Strathmore University
Law School

and Lesbians and Transexuals.

GAY RIGHTS ARE HUMAN RIGHTS: A CASE FOR THE DECRIMINALISATION OF HOMOSEXUALITY IN KENYA.

A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE BACHELOR OF LAWS DEGREE

STUDENT'S NAME: KIMEMIA, MARY WAMBUI

STUDENT'S REGISTRATION NUMBER: 072402

SIGNATURE OF SUPERVISOR:
Kimemia

DATE: 22/1/2016

STRATHMORE UNIVERSITY LAW SCHOOL

NAME OF SUPERVISOR: JOHN OSOGO AMBANI

SIGNATURE OF SUPERVISOR: _____

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DECLARATION

I declare that this dissertation is my original work and has not been submitted for the award of a degree or any other award in any other university.

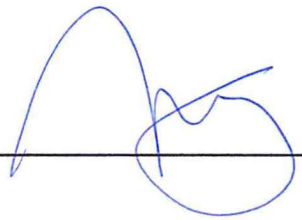
Signature: Kimemia Date: 22-1-2016.

Kimemia Mary Wambui

Adm. No. 072402

Supervisor

This dissertation has been submitted for examination with my approval as University Supervisor.

Signature:  Date: 22-1-2016.

Mr John Ambani

Strathmore Law School

ABSTRACT

At present, Kenya's Penal Code prescribes a punishment of up to five years imprisonment for the offence of 'gross indecency' between males; whether committed in public or private. It further criminalises sexual relations between males which the Act refers to as "*indecent practice between males*" and "*carnal knowledge... against the order of nature*"; thus forming Kenya's anti-sodomy law clause. This is despite Kenya's ratification of international law instruments such as the ICCPR, ICESCR and the African Charter on Human and People's Rights; all which prohibit the criminalisation of homosexuality.

This paper, taking a normative approach, looks at the provisions of the above instruments and the judicial decision arising from them and establishes that the said instruments do in fact prohibit their state parties from criminalising homosexuality. It then uses South Africa as a comparative study from which Kenya can and should borrow from; with its inclusion of sexual orientation as a non-discriminatory ground in its constitution. It therefore establishes that there is in fact an international law and comparative law consensus against the criminalisation of homosexuality.

It then looks at the legal and practical situation in Kenya and establishes that Kenya is in fact in violation of its international law obligations. In conclusion, it offers several recommendation key among them, the decriminalisation of homosexuality in Kenya.

ABBREVIATIONS

ECHR- European Convention on Human Rights

ECtHR - European Court of Human Rights

ECmHR- European Commission of Human Rights

GALCK- Gay and Lesbians Coalition of Kenya

HRC - Human Rights Committee

HRW - Human Rights Watch

ICCPR - International Covenant on Civil and Political Rights

ICESCR - International Covenant on Economic Social and Cultural Rights

MSM - Men who have Sex with other Men

NGO - Non- Governmental Organisation

LIST OF CASES

1. Baehr v. Lewin, (Haw. 1993)
2. Dudgeon V. United Kingdom Of Great Britain And Northern Ireland 45 Eur. Ct. H.R. (1981)
3. Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others[2015] Eklr
4. L. & V. v Austria, 2003-I Eur. Ct. H.R. 29
5. Marcx v Belgium 31 Eur. Ct. H.R (1979)
6. Minister of Home affairs v. Fourie, 2006(3) BCLR 355 (CC)
7. Modinos V. Cyprus, 7/1992/352/426 (European Court Of Human Rights 1993-04-22)
8. National Coalition for Gay & Lesbian Equality v Minister of Justice of South Africa & Others (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998)
9. Satchwell v. President of the Republic of South Africa & another, 2002(6) SA 1 (CC)
10. Toonen –v- Australia, U.N. Human Rights Comm., Commc'n No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994)

CHAPTER 1: INTRODUCTION

Background on the Problem

There are various citations that indicate that homosexuality was indeed a common and accepted practice in African societies, prior to imperialism.[1] Further studies show that homosexuality was very much present in Africa dating as far back as centuries preceding colonisation[2]. Although not so widely accepted, homosexuality, taking the form of sexual relationships between men and boys, was a tolerated[3] practice. Based on these findings, it is plausible for the assumption that homosexuality goes against African practices and culture to lose merit. Scientific research further shows that Africans were not heteronormative[4] in nature. There was sexual fluidity[5] in African communities.

Narrowing down to the Kenyan context, organised movement of the same sex orientation community was first seen in 1997 with the formation of Ishtar MSM (Men who have Sex with other Men). However, in 1999, homosexuality was described as being "*a scourge that goes against Christian teaching and African traditions*"[6] by the former president of the Republic of Kenya, Daniel Toroitich Arap Moi. Following the formation of MSM, the Gay and Lesbians Coalition of Kenya (GALCK) was founded as an umbrella organisation in 2006 and currently has 9 official member organisations[7].

The 2010 Kenyan Constitution saw the progression of laws[8] and in particular the protection and observation of the Bill of Rights. Even so, not all Kenyans have been able to fully enjoy this progression. Same sex oriented Kenyans are among those who have yet to fully enjoy the rights prescribed to be basic Human Rights such as equality and freedom from discrimination[9], human dignity[10], privacy[11] and freedom of expression.[12]

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[1] Stephen O. Murray, '*Homosexuality in "Traditional" sub-Saharan Africa*' (1998)
[2] Roscoe M *the Mamlukes, 'In Cultural Diversity and Homosexuality'*(1987)
[3] Evans – Pritchard, E. E *"Sexual Inversion among the Azande"* (1970), 1428 – 1434
[4] Heteronormative; relating to a world view that promotes heterosexuality s the normal/preferred sexual orientation – Oxford Dictionary
[5] Bernedette Muthien '*Heteronormativity in the African Women's Movement*'
[6] Moi condemns gays. See http://news.bbc.co.uk/2/hi/africa/461626.stm
[7] GALCK members available at http://www.galck.org
[8] Courtney E. Finerty *"Being Gay in Kenya: The Implications of Kenya's New Constitution for Its Anti-Sodomy Laws"* , 432
[9] Article 27, Constitution of Kenya
[10] Article 28, Constitution of Kenya
[11] Article 31, Constitution of Kenya

Statement of Problem

This is seen where the Penal Code[13] prescribes a punishment of up to five years imprisonment for the offence of 'gross indecency' between males; whether committed in public or private.[14] This section of the law is what essentially forms what is referred to as anti-sodomy laws. It criminalises sexual relations between males which the Act refers to as "*indecent practice between males*"[15] and "*carnal knowledge... against the order of nature*".[16]

This thus gives effect to the first problem which suggests discrimination on the basis of sex in Kenya, which in some precedential instances is taken to mean sexual orientation, where sexual orientation is not expressly stated as a non-discrimination ground.[17] The section also suggests an infringement on the right to privacy on males of homosexual orientation. This then suggests violation of Article 31 of the Constitution of Kenya. Moreover, enforcing a punishment merely on the basis of sexual orientation violates the person's inherent dignity as a human being.

The continued existence of this law has formed basis for the justification of constant abuse of persons of same sex orientation thus making them susceptible to constant harassment, verbal and physical injury as well as social discrimination[18]. Therefore, although not actively implemented, it does not take away the fact that its mere existences amounts to the violation of the rights of the same sex orientation community.[19]In addition, it has facilitated the tabling of legislation that is aimed at actively enforcing the criminalization of homosexuality in Kenya.[20]This is in emulation of our neighbours, Uganda, who recently attempted to pass into law the Anti-homosexuality Bill[21] which prescribes the punishment of death for the offense of 'aggravated homosexuality'.[22]

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[12] Article 33, Constitution of Kenya
[13] Penal Code Act, (1948), CAP 63 of the laws of Kenya
[14] Chapter XV, section165 , Penal Code Act, (1948), CAP 63 of the laws of Kenya, ("Indecent practices between males Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.")
[15] Section 165, Penal Code Act (1948)
[16] Section 162, Penal code Act, (1948)
[17] Toonen v Australia (1994), U.N. Human Rights Committee
[18] Kenya Human Rights Commission, *'The Outlawed Amongst Us -A Study on The Same Sex Orientation's Community's Search For Equality And Non-Discrimination In Kenya'* pg 7
[19] Modinos v Cyprus, 7/1992/352/426 (European Court of Human Rights 1993-04-22)
[20] The draft Anti-homosexuality Bill, No.5 of 2014
[21] The Anti-Homosexuality Act, 2014(Uganda)
[22] Section 3,The Anti-Homosexuality Act

Methodology

The methodological approach of this paper is that of a comparative study. It seeks to compare Kenya's criminalisation of homosexuality with that of the emerging international and comparative law consensus with human rights in favour of sexual orientation.

a. Data collection

The study relies on primary sources such as the Constitution, newspaper articles, broadcast features, and interviews and focused group discussions. The focused group discussions shall comprise of persons of same sex orientation, persons against criminalisation of homosexuality, persons in support of criminalisation of homosexuality, sympathisers of the gay community and neutral parties. This is aimed at acquiring a view that encompasses the different categories of persons in society.

I have also relied on secondary data. This includes scholarly journals, books and articles written on the rights of the same sex orientation community and the journey to the attainment of these rights. Moreover, seeing as the study takes a normative approach in its analysis of the above research problem, it also relies quite heavily on international law instruments and case law with an aim to illustrate the progressiveness of laws on this issue in other jurisdictions from which Kenya should be informed by.

b. Data analysis

The data obtained in this study shall be qualitative. It shall therefore be analysed and evaluated in the context and scope of the research objectives and hypothesis.

Research Objectives

1. To look at the emerging consensus in international and comparative law against the criminalisation of homosexuality.
2. To look at whether Kenya's continued criminalisation of homosexuality contradicts the emerging consensus.
3. To make recommendations to the effect of decriminalisation of homosexuality in Kenya.

Hypothesis

1. Kenya's laws criminalise sexual orientation in its provisions under section 162- 164 of the Penal code Act.

2. Emerging international law consensus and comparative jurisdictions are in agreement with human rights in favour of sexual orientation.
3. Continued criminalisation of homosexuality has resulted in violation of human rights.
4. The anti-sodomy laws in Kenya are in contradiction with international law and comparative jurisdictions on human rights in favour of sexual orientation.

Normative Framework

This research is informed by the principle of human rights which is then broken down to equality of all persons, non-discrimination and right to privacy. Each and every human being has an inherent right to the enjoyment of human rights by virtue of being a human being. Human rights are extensively provided for in various Constitutions, statutes, conventions and covenants.[23]

Owing to the research's heavy reliance on the concept of rights rather that deity, the research looks at the problem from a legal positivist approach.[24]Therefore, the research shall be looking at the law, what the law dictates and whether the law is being upheld. This is owing to the fact that legal positivist opined that "the law is what the law is" and should not be influenced nor limited by morality. This is contrary to what the natural law theorist set out by stating that morality ought to form the starting line up in the match that is legislation of laws and not merely be on the bench.

Literature Review

Having taken the positivist approach to the research, the literature used in this research shall mainly constitute of statutes as well as commentary articles and journals on the same statutes and conventions. Moreover, most of the articles that shall be used in this research show the

[23] *See* for example the 2010 Constitution of Kenya, Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, the European Convention on Human Right etc.

[24] Legal Positivism—whether a certain rule is a law, creating legal obligations to comply with it, all depends on its source. Valid laws are simply rules that come from certain people (kings, city councils, etc.), in accordance with certain procedures, that the society enforces. A rule can be a genuine, valid law even though it is grossly unjust. According to H.L.A. Hart, a contemporary legal positivist, the essence of legal positivism is the "separation thesis." Separation thesis: having a legal right to do x doesn't entail having a moral right to do it, and vice versa; having a legal obligation to do something doesn't entail having a moral right to do it, and vice versa; having a legal justification to do something doesn't entail having a moral justification, and vice versa; etc. In order to know what your legal rights are, you need to look at what laws your society has. In order to know what your moral rights are, you need to figure out what is the true morality. You might have legal rights that the true morality says you shouldn't have (e.g. the right to own slaves), and your society might deny you legal rights that the true morality says you should have.

implementation of these international statutes and decisions and how they have influenced various jurisdictions and acted as a guide away from anti-sodomy laws.[25]

The purpose of the articles and journals used in this research is to act as a guiding principle and basis for Kenya to follow suit in the abolishment of anti-sodomy laws in compliance with the provisions of the various international conventions and covenants that Kenya is party to.[26] Moreover, in line with the common law principle on precedence, the decisions of various common law jurisdictions as well as England itself, the patriarch of common law, the decisions of these jurisdictions on the matter; though not binding to the Kenyan courts, the Kenyan courts should be guided by these decisions[27].

Emerging consensus in international law suggest agreement with human rights in favour of sexual orientation. This is seen in supervisory body decisions,[28] anchored on the provisions of international law instruments, such as the International Covenant on Civil and Political Rights (herein referred to as ICCPR).[29] The ICCPR is fundamental to this research seeing as it is the only one, of the international instruments, that has been able to combat anti-sodomy laws and protects individuals from discrimination on the basis of sexual orientation.[30]This is because, of the international instruments relevant to this research, the ICCPR has a monitoring body, the Human Rights Committee, which has on occasion found discrimination on the basis of sexual orientation contrary to the provisions of the covenant.[31]

One such occasion is seen in *Toonen v. Australia*[32]. Toonen was an Australian citizen residing in Tasmania and a leading member of the Tasmanian Gay Law Reform Group.[33]He sort to challenge the provisions of the Tasmanian Criminal Code that criminalised various forms of sexual conduct between consenting males conducted in private.[34]He challenged this criminalisation under articles 2(1), 17 and 26 of the ICCPR. The argument he forged before the Human Rights Committee was that the provisions of the Criminal Code violated his right to privacy seeing as the Act allowed police to enter a household on suspicion of violation;

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[25] Michael Hollander, *'Gay Rights in Uganda: Seeking to Overturn Uganda's Anti-Sodomy Laws '*
[26] For example the *International Covenant on Civil and Political Rights*
[27] *Dudgeon v. United Kingdom of Great Britain and Northern Ireland* 45 Eur. Ct. H.R. (1981)
[28] Human Rights Committee established by Part IV of the International Covenant on Civil and Political Rights.
[29] Toonen v Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992
[30] Oyo & Mukasa v Attorney General (Misc. Application No 247 of 2006) [2008] UGCC
[31] Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994)
[32] Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) *available at* http://www.ohchr.org
[33] Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992
[34] S122 & s123 of the Tasmanian Criminal Code

distinguished the privacy of individuals on the basis of their sexual orientation and only punished men for these actions when conducted with or amongst men but not with or amongst women.[35]

The Tasmanian government, in their defence, claimed that Article 17 of the ICCPR did not create a right to privacy but instead prohibited arbitrary interference with privacy.[36]Moreover, the democratic enactment of the laws, in the government's opinion, could not be construed as being illegal.[37]

This argument was however rejected by the committee, where it found the provisions challenged by Toonen to be in violation of the provisions of the ICCPR.[38]It is important to note that the Committee concluded by stating that in its view, Article 2(1) and 26 encompass sexual orientation as well. This interpretation of the term 'sex', in the aforementioned articles of the ICCPR, is essential in the interpretation of the non-discrimination clauses where sexual orientation is not expressly stated as a non-discrimination ground. This international instrument however leaves loopholes in that it is unclear whether this declaration is indeed binding authority or simply *obiter dicta.*

Although this decision was a win in the battle against criminalisation of homosexuality, the war is yet to be won. Writing in 2012, Erica Nordberg criticises the *Toonen v. Australia* decision by stating that although the decision, by virtue of Article 17 of the ICCPR, forbids arbitrary or unlawful interference with a person's privacy, it allows lawful and reasonable interference where necessary.[39]Moreover, this may be interpreted to mean that homosexual acts are permissible if conducted in a private setting but may be deemed illegal if committed in public. As such, this interpretation suggests that homosexual acts are inferior to heterosexual acts seeing as the legality of heterosexual acts is not restricted in the public sphere. Consequently, the ICCPR fails to fully address discrimination on the basis of homosexuality.

The International Covenant on Economic Social and Cultural Rights (herein referred to as ICESCR) is another essential international instrument. Similar to the ICCPR, the ICESCR

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[35] Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 paragraph 3.1 (a)-(c)
[36] Toonen v Australia
[37] Toonen v Australia
[38] Toonen v Australia
[39] Erica Nordberg, *'Ignoring Human Rights for Homosexuals: Gross Violation of International Obligations in Cameroon'* (2012)

declares that the rights found in this covenant are derived from the inherent dignity of the human person.[40] Moreover, its non-discrimination clause mirrors that of the ICCPR.[41] It protects the rights of same sex oriented individuals from private and public discrimination.[42]This is because it provides for the right to work;[43] right of everyone to an adequate standard of living for himself and his family;[44] and right of everyone to the enjoyment of the highest attainable standard of physical and mental health[45] among other social, economic and cultural rights. This treaty proves its worth to the cause against criminalisation of homosexuality where the Committee on Economic, Social and Cultural Rights states that the provision of 'other status' in the ICESCR's non-discrimination clause indicated that the grounds do not represent the full scope of grounds for non-discrimination.[46]It is of the opinion that discrimination is subject to context and evolution; as a result, new ground emerge over time.[47]Homosexuality is one such ground.[48]

Nonetheless, it is lacking in that; it is too broad thus making implementation and observance difficult; it does not compel the state parties to uphold the provision of the covenant and although it provides for the protection of sexual minorities, it is characterised by ambiguity.[49]

Certain scholars refer to the European human rights system as being the cradle for sexual orientation jurisprudence.[50] Therefore, the European Convention on Human Rights is another essential international instrument. Although operating at a regional realm, it has set precedence that is applicable to non-European states.[51]This Convention, unlike other conventions, is essential in this study for two main reasons. First, it has put in place formal legal mechanisms, the European Court of Human Rights (herein referred to as ECHR), that ensures compliance by member states.[52]Second, the member states to this convention comply

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[40] Preamble, ICESCR
[41] Michael Hollander *'Gay Rights in Uganda: Seeking to Overturn Uganda's Anti-Sodomy Laws'*
[42] Michael Hollander *'Gay Rights in Uganda: Seeking to Overturn Uganda's Anti-Sodomy Laws'*
[43] Article 6(1), ICESCR
[44] Article 11(1), ICESCR
[45] Article 12(1), ICESCR
[46] General comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), Paragraph 15
[47] General comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), Paragraph 27
[48] General comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), Paragraph 32
[49] Michael Hollander *'Gay Rights in Uganda: Seeking to Overturn Uganda's Anti-Sodomy Laws'*
[50] John Ambani, Tweaking the Standards: Emerging Consensus on the Right to Sexual Orientation in International Human Rights Law.
[51] Dudgeon v. United Kingdom of Great Britain and Northern Ireland 45 Eur. Ct. H.R. (1981).
[52] Mark W. Janis, Richard S. Kay & Anthony W. Bradley, European Human Rights Law 1, 6 (2nd Edition) (2000).

with the decisions of this court which in turn are binding to all its signatories.[53]However, the ECHR is deemed to be the court of last resort, where member states must exhaust all other local channels of redress.[54]Most cases brought before the court are brought under Articles 8 and 14 of the Convention.[55]

Article 8 – Right to respect for private and family life:

1. Everyone has the right to respect for his private and family life, his home and hi s correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[56]

Article 14 Prohibition of discrimination:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."[57]

One such case is *Dudgeon v. United Kingdom of Great Britain and Northern Ireland.*[58]In this case, Dudgeon's house was raided by police under the Misuse of Drugs Act of 1971.[59]However, the police found his diary that described homosexual activities. He was then taken to the police station where he was questioned but never charged.[60]At the time, in Northern Ireland, the offense of committing or attempting to commit buggery was punishable by a maximum sentence of life or ten years imprisonment.[61]However, this law had previously only been enforced with respect to persons under the age of 21 years.[62]

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[53] Mark W. Janis, Richard S. Kay & Anthony W. Bradley, European Human Rights Law 1, 6 (2nd Edition) (2000).
[54] Article 35 Convention for the Protection of Human Rights and Fundamental Freedoms, (1950).
[55] Michael Hollander "Gay Rights in Uganda: Seeking to Overturn Uganda's Anti-Sodomy Laws.
[56] Article 8, European Convention on Human Rights
[57] Article 14, ECHR
[58] Dudgeon v. United Kingdom of Great Britain and Northern Ireland 45 Eur. Ct. H.R. (1981)
[59] Dudgeon v. United Kingdom of Great Britain and Northern Ireland
[60] Dudgeon v. United Kingdom of Great Britain and Northern Ireland
[61] Dudgeon v. United Kingdom of Great Britain and Northern Ireland
[62] Dudgeon v. United Kingdom of Great Britain and Northern Ireland

In his application to the ECHR, Dudgeon claimed that the mere existence of this law, with or without active enforcement, constituted a violation of his rights as prescribed under Article 8 of the Convention.[63] He further claimed that article 14 of the Convention had also been violated as he had faced discrimination on the basis of sex. [64]

The court held that a moral climate against homosexuality does not suffice as justifiable reason for the risk of harm to vulnerable sections of the society requiring protection.[65] It further held that even though the law had not been enforced in the context of an adult relationship, it does not take away the fact that it could be enforced at any given time thus making it discriminatory.[66]

However, just as is criticised in the decision of *Toonen v. Australia,* the decision in Dudgeon is also anchored on the right to privacy, which then leaves a loop hole as to whether criminalisation of homosexual acts conducted in public is justifiable.

At a comparative level, as Adam J Kretz rightly puts it, the legal structures governing the rights of, and lack thereof, same sex oriented persons in Africa could not be anymore disparate.[67]On one hand, there is South Africa, which has not only set pace in the continent but also the world by being the first nation to expressly prohibit discrimination based on sexual orientation in her Constitution.[68]Moreover, in 2006, South Africa became the fifth nation to legalise same-sex marriages.[69]On the other hand, there is our neighbouring country, Uganda, whose proposed laws criminalise homosexuality with a gross punishment of death, which accompanies the offense of 'aggravated homosexuality'.[70]

Like in most African countries, sexual minorities in South African, during the apartheid regime, were not protected by the social and legal systems; if anything they were condemned and punished by the law.[71]However, December 1996 with the assenting of a new Constitution, came a new age in South Africa in terms of the pursuit of equality. South

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[63] Dudgeon v. United Kingdom of Great Britain and Northern Ireland
[64] Dudgeon v. United Kingdom of Great Britain and Northern Ireland
[65] Dudgeon v. United Kingdom of Great Britain and Northern Ireland
[66] Dudgeon v. United Kingdom of Great Britain and Northern Ireland
[67] Adam J. Kretz, *'From "Kill the Gays" to "Kill the Gay Rights Movement": The Future of Homosexuality Legislation in Africa'*, Northwestern Journal of International Human Rights
[68] Section 9(3), South Africa Constitution, 1996
[69] Minister of Home Affairs and another v Fourie and another 2005 (1) SA 524 (CC) (S. Afr.)
[70] Section 3, Anti-Homosexuality Bill, 2009, (Uganda)
[71] Ilyayambwa, *'Homosexual Rights and the Law: A South African Constitution Metamorphosis'*

Africa, with its new Constitution, became the first country to expressly provide for sexual orientation as a non-discriminatory ground.[72]

Section 9:

Everyone is equal before the law and has the right to equal protection and benefit of the law.

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, *sexual orientation*, age, disability, religion, conscience, belief, culture, language and birth."[73]

A discussion on human rights in favour of sexual orientation would be lacking if it did not make reference to same-sex marriages.[74]This is seen in the decisions of cases such a *Minister of Home affairs v. Fourie; Lesbian and Gay Equality Project v. Minister of Home Affairs*[75]. The decision in this case was with no doubt influenced by the constitutional provision in Section 9 of the South African Constitution.[76]This case was heard before the Constitutional Court where a lesbian couple contended that they had been precluded from getting married owing to the common law definition of marriage.[77]It was heard together with a case in which the Lesbian and Gay Equality Project challenged section 30(1) of the Marriage Act 25 of 1961 which defined marriage in a heterosexual sense thus precluding marriage between same sex couples.[78]

The court held that the Marriage Act as well as the common law definition of marriage, was inconsistent with the Constitution and as such invalid to the extent that it prohibits same sex marriage.[79] *Fourie* was a landmark case in South Africa and Africa in the legalisation of same sex marriages.

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[72] Ilyayambwa *'Homosexual Rights and the Law: A South African Constitution Metamorphosis'*
[73] The Constitution of the Republic of South Africa (1996)
[74] John C Mubangazi, *'Protecting the Right to Freedom of Sexual Orientation: What can Uganda Learn from South Africa?'*
[75] Minister of Home affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs 2006 3 BCLR 355
[76] John C Mubangazi, *'Protecting the Right to Freedom of Sexual Orientation: What can Uganda Learn from South Africa?'*
[77] Minister of Home affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs 2006 3 BCLR 355
[78] Minister of Home affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs 2006 3 BCLR 355
[79] Minister of Home affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs 2006 3 BCLR 355

Limitations

As like any other study, this too is likely to encounter several limitations. First, this study mainly takes a desktop survey approach. It is heavily informed by case studies, articles, journals, books and scholarly writing in general, on the matter.

Second, it takes a nominative rather than a theoretical approach in its analysis of the illegality of the anti-sodomy laws. It further takes a positivist approach by looking, strictly, to what the law states.

Finally, this study is limited to the scope of South Africa as a comparative case study.

Chapter Breakdown

Chapter 1 – Introduction

This chapter shall entail a background on the violation of human rights in Kenya; in as far as members of the same sex orientation community are concerned. It shall also contain the research problem, research questions and objectives, the limitations experienced in the course of the study, the approach and methodology used in conducting the study, a normative framework and a literature review.

Chapter 2 – Emerging Consensus in International and Comparative Law on Human Rights in Favour of Sexual Orientation

In this chapter, I shall look at what is the international and comparative law position when it comes to discrimination on the basis of sexual orientation. With this, I shall look at the various international law instruments as well as what they opine with regards to equal human rights to the same sex orientation community. Consequently, I shall also look at the decisions made by the bodies established to oversee the implementation of the provisions of some of these international law instruments.

This chapter shall also look at the South Africa as a comparative case study. This is because South Africa sets the standards, particularly in Africa, in terms of human rights in favour of same sex orientation.

Chapter 3 – Criminalisation of Homosexuality in Kenya

This chapter shall look at the situation in Kenya in terms of equal rights to persons of same sex orientation. It shall look at the pre-colonial period, colonial period and post colonial

period and in particular how the law dealt with homosexuality. This chapter shall seek to look at the evolution of anti-sodomy laws in Kenya and how the different eras impacted these laws, if at all.

Chapter 4 – Recommendations and conclusions

In this chapter, I shall attempt to make recommendations based on the finding of the research on which is the best way forward in achieve equality and non-discrimination in Kenya on the basis of sexual orientation. I shall then proceed to giving conclusions of my research.

CHAPTER 2: EMERGING CONSENSUS IN INTERNATIONAL AND COMPARATIVE LAW ON HUMAN RIGHTS IN FAVOUR OF SEXUAL ORIENTATION

This chapter shall look into the various international law instruments and decisions emanating from the instruments that have contributed to the emerging consensus in human rights in favour of sexual orientation. Key among these international law instruments shall include the 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 People's Rights. It shall also look at the European Convention on Human Rights as a comparative study alongside the case study of South Africa. The purpose of using a comparative study in this study is to prove the emerging consensus as well as the adoption of anti-sodomy laws across various jurisdictions and global regions.

International law is based on values, traditions, standards and norms accepted globally; although not necessarily by all states or cultures.[80]Certain scholars, such as James Wilet, are of the opinion that the process of recognising certain rights as fundamental rights is relatively slow in international human rights law. As such, the emerging consensus in international law as far as human rights are concerned may only be appropriate for a legal system that seeks a consensus prior to determining which rights it should consider fundamental. This should be regardless of state boarders and solely based on the fact that these laws are fundamental to all human persons by virtue of being human beings.[81]As such, the emerging consensus in international law, as far as human rights in favour of sexual orientation are concerned, is therefore relevant to the Kenyan legal system. This is owing to the fact that there is conflict in determining the importance of according persons of same sex orientation equal human rights as their fellow heterosexual citizens. This is seen in Kenya's criminalisation of the same[82]as well as the lack of urgency in decriminalising homosexuality in Kenya.[83]

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[80] Preamble, International Covenant on Civil and Political Rights

[81] James D. Wilets, *From Divergence to Convergence? A Comparative and International Law Analysis of LGBTI Rights in the Context of Race and Post-Colonialism*

[82] s162, s165, Penal Code CAP 63 Kenya Laws

[83] "We share a lot of things but gay issues are not among them... We cannot impose on people what they don't accept," Mr Kenyatta said during a joint press conference at State House, Nairobi... Mr Kenyatta on Friday urged the US to respect the will of the Kenyan society, which he said had rejected same-sex marriages. Harry Misiko for *Uhuru Kenyatta dismisses gay rights as a non-issue in Kenya,* Daily Nation, July 25, 2015.

The international human rights law consensus in favour of sexual orientation has been countered with arguments that sexual orientation freedom and homosexuality, in this case, is a matter of cultural relativism. African societies in particular, with Kenya being no exception, have argued that homosexuality is not only *"unafrican"* but also *unchristian*. Nonetheless, where a conflict between cultural and religious traditions and the universality of human rights ensues, then human rights prevail.[84]

Homosexuality is believed to be a product of contemporary Western societies and homosexual persons are unlikely to be accepted as sexual minorities deserving protection in their own legal systems.[85] It is however interesting to note that the emerging international law consensus merely seeks to remedy a predominantly western phenomena which was introduced to various societies during conquest and colonisation, where opposition to homosexuality emerged as opposed to it being an indigenous practice; as argued.[86]James Wilet likens homophobia to racial discrimination terming it a hierarchical view developed and promulgated by Christian denominations to justify the institutions of slavery and apartheid. It should therefore be classified as a non-discriminatory ground as the others have. To this effect, several jurisdictions as well as judicial holdings have allowed sexual orientation as a non-discriminatory ground in its own right or as an extended interpretation of the ground of sex as a non-discriminatory ground.

The next section of this chapter shall delve into the provisions and judicial holdings emanating from the various international instruments. In its conclusion it shall the look at the comparative instrument; the ECHR as well as the South African case study.

A. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

The ICCPR[87] as an international human rights law instruments has the highest potential for protecting sexual minorities. This is owing to the fact that it has a monitoring body; the

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[84] See for example http://www.apa.org/international/pi/2012/06/un-matters.aspx Juneau Gary (PhD) and Neal S Rubin (PhD, ABPP, *"Are LGBT rights human rights? Recent developments at the United Nations"*), Psychology International, June 2012

[85] "We share a lot of things but gay issues are not among them... We cannot impose on people what they don't accept," Mr Kenyatta said during a joint press conference at State House, Nairobi... Mr Kenyatta on Friday urged the US to respect the will of the Kenyan society, which he said had rejected same-sex marriages. Harry Misiko for *Uhuru Kenyatta dismisses gays rights as a non-issue in Kenya,* Daily Nation, July 25, 2015

[86] James D. Wilets, *From Divergence to Convergence? A Comparative and International Law Analysis of LGBTI Rights in the Context of Race and Post-Colonialism*

[87] International Covenant on Civil and Political Rights, (16 December 1966) General Assembly resolution 2200A (XXI) http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

Human Rights Committee (herein referred to as the HRC) that monitors the compliance and implementation of the treaty by its state parties. Its articles 2, 17 and 26 are of particular relevance to the protection of sexual minorities. It is on the foundation of these three articles that the HRC has found that discrimination on the basis of sexual orientation is not permissible under the treaty.

Article 2 states:

> "*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*"[88]

> Article 17 states:

> *"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."*[89]

> Article 26 states:

> "*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*"[90]

The HRC has set precedence for future rulings stating that anti-sodomy laws and the criminalization of homosexuality contravene the ICCPR and as a result, all signatory states must in fact and in practice abolish their anti-sodomy laws.[91] The first precedence set by the

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[88] Article 2, ICCPR http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
[89] Article 17, ICCPR http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
[90] Article 26, ICCPR http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
[91] See Toonen –v- Australia, U.N. Human Rights Comm., Commc'n No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994)

HRC was in *Toonen -v- Australian*[92] where an Australian citizen residing in Tasmania was a leading member of the Tasmanian Gay Law Reform group. He sort to challenge three provisions of the Tasmanian Criminal Code[93] which criminalized various forms of sexual relations amongst men including consensual sexual acts conducted in private between two adult males.[94] Albeit these laws had not been enforced in the recent past, Toonen claimed their existence alone threatened his privacy in the event of a long term relationship as well as his work in HIV/AIDS among the gay community. He stated that there was indeed discrimination in work places, constant stigmatization, and threat of physical violence as well as denial of basic democratic rights. In his opinion, the presence of these laws encouraged discrimination and harassment from the general public as well as derogative language against the gay community by state leaders.

Citing articles 2, 17 and 26 of the ICCPR, Toonen claimed that the Tasmanian domestic laws;

i. Violated his right to privacy seeing as the police could use the provisions of the Tasmanian criminal code as reason to enter his house on suspicion that the said acts were being committed.
ii. Distinguished the right to privacy of their citizens on the basis of sexual orientation.
iii. Only criminalised sexual relations conducted among men and not with or amongst women. Thus discriminatory on the basis of gender.

In its defence, the Tasmanian government stated the following:

i. Article 17 of the ICCPR prohibits arbitrary interference with one's privacy. They claimed that the Tasmanian law was not in violation of this and seeing as the laws were not arbitrarily enforced, Toonen could not claim that they were in violation of article 17.
ii. The Tasmanian laws were enacted using a democratic procedure and could therefore not be termed unlawful.
iii. The laws were part of Tasmania's plan in protecting its people's moral fabric and to curb the spread of HIV/AIDS.

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[92] Toonen v Australia,
[93] Toonen v Australian, Tasmanian Criminal Code Sections 122(a), 122(c) and 123
[94] Toonen v Australia

The HRC however, held against the Tasmanian government rejecting their arguments. The Committee found that Tasmania was indeed in violation of the ICCPR in its criminalization of homosexuality. It held that albeit the laws had not been enforced in nearly 10 years, their continued existence did not dispel fears that the law would not be enforced in the future. The Committee further rejected the state's argument that its criminalization of homosexuality was for purposes of reducing HIV/AIDS infections in Tasmania. The Committee held that continued criminalization of homosexuality would work to the contrary. This is because the fear of prosecution would cause those in need of treatment to go underground thus furthering the spread of the virus. In conclusion, the Committee held that the reading of Articles 2(1) and 26 of the ICCPR, prohibiting discrimination of the grounds of sex, be read to mean sexual orientation as well.

However, in view of the case being brought under Article 17 of the ICCPR, it is unclear as to where the declaration made by the Committee constitutes binding authority or is simply obita dicta.[95] Nonetheless, the declaration was part of the ruling made by the committee and as such is sufficient for decriminalization of homosexuality.[96]

The second precedence founded on the ICCPR was seen in the *Opinion of the United Nations Working Group on Arbitrary Detention Regarding the Detention of Homosexuals in Cameroon.*[97] In 2005 eleven men were arrested in Cameroon following the raid of a gay bar.[98] One year later (2006) a news release from the International Gay and Lesbian Human Rights Commission noted that, in the two previous years over thirty people had been arrested on charges of homosexuality despite the ruling of the United Nations Working Group. The HRC vehemently rebuked this detention terming it a violation of the men's liberty and consequently a violation of their rights as provided for in the ICCPR.[99] Regardless of this ruling having come twelve years after the ruling in *Toonen –v- Australia*, Michael Hollander is of the opinion that this ruling holds the promise of the ICCPR's potential in the fight against anti-sodomy laws.

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[95] Michael Hollander, *Gay Rights in Uganda: Seeking to Overturn Uganda's Anti-Sodomy Laws*, Virginia Journal of International Law Association,(2009)

[96] Michael Hollander, *Gay Rights in Uganda: Seeking to Overturn Uganda's Anti-Sodomy Laws*

[97] U.N. Working Group on Arbitrary Detention, No. 22/2006, Opinion (Aug. 31, 2006) (Cameroon), reprinted in U.N. Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention, at 91, U.N. Doc. No. A/HRC/4/40/Add.1 (Feb. 2, 2007)

[98] U.N. Working Group on Arbitrary Detention, No. 22/2006, Opinion, at 93-94

[99] U.N. Working Group on Arbitrary Detention, No. 22/2006, Opinion, at 94

These two rulings establish the strength of the ICCPR in the fight against discrimination on the basis of sexual orientation. As such, human rights activists in countries such as Kenya where anti-sodomy laws are still in existence should utilise this international law instrument in its fight against criminalisation of homosexuality and the subsequent discrimination of its citizens on the basis of sexual orientation. In the event that their judicial system is hesitant to evoke a change in the state laws, then the Human Rights Committee is well set up to effect change in the domestic laws of its signatory states.

B. THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)

Similar to the ICCPR, the ICESCR[100] in its preamble states that the rights in the convention are to be enjoyed by all persons by virtue of the inherent dignity of the human person.[101] Michael Craven has criticised the ICESCR as being too broad thus tasking the oversight body, the Committee on Economic Social and Cultural Rights, with the burden of interpretation and development of human rights norms related to social, economic and cultural rights.

This instrument further suffers lack of implementations mechanism as it does not create a duty to the state parties to "respect and ensure" but instead only requires the state parties to "take steps" to ensure realization of the rights contained in this instrument. As such, countries can only be persuaded by this instrument as opposed to being held to account for its violation. Nonetheless, its article 2 provides a basis for the case of decriminalization of homosexuality. One may even term it flexible as there are several articles that if read together with article two, would provide a strong case for the decriminalization of homosexuality. Such persuasive articles include articles 6, 11 and 12.

Article 2 states:

> "*The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without*

[100] International Covenant on Economic, Social and Cultural Rights [16 December 1966] General Assembly resolution 2200A (XXI) http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx

[101] Preamble, International Covenant on Economic, Social and Cultural Rights http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx

discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[102]

Article 6 states:

"*The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*"[103]

Article 11 states:

"*The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.*"[104]

Article 12 states:

"*The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*"[105]

An additional provision of the ICESCR that may be of great relevance, as shall be seen in chapter 3 of this article, is article 13 which states:

"*The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development*

[102] Article 2, International Covenant on Economic, Social and Cultural Rights http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx
[103] Article 6, International Covenant on Economic, Social and Cultural Rights http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx
[104] Article 11 , International Covenant on Economic, Social and Cultural Rights http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx
[105] Article 12, International Covenant on Economic, Social and Cultural Rights http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx

of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms..."[106]

These provisions are essential in the fight against anti-sodomy laws. This is because the resultant effect of anti-sodomy laws is the discrimination of person of same sex orientation thereby denying them equal access/opportunity to access and realise the above mentioned rights. It is for this reason that the above articles are read together with article 2 of the Covenant which prohibits discrimination on the grounds stated; sex, as was seen in the interpretation of the ICCPR being one of the prohibited discriminatory grounds.

Theoretically and by principle, one's enjoyment of economic, social and cultural rights should not be based on their sexual orientation. However, in practice, in most African and Asian countries[107], one's sexual orientation is a pre-determinant of the rights he/she may or may not enjoy. Albeit there is international consensus as to the decriminalization of homosexuality as well as consensus within the ICESCR enforcement body, the ICESCR's weak enforcement mechanism and homosexuality being termed 'a non issue' in Kenya by the President[108] as well as the continued discrimination, violation and discrimination of homosexual persons[109], the ICESCR may only play a persuasive role in the decriminalisation of homosexuality but cannot warrant a change in the anti-sodomy laws as the ICCPR did in Tasmania.

C. THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS

Part I of the African Charter on Human and People's Rights[110], like all other international human rights law instruments, safeguards the implementation and observation of human rights to all persons without discrimination on the basis of sex, colour, religion, race, ethnic group, language, political affiliation or any other opinion, national and social origin, fortune,

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[106] Article 13 , International Covenant on Economic, Social and Cultural Rights http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx

[107] See Dr Paula Gerber *'Countries that Still Criminalise Homosexuality'* http://antigaylaws.org/

[108] "We share a lot of things but gay issues are not among them... We cannot impose on people what they don't accept," Mr Kenyatta said during a joint press conference at State House, Nairobi... Mr Kenyatta on Friday urged the US to respect the will of the Kenyan society, which he said had rejected same-sex marriages. Harry Misiko for *Uhuru Kenyatta dismisses gay rights as a non-issue in Kenya,* Daily Nation, July 25, 2015.

[109] Human Rights Watch Report [2015], *'The Issue is Violence: Attacks on LGBT People on Kenya's Coast'* https://www.hrw.org/report/2015/09/28/issue-violence/attacks-lgbt-people-kenyas-coast

[110] African Charter on Human and Peoples Rights [June 27, 1981] http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf

birth or any status.[111] Similarly, it too has several provisions that could be used in the fight against anti-sodomy laws that, as earlier mentioned, are more prevalent in Africa. One can only hope that this charter may be the game-changer in the fight against anti-sodomy laws in Africa and with relevance to this paper, Kenya, as it was crafted by African states themselves and are not an 'imposition' of the West.

Article 2 states:

> "*Every individual shall be equal before the law,*
> *Every individual shall be entitled to equal protection of the law.*"[112]

Article 5 states:

> "*Every individual shall have the right to the respect of the dignity inherent in a being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.*"[113]

Article 6 states:

> "*Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.*"[114]

These sections notwithstanding, the charter in itself has several flaws that may impede the progression towards a tolerant Africa. Notably is the absence of the right to privacy that is present in the previously discussed instruments. The right to privacy is an essential in the fight for decriminalization of homosexuality as seen in the case of *Toonen v Australia* where one of the core rights that were being violated was the right to privacy. Second, the

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[111] Article 2, African Charter on Human and Peoples Rights http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf

[112] Article 3, ACHPR http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf

[113] Article 5, ACHPR http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf

[114] Article 6, ACHPR http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf

limitations set by the charter as relates to enjoyment of certain rights[115] further impedes the desired progression in the quest to decriminalise homosexuality not only in Kenya but in Africa as a continent as seen in Europe when discussing the European Convention on Human Rights. Third, the supervisory body to the charter is yet to implement these provisions and protect same sex oriented persons from discrimination. This is mainly owed to the fact that the supervisory body, the African Commission on Human and People's Rights, is mainly comprised of the very states that are in violation of the charter itself. As such, a conflict of interest arises where the Commission is tasked with ensuring implementation and observance of the charter whilst its members are in violation.

Hollander[116] however argues that these impediments notwithstanding, the charter may still play a pertinent role in the decriminalisation of homosexuality. This is because its provisions under article 2, as stated above, prohibit discrimination on the basis of sex. He takes up a different angle to the argument against anti-sodomy laws by stating that these laws are in fact discriminatory on the basis of sex, prima facie. This is owing to the fact that a man's sexual relations only become criminal if they are with another man. However, where a man has sexual relations with a woman, the law does not intervene. As such, anti-sodomy laws are discriminatory on the basis of sex by discriminating against a man's sexual partner. He bases this argument on the decision set out in *Baehr v. Lewin*[117] by the Supreme Court of Hawaii; where the court held that the marriage laws in Hawaii were discriminatory on the basis of sex by criminalising the marriage between a man and another man whilst legalising the marriage between a man and a woman.[118]

D. European Convention on Human Rights

The European Convention for the Protection of Human Rights and Fundamental Freedoms[119] is arguably the most effective international law instrument for the protection of individual

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[115] Article 10, ACHPR http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf
Article 10 of the ACHPR imposes restrictions as to the full enjoyment of the right to freedom of association. It hinges the enjoyment of this right by stating that in doing so, those exercising this right must be acting within the confines of the law. As such, where a state has anti-sodomy laws, a man cannot exercise his right to freedom of association by associating himself sexually with another man.

[116] Michael Hollander, *Gay Rights in Uganda: Seeking to Overturn Uganda's Anti-Sodomy Laws*, Pg 235

[117] Baehr v. Lewin, 852 P.2d 44 (Haw. 1993)

[118] Baehr v. Lewin, 852 P.2d 44 (Haw. 1993)

[119] The European Convention for the Protection of Human Rights and Fundamental Freedoms, (November 9 1950), 213 U.N.T.S 222

rights. This is owing to its well established judicial enforcement organs; the European Court for Human Rights (ECtHR) and the European Commission of Human Rights (ECmHR). The decisions of these two bodies are not only universally accepted by the contracting states but are implemented by the states.[120]

This Convention sets the pace for the other instruments discussed above in that its enforcement organs interpret the Convention by taking into account the drafters' intentions as well as treating it as a modern instrument that takes into account the changing times in Europe as well as the changing European social and legal developments. The ECtHR illustrated this in its decision in *Marcx v Belgium*[121] where it held that the Convention should be interpreted in light of present day conditions.[122]Therefore, the Court and the Commission are able to reach out to minority groups that the drafters of the Convention had not envisioned at the time of drafting but have subsequently emerged with the evolution of society. As such, one may conclude that this Convention, of all the other instruments, best implements the 'other status' that characterise most if not all non-discrimination clauses in international law instruments. This is because it does not limit the clause to the grounds that were present at the time of drafting the instruments, which as seen in most of these instruments, date as far back as 30-40 years ago. Therefore, although not binding to Kenyan courts, the Kenyan Constitutional court should emulate the interpretation mechanisms applied by the ECtHR in the interpretation of Article 27 of the Constitution for the protection of emerging minority groups in Kenya, key among them, the homosexual minority.

On the other hand, Laurence Helfer observes that the Convention's greatest threat is the fact that the Convention has been as effective as a result of consent by the contracting states. Consequently, in the event that the court issues an extremely unfavourable decision then the state may choose to not renew the right to individual petition or may withdraw from the Convention altogether.[123]Hollander however, as if in response to Laurence's observation, holds that it would be unlikely for a state to act in defiance of the court's orders as defiance would be viewed as the defiance of human dignity and rule of law which would not be a viable option for the unfavoured state.[124]

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[120] Laurence R. Helfer, *'Consensus Coherence and the European Convention on Human Rights'* Cornell International Law Journal (2009)
[121] Marcx v Belgium 31 Eur. Ct. H.R (1979)
[122] Marcx v Belgium
[123] Laurence R. Helfer, *'Consensus Coherence and the European Convention on Human Rights'* 137
[124] Michael Hollander, *Gay Rights in Uganda: Seeking to Overturn Uganda's Anti-Sodomy Laws*, 238

The result of the Court's decision is often the payment of damages to the aggrieved person or the amendment of the conflicting national law or both; by the state.[125] As regards anti-sodomy laws, most cases brought before the Court are founded on articles 8 and 14 of the Convention.

Article 8 states:

> *"Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*[126]

Article 14 states:

> *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*[127]

The seminal case, founded on the Convention and in particular the above quoted articles of the Convention, is *Dungeon v United Kingdom of Great Britain and Northern Ireland.*[128] In this case, Dungeon, a shipping clerk, brought the case following the raid of his house by police under the Misuse of Drugs Act of 1971.[129] In the course of the raid, police found his diary which contained, what the police termed, homosexual activity.[130] He was consequently arrested and taken in for questioning but was never prosecuted.[131] However, had he been in fact prosecuted, he would have been charged with the offence of committing or attempting to commit buggery which was a crime in Ireland punishable by life in imprisonment in

[125] Article 8, ECHR
[126] Article 8, ECHR
[127] Article 14, ECHR
[128] Dungeon v United Kingdom of Great Britain and Northern Ireland 45 Eur. Ct. H.R. (1981)
[129] Dungeon v United Kingdom of Great Britain and Northern Ireland, 7, 15
[130] Dungeon v United Kingdom of Great Britain and Northern Ireland,15
[131] Dungeon v United Kingdom of Great Britain and Northern Ireland,15-16

accordance with Sections 61 and 62 of the Offences Against Persons Act of 1861. Albeit this section was not enforced in the case of Dungeon, it had been enforced 62 timed in the 8 years preceding his arrest. Dungeon therefore brought his claim citing violation of articles 8 and 14 of the Convention. He claimed that although the law was not actively enforced, it did not take away the fact and fear that it could be enforced at any given time if the law enforcement so wished.[132]

The court held in Dungeon's favour ruling that the United Kingdom was indeed in contradiction with the Convention. It further stated that the intense moral climate against homosexuality "cannot be maintained in these circumstances that there is a 'pressing social need' to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public."[133] The court was in agreement with Dungeon's argument that albeit the law had not been regularly enforced, it nonetheless created a sense of 'fear' amongst gay persons as the police could enforce it at anytime.[134] Moreover, Dungeon's arrest and questioning was proof of that. It therefore held that the existence of anti-sodomy laws have adverse effects on the private lives of gay individuals which is a violation of their rights guaranteed under the Convention.[135]

Another case brought before and decided on by the Court is *L. & V. v Austria.*[136] It is interesting to note that the rationale behind the claim of violation of this Convention is quite similar to the rationale used by the Supreme Court of Hawaii; which took the angle of discrimination on the basis of sex when looking at anti-sodomy laws; where it stated that anti-sodomy laws were in fact discriminatory on the basis of sex as they discriminated against the man's partner on the basis of their gender. In this case, L & V were both gay males who had been sentenced to prison, in accordance with section 209 of the Austrian Criminal Code, for having sexual relations with adolescent boys aged between 14 and 18 years.[137] Naturally, sexual relations with minors should be an offense. However, in Austria, similar heterosexual relations were not criminalized. As such L & V felt that their prosecution and subsequent

[132] Dungeon v United Kingdom of Great Britain and Northern Ireland,16
[133] Dungeon v United Kingdom of Great Britain and Northern Ireland, 24
[134] Dungeon v United Kingdom of Great Britain and Northern Ireland, 18-19
[135] Dungeon v United Kingdom of Great Britain and Northern Ireland, 18
[136] L. & V. v Austria, 2003-I Eur. Ct. H.R. 29
[137] L. & V. v Austria, 35

imprisonment was discriminatory by virtue of their being gay not to mention Austria's anti-sodomy laws were frequently enforced.

The Court opined that the critical question here was why there was a need for protection of males aged fourteen to eighteen from adult men, but no similar need to protect females of the same age from adult men, or young males from adult women.[138] This is despite the Austrian Parliament having been informed by a number of experts that the age of consent for homosexual and heterosexual relationships should be the same because sexual orientation is formed at puberty. Nonetheless, the Parliament chose to maintain its differing age of consent in 1995.[139] The Court termed this "predisposed bias on the part of a heterosexual majority against a homosexual minority" insufficient to justify differential treatment based on sexual orientation and declared the law a violation of the Convention.[140]

COMPARATIVE LAW: SOUTH AFRICA

South Africa was the first country in the world to provide for sexual orientation as a non-discriminatory ground in its constitution and naturally, it was also among the first countries in the world to recognise same-sex marriage unions.[141] It set the pace through successive judicial decisions, progressively expanding its rights on equal protection and explicitly providing for non-discrimination of sexual minorities in its constitution.[142]

The seminal case, for South Africa, that resulted in the sticking down of numerous anti-sodomy laws has to be *National Coalition for Gay & Lesbian Equality v Minister of Justice of South Africa & Others*[143]. Justice Albie Sachs was guided by various rights provided for in the constitution such as dignity, equality, privacy and freedom[144]. In addition to the laws of South Africa, SachsJ was further guided by the emerging international consensus against

[138] L. & V. v Austria, 43
[139] L. & V. v Austria, 43-44
[140] L. & V. v Austria, 44
[141] James D Wilets, 'From Divergence to Convergence? A Comparative and International Law Analysis of LGBTI Rights in the Context of Race and Post-Colonialism' (2011) Duke Journal of Comparative & International Law, 682
[142] In 1999, the South African Constitutional Court ruled that its Alien Control Act of 1991 was unconstitutional as it barred the immigration of same sex couples into South Africa. In addition to this, the holding in Minister of Home Affairs & another v Fourie & others (2006) found that messages that gays and lesbians lack inherent humanity to have their family lives in same-sex relationships respected and protected was an invasion on their dignity. A right provided for in the Constitution
[143] National Coalition for Gay & Lesbian Equality v Minister of Justice of South Africa & Others (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998)
[144] The Constitution of the Republic of South Africa (1996), section 66-68

anti-sodomy laws in rendering his decision in this case.[145] These included decisions such as *Dungeon v United Kingdom*, discussed above, where the ECtHR rendered anti-sodomy laws unconstitutional, he was further guided by the decriminalisation of homosexuality in England, Australia, Canada and Germany.[146] In his decision, SachsJ noted that anti-sodomy laws far much transcend just sexual relations between consenting males. It comes down to the inherent dignities and freedoms entitled to all South African citizens. This case was a direct constitutional challenge on the offence of sodomy in South Africa and was brought under section 9 of the Constitution.[147] It was interesting to note, as did the court, that section 9(5) allowed for discrimination if the discrimination was fair. The court therefore opined that for a discriminatory act to be termed fair, it must be a balance of the interests infringed vis a vis the interest of the state in that infringement.[148] In so doing, the court found that the rights infringed upon, for a gay person, range from privacy, dignity to non-discrimination all which, more often than not, affect his chances at self-fulfilment and self-realisation.[149] Whereas, the only interest the state has in that infringement is a moral view founded on prejudice by members of society.[150] This, according to the court, did not suffice as just cause for the infringement of these rights. It did however acknowledge that religion is a big part of South Africa and it does have it reservations when it comes to sexual orientation. Even so, that still did not form just cause for the infringement and religious views could not reasonably be used to regulate people of all religion.[151]

It is important to note that this case arose under the post-apartheid South African Constitution of 1996, the first in the world to explicitly include sexual orientation as a protected class.[152]

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[145] National Coalition for Gay & Lesbian Equality v Minister of Justice of South Africa & Others, 83

[146] National Coalition for Gay & Lesbian Equality v Minister of Justice of South Africa & Others, 83

[147] Section 9 of the SA Constitution, Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair

[148] National Coalition for Gay & Lesbian Equality v Minister of Justice of South Africa & Others, 33

[149] National Coalition for Gay & Lesbian Equality v Minister of Justice of South Africa & Others, 36

[150] National Coalition for Gay & Lesbian Equality v Minister of Justice of South Africa & Others, 37

[151] National Coalition for Gay & Lesbian Equality v Minister of Justice of South Africa & Others, 38

[152] Section 9(3), SA Constitution, "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

While sexual orientation had been protected in the past, this protection always came about through a judiciary body reading the protection of "sex" to be inclusive of sexual orientation, for instance in the *Toonen* judicial holding by the HRC; in the case of South Africa's post-apartheid Constitution, a non-judicial coalition, directly accountable to the public, explicitly included this protection.[153] By eliminating state support for this prejudice, South Africa has given LGBTI individuals the dignity of being treated equally under the law.[154]

From criminalisation to protection

Like present day Kenya, South Africa was once intolerant to sexual minorities with the criminalisation of homosexuality and intolerance to other sexual minorities such as transgender persons. In his analysis of South Africa's metamorphosis, Ilyayambwa[155] writes;

> '*Human rights are afforded to all people, regardless of their status or whether they are in majority or minority. The jurisprudence of a nation or region has to accommodate the changes that are occurring in society; otherwise, the law would become irrelevant and redundant.*'[156]

The creation of *Gays and Lesbians of Witwatersrand* as well as the *National Coalition case* formed the lava stage of what was to become the butterfly that South African laws are today. Like Kenya and most African states, the apartheid regime, which was in existence in South Africa until 1994, neither protected nor tolerated sexual minorities. Sexual minorities in apartheid South Africa faced prosecution under criminal, civil and family law.[157] However, with the end of apartheid and the national struggle that forced it out, South African leaders had imbued in them a strong commitment to non-discrimination and equal protection for all under the law.[158] They therefore sort to protect the rights of sexual minorities in South Africa even though a majority of its population was against granting equal rights to sexual minorities. As noted above by SachsJ, this prejudice was informed by various beliefs, key

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[153] Lourens Du Plessis & Hugh Corder, 'Understanding South Africa's Transitional Bill Of Rights' (1994) 144

[154] Michael Hollander, *Gay Rights in Uganda: Seeking to Overturn Uganda's Anti-Sodomy Laws*, 247

[155] Mwanawina Ilyayambwa, *'Homosexual Rights and the Law: A South African Constitutional Metamorphosis'* (February 2012) International Journal on Humanities and Social Sciences, vol2 no 4

[156] Mwanawina Ilyayambwa, *'Homosexual Rights and the Law: A South African Constitutional Metamorphosis'*, 50

[157] http://www.global-briefing.org/2012/10/lgbt-rights-were-integrated-into-the-vision-of-a-new-south-africa-in-which-people-were-respected-for-who-they-were/

[158] James D Wilets, *'From Divergence to Convergence? A Comparative and International Law Analysis of LGBTI Rights in the Context of Race and Post-Colonialism'*, 683

among them being religion and African beliefs. With the dawn of a new post apartheid constitution, sexual minorities began organising themselves with the aim of negotiating equal rights and protection under the new constitution.[159] The long awaited constitution was finally approved by the Constitutional Court in December of 1996 and came into effect in February of 1997.[160] With it came the protection of rights of sexual minorities; homosexuals, under its chapter 1[161] which stated that all persons are equal and its section 9[162]; non-discrimination clause, which prohibited discrimination on the basis of sexual orientation.

However, this transition into an all inclusive state was not as seamless as the leaders had hoped. Although the laws were tolerant to sexual minorities, the greater South African populace was still very hostile and intolerant to homosexual.[163] At the time of coming into force for the new constitution, only thirty eight percent of South Africans were in support of protection of sexual minorities.[164] It is even more unfortunate to note that to date, this hostility and intolerance still plagues the South African populace, with bodily harm being occasioned on homosexuals and even killing of homosexuals, even though in theory South Africa ought to be a safe haven for sexual minorities.[165]

As such there was a need to create awareness and educate people so as to not only create legal tolerance but also social tolerance. The National Coalition undertook to create awareness and to mainstream the gay rights struggle in lower middle class and poor South African circles. This is because at its inception, the National Coalition was mainly comprised of upper and middle class white South Africans.[166] However this was met with hostility and

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[159] Massoud MF, *'The Evolution of Gay Rights in South Africa'*, Peace Review 15:3, 302

[160] http://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1

[161] Section 1 (a) (b) of the SA Constitution, The Republic of South Africa is one, sovereign, democratic state founded on the following values:
a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.
b. Non-racialism and non-sexism

[162] Section 9(3) of the SA Constitution, The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth

[163] Massoud MF, *'The Evolution of Gay Rights in South Africa'*, Peace Review 15:3, 301

[164] Massoud MF, *'The Evolution of Gay Rights in South Africa'*, Peace Review 15:3, 304

[165] Amnesty International, South Africa Report, https://www.amnesty.org/en/countries/africa/south-africa/report-south-africa/

[166] Mwanawina Ilyayambwa, *'Homosexual Rights and the Law: A South African Constitutional Metamorphosis'*, 52

stereotyping. Some claimed that homosexuality was a lifestyle that was embarrassing their ancestors.[167]

Following the *National Coalition case* in 1999, in 2002 the Constitutional Court issued another landmark decision in the quest for equal rights for sexual minorities, in particular homosexual people.[168] The court held in favour of equal rights of adoption and guardianship to same sex couples as was accorded to heterosexual married couples and singles. We therefore see a transitional process in every aspect of the law as far as equality for sexual minorities in South Africa and to think it all started with the inclusion of sexual orientation as a non-discriminatory ground enshrined in the constitution. Albeit there is still some social discrimination from the populace, if the law enforcement is keen on upholding the law, then this may discourage social discrimination against homosexual persons. Civic education and awareness also plays an essential role in the shift from a prejudice mindset to a more accommodative and tolerant mindset. South Africa sets an excellent legislative and legal example that many African countries, key among them Kenya, can emulate in the protection of sexual minorities against abuse and discrimination.

In confirmation of this study's second hypothesis, this chapter illustrates the emerging consensus in favour of same sex orientation and the subsequent abolishment of anti-sodomy laws in various jurisdictions; either by the legislature or by virtue of judicial rulings. With particular focus on the European Union whose member states have all abolished anti-sodomy laws, although not binding to the Kenyan courts, it should serve as a guideline and as a point of reference as was the case in South Africa. One might even dare say that the emerging consensus is slowly but surely forming part of international law custom.

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[167] Oswin N, *'The End of Queer (as we knew it): Globalization and the making of a gay-friendly South Africa. Gender, Place and Culture'*, February (2007) Vol 14, No 1, 99

[168] Du Toit and Another v Minister for Welfare and Population Development and Others, 2002 (10) BCLR 1006 (CC), 2002 SACLR LEXIS 23

CHAPTER 3: CRIMINALISATION OF HOMOSEXUALITY IN KENYA

Having confirmed the second hypothesis that there is in fact an emerging consensus on same sex orientation and the abolishment of anti sodomy laws across various jurisdictions, this chapter shall seek to answer the first, third and fourth hypotheses of this study. It shall look at the situation in Kenya in terms of equal rights to persons of same sex orientation. It shall look at the colonial period, as this is when legislated laws were introduced to Kenya, post colonial period and in particular how the law dealt with homosexuality. This chapter shall seek to look at the evolution of anti-sodomy laws in Kenya and how the different eras impacted these laws, either through legislation or through judicial holdings; if at all.

Looking at the issue of equal rights to same sex persons within the Kenyan context is twofold; colonial era and post-colonial era. African societies, with Kenya being no exception, have argued that homosexuality is not only "unafrican" but also "unchristian". There is a deep founded essentialist assumption that Africa is a homogeneous society. However, there is evidence that African history is rife with same sex relationships.

Colonial Period

The British colonized Kenya in 1895 making it a protectorate and later changing it into a colony in 1921.They proceeded to institute their own judicial system which then applied alongside the existing customary law:

> "*By the East Africa Order in Council 1897 (later repeated in the 1921 Order and applied to the Protectorate), the jurisdiction of the Supreme Court and subordinate courts of Kenya was to be exercised 'so far as circumstances admit . . . in conformity with the Civil Procedure and Penal Codes of India and the other Indian Acts which are in force in the Colony*"[169]

In 1930, the British replaced the Indian Penal Code with the Colonial Office Model Code (based on the Queensland Code of 1899), which has remain as Kenya's Penal Code to date.

It is quintessential to note that customary law had to give way to English law if it was "repugnant to justice or morality or inconsistent with the provisions of any Order in Council or with any other law in force in the Colony." This "repugnancy clause" was provided for in section 3(2) of the Judicature Act:

[169] Eugene Cotran, 'The Development and Reform of the Law in Kenya', 27 J. AFR. L. 42, 42 (1983)

> *"The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or allocated by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."*[170]

In the area of Kenya's criminal law, customary law gradually gave way to the Penal Code Provisions as the British law was deemed superior to customary law and the validity of customary law was based on the repugnancy clause as set out by the British Laws.

Post Colonial Period

Upon attainment of independence from the British in 1963, the new government retained the former British colonial legal system including its Colonial Office Model Code.[171] These laws contained anti-sodomy laws as is in the existing Penal code. As such, Kenyan law, to date criminalizes homosexuality.

Kenya promulgated the relatively new constitution on 27 August 2010. It however does not expressly provide for the protection of sexual minorities. Some articles within the Constitution seek to generally protect individuals but as a whole it does not expressly consider sexual minorities. There have been arguments far and wide that Kenya's statutes discriminating against homosexual persons are unconstitutional and void by virtue of the Constitution's broad protection of civil and human rights.[172]

Article 27(4) of the Constitution of Kenya states that:

> *"The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."*[173]

While the Constitution does not explicitly provide for non-discrimination on grounds of sexual orientation and gender identity, there is scope for this to be rectified through the courts

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[170] Section 3(2), Judicature Act CAP 8

[171] Finerty E.C, *'Being Gay in Kenya: The Implications of Kenya's New Constitution for its Anti-Sodomy Laws'*, Cornell International Law Journal Vol. 45, 437

[172] Finerty E.C, *'Being Gay in Kenya: The Implications of Kenya's New Constitution for its Anti-Sodomy Laws'*, Cornell International Law Journal Vol. 45

[173] Article 27(4), Constitution of Kenya 2010

or subsequent legislation. The Equal Rights Trust and the non-governmental Kenya Human Rights Commission argued that the prohibition and discrimination by both the state and non-state actors should be read as inclusive of sexual orientation and gender identity. Article 27, which is the Equal Protection clause of the Constitution, provides "every person" is "equal before the law" and has the "right to equal protection" before the law. That is an unequivocal, categorical, and blanket protection against discrimination. The article does not exclude homosexuals from the ambit of constitutional protection. Further, Article 27(4) prohibits discrimination on the grounds of "sex". The prohibition of discrimination on the grounds of sex has been understood to include sexual orientation.[174] The Constitution eliminates all wiggle room by prohibiting both direct and indirect discrimination.[175]

Furthermore, Article 28 of the Constitution of Kenya provides that,

> "*Every person has inherent dignity and the right to have that dignity respected and protected.*"[176]

The 2010 Constitution incorporates international law into its domestic law through Article 2(5), which provides that the general rules of international law shall form part of the law of Kenya. Subsequently, Article 2(6) states that "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."[177]I t also provides, under Article 2(4), that, "Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."[178]

Additionally, the 2010 Constitution specifies that the State must "enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms."[179] The ramifications of these constitutional provisions are well-defined and certain: International human rights norms prohibiting discrimination are applicable to Kenya and therefore Kenya has an international obligation to abide by them. Kenya's Anti-Sodomy Laws violate general principles of International Law and International agreements to which Kenya is bound by, these include the ICCPR, the ICESCR and the African Charter on Human

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[174] Toonen v Australia
[175] Makau Mutua, *'Rights body has finally stood up for gays and lesbians'*, Daily Nation, 12 May 2012
[176] Article 28, Constitution of Kenya 2010
[177] Article 2(6), Constitution
[178] Art 2(4), Constitution
[179] Article 21(4), Constitution

and People's Rights. All these as seen in chapter two of this paper prohibit the criminalisation of homosexuality.

Under Chapter 4 of the Constitution of Kenya, 2010 the bill of rights has been incorporated into the supreme law of the land.

Article 19 of the Constitution of Kenya provides that,

> *"(1) The Bill of Rights [Articles 19-59] is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.*
>
> *(2) The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings."*[180]

This article is construed to protect every individual as the scope for its interpretation is significantly expanded. Sexual orientation easily falls within this scope and as such the rights of same sex oriented persons should be safeguarded.

Moreover, Article 45(2) of the Constitution of Kenya specifically authorizes opposite sex marriage but is silent about same-sex marriage. It states that "Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties."[181] This article has the effect of barring same sex marriages as only heterosexual marriages are legalised and restricting in the advancement of equal rights to same sex oriented persons.

1. The Penal Code

Sexual acts between men or women are prohibited under Kenyan statutes and carry a maximum penalty of 14 years' imprisonment, except 21 years in certain aggravating circumstances. The main statute criminalizing homosexuality is the Penal Code. The Kenyan Penal Code of 1930, as revised in 2009, states as follows:

Section 162: Unnatural offenses

> *"Any person who -*
>
> *(a) has carnal knowledge of any person against the order of nature; or*
> *(b) has carnal knowledge of an animal; or*

[180] Article19, Constitution of Kenya
[181] Article 45(2), Constitution of Kenya

(c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years:

Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if:

(i) The offence was committed without the consent of the person who was carnally known; or

(ii) *The offence was committed with that person's consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act."*[182]

Section 163: Attempt to commit unnatural offenses:

> *"Any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for seven years."*[183]

Section 165: Indecent practices between males

> "*Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.*"[184]

From the Penal code, sexual acts between women are not mentioned, although it can be argued that the gender-neutral term "person" in Section 162 of the Penal Code can be construed to include women. Although the laws are rarely enforced, same sex oriented Kenyans are still prosecuted and imprisoned under these laws.

Implications of Criminalisation of Homosexuality in Kenya

The repercussions that anti-sodomy laws have in a society are far and wide. They pose a serious threat to sexual minorities and their subsequent protection. The effects of these laws include:

[182] Section 162, Penal Code
[183] Section 163, Penal Code
[184] Section 165, Penal Code

1. Violence and Discrimination

Criminalization provides a license for the perpetration of horrific crimes, including murder, against this vulnerable minority group. Same sex oriented persons are exposed to atrocities and are harassed by state officials, subjected to physical violence and even death threats in extreme cases.[185] Attackers consider themselves vigilantes with a duty to uphold laws that criminalize same-sex relationships. The state's apathy and often open hostility towards same sex oriented people merely encourages the aggressors in their actions.[186] . Such regulations lead to incidents of harassment, discrimination and mob violence against these sexual minorities, dividing communities and families and undermining the rule of law. Violence is the primary issue facing these sexual minorities and with such laws in place, it is only likely to continue unimpeded.

2. Stigmatization

Same sex oriented Kenyans are generally stigmatized by their families and society at large owing to their sexual orientation or gender identity. Family members disowned them upon discovering their sexual orientation or gender identity. There are instances where individuals were forced to undergo psychological therapy to cure their so called confusion. This extends to place of work where individuals are fired from their jobs.

Where they need medical care, they suffer stigma perpetuated by health care providers who breach their privacy and confidentiality by exposing their sexual orientation to other colleagues at the facilities. The health care providers are not friendly and hardly understand their sexual and reproductive health needs.[187] Moreover, police subject them to unnecessary body and house searches without search warrants as prescribed by criminal procedure.

Research conducted by the Human Rights Watch (herein referred to as HRW) and a subsequent report further illustrate the implications mentioned above. Lorna Dias, the executive coordinator of the gay and lesbian coalition of Kenya, is quoted in the report saying, "Being lesbian or gay is a non-issue. Being harmed because of who we are is a huge issue."[188] In this report, the HRW uncovers the gross human rights violations taking place in

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[185] Human Rights Watch Report, *'The Issue is Violence Attacks on LGBT People on Kenya's Coast'* September 2015 https://www.hrw.org/report/2015/09/28/issue-violence/attacks-lgbt-people-kenyas-coast

[186] Cooper J, *'Kenya's anti-gay laws are leaving LGBT community at the mercy of the mob'*, The Guardian

[187] Finerty E.C, *'Being Gay in Kenya: The Implications of Kenya's New Constitution for its Anti-Sodomy Laws'*, Cornell International Law Journal Vol. 45

[188] Human Rights Watch Report, *'The Issue is Violence Attacks on LGBT People on Kenya's Coast'* September 2015 https://www.hrw.org/report/2015/09/28/issue-violence/attacks-lgbt-people-kenyas-coast

the Kenyan coast with the law enforcement agents taking part in this gross violation. From the use of derogatory words such as '*shoga*' to refer to homosexual person, it is evident that homosexual conduct is not tolerated in the coast.

In the report, the HRW highlights one case in particular where two men were arrested and charged with unnatural offenses as prescribed in the penal code. This was after the residents of the area put pressure on the police to arrest them after pictures of the two men engaging in sexual activities surfaced on the internet. The police then arrested them, threatening bodily harm in an aim to obtain a confession from the men. When this failed, they were subjected to anal medical tests that they had not consented to; this is contrary to criminal procedure. They would need a search warrant to such a procedure which in this case, there is no mention of a search warrant. The report goes on to show the fear with which homosexuals in the Kenyan coast are living with. This then manifests with their going into hiding or opting to not report abuse and harm occasioned on them out of fear of being arrested and persecuted instead. Same sex oriented persons at the Kenyan coast are strongly condemned by religious leaders and this often triggers mob violence occasion on these sexual minorities. The law enforcement agencies are often 'on the fence' as far as this matter is concerned. At times they will intervene in the harassment or physical abuse of these sexual minorities while other times they are the ones occasioning physical abuse on these minorities. One may blame it on the conflict of Kenyan laws. This is to say that the constitution provides for/mandates the protection of all Kenyans, however, the penal code then criminalises a section of the populace. As such, the law enforcement agencies are at a loss on which law to enforce.

However, this past year has seen great strides in the protection of sexual minorities. This is with the holding in *Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others*[189] where the petitioner brought a petition before the High Court at Nairobi, constitution and judicial review division. This is after his application to register a non-governmental organisation (NGO) whose core business would be to address the human rights abuse and violence suffered by sexual minorities was denied by the first respondent, the NGO co-ordination board. He filed this petition alleging that the board's decision to deny his application was on the basis of the beneficiaries being homosexuals. He further claimed that their right of association guaranteed under article 38 of the Constitution had been violated.

[189] Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others[2015] eKLR http://kenyalaw.org/caselaw/cases/view/108412/

He therefore sort the guidance of the court to answer the question 'Is he not a person worthy of protection as guaranteed by the constitution?'

In its defence, the board claimed that if in fact the application was denied for the reasons stated above, the denial is justified by the criminalisation of homosexual intercourse as provided for in the Penal Code.[190] They claimed that this would be furthering a criminality and immoral affairs[191] citing sections 162, 163 and 165 of the penal code.[192]

The court held that the penal code does not criminalise nor does it limit the freedom of association on the basis of sexual orientation. As such, the Board's argument that its denial of registration is based on the provisions of the penal code lacks merit. It further stated that the penal code does not criminalise the status of being gay or lesbian; it merely criminalises sexual conduct against the order on nature yet fails to define what is meant by order of nature. As such, the arguments put forth by the board were dismissed and the board directed to grant the petitioner registration of his NGO.

There are however several loopholes left by this decision. The court stated that the state of being homosexual is not criminal; instead it is sexual conduct against the order of nature, which it rightfully noted had no definition. The court should have therefore sought to demystify what 'against the order of nature' meant. This is an aim to prevent future prosecution, harassment, discrimination and human rights violations occasioned on same sex oriented persons under the justification that they are in fact in contravention of the law themselves. Although Kenya still has a long way to go in terms of abolishment of its anti-sodomy laws, this decision is a step in the right direction. It set precedence for future petitions seeking protection and accordance of equal rights to sexual minorities. Moreover, it laid a foundation for the fight against anti-sodomy laws.

The first, third and fourth hypothesis are confirmed within this chapter. Kenyan laws do in fact criminalise homosexual acts with and among males conferring fines and imprisonment as punishment. This has in turn resulted in the harassment and blatant discrimination of same sex orientated persons with the law enforcement agents taking a dormant position. This continued criminalisation, with consideration to the previous chapter, contradicts international law instruments that Kenya is party to and what is slowing becoming an

[190] Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others, 4
[191] Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others, 13
[192] Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others, 11

international law custom. As a result, as the international community moves 'North', Kenya may in fact be deemed to be going 'South' as far as granting to all persons equal rights regardless of sexual orientation are concerned. However, all hope is not lost with seminal cases such *Eric Gitari v Non-Governmental Organisation Co-ordination Board & 4 others*, the judiciary is following in South Africa's footsteps by interpreting the law to fit the present day gaps in society.

CHAPTER 4: CONCLUSIONS AND RECOMMENDTIONS

This chapter looks at the findings and conclusions of the study in relation to the research objectives; whether there is in fact an emerging consensus in international and comparative law against the criminalisation of homosexuality and whether Kenya's continued criminalisation of homosexuality is in contravention with this emerging consensus.

Findings

i. Is there an emerging consensus against the criminalisation of homosexuality?

There is evidently an international shift and emerging consensus as far as anti-sodomy laws are concerned; that criminalisation of homosexuality is a violation of the inherent dignity of same sex oriented persons as well as a contravention of the international instruments discussed in chapter two. Further, as seen in chapter two, looking at the ECHR, all European states have in fact abolished their anti-sodomy laws. This has mainly been as a result of the ECtHR's interpretation mechanism, which seeks to look at the Convention as a living instrument, therefore guarantying protection to emerging social/national minorities; key among them sexual minorities. The ECHR establishes legal bodies; ECtHR and ECmHR which guarantee that the provisions of the convention and the decisions of the ECtHR are upheld by the contracting states. Moreover, the contracting states cooperate in and consent to implementing the provisions and the decisions stemming from the ECHR. This therefore gives the convention more power in the protection of sexual minorities as illustrated in chapter two of this paper.

Looking at South Africa as the comparative study for this paper, it not only sets an example for the continent but also for the world in terms of protection of sexual minorities. Its constitution expressly protects homosexuals by including sexual orientation as a non-discriminatory ground within its Bill of Rights. In doing so it has attempted to ensure universality of rights. Albeit it populace is yet to fully embrace sexual minorities, their protection under the law is a step in the right direction and worth commendation.

ii. Is Kenya's continued criminalisation in contravention of this consensus

Looking specifically at the focus of this paper, Kenya, vis a vis the international instruments that it is party to, it is the finding of this research that Kenya is in fact in contradiction of its obligations to implement the provisions of the said instruments as well as its very own

constitution. As such, the continued existence of anti-sodomy laws found in Kenya's penal code is not only unconstitutional but also an infringement on the rights guaranteed to homosexual Kenyan citizens under the respective provisions found in the ICCPR, the ICESCR and the African Charter on Human and People's Rights.[193]

Even then, Kenyan Constitution courts are starting to realise the need for the protection of sexual minorities; with the *Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others* case which allowed the registration of an NGO seeking to address the violation and abuse of sexual minorities in Kenya. This is the first step of a long journey ahead but a step in the right direction all the same.

Recommendations

The possible recommendations following the findings of this paper include

a) Amendment of the penal code by repealing sections 162, 163 and 165

Kenya needs to comply with and honour its obligations to the conventions and treaties that it has ratified. This is in accordance with article 2(6) of the constitution with states that any treaties and/or conventions ratified by Kenya shall in fact form part of its laws. As such the penal code in its criminalisation of homosexuality contravenes these international instruments and by and large, the constitution itself owing to the holding in the *Eric Gitari case.*

b) Broadening of interpretation mechanisms

As seen in the ECtHR decisions, Kenyan courts should interpret the law as a living instrument taking into consideration the present conditions and the evolution of society. Courts should realise that same sex orientation has become prevalent in Kenya thus leading to the emergence of a sexual minority group in Kenya; a minority that is being discriminated against by virtue of the status of its members. The courts therefore have an obligation under article 27 of the constitution to protect any person who faces discrimination by virtue of their status.

c) Sensitisation of the general public

As seen in South Africa, Kenya is at risk of advancing its laws to protect sexual minorities but have it amount to naught because the social mind set has not changed. It is therefore essential to concurrently sensitise the public on the fact that gay rights are in fact human

[193] Article 2(6) Constitution f Kenya 2010, Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution

rights. It is simply the accordance of the same rights enjoyed by heterosexual citizens to their homosexual counterparts. Not only that but also conduct civic education with same sex oriented persons in mind so as to educate them on the rights they are entitled to by virtue of being human beings and Kenyan citizens.

d) **Harsh penalties to those found infringing the rights guaranteed to same sex oriented persons**

As a deterrent measure, law enforcement should prosecute those who discriminate or abuse on the basis of sexual orientation as would on any other ground. This shall dispel any fears by homosexual citizens as they would now have a point of recourse.

Conclusion

It is the conclusion of this paper that with its continued criminalisation of homosexuality, Kenya is indeed in violation of its international human rights law obligations. It is also the conclusion of this paper that the Kenyan courts are slowly but surely moving towards the granting of equal rights to all persons regardless of their sexual orientation. Therefore, it is the joint responsibility of both the legislative and judicial arm of the government to make the necessary amendments to the law that shall see equality prevail for all its citizens regardless of their sexual orientation; gay rights are human rights.

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