted to talk to them. Two out of the twenty five (8%) respondents were denied the right to benefit from the estate of their parents because of their sexual orientation. Paul had this to say:

When my parents discovered that I was a homosexual, they stopped talking to me. I was taken to a psychologist to be counseled with an aim of making me change my orientation. I visited the psychologist for two months but nothing changed. I contemplated suicide because I felt I had no place in the world. Later on my mother decided to accept me as I am.²⁸⁸

Hence, many homosexuals face rejection and expulsion from their families and become homeless after revealing their sexual orientation. Some parents reach the extent of ceasing to pay school fees for their children after discovering that they are homosexuals. Such victims face painful choices and risks. How are they to choose between honesty and possible loss of friendship or parental love? Such acts of discrimination against children on grounds of their sexual orientation are a violation of article 21(2) of the constitution that guarantees freedom from discrimination. It also contravenes articles 30 and 34(3) of the constitution which provide for the

²⁸⁷ 3rd July 2011, Kamwokya.

²⁸⁸ 5th August 2011, Ntinda.

right to education to all persons, particularly children. A human rights activist working with Ice Breakers Uganda reported that they give emotional support to victims that have been chased away from their homes. Such victims are always traumatized and so they encourage them by telling them that they can enjoy life just like any other person.

Eighteen out of the twenty five (72%) respondents reported that they faced discrimination from friends immediately they came out of the closet or when the friends discovered on their own that they were homosexuals. The friends parted company with them and they did not want anything to do with them. Juliana particularly said:

My friends parted company with me in my third year at campus when they discovered that I was a lesbian. They decided to leave me out of the academic discussion group that we had. They only recalled me back when they realized that they could not do without me because I was a bright student.²⁸⁹

Most of the respondents preferred associating with fellow homosexuals. They said they could not interact and express themselves freely with the public for fear of being arrested. Once in a while they meet together as homosexuals to discuss their issues and concerns but such meetings could only be conducted underground, behind closed doors.

4.2.5 Discrimination in Employment

The research findings also revealed that sixty percent of the respondents faced discrimination in employment. Davis who was working at Centenary bank reported that he faced discrimination at his place of work when his boss discovered that he was gay. In his words:

My boss reduced my work load, made me work long hours, made provocative statements and surveyed my computer all the time. During staff meetings he could make provocative statements that were aimed at stigmatizing me. I had to quit this job because I lived in constant fear of what my boss would eventually do and also because of the depression that I suffered. I could not get a job with any other bank as it required obtaining a recommendation from the previous bank.²⁹⁰

Many fear looking for jobs because of stigma. Those that have not faced discrimination at the work place have not disclosed their sexual orientation.

²⁸⁹ 6th June 2011 in Ntinda.

²⁹⁰ 2nd July 2011, Ice Breakers offices on Salaama road.

Another confessed that when he came out in the media and publicly declared that he was a homosexual, strangers started hunting for him at his place of work. His boss was not comfortable with that. Neither were his colleagues. The outcome was that he was sacked from his job. Discrimination in employment manifests in various forms including recruitment, working conditions, promotion and dismissal. In some jobs like the military forces, you cannot be recruited when you are discovered to be a homosexual. Even after recruitment, once it is known that you are a homosexual you will be fired or you are forced to resign which has little or nothing to do with your ability to serve as a soldier.

While discrimination against homosexuals in employment is manifest in Uganda, the case in South Africa is different. In 1998 the South African parliament passed the Employment Equity Act which protects the South Africans from labour discrimination based on sexual orientation among other categories. Homosexuals are allowed to serve openly in the South African National Defence force (SANDF). In 1996 the government adopted the White Paper on National Defence which was to the effect that in accordance with the constitution, the SANDF shall not discriminate against any of its members on the grounds of sexual orientation.²⁹¹ In 1998 the Department of Defence adopted a Policy on Equal Opportunity and Affirmative Action under which recruits may not be questioned about sexual orientation and the Defence Force officially takes no interest in the lawful sexual behavior of its members.²⁹²

Courts have also pronounced themselves on the issue of labour discrimination based on sexual orientation. In *Satchwell v President of the Republic of South Africa*²⁹³ the court held that same sex partners should not be denied pension and other benefits given to spouses of judges. In the case of *Langemaat v Minister of Safety and Security*²⁹⁴ the court found that the regulations and rules of the Police Medical Aid Scheme which did not include same sex couples unfairly

²⁹¹ “White paper on National Defence for the Republic of South Africa: Defence in a democracy.” Government of South Africa. 8 May 1996.

<http://www.info.gov.za/whitepapers/1996/defencwp.htm> (Accessed November 10, 2010)

²⁹² Aaron Belkin and Margot Canaday “Assessing the integration of gays and lesbians into the South African National Defence Force.” 12 January 2011.

http://www.palmcenter.org/assessing_integration_gays_and_lesbians_south_african_national_defence_force.htm (Accessed November 13, 2010)

²⁹³ 2001 12 BCLR 1284 (T).

²⁹⁴ 1984 4 BCLR44 (T).

discriminated against lesbian and gay people and on that basis declared the rules and regulations to be unconstitutional.

Studies elsewhere have found that employers often harass, abuse, blackmail or fire employees because of their sexual orientation.²⁹⁵ In making these determinations, many of the scholars have explicitly considered employment and other forms of discrimination by public employers, including state, local, and federal government employers. This has forced many homosexuals to remain in the closet. A homosexual fears to be 'outed' because his/her homophobic employer may then engineer dismissal in clear violation of the ICESCR as well as a host of International, Regional and National laws. 'Outing' might also incite groups on the fringes of some cultural or religious institutions to hurt or kill such a homosexual in breach, among other norms, of the ICCPR. Such an environment of abuse and harassment is not conducive for work and is a violation of Article 40(1) of the constitution that provides for a right of persons to work under satisfactory, safe and healthy conditions.

Seven out of the twenty five (26.6%) respondents who are now human rights activists after losing jobs in their previous places of work resorted to joining organizations that seek to fight and protect rights of sexual minorities. This includes SMUG, Spectrum and Icebreakers. They felt safer working with such organizations.

Discrimination was also revealed to exist in sports clubs. Two respondents playing with the rugby team for women stated that they faced discrimination from their teammates when they were discovered to be lesbians. Three said that they could not join the Women's Federation in sports because of their sexual orientation. Such discrimination even in sports denies homosexuals an opportunity to exploit their talents and also deprives Uganda of people who would boost the country nationally and internationally in sports. This kind of discrimination on grounds of sexual orientation is unconstitutional and violates article 21 of the constitution.

²⁹⁵Harris M. Miller, 1984, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, pp799-807.
<[http:// williamsinstitute.law.ucla.edu/wp-content/.../6_FindingsCourtsScholars.html](http://williamsinstitute.law.ucla.edu/wp-content/.../6_FindingsCourtsScholars.html)> (Accessed January 28, 2011)

4.2.6 Discrimination in Healthcare Facilities

Five out of the twenty five (20%) respondents stated that they faced discrimination in healthcare facilities. Whenever they went to hospitals to seek medical attention especially when infected with sexually transmitted diseases (STD), the nurses would ask them to bring their partners before they could get treatment. They shied away from revealing their sexual orientation because of the prejudice and stigma that they would have to deal with.

Micheal stated that one time he went to Mulago hospital to seek medical attention. He was diagnosed with an STD and was told to bring his partner before being treated. When he told the nurse that his partner was male, the nurse sent word round to all the nurses in that department to come and see a homosexual.

Many came by and laughed at me sarcastically hurling insults at me and referring to me as *omusiyazi* (derogatory term for homosexuals). The patients who were in the queue waiting to be attended to wondered what was happening. I was at a loss of words and opted to leave. As I left all eyes were on me.²⁹⁶

As a result of such discrimination many patients who have contracted STDs including HIV opt to remain in the closet. Stigma and discrimination prevent homosexuals from accessing vital HIV prevention, treatment and care services. This paralyses the work of individuals and organizations working with HIV/AIDS prevention programmes and access to treatment for people living with HIV and AIDS. Such discrimination in health facilities violates the right to health which is provided for by the African Charter and the ICESCR. Tackling homophobia can help overcome this, and encourages homosexuals to be tested for HIV and other sexually transmitted diseases.

Spectrum as an organization reported that homosexuals are discriminated against and hence failed to access medical facilities. It is for that reason that Spectrum as an organization includes among its objectives to the mandate to fight HIV among homosexuals. They teach homosexuals living with HIV about prevention, care and treatment. They provide them with leaflets, lubricants and condoms. Spectrum has identified some health centres that are supportive and they make referrals to some of their clients. They also offer counseling services. SMUG as an organization is also involved in HIV campaigns that advocate for the inclusion of homosexuals

²⁹⁶ 20th July 2011 on Luwum street.

in medical services. Ice Breakers is another organization that focuses on health issues for homosexuals. They provide reading materials and condoms for homosexuals.

4.2.7 Discrimination in the Public Arena

The study also revealed that most homosexuals face discrimination from the general public or public arena. Charles confessed that he faced discrimination from his neighbors who would abuse him verbally everyday as he walked out of his house.

Omusajja omukulu otandika otya okulya ebisiaga? Olimusiru toline amagezi. Tuja okufunira omuwala oleme okuswaza maama wo. [How can a big man like you practice homosexuality? You are so stupid. We shall get you a wife so that you do not bring shame to your mother.]²⁹⁷

The insults and slurs are not limited to homosexuals alone but extend to their family members. For instance, the friend of Charles's mother isolated her and accused her of tolerating such behavior from her son. Eventually they had to shift residence and relocated elsewhere. Three out of the twenty five (12%) respondents stated that because of the way they dressed and wore their hair, the public got to know that they are homosexuals and they are abused verbally when they walk around or when they enter public taxis. The public throws insults at them.

Four out of the twenty five (16%) respondents reported that they were literally evicted from their rental houses by landlords without prior notice after being discovered to be homosexuals. Such victims end up homeless and live in fear for their lives. One of the human rights activists who works with Refugee Law Project said that they provide legal support to such homosexuals to find asylum in other countries. They also offer them counseling, organize them into support groups and teach them how to empower themselves in the face of threats.

Contrary to the above, in 2000, protections were extended to public accommodations and services in South Africa, with the commencement of the Promotion of Equality and Prevention of Unfair Discrimination Act which similarly forbids discrimination on grounds including sex, gender or sexual orientation, and establishes a system of Equality Courts to enforce the prohibition. The Employment Equity Act and the Rental Housing Act specifically forbid discrimination to employment and housing, respectively.

²⁹⁷ 10th July on Salaama road.

The Promotion of Equality and Prevention of Unfair Discrimination Act also prohibits hate speech and harassment based on any of the prohibited grounds of discrimination. The South African Constitution outlaws hate speech.²⁹⁸ This is not the case in Uganda. Hate speech is very common in Uganda. This is borne out in the media where a Ugandan tabloid, *Rolling Stone* released a list of top 100 homosexuals in the country with photos and addresses published with an accompanying banner reading “Hang them.” One year later Uganda’s leading homosexual was included on this list. Following the release of this list, Kato shared a fear for his life. A year later, David Kato was found bludgeoned to death in his home.²⁹⁹

It is important to note that South Africa has no specific “hate crime” legislation. Neither the common law nor statutory law provides any definition of what constitutes hate crime. As a result many reported cases of hate crimes such as “corrective rape” and subsequent murders rarely result in successful prosecution and conviction.³⁰⁰ Human rights organizations have criticized the South African police for failing to address the matter of bias motivated crimes. For example the NGO action aid has condemned the continued impunity and accused governments for turning a blind eye to reported murders of lesbians in homophobic attacks in South Africa as well as to cases of “corrective rapes”, including cases among pupils, in which cases the male rapists purport to raping the lesbian victim with the intent of thereby “curing” her of her sexual orientation.³⁰¹ Despite the occasional incidents of homophobia, gay people in major urban areas are fairly accepted.

Many homosexuals have decided to remain in the closet or underground for fear of persecution because of such discrimination. Some of the respondents interviewed could not easily be identified as homosexuals through their behavior or dress. This takes away the stereotype that

²⁹⁸ Constitution of South Africa, s.16.

²⁹⁹ Chris Stedman, “Gay Rights Activist, Is Killed in *Uganda*.” *New York Times*, January 27, 2011. <www.nytimes.com/2011/01/28/world/africa/28uganda.html Accessed March 17, 2011>

³⁰⁰ Juan A. Nel & Melanie Judge, “Exploring Homophobic Victimization in Gauteng, South Africa: Issues, Impacts and Responses,” *Acta Criminologica* 21, no.3 (2008): 22.

³⁰¹ South African Human Rights Commission Report of the Public Hearing on School-based Violence (2008) 9. <<http://edulibpretoria.files.wordpress.com/2008/03/sbvreportchapter-2.pdf>> (accessed February 3, 2012)

homosexuals can be identified through their physical appearance. Some are married as a cover up yet they practice homosexuality underground. As Tamale notes:

It is not surprising that most homosexuals find it difficult to “come out” of their closeted lives or to be open about their sexual orientation. Most blend within the wider society and even live under the cover of heterosexual relationships while maintaining their homosexual relationships underground. The tendency is to construct “comfort zones” where they complacently live a different and segregated lifestyle until they are rudely awakened.³⁰²

Living in a homophobic environment forces many homosexuals to conceal their sexuality for fear of negative reactions and consequences of coming out. For people who have been brought up to believe that homosexuality is a sin and a crime, the realization that they might be homosexuals can cause feelings of shame and self-loathing, leading to low self esteem. Suppressing homosexuality involves denying an important part of a person’s identity and can have a serious impact upon their life and relationships. Moreover, the dilemma of whether to come out or not may cause a great deal of personal distress. Homosexuals who live in fear of being publicly identified will often conceal their sexual orientation in order to avoid severe consequences of such exposure. This includes the risk of incurring harsh criminal penalties, arbitrary house raids, dismissal from employment and societal disapproval. Such actions may not only be considered discriminatory and a violation of the right to privacy, but also infringing the right to freedom of opinion and expressions. This was confirmed by the Yogyakarta principles:

Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or person hood through speech, deportment, dress, bodily characteristics, choice of name or any other mean, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights.³⁰³

The Yogyakarta Principles represent the status of human rights law as applied to the social classifications of sexual orientation and gender identity as studied and debated by 29 global human rights scholars, practitioners and activists who gathered in Yogyakarta Indonesia in November 2006 and published a year later. The Yogyakarta Principles in and of themselves are not binding law, though they do represent an authoritative interpretation of international law, as

³⁰² See Tamale, “Out of the closet,” supra note 15.

³⁰³ See “Yogyakarta Principles,” supra note 217.

distilled from the text and legal interpretation of a number of international human rights treaties, which *are* binding on signatory states.³⁰⁴

The study sought to find out at what stage homosexuals discovered their sexual orientation. The intention here was to direct the law to the grassroot of the practice. Four out of the twenty five (16%) respondents stated that they discovered they were homosexuals right from primary school. They felt attracted to fellow boys and fellow girls. Three out of the twenty five (12%) said they tried dating people of the opposite sex but realized they had no feelings for them. One respondent said he tried dating a girl because his parents had started becoming suspicious about his orientation. He even impregnated the girl but afterwards dumped her when he discovered that he had no feelings for her. The second respondent said that she was also forced to enter into a relationship with a man and even got a baby but after some time she also quit the relationship because she had no feelings for the opposite sex. The rest of the respondents stated that they have always been attracted to people of the same sex.

From the above, it can be asserted that homosexuals may be unable to forge meaningful relationships, be forced into arranged marriages or experience extreme pressure to marry. They might fear that a failure to marry will ultimately mark them out as homosexuals in the public eye. Social, cultural and other restrictions which require them to marry persons of the opposite sex can have the effect of violating the right to marry with full and free consent³⁰⁵ and the right to respect for private life as provided for in the constitution. Based on the findings of this study homosexuality seems to be in-born and one is not just recruited into this practice. It is a natural orientation.

While homosexuals in Uganda still struggle and try to come to terms with prohibition of same sex marriages,³⁰⁶ in November 14, 2006 homosexuals triumphantly entered their destiny when legislators in South Africa overwhelmingly passed a bill legalizing same-sex marriage.³⁰⁷ The Civil Unions Act 17 Of 2006 establishes the South African legal position on same sex marriages.

³⁰⁴ See Ettel and Zeran, "The Impact of the Yogyakarta Principles on International Human Rights Law and Development," supra note 218.

³⁰⁵ Article 31(3).

³⁰⁶ Article 31(a).

³⁰⁷ See Robinson, "End of the World Predictions," supra note 31.

In the case of *Minister of Home Affairs v. Fourie*³⁰⁸ the Constitutional Court of South Africa declared a constitutional right to same-sex marriage. The Court's holding is based on Section 9 of the Constitution of South Africa which guarantees equal rights and equal protection for all and the explicit prohibition of discrimination on the basis of sexual orientation.³⁰⁹ The court held that South Africa has a multitude of family formations that are evolving rapidly as society develops, so that it is inappropriate to entrench any particular form as the only socially and legally acceptable one. After this decision by the Constitutional Court, the promulgation and adoption of the Civil Unions Act by the South African Parliament in 2006 was inevitable. To the contrary, same sex marriages are prohibited in Uganda.

The research also sought to establish why the respondents (human rights activists) picked interest in doing this particular work. Three out of the fifteen (20%) respondents said that they picked interest in doing this particular work to defend human rights because these particular groups of people face a high degree of discrimination. That the rights of homosexuals have been infringed and yet they are human beings and they have to enjoy these rights. One out of the fifteen respondents said that he picked interest in doing this particular work because homosexuals are excluded from government planning and implementation and so he is trying to advocate for that.

Another respondent who works with the Refugee Law Project said that the LGBTI are denied asylum on grounds of sexual orientation saying that there is no persecution on them and because of this he picked interest in doing this particular work. The UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity has defined what amounts to persecution. It is to the effect that persecution should be considered to involve serious human rights violations including a threat to life or freedom as well as other kinds of serious harm as assessed in light of the opinions, feelings and psychological makeup of the applicant. A pattern of harassment and discrimination could, on cumulative grounds reach the threshold of persecution.³¹⁰ Being compelled to forsake or conceal one's sexual orientation and gender

³⁰⁸ 2005 ZACC 19.

³⁰⁹ The Constitution of South Africa, S. 9(1) (3).

³¹⁰ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1979, re-edited January 1992. Available at <http://www.unhcr.org/refworld/docid/3ae6b3314.html> (hereafter "UNHCR Handbook"), paras. 42, 60. See also, for

identity where this is instigated or condoned by the state may amount to persecution.³¹¹ Claims made by the LGBTI persons often reveal exposure to physical and sexual violence, extended periods of abuse, threat of execution and killing. These are all acts of harm and mistreatment so serious in nature that they would generally reach the threshold of persecution within the meaning of 1951 convention.

Five out of the fifteen (33%) respondents said that they picked interest in doing this particular work because they are homosexuals and have seen how LGBTI individuals have been marginalized. From the responses given by the human rights activists regarding why they picked interest in doing this particular work, it can be concluded that homosexuals have actually suffered human rights abuses. This is backed by the responses given by homosexuals on the question of whether they enjoy the legal and constitutional liberties provided for in the constitution. They all averred that they do not enjoy the above mentioned liberties.

This abuse suffered by homosexuals has prompted many human rights activists to rise and be a voice for the many homosexuals who are voiceless. By doing this, they aim at bringing to the attention of the government the fact that there is a direct violation of human rights on homosexuals yet they are human beings and ought to be treated equally like any other citizen. They also aim at influencing policy and law makers to come up with policies and laws that do not promote discrimination based on sexual orientation and gender identity. The human rights activists strongly believe in the core values of human rights being that they are: universal, inherent, inalienable, indivisible, interdependent and interrelated.

4.2.8 The Views of Respondents Regarding Penal Laws

Two out of the forty (5%) respondents said that the Penal Laws have a colonial element in it and the remaining thirty eight (95%) said that they are archaic because they were introduced by the colonialists before having human rights movements. From this observation it can be deduced that the colonialists aimed at oppressing Ugandans and that is why they came up with laws that

instance, *Refugee Appeal No. 76152*, 8 January 2008 (New Zealand RSAA), para. 34, available at <<http://www.unhcr.org/refworld/docid/47bd93cf2.html>>; *Refugee Appeal No. 74665*, (Accessed June 20, 2011).

³¹¹ RRT Case No.071818233[2008] RRTA 62,15 February 2008(Refugee Review Tribunal (RRT) of Australia),available at <http://www.unhcr.org/refworld/docid/484552e22.html> (Accessed February 8, 2011).

are repressive not putting into consideration human rights which are inherent. Much as the UDHR was promulgated in 1948 and it aimed at promoting human rights, this could not be realized in Uganda soon thereafter because Uganda had not yet attained political independence. Times have changed and the penal laws should take into account the current socio-economic conditions. They have surely outlived their usefulness and are outdated in a democratic society. This explains why the Civil Society Coalition on Human Rights and Constitutional Law was formed to reject discrimination based on sexual orientation and to advocate for the repeal of such laws.

Twelve out of the forty (15%) respondents said that the Penal Laws are vague because they say ‘if any person has carnal knowledge of any person against the order of nature.’ This provision does not mention homosexuality specifically. Even heterosexuals can fall prey to this when, for example they engage in anal sex. Secondly, the Penal Code criminalizes “unnatural” sex and homosexuality is said to fall under this section because it involves same-sex carnal knowledge. This is too vague a provision and it leaves room for abuse by the public because even heterosexuals can choose to have sex that is unnatural.

One human rights activist stated that it is very hard to convict someone under this law because the law requires you to catch them in the act, which is very difficult and that would mean peeping in people’s bedrooms which would violate the right to privacy. It can therefore be concluded that this law is redundant and dormant because no one has been charged and sentenced under this law.

Five out of the forty (13%) respondents said that the Penal Laws are draconian while the remaining thirty five (87%) said that this law is obsolete and unconstitutional and should be repealed. Homosexuals should not be penalized as laws are supposed to protect people from harm. A law that seeks to police consensual sexual conduct in private has a problem. One respondent said that the penal laws should be removed because anything happening between two consenting adults should not be criminalized as long as it is not done in public. In this sense, homosexuality can be said to be a “victimless crime.” Such Penal Laws that prohibit same-sex consensual relations between adults are discriminatory and constitute a violation of the right to

privacy. The very existence of such a law, irrespective of whether it is enforced and the severity of the penalty it imposes, may have far-reaching effects on homosexuals' enjoyment of their fundamental human rights. All the human rights activists interviewed called for the repeal of this law that criminalizes same sex consensual relations between two consenting adults.

In relation to the above, when the opinion of the human rights activists about Uganda's human rights commitments and obligation and its treatment of homosexuals was sought, all the respondents said that Uganda is not committed to its international obligations by keeping such archaic laws, persecuting and excluding homosexuals in its planning and even seeking to recriminalize them. Homosexuals have been treated or equated to paedophiles or pigs.³¹² One respondent asserted that Uganda signed international treaties³¹³ without knowing they would cover homosexuality.

While Uganda is still struggling with archaic penal laws that criminalize consensual sexual conduct in private, the South African Constitutional Court made a landmark decision in the case of *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*.³¹⁴ The court unanimously overturned as unconstitutional the law prohibiting homosexual conduct between two consenting adults in private.³¹⁵ The National Coalition for Gay and Lesbian Equality, an association representing a broad spectrum of South African LGBT organisations, launched a constitutional challenge in the Witwatersrand Local Division of the High Court. The Coalition was joined as applicant by the South African Human Rights Commission, an independent chapter nine institution created by the Constitution and tasked with the promotion and protection of human rights. The respondents were Minister of Justice the Minister of Safety and Security and the Attorney General of the Witwatersrand. The applicants asked the High Court to invalidate as unconstitutional the common-law offences of sodomy and

³¹² Harris Mirkin, "The Pattern of Sexual Politics: Feminism, Homosexuality and Pedophilia," *The Journal of Homosexuality* 37, no.2 (1999). Available at <http://snifferdogonline.com/reports/Child%20Abuse.%20Sexuality%20and%20Violence/The%20Pattern%20of%20Sexual%20Politics.pdf> (Accessed March 4, 2011)

³¹³ The International Covenant on Civil and Political Rights, The International Covenant on Economic, Social and Cultural Rights and the African Charter.

³¹⁴ CCT 11/98 (1998).

³¹⁵ "South African Court ends sodomy laws." *New York Times*. May 8, 1998. <http://www.nytimes.com/1998/10/10/south-africa-strikes-down-laws-on-gay-sex.html>.> (Accessed May 5, 2010)

commission of an unnatural sexual act, and section 20A of the Sexual Offences Act (the "men at a party" offence). They also asked court to invalidate the inclusion of sodomy as a Schedule 1 offence in the Criminal Procedure Act, and its inclusion in the Schedule of the Security Officers Act, 1987 (which had the effect of disqualifying those convicted of sodomy from being registered as security officers).

The applicants argued that because the offences applied only to men and only to sex between men, they infringed the equality clause of the Constitution because they unfairly discriminated in terms of gender and sexual orientation. They also argued that "commission of an unnatural sexual offence" was so vaguely defined that it was not compatible with the rule of law, as a person could not be certain what acts it criminalized.

In his judgement, Judge Jonathan Heher considered each of the attacked offences in terms of the equality guarantee in the Constitution. The offence of sodomy, he ruled, amounted to unfair discrimination both in terms of gender, because it criminalized an act between men that would not be a crime between a man and a woman, and in terms of sexual orientation, because anal intercourse is the gay male analogue to vaginal intercourse for heterosexuals. He then examined whether the discrimination could be justified, and observed that the only arguments for justification were based on prejudice or religious beliefs, which are irrelevant in a constitutional secular state; protection of public morals, which could be achieved by non-discriminatory sex offence laws; or the prevailing public opinion. The court therefore ruled that the offence of sodomy was inconsistent with the Constitution and invalid.³¹⁶

The decades-long struggle against apartheid which was enforced by the National White Party's white-supremacist government engineered the rapid change in South Africa. This led to an intense aversion against racism by the Black majority which expanded to include dislike of discrimination of all types. Having been oppressed so viciously for so many decades by a Christian-based White government, they had no desire to turn around and oppress others,

³¹⁶ *Ibid.*

whether on the basis of religion, race, skin, color or sexual orientation.³¹⁷ Campbell Lyons the Executive Director of Khululekani Institute for Democracy explains that the National party African National Congress (ANC) and others negotiated a constitution and the democratic government attempted to remedy past injustices by guaranteeing equal rights for all. After the gross inequality and discrimination that South Africa suffered it was inevitable that the guarantee of equality would lie at the heart of the new constitution. In large part, South Africa has noted its past and acted in a manner to ensure that all persons no matter how diverse would not be discarded from legal protections.³¹⁸

In the same vein, Uganda has also gone through a period of political turmoil characterized by violence. In 1970s we had the dictatorial regime of Idi Amin which was responsible for the deaths of 300,000 opponents. Then from 1980-1985, guerilla war and human rights abuses under Milton Obote that claimed at least another 100,000 lives. Ugandans should have learnt from the past experience that led to violence and loss of lives and in effect get rid of laws that are discriminatory. As earlier discussed, homosexuality is a crime in Uganda's Penal Code Act. We also have the Anti-homosexuality bill which if passed into law would grant death penalty to homosexuals. The bill sets out provisions on what it names "aggravated homosexuality" which would lead to death penalty.

4.2.9 The views of the Respondents regarding the Anti-Homosexuality bill

The respondents' views about the anti-homosexuality bill were also sought. Thirty two out of the forty (80%) respondents said that the bill violates International law while the remaining eight (20%) said that the bill had gone overboard. Clause 18 of the bill provides for the nullification of any International treaty whose provisions are contradictory to the spirit and provisions of the bill. Thirty six out of the forty (90%) respondents also said the bill is disproportionate and the penalty provisions are disproportionate to the offences while the remaining four (10%) said that the bill is redundant. It can be noted that the bill proposes to elevate the crime of homosexuality to the same level as terrorism and treason and an even higher plane than murder or rape. There is

³¹⁷Robinson, BA, "Religion and Apartheid" *Ontario Consultants on Religious Tolerance*.

<http://www.religioustolerance.org/end_wrlld.htm> (accessed June 11, 2007).

³¹⁸ Paul Collier, *Wars, Guns, and Votes: Democracy in Dangerous Places* (New York: Harper Perennial, 2010).

no rational basis for such attention to homosexuality. The law should draw a distinction between consensual and non-consensual sex.

The human rights activists made a loud cry that the bill, if passed into law, would curtail their work. By criminalizing “Promotion of Homosexuality” the bill would bring to an end the advocacy work of the human rights activists for equality of persons and it would bring an end to coalitions like the Civil Society Coalition on Human Rights and Constitutional Law that was formed to oppose this draconian bill. This would violate their freedom of expression and association which includes the freedom to form and join associations including civic organizations. It would also contravene article 38(2) of the constitution that gives a right to every Ugandan to participate in peaceful activities to influence the policies of government through civic organizations. This is not justifiable in a democratic society like Uganda. All the forty (100 %) respondents also said that the death penalty is harsh and should be abolished. They said that it is too severe a punishment that consenting homosexual adults having sexual intercourse will have to pay for their lives.

Five out of the fifteen (30%) human rights activists also reported that the bill is based on ignorance of human sexuality because it states that it aims at protecting the traditional family. The need to protect the traditional family would only suffice if there was a real likelihood of the traditional family being severed. Threats alone cannot be used as a stepping stone to limit a right i.e., not all human beings are heterosexual. The human rights activists and homosexuals called for the withdrawal of the bill because it is based on misrepresentation and the repercussions are severe and regrettable.

4.3 Conclusion

In view of the foregoing findings and discussion, it is submitted that homosexuals have faced discrimination in different areas with far reaching effects in their lives. As regards the protection of homosexuals in South Africa and Uganda, the foregoing comparative analysis shows that South Africa has constitutional, judicial and legislative developments in the protection of the right to freedom of sexual orientation. Although the constitutional and legal system in South Africa theoretically ensures equality, social acceptance is generally lacking, especially outside

urban areas, there have been a number of cases in which homosexual women have been the victims of murder, beating or rape.³¹⁹ This has been posited in part to be because of the perceived threat they pose to the traditional male authority. Cultural prejudices against gays and lesbians remain strong, that attitudinal changes do not necessarily correlate with rights, and that rights *do* not necessarily result in justice.³²⁰ This explains why homosexuals in South Africa still face discrimination and are often victims of violence and crimes.

³¹⁹ Abrahams Naeemah, "Sexual Violence Against Women In South Africa," *Sexuality in Africa Magazine* 1, no.3 (2004).

³²⁰ Ben Roberts and Vasu Reddy, "Pride and Prejudice: Public attitudes towards Homosexuality," *HSRC Review* 6, no.4 (Nov 2008).
<http://www.hsrb.ac.za/HSRC_Review_Article-121.phtml> (accessed June 15,2010)

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

From the investigation carried out, it comes out clearly that homosexuals in Uganda do not generally enjoy the legal and constitutional liberties enjoyed by other citizens. As much as Uganda is a party to the International and Regional human rights mechanisms and has got a Bill of Rights in its Constitution and a legal framework for the protection of minorities, a contradiction exists between Uganda's human rights commitments and its treatment of homosexuals. The 1995 Constitution guarantees equality and freedom from non-discrimination but this is not a reality for homosexuals who have suffered human rights abuses.

The Penal Code Act criminalizes homosexuality and the Anti-Homosexuality Bill 2009 proposes to maintain that status quo – retain homosexuality as a crime. The prohibition of homosexual practices has impinged upon the personal liberties of some Ugandans. As seen in the findings, both the current law and the bill constitute prima facie violations of a number of human rights. The rights violated according to the findings are the right to privacy, freedom of association and expression, right to health, right to liberty and freedom from non-discrimination. It should be noted that the Penal Laws are archaic, and outdated in such a democratic society. By keeping such archaic laws, persecuting and even seeking to recriminalize them, Uganda is not committed to its international obligations of upholding human rights and fundamental freedoms.

The criminalization of same sex conduct is discriminatory. In the study findings discrimination against homosexuals was revealed within religious institutions, in schools, from family and friends, in employment, sports club and in health facilities. The effects of such discrimination are far reaching ranging from under achievement, school dropout, low self-esteem, mental ill-health, high suicide rates, rejection and expulsion from families, harassment, abuse, blackmail to firing of employees because of their sexual orientation. Although this apparent persecution has attracted loud cries both nationally and internationally, the government has done nothing to alleviate the problem.

The social-cultural norms and religious beliefs constitute the screws that keep the clamp of sexual repression firmly in place. Homosexuality has been attacked on grounds of culture. Culture changes differs from one society to the other. Most of what we hold so dearly and cherish today are western concepts that were adopted from the colonialists. Christianity and Islam are not indigenous. Even the clothes we put on are western. Homosexuality has been accused of being a western vice. The reality is that even our culture has been compromised and so there should be no reason as to why homosexuality should be prohibited on cultural grounds. Homosexuals should be tolerated.

Arguments against homosexuality have a religious connotation. Most Ugandans look to the biblical teachings to condemn homosexuality. Jesus Christ constantly preached about love and understanding of the wounded, marginalized and despised. Religious leaders should be accommodative and preach a message of love and not condemnation.

Homophobia still rides high in Uganda. Living in a homophobic environment has forced many homosexuals to remain in the closet and conceal their sexuality for fear of harsh criminal penalties, arbitrary harsh raids and societal disapproval. These ruthless conditions for homosexuals in Uganda have detailed the deep contrast with South Africa's continuing progress for homosexual equality. While Uganda slips away into western evangelical influence, anti-gay legislation and media led 'outing campaigns', South Africa moves forward with a Constitution that guarantees legal protection, the passage of gay marriage and NGOs that drew off the aspects of global tolerance for homosexuals. A staunch ignorance stifles any alleviation to the dehumanization of homosexuals. South Africa must stand as an example of triumph and progress for homosexuals. Uganda needs to note that homosexuals deserve a voice. They deserve acceptance and legal protection. Most of all they deserve humanity.

It is against this background that the researcher advances some proposals and solutions to ensure change and equality in the treatment of homosexuals.

5.2 Recommendations

Homosexuality should be decriminalized. This law was imported to Uganda via India in the late nineteenth century. *Naz Foundation v. Govt. of NCT of Delhi*³²¹ is a landmark Indian case decided by a two-judge bench of the Delhi High Court, which held that treating consensual homosexual sex between adults as a crime is a violation of fundamental rights protected by India's Constitution. Section 377 of the Indian Penal Code, introduced during British rule of India, criminalized "carnal intercourse against the order of nature." The movement to repeal Section 377 was led by the Naz Foundation (India) Trust, a non-governmental organization, which filed a lawsuit in the Delhi High Court in 2001, seeking legalisation of homosexual intercourse between consenting adults. The Court located the rights to dignity and privacy within the right to life and liberty guaranteed by Article 21 (under the fundamental Right to Freedom charter) of the Constitution, and held that criminalization of consensual gay sex violated these rights.³²²

The Court also held that Section 377 offends the guarantee of equality enshrined in Article 14 (under the fundamental Right to Equality charter) of the Constitution, because it creates an unreasonable classification and targets homosexuals as a class. Public *animus* and disgust towards a particular social group or vulnerable minority, it held, is not a valid ground for classification under Article 14. Article 15 of the Constitution forbids discrimination based on certain characteristics, including sex. The Court held that the word "sex" includes not only biological sex but also sexual orientation, and therefore discrimination on the ground of sexual orientation is not permissible under Article 15. The Court also noted that the right to life under Article 21 includes the right to health, and concluded that Section 377 is an impediment to public health because it hinders HIV-prevention efforts. The section was declared unconstitutional in so far as it criminalises consensual sexual acts of adults in private.

³²¹160 Delhi Law Times 277 (Delhi High Court 2009).

³²² On December 11, 2013, the Supreme Court overturned the decision of the Delhi court and re-criminalized same-sex relationships in India. It said that the 2009 order of the high court is "constitutionally unsustainable as only parliament can change a law, not courts."

<judis.nic.in/supremecourt/imgs1.aspx?filename=41070>

Homosexuality is a crime under the Penal Code Act of Uganda.³²³ This law is not clear and is incapable of definition. Homosexuals live in constant fear and threats of arrest and prosecution. Once homosexuality is decriminalized, the society will have no reason to harass homosexuals since their action will have no legal backing. In order to take steps to eradicate all forms of discrimination and act in conformity with established International Human Rights standards, Uganda should immediately repeal the so-called sodomy laws just like India did.

Homosexuals should challenge violations of their human rights through court action. The constitution enjoins any person who claims that a fundamental or other right or freedom has been infringed or threatened to apply to a competent court for redress.³²⁴ This right to bring an action is not only limited to the victims or aggrieved parties. It extends to other persons or organizations that are enjoined to bring an action against the violation of another person or groups' human rights.³²⁵ It was through court action that the constitutional court in South Africa declared the common law offence of sodomy as unconstitutional³²⁶ by invoking the right to equality which is provided for in the South African constitution.³²⁷ Courts in Uganda have not yet pronounced themselves on the question of sexual orientation. It should be noted that although the case of *Victor Juliet Mukasa & Yvonne Oyo v Attorney General*³²⁸ did not directly concern the question of sexual orientation, it illustrates that the violation of citizen's rights cannot be tolerated simply because of their sexual orientation.³²⁹ Therefore there is a need for court action to challenge the human rights violations perpetrated by the police and other authorities.

The government should include homosexuals in all programmes especially the health programmes. Since they are not recognized in Uganda as minorities they are not at all addressed in the country's health programmes including responses to the HIV/AIDS pandemic. AIDS and STDs have become rampant in LGBT communities. In some cases the medical personnel does

³²³Section 145.

³²⁴ Article 50(1) of the Constitution of Uganda.

³²⁵ Article 50(2).

³²⁶ National Coalition for Gay and Lesbian Equality v The Minister of Justice 1998 12 BCLR 1517 (CC).

³²⁷ Section 9(3).

³²⁸ Misc. Cause No.246/06.

³²⁹ See Twinomugisha and Mubangizi, "Protecting the Right to Freedom of Sexual Orientation," supra note 155.

not attend to them insisting that they should first bring their partners. The law ³³⁰provides for affirmative action in favour of “groups marginalized on the basis of any reason created by history, tradition or custom for the purpose of redressing imbalances which exist amongst them.” Homosexuals definitely fall within this category and should be given attention in HIV/AIDS programme. The government should put in place facilities that enhance the position of homosexuals. These facilities include provision of safe and anal sex lubricants and shelters for counseling and sensitization.

The Anti-Homosexuality bill should be completely withdrawn from parliament because if passed into law it would infringe on many other human rights and it would conflict various human rights standards and principles as well as many International Human Rights instruments that Uganda is party to. This bill is a duplication of the law in that the Penal Code in section 145(a) already criminalizes “carnal knowledge of any person against the order of nature.” The bill simply restates existing law and because of this, it is redundant and contradicts the principle that laws should only be adopted to address a nuisance that has previously not been legislated upon.

The Government should implement clear policies to address the current impunity for torture. It should specifically educate officials to end social stigma surrounding homosexuality which heightens same-sex practicing peoples’ vulnerability to torture and cruel, inhuman and degrading treatment. Article 24 of the constitution provides for freedom from torture, cruel, inhuman or degrading treatment or punishment. Article 44 is to the effect that this right is non-derogable. The UN Special Rapporteur on Torture has specifically addressed the prevalence of the use of torture against sexual minorities. In his 2001 report, he outlined communications he had received where members of sexual minorities have been subjected, inter alia, to harassment, humiliation and verbal abuse relating to their real or perceived sexual orientation or gender identity and physical abuse, including rape and sexual assault.³³¹ Likewise in Uganda homosexuals face torture which has to be brought to an end.

³³⁰ Article 32 of the constitution.

³³¹ “Report of the Special Rapporteur on the question of torture and other cruel, inhuman and degrading treatment or punishment,” 3 July 2001, UN Doc A/56/156, p.6.

The Government of Uganda should ensure that the police are held accountable for their acts and in particular ensure that extortion and arbitrary arrests are strictly prohibited. The police have abused their power. As discussed earlier on in the data analysis, the police often raid the homes of homosexuals and seize documents and other materials looking for incriminating material and arbitrarily arresting and detaining them. In most occasions the police have no warrant of arrest. Abuse of police power also comes in the form of extortion. Extortion is the single most common abuse facing gay men and lesbians in Uganda. IGLHRC and SMUG have documented dozens of cases of gay men and lesbians who have been forced to pay money to extortionists. Extortion usually takes the form of a threat by someone to inform police, family, school or employers about someone's sexuality. The police themselves often act as the blackmailer, and when they are not, they are still often complicit in the crime. Extortion can also take the form of demands for sexual favors from lesbians and bisexual women who are at particular risk for this type of abuse placing them at increased risk for sexually transmitted diseases including HIV and unwanted pregnancies. When the power of the police is checked, this vice will also be checked.

The Government of Uganda should sensitize the general public about the existence of LGBT rights in the international culture of human rights through media, seminars, workshops and in schools. Most Ugandans are ignorant about this. This ignorance about LGBT rights has also discouraged many LGBT people from coming out to advocate for their human rights and dignity due to fear of arrest and detention. The findings of this research show that most people have no idea what homosexuality is all about. Despite the many Human Rights Organizations, few have come out to openly support and educate the public about LGBT rights. Most of them are shy to advocate for LGBT rights. The few, which have been established specifically for the plight of LGBT rights, lack financial ability to advocate for the respect of LGBT rights. Many of them have failed to register thus lacking legal existence in Uganda.

Government should put a framework in place to implement International Human Rights provisions in order to protect and support sexual minorities in Uganda. Lack of a supportive framework to implement the inspirations of International Conventions and declarations for the protection of LGBTs in Uganda, hampers the task of harmonizing constitutional rights of sexual

minorities with International standards, and makes the enforcement and monitoring of those rights more difficult.

Parliament should amend the 1995 constitution to clearly, in ascertainable words include sexual orientation as a ground for non-discrimination. Unlike South Africa which included sexual orientation among the listed grounds on which unfair discrimination is prohibited, Uganda's constitution does not. Important to note is that the inclusion of the prohibition laid a foundation for decriminalizing the common law offence of sodomy in South Africa. The express inclusion of sexual orientation in Uganda's constitution will give homosexuals a ground for legally challenging the violations of their rights.

Parliament should amend the 1995 constitution to also include homosexuals under the minorities. Article 32 provides for affirmative action to minorities. Article 33 provides for the rights of women, article 34 provides for the rights of children and the rights of people with disabilities in article 35. This however indicates that the framers of the Uganda Constitution had a limited view of minorities. They missed out to affirm that homosexuals in Uganda are part and parcel of minorities and that they are entitled to the minority rights laid down in the constitution. It is no wonder that the sexual minorities of Uganda rarely participate in the decisions affecting the respect of their fundamental rights as required under article 36 of the constitution.

Parliament should repeal section 15 (6) (d) of the Equal Opportunities Commission Act. This provision aims at exempting homosexuals from being afforded equal opportunities hence contrary to the spirit of the Act that aims at ensuring that policies, laws, plans and programmes are compliant with equal opportunities and affirmative action in favour of groups marginalized on the basis of among others sex. All other minorities are left out in the process of keeping homosexuals out of benefitting from the equal opportunities hence rendering the commission irrelevant. This Act negatively impacts persons of the homosexual orientation.

The state should preserve the identity of sexual minorities by abstaining from policies that negatively impact on LGBT people and embarking on those that shall protect them against activities of the society which tantamount to human rights violations. There is, therefore, a need

to strengthen the political commitment to LGBT rights in Uganda. The state should put an end to the defamatory and harassing campaigns against homosexuals and reconfirm its commitment to protecting the rights of all persons regardless of their sexual orientation or gender identity in anti-discrimination and equal opportunity legislation and bodies; The LGBTI activists should organize sessions where they can sit with the government officials on a neutral ground. The interaction would enable more awareness and sensitivity to the issues advocated for; specifically the non-discrimination in all spheres.

State discrimination on the basis of sexual orientation should be outlawed. This is the only way the rights of sexual minorities can gain full recognition and respect. The reason why homosexuals face discrimination in Uganda is because homosexuality threatens patriarchy. Patriarchy uses sexuality as a tool to create and sustain gender hierarchy in African societies by enshrouding it in secrecy and taboos. One of the stated objectives of the Anti-homosexuality bill is to protect the traditional family by prohibiting any form of sexual relations between persons of the same sex. The public should be sensitized on the fact that we are living in a society that is dynamic which encompasses both homosexuals and heterosexuals. The state should not promote patriarchy and look at marriage as merely for procreation. The law should not concern itself with sexual matters but instead direct its resources into important matters.

Culture should not be used as a yardstick to condemn homosexuality. The African culture has been presented as the basis of homophobia in Uganda. Culture is not static. It changes with time. What we cherish and hold so dearly today are western concepts. Some people have argued that homosexuality is a western vice. What then will we say about Christianity or Islam? Are they indigenous or they were imported by the colonialists? How about education and the dressing? Our culture has been compromised and so we should be tolerant with homosexuals.

Religious inspired homophobia should be discouraged by pastors/priest/bishops/pope. Religion may be considered as the thread that runs through the whole breadth of culture. Most people depend on religion to denounce homosexuality as deviant and unholy behavior. Rather than condemning and passing judgement on homosexuals, religious leaders should preach a message of love, tolerance and reconciliation. Jesus Christ preached love and he welcomed even the so

called sinners to dine with him. He called upon people to have unity even in diversity. Since Christ is the head of the church and we follow into his footsteps, we must emulate his example by loving everyone unconditionally.

5.3 Further areas of research

This research does not claim to be all embracing for what it has dealt with is only a drop in the ocean of the big homosexuality question. There is still substantial virgin ground that scholarship has not addressed. This research dealt with Sexual Orientation and the Law. There is a need to research into other aspects of homosexuality apart from the Law and Human Rights. Further research should be directed on homosexuality versus morality, the relationship between homosexuality and HIV/AIDS, Homosexuality: Nature or Nurture, the “un-Africanness” of homosexuality, how tolerance for homosexuals can be achieved just to mention but a few.

POST SCRIPT: PERTINENT ISSUES OF THE BILL TURNED INTO AN ACT AS OF FEBRUARY 14, 2014

Much of the analysis in this dissertation was based on the Anti-homosexuality Bill, 2009. A short while after completion of the dissertation, the Bill was passed by Parliament³³² and later signed into law by the President³³³ defying local and international pressure against passing it into law. It is therefore pertinent to look at the Act to establish the extent to which its content nuances, moves away or modifies the content of the Bill and therefore the arguments put forward in the dissertation.

So many issues surrounded the passing of the bill. As Kristof Titeca puts it, “Sexual identity has only recently become an important factor in Ugandan society and politics, as the issue has become politically mobilized by a range of actors.”³³⁴ The Bill coincided with the political ambitions of a range of actors which acted as an excellent platform for them to further their interests. This internal political climate helped the Bill to gain prominence and importance within the public debate which was in turn further fuelled by external interventions. This Bill was also popular at the local levels where constituencies wanted their Members of parliament to deliver on the Bill. Churches had also consistently supported this Bill both on a local and national level. Given the above reasons, the Bill had to be passed into law.³³⁵

First, the Anti-Homosexuality Bill originally included a clause which would punish “Aggravated homosexuality” with a death penalty.³³⁶ The death penalty was dropped in favour of life imprisonment. Clause 14 that provided for the offence of failure to disclose the offence of homosexuality within twenty four hours was also dropped as was clause 16 on extra-territorial jurisdiction. Although it is good that some of the more draconian provisions of the bill were dropped, the fact is that two consenting adults engaged in same sex relations in private are still criminalized and have to pay for their actions with their life. The law is still essentially

³³² December 20, 2013

³³³ February 24, 2014

³³⁴ Kristof Titeca, “Uganda’s Anti-Homosexuality Bill : Looking beyond a single explanation.”

africanarguments.org/.../ugandas-anti-homosexuality-Bill -looking-beyond-a- single-explanation-by-kristof-titeca (Accessed April 23, 2014)

³³⁵ *Ibid*

³³⁶ The Anti- Homosexuality Bill , Clause 3(2)

draconian. This in turn increases the social stigmatization of homosexuals and makes them more vulnerable to violence and human rights abuses.

The passing of the Act has several implications in Uganda. It is unconstitutional, redundant and disproportionate. It sets a precedent for strict government control and censorship and limits on individual citizen's fundamental rights and freedoms guaranteed by the Constitution. This basically means that Uganda is not committed to her International obligation of abiding by, upholding and safeguarding fundamental rights and freedoms. The draconian measures to be taken by this law may succeed in further narrowing down the political space rather than the stated objectives of the law. A major problem will be how individual actors will understand and enact the law.

This law has been condemned by Human Rights Groups and several western countries. Some Ugandan donors have since cut Aid. The Civil Society Coalition on Human Rights and Constitutional Law filed a petition in the constitutional court challenging the new Act.³³⁷ The activists argue that the Anti-Homosexuality Act violates Ugandans' Constitutionally guaranteed right to: privacy, to be free from discrimination, dignity, to be free from cruel, inhuman and degrading treatment, to the freedoms of expression, thought, assembly and association; to the presumption of innocence, and to the right to civic participation. The petitioners argue that the penalty of life imprisonment is disproportionate and that the Bill was passed without a parliamentary quorum. The petitioners are calling for the Constitutional Court to pronounce itself urgently on the legality of this Act, and to issue an injunction against enforcement as the case proceeds.³³⁸

The petitioners have also called for the High Court to issue an order preventing the media from continued inciting of hatred and violation of privacy by publishing the names and pictures of people accused of being lesbian, gay, bisexual or transgender,³³⁹ saying that since the signing of the Bill, there have been a number of allegations of violence and retaliation against people

³³⁷*Human Rights Awareness & Promotion Forum (HRAPF), Center for Health, Human Rights & Development and eight others v Attorney General*, Constitutional Petition No.08 of 2014

³³⁸Civil society petition court over Anti-Homosexual Act – The Daily Monitor March 11, 2014
<www.monitor.co.ug/...petition...Anti-Homosexual-Act/-/.../...> (Accessed in April 21, 2014)

³³⁹“Exposed! Ugandans 200 Top Homos named.” *Red Pepper* 24, February 2014

known or suspected to be gay, ranging from uncalled for evictions by many landlords of their tenants, to the threat of violence by community members. The Constitutional court is yet to hear this matter.

In sum it can be asserted that though they were attempts to change some clauses in the Anti-Homosexuality Bill due to local and international pressure, the changes are negligible. It does not change the spirit of the Act that aims at legislating against homosexuality and stumping it out completely. This does not also in any way change the arguments advanced in my dissertation. I therefore call for the repeal of the Anti-Homosexuality Act, 2014.

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APPENDICES

APPENDIX A

LIST OF PERSONS INTERVIEWED

1. Retired Bishop Christopher Ssenyonjo at Bukoto, Kampala on 15th June 2011.
2. Mr. Paul Epenu at Kamwokya, Kampala on 3rd July 2011.
3. Ms. Juliana Nakiyimba at Ntinda, Kampala on 6th June 2011.
4. Mr. Davis Opige on Salaama road, Kampala on 2nd July 2011.
5. Mr. Micheal Ssenfuma at Luwum street, Kampala on 20th July 2011.
6. Mr. Charles Balondemu on Salaama road, Kampala on 10th July 2011.
7. Samuel Odhiambo at Ntinda, Kampala on 5th August 2011.
8. Evelyn Nekesa at Nsambya, Kampala on 30th August 2011.

APPENDIX B

INTERVIEW GUIDE FOR HUMAN RIGHTS ACTIVISTS

Dear respondent, this Interview guide is designed to carry out research on Sexual Orientation and the Law taking a case study of Kampala district. The information collected shall be kept confidential. Your co-operation will be highly appreciated. Thank you.

PROFILE OF THE RESPONDENT

Name.....

Sex.....

Place of work.....

Age.....

Profession.....

1. What do you understand by the word ‘human rights?’
2. How are these rights expressed or guaranteed?
3. Have you ever done in the past or are you doing any work related to sexual minorities particularly gays and lesbians?
4. If so, how long have you done this work? [If not, why not?]
5. Why did you pick interest in doing this kind of work?
6. What is your opinion on the issue of the homosexuals in Uganda enjoying the legal and constitutional liberties provided for in the constitution?
7. Do you think they enjoy the legal and constitutional liberties as heterosexual citizens?
8. Why do you say so? Please explain
9. What is your opinion about Uganda’s Human Rights Commitments and obligations and its treatment of homosexuals?
10. What is your view on the Penal laws?
11. What is your view on the Anti-Homosexuality bill?
12. What proposals and solutions can you advance in line with the above?

APPENDIX C

INTERVIEW GUIDE FOR HOMOSEXUALS

Dear respondent, this Interview guide is designed to carry out research on Sexual Orientation and the Law taking a case study of Kampala district. The information collected shall be kept confidential. Your co-operation will be highly appreciated. Thank you.

PROFILE OF THE RESPONDENT

Name.....

Gender.....

Place of work.....

Age.....

Profession.....

1. Where do you live?
2. Whom do you live with?
3. Do you go to school? [If yes, which school do you go to?]
4. What do you do for a living?
5. What is your sexual orientation?
6. Do you have friends?
7. What is the sexual orientation of your friends?
8. Do you interact with them freely?
9. Have you faced any discrimination experiences at any level?
10. What perception do people have about you?
11. How do they treat you?
12. Why do you think they treat you like this?
13. Have you heard about the Penal laws? [If yes, what is your comment on these laws?]
14. Have you heard about the Anti-Homosexuality Bill? [If yes, what is your comment on this bill?]

Thank you.