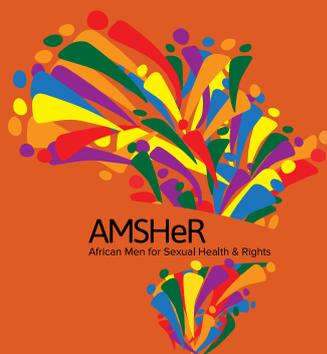




# REFLECTIONS ON SEXUALITY AND EQUALITY IN AFRICA

VOLUME 1:

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## About AMSHeR

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The African Men for Sexual Health and Rights (AMSHeR) is a regional coalition of men who have sex with men (MSM)/lesbian, gay, bisexual, transgender (LGBT)-led organizations in Africa. Through advocacy and capacity strengthening, AMSHeR works to promote non-discrimination, particularly based on sexual orientation and gender identity, and to advance access to quality health service for MSM/LGBT individuals in Africa. AMSHeR provides a platform for exchange, learning, and advocacy among grassroots MSM organizations, human rights organizations, national agencies, and other stakeholders working with and/or for MSM/LGBT communities in Africa.

*“Je suis woubi déclarée”*

*“I am an out woubi”*

*In memory of Joel Gustave Nana [1982 - 2015],  
founding Executive Director,  
African Men for Sexual Health and Rights [AMSHeR]*

**The African Men for Sexual Health and Rights (AMSHeR)**  
27 Cliveden Avenue, Auckland Park, Johannesburg, South Africa

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# REFLECTIONS ON SEXUALITY AND EQUALITY IN AFRICA

VOLUME 1:

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## Disclaimer

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The statements, findings, conclusions and recommendations in this document are those of the contributors and do not reflect the views and positions of the African Men for Sexual Health and Rights (AMSHeR). While reasonable efforts have been made to ensure the accuracy and good faith of the articles collected in this document, AMSHeR does not accept any responsibility or any consequences whatsoever that may arise from the statements, findings, conclusions or recommendations they contain.

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# FOREWORD

It is a great honour and a privilege to be associated with this important publication. The *Reflections* series is rooted in the strongest grounding of effective advocacy – research, fact-based policy, lucid exposition, plus an overriding demand for justice.

The series is a product of the Sexuality and Equality in Africa Project of the African Men on Sexual Health and Rights (AMSHeR), Africa’s sole continent-wide advocacy organisation of its kind.

With the support of the Open Society Initiative for Southern Africa (OSISA) and the Ford Foundation, the project creates voice and visibility for gay men and other men-having-sex-with-men (MSM) across Africa. At the same time it generates and documents different forms of evidence about the real lives of lesbian, gay, bisexual, transgender and intersex (LGBTI) people across the continent.

The *Reflections* series aims high. It is designed to encourage voices of African students, scholars, researchers, professionals and activists to emerge. Our human presence can be found in every country and in every culture and every community on this continent. But our existence has been denied, reviled, persecuted and repressed – too often in blood. Now is the time to create a discourse specific to our continent on sexuality, sexual rights, gender identity and gender expression. A discourse that defiantly, but informedly, and persuasively, asserts our claims to human dignity and to justice. A discourse that measures passion and reason and facts and focuses them on tender lives.

That is what this series does.

The articles in this first collection display an evocative diversity of issues. They range from language through law, legislation and advocacy to asylum:

- The richly encoded languages and social expression of gay men and other MSM living in Abidjan, Cote d’Ivoire (Amara);
- An analysis of the obligations of African states, under the *African Charter on Human and Peoples’ Rights*, to prohibit discrimination on the basis of sexual orientation (Claude);
- How a project aimed at facilitating inclusion and participation of MSM in multi-sectoral advocacy planning earned its subjects recognition, respect and equity (Didier);
- The experiences of lesbian, gay and transgendered refugees and asylum seekers in Uganda and South Africa (Jalisi, Johnston, Ongwech);
- The effect of social, political and cultural discourse on the acceptance or non-acceptance of gay and lesbian realities as reflected in the popular media in Malawi (Kaiyatsa);
- An analysis of the right to same-sex marriage in international human rights law and the implications of this for anti-homosexuality bills (as they were then) in Uganda and Nigeria (Ogendi);
- The legitimacy of the proposed (as it was then) Anti-Homosexuality Bill under the Constitution of Uganda (Stanley); and finally,
- Advancing the rights of sexual and gender minorities using the African Commission on Human and Peoples’ Rights (Esom).

Taken together, these articles vividly illustrate the vibrancy of the debate about sexuality,

equality and human rights for Africans. And this is no debate in the air. It is about lives and bodies and brutality and resistance and the clamant demand for dignity. And its outcome is designed to secure the elementary but still-fragile goal of safe physical, legal and social spaces for all.

As the sole organisation of its kind in Africa, AMSHeR wants this first collection of Reflections to spread far and wide. The contributions are evidence-based and soundly rooted in practice. So we hope they will evoke debate and discussion – and, even better, inspire more LGBTI individuals to speak out and speak up by participating in the important conversation the Reflections series represents.

**Justice Edwin Cameron**  
*Constitutional Court of South Africa*

November 2015

# Sex between men in the era of HIV in Abidjan: Context, practices and needed interventions

**Bamba Amara<sup>1</sup>**

[*Editor's note: This article has been translated and edited from its original French version.*]

## ABSTRACT

This article addresses the difficulties faced by men-who-have-sex-with-men (MSM) in regard to the recognition of their right to health in Côte d'Ivoire. It gives some understanding of the context of stigmatization and discrimination in which they live on a daily basis. It examines the social consequences of this and their vulnerability to sexually transmitted infections (STIs) and HIV. Consequently, one finds evidence of numerous risk behaviours. Despite this climate, it is imperative that interventions are set up or strengthened in order to control the prevalence of STIs and HIV in this community.

## Introduction

The epidemic of HIV transmission in Africa has mainly been alluded to as “heterosexual.”<sup>2</sup> However, epidemiological data indicate that unprotected anal sex between men is also a significant factor in the transmission of HIV across sub-Saharan Africa.<sup>3</sup> For example, studies in Dakar (Senegal) and Mombasa (Kenya) have estimated the prevalence of HIV among MSM at 21.8% and 24.5% respectively, whereas the continental average for all groups is 4.9%.<sup>4</sup>

In the present time, homosexuality has become increasingly visible in African contexts but it is still highly stigmatized.<sup>5</sup> This stigmatization often confines homosexual practices to the underground, which leads to an increased vulnerability to STIs, including HIV.<sup>6</sup> This situation is accompanied by inadequate information on the risks of transmission of HIV during anal sexual intercourse and other same-sex sexual practices along with limited access to diagnosis and treatment.

Côte d'Ivoire is one of the countries in West Africa most affected by the global HIV pandemic, with a prevalence of 3.7% in the general population.<sup>7</sup> This rate masks a considerably higher rate in certain

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2 Belec L. 2001. *La transmission sexuelle du sida* (2e édition). Paris, FR: PUF.

3 Baral S et al. 2007. “Elevated Risk for HIV Infection Among Men Who Have Sex with Men in Low- and Middle-income Countries 2000-2006: a Systematic Review.” *PLoS Medicine* 4 (12): e339.

4 Smith AD et al. 2009. “Men Who Have Sex with Men and HIV/AIDS in sub-Saharan Africa.” *Lancet* 374 (9687): 416–422; and, UNAIDS. 2013. *Getting to Zero: HIV in Eastern and Southern Africa*. Johannesburg, RSA: UNAIDS.

5 Gueboguo C. 2006. “L'homosexualité en Afrique : sens et variations d'hier à nos jours.” *Socio-logos: Revue de l'association française de sociologie*. Available: <http://sociologos.revues.org/37>

6 Politique générale. VIH et sexualité entre hommes, supra note 3 à la p. 1.

7 Résultats Préliminaires de l'Enquête Démographique et Santé 2012

sub-groups within the population, such as sex workers SW and MSM. Preliminary results of a study on risk factors and prevalence of STIs and HIV among MSM in Abidjan, for example, showed a prevalence of HIV of 18%.<sup>8</sup> Hence the importance of urgently improving access to prevention and treatment of STIs and HIV for MSM in this region.

## Purpose and method

This study sought through more informal, less rigorous means, to describe the socio-cultural context in which MSM live in the city of Abidjan, as well as their sexual practices and perceptions. It was done to raise awareness among policy makers in regard to strengthening health programmes towards MSM at high risk for HIV infection. The study was qualitative, based on individual interviews with key informants, participant observation, review of documentation, and a group discussion with young MSM. Data analysis followed the procedures for thematic analysis of qualitative data.

## The context of homosexuality in Abidjan

Côte d'Ivoire is one of the few African countries where sexual relations between adults of the same sex are not criminalized. However, many difficulties still persist for populations such as sex workers and MSM, including verbal and physical violence. This is despite the fact that, at least from the 1980s, homosexuality was already visible in Côte d'Ivoire.<sup>9</sup> MSM use the terms *'branchés'* ('trendy') or *'milieu'* to refer to their community. As for the term *'pédé'* ('faggot'), it is commonly used by the general population to refer to people with a homosexual orientation. But this term is rarely used by the *'branchés'* themselves. For them it is stigmatizing and frightening.

*When you are in the street and you hear 'faggot' around you, you are afraid because you think that you are exposed and that the 'controus'<sup>10</sup> want to assault you.*

In the city of Abidjan, the MSM experience of their social context is variable depending on the place of residence. The testimonies collected during the study revealed that the Marcory commune, situated to the south of the city, was considered to be the most homophile commune. Abobo was viewed as the most homophobic, which could be explained by the fact that the population of this commune is predominantly Muslim.

*I am an out woubi [gay man, see below]. In Marcory one can identify oneself in the street, there are no problems, but in Abobo it is not possible. I never go to Abobo for fear of being assaulted.*

In general, though, the *'branchés'* in Abidjan are subjected to stigmatization and discrimination. This stigmatization also leads to a self-stigmatization. MSM are often victims of verbal and physical abuse by the population and also the police. This police action combined with the self-stigmatization prevents the filing of a complaint for homophobic assaults. In order to protect themselves from verbal and physical abuse in the street, MSM strive to be *'garé'* or *'parked'*, meaning that their sexual orientation is outwardly disguised to avoid problems in public spaces.<sup>11</sup>

8 Hakim AJ et al. 2015. The Epidemiology of HIV and Prevention Needs of Men Who Have Sex with Men in Abidjan, Cote d'Ivoire. PLoS One 10(4): e0125218.

9 Le Pape M, Vidal C. 1984. "Libéralisme et vécu sexuel à Abidjan." Cahiers internationaux de la sociologie 76: 111-118.

10 Homophobic people

11 Term used by the MSM so that their sexual orientation is not suspected when they are in the street in areas where they are likely to be physically assaulted.

## A coded language

The social marginalization of MSM in Côte d'Ivoire has led to the creation of recognition codes (clothing, gestural) and a coded language: *'le woubikan'*. The country's official language, French, coexists with about sixty local languages and a mixed dialect or argot called *'nouchi'*. This dialect uses a pictorial language and words from local languages to translate everyday life.

The *'branchés'* specifically use *'le woubikan'* to facilitate communication between them. It is modelled on *'nouchi'* but differs from it in that it often uses the same terms but with different meanings. This is for camouflage, not only from the general population, but also from those that regularly use *'nouchi'*. There is therefore a double camouflage in relation to French and to *'nouchi'*. Some important features of *'le woubikan'* are described below, as it is imperative for social workers, researchers and all those wanting to enter the *'milieu'* of the *'branchés'* to immerse themselves in this language.

## A specific social network

In Abidjan, the mobile telephone plays an important role in the establishment of social networks for MSM.<sup>12</sup> It is difficult to enter the *'milieu'* if one is not part of the social network. Social and sexual relationships are forged around the *'yossi'* and the *'woubi'*. The *'yossi'* play the active sexual role. They are called 'cock' or 'boy in boy' because they do not have the external signs of homosexuality as described by the *'branchés'*. These include, "undulating gait, braids, slinky outfits, lightening of the skin, gesticulation." Some *'yossi'* have substantial financial resources. Most of the *'yossi'* are bisexual.

The *'woubi'* play the passive sexual role. They are called 'hen', 'queen', 'modern woman', 'woman of today'. They are involved in professions where one finds many women like hairdressing, couture, and modelling. Among the *'woubi'*, one finds the *'déclarées* [out]<sup>13</sup> and the *'garées* [discreet]'. Amongst the *'woubi déclarées'*, there is a sub-category consisting of transvestites. The *'woubi'* are predominantly homosexual, some have never had heterosexual intercourse.

Between these two categories (*'yossi'* and *'woubi'*) is an intermediate that is not well liked in the *'milieu'*. It is the category of the *'branchés'* that is both active and passive. In the *'milieu'* they are accused of not assuming their responsibilities and wanting to enjoy all the pleasures. For this reason they are called 'hen-cock', 'double-sided', 'cassette', 'braised fish'. They are active and passive during sexual intercourse depending on the partner. Most often, they are bisexual.

## Sex, HIV and Risk: Perceptions and Practices

The following perceptions and practices related to sex and risk for HIV amongst the *'branchés'* were derived from the interviews and group discussion:

- **Anal intercourse** - is often seen as less risky than vaginal intercourse. The anal region or *'tchapa'* is perceived as the area of pleasure.<sup>14</sup> It must therefore be maintained to remain clean in order to have the maximum pleasure.
- **Bisexuality** - is perceived as a bad practice. People who indulge in it are seen as hypocrites. Above all, it allows them to hide their sexual orientation in order to have a normal social and family life. They are seen with women during the day and at night they are attracted to men. This bisexuality is very widespread in the *'milieu'* especially among adults where the heterosexual union would be

<sup>12</sup> The Internet is gaining use as a communication tool by the *'branchés'*. There are many cyber cafés in Abidjan where one can access the Internet at a relatively affordable cost.

<sup>13</sup> The use of the feminine in French is deliberate.

<sup>14</sup> Term used to refer to the anal area

a 'social cover.'<sup>15</sup>

- **Condoms**- The male condom is available, accessible and appropriate. It is the only means of protecting oneself against STIs and HIV. But the use of condoms still remains very low. Young 'woubi' seeking financial resources are vulnerable and therefore do not insist upon the condom. In regard to the 'yossi', the use of the condom during sexual intercourse is based on his education and awareness of the risk of contracting HIV. The female condom is also beginning to be used in the 'milieu' mainly by the 'office girls' [see Sex work below].
- **Heterosexuality**- is considered to be a good practice because it is natural and allows one to have children. This heterosexuality also allows for the introduction of new 'branchés' through 'castorisation' or the seduction of a man who has not previously had male-male sexual relations.
- **HIV**- or 'the great lady' represents the 'absolute evil'.<sup>16</sup> To know that somebody in the 'milieu' has HIV, leads systematically to his rejection by the social network. He becomes a pariah because all those who rub shoulders with him are accused of carrying the virus. It is therefore preferable to avoid contact with people living with HIV.
- **Lubricant gel**- is in great demand but is rarely used because of its price. Consequently, saliva is mostly used as a lubricant during sexual intercourse. Shea butter or vaseline may also be used.
- **Multiple sexual partnerships**- are seen as a bad thing with an increased risk of contracting diseases. This can also tarnish one's reputation and falls under prostitution and promiscuity. But, paradoxically, it is widespread in the 'milieu'.
- **Sexual fidelity**- is seen as a good sexual practice. It enables one to avoid many diseases, especially STIs and HIV, and to lead a healthy, fulfilling and enjoyable life. But it is uncommon.
- **Sex work**- is carried out regularly. It is either done openly, like the transvestites who are referred to as 'office girls', or covertly, increasingly on the Internet. In Abidjan, the 'office' is situated in the town of Marcory in zone 4.
- **Transactional sex**- Sexual intercourse is heavily dependent on financial resources. This is shown in the practice of 'bizi' where the choice of one's sexual partners is often based on their financial resources.

### Limited access to health services

In the face of the stigmatization endured, the self-stigmatization, the specifics of the community and the numerous risk behaviours amongst the 'branchés', it is essential that specific interventions are carried out for the prevention and management of STIs and HIV. In this regard, the community is faced with a lack of medical care facilities for specialized medical treatment. Public health centres do not as yet offer specific care of STIs among MSM. So much so that to go to a public health centre for anal STIs is prohibited in the community. Care is provided by health centres managed by non-governmental organizations. The latest survey among MSM in the city of Abidjan revealed that only 35% of the respondents had recourse to public health centres for their care.<sup>17</sup>

This leads to delays in seeking appropriate medical support, obstacles in HIV screening and the adoption of risk behaviour. The strong stigma around HIV and the lack of confidentiality in the

15 Larmarange J et al. 2009. "Homosexualité et bisexualité au Sénégal : une réalité multiforme." Population (Edition française) 64(4): 723-756.

16 Name given to HIV in the 'branché' language 'woubikan.'

17 See note 8, above.

screening centres, for example, explain the low recourse to screening. The ‘*woubi*’ often go for testing whilst the ‘*yossi*’ go less frequently. As for the bisexuals, they are very reluctant to go for screening. While antiretroviral therapy is available, it is not available in all health centres.

### What interventions need to be developed?

As a way to address the gap in services for MSM, in 2010, the IMPACT-CI project, financed by PEPFAR with technical support from Heartland Alliance Côte d’Ivoire, began implementation. The IMPACT-CI project carries out interventions in the following locations: Abengourou, Abidjan, Bouaké, Bondoukou, Daloa, Gagnoa, Guiglo, Man, and Yamoussoukro. The minimum package of activities consists of six main activities: communication for change in behaviour, promotion of condoms and lubricant gels, advice and HIV screening, screening and treatment of STIs, treatment of common illnesses, antiretroviral therapy management. Some activities are carried out in the community health centre while others are delivered by MSM-led community-based organisations (Arc-en-ciel plus and Alternative-CI). Despite this activity package, weaknesses remain. It is essential to establish and to strengthen existing interventions but also to develop new interventions. MSM-led community-based organisations should be at the centre of such work.

#### *Strengthening the fight against stigmatization and discrimination*

Stigmatization in health centres leads to a delay in the treatment of STIs. This fight must therefore be integrated into the fight against STIs and HIV.<sup>18</sup> Legal provisions that prohibit acts of stigma and discrimination against MSM must be adopted. It is not enough that same-sex sexual relations are not criminalized. These additional provisions should encourage the reporting to the police of homophobic assaults which have proliferated with the advent of the post-electoral crisis in the country. As a priority, this fight against stigmatization and discrimination must also be undertaken at health centres to promote better management of STIs and HIV and a more welcoming environment for MSM.

#### *Strengthening of peer education*

There has been good success in Abidjan and elsewhere with the deployment of peer educators. However, this strategy needs to be expanded to reach more MSM. Peer educators can be ideally placed to provide information and referral for STIs and HIV screening.<sup>19</sup> They can also promote condoms, lubricant gels, and encourage behaviour change.<sup>20</sup> They can become trusted and respected amongst the ‘branchés’ when they are carefully selected, well-trained and supported.

#### *Expand promotion of condoms and water-based lubricant gel*

Promotion of condom use needs to be maintained and increased. Without access to appropriate lubricants, however, condom use will be limited. Ensuring that condoms and lubricants are available in all places frequented by MSM will help to improve the use of condoms. This should include toilets in bars and nightclubs since these places are frequently used to have sexual intercourse.

#### *Expanding sensitisation and training of medical staff*

It is imperative that more medical practitioners are sensitized to the realities and needs of MSM in

18 Anyamele C et al. 2005. Sexual Minorities, violence and AIDS in Africa. Africa Region Working Paper Series No. 84. Washington, DC: World Bank.

19 Jones KT et al. 2008. Evaluation of an HIV Prevention Intervention Adapted for Black Men Who Have Sex With Men. American Journal of Public Health 98(6): 1043–1050.

20 Larmarange J et al. 2010. Men who have sex with men [MSM] and risk factors associated with last sexual intercourse with a man and a woman in Senegal. PLoS One 5(10): e13189.

# 1

Abidjan and across the country. The training should include prevention of stigma and discrimination as well as specific information on STIs and other sexual health needs for MSM.

### ***Rethinking awareness campaigns on STIs and HIV/AIDS towards the general population***

Communication campaigns directed at the general population have omitted the existence of homosexuality in Côte d'Ivoire.<sup>21</sup> New campaigns of mass communication should take this social reality into account.<sup>22</sup> The latest survey among MSM in the city of Abidjan revealed that 51% of the respondents thought that vaginal intercourse was more risky than anal sexual intercourse.<sup>23</sup> Prevention messages should focus on behaviours and practices, and not on population groups.

### ***Ensuring that bisexuality and female partners of MSM are included in interventions***

Bisexuality remains frequent amongst the 'branches' hence the presence of potentially complex HIV transmission networks. Thus the female partners of the MSM are at risk for STIs and HIV. The latest survey on the modes of transmission of HIV in Côte d'Ivoire showed that 46% of new HIV infections occur in stable couples.<sup>24</sup>

## **Conclusion**

The homosexual community in Abidjan, referred to as 'branchés', is highly diversified. It shows the differences of which the main characteristics are based on age, social network and sexual orientation. The most widespread sexual orientation is bisexuality, which serves as a 'social cover'. The social network is built around bars, nightclubs, restaurants, and the beach with the help of tools such as mobile telephones and, increasingly, the internet. In the face of increasing visibility, however, there is growing homophobia within Ivorian society. This stigmatization hampers the implementation of prevention and treatment measures for STIs and HIV, particularly amongst MSM.

In spite of this climate, programmes must be set up to reduce the prevalence of STIs and HIV in this group. Such interventions must take into account elements like sexual intercourse practised mainly without condoms and lubricant gels, with a high prevalence of transactional sex and low recourse to HIV screening. Actions directed towards the general population should not only focus on heterosexual relationships. They must take into consideration homosexuality, which is increasingly common within society.

The prevention priorities are communication for behaviour change through the strengthening of peer education, the development of new communication strategies directed towards the general population, and strengthening the fight against stigmatization and discrimination.

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21 Gueboguo C. 2009. *Sida et homosexualité(s) en Afrique*. Paris, FR: L'Harmattan.

22 Broqua C. 2003. La communication publique sur le sida en direction des homosexuels et bisexuels masculins en France 1989-2002. In : Broqua C., Lert F., Souteyrand Y., eds. *Homosexualités au temps du sida. Tensions sociales et identitaires*. Paris, FR: ANRS.

23 See note 8, above.

24 ONUSIDA. 2009. Modes de transmission du VIH en Côte d'Ivoire : Analyse de la distribution des nouvelles infections par le VIH en Côte d'Ivoire et recommandations pour la prévention. Abidjan, CI: ONUSIDA.

# The right to sexual orientation in the African context: the obligations OF STATES Party under the African Charter on Human and Peoples' Rights.

**Claude Ndemeye**<sup>25</sup>

[*Editor's note: This article has been translated and edited from its original French version.*]

## ABSTRACT

No other human rights issue in the African context has given rise to such controversy as that concerning sexual orientation. Although the right to sexual orientation is not an explicitly recognized right in terms of the *African Charter on Human and Peoples' Rights* (*The African Charter*) other human rights instruments to which it is linked, such as the Universal Declaration of Human Rights (UDHR), as well as international human rights jurisprudence, point to opportunities for change. As the *African Charter* is interpreted across the continent in relation to the right to sexual orientation, obligations will fall to States Party to promote and protect the right to sexual orientation, especially amongst their Lesbians, Gays, Bisexuals, Transgenders and Intersex (LGBTI) citizens. This will subsequently turn the tide of the current reality where, in spite of their ratification of the *African Charter* and other international human rights instruments, most African states continue to deny the right to sexual orientation for LGBTI persons.

## Introduction

To wonder about the issue of the right to sexual orientation in the African context seems to be a perilous exercise. The issue is so controversial. Indeed, no other human rights issue has given rise to so much discourse on the African continent. Although the right to sexual orientation is not an explicitly recognized right in terms of the *African Charter on Human and Peoples' Rights*, the laws and legal principles that underpin this right are guaranteed in most constitutions, as well as in international treaties on human rights, ratified at state levels.

With regard to the *African Charter*, African states have set up bodies responsible for its implementation: the African Commission on Human and Peoples' Rights; and, the African Court on Human and

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Peoples' Rights. These two bodies have the authority to hear cases of violations of the human rights enshrined in the *African Charter*, and to invoke remedial actions. The question that arises is on what basis the African Commission or the Court can be referred to by people who are victims of human rights violations based on their sexual orientation. This article aims to analyse the legal sources of protection of the right to sexual orientation as well as the types of obligations that arises for states in this regard.

### Legal sources of protection of the right to sexual orientation

If the term sexual orientation is relatively recent, the laws that refer to the right to sexual orientation in the corpus of human rights jurisprudence benefit from certain seniority. International law on human rights does not explicitly guarantee a framework of protection of the right to sexual orientation as a fundamental human right. The absence of formal reference to the right to sexual orientation in the various international instruments on human rights constitutes the backbone of the problem of protection of this right. To grasp the scope of the protection granted to individuals in regard to sexual orientation, it is necessary to analyse international human rights texts on which monitoring bodies have made comments which include sexual orientation as a basis for protection against discrimination.

#### *Protection within the framework of international human rights instruments*

The UDHR, although non-binding, is the first text of universal scope in which fundamental human rights and freedoms are enshrined. The UDHR is complemented in the global human rights framework by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). All of these human rights instruments collectively guarantee equality and non-discrimination, including for people of non-heterosexual orientation. As we will see in the following section, the interpretation of these instruments has extended their reach into the jurisprudence of the United Nations Human Rights Committee.

#### *Protection of the rights contained in the international human rights instruments*

Many major texts pertaining to human rights from the UDHR refer to rights related to the private and personal spheres of individuals: for example, the right to marry, to have a family, of freedom of thought and conscience. Although, at present, no international agreement or treaty has explicitly recognized the right to sexual orientation, several specific legal cases are considered as jurisprudence to this effect. Indeed, in these cases, the UN Human Rights Committee has affirmed that sex is a prohibited ground of discrimination under Article 2.1 of the ICCPR, and that sex may also include sexual orientation under Article 26.<sup>26</sup> In a similar vein, in its general comments, the Committee on Economic, Social and Cultural Rights has stated that “any other status” in Article 2(2) of the ICESCR includes prohibition of discrimination on the basis of sexual orientation.<sup>27</sup>

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26 UN Human Rights Committee. 1994. Communication No. 488/1992 : Australia. 04/04/1994. CCPR/C/50/D/488/1992. Available: <http://www.unhchr.ch/tbs/doc.nsf/0/d22a00bcd1320c9c80256724005e60d5>. This Communication, generally called the *Toonen v Australia* case, was made with regard to a Tasmanian activist who challenged the criminalization of homosexuality which still existed in that state, whereas other Australian states had repealed these laws. The Committee ruled, among other things, that the grounds of sex, recognized as prohibited grounds for discrimination under Article 2(1) and Article 26 of the ICCPR, included sexual orientation. Consequently, the Committee recognized that criminalization of homosexuality constituted discrimination on this basis. This interpretation was affirmed in *Communication No 941/2000 : Australia*. 09/18/2003 or *Young v Australia*. CCPR/C/78/D/941/2000. Available: <http://www.unhchr.ch/tbs/doc.nsf/0/3c839cb2ae3bef6fc1256dac002b3034>

27 Committee on Economic, Social and Cultural Rights. 2009. General Comment No. 20: Non-discrimination in the enjoyment of economic, social and cultural rights. U.N. Doc. E/C.12/GC/20 (2009). Available: [www.un.org/Docs/journal/asp/ws.asp?m=E/C.12/GC/20](http://www.un.org/Docs/journal/asp/ws.asp?m=E/C.12/GC/20)

## Sexual Orientation and the African Charter

The *African Charter* was adopted in 1981 and has the distinction of being the first binding text for the promotion and protection of human rights on the African continent. The *African Charter* emphasizes the values of African civilisation.<sup>28</sup> As in other texts seen above, it does not mention the right to sexual orientation. It does, however, guarantee the rights to equality and non-discrimination. In Article 2, it guarantees the enjoyment of such rights without distinction, including on the basis of sex. This can open two lines of thought for possible extension of this term to include sexual orientation.

Firstly, it is open for this provision to be interpreted to include sexual orientation. Secondly, in addition to sex, there is also prohibition of discrimination on the basis of any other status. Elsewhere, this term has been interpreted to include sexual orientation, as J. Donnelly has argued:

*Sexual orientation is a prima facie case of 'other status' by which individuals are singled out for odious discrimination.*<sup>29</sup>

If we consider the right to non-discrimination and the right to equal protection of the law set out in Articles 2 and 3 of the *African Charter*, and read them together with 60 and 61 (on guidance for interpretation), we can deduce that the *African Charter* prohibits discrimination on the grounds of sexual orientation or any other form of discrimination. Indeed, as Article 60 states, in applying the provisions of the *African Charter*:

*...the [African] Commission shall draw inspiration from international law on human and peoples' rights, particularly from... the Universal Declaration of Human Rights... as well as from the provisions of various instruments adopted within the specialised agencies of the United Nations of which the Parties to the present Charter are members.*<sup>30</sup>

Article 61 continues in the same vein:

*The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by Member States of the Organization of African Unity...*<sup>31</sup>

As we have seen above, the Human Rights Committee has already established that discrimination on the grounds of sexual orientation is a violation of the human rights contained in the UDHR, the ICCPR, and the ICESCR. We can therefore say that the clear indication is that the African system for protection of human rights, in applying the provisions of the *African Charter*, should clearly address human rights violations on the basis of sexual orientation and provide mechanisms for victims of such violations to seek redress.

One of the unique aspects of the *African Charter* is the duties it sets out for individuals, as follows, in Article 28:

*Every individual shall have the duty to respect and consider his fellow beings without discrimination and to maintain relations aimed at promoting, safeguarding and reinforcing*

28 African Union. 1981. *African Charter on Human and Peoples' Rights*. Available: <http://www.refworld.org/docid/3ae6b3630.html>

29 Donnelly J. 1999. "Non-discrimination and sexual orientation: Making a place for sexual minorities in the global human rights regime." In Baehr P, Flinterman C, and Senders M (eds.). *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights*. Amsterdam: Royal Netherlands Academy of Arts and Sciences.

30 As above, note 28.

31 As above.

*mutual respect and tolerance.*<sup>32</sup>

Although only the States Party can respond to the bodies responsible for the implementation of the *African Charter*, the African Commission has already ruled on situations where private individuals have committed rights violations. In the case of *Sudan Human Rights Organizations and COHRE v Sudan*, for example, the African Commission pointed out that an act committed by a private individual or a non-state entity, and thus not directly attributable to a state, may incur liability of the state nonetheless.<sup>33</sup> This was not because of the act itself, but due to the lack of due diligence on the part of the state in preventing the violation or for not having taken the necessary measures to provide reparation to victims.

Despite this potential, within the *African Charter* and the African human rights system, to protect against discrimination on the basis of sexual orientation, many African states continue to pass laws and to adopt positions institutionalizing homophobia. For example, currently, only 16 African countries have laws that allow for or are silent on sexual relations other than those considered heterosexual.<sup>34</sup> Conversely, 36 other states have provisions in their legislation explicitly criminalising homosexual acts, with penalties including life imprisonment, death, corporal punishment, deportation, or forced labour.<sup>35</sup>

### Positions of the African Commission in relation to the right to sexual orientation

The jurisprudence of the African Commission is poor in terms of the right to sexual orientation. Up until now the Commission has only received a single complaint in regard to violation of the right to sexual orientation.<sup>36</sup> The case concerned the legal status of gay men in Zimbabwe. Zimbabwean law condemns same-sexual relations between men.<sup>37</sup> The situation was further exacerbated at the time by harsh and derogatory statements made by the President of the Republic and the Minister of the Interior. These encouraged wide-spread hatred, persecution and violence against men perceived to be gay in the country. Very unfortunately, the complainant withdrew the complaint before the Commission had ruled.

The African Commission has however, subsequently given a position on discrimination based on sexual orientation in the complaint filed by the Zimbabwe Human Rights NGO Forum. In that instance, the Commission stated that:

*Together, with equality before the law and equal protection of the law, the principle of non-discrimination provided under Article 2 of the Charter provides the foundation for the*

32 As above.

33 ACHPR. 2009. Communication 279/03-296/05 : Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan. Available: <http://www.achpr.org/communications/decision/279.03-296.05/>. See also, ACHPR. 2006. Communication 245 / 2002 or Zimbabwe Human Rights NGO Forum v Zimbabwe. Available: <http://www.achpr.org/communications/decision/245.02/>.

34 Itaborahy LP, Zhu . 2014. *State-sponsored homophobia. A world survey of laws: Criminalisation, protection and recognition of same-sex love*. Geneva, CH: International Lesbian and Gay Association. These countries are South Africa, Burkina Faso, Côte d'Ivoire, Cap-Verde, Congo, Djibouti, Gabon, Guinea-Bissau, Equatorial Guinea, Madagascar, Mali, Niger, Central African Republic, Democratic Republic of the Congo, Rwanda, Chad.

35 As above. These countries are Algeria, Angola, Benin, Botswana, Burundi, Cameroon, Comoros, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Malawi, Mauritania, Morocco, Mauritius, Mozambique, Namibia, Nigeria, Uganda, Sao Tome, Senegal, Seychelles, Sierra Leone, Somalia, Sudan, South Sudan, Swaziland, Tanzania, Togo, Tunisia, Zambia, Zimbabwe.

36 ACHPR. 1995. Communication 136/94 : William A. Courson v Zimbabwe. Available: <http://www.achpr.org/communications/decision/136.94/>

37 Article 73 of the Zimbabwe Criminal Law (Codification and Reform) Action (2006) states that, "any man, that with the consent of another man, has, in full knowledge of the facts, anal intercourse with that other person (...) will be guilty of sodomy and liable to a fine of level fourteen or higher or a term of imprisonment not exceeding one year, or both."

*enjoyment of all human rights (...) The aim of this principle is to ensure equality of treatment for individuals, irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.*<sup>38</sup>

This statement ensured that the scope of Article 2 of the *African Charter* clearly included sexual orientation as a prohibited ground of discrimination.

Critics of this recognition of sexual orientation cite Article 27.2 of the *African Charter* which provides that, “the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.” Opposition to sexual minorities in Africa is usually founded on biased conceptions of morality, culture and communal interest. In this regard, the Human Rights Committee has stated that:

*...the conception of morals derives from many social, philosophic and religious traditions; as a result, the restrictions (...) in order to protect morals must be based on principles not deriving exclusively from a single tradition. Any such restriction must be interpreted in the light of the universality of human rights and the principle of non-discrimination.*<sup>39</sup>

More specifically, in respect of the *African Charter*, in the case of *Media Rights Agenda and others v Nigeria*, the African Commission ruled on the scope of Article 27.2.<sup>40</sup> In this instance, it stated that:

*The reasons for possible limitations must be founded in a legitimate State interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained. Even more important, a limitation may never have as a consequence that the right itself becomes illusory.*<sup>41</sup>

While, in the African context, morality and culture may be of a different importance, in considering such things in the context of the *African Charter*, basic, universally accepted principles must prevail. The African Commission has further emphasised this point by stating that rights protected in Article 2 are paramount since their availability or absence affects the ability of everyone to enjoy fundamental rights and freedoms.<sup>42</sup> Thus the protections they offer must rise above more narrow concerns of culture or morality at the state level.

## Obligations of States Party in Africa regarding the right to sexual orientation

As with other international human rights conventions, accession or ratification of the *African Charter* creates obligations on States Party to comply. Almost all African countries are party to the *African Charter*.<sup>43</sup> This therefore imposes obligations for States Party to ensure, by appropriate means, that persons under their jurisdiction benefit from its protections. In international law on human rights, the responsibility to protect human rights rests primarily with the state. This means that states must

38 Communication 245/2002, para 169, see note 33, above.

39 UN Human Rights Committee. 2012. Communication No. 1932/2010 (*Irina Fedotova v Russian Federation*). CCPR/C/106/D/1932/2010. Available: <http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.106.D.1932.2010.doc>; see also, UN Human Rights Committee. 2011. General Comment No. 34. Article 19: Freedoms of opinion and expression. CCPR/C/GC/34, at para. 32. Available: <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

40 ACHPR. 1998. Communication 105/93-128/94-130/94-152/96 *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project / Nigeria*. Available: <http://www.achpr.org/communications/decision/105.93-128.94-130.94-152.96/>

41 As above.

42 As above.

43 Only Morocco is not a party to the *African Charter*.

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respect, promote, protect and ensure the realisation of human rights as set out in the various treaties, protocols and other instruments, to which they accede, including the *African Charter*.

As an example, in the case *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria*, the African Commission stated that:

[T]he various obligations created by human rights indicate that all rights, civil, political, economic, social and cultural, create at least four levels of obligation for a State that undertakes to adopt a system of rights, including the duty to respect, protect, promote and fulfil these rights.<sup>44</sup>

It further gave meaning to these obligations in asserting that:

...the obligation to respect requires that the State refrains from interfering in the enjoyment of all fundamental rights; it should respect those that are to enjoy their rights, respect their freedoms, independence, resources and freedom of action ...<sup>45</sup>

This form of negative obligation of non-interference has been further clarified by K. Drzewicki, who states that:

On the first level, the obligation to respect human rights requires that the State refrains from interfering in the enjoyment of all fundamental rights; it must respect the rights holders, their freedoms, autonomy, resources and freedom of action.<sup>46</sup>

It is very clear then, within the African human rights system, that states are obliged to respect the rights set out in the *African Charter*, as they are interpreted and applied by the African Commission, and must refrain from implementing laws, regulations or taking any other action that renders them unattainable or obsolete.

What is unfortunate, then, about this position, is the number of African states that ignore such obligations and continue to maintain existing laws, or are in the process of creating new ones, that clearly sanction discrimination on the grounds of sexual orientation. This latter group includes Burundi, Ethiopia, Gambia, Nigeria, and Uganda. On the African continent, only South Africa fulfils this obligation. Under its Constitution, the country prohibits any form of discrimination, including on the grounds of sexual orientation.<sup>47</sup> As a result, through landmark litigation and other means over the years, gays and lesbians have been granted the right to form civil unions (although not to marry), to adopt or even to inherit from their partner.

In addition to binding obligations on their own institutions, as discussed above, the *African Charter* stipulates that States Party must also ensure that non-state entities do not violate human rights. This is known as the duty of states to protect rights holders against other subjects by appropriate legislation. This obligation requires states to take steps to protect the beneficiaries of protected rights against political, economic and social interference.<sup>48</sup> This was set out by the African Commission in *Commission nationale des droits de l'Homme et des libertés v Chad*, where it held that governments have

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44 ACHPR. 2001. Communication 155/96 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria. Available: <http://www.achpr.org/communications/decision/155.96/>

45 As above.

46 Drzewicki K. 1999. "Internationalization of Human Rights and Their Juridization." In Rajja Hanski and Markku Suksi (eds.). *An Introduction to the International Protection of Human Rights: A Textbook (Second Revised Edition)*. Copenhagen, DK: Institut for menneskerettigheder. Also cited in ACHPR Communication 245/2002. See note 33, above.

47 Government of the Republic of South Africa. *Constitution of the Republic of South Africa 1996*. Available: <http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf>

48 See ACHPR Communication 245/2002 at note 33, above.

the duty to protect their citizens, not only by adopting appropriate legislation and the effective implementation of such legislation, but also by protecting them against harmful acts that may be perpetrated by private parties.<sup>49</sup> The same position was adopted by the Commission in the case of *SERAC and others v Nigeria*, cited above, when it stated that this obligation to protect:

*...generally requires the creation and maintenance of an atmosphere or a framework through an effective interplay of laws and regulations, so that individuals can freely exercise their rights and freedoms. This is inextricably linked to the third obligation of the State which is to promote the enjoyment of all human rights. The State should ensure that individuals can exercise their rights and freedoms, for example by promoting tolerance, raising public awareness and even building infrastructure.*<sup>50</sup>

In order that individuals may freely exercise their rights and freedoms, states must create and maintain an environment or a framework of effective interplay of laws and regulations. This creates the obligation of the state to promote the enjoyment of human rights for all by, for example, promoting tolerance, awareness and even, when necessary, developing the relevant infrastructure.<sup>51</sup>

Under the *African Charter*, states are obliged to fulfil the human rights it contains. Thus, states have the primary responsibility of ensuring that individuals whose rights have been violated have accessible and effective recourse. Indeed, human rights are only effective when, in the event of a violation, the victim has the right to fair compensation. However, it so happens that many States have institutionalized discrimination based on sexual orientation, negating any chance of recourse to the courts for such victims.

The last level of obligation of the state is the requirement to fulfil rights and freedoms in accordance with the various human rights instruments to which it has freely acceded. This is more a question of a positive expectation on the part of the state to orientate itself towards the effective fulfilment of rights. By adopting laws that are contrary to international instruments to which they are party, such as the UDHR, a number of African states have fallen short of this obligation.

The African Commission has ruled in *Legal Resources Foundation v Zambia* that the rights to equality and non-discrimination, protected under Article 2 of the *African Charter*, are important seeing that their availability or absence affects the ability of everyone to enjoy many other rights.<sup>52</sup> States therefore have the primary responsibility to protect them to enable all citizens to enjoy the same rights. This by extension, then, must include a right to sexual orientation.

49 ACHPR. 1995. Communication 74/92 Commission nationale des droits de l'Homme et des libertés / Chad. Available: <http://www.achpr.org/communications/decision/74.92/>

50 See ACHPR Communication 155/96 at note 44, above.

51 See ACHPR Communication 245/2002 at note 33, above.

52 ACHPR. 2001. Communication 211/98 Legal Resources Foundation / Zambia. Available: <http://www.achpr.org/communications/decision/211.98/>

## Conclusion

To conclude, we can state with Shestack that equality and non-discrimination “are at the centre of the movement for human rights.”<sup>53</sup> Although no text of international scope makes explicit mention of the right to sexual orientation, the extensive interpretation of the provisions on equality, non-discrimination and the right to privacy by the Human Rights Committee has created a significant development in the recognition and the ‘justiciability’ of what may effectively be considered to be such a right. In spite of this trend, however, on the African continent, many countries have adopted and vigorously maintain criminal or civil laws sanctioning discrimination on the grounds of sexual orientation. As this discussion has argued, this is in violation of their obligations under the *African Charter* which obliges states to protect and promote human rights for all.

In this regard, then, it has also been argued that all LGBTI individuals that have their rights violated on the basis of their sexual orientation in Africa are entitled to seek the protection of the *African Charter* and to get appropriate redress. The time must come to an end on the continent when erroneous arguments of African cultural values and morality are used to perpetuate, justify and encourage violence and other serious violations of human rights suffered by LGBTI people.

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53 Shestack J. 1984. “The Jurisprudence of Human Rights.” In Theodore Meron (ed.). *Human Rights in International Law: Legal and Policy Issues*. Oxford, UK: Oxford University Press. Also, cited in ACHPR Communication 245/2002, para 169, see note 30, above.

# Equality and recognition of non-conforming sexual identities through the right to participation in Cameroon, Ghana and Mozambique: A note from the field

**Berry Didier Nibogora<sup>54</sup>**

## ABSTRACT

This paper is aimed at starting a discussion on how important an active participation of criminalized groups, especially sexual and gender non-conforming people, in decision-making processes to design, implement and evaluate targeted interventions. It is based on six months of interaction with stakeholders on issues related to access to social, legal, health and HIV-related services in three African countries. The central argument is that ensuring participation of socially disadvantaged groups in decision-making processes is a form of recognition that fosters the principles of individual liberty, inclusion and social equality.

## Background

In 2012, AMSHeR partnered with the United Nations Development Programme (UNDP), the Southern African AIDS Trust (SAT) and the Health Policy Project (HPP) to implement the *Utetezi* project.<sup>55</sup> The goal of the project was to increase health care access for communities of gay men and other men who have sex with men (MSM) through policy and advocacy trainings, which would result in locally, led policy interventions. The project had a further aim to ensure meaningful participation of MSM in policy-level processes, regardless of their legal status within the target countries.

When the project was conceived, access to HIV services for MSM in Africa was hindered by many factors, not least of which was the hostile policy and legal environments. At the time, a United Nations General Assembly Special Session (UNGASS) report indicated that only 12% of MSM in Africa had access to HIV services.<sup>56</sup> Other research had shown that, due to a number of structural factors that affected MSM disproportionately from the general population, “MSM had a 19.3 times

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55 Utetezi is a Swahili word which means ‘advocacy.’

56 United Nations. 2011. Resolution 65/277. Political Declaration on HIV/AIDS: Intensifying Our Efforts to Eliminate HIV/AIDS. Available: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/65/277](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/65/277)

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higher odds of having HIV compared with background populations.<sup>57</sup> In addition, less than 2% of global HIV prevention funding was directed toward MSM.<sup>58</sup>

#### Concepts and forms of participation

The principle of participation has been extensively explored in the literature on democracy, good governance and human rights.<sup>59</sup> Institutions that play a great role in shaping state policies have endorsed popular participation as a key principle that gauges good governance. For example, in 1998, the World Bank emphasised citizen participation in public affairs as a determining principle for its newly articulated position on good governance.<sup>60</sup> In its view, participation ensured long-term sustainability of projects and programmes through strengthening ownership, transparency and accountability. The African Development Bank has also adopted a policy on good governance which includes the central role of political participation of citizens.<sup>61</sup> The United Nations Millennium Declaration further endorsed the framework of human rights, democracy and good governance with an explicit reference to political participation of all citizens.<sup>62</sup> Lastly, in 2012, with regard to the continental response to HIV, the African Union identified amongst a number of priority actions the urgent need to, “support communities to claim their rights and participate in governance of the responses.”<sup>63</sup>

Quite clearly, the principle of participation has gained extensive support as an element of good governance. The ways of strengthening participation include education and training, support for grassroots organisations, and the involvement of stakeholders in the design, operation, monitoring and evaluation of development projects.<sup>64</sup> From a community perspective, participation means involvement of members of the target group as equal citizens in the identification of the problem, the design of the response, the implementation of activities, the monitoring of the progress, and the evaluation of whether the activities undertaken led to desired objectives.

Different forms of participation exist and do not all permit the same level of involvement and influence on public policy.<sup>65</sup> A distinction needs therefore to be made between *substantive or effective participation and procedural participation*. The first focuses on the empowerment of participants, before they take part in the decision-making, with a view to getting better and locally-owned outcomes by removing all barriers to the beneficiaries’ access to information related to the procedures and the content of the issues at hand. The second type of involvement speaks to the decision-making procedures rather than

57 Baral S et al. 2007. “Elevated Risk for HIV Infection Among Men Who Have Sex with Men in Low- and Middle-income Countries 2000-2006: a Systematic Review.” PLoS Medicine 4 (12): e339.

58 Global Forum on MSM & HIV (MSMGF). 2012. Access to HIV prevention and treatment for men who have sex with men: Findings from the 2012 Global Men’s Health and Rights Study. Available at: [http://www.msngf.org/files/msngf/documents/GMHR\\_2012.pdf](http://www.msngf.org/files/msngf/documents/GMHR_2012.pdf)

59 See, for instance, Devas N, Grant U. 2003. Local government decision-making, citizen participation and local accountability: some evidence from Kenya and Uganda. *Public Administration and Development*, 23(4): 307-316; Smith BC. 2007. *Good Governance and Development*. New York, NY: Palgrave Macmillan. p149-74; Thompson J. 1995. Participatory approaches in government bureaucracies: facilitating institutional change. *World Development* 23(9): 1521-54; Useem M, Setti L, Kachanabucha K. 1988. Predictors of success in a participatory village development project in Thailand. *Public Administration and Development* 8(3): 289-303.

60 Smith BC, as above, p150.

61 As above.

62 United Nation. 2005. Resolution 55/2. United Nations Millennium Declaration. A/55/L.2. Available: <http://www.un.org/millennium/declaration/ares552e.htm>

63 African Union. 2012. Roadmap on Shared Responsibility and Global Solidarity for AIDS, Tuberculosis and Malaria in Africa. Available: [http://www.au.int/en/sites/default/files/Shared\\_Res\\_Roadmap\\_Rev\\_F%5B1%5D.pdf](http://www.au.int/en/sites/default/files/Shared_Res_Roadmap_Rev_F%5B1%5D.pdf)

64 OECD. 1997. *Evaluation of Programmes Promoting Participatory Development and Good Governance. Synthesis Report*. Paris, FR: OECD. Available: <http://www.oecd.org/dac/evaluation/dcdndep/35019452.pdf>

65 Smith BC. 1998. Participation without power: subterfuge or development? *Community Development Journal* 33(3): 197 – 204.

the extent of public participation in them.<sup>66</sup> Clearly, the first is the more desirable.

Other forms of participation include *consultation*, a weaker mode of participation, and *representation on managing bodies of the local institutions*. This latter form is viewed by the World Health Organisation as a method of, “promoting greater responsiveness to consumer preferences’ in health care.”<sup>67</sup> This is also seen as a way of involving hitherto excluded sections of the community in decision-making related to programming and implementation.<sup>68</sup> Participation may also consist of *management of public services*. This is different from participation in service delivery. It brings citizens and service users into the management of projects or programmes while giving them more agency and power in their administration.

### Participation as a human right

From a human rights perspective, the foundation of participation was set out in the Universal Declaration of Human Rights (UDHR), which states that “everyone has the right to take part in the government of his country, directly or through freely chosen representatives.”<sup>69</sup> Further, Article 25 of the International Covenant on Civil and Political Rights (ICCPR) speaks of, “the right and the opportunity of every citizen ... to take part in the conduct of public affairs, directly or through freely chosen representatives.”<sup>70</sup> The United Nations Human Rights Committee, in interpreting Article 25, has stated unambiguously that,

*...the conduct of public affairs, referred to in Article 25(a), is a broad concept which covers all aspect of public administration, the formulation and the implementation of policy at international, national and regional and local levels.*<sup>71</sup>

The Committee stressed that citizens may participate directly by taking part in popular assemblies, for example, which have the power to make decisions about local issues or about the affairs of a particular community, and in bodies established to represent citizens in consultation with government.<sup>72</sup> Interestingly enough, the Committee makes a link between the right to take part in the conduct of public affairs and the exercise of influence by citizens through self-organising, public debate and dialogue.<sup>73</sup> Such participation is supported by ensuring freedom of expression, assembly and association.<sup>74</sup> This is a very important point in the context of criminalised or socially excluded groups such as MSM, transgender individuals or other key populations, namely sex workers and people who inject drugs. It is this type of participation, and the benefits of recognition and equal status it confers, that the *Utetezi* project sought to achieve in the countries where it was implemented.

66 Smith BC, see note 59, above. p152.

67 World Health Organisation. 1993. *Evaluation of recent changes in the financing of health services*. Technical Report No. 829. Geneva, CH: WHO. p51.

68 Smith BC, see note 59, above. p153.

69 United Nations. 1948. *Universal Declaration of Human Rights*. Available: <http://www.un.org/en/documents/udhr/>

70 United Nations. 1966. *International Covenant on Civil and Political Rights*. Available: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

71 United Nations Human Rights Committee. 1996. General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service. CCPR/C/21/Rev.1/Add. para. 5. Available: <http://www.refworld.org/cgi-bin/texis/vtx/nwmain?page=search&docid=453883fc22&skip=0&query=CCPR/C/21/Rev.1/Add.7>

72 As above.

73 As above, para. 8.

74 As above.

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### Objectives and implementation of the project

Within this context, the *Utetezi* project aimed to generate a framework that united MSM and other local stakeholders to identify, prioritize, strategize, and intervene for improved health and rights outcomes. The objectives of the project were (1) to increase capacity for national stakeholders, including MSM organisations, to analyse existing HIV policies and their effect on access to HIV services; (2) to identify policy gaps and priorities for advocacy; (3) to develop and sustain relationships between key government and civil society stakeholders for improved access to HIV and HIV-related social services for the MSM community; (4) to strengthen the capacity of MSM organisations to implement short-term advocacy projects through mentoring and coaching; and (5) to increase knowledge dissemination on MSM health and rights programming.

To achieve the first four objectives, AMSHeR organised a series of in-country training workshops on effective policy advocacy strategies, which brought together with MSM representatives key government representatives, civil society organisations, representatives of private sector, and development partners. The workshops also provided opportunities for the establishment of cross-stakeholder Advocacy Working Groups (AWG) with the aim that they would address a minimum of two prioritized policy interventions. The workshops were preceded by a one-day community dialogue meeting in which MSM representative on their own identified a list of issues that presented access barriers to social, health and HIV-related services. The list of challenges then informed the four-day training workshops that followed.

### Participation of MSM in implementation of the *Utetezi* project

#### Cameroon

Cameroon is one of the countries with a more hostile environment for sexual minorities and their human rights defenders. State actors are outspokenly opposed to any protection of homosexuals to such an extent that they consider homosexuality “as a manifestation of moral decadence that should be fought.”<sup>75</sup> The Penal Code criminalises same-sex relations between consenting adults.<sup>76</sup> This provision has been used to persecute, arrest and discriminate against individuals who are, or are perceived to be, homosexuals along with their human rights defenders.<sup>77</sup>

Under the coordination of AMSHeR, the local MSM implementing organization, AIDS Acodev, prepared, in collaboration with Douala Municipality and UNDP country office, the *Utetezi* workshop.<sup>78</sup> The responsibility and leadership was deliberately left to AIDS Acodev to identify a safe and friendly venue for the one-day community dialogue. This raised the MSM organization’s profile and strengthened its capacity to negotiate with other stakeholders on an equal basis, while the group the organization stands for was implicitly recognized. Only members of the MSM/LGBTI community were convened to freely discuss, in a friendly and secure environment, their experiences, challenges and success stories in relation to access to services.

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75 Republic of Cameroon. 2010. *Second Periodic Report of Cameroon Within the Framework of the African Charter on Human and Peoples’ Rights*. para. 96. Available: <http://www.achpr.org/states/cameroon/reports/2nd-2003-2005/>

76 See Article 347 of the Penal Code. The text is available at: [www.glapn.org/sodomylaws/world/cameroon/cameroon.htm](http://www.glapn.org/sodomylaws/world/cameroon/cameroon.htm)

77 See incidents of violations in AMSHeR and Coalition of African Lesbians (CAL). 2013. *Violence based on perceived or real sexual orientation and gender identity in Africa*. Johannesburg, RSA: AMSHeR and CAL. See also, Association pour la Défense des Droits des Homosexuels (ADEFHO) and others. 2013. *Report on the Violation of Rights on the Basis of Sexual Orientation and Gender Identity in the Republic of Cameroon. Shadow report to the Third Report of the Republic of Cameroon, submitted on 11 April 2013 for consideration during the 54th session of the African Commission on Human and Peoples’ Rights, 22 October to 5 November 2013*.

78 Aids Acodev is a Cameroonian nonprofit association that provides support to the most vulnerable and under-served populations, particularly to transgendered men and women, sex workers, and MSM.

The problems identified were presented, the next day, in the stakeholders' training to inform the planning process for policy advocacy. It is important to note that the training was attended by stakeholders from the Douala municipality, the Ministry of Health, the regional AIDS control authority, mainstream human rights organisations, youth representatives, people living with HIV, the media, and six representatives of MSM/LGBTI organisations. The workshop participants prioritized the issues identified by the community dialogue and identified two policy interventions that an AWG would address. The two interventions were: (1) the development of training modules and an information toolkit for health services providers on MSM specific needs and problems; and (2) the development of directives on non-discrimination, to be adopted by the regional authority, instructing health care providers to comply with medical ethics and setting clear procedures and measures against reported cases of discrimination, especially against MSM.

During the engagement between MSM and other stakeholders, it came out clearly that the language used to publicly communicate the policy interventions was crucial. Representatives of the MSM community insisted on the systematic use of the terms "MSM and LGBTI." Other stakeholders stressed that the words "key populations" should be used instead. The compromise reached was that "key populations" would be used to speak about the intervention in unfriendly spaces while "MSM and LGBTI" would be used to inform the target audiences of the policy interventions and in information to be shared with partners and allies. This displayed how hesitant a number of stakeholders were to be involved in interventions that related specifically to the MSM and LGBTI communities.

### Ghana

Ghana has a reputation in West Africa as an open and democratic society, one where individual freedoms and fundamental rights are respected.<sup>79</sup> For MSM and LGBTI, however, this is not necessarily the case. The fact is that same-sex sexual relations are still criminalized.<sup>80</sup> During the community dialogue, organised by the Centre for Popular Education and Human Rights, a local AMShEr partner, it was reported that social stigma and discrimination was rampant. Participants listed 24 challenges that affected MSM access to services in Ghana.

These challenges were subsequently shared in the training workshop, which included the Ministry of Health, the Ghana AIDS Commission, human rights organisations, development partners, PLHIV, and representatives from the MSM community. For the MSM representatives, sitting together with other stakeholders gave them agency and consideration as equal citizens, according to participants, especially in a country where same-sex sexuality is still criminalised and persons with non-conforming sexual orientation and gender identity are socially excluded.

At the end of the training, the participants agreed on the following two priority policy advocacy interventions: (1) increased knowledge of human rights issues to improve access to justice by setting up a key population desk within the Commission for Human Rights and Administrative Justice; and (2), the addition of lubricants to the Essential Drugs List. The first intervention was particularly crucial as the creation of the key population desk to monitor, document and report incidents of human rights violations and abuses that MSM face would raise their visibility. As MSM would be meaningfully involved in the entire process of reporting, the key population desk would be a critical space in which to make their voices and concerns heard. This would certainly contribute to raising the

79 Ghanaian democracy has been admired as a model in West Africa because of its successful transition and progressive institutions. See Gyimah-Boadi E. 2009. Another Step Forward for Ghana. *Journal of Democracy* 20(2): 138-152.

80 See section 104 (1) (a)&(b) of the Criminal Code, 1960 (Act 29), as amended to 2003. Available: <http://www.imldb.ion.int/viewDocument.do?id=%7B3856B76B-1B0E-47BB-B967C88B8F0534C7%7D>

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MSM community in Ghana from exclusion to recognition as partners for the implementation of an important mandate which was to monitor the observance of human rights in Ghana and to ensure that the country complies with its obligations under national and international human rights law.<sup>81</sup>

#### *Mozambique*

At the time that the project was implemented, the legal status of same-sex relations was ambiguous. However, MSM consistently reported that the social environment was hostile, intolerant and even exclusionary, in some instances. This was especially the case in health care settings, where nurses and other health services providers, by ignorance, lack of professionalism and homophobic beliefs, discriminated against MSM and other individuals who were simply perceived to be different.

For the project, the one-day community dialogue was organized by the Mozambican Association for Sexual Minority Rights (LAMDA).<sup>82</sup> The convening of the community dialogue was not as sensitive as it was in the other two countries. It appeared that outreach programmes conducted by LAMBDA since 2006, in addition to the fact that same-sex relations were not explicitly criminalized, played a great role in making the environment conducive.<sup>83</sup> Nevertheless, a number of issues were identified by the community dialogue as affecting negatively access to services for MSM in Mozambique.

The issues were subsequently tabled at the training workshop, whose participants included the National AIDS Council, the Commission for Human Rights, representatives of vulnerable groups such as albinos, human rights organisations, Ministry of Health, development partners such as UNDP and UNAIDS, and MSM representatives. During the deliberations, two priority problems facing MSM in access to services were agreed upon linked to two corresponding policy interventions. They were: (1) including lubricants on the essential medicines list as an HIV prevention commodity; and (2) ensuring that key population organisations, specifically LAMBDA, were registered by the Ministry of Justice. In this instance, participants used explicit criteria to decide on priorities. These were: (1) relative contribution to solving the problem; (2) potential impact on a larger number of the affected population; (3) likelihood of success within the timeframe and available resources; (4) the potential risks associated with the intervention; and (5), the group's capacity to implement the intervention.<sup>84</sup>

The second intervention was particularly critical as it spoke to the issue of equality and recognition. Indeed, the right to form an association is recognized in the Constitution of Mozambique.<sup>85</sup> However, for unknown reasons, the Minister of Justice in Mozambique had failed to register LAMBDA, despite its attempts since 2008 to comply with all of the administrative requirements. It was expected that the AWG, which included representatives from the Human Rights Commission, the National AIDS Council, a local human rights organisation, and a representative from the MSM community, would make the case for LAMBDA to be registered without further delay. At the very least, the partnership between LAMBDA, as a *de facto* organisation that speaks for the MSM community,

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81 See the mandates of the Commission on Human Rights and Administrative Justice at [http://www.chrajghana.com/?page\\_id=43](http://www.chrajghana.com/?page_id=43)

82 LAMBDA is a non-registered organization founded in 2006. Its mission is to promote the civic, human and legal rights of LGBTI citizens, through public awareness and education, advocacy and social dialogue. See <http://www.lambdamoz.org>

83 LAMBDA has positioned itself as the legitimate representative of the MSM community in Mozambique. It has partnered with almost all donors, international non-governmental organisations, and state institutions that work on HIV interventions for key populations, including MSM and LGBTI people. This has enhanced its technical capacity and contributed to giving it an influential role.

84 See Esom KC, Nibogora BD. 2014. A Multi-stakeholder training curriculum on policy advocacy for improved access to services for MSM (forthcoming). Johannesburg, RSA: AMSHeR.

85 Article 52 of the Constitution of the Republic of Mozambique, adopted in 2004. Available at : [http://confinder.richmond.edu/admin/docs/Constitution\\_\(in\\_force\\_21\\_01\\_05\)\(English\)-Mozlegal.pdf](http://confinder.richmond.edu/admin/docs/Constitution_(in_force_21_01_05)(English)-Mozlegal.pdf)

with the above key stakeholders in working together to advocate for policy change would ensure recognition and consideration of MSM in Mozambique as equal citizens, regardless of the outcome of the joint effort.

## Conclusion

Participation of sexual minority groups in decision-making is essential to making their voice heard and getting their concerns addressed. Among different forms of participation, meaningful and direct participation from the outset of development initiatives is not only desirable but also essential for better health and rights outcomes. The *Utetezi* project was one of such initiatives that was striving to start or sustain a conversation between key local actors on issues of sexuality, human rights, health and the well-being of MSM and the broader LGBTI communities.

Leaving the leadership of the implementation of the *Utetezi* project to the local MSM or LGBTI organisation, which collaborates with an institution enjoying a convening power to invite stakeholders to the table, and works jointly to achieve agreed advocacy objectives, was essential. By sitting together with stakeholders from key governmental and non-governmental sectors to discuss and prioritise issues that affected MSM, and jointly committing to implement an advocacy plan, the MSM community enjoyed more respect and consideration as partners, a group definitely worth working together with. This contributed to the recognition of this group in different countries, while furthering the principles of equality, inclusion and non-discrimination.

Overall, participation of the MSM and LGBTI communities in designing, implementing and evaluating initiatives that affect their lives provides space for engagement with local actors and addresses stakeholders' ignorance and need for information on sexuality and human rights. As realised through the *Utetezi* project, meaningful participation also ensures progressive recognition of MSM and LGBTI communities by various stakeholders and furthers the principle of equality of all citizens, including those whose sexuality and dissenting sexual attraction make them criminals and socially excluded.

# 'I am *kuchu* and a refugee': Ethnography of structural discrimination of gay and lesbian refugees in a Ugandan refugee camp

**Luckmore Jalisi<sup>86</sup>**

## ABSTRACT

This paper is based on experiences arising from a four-month ethnographic research study with gay and lesbian refugees in the Nakivale Refugee Camp in south western Uganda. The experiences of the refugees shared in this paper show how humanitarian principles and practices on non-discrimination, justice, neutrality and impartiality fail to protect these refugees in camps situated in a homophobic country. In these stories, being a refugee who is gay or lesbian compromised protection and security despite the presence of the United National High Commission for Refugees (UNHCR) and other international organisations. This was due to stigmatising and discriminatory attitudes and behaviours on the part of humanitarian workers themselves who let local laws and socio-cultural beliefs dominate humanitarian principles. In Nakivale, the state sanctioned homophobia of Uganda largely found its way into the refugee camp through Ugandan nationals employed by international organisations.

## Introduction

This paper is a personal story linked to a four-month ethnographic study I carried out in the Nakivale Refugee Settlement, in Southwestern Uganda, from November 2011 to March 2012. At that time, the settlement housed over 55 000 refugees from Congo, Somalia, Rwanda, Burundi and South Sudan.<sup>87</sup> This story shares my personal interactions with a small group of lesbian and gay refugees in the settlements. In my larger research endeavour, I am focusing on human lives of those at the margins of the margins. The method used to shape the story is constructivist in nature.<sup>88</sup> In this approach, the emphasis is on empathy in order to write someone's story.

While carrying out my ethnographic research, I interacted with 'Angels,' an underground group of mostly gay male refugees in Nakivale. They were formally organised. They met in the evenings to share experiences, including what people were saying about members of the group, and also to give advice to each other on how to protect themselves and have personal security. Over the course of my

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87 Office of Prime Minister, Republic of Uganda.

88 Hammersley M, Atkinson P. 2000. *Ethnography: Principles in Practice (Second Edition)*. London, UK: Routledge.

interactions, members of the group confided in me their daily suffering. Their stories moved me and I decided to share them alongside my ethnographic research. Some of these young men had been child soldiers, or otherwise victims of war trauma. Some had seen their entire family killed or raped; some had been forced to commit such acts. Throughout the four months I lived with them, I played basketball with them and shared a lot with them. In the process, I got into their world.

The stories that I collected, and the events that I witnessed, showed that a refugee settlement, far from being a place of safety for LGBTI refugees, can perpetuate and reinforce homophobic discrimination linked to the prevailing laws, policies, and cultural and social practices of the country where it is situated. As the experiences reveal, this is often done by the very men and women who are staffing non-governmental organisations operating or supporting the settlement.

### Situation of LGBTI in Uganda

Like many countries in Africa, LGBTI people in Uganda face serious challenges that prevent them from living freely as equal citizens. LGBTI people in Uganda face a daily backlash that brands them as a threat to national 'morals' and culture.<sup>89</sup> There is steady pressure to have more and more strict anti-gay laws, for example, and the Minister of Ethics and Accountability has had many clashes with the LGBTI community by disrupting and closing down many of their meetings in Kampala.

Ignorance about LGBTI people drives cruelty in Uganda as elsewhere in the world. In Uganda, it is a popular belief that gay men are paedophiles and that they are recruiting more people to become gay. This hatred, which has found its roots in the church and other religious settings, has led to gay bashing and is attributed to the brutal murder of the renowned gay activist David Kato. LGBTI people seeking asylum in Uganda find themselves in this highly discriminatory setting. In many cases, they do not express their sexuality for the fear of such discrimination and persecution.

### Human security: Do LGBTI refugees count?

The concept of security has been traditionally interpreted as referring to states protecting themselves from aggression or maintaining stability through the use of force.<sup>90</sup> In other words, the classical view of security has been centred on nation states rather than people. However, it is important to note that there are aspects of life that affect people more and threaten their security, more than bombs, guns or aggression. These include limited access to food and water, threatening environmental hazards, disease and political repression.<sup>91</sup> This leads to the necessity of a people-centred approach in human security.<sup>92</sup> Under human security, determinants of insecurity include enabling socio-economic and political conditions, food, health, and environmental, community and personal safety.

In the post-Cold-War era, conflicts occur mainly within a country's borders and these involve state repression and insurgency, among others. These modern acts that cause human suffering account for much of the mass movement of affected populations, resulting in them claiming asylum in search of security. The UN system has been mandated to secure the lives of such refugees in settlements, regardless of race, nationality, sex, sexuality and other natural or social differences. However, as the experiences of Bahati and Desire (two members of the Angels group) show, in Nakivale, there were instances where human security was not protected and these individuals were alienated from aid based on their sexuality.

89 Ross WM et al. 2010. Measurement of internalized homonegativity in gay and bisexual men in Uganda: Cross-cultural properties of the Internalized Homonegativity Scale. *Psychology, Health & Medicine* 15(2): 159-165.

90 Bajpai K. 2000. *Human Security: Concept and Measurement*. *Kroc Institute Occasional Paper #19:OP:1*. Available: [http://www.hegoa.ehu.es/dossiera/seguridad/Human\\_security\\_concept\\_and\\_measurement.pdf](http://www.hegoa.ehu.es/dossiera/seguridad/Human_security_concept_and_measurement.pdf)

91 As above.

92 As above.

## 4

Bahati and Desire are two young men aged 28 and 22 respectively. They are both refugees from eastern Congo who arrived at Nakivale in 2010. I conducted this interview while at the police post where they had been incarcerated for being homosexuals, as the police officer put it. This story is an account I got from Bahati when I brought some fruits to them while in detention. They both had swollen faces and Desire had visible and horrible scars. At the time I conducted the interview, they had not received any medical attention since being put in jail.

*Bahati: 'Desire is my boyfriend for 2 years now since we came to the camp. We met at the basketball field and together with some other guys formed the Angels group after finding out that we all liked guys. Unfortunately, three days ago we were attacked by a group of people in New Congo [a village in the camp]. We were by the roadside making love in the dark, expressing ourselves as people in love. They brought machetes, logs and sticks beating us. They took us to the police and the police detained us instead of taking us to the clinic. I am in pain and Desire says the same.'*

I subsequently asked the police officer why the people who beat them were not arrested also. He said to me, *'That's instant justice. We do not tolerate 'kuchus' [a local Luganda word for homosexuals]. They must be glad they were not killed. We shall proceed to make them pay fine.'*

At this time, no staff from the United Nations High Commission for Refugees (UNHCR) protection department had arrived at the police post to rescue the two young men or to hear their story.

The experience of Bahati and Desire show how men like them, already in insecure environments like refugee camps, have additional threats to their security as compared to their heterosexual counterparts. Refugees like them suffer double impacts. They have to deal with the fact that they are refugees and also deal with their sexuality. Their story also shows the negligence, abuse and disrespect of human life that can be perpetuated by those ostensibly meant to protect them within the refugee system.

In Nakivale, state-sponsored homophobia and discrimination against LGBTI people is brought into humanitarian work by humanitarians themselves. For example, the protection section in UHNCR at Nakivale, which is mandated to protect refugees regardless of their sexuality, failed in the case of Bahati and Desire. Bahati explained to me how he once went to a UNHCR protection officer to explain how he feels his life is in danger and the protection officer told him, *"You are all fake gays. There are no gays in Uganda. You think we do not know what you want to do. You just want sympathy so that you get resettled."*<sup>93</sup> For local protection and aid workers, a refugee who says he is gay is said to be trying to beat the system so that he gets resettled in a Western country. This has serious ramifications on the human security of refugees as a whole, which UN agencies and non-governmental organisations seek to achieve.

Homophobia also affects accessibility by LGBTI refugees to UN-sanctioned public goods that are meant to be available for all refugees. Where officers are supposed to provide services under the conditions of their employment, some are driven by their stigmatizing attitude to deny LGBTI refugees. As one legal officer at Nakivale, who was deployed by the Office of the Prime Minister in Uganda, related to me: *"If a gay refugee comes to me asking for legal advice, I will refuse. I will instead offer to pray for him. My values do not support that."*

Bahati also mentioned to me instances when he has been denied food rations twice because the

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<sup>93</sup> Under the UNHCR durable solutions policy, refugees in protracted situations may receive resettlement in a third country, often developed western countries, as a permanent resident. See: <http://www.unhcr.org/pages/49c3646cf8.html>

distributing officer knew that he was gay. Due to their sexuality, members of Angels fear to walk freely or go to public events like food distribution and thus miss food rations and do not benefit from other services. In all of these ways, this group of young men is denied protection and the benefit of those things that constitute human security. That this was occurring in a refugee settlement was doubly disturbing.

### Humanitarian principles

Work in refugee settlements is meant to be guided by humanitarian principles.<sup>94</sup> Such principles “provide the fundamental foundations for humanitarian action.... Promoting compliance with humanitarian principles in humanitarian response is an essential element of effective humanitarian coordination.”<sup>95</sup> These principles include the principle of humanity, the principle of neutrality, the principle of impartiality and the principle of independence. Placing the experiences of LGBTI refugees in Nakivale in the context of these principles brings out more clearly the stark denial of their human security.

For example, the principle of neutrality entails that “humanitarian actors must not take sides in hostilities or engage in controversies of a political, racial, religious or ideological nature.”<sup>96</sup> It is this principle that puts humanitarian workers who are homophobic in disrepute. When signing-on to work in a refugee setting, one signs a contract that has these principles attached to them. When I decided to do research in Nakivale, I was also asked to adhere to these principles. However, the actions of humanitarians with regards to LGBTI refugees are at variance with the principles they vowed to adhere to when they got jobs. Their socio-cultural values affect how they do their work independent of their contractual commitments.

The principle of humanity states that human suffering must be addressed wherever it is found. The entire purpose of humanitarian action is to protect life and health, and to ensure respect for human beings.<sup>97</sup> Yet, for the Angels group in Nakivale, this was not the case. The denial of medical treatment to Bahati and Desire while in detention, for example, and the UNHCR protection officer who accused Bahati of lying to obtain resettlement, are instances of the complete contradiction of this humanitarian principle. The principle respects people regardless of their sexuality. In humanitarian studies and practice, for example, debate has always been; should humanitarians help former rebels with food or medication when they come to seek refuge? In response, it has already been agreed that aid must not discriminate.

The principle of impartiality brings out the double standards that exist with humanitarians in the context of Nakivale. To demonstrate this principle, I give three short examples:

*Uhumire: I went to the clinic seeking treatment for an STI. The nurse asked me where I had the infection. I told her that it is on my anus. She roared to me and called other nurses and said, ‘How can a man have an STI on the anus? He is definitely Kuchu.’ I felt embarrassed. She went on to say that they do not treat kuchus. It is an abomination.*

94 Principles that were spelt out in the Geneva Convention to guide the operations of humanitarian work. These include the principle of neutrality, impartiality, independence and non-interference. See International Committee of the Red Cross (ICRC). 1949. *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287. Available: <http://www.refworld.org/docid/3ae6b36d2.html>

95 Office of Coordination of Humanitarian Action. 2010. *OCHA on Message: Humanitarian Principles*. Available: [https://docs.unocha.org/sites/dms/Documents/OOM\\_HumPrinciple\\_English.pdf](https://docs.unocha.org/sites/dms/Documents/OOM_HumPrinciple_English.pdf)

96 OHCA, as above.

97 OHCA, as above.

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*Miriam: My house was burnt to ashes. I saw the people who burnt my house. I reported the case to the police. They said it was because I am a lesbian. They walk freely and I am the one embarrassed. I have nowhere to live and nothing to wear. I will go to Kampala and engage in prostitution.*

*Bahati: I was beaten up because I am gay. Because I was caught kissing my boyfriend. The guys who beat me where not jailed I was jailed and denied treatment.*

The principle of impartiality entails that, “humanitarian action must be carried out on the basis of need alone, giving priority to the most urgent cases of distress and making no distinctions on the basis of nationality, race, gender, religious belief, class or political opinions.”<sup>98</sup> The three situations above show lack of such impartiality because of perceived sexual difference which is linked to ideas of gender and what men and women should or should not be or do. In the case of Uhumire, not only was he denied treatment he was also denied privacy. Such actions break the foundations that make humanitarian workers and their institutions what they are. In the case of Bahati, where justice is supposed to be applied in humanitarian settings, it is to the disadvantage of LGBTI people.

The notion of humanitarian space has been defined as, “a consensual environment where humanitarians can work without hindrance and follow the humanitarian ethic’s principles of neutrality, impartiality and humanity.”<sup>99</sup> However, this rather utopian concept misses the point that humanitarians bring their person beliefs into humanitarian work. The assumption is that humanitarian workers will abide by humanitarian principles and that they will do this freely. However, I assert that there is need to investigate and to monitor the adherence to these principles by humanitarian workers. Without these mechanisms, LGBTI people are set to face daily discrimination in a UN system that claims to be all inclusive. In a country like Uganda, where being gay is like being in hell, a refugee setting should be a precious enclave where the rights of minorities including LGBTI people are upheld and protected. Sadly, for the ‘Angels’ in Nakivale, it is not.

### Conclusion

The experiences of the ‘Angels’ shows that the diversity of humanitarian workers bring an added dimension to the humanitarian space where humanitarian principles are negotiated and acted on day by day. A humanitarian setting like Nakivale, where international laws, norms and standards should be used to protect LGBTI people, falls short because of the social, religious or cultural beliefs of people mandated to protect these insecure populations. Instead of giving protection, and fulfilling all of the requirements of human security, daily practices on the part of humanitarian workers in Nakivale create a new situation of conflict and insecurity for LGBTI people, a reminiscence of the war landscapes in their home countries from which they fled.

Since refugee camps are highly securitised, the outside world hardly knows what takes place in these settings, thereby putting the lives of LGBTI refugees at additional risk. A long-term solution to their plight would be for UNHCR to conduct LGBTI-friendly human rights training with staff and other humanitarian workers. Also, designing health and human rights programmes that target LGBTI people in refugee camps would assist in the long run. This group is often in a situation of double jeopardy where they are not only seeking asylum in refugee camps because of war at home but also because of persecution based on their sexuality.

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98 OHCA, as above.

99 Spearing C. 2001. Private security companies and humanitarians: A corporate solution to securing humanitarian space. *International Peacekeeping* 8(1): 24.

# Is South Africa a safe haven for LGBTI persons seeking asylum?

**Elisabeth Libby Johnston<sup>100</sup>**

## ABSTRACT

This article describes LGBTI refugees' adaptation in South Africa. It explores South Africa's progressive legislation on sexual minorities and exposes the treatment of the LGBTI refugee by the general public. The overall argument is that South Africa is a viable durable solution for LGBTI refugees. However, the degree to which LGBTI refugees can meet their psychosocial needs is directly related to the degree to which a country can be considered as a safe haven for them. In this regard, the situation in South Africa is contradictory since, despite progressive legislation, the most progressive on the continent, social and cultural realities continue to be difficult for LGBTI individuals, more especially asylum seekers and refugees. Despite these challenges, however, South Africa is still considered to be a destination of choice for LGBTI individuals fleeing their countries of origin.

## Introduction: Conceptualising LGBTI as refugees and asylum seekers

In the past two decades, many advances have been made in the promotion and protection of human rights. In 2008 the United Nations High Commissioner for Refugees (UNHCR) added LGBTI persons to its mandate as a social group in need of protection and care.<sup>101</sup> With this addition, LGBTI persons were more formally enabled than previously to seek asylum based on sexual orientation or gender identity (SOGI). The UNHCR stated that SOGI was a fundamental part of human identity linking it to the five other characteristics that form the basis of the refugee definition: race, religion, nationality, membership of a particular social group and political opinion.

In making the addition, UNHCR reported that LGBTI individuals, "face serious human rights abuses because they do not conform with culturally established norms."<sup>102</sup> However, LGBTI individuals who flee their countries of origin for such reasons are not always easily conceptualized as migrants or refugees. When additional social groups, LGBTI in this case, are introduced into the migration pool, the already fragile conceptualisations of migrant or refugee are further challenged. There is often tension between adopting and implementing international law and prevailing local culture and practices in countries to where LGBTI individuals flee. They should be officially recognised as refugees and asylum seekers in accordance with the UNHCR mandate; however, this often causes social and cultural friction.

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101 UNHCR. 2011. Working with Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Forced Displacement. Geneva, CH: UNHCR. Available: <http://www.refworld.org/docid/4e6073972.html>

102 As above, p 13.

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Contextualising migration is complex, as are the reasons for migration in general. There is a constant debate on defining the terminology. On this point, Manalansan notes that the addition of social groups and or categories in need of protection, “challenges migrations studies’ reliance on heteronormative meanings and practices.”<sup>103</sup> Manalansan’s point highlights that new terminology is challenging, not only for conceptualising migration and migrant groups, but in order to enforce good practice in the local community. South Africa offers a highly relevant example to explore in this regard, particularly the tensions LGBTI refugee and asylum seekers experience between the promise of a country that ostensibly protects their rights and well-being, the only one on the continent, and the harsh daily realities of on-going stigma, discrimination and violence LGBTI people still encounter within its borders.

### History of recognition and protection for LGBTI in South Africa

In order to expound on this tension, it is necessary to briefly address some of the history of racial and sexual division in the country. During the apartheid era, alternative sexual acts were criminalised and policed. The virulently conservative government saw homosexuality as a pathological condition that should be treated in order for such persons to re-enter heterosexual society.<sup>104</sup> At this time, many lesbian and gay activists were arrested and subjected to torture, rape and aversion therapy.<sup>105</sup> Amongst these activists were Simon Nkoli and Ivan Toms. In the early 1990’s, as South Africa neared the end of the apartheid era, Nkoli and Toms were released. Together they defined a new type of activist who was HIV-positive, black and gay. This group of activists gave the anti-apartheid movement the final push it needed into a free and democratic South Africa.<sup>106</sup>

Nel states that previous to this, the anti-Apartheid movement needed a large cohesive following and embraced many groups and individuals oppressed by the regime.<sup>107</sup> The coalition of different persons involved in the movement created two rich documents, namely the Constitution and the Bill of Rights.<sup>108</sup> The explicit mention of gender rights and gay, lesbian and transgender persons rights in these documents was an indicator of the extent to which these different persons saw common cause in their shared experience of mistreatment during apartheid. However, as Sember states, it was not enough to have a written document ‘equalising’ those whom were discriminated against during Apartheid.<sup>109</sup> He insists further , “that the extent to which [such statements] are realised is [the] measure of the success of the democracy as a whole.”<sup>110</sup> Hoard contributes to the debate when he argues that LGBTI rights emerged as a positive and new factor of the post-apartheid national hegemony.<sup>111</sup> However, he makes an important qualification when he states that the addition and acceptance of these particular groups is still vulnerable. Just like it has taken nearly twenty years to desegregate South Africa from racial divide, it too will take time to accept sexually variant persons.

103 Manalansan, M. 2006. Queer Intersections: Sexuality and Gender in Migration Studies. *International Migration Review* 40(1): 224–249.

104 Reddy V, Standfort T, Rispel L. 2009 . *From Social Silence to Social Science*. Johannesburg, RSA: HSRC Press.

105 Mbalii, M. 2009. Gay AIDS activism in South Africa prior to 1994. In, *From Social Silence to Social Science*. As above.

106 As above.

107 Nel JA. 2009 . Same-sex sexuality and health: Psychosocial scientific research in South Africa. In, *From Social Silence to Social Science*, as above, note 104

108 Government of the Republic of South Africa. *Constitution of the Republic of South Africa 1996*. Available: <http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf>

109 Sember R. 2009. Sexuality research in South Africa: The policy context. In, *From Social Silence to Social Science*., as above, note 104.

110 As above.

111 Hoard N. 1999. Between the White Man’s Burden and the White Man’s Disease: Tracking Lesbian and gay Human Rights in Southern Africa. *GLQ: A Journal of Lesbian and Gay Studies* 5: 559–584.

## Is South Africa a safe haven for LGBTI refugees?

Just two years after the South African Constitution was finalised and implemented, new legislation on refugees was adopted. At that time, due to the progressive and liberal stance of its Constitution, the country became, “the only country in the world to explicitly include gender as a binding ground for asylum.”<sup>112</sup> It continues to be the only African country that recognises LGBTI as potential refugees. However, there are still serious discrepancies between policy and practice.

For example, the Department of Home Affairs (DHA) is responsible for documentation and refugee status determination. The staff and reception officers do not view their roles as protecting those who flee from persecution, but as protecting South Africa from intruders.<sup>113</sup> DHA officials act as gatekeepers to asylum and if their aim is keeping out ‘undesirable’ migrants or persons they deem as ‘undesirable’ because of personal convictions, they are thus hindering if not halting the protection of LGBTI refugees and asylum seekers coming to the country. According to the UNHCR, South Africa has the highest number of asylum applications in the world.<sup>114</sup> Taking this in consideration with South Africa’s progressive legislation this should not come as a surprise.<sup>115</sup> However, the surprise is that the DHA has a 92% rejection rate of asylum claims, most as manifestly unfounded, according to Amit.<sup>116</sup> No doubt, LGBTI persons figure prominently in this group despite the absence of specific statistics on this issue.

Regardless of this trend, South Africa continues to be seen by the international community, namely the UN, as a safe haven for African LGBTI migrants and asylum seekers. Yet, as Nel and Judge argue, “homophobic victimization is an endemic part of the South African landscape.”<sup>117</sup> Further, as Middleton points out, “there is a certain irony that South Africa, a country with one of the highest levels of gender related violence in the world seeks to offer asylum to those fleeing similar harm.”<sup>118</sup> According to Human Rights Watch, “South Africa has attempted to foster a culture of tolerance by outlawing discrimination based on sexual orientation” but the reigning social conservatism means that LGBTI remain vulnerable to violence and discrimination.<sup>119</sup> Still, however, for many LGBTI asylum seekers, South Africa can appear to be a safer haven in comparison to the homophobic climate across the rest of the continent.

## What needs to change?

Due to growing international awareness of the situation in South Africa for LGBTI people, international organisations have come together in order to advocate for better protection of them. This attention by the international community led to the adoption of a resolution at the United

112 Middleton, J. 2010. Barriers to Protection: Gender-related Persecution and Asylum in South Africa. In Palmay I et al. (eds.). 2010. *Gender and Migration: Feminists Interventions*. London, UK: Zed Books.

113 Migrant Rights Monitoring Project (MRMP). 2009. *National survey of the refugee reception and status determination system in South Africa. MRMP Research Report*. Johannesburg, RSA: Wits University. Available: <http://www.migration.org.za/uploads/docs/report-15.pdf>

114 As above, note 96.

115 Government of the Republic of South Africa. 2011. *2010-2011 Annual Report on Asylum Statistics*. Pretoria, RSA: Department of Home Affairs.

116 Amit R. 2010. Lost in the Vortex: Irregularities in the Detention and Deportation of Non-Nationals in South Africa. Forced Migration Studies Programme Research Report. Johannesburg, RSA: Wits University. p1-76. Available: [http://www.cormsa.org.za/wp-content/uploads/2009/05/lost\\_in\\_the\\_vortex-\\_irregularities\\_in\\_the\\_detention\\_and\\_deportation\\_of\\_non-nationals\\_in\\_south\\_africa.pdf](http://www.cormsa.org.za/wp-content/uploads/2009/05/lost_in_the_vortex-_irregularities_in_the_detention_and_deportation_of_non-nationals_in_south_africa.pdf)

117 Nel JA, Judge M. 2008. Exploring Homophobic Victimisation in Gauteng, South Africa: Issues, Impacts and Responses. *Acta Criminologica* 21:19–36.

118 As above, note 112.

119 Human Rights Watch. 2011. “We’ll show you you’re a women”: Violence and discrimination against black lesbians and transgendered men in South Africa. Geneva, CH: HRW. Available: <https://www.hrw.org/report/2011/12/05/well-show-you-youre-woman/violence-and-discrimination-against-black-lesbians-and>

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Nations Human Rights Council, and another by the African Commission for Human and People's Rights.<sup>120</sup> There have been tremendous efforts by Amnesty International, the Organisation for Refugee, Asylum and Migration (ORAM), Lawyers for Human Rights (LHR) and various other non-profit organisations to train, advocate and promote the rights of LGBTI refugees to government officials. This training is particularly important because LGBTI refugees do not fall within the typical refugee category. For example, Zimbabweans are generally not seen as refugees (as economic turmoil is not grounds for refugee status), therefore most Zimbabwean cases are rejected. However, under the UNHCR mandate, an LGBTI Zimbabwean could receive refugee status on the basis of his or her sexual orientation. Further training and advocacy need to be implemented to ensure that all persons that fall under the UNHCR mandate, and under the ambit of the Refugees Act, which include LGBTI people, are protected.

### Conclusion

The outlook for South Africa being a safe haven to LGBTI refugees and asylum seekers seems, at times, bleak, but the on-going evolution of human rights protections in the country since the end of the apartheid era hold promise for change. With the growing interest by non-profit organisations, Western states and international organisations about LGBTI issues in Africa, the movement for improvement will gain momentum. Mentoring programmes for new arrivals, awareness and anti-stigma campaigns and training for governmental staff and other such interventions need to be more widespread and available throughout the country. South Africa also needs to continue to support anti-homophobia, anti-transphobia and anti-xenophobia campaigns in order to further progress in the protection and care of LGBTI persons. While the country still has many challenges with regard to full acceptance of LGBTI individuals, South Africa, given its merits, will continue to be a viable option for achieving a durable solution for LGBTI refugees from across Africa and elsewhere.

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120 United Nations Human Rights Council. 2011. Resolution 17/19 Human rights, sexual orientation and gender identity. A/HRC/RES/17/19. Available: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/148/76/PDF/G1114876.pdf>; ACHPR. 2014. 275: Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity. Available: <http://www.achpr.org/sessions/55th/resolutions/275/>

# Repealing Malawi's sodomy laws: an on-going debate

**Michael Kaiyatsa<sup>121</sup>**

## ABSTRACT

The subject of homosexuality has become a hot topic for debate in Malawi following former President Joyce Banda's announcement that her government would repeal laws criminalising same-sex sexual behaviour. Since that statement, politicians, religious leaders, chiefs and other members of the public openly expressed their views on the topic. In this paper I present and discuss some of the views captured in the local media during this debate, which is still ongoing. This discussion is important as the media acts as a mirror of society, reflecting the views of the people and at the same time shaping people's attitudes and opinions. The paper concludes with a call for more dialogue and civic education to ensure that any changes in law that will be made are accompanied by changes in attitudes and understandings.

## Introduction

In her inaugural state of the nation address delivered in Parliament in May 2012, Malawi's Former President, Joyce Banda, announced her government's intention to abolish certain laws that were hostile to fundamental human rights, including laws criminalising "unnatural" acts, such as sodomy and other same-sex sexual relations.<sup>122</sup> While her intention to repeal such laws earned her much praise from the public, her intention to decriminalise homosexuality stirred up a hornet's nest.

Fearing a public backlash, and a possible split within her newly formed Government of National Unity, Banda later placed the issue in the public domain, urging Malawians in and outside Parliament to debate the matter "without looking at who Joyce Banda is and what she thinks."<sup>123</sup> In this paper, I present and discuss some of the views that were expressed in the local media regarding this issue. The media provided a good forum to understand the debate, not only because of its role as a market place of ideas and a mirror to society, but also because of the critical role it played and continues to play in nurturing and sustaining the debate.

It should be noted that this debate did not begin with the former President's announcement. This debate started in 2006 during the Constitutional Review. As part of this process, the issue of homosexuality was brought up by various civil society organisations with a view to repealing provisions in the Penal Code concerning "unnatural acts" and "indecent practices." However, the proposal was shot down by conservatives who felt that the country was not ready to take this step. The debate was revived by the case of Steve Monjeza and Tiwonge Chimbalanga, two men (although

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122 The full speech is available at: <http://www.nyasatimes.com/2012/05/18/malawi-president-bandas-state-of-the-nation-address-in-full/> [ Accessed July 12, 2012].

123 Anthony Kasunda. "JB wants debate on same-sex marriages." *The Nation*. June 5, 2012. Available: <http://mwntation.com/jb-wants-debate-on-same-sex-marriages/>

Chimbalanga dressed and lived as woman), who were arrested in 2009 after holding a traditional engagement ceremony known locally as *Chinkhoswe*.<sup>124</sup>

The Constitution of Malawi contains a Bill of Rights, which guarantees human rights for all.<sup>125</sup> The country has also ratified various international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>126</sup> The debate in Malawi on the repeal of sodomy laws is thus a call for the country to account for its state of compliance to its own constitutional provisions and the various international human rights treaties it has signed and ratified.

### Views on decriminalisation of homosexuality

The views presented in this paper were extracted from Malawi's leading daily and weekend newspapers, including *The Daily Times*, *The Nation*, *Malawi News*, *the Weekend Nation*, *Nation on Sunday* and *The Sunday Times*. As could be expected, they were highly diverse and contradictory. While some writers were clearly against the decriminalisation of homosexuality, others were in favour. Arguments against raised issues of religion, culture and public morality while those in favour invoked human rights and the need to prevent the spread of HIV. In some cases, similar arguments were used on both sides as when one person argued, "When Jesus said 'Love your neighbour,' he meant everyone regardless of what they do or do not do."<sup>127</sup>

Sometimes, both sides misconstrued the nature of homosexuality and reflected the same myths and stereotypical misconceptions. For instance, one individual, writing in support of decriminalisation observed:<sup>128</sup>

*What exact harm do these homosexuals and lesbians do to other people other than themselves?... Agreed that most of us abhor the lifestyle these people [homosexuals] have chosen. They are deviants alright but I don't think anyone should be arrested for being different and acting differently.*

Thus, while this person was in favour of decriminalisation he was convinced that homosexuals do harm to themselves. What is clear is that the former President's effort to engage public debate was not accompanied by civic education to inform citizens and help them understand homosexuality within the human rights discourse. This was despite the presence of the Ministry of Information and Civic Education in the country which has such a mandate.

### Attitudes to homosexuality from religious leaders

Leading the onslaught against the decriminalisation of homosexuality were religious leaders and church institutions. For example, responding to President Banda's announcement, the Nkhoma Synod of the Church of Central African Presbyterian (CCAP) said in a statement:

124 See Gevisser M. "Love in exile." *The Guardian*. November 27, 2014. Available: <http://www.theguardian.com/news/2014/nov/27/-sp-transgender-relationship-jail-exile-tiwonge-chimbalanga>

125 Government of the Republic of Malawi. 2006. *Constitution of the Republic of Malawi*. Available: <http://www.hrcmalawi.org/Constitution%20of%20the%20Republic%20of%20Malawi.pdf>

126 United Nations. 1966. *International Covenant on Civil and Political Rights*. Available: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; United Nations. 1966. *International Covenant on Economic, Social and Cultural Rights*. Available: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx>

127 Anold Manjenje. "Let's avoid hypocrisy." *The Daily Times*, August 7, 2012.

128 Anonymous. "We should learn to tolerate differences." Out of Turn Column, *The Daily Times*, May 31, 2012.

*Homosexuality is an unnatural act, which must be condemned by all professing Christians.... The Bible is clear that nurturing the lust or participating in homosexual behaviour is a sin.*<sup>129</sup>

Apostle Samuel Chilenje, founder of the Jesus Pentecostal Church, who famously remarked, in April last year, that homosexuals deserve to die, said:<sup>130</sup>

*The religious community has a strong feeling that God's command to ban these indecent acts should be fulfilled. I would urge her Excellency Joyce Banda to slow down, put the bill or law aside. There must be enough consultations with religious bodies.*<sup>131</sup>

Remarkably, some religious leaders argued against continued criminalisation of homosexuality in Malawi. Reverend MacDonald Kadawati of the CCAP Church was one of those that adopted this position. Reacting to calls for the death penalty to be imposed on homosexuals and those who claim to 'promote' their rights, Kadawati said:

*Although the Bible says so, it is going too far to call for the death of gays and lesbians. We are all sinners, we are saved by grace. The Bible should not be interpreted literally.*<sup>132</sup>

In another article, Reverend Kadawati, who also chaired the Public Affairs Committee (PAC), a grouping of faith institutions interested in governance issues, stated:

*We do not subscribe to the fact that those who are involved in this business [homosexuality] should be discriminated against. We believe that through prayers those practising gay issues may realise their weakness.*<sup>133</sup>

Bishop Brighton Malasa of the Anglican Church was another cleric who took a moderate position on the issue. In a statement made during a Malawi Council of Churches (MCC) conference organised to discuss homosexuality, he argued:

*Just like Jesus Christ himself, you [the Church] are there for sinners. We are there for the condemned, sinners, marginalised groups and those that have no voice. This is living the gospel; we should embrace God's flock without discrimination.*<sup>134</sup>

### **Attitudes towards homosexuality from religious followers**

It is important to note that Malawi is overwhelmingly religious. According to the 2008 national census, the country's religious demographics were: Christians 82.6%, Muslims 13%, other religions 1.9%, none 2.5%.<sup>135</sup> Although a survey carried out by the Afrobarometer group showed 94% percent of Malawians opposing same-sex sexual acts, such studies did not ask people whether they felt homosexuality should be decriminalised or not.<sup>136</sup> For example, a study carried out in 2012 by the Malawian organisations Centre for Human Rights and Rehabilitation (CHRR) and the Centre for

129 Emmanuel Muwamba. "Nkhoma CCAP Synod warns MPs on gay laws." *Nation on Sunday*, June 3, 2012.

130 Deogratias Mmana. "Homosexuals deserve to die – apostle." *The Nation*, April 30, 2011.

131 Deogratias Mmana. "Apostle asks JB to slow down on gays." *The Nation*, June 2012.

132 As above.

133 Anthony Kasunda. "PAC speaks on gays, local polls." *The Nation*, May 27, 2012.

134 No author. "Accept gays, prostitutes." *The Nation*, February 28, 2011.

135 National Statistics Office. *2008 Population and Housing Census. Main Report*. Lilongwe, MW: National Statistics Office. Available: <http://www.nsomalawi.mw/2008-population-and-housing-census/107-2008-population-and-housing-census-results.html>

136 Thom Chiumia, "Malawians against same-sex relationships, Afrobarometer survey reveals." *Nyasa Times*, September 5, 2012. Available: <http://www.nyasatimes.com/2012/09/05/malawians-against-same-sex-relationships-afrobarometer-survey-reveals/>

the Development of People (CEDEP) showed that even though most respondents still viewed homosexuality as a sin, a good number of them (about 30%) did not think that the criminal law was the best way of dealing with the issue.<sup>137</sup>

Reflecting this view, one person writing to the Editor in *The Nation* newspaper stated, “I do not approve of homosexuality. At the same time I do not think homosexuality should be criminalised.”<sup>138</sup> Expressing a similar view, in *The Weekend Nation* newspaper, columnist George Kasakula wrote:

I do truly believe that homosexuality is a sin which my Church should condemn and preach against...I also know, again by going through the dictates of my Christian upbringing, that God promises infinite mercy to all He considers sinners and that punishment for sins is up to Him only.<sup>139</sup>

### *Challenges to religious arguments*

The argument that homosexuality should not be decriminalised because Malawi was a “God-fearing nation” was challenged by proponents of decriminalisation. Writing in *The Sunday Times* newspaper, columnist Idris Ali Nasser observed:

*To say Malawi cannot be tolerant to gay people because we are a God-fearing nation is an utterly absurd theory. This talk of a God-fearing nation to a stranger on his first visit to Malawi might create the impression that this is one of the holiest countries in the world, where everything is entirely kosher....But the sick irony to this is that we are, above all else, a corrupt, thieving, lying, killing, plundering, hateful, intolerant nation...God would be ashamed of us.*<sup>140</sup>

Another person writing to the Editor in *The Daily Times* newspaper under the name Joseph Kapingama Kamkwasi wondered:

What is meant by the expression ‘Malawi is a God fearing nation’? Does this expression entail harsh or negative treatment to people with different sexual feelings in the name of the same God who created them differently?<sup>141</sup>

Indeed, Malawi is ostensibly a secular state governed by a secular constitution and not religious decrees. Nevertheless, religion plays an important role in Malawian society, where any public meeting begins and ends with a prayer – whether Christian or Muslim – and where citizens and public officials proudly refer to themselves and their nation as “God-fearing.”

### *Arguments from culture*

Opponents of decriminalisation of homosexuality also took a cultural perspective. A contributor to *The Nation* argued that because homosexuality was never taught in college, it could not be Malawian.<sup>142</sup> Another, responding to the question ‘Is homosexuality in tandem with Malawian culture?’ in the *Malawi News*, stated:

*Homosexuality and our Malawian culture are two parallel lines that can never meet....Every nation has its own culture and as for Malawi this culture of homosexuality is very foreign to us.*

137 Dr. Charles Chilimampungu. 2013. *Knowledge, Attitude, and Practices of Religious and Traditional Leaders Related to MSM and LGBTI Community in Malawi*. Lilongwe, MW: CEDEP and CHRR.

138 George Kasakula. *The Nation*, 7 August 2012

139 George Kasakula. “Do we have to be cruel to homosexuals?” *The Weekend Nation*, May 26, 2012.

140 Idriss Ali Nasser. “Our God-fearing nation.” *The Sunday Times*. May 6, 2012.

141 Joseph Kapingama Kamkwasi. “My take on homosexuality.” *The Daily Times*. September 12, 2012.

142 Joshua Chienda. “Homosexuality and culture.” *The Nation*. June 4, 2011.

*We should not copy what other nations are doing, let us preserve our culture.*<sup>143</sup>

The Evangelical Association of Malawi (EAM), in a statement it issued, went further to describe homosexual acts as “alien acts”:

*The Evangelical Association of Malawi further urges the Malawi Government, Parliament and all those entrusted with the duty to govern, to jealously guard and protect the interests and values of the Malawian people who they represent to be steadfast in representing the citizens of this nation by not bowing down to alien practices which undermine our very cultural values to the core.*<sup>144</sup>

However, arguments from culture were flawed. Malawi is a large country with different cultures. What is acceptable in one culture is not necessarily acceptable in another culture. Cultures in Malawi have also changed over time. Phiri, for example, observed that among the *Chewa* culture the family system has undergone so many fundamental changes over the years that it is almost impossible to mark a particular institution as the one and only traditional *Chewa* family.<sup>145</sup>

### **The “Western” agenda argument**

Other arguments used against decriminalisation in the debate were those that were convinced that the West was out to impose “gay rights” on cash-strapped Malawians in exchange for aid. Ngoni paramount chief Inkosi ya Makosi Mbelwa IV was quoted in *The Nation* as saying, “We cannot accept donor money meant to promote gays and lesbianism in this country because that is foolish money.”<sup>146</sup>

Writing to the Editor in *The Nation* newspaper, one individual wondered:

*Why should Malawians waste time debating these issues in exchange with dollars from the West? According to the Bible, God forbids same-sex marriages. The West must come in the open and tell us what exactly they get from these same-sex marriages for them to be given a priority.*<sup>147</sup>

And even the EAM, quoted above, noted that:

*The people of Malawi are in a socio-economic war with agencies and institutions that are advocating for same sex marriages with an agenda of shifting the society towards an internationally harmonised code of behaviour and making imperialistic impositions of culture, norms and values which remain deviant to the society of Malaw.*<sup>148</sup>

The idea that donors are using aid to impose gay rights on Malawians was entrenched during the late President Bingu Wa Mutharika’s regime. Towards the end of Mutharika’s tenure, Malawi was in serious trouble. Its human rights record had deteriorated rapidly and its economy was in dire straits following the withdrawal of aid by some Western donors in protest at his dictatorial style of leadership and economic mismanagement.

Britain, whose ambassador was kicked out over a leaked diplomatic cable that referred to Mutharika as “autocratic and intolerant of criticism,” was one of the countries that withheld aid. Months later,

143 No author. “Is homosexuality in tandem with Malawian culture.” *Femail Closet*. Malawi News. May 7-13, 2011.

144 Evangelical Association of Malawi. No date. Press Statement on Same Sex Marriages. Available: <http://www.aefrica.org/afroscope/view.htm?id=15>

145 Phiri KM. 1983. Some changes in the matrilineal family system among the Chewa of Malawi since the nineteenth century. *Journal of African History* 24(2): 257-274.

146 Philip Pemba. “God will burn us, warns Mbelwa.” *Nation on Sunday*. May 1, 2011.

147 Phillimon Chiweta. “On gay rights.” *The Nation*. September 12, 2012.

148 As above, note 144.

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in October 2011, British Prime Minister David Cameron threatened to cut aid to countries that persecuted LGBTI persons, confirming suspicions that the West was out to impose gay rights on Malawians using aid.<sup>149</sup>

However, if truth be told, donors withheld aid from Malawi not because of its position on gay rights. Rather donors pulled out in response to the previous administration's authoritarianism, making it clear poor economic and political governance would not be tolerated.

### ***'The people must decide' argument***

Other opponents of decriminalising homosexuality, knowing full well that a majority of Malawians were against it, called on the government for a referendum on the issue. For instance, the Democratic Progressive Party (DPP) stated:

*DPP suggests that any repeal or amendment to such laws [sodomy laws] should take into account the voices of the people, and Malawians should be the ultimate decision makers on whether this country should open up to same sex relationships, gay marriages and similar affairs.*

The party further said:

*While we appreciate that homosexuals are first and foremost human beings with equal rights like the right to life, right to education, right to economic activity, and others which should be guaranteed and protected, it is however too premature and careless to behave as if all Malawians have accepted the notion of homosexuality, gay marriage, lesbianism and same sex relationships. The party suggests that the President should call for a referendum on the issue.<sup>150</sup>*

Arguing against the call for a referendum, Ernest Thindwa wrote in *The Nation*:

*It has to be acknowledged that rights of minorities do not depend on the goodwill of the majority and cannot be eliminated by majority vote, dominant norm or opinion. Malawi has to adapt to this democratic requirement if she is to enhance its democratic credentials.<sup>151</sup>*

### ***Use of homophobia as a political tool***

While religious leaders were in the forefront of opposing the decriminalisation of homosexuality, it was Malawian politicians, particularly those in opposition camps, who embraced the anti-gay rhetoric for political gain. Reacting to President Banda's announcement, the People's Transformation Party (PETRA) held a press conference in Blantyre in 2012 during which party president, Kamuzu Chibambo, warned that Malawi would be making a "grave mistake" to legalise same-sex relationships.<sup>152</sup> Chibambo, a lawyer, argued on the basis of religion, saying decriminalising homosexuality would be an "onslaught" on the family "as ordained by God."<sup>153</sup> Chibambo urged parliamentarians, faith leaders and "all Christians and Muslims within and outside the country" to vehemently resist any intention directly or indirectly to "legalise" same-sex practices.

The DPP, on its part, indicated that it would block any moves in Parliament to decriminalise same-

149 See <http://www.bbc.com/news/uk-15511081>

150 Golden Matonga. "DPP wants referendum on homosexuality." *The Daily Times*. July 30, 2012.

151 Ernest Thindwa. "The gays rights challenge." *The Nation*. November 11, 2011.

152 No author. "PETRA against repeal of same-sex law." *The Nation*. May 21, 2012; No author. "PETRA queries homosexuality legalization." *The Daily Times*, May 21, 2012.

153 Anthony Kasunda. "PETRA cautions MPs on same sex debate." *The Nation*. June 2012.

sex sexual acts.<sup>154</sup> The party's leader was quoted as saying:

*This provision on same-sex marriages is strongly opposed by almost all Malawians, including those in the current government. We are, therefore, surprised and shocked that the president has decided that this stance should be reconsidered.*<sup>155</sup>

Proponents of homosexual rights have, however, attacked the DPP for driving an anti-gay agenda during its reign. As one contributor to *The Daily Times* wrote:

*They [DPP] peddled lies that the July 20 demonstrations were about supporting same sex marriages and this is why people went into the streets. To imagine that they are now in opposition and still peddling more lies in order to defend the bad laws they enacted is unbelievable. I hope they stay in opposition forever.*<sup>156</sup>

### “Gay rights are human rights”

Proponents of decriminalisation of homosexuality used the human rights argument to gain support. In a joint press statement released on May 17, 2012 to mark the International Day Against Homophobia and Transphobia, CHRR and CEDEP wrote:

*Homophobia is a clear breach of human dignity, and is incompatible with the principles of equality and non-discrimination on which our constitution is founded. The principle of non-discrimination requires that human rights apply equally to every human being regardless of status. One does not cease to be human because they are engaging in same-sex practices.*<sup>157</sup>

The organisations further said:

*We urge Her Excellency to repeal all laws criminalising consensual same-sex acts between consenting adults. Criminalisation of sex between consenting adults is an affront to human dignity and seriously undermines the country's human rights commitments under international law, which obligates Malawi to protect the human rights of all its citizens, regardless of sex, colour, gender or “any other status.”*

Although most journalists were careful not to take sides in national debates, as journalistic ethics demand, a few journalists made their stand clear through their columns. For example, in his weekly column, Daniel Nyirenda wrote:

*I find our secular Constitution in Malawi to be such a beauty in that it lays a conducive environment for the flourishing of a diversity of people including minorities. Chapter IV Section 20 of the Constitution says: “Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status.” Therefore, I encourage our honourable Members of Parliament to go ahead to scrapping discriminatory laws which seek to criminalise a group of people based on their sexual orientation.*<sup>158</sup>

154 No author. “Chaponda says DPP to oppose legalising homosexuality” *Nyasa Times*. May 22, 2012.

155 Bright Sonani. “JB’s move on unnatural acts shocks DPP.” *The Nation*. May 22, 2012.

156 No author. “We should learn to tolerance differences.” *The Daily Times*. May 22, 2012.

157 CHRR and CEDEP Press Release. May 17, 2012.

158 Daniel Nyirenda. “Homosexuality and Malawi as a secular state.” *The Daily Times*. September 3, 2012.

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### *Arguments from the HIV perspective*

The debate on homosexuality and criminalisation was also approached from a health perspective, with HIV activists arguing that criminalisation hampered efforts to address populations at higher risk of HIV exposure, including men-who-have-sex-with-men (MSM).

One HIV organisation that advanced this argument is the Malawi Network of People Living with HIV (MANET+). The organisation was quoted in *The Daily Times* newspaper as saying:

*Our appeal is that there should not be discrimination and human rights violations, particularly [against] people living with HIV and key populations such as men who have sex with men, sex workers and young people.<sup>159</sup>*

And in a joint statement, CHRR, CEDEP and the Malawi Network of Religious Leaders Living with or Affected by HIV (MANERELA+) argued:

*Decriminalisation will not only help people from the misery of having to live a life underground, but will also help to stem the continuing HIV epidemic. There is overwhelming scientific evidence that sexual minorities, particularly Men-who-have-Sex-with-Men (MSM) are at an increased risk of HIV infection. This is largely because HIV prevention programmes ignore anal sex, allowing the misconception to develop that anal sex is safer than vaginal sex.*

The position taken by these organisations was ostensibly based on research, which showed that homosexuals had higher rates of infection than the general population. For example, at the time, the results of an MSM study that was being conducted by the Malawi College of Medicine, in conjunction with John Hopkins University and CEDEP, showed an HIV prevalence of 13% among MSM in Malawi, which was higher than the national HIV prevalence rate of 10%.<sup>160</sup>

### Conclusion

The collection of views presented in this paper serves as evidence that homosexuality has generated a lot of interest among the people of Malawi. While most arguments against the decriminalisation of homosexuality have been based on sheer ignorance, it is encouraging to note that Malawians are willing to engage in discussion on the issue. Civil society organisations and other interested parties have an opportunity to capitalise on this and to encourage more dialogue on the issue. It is only through dialogue – and not only debate – that more and more people will come to understand the nature of homosexuality and appreciate its human rights dimensions.

What the Government of Malawi should realise is that it will take more than the repeal of the country's sodomy laws to change public perceptions and attitudes. The Ministry of Information and Civic Education is a resource that should be mobilised to help inform the public in this debate. Also, forming strategic partnerships with human-rights-oriented non-governmental organisations to achieve this objective would be a step in the right direction. Doing so would not only help circumvent homophobic sentiments but would also promote greater public participation and ownership of the reform process.

159 Golden Matonga. 'Engage gays in AIDS fight, says MANET+.' *The Daily Times*. June 2012.

160 Baral S et al. 2013. HIV prevalence, sexual risks and HIV knowledge among MSM in Malawi: understanding risks among a stigmatized population and opportunities for interventions. Paper presented at the training of health workers on LGBT Human Rights in Mangochi, Malawi.

# Human rights, same-sex unions, and the proliferation of 'anti-homosexuality' bills in Africa: The cases of Nigeria and Uganda

**Paul Ogendi**<sup>161</sup>

*[Editor's note: This article was prepared prior to the enactment of the Same Sex Marriage Prohibition Act in Nigeria in January 2014, and the Anti-Homosexuality Act in Uganda in February 2014. The legislation in Uganda was subsequently invalidated by the Supreme Court of Uganda later that year. The argument made, however, provides an important perspective on marriage as a human right for LGBTI within global human rights instruments and jurisprudence.]*

## ABSTRACT

'Anti-homosexuality' bills are a very recent phenomenon in the LGBTI rights discourse. However, these bills have created acrimony amongst a section of human rights scholars. The proposed laws have adopted a hard-stance position against homosexuality by introducing new offences and punishments. Same-sex unions have been particularly targeted with offences extending beyond same-sex couples to affect associating persons and organizations. What is disturbing is the popularity of these bills in Africa and their continued proliferation despite their detrimental provisions on human rights of LGBTI persons. If passed, the bills will create a new wave of human rights violations for homosexuals. This paper addresses the human rights ramifications of the bills and argues against their adoption in African countries, particularly in Uganda and Nigeria. It borrows widely from the international, regional and national legal and non-legal sources to build a case against the proposed laws.

## Introduction

The right not to endure unfair discrimination as a fundamental human right traces its modern origin to Article 2 of the Universal Declaration of Human Rights (UDHR).<sup>162</sup> This right protects all human beings in equal measure, heterosexual and homosexual alike, including in regard to marriage. The right against discrimination should not be limited by law. In this respect, the law should facilitate and offer equal protection for all groups. In the case of marriage, any restrictions in law should be limited to procedural formalities to determine, for instance, the consent between individuals entering

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<sup>162</sup> Smith BC, see note 56, above. p153. United Nations. 1948. *Universal Declaration of Human Rights*. Available: <http://www.un.org/en/documents/udhr/>

marriage and their legal capacity. In addition, the law should also protect vulnerable groups, including children, and offer a way out of marriage by way of, for example, divorce.

Sadly, as will be discussed later in this paper, in Africa and elsewhere, unfair discrimination against same-sex unions is rampant compared to heterosexual relationships. Apart from the Victorian penal code punishment on sodomy, *sui generis* 'anti-homosexuality' bills are being developed at an alarming rate with additional punishments. So far, Uganda and Nigeria are leading the way in Africa to pass the barbaric bills into law with far-reaching ramifications, including in the area of same-sex unions.

### The right to marriage?

The benefits of marriage are many and varied. In particular, marriage facilitates the enjoyment of socio-economic benefits "such as the right to inheritance, medical insurance coverage, adoption, access to wrongful death claims, spousal benefits, bereavement leave, tax advantages and post-divorce rights."<sup>163</sup> The Office of the High Commissioner for Human Rights (OHCHR) also outlines the benefits of marriage to include "pension entitlements, the ability to leave property to a surviving partner, the opportunity to remain in public housing following a partner's death, or the chance to secure residency for a foreign partner."<sup>164</sup>

Despite these imputed benefits, most countries currently "provide benefits for married and unmarried heterosexual couples but deny these benefits to unmarried homosexual couples."<sup>165</sup> This scenario has continued to perpetuate unfair discrimination for same-sex couples. Amongst other things, such non-recognition predisposes homosexual couples to discrimination by "private actors, including health-care providers and insurance companies."<sup>166</sup> It has also facilitated human rights violations, including during inheritance and adoption. It is therefore important for human rights scholars to re-visit this subject as a matter of urgency.

Disenfranchisement in marriage is not limited to same-sex couples but also affects transgendered persons. For example, in *Corbett v Corbett*, the petitioner was a transgendered woman who desired to get married.<sup>167</sup> The Court held against her and observed that the word 'woman' for the purposes of marriage must fit the biological criteria determined by the congruency of chromosomes, gonadal and genital tests. By this definition, the petitioner was not a 'woman' for purposes of marriage. Such English common law traditions have continued to influence marriage laws in many Commonwealth countries, including Nigeria and Uganda, to the detriment of same-sex couples.

Interestingly, a study conducted by Cardell indicated that there was no particular difference in the quality of relationships between lesbian, gay or heterosexual couples, since couples in all of the categories were equally satisfied with their relationships.<sup>168</sup> In fact, evidence elsewhere points to a comparatively more satisfactory relationship amongst same-sex couples than heterosexuals. Peplau et al., for example, have argued that same sex unions are enhanced by two factors, namely, "equality of

163 *Minister of Home Affairs and Another v Fourie and Another*. CCT 60/04 at 70. Available at: <http://www.saflii.org/za/cases/ZACC/2005/19.html>

164 United Nations High Commissioner for Human Rights (OHCHR). 2011. Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity. UN Doc A/HRC/19/41. Para 69. Available: [http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.41\\_English.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.41_English.pdf)

165 As above

166 As above.

167 *Corbett v Corbett* [1971] 2 All ER 33.

168 Carell M. et al. 1981. Sex-role Identity, Sex-role Behavior and Satisfaction in Heterosexual, Lesbian and Gay Male Couples. *Psychology of Women Quarterly* 488: 488; Cited in, Jordan KM, Deluty RH. 2000. Social support, coming out, and relationship satisfaction in Lesbian couples. *Journal of Lesbian Studies* 4(1): 148.

involvement by partners and an equal balance of power between the partners.<sup>169</sup>

Notwithstanding this apparent fact that same-sex and heterosexual unions are similar, unfair discrimination is still common. For example, in Nigeria and Uganda, anti-homosexuality bills have been proposed with provisions punishing same sex unions. The preamble for the Nigerian bill states that it is a proposal, “for an Act of parliament to make provisions for the prohibition of sexual relationships between persons of the same sex, celebration of marriages by them and for other matters concerned therewith.”<sup>170</sup> Similarly, the Ugandan bill proposes “an Act to prohibit any form of sexual relations between persons of the same sex; prohibit the promotion or recognition of such relations and to provide for other related matters.”<sup>171</sup>

The memorandum accompanying the Ugandan proposal states that the justification is to provide for “...a comprehensive and enhanced legislation to protect traditional family values.”<sup>172</sup> This rationale is illogical since, as Ugandan human rights advocate Professor Sylvia Tamale has argued, there is no way that, “people who are in a loving relationship and harming no one pose a threat to the family simply because they happen to be of the same sex.”<sup>173</sup> Similarly, same-sex unions alone cannot threaten the continuity of humankind and lead to the extinction of the human race, as some anti-homosexual advocates would infer.<sup>174</sup> The anti-homosexuality bills in Uganda and Nigeria are, therefore, nothing more than the extension of unfair discrimination against homosexuals only that this time in the context of marriage.

### International human rights and same-sex unions

Internationally, the foundation of all human rights, including rights related to marriage, is the UDHR.<sup>175</sup> The UDHR does not textually restrict the institution of marriage to heterosexuals against homosexuals.<sup>176</sup> The responsibility to protect the institution of marriage is on the society and the State.<sup>177</sup> Similarly, the International Covenant on Civil and Political Rights (ICCPR) provides for the right to marry at Article 23.<sup>178</sup> In particular, it stipulates that marriages must be entered into “with the free and full consent of both partners.”<sup>179</sup> The deliberate use of the word ‘partner’ symbolizes that same sex unions are also potentially protected, at least from a textual analysis point of view. Unlike the UDHR, the obligation to ensure equality of rights and responsibilities of the spouses as to marriage, during marriage and its dissolution rests solely upon the state.<sup>180</sup>

Notwithstanding the difficulties, the role of international instruments cannot be overemphasised particularly for norm setting. A good example is the *Yogyakarta Principles*, which are essentially a non-legal but persuasive set of principles elaborating on state responsibilities under international law

169 As above.

170 See the Nigerian Same-Sex Marriage Prohibition Bill No C546. Available at <http://www.nassnig.org/nass/legislation.php> [Accessed: August 28, 2012].

171 See the Ugandan Anti-Homosexuality Bill, 2009, Bill No 18. Available at [www.publiceye.org/publications/globalizing-the-culture-wars/pdf/uganda-Bill-september-09.pdf](http://www.publiceye.org/publications/globalizing-the-culture-wars/pdf/uganda-Bill-september-09.pdf) [Accessed: August 28, 2012].

172 As above.

173 Tamale S. 2009. A human rights impact assessment of the Anti-homosexuality Bill. *Equal Rights Review* 4: 2. Available: <http://www.equalrightstrust.org/ertdocumentbank/Sylvia.pdf>

174 As above.

175 Article 16 of the UDHR provides for the right to marry.

176 Article 16(1) of the UDHR.

177 Article 16(3) of the UDHR.

178 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> (accessed 22 July 2013).

179 Article 23(3) of the ICCPR.

180 Article 23(4) of the ICCPR.

with special regard to sexual orientation and gender identity. In other words, it is an authoritative set of standards on human rights as it applies to sexual minorities. With regard to the right to found a family, Principle 24 provides as follows:

*Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of sexual orientation or gender identity or any of its members.*<sup>181</sup>

One of the state obligations in this regard is as follows:

*[To] [e]nsure that laws and policies recognize the diversity of family forms, including those not defined by descent or marriage, and take all necessary legislative, administrative and other measures to ensure that no family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members, including with regard to family-related social welfare and other public benefits, employment, and immigration.*<sup>182</sup>

It is clear, then, that the direction taken by international human rights principles is towards recognition of same-sex unions, including marriages.

### Jurisprudence of treaty bodies

Human rights jurisprudence seems to also be following this trend. For example, the United Nations Human Rights Committee (HRC) in *Toonen v Australia* held that all rights under the ICCPR are also guaranteed for homosexuals.<sup>183</sup> While no mention of the words 'sexual orientation' can be traced under the ICCPR, the HRC interpreted the term 'sex' in Article 26 (on equal protection before the law), and in Article 2 (on equality and non-discrimination), to also include 'sexual orientation.'

Further, in *Young v Australia*, the HRC held that States not only have negative obligations but also positive obligations with regards to guaranteeing the human rights of everyone, including homosexuals.<sup>184</sup> Similarly, in *Joslin v New Zealand*, this obligation was found to be lacking on the part of the State with regard to the recognition of same sex marriages.<sup>185</sup> However, with regard to the particular issue in this case related to marriage, O'Flaherty and Fisher believe that the position taken by HRC would have been altered if the complainants had not failed to "identify any difference in treatment arising from their inability to marry."<sup>186</sup> In other words, the case would have been decided in favour of the applicants if it was based on equality and non-discrimination.

While jurisprudence may be sending mixed signals, it is clear within the principles of human rights that consenting adult homosexuals have human rights, including the right to marry and to found a family. Prohibiting same sex unions, then, is discriminatory and increases homophobia and the associated human rights violations. Eliminating discrimination in all spheres is therefore an immediate obligation incumbent upon all states. International protection of sexual minority rights

181 International Commission of Jurists (ICJ). 2007. *Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity*. Available: <http://www.refworld.org/docid/48244e602.html>

182 As above.

183 UN Human Rights Committee. 1994. *Communication No. 488/1992 : Australia*. 04/04/1994. CCPR/C/50/D/488/1992. Available: <http://www.unhcr.ch/tbs/doc.nsf/0/d22a00bcd1320c9c80256724005e60d5>

184 UN Human Rights Committee. 2. *Communication No 941/2000 : Australia*. 09/18/2003 or *Young v Australia*. CCPR/C/78/D/941/2000. Available: <http://www.unhcr.ch/tbs/doc.nsf/0/3c839cb2ae3bef6fc1256dac002b3034>

185 UN Human Rights Committee. *Communication No. 902/1 : New Zealand or Joslin v New Zealand*. CCPR/C/75/D/902/1999.

186 O'Flaherty M, Fisher J. 2008. Sexual orientation, gender identity and international human rights law: Contextualising the Yogyakarta Principles. *Human Rights Law Review* 8: 217.

including the right to marry should therefore exploit this avenue to further develop State obligations on non-discrimination and the right to marry for same-sex couples.

### Regional human rights system and same sex unions

Regionally, in Africa, the issue of same sex unions has not been discussed, although issues of sexual orientation have been raised with regard to the *African Charter on Human and Peoples' Rights* and the African Commission on Human and Peoples' Rights.<sup>187</sup> For example, in *Zimbabwe for Human Rights NGO Forum v Zimbabwe*, the African Commission stated that the principle of equality and non-discrimination should “ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.”<sup>188</sup> However, whether this extends to same sex unions remains unclear.

Various decisions on the continent have held that there exist other avenues for the protection of the rights of same sex couples under the *African Charter*, including the provisions relating to “human dignity, human integrity, freedom and security.”<sup>189</sup> In South Africa, for example, in the *National Coalition for Gay and Lesbian Equality v The Minister of Justice*, the Constitutional Court declared anti-sodomy laws were unconstitutional by observing that they infringed on constitutional rights to privacy, dignity, equality and non-discrimination.<sup>190</sup> In *Minister of Home Affairs and another v Fourie and another* (the *Fourie* case), the same court held that the definition of marriage was unconstitutional in as far as it did not recognise same sex unions.<sup>191</sup> This therefore infringed the right to equal protection before the law and the right not to be the object of unfair discrimination. The decision in this case represents the only instance where same sex unions were recognized as human rights in Africa. It is yet to be seen whether other African countries including, the African Union, will adopt the same position.

### An emerging trend: The case of Schalk and Kopf v Australia

The European Court of Human Rights (ECtHR) recently had to decide on the issue of same sex unions in the case of *Schalk and Kopf v Australia*.<sup>192</sup> Europe has, for some time, in a number of countries, guaranteed equal access to marriage. This is true for Belgium, the Netherlands, Norway, Portugal, Spain, Sweden and France, which all recognize same sex unions in various degrees in their laws.<sup>193</sup> In the *Schalk* case, the applicants alleged discrimination by Australia because they were not allowed to marry or have any legal recognition since they were same sex couples.<sup>194</sup> The applicant argued that Article 12 of the European Convention on Human Rights guaranteed the right to marry and found a family and that this had been violated by the Government of Australia. At the time, Australia recognized same sex unions under the Registered Partnership Act but this did not confer the same legal status as marriage.<sup>195</sup>

187 Article 30 of the *African Charter*.

188 ACHPR. 2006. Communication 245 / 2002 –Zimbabwe Human Rights NGO Forum v Zimbabwe. Available: <http://www.achpr.org/communications/decision/245.02/>

189 Murray R, Viljoen F. 2007. Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union. *Human Rights Quarterly* 29: 91.

190 1998(12)BCLR 1517(CC)(S.Afr).

191 As above, note 155.

192 *Schalk and Kopf v. Austria*, Application no. 30141/04, Council of Europe: European Court of Human Rights, 24 June 2010, available at: <http://www.refworld.org/docid/4c29fa712.html>

193 'Gay marriages around the world' *BBC News* April 23, 2013. Available: <http://www.bbc.co.uk/news/world-21321731>

194 As above, note 192, para 3.

195 As above, note 192, para 35.

This case was primarily decided on the basis of the principle of Margin of Appreciation. In its decision, the ECtHR stated that:

*...the traditional concept of marriage which underpins Article 12 provided sufficient reason for the continued adoption by the respondent State of biological criteria for determining a person's sex for the purpose of marriage. Consequently, this was considered a matter encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry.*<sup>196</sup>

Although, in its decision, the ECtHR considered that, “the inability of any couple to conceive or parent a child cannot be regarded as per se removing the right to marry,” and that same-sex couples could enjoy family life just as opposite sex couples, it nevertheless ruled that states retained the margin of appreciation to define the “exact status conferred” to same sex unions. This meant that states were free to restrict the right to access marriage for same-sex couples pursuant to articles 12, 14 and 8 of the European Convention on Human Rights.<sup>197</sup>

The reaction to this ruling was critical. As an example, in its statement in response to the judgement, the International Lesbian and Gay Association stated:

*...the judgment reflects an emerging European consensus. As more and more countries provide legal recognition for same-sex partners, Europe as a whole is gradually moving towards full equality for same-sex families. We are disappointed that on this occasion the Court employed a less proactive approach and limited itself to stating that the issue is within the legal competence of individual countries.*<sup>198</sup>

While the decision recognised the equal right of same-sex couples to form lasting unions, and to have these recognized in law, it fell short of requiring that States give such unions the same status as heterosexual marriage. Thus, it can be viewed as a partial victory. However, in Africa, the situation is much different. Discrimination against same-sex unions appears to be the norm, including in Nigeria and Uganda, as illustrated by the absence of same-sex marriage laws or its equivalent as discussed below.

## Overview of marriage laws in Nigeria and Uganda

The marriage laws in most British colonies are modelled after the common law. Indeed, Stibich observes that many African countries borrow their marriage law from the British common law and statutory law which creates an “inevitable conflict” since the citizens to whom such laws apply are “widely separated from his [or her] English counterpart in customs, languages, traditions and temperament.”<sup>199</sup> The inevitable conflict here is normally in the context of polygamy and not same sex marriages. In the British tradition, the prevailing definition of marriage was set by Lord Penzance in *Hyde v Hyde*, in 1886, when he ruled that marriage was, “a voluntary union for life of one man and one woman, to the exclusion of all others.”<sup>200</sup> This meant that the polygamous marriages which were popular amongst African communities were not considered marriages according to this definition.

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196 As above, note 192, para 51.

197 As above, note 192.

198 'European Court of Human Rights: 'a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would' *ILGA Europe* June 24, 2010. Available at [http://ilga-europe.org/home/news/for\\_media/media\\_releases/schalk\\_and\\_kopf\\_v\\_austria](http://ilga-europe.org/home/news/for_media/media_releases/schalk_and_kopf_v_austria).

199 Stibich R. 1969. Family law in some English-speaking African states. *Journal of Legal Pluralism* 2: 49. Available: [www.jlp.bham.ac.uk/volumes/02/stibich-art.pdf](http://www.jlp.bham.ac.uk/volumes/02/stibich-art.pdf)

200 1986 L.R. 1 P&D. 130.

African constitutions, however, have made it possible for polygamous marriages by adopting more unrestrictive definitions. For example, the Constitution of Uganda provides for the right of the family and provides as follows under its Article 31:

*(1) Men and women of the age of eighteen years and above have the right to marry and found a family and are entitled to equal rights in marriage, during marriage and at its dissolution....*

*(3) Marriage shall be entered into with free consent of the man and woman intending to marry.*

Subsection (3) therefore was deliberately inserted in the Ugandan Constitution to block same sex couples from claiming the right of the family while allowing for polygamy under subsection (1).<sup>201</sup>

The existence of such a barrier at the constitutional level represents a daunting challenge for same sex couples. Other laws that govern the institution of marriage in Uganda have maintained this trend, including in the Marriage Act,<sup>202</sup> Marriage of Africans Act,<sup>203</sup> Marriage and Divorce of Mohammedans Act,<sup>204</sup> Hindu Marriage and Divorce Act<sup>205</sup>, the Divorce Act<sup>206</sup> and the Customary Marriage (Registration) Act.<sup>207</sup>

The situation in Nigeria is a little nuanced because of its federal character, coupled with the tensions between Muslims who predominantly occupy the north, and Christians who predominantly occupy the south. Therefore, religion and family have always dominated Muslims' and Christians' "construction of individual and communal identity."<sup>208</sup> There are various laws governing marriage at the federal level including: Constitution of the Federal Republic of Nigeri,<sup>209</sup> Marriage Act,<sup>210</sup> and the Matrimonial Causes Act.<sup>211</sup> Northern parts of Nigeria, however, apply laws governing Islamic marriages. In all these laws, marriage is between a man and a woman and there is no recognition of same sex marriages in any federal or state level laws.

## Analysis of the proposed 'anti-homosexuality' bills in Nigeria and Uganda

Despite existing laws in both Nigeria and Uganda, which already criminalize consensual same-sex behaviour, both countries are nevertheless proposing additional criminal statutes. The proposed legislation in Nigerian was recently approved by the Senate and is close to becoming law. According to commentators, the proposed legislation reflects the "prevailing values of Nigerian society" and that both Muslims and Christians are united on this issue.<sup>212</sup>

201 Government of the Republic of Uganda. 1995. *The Constitution of Uganda*. Available: [http://www.statehouse.go.ug/sites/default/files/attachments/Constitution\\_1995.pdf](http://www.statehouse.go.ug/sites/default/files/attachments/Constitution_1995.pdf)

202 Cap. 251.

203 Cap. 253.

204 Cap. 252.

205 Cap. 250.

206 Cap. 249.

207 Cap. 248

208 MC Green. 2011. Religion, family law, and recognition of identity in Nigeria. In An-Na'im AA, Green MC (eds.). Symposium Issue 'Shari'a, family, and democracy: Religious norms and family law in pluralistic democratic states.' *Emory International Law Review* 25: 945-966.

209 1979, No 25 of 1978.

210 1990, Cap 218.

211 1970, No 18 of 1970

212 "Nigerian leaders unite against same-sex marriages." BBC News Africa December 5, 2011. Available: <http://www.bbc.co.uk/news/world-africa-15992099>

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The proposed law defines marriage to mean “a legally binding union between a man and a woman.”<sup>213</sup> It also defines “same sex marriage’ to mean,

*“the coming together of two persons of the same gender or sex in a civil union, marriage, domestic partnership or other form of same sex relationship for the purposes of cohabitation as husband and wife.”*<sup>214</sup>

The proposed legislation expressly provides for non-recognition of all same sex marriages whether conducted within or outside Nigeria.<sup>215</sup>

In Uganda, the proposed legislation is more far reaching in its objectives. As stated in the bill, the first three objectives were to:

1. *Provide for marriage in Uganda as that contracted only between a man and a woman;*
2. *Prohibit and penalize homosexual behavior and related practices in Uganda as they constitute a threat to the traditional family;*
3. *Prohibit ratification of any international treaties, conventions, protocols, agreements and declarations which are contrary or inconsistent with the provisions of this Act;*<sup>216</sup>

What is remarkable, in addition to the express purpose of the bill to protect heterosexual marriage and address the “threat to the traditional family” is the extension of the bills provisions to international treaties, conventions and protocols. With regard to same-sex marriage, at Part III. 12, the bill states that:

*A person who purports to contract a marriage with another person of the same sex commits the offence of homosexuality and shall be liable on conviction to imprisonment for life.*<sup>217</sup>

Aside from issues of same-sex marriage, the two bills contain many other provisions that not only deny human rights to LGBTI; they even condone and encourage blackmail, persecution and victimisation.<sup>218</sup> In concluding this part of the discussion, it is clear that the two Bills are by all standards extreme pieces of legislation. In a constitutional democracy based on human rights it is inconceivable that such laws could even be entertained in the respective legislatures of the two countries.

### Conclusion

In conclusion, the subject of gay rights around the world is problematic since an international consensus on this issue is still evolving. Same-sex unions have lately become a subject of scrutiny in Africa, particularly after the introduction of the ‘anti-homosexuality’ bills in Uganda and Nigeria. Moreover, the proliferation of ‘anti-homosexuality’ bills on the continent is an indication that some African countries are not yet ready to engage in the debate towards the recognition of LGBTI rights. Instead of making progress, Uganda and Nigeria are leading other countries in adopting hard line positions. This trend should be dealt with since it has the potential of reversing all the gains achieved in as far as LGBTI rights are concerned in Africa, and globally.

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213 Clause 2 of the Nigerian bill. See note 170, above.

214 As above.

215 As above.

216 See note 171, above.

217 As above.

218 As argued by Tamale 2009, at note 173, above.

# Doubly excluded: The experiences of LGBTI forced migrants in Uganda

**Onen David Ongwech<sup>219</sup>**

## ABSTRACT

This article outlines the experiences of LGBTI refugees seeking asylum in Uganda. It is based on the many experiences of the author in assisting these individuals as well as those of the organisation for which he works. It explain how, vulnerable already as migrants, refugees or asylum seekers, LGBTI individual face additional threat to their security and well-being as a result of locally entrenched homophobic and xenophobic attitudes that pervade places of settlement and influence those working their. The burden on such individuals is truly enormous and much needs to be done to address intolerance and discrimination throughout the refugee support process in the country.

## Introduction

Human rights violations, abuses and suffering caused by oppressive regimes and state sanctioned violence have existed for ages forcing many people to flee their home countries for fear of their lives. However, LGBTI refugees and asylum seekers find themselves under limited protection by the host country despite the life threatening challenges they went through prior to, during and after flight.

Refugees who come to Uganda are from war-torn neighbouring countries like Democratic Republic of Congo (DRC), Rwanda, South Sudan, Burundi, Somalia and Eritrea, of which a great percentage have lived through tormenting experiences. Being a refugee is an experience nobody deserves to go through. However, LGBTI refugees in Uganda face enormous challenges unlike other refugees and asylum seekers. The inhuman acts that LGBTI refugees in Uganda face mean that many prefer to look for survival in urban centers but the majority live in the refugee settlements gazetted by the government of Uganda, namely Nakivale, Kyangwali, Kyaka II, Oruchinga and Invempi. While the aim of such settlements is to provide protection and assistance, LGBTI refugees continue to face violence, gross violation of rights and live in abject poverty.

## Experience with Uganda Police, military agents and private security forces

LGBTI refugees and asylum seekers face enormous challenges with the Uganda Police, military agents and other private security operatives who are ideally meant to protect them. Many LGBTI migrants have been arrested and kept in detention for a very long time without their statement being recorded or any charges brought against them. Many others have suffered blackmail from police who

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ask for money in order to be released. Those in prisons are often paraded before inmates and regarded as “demonic,” as spoiling the Ugandan community and violating tradition.<sup>220</sup>

The experiences of LGBTI refugees fall into three broad categories. The first is characterised by verbal abuse and demeaning words which subjects them to secondary victimisation. The second category includes instances of inefficiency, corruption, inaction or biased actions, which create a climate of impunity for criminals who victimize them. The third category is when the Police themselves are the primary perpetrators of violence. The overall result is the pervasive lack of faith and trust in the police.<sup>221</sup>

A large proportion of LGBTI refugees, especially those involved in sex work, have resorted to offering free sex to deployed police officers in order to be freed each time they find themselves in conflict, whether with their clients, fellow refugees or Ugandan nationals. When the conflict is with fellow refugees, police often hesitate to help. Facing the police for any form of assistance is like sending LGBTI migrants to the gallows. The only way to avoid more problems is to avoid anything to do with the police.

The impunity with which LGBTI persons are attacked and threatened indicates the failure of the people in authority, including the police, to prevent violence against LGBTI. Faced with such constant mistreatment and threats, some LGBTI refugees have developed their own response mechanisms because they believe that neither the police nor anyone else will intervene or protect them.

Some have developed individual and collective strategies to try and stay safe, while others have resorted to carrying knives, especially after dark.<sup>222</sup> Still others choose to restrict movement and to stay at their homes, or to constantly relocate from one location to another because of the belief that they might be followed.

### Economic situation and its relationship to survival sex work by LGBTI migrants

The problems facing LGBTI refugees with regard to employment are very complex. A few who have started their own small scale income generating activities such as hair dressing, selling of pancakes, bricklaying, or small restaurants have been isolated by their own communities who do not want to buy from them because of their sexual orientation or gender identity.

The few LGBTI refugees and asylum seekers who have managed to access employment have been abused sexually by their bosses and also discriminated against by their fellow employees once they are discovered to be LGBTI. In some cases, their salaries have not been paid and if they demand for payment, they are threatened that the police and other authorities will be notified that they are homosexual. For fear of their lives, they accept to go without pay, resorting instead to survival sex work that also exposes them to additional risks, including health complications such as HIV infection or other sexually transmitted diseases. Some have been beaten up and stripped naked when they demanded for their payment after sex; some have been paraded before the media.

### Interactions with service providers

LGBTI asylum seekers and refugees face daunting challenges with service providers, for instance the

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220 Human Rights Watch. 2011. *We'll Show You You're a Woman.* *Violence and Discrimination against Black Lesbians and Transgender Men in South Africa.* Geneva, CH: HRW. Available: <https://www.hrw.org/report/2011/12/05/well-show-you-youre-woman/violence-and-discrimination-against-black-lesbians-and>

221 As above.

222 As above.

Office of the United Nations High Commissioner for Refugees (UNHCR) and the Directorate for Refugees in the Office of the Prime Minister. While there are LGBTI-serving organisations in the country, very few have services tailored to meet the unique needs of LGBTI refugees.

The interaction gap between many service providers and LGBTI refugees continues to widen. Language continues to be a huge challenge, for example, for refugees who come from non English-speaking countries. Many LGBTI refugees from Francophone speaking countries require interpretation in almost all areas of service needs, including hospitals, courts of law, and the police. LGBTI refugees from DRC are the most affected because a majority speak either French or Kiswahili as their primary languages, thus making self-expression an uphill task.

Some refugee serving agencies have tried to help by providing interpreters at no cost but LGBTI refugees go through great challenges of confidentiality and misrepresentation of facts. Some of them do not trust the interpreters given the fact that they can come from the same community in their home country. Much as they may want to express their health issues to doctors, they grapple with the dilemma of balancing what to tell the interpreter and how the interpreter will translate it to the person they intend to talk to.

The few organisations that try to work with LGBTI refugees have faced threats from government.<sup>223</sup> Organizations working on human rights and other sensitive issues are the main targets. In recent times, Ugandan officials have closed civil society meetings and workshops, reprimanded organizations for their research, demanded retractions or apologies, and confiscated t-shirts, calendars and training materials.

### LGBTI migrants and hostility from the host community

While refugees flee their country of origin in hope of finding better and safer surroundings, in reality this is hindered by the host communities' attitudes, culture, and religious beliefs. Due to xenophobia in Uganda, LGBTI refugees are not able to seek or receive assistance from service providers. There is a high level of intolerance to sexual minorities already and this means that LGBTI refugees already prone to xenophobia face a double effect of phobia in light of their sexual orientation and gender identity.

As a result, LGBTI persons are forced into indirect confinement and isolation in the Ugandan society. Even within the refugee community, there are high levels of transphobia and homophobia. There have been occurrences of sexual violence, public ridicule, humiliation and embarrassment by their own counterparts, both in settlements and in urban centres.

### Refugee Status Determination and durable solutions for LGBTI forced migrants

There is a general image that all refugees and asylum seekers have equal access to durable solutions. However, the light is dim for LGBTI refugees who face double exclusion. Of the three durable solutions of resettlement, local integration and repatriation, resettlement seems to be the only option for LGBTI refugees. However, resettlement is offered to less than 3% of the world's refugees.<sup>224</sup>

The situation is worse for LGBTI refugees who flee due to sexual persecution because Uganda's law criminalises same-sex behaviour therefore making it almost impossible to acquire refugee status on grounds of sexual orientation or gender identity. This is partly the reason some LGBTI refugees

223 The Observer (Uganda). Vol. 7 Issue: 153. June 27-28, 2012.

224 Refugee Health Policy Advisory Committee. (RHPAC) 1997.5

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prefer to stay behind the scene than appear before protection officers at the Office of the Prime Minister, which has the mandate to grant or revoke refugee status.

Voluntary repatriation is not a good option for LGBTI refugees because some of them fled to Uganda because of persecution on grounds of sexual orientation and gender identity in the first place. Local integration is also not an option given the fact that homosexuality is criminalised.

### Shelter and safer spaces for LGBTI refugees and asylum seekers

LGBTI refugees and asylum seekers find it difficult securing safe, affordable housing due to lack of previous rental and credit histories, income and language barriers, xenophobia, and racism. The condition of LGBTI asylum seekers when it comes to housing and accommodation is appalling. Some LGBTI clients do not have permanent places of residence given that they keep on changing location due to pressure mounted by the community, their landlords and other tenants.

Some LGBTI migrants have been issued very strong eviction letters with explanations that they do not fit in society. Some of these letters contain very demeaning and very inhuman and labelling words, such as “Hippi”, “Satan”, “Unclean”, etc. Some local councillors would call for community meetings where suspects are named, shamed and paraded. Some LGBTI clients have been evicted from houses they rent not because they have failed to pay rent but because of bringing to their homes other people that the community members regard as non-conforming and “strange” people. Still others have been kicked out of rooms because of their dressing or because people have watched them kiss a same-sex person.

### Loss of hope and feeling that life is meaningless

The LGBTI forced migrants are in many cases traumatised due to the experiences they go through. Exacerbated by their exclusion from traditional refugee support networks, LGBTI refugees frequently struggle with psychological and physical maladies.<sup>225</sup> Many LGBTI refugees live in fear and sorrow; many regret having been born and keep bargaining with life only to find no answers or explanations. Some LGBTI forced migrants continue to face multiple episodes of severe violence with no hope of things getting better.

### Conclusion

Viewing refugees as traumatised people with multiple problems is only one side of the story. It is important to affirm the survival and the hope which LGBTI refugees have maintained throughout their lives. It is important to recognise that some LGBTI refugees are determined people who have come through potentially overwhelming life experiences to finally reach a country of asylum or resettlement.

From being refugee, with socio-economic problems that come with such status in Uganda, to being known as a member of the LGBTI community, with the stigma and further discrimination associated with this identity, it is plausible to conclude that LGBTI refugees in Uganda are doubly excluded.

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225 ORAM. 2012. *Rainbow Bridges: A Community Guide to Rebuilding the Lives of LGBTI Refugees and Asylees*. Available: <http://www.oraminternational.org/en/publications/223-rainbow-bridges>

# Why the limitation of Article 43 of the Constitution of Uganda is not legitimate towards the Anti-Homosexuality Bill

**Stanley Atona** <sup>226</sup>

*[Editor's note: This article was prepared prior to the enactment of the Anti-Homosexuality Act in February 2014 in Uganda, and its subsequent invalidation by the Supreme Court of Uganda later that year. The argument made, however, has relevance to any future efforts in the country to table similar legislation.]*

## ABSTRACT

Homosexuality remains controversial across the African continent, in no small measure given the number of states that continue to criminalize same-sex sexual behaviour. Starting in 2009, efforts were made in Uganda to enhance existing Penal Code provisions with more comprehensive and harsher penalties targeting homosexuality. Under the Constitution of Uganda, fundamental rights and freedoms are guaranteed to all citizens, free only from certain express limitations set out under Article 43. However, the provisions of the proposed Anti-Homosexual Bill far exceed what was envisioned by the framers of these limitations, both as interpreted in other instances by the Supreme Court of Uganda, and with regard to international case law and human rights instruments. The proposed bill must be seen then as unconstitutional and invalid.

## Introduction

In Uganda, like most African countries, people think being homosexual is all about sexual preferences. However, being homosexual can be defined as “to have romantic, sexual, intimate feelings for, or a love relationship with, someone of the same sex.”<sup>227</sup> There are currently over 50 countries in Africa that criminalize same-sex sexual conduct between consenting adults, despite its protection under international human rights mechanisms. For over half of these countries, such laws stem primarily from the United Kingdom's own colonial past. They are a British legacy as 42 of the 54 Commonwealth states continue to criminalize same-sex sexual conduct.<sup>228</sup> These dehumanizing laws, such as the Anti-Homosexuality Bill currently before the Ugandan Parliament, once again only legitimize this sort of brutality.

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<sup>227</sup> See <http://www.out.org.za> OUT LGBTI well-being [Accessed: March 17, 2011]

<sup>228</sup> See <http://www.consultancyafrica.com/index.php> [Accessed: March 17, 2011]

### Sexuality within an African perspective

The notion of sexual preferences among homosexuals is not true; this thinking is only based on an African thinking, which is deeply rooted in culture. Sexuality is complex and requires an in-depth societal understanding since it is perceived as a white man's import and a new emerging field in contemporary Africa. However within Africa, the discourse on sexuality reveals a unique cultural tapestry in which difference does not deny the mutual coexistence of the idiosyncratic with its thesis. Its diversity produces a complex fabric of conformist and non-conformist attitudes and behaviour.

Just as the African region displays its unity in the midst of diverse geographical, ethnic, linguistic, and cultural differences, the subject of sexuality is analogous in that it too results from forces that are sometimes common to all regions and areas but often come with specific tendencies and effects that are unrepeated elsewhere. The fact that multiple societies coexisted, say, in the Stone Age, does not mean they all utilized stone tools in the same way; the modern discourse 'artifacts' a uniform interpretation. In this light, the modern discourse on sexuality in Africa is to be understood in terms of this interweaving of ecological stimuli and responses across the societies and among the people and the peoples of the physical and moral continent.<sup>229</sup>

### History of the Anti-Homosexuality Bill in Uganda

Across the African continent, false claims that homosexuality is "un-African" fuel discrimination and violence against LGBTI persons.<sup>230</sup> Both male and female homosexual activity is illegal in Uganda. Prior to 2000, only male homosexuality was criminalized. However, under Section 145 of the Penal Code Amendment (Gender Reference) Act 2000, all reference to "any male" was changed to "any person" so that lesbianism was criminalized as well.

As do many countries in Africa, Uganda culture regards homosexuality as taboo. In spite of this, BBC News estimates that there are roughly half a million LGBTI people in Uganda.<sup>231</sup> As an illustration of the prevailing attitude in Uganda, on October 14, 2009, the Honourable Member of Parliament, David Bahati, introduced the Anti-homosexuality Bill as a private members' bill.<sup>232</sup> His proposal provided for harsher penalties for homosexuals, including the death penalty for "repeat offenders." Subsequently, however, some of these harsher clauses were removed and the bill was re-introduced on February 7, 2012. As the bill has been debated and the issue of homosexuality has once again gripped the country, it has further fuelled homophobia, hate and discrimination.

### Is the Limitation of Article 43 of the Constitution of Uganda legitimate towards the Anti-Homosexuality Bill?

The Constitution of Uganda 1995 abolished claw-back clauses in the Bill of Rights (now Chapter 4), which previously unduly restricted the enjoyment of basic human rights and freedoms. The general standard set for testing the permissible limitations is now contained in Article 43 (1), which states that, "In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest." Article 43 (2) states that acting in the public interest specifically precludes, "political persecution, detention without trial, or any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society,

229 Obono O (ed.). 2012. *A tapestry of human sexuality in Africa*. Cape Town, RSA: Jacana Media.

230 Tamale S (ed.). 2011. *African Sexualities: A reader*. Oxford, UK: Pambazuka Press.

231 Ugandans hold anti-gay sex rally.\* *BBC News*. August 21, 2007

232 Honorable Member of Parliament of Uganda, Representing Ndoorwa County, West-Kabale District.

or what is provided in this Constitution.”

Democracy is a fundamental constitutional value and principle in Uganda. As stated in the Constitution at Clause 2 (i) of the National Objectives and Directive Principles of State Policy, “the state shall be based on democratic principles, which empower and encourage the active participation of all citizens at all levels in their own governance.” Within such contexts, it is true that fundamental rights and freedoms can be limited; however, such derogations must be strictly limited. As, for example, the Siracusa Principles stipulate, derogations must not undermine the essence of the right concerned and not be done arbitrarily. Further, a state may use no more restrictive means than are required for the achievement of the purpose of the limitation.<sup>233</sup>

My contention, then, is that the Anti-Homosexuality Bill, as proposed, is inconsistent with Article 2 (2) of the Constitution since the limitation imposed on the enjoyment of these rights is beyond what is permitted under Article 43 and discriminates against a particular group of people. The bill, if passed into law, would constitute *prima facie* violations of a number of human rights, including the rights to equality and non-discrimination, privacy, liberty and security of the person, freedom of expression, freedom of thought, conscience and religion, and health. The bill may also be construed as an official incitement to violence against LGBTI persons, or anyone thought to be so. It would deprive its victims of any redress, and allow their abusers to continue assaulting others with impunity. As noted by the former Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Asma Jahanghir:

*The criminalization of matters of sexual orientation increases the social stigmatization of these persons. This in turn makes them vulnerable to violence and human rights abuses, including death threats and violations of the right to life, which are often committed in a climate of impunity.*<sup>234</sup>

The Constitution acknowledges an important principle of the modern state which is a duty to facilitate and enhance individual self-fulfilment and advancement, recognizing individual rights and freedoms as inherent in humanity.<sup>235</sup> In this regard, under Article 20, the Constitution stipulates that:

(1) *Fundamental rights and freedoms of the individual are inherent and not granted by the State.*

(2) *The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of government and by all persons.*

Nothing can limit such fundamental rights and freedoms beyond what is acceptable and justifiable in a free and democratic society. Under international human rights norms, the burden is always upon the state imposing limitations to demonstrate that they do not impair the democratic functioning of the society. While there is no single, all encompassing definition of democratic society, surely one that recognizes and respects the human rights set forth in the Universal Declaration of Human Rights (UDHR) may be viewed as such. The contention here is that, as a member of the United Nations, acknowledging the supremacy of the UDHR, and having ratified and domesticated a

233 United Nations. 1966. *International Convention on Civil and Political Rights*. Available: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

234 United Nations Council on Human Rights. 2011. *Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights resolution 2000/31. E/CN.4/2001/9*. Available: [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/7eab0905d2e2a355c1256a0d003265b5/\\$FILE/G0110156.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/7eab0905d2e2a355c1256a0d003265b5/$FILE/G0110156.pdf)

235 See <http://www.constitution.org>. “Principles of political right or the social contract by Jean-Jacques Rousseau.” [Accessed: March 17, 2011]

number of human rights instruments, Uganda holds itself out as a democratic society and therefore must behave in this manner.

This was clearly illustrated in the case of *Charles Onyango Obbo & Andrew Mwenda v Attorney General*.<sup>236</sup> In interpreting Article 43 of the Constitution, Mulenga JSC ruled that the provision in clause (1) is couched as a prohibition of expressions that ‘prejudice’ the rights and freedoms of others, as well as the public interest. This translates into a restriction on the enjoyment of individual rights and freedoms in order to protect the enjoyment by others of their rights and freedoms, as well as to protect the public interest. In other words, the constitutional protection of rights and freedoms does not extend to two scenarios, namely: (a) where there is prejudice to the rights and freedoms of another person; and (b) where there is prejudice to the public interest. It follows therefore, that, subject to clause (2) of Section 43, any law that derogates from any human right in order to prevent prejudice to the rights or freedoms of others, or to the public interest, is not inconsistent with the Constitution.

However, the limitation provided for in clause (1) is qualified by clause (2), which in effect introduces a limitation upon the limitation. It is apparent from the wording of clause (2) that the framers of the Constitution were concerned about a probable danger of misuse or abuse of state power under the guise of defence of public interest. In order to avoid this, clause (2) contains express prohibitions against such things as political persecution or detention without trial. In addition, they provided in that clause a yardstick. Nothing may be done to interfere with individual rights and freedoms or to protect the public interest that cannot be justifiable in a free and democratic society. The existence of provisions that both protect rights and provide for their limitation necessarily generates competing interests. Where such conflicts occur, however, they must be resolved having regard to the different objectives of the Constitution. As the judgement quoted above sets out, the primary objective of the Constitution of Uganda is the protection of rights, other objectives are secondary. Therefore, any proposed limitations on constitutionally guaranteed rights and freedoms must be construed as narrowly as possible.

It is important to note that since the Anti-Homosexuality Bill is a private member’s Bill, parliament may only refuse to support it since they have no power to shelve such a proposal once introduced. However, should it be passed then it may be challenged for its manifest unconstitutionality. How the court is likely to treat the case, in light of Section 43, can be further gleaned from the *Onyango* case. While an argument was put forward that what constitutes “acceptable and justifiable” in a free and democratic society should be construed subjectively in the Ugandan context, since such things vary from one democratic society to another, the proposal was not accepted. As Mulenga JSC set out, such an approach would distort the standard set out by the Constitution. Clause (2) of Section 43 clearly presupposes the existence of universal democratic values and principles, to which every democratic state must adhere.

Following on from this, then, it is clear that courts must construe such standard objectively. This was clearly articulated in the case of *R v. Oakes* where the Supreme Court of Canada elaborated on that standard in relation to Section 1 of the *Canadian Charter of Rights and Freedoms*, a limitation clause similar in terms to Article 43. In his ruling, Dickson CJC stated:

*Inclusion of these words [free and democratic] as the final standard of justification for limits on rights and freedoms refers the court to the very purpose for which the Charter was originally*

<sup>236</sup> *Charles Onyango Obbo & Andrew Mwenda v Attorney General*, Constitutional Appeal No. 2 of 2002|2004| UGSC 1 (February 2004).

*entrenched in the Constitution: Canadian society is to be free and democratic. The court must be guided by the values and principles essential to a free and democratic society, which I believe embody, to name but a few, respect for inherent dignity of the human person, commitment to social justice and equality. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown to be reasonable and demonstrably justified.<sup>237</sup>*

In the Onyango case, there was explicit concurrence with this point of view. Therefore, in determining the validity of the limitation imposed by the Anti-Homosexuality Bill on fundamental rights and freedoms, the court must be guided by the values and principles essential to a free and democratic society. The proposed bill can in no way be saved by the limitations set out in Article 43.

### Conclusion and Recommendations

Africa's sexual revolution should no longer be ignored. The continent must be prepared for how this revolution impacts it and how it initiates changes in its moral infrastructure, or in the consciousness with which it must move forward on its new societal journey. What is required are more voices to comment on it, seek out its forms, and describe the nature of understanding best suited to it. The Anti-Homosexuality Bill violates the Ugandan Constitution and there is even no need for the government to get involved against LGBTI rights. The government has an obligation to protect such persons at heightened risk. Besides, who are the people lobbying for such law? It is a private member's bill used as a political tool to suppress the most at risk population. In this regard, there is need for a concerted effort by lawyers, civil society activists and human right defenders in Uganda to challenge section 145 of the Penal Code Act. Almost without exception, decriminalization of consensual same-sex sexual conduct between adults has come about through legal challenge.

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237 R. v. Oakes, [1986] 1 S.C.R. 103.

# Advancing the rights of sexual and gender minorities using The African Commission on Human and Peoples' Rights

**Kene C. Esom**<sup>238</sup>

## Abstract

Despite developments in international and regional legal jurisprudence on the right to freedom from discrimination on the basis of sexual orientation and gender identity [SOGI], the African Commission on Human and Peoples' Rights, which is the interpretative body of the African Charter and which has over the last 30 years of the Africa Charter has been exemplary and progressive in the manner in which it has interpreted both its mandate and the provisions of the African Charter, for a long time failed to pronounce itself on the question of discrimination on the basis of sexual orientation and gender identity.

This failure on the part of the African Commission, despite the growing spate of violence and human rights violations on grounds of SOGI, seemed to portend doom on the otherwise dynamic human rights charter of the continent. This paper examines the practice and jurisprudence of the African Commission on freedom from discrimination on the basis of sexual orientation and gender identity. The paper will also highlight the cost of the silence of the African Commission on this issues and make few recommendations on immediate steps that the African Commission can take in addressing the issue of discrimination, violence and other human rights violations on the basis of sexual orientation and gender identity.

## Introduction

Incidences of violence and discrimination on the basis of sexual orientation and gender identity have increased steadily over the past few years. In countries across Africa, reports of organs of states sponsoring discriminatory legislations and policies, denying access to justice and services, and State-condoned attack and violence against persons on the basis of their perceived or real sexual orientation and gender identity, continue to abound.<sup>239</sup> The notoriety of Uganda's Anti-Homosexuality Bill 2009

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239 See Human Rights Watch, *More than a name: State Sponsored Homophobia and its consequences in South Africa*, 2003. Available at <http://www.hrw.org/sites/default/files/reports/safriglhr0303.pdf>. Accessed 28 October 2012; Amnesty International, *Crimes of Hate, Conspiracy of Silence: Torture and ill-treatment based on sexual identity*, 2001. Available at <http://www.amnesty.org/en/library/info/ACT40/016/2001>. Accessed 28 October 2012; S. Gear, *Behind the bars of masculinity: Male rape and homophobia in and about South African men's prisons*, 2007. Available at <http://www.csvr.org.za/docs/gender/behindbars.pdf>. Access 28 October 2012; Human Rights Watch, *We'll show you you're a woman: Violence and Discrimination against black lesbians and transgender men in South Africa*, December 2011. Available at <http://www.hrw.org/sites/default/files/reports/southafrica1211.pdf>. Accessed 28 October 2012.

which among others prescribed for the death penalty for certain same sex relations,<sup>240</sup> and similar bills criminalizing homosexual identity in Nigeria<sup>241</sup>, Liberia<sup>242</sup> and utterances by political leaders across Africa describing homosexuality as ‘un-African’ and likening homosexual persons to dogs have further incited violence against lesbian, gay, bisexual, transgender and intersex [LGBTI] persons within those countries and across the continent.

The African Commission on Human and Peoples’ Rights which has been very innovative in its interpretation of the protection afforded by the African Charter on Human and Peoples’ Rights had been rather reluctant to respond to the issues of discrimination and violence on the basis of sexual orientation and gender identity in Africa with the same courage and dexterity it has demonstrated through its jurisprudence.<sup>243</sup>

### Sexual Orientation, gender identity and human rights jurisprudence

As with other regional human rights instruments, adopted around the same period, the African Charter on Human and Peoples’ Rights [The African Charter] makes no mention of gay, lesbians, bisexuals or of sexual orientation and gender identity.<sup>244</sup> The International Bill of Rights – the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, made no mention of these terms either. Also at a domestic level, with the exception of South Africa, where the principle that the State may not unfairly discriminate against an individual on the basis of their sexual orientation is provided for in the Bill of Rights of the national constitution, no other national constitution provides for non-discrimination on the basis sexual orientation.<sup>245</sup> In fact, consensual same-sex conduct is outlawed in many African countries.<sup>246</sup>

However, despite the lack of specific mention of sexual orientation and gender identity in international and regional human rights instruments, the UN Human Rights Council [previously, the Human Rights Committee],<sup>247</sup> the European Court of Human Rights<sup>248</sup> and the Inter-American Commission on Human Rights<sup>249</sup> have found that their various instruments provide protection from violations on the basis of sexual orientation and gender identity. The United Nations Human Rights Council in

240 For full text of the Uganda Anti-Homosexuality Bill 2006, see <http://www.boxturtlebulletin.com/2009/10/15/15609>. Accessed 26 October 2012

241 Full text of Nigeria’s Anti Same-Sex Marriage Bill is available at <http://www.boxturtlebulletin.com/2011/09/29/37491>. Accessed 26 October 2012.

242 Text of the Liberia Bill to make homosexuality a first degree felony is available at <http://wthrockmorton.com/2012/02/21/text-of-liberias-bill-to-make-homosexuality-a-first-degree-felony/>. Access 28 October 2012

243 See the SERAC case as an example of a forward-looking and innovative interpretation of the African Charter by the African Commission on Human and Peoples’ Rights. The Commission found that the Nigerian government violated the right to health and a third generation right to a clean environment by directly contaminating water, soil, and air; harming the health of the Ogoni people; and failing to protect them from the harm caused by the oil companies. It also found violations of the rights to housing and food, which are not expressly recognized under the Charter. It determined, quite innovatively, that the right to housing or shelter is implicitly entrenched in the rights to property, family protection, and in the right to enjoy the best attainable state of mental and physical health. Likewise, the Commission inferred the right to food from the rights to life and health and to economic, social, and cultural development. The Social and Economic Rights Action Center for Economic and Social Rights (SERAC) v. Nigeria, Communication No. 155/96, African Commission on Human and People’s Rights, 68 (May 2002).

244 Neither Article 14 of the European Convention on Human Rights or Article 1 of the American Convention on Human Rights provide ‘sexual orientation’ or ‘gender identity’ as a grounds for non-discrimination.

245 Section 9[3] of the South African Constitution 1996.

246 According to the report of the International Lesbian and Gay Association, *State-sponsored homophobia: A world survey of laws prohibiting same sex activity between consenting adults*, 2015, same-sex sexual acts are legal in only 19 out of the 55 African countries. Available at [http://old.ilga.org/Statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2015.pdf](http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2015.pdf).

247 Toonen v. Australia, Communication 488/92, Human Rights Committee, UN Doc. CCPR/C/50/D/488/1992 [Mar. 1994]

248 Dudgeon v. UK, 45 Eur. Ct. H.R. [Ser. A] [1981].

249 IACHR, Report No. 139/09 (merits), Case 12.502, Karen Atala and her daughters, December 18, 2009.

June 2011, adopted Resolution 17/19, the first United Nations resolution on human rights, sexual orientation and gender identity, and which initiated the landmark report of the High Commissioner on Human Rights on systemic violence and discrimination on the basis of sexual orientation and gender identity.<sup>250</sup> These development in jurisprudence demonstrate a recognition by the drafters of the human rights instruments that they should be living documents which actively respond to new forms of human rights violations.

### SOGI-related decisions of African courts

At the level of domestic courts, there is a small but increasing number of decisions of domestic courts condemning discrimination and human rights violations based on, and/or affirming the human rights of persons regardless of sexual orientation and gender identity.

(a.) *Mukasa and Oyo*<sup>251</sup> was decided, in December 2008, Section 145 of the Penal Code already criminalised “carnal knowledge against the order of nature” with a maximum term of life imprisonment. Police violence and arrests were common case of police ill-treatment, although the court did not directly mention the sexual orientation or gender identity of the applicants. Rather, the court upheld the principle of the universality of all human rights in finding that Mukasa’s and Oyo’s constitutional and human rights had been violated by illegal search and seizure and subsequent physical abuse.

(b.) *Kasha Jacqueline and Others v. Rolling Stone Ltd and Anor*<sup>252</sup>. The respondents were the publishers of a newspaper called “Rolling Stone”. On 2 October 2010, an article with the title “100 Pictures of Uganda’s top homos leak” was published in the newspaper. The article accused the gay community of trying to recruit “very young kids” and “brainwash them towards bisexual orientation”. It called on the government to take a bold step against this threat by hanging dozens of homosexuals.

The article published the names and pictures of several members of the Ugandan LGBT community and provided information about them and, in some cases, their home addresses. With regard to the first applicant, the article accused her of hosting at her house gatherings of the gay community, sometimes ending in orgies. The article also accused the third applicant of planning to recruit children at schools. The second applicant’s name and address were published in the article and his picture appeared on the cover.

The Court found that the publication of the applicants’ identities and addresses, coupled with the explicit call to hang gays by the dozen, tended to “tremendously threaten” their right to human dignity.

As for the applicants’ right to privacy of the person and home, the Court affirmed they had “no doubt” that this right had been threatened by the exposure of the applicants’ identities and addresses in the article.

Lastly, the Court addressed the criminalisation of homosexual acts and noted that, under section 145

250 United Nations High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity* UN Doc. A/HRC/19/41.

251 *Mukasa and Oyo v Attorney-General*, High Court of Uganda at Kampala [22 December 2008]. Full text of judgement available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/07/Mukasa-and-Oyo-v.-Attorney-General-High-Court-of-Uganda-at-Kampala.pdf>

252 *Kasha Jacqueline, David Kato Kisule and Onziema Patience v. Rolling Stone Limited and Giles Muhame*, High Court of Uganda at Kampala [30 December 2010]. Full text of judgement available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/07/Kasha-Jacqueline-David-Kato-Kisule-and-Onziema-Patience-v.-Rolling-Stone-Ltd-and-Giles-Muhame-High-Court-of-Uganda-at-Kampala.pdf>

of the *Penal Code Act*, a person was not considered a criminal for the sole fact of being gay. In order to be regarded as a criminal, one had to commit an act prohibited under that provision. The Court thus distinguished between the being gay and sexual conduct.

The Court held that Rolling Stone threatened the applicants' rights to human dignity and protection from inhuman treatment, as well as their right to privacy of the person and home. The Court issued the injunction sought by the applicants, restraining the respondents from publishing more information about the identities and addresses of Ugandan gays and lesbians.

(c.) *National Coalition for Gay and Lesbian Equality v. Min. of Justice* is the decision of the Constitutional Court of South Africa which struck down the laws prohibiting consensual sexual activities between men. Basing its decision on the Bill of Rights in the Constitution – and in particular its explicit prohibition of discrimination based on sexual orientation – the court unanimously ruled that the crime of sodomy, as well as various other related provisions of the criminal law, were unconstitutional and therefore invalid.<sup>253</sup> In 1997 the National Coalition for Gay and Lesbian Equality, an association representing a broad spectrum of South African LGBT organisations, launched a constitutional challenge in the Witwatersrand Local Division of the High Court. The Coalition was joined as applicant by the South African Human Rights Commission, an independent chapter nine institution created by the Constitution and tasked with the promotion and protection of human rights. Named as respondents were the Minister of Justice, the national minister responsible for criminal law; the Minister of Safety and Security, the national minister responsible for policing; and the Attorney General of the Witwatersrand, the official responsible for prosecutions in the Witwatersrand Division.[11] (The position of Attorney General has since been replaced by that of Director of Public Prosecutions within the National Prosecuting Authority.)

The applicants asked the High Court, among others, to -

- invalidate as unconstitutional the common-law offences of sodomy and commission of an unnatural sexual act, and section 20A of the Sexual Offences Act (the 'men at a party' offence).
- invalidate the inclusion of sodomy as a Schedule 1 offence in the Criminal Procedure Act, 1977 (which had the effect that people could be arrested without a warrant on reasonable suspicion of having committed sodomy, and deadly force could be used to prevent fleeing from arrest), and its inclusion in the Schedule of the Security Officers Act, 1987 (which had the effect of disqualifying those convicted of sodomy from being registered as security officers).

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

(d.) *R.M. v Attorney General – High Court of Kenya*<sup>254</sup> – regarding the rights of intersex persons

The petitioner who was a prison inmate brought a petition against the Attorney-General of Kenya, Commissioners of Prison and Police, the Registrar of Births alleging contravention of the fundamental rights provisions of the Kenyan Constitution and relevant sections of the Prisons Act and Birth and Death Registration Act.

The Petitioner sought, among others, a declaration that the Government had failed to introduce

253 Available at <http://www.saflii.org/za/cases/ZACC/1998/15.pdf>

254 Available at [http://kenyalaw.org/Downloads\\_FreeCases/79392.pdf](http://kenyalaw.org/Downloads_FreeCases/79392.pdf) Accessed 29 October 2012

legislation setting out procedure, rules and regulations for dealing with intersex persons, to regulate and or monitor the intersex persons so as to ensure that they get a statutory guarantee against discrimination, arbitrary and or unnecessary corrective surgeries; a declaration that the Government of Kenya through the Respondents has neglected the petitioner and other intersex persons in that the Government has not set up any institutions, facilities for intersex persons like toilets, cells, schools, no trained any personnel to deal with the intersex persons, thereby depriving the petitioner of the Constitutional right of freedom of association as provided for under section 80 of the Constitution.

The court found that the petitioner had been subjected to various human rights violations on the basis of the petitioner's gender identity.

(e.) *Katam v. Chepkwony – High Court of Kenya*<sup>255</sup> – The court upheld the Nandi customary practice of female-to-female marriage. In the Nandi tradition, a female husband is a woman who pays bridewealth for, and thus marries (but does not have sexual intercourse with) another woman. By so doing, she becomes the social and legal father of her wife's children. The basic institution of woman/woman marriage is widespread in African patrilineal societies, although the way it functions varies from society to society. In Nandi, a female husband should always be a woman of advanced age who has failed to bear a son. The purpose of the union is to provide a male heir.

(f.) *Thuto Rammonge & 19 ors v. Attorney General of Botswana*<sup>256</sup> – The High Court of Botswana declared as unconstitutional the decision of the Botswana Department of Civil and National Registration refusing to register the organisation, Lesbians, Gays and Bisexuals of Botswana (LEGABIBO). The department had denied registration to LEGABIBO on the grounds that Botswana's constitution did not recognise homosexuals. The High Court held that the decision of the department had the effect of hindering the applicants in the enjoyment of their rights to freedom of association and assembly.

## SOGI and the African Commission

### *SOGI in the jurisprudence of the African Commission*

The African Commission has not pronounced itself directly on the question of sexual orientation and gender identity as a protected ground within the non-discriminations provisions of the African Charter. A Communication in 1994 raised the question whether 'other status' in Article 2 of the African Charter covered 'sexual orientation' was withdrawn before the Commission had an opportunity to decide on it. It is reported that the rapporteur on the case inferred that sexual orientation was not a protected ground saying 'Homosexuality offends the African sense of dignity and morality and is inconsistent with positive African values'.<sup>257</sup>

The only direct mention of the phrase 'sexual orientation' in the decisions of the African Commission is found in the case of *Zimbabwe NGO Human Rights Forum v. Zimbabwe* where the commission stated that '[T]ogether with equality before the law and equal protection of the law, the principle of non-discrimination provided under Article 2 of the Charter provides the foundation for the enjoyment of all human rights ... the aim of this principle is ensure equality of treatment of individuals irrespective of nationality, sex, race or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation'<sup>258</sup>

255 Available at [http://kenyalaw.org/Downloads\\_FreeCases/82443.pdf](http://kenyalaw.org/Downloads_FreeCases/82443.pdf) Accessed 29 October 2012

256 Available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/11/LEGABIBO-judgment-low-resolution.pdf>. Accessed 10 November 2015

257 Quoted by O. Amao, 'Civil and political rights in the African Charter' in M. Ssenyonjo [ed] *The African regional human rights system: 30 years after the African Charter on Human and Peoples' Rights* 2012 p.34

258 *African Commission on Human and Peoples' Rights, Decision of 15 May 2006, Zimbabwe NGO Human Rights Forum v.*

### *Civil Society Activism*

Civil society activism at the African Commission has helped to shed more light on the human rights violations on the basis of sexual orientation and gender identity. Civil society direct engagement on SOGI issues at the African Commission began at the 39th session held in May 2006 with the delivering a statement by Cameroonian activist, Sebil Ngo Nyeck on the situation of LGBTI persons in Cameroon.<sup>259</sup> This statement prompted the Commissioners to question the Cameroon delegation on some of the human rights violations alleged in the civil society statement during the State reporting process at that session. The Africa Commission made specific mention of the treatment of sexual minorities in Cameroon in its Concluding Observations. It stated that ‘the Commission is also worried about the upsurge in intolerance towards sexual minorities’<sup>260</sup>

Since the 39th sessions, a number of organisations notably the Centre for Human Rights, University of Pretoria, Heartland Alliance for Human Rights and Human Needs and the African Men for Sexual Health and Rights have consistently submitted shadow reports and statements to the commissioners on the situation of sexual and gender minorities in the states being reviewed at every session.

The civil society pre-session meeting, known as the NGO Forum brings together about 200 civil society activists from across Africa in a three-day pre-conference to immediately preceding each session of the African Commission.<sup>261</sup> These meetings have proved a useful space for galvanising CSO action around human rights challenges facing the continent and for strategic dialogue on how to engage the African Commission to respond to these issues. The NGO Forum has provided a platform for organisations working particularly on the protection of the rights of sexual and gender minorities to highlight the challenges faced by these communities in Africa. During the pre-meeting preceding the 46th session of the African Commission, the NGO Forum issues a resolution calling on the African Commission to:

- (a.) Acknowledge the continuing and increasing incidence of human rights violations, including murder, rape, assault, persecution and imprisonment based on perceived or actual sexual orientation and gender identity on the continent as a problem requiring urgent action;
- (b.) Condemn these acts of human rights violations;
- (c.) Condemn discrimination and exclusion of individuals and communities from the enjoyment of rights and the full realization of their potential because of their sexual orientation and gender identity;
- (d.) Specifically condemn the situation of hatred and systematic attacks by state and non-state actors against lesbian, gay, bisexual, transgender and intersex individuals and, more in general, against any human rights defenders who is operating for the protection of LGBTI human rights in Malawi, Kenya and Uganda, with a particular attention for the draconian legislation under consideration by the Ugandan Parliament;
- (e.) Mandate the Special Rapporteur on Human Rights Defenders, the Special Rapporteur on the Rights of Women and the Special Rapporteur on the Freedom of Expression to coordinate a

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*Zimbabwe, Communication No. 245/2002, para. 169.*

259 For a chronology of civil society activism on SOGI issues at the African Commission, see S. Ndashe, *Seeking protection of LGBTI rights at the African Commission on Human and Peoples’ Rights*, Feminist Africa Issue 15, 2011: Legal Voices Special Issue. Available at [www.agi.ac.za](http://www.agi.ac.za). Accessed 26 October 2012.

260 See [http://www.achpr.org/files/sessions/39th/conc-obs/1st-2001-2003/achpr39\\_conc\\_staterep1\\_cameroon\\_2005\\_eng.pdf](http://www.achpr.org/files/sessions/39th/conc-obs/1st-2001-2003/achpr39_conc_staterep1_cameroon_2005_eng.pdf)

261 On the NGO Forum – see <http://www.acdhrs.org/ngo-forum/>

Special Committee to investigate, document and report on these violations in order to develop appropriate responses and interventions;

- (f.) Create a mechanism to address human rights violations based on sexual orientation and gender identity;
- (g.) Ensure that states put in place mechanisms for access to HIV prevention treatment and care services for everyone regardless of their sexual orientation and gender identity.
- (h.) Strongly urge states to:
  - i. Comply with the African Charter on Human and Peoples' Rights, and other binding international treaties, by repealing laws which criminalise non-hetero-normative sexualities and gender identities, such as laws criminalizing sexual conducts between consenting adults of the same sex, or laws banning cross-dressing, and by amending other laws that are implemented with the purpose of persecuting individuals and communities based on their sexual orientation and gender identity, such as laws against indecency, impersonation, and debauchery, among others.
  - ii. End impunity for acts of violation and abuse, whether committed by state or non-state actors, by enacting appropriate laws, ensuring proper investigation, arrests and punishment of the perpetrators, and establishing judicial procedures favorable to the victims.
  - iii. Protect the right of all people, regardless of their sexual orientation and gender identity, to freedom of association and assembly, freedom of expression, and freedom to participate in civil society and key decision-making organs of government.<sup>262</sup>

There was no formal reaction to this resolution by the African Commission during the 46th session nor in the sessions subsequent to that, however civil society activists continued to highlight the human rights violations on the basis of sexual orientation and gender identity and the situation of sexual and gender minorities in Africa during each session of the African Commission. At each of these sessions, the NGO Forum adopts a resolution requesting the Africa Commission to condemn, among others, the violations of the rights of sexual and gender minorities and discrimination based on sexual orientation and gender identity.

#### ***Application for Observer Status by Coalition of African Lesbians [CAL] -***

In 2008, the Coalition of African Lesbians (CAL), an NGO working for the protection and promotion of the rights of lesbians, bisexual women and transgendered persons in Africa, applied to be granted observer status with the African Commission. In 2010, the African Commission decided to decline this application without stating any reasons. Although the Commission did not provide any reasons for its finding of refusal, it is clear that since the CAL application met all the administrative and procedural requirements, the only application criterion on which the finding could have been based is the one that applying NGOs should have objectives and activities 'in consonance with' the fundamental principles and objectives in the African Union Constitutive Act and the African Charter.<sup>263</sup>

262 S. Ndashe, [n 22 above].

263 This reasoning was confirmed by Commissioner Faith Pansy Tlakula, who was part of the Commission's panel decided the on CAL's application, during the presentation of her paper *The African Commission and the promotion and protection of the rights under the African Charter on Human and Peoples Rights* at the International Conference of the 30th Anniversary of the African Charter on Human and Peoples' Rights held at the University of South Africa from 5 – 7 November 2012.

The activities and principles of CAL are consistent with the following provisions of the AU Constitutive Act: promotion of human rights [art. 3[h]]; promotion of gender equality (art. 4[1]); and promotion of social justice [art. 4[h]]. There is no principle in the AU Constitutive Act that is inconsistent with the work and principles of CAL. In addition, CAL's activities and principles are in line with at least the following provisions of the African Charter: the promotion of equality before the law [art. 3]; protection of the right to liberty and security of the person [art. 5]; the right to the best attainable status of health [art.16].<sup>264</sup>

With the denial of observer status to CAL which was a first in the history of the African Commission for an applicant meeting the administrative and procedural requirements, and more importantly the reason for the denial decision, the African Commission seemed to be sending a message that the protection of the human rights of sexual and gender minorities is not within the mandate. This is ironic indeed especially since the African Commission till date has not issued a resolution condemning the growing incidents of violence against, and murder of sexual and gender minorities in Africa, especially the notorious corrective rape of lesbian women – an issue which CAL has been on the forefront of advocacy against.

#### ***Consideration of a draft paper on sexual orientation in Africa at the 47th Session***

At the 47th session held in Banjul, The Gambia in May 2010, the African Commission under Item No. 8 of its agenda considered a Draft Paper on Sexual Orientation in Africa.<sup>265</sup> The Draft paper which was developed by a number of civil society organisations, was an extensive document which highlighted the violations faced by persons across the continent on the basis of their perceived or real sexual orientation and gender identity, the various rights under the African Charter on Human and Peoples' Rights which offer protection against these violations, ground for limitation of rights un the African Charter as a way of demonstrating that human rights violation on the basis of sexual orientation cannot be justified under the African Charter, developments in international human rights law on sexual orientation and gender identity, as well as recommendations to the African Commission on how to respond to these issues on the continent. The paper was considered in a private session and the African Commission did not make the nature and content of deliberations on this paper public beyond a reference in its final communiqué at the end of the session stating the fact that the draft paper was considered.<sup>266</sup> Again, the African Commission side-stepped an opportunity to clarify its position on the question of discrimination and violence on the basis of sexual orientation and gender identity in Africa further complicating the debate on this issue on the continent.

#### ***Establishment of the Committee on the Protection of People Living with HIV and those Most at Risk –***

Although as mentioned above the African Commission did not pass a resolution subsequent to the consideration of the draft paper on sexual orientation condemning discrimination on the basis of sexual orientation and gender identity, one positive development in that regard from the 47th session was the establishment of the Committee on the Protection of People Living with HIV and those Most at Risk (HIV Committee). The resolution establishing the Committee mandates the committee

264 *African Commission should reconsider decision on Coalition of African Lesbians* [Feature article] <http://www.pambazuka.org/en/category/features/68946>. Accessed 28 October 2012. See further on the CAL application and the processes leading up to the decision S. Ndashe [n 25 above] part. p27-31

265 Agenda of the 47th session of the African Commission on Human and Peoples' Rights. Available at <http://www.achpr.org/sessions/47th/info/agenda/>. Accessed 29 October 2012.

266 Final Communiqué of the 47th session of the African Commission on Human and Peoples' Rights. Available at <http://www.achpr.org/sessions/47th/info/communique47/>. Accessed on 29 October 2012.

to 'integrate a gender perspective and give special attention to persons belonging to vulnerable groups, including women, children, sex workers, migrants, men having sex with men, intravenous drugs users and prisoners'<sup>267</sup> This reference to 'men who have sex with men' provided an opportunity for the Commission to respond to a number of structural factors contributing to discrimination against LGBT persons, especially gay and bisexual men in public health programming around HIV.

At its 16th Extraordinary Session held in Kigali, Rwanda, the African Commission adopted Resolution 290 mandating the HIV Committee to conduct a study on HIV, the Law and Human Rights in the African Human Rights System: Key Challenges and Opportunities for Rights-based Responses to HIV.<sup>268</sup> Given that the mandate of the Committee expressly includes men who have sex with men (MSM), it remains to be seen what the finding of the study will be in regard to MSM and the recommendations for a rights-based HIV response to this group and other marginalized sexual and gender minority groups impacted by HIV in Africa. This study provides an opportunity for the African Commission to come to grips with the challenges faced by sexual and gender minorities, howbeit within the context of the HIV response in Africa and take steps to address them.

### Recent development on SOGI issues within the African Commission

#### *Resolution 275 on violence based on sexual orientation and gender identity*

Following extensive advocacy by civil society organisations against violence based on sexual orientation and gender identity in Africa, and report jointly published by AMSHeR and CAL on the subject in 2013,<sup>269</sup> the African Commission adopted Resolution 275 during its 55th Ordinary Session in Luanda Angola. In that Resolution, the African Commission –

- (a.) Condemn[ed] the increasing incidence of violence and other human rights violations, including murder, rape, assault, arbitrary imprisonment and other forms of persecution of persons on the basis of their imputed or real sexual orientation or gender identity;
- (b.) Specifically condemn[ed] the situation of systematic attacks by State and non-state actors against persons on the basis of their imputed or real sexual orientation or gender identity;
- (c.) Call[ed] on State Parties to ensure that human rights defenders work in an enabling environment that is free of stigma, reprisals or criminal prosecution as a result of their human rights protection activities, including the rights of sexual minorities; and
- (d.) Strongly urge[ed] States to end all acts of violence and abuse, whether committed by State or non-state actors, including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims.<sup>270</sup>

267 African Commission on Human and Peoples' Rights Resolution 163 on the Establishment of a Committee on the Rights of People Living with HIV [PLHIV] and Those at Risk, Vulnerable to and Affected by HIV. Available at <http://www.achpr.org/sessions/47th/resolutions/163/?prn=1>. Accessed 30 October 2012.

268 Available at <http://www.achpr.org/sessions/16th-oo/resolutions/290/>. Accessed 10 November 2015

269 African Men for Sexual Health and Rights & Coalition of African Lesbians, *Violence based on perceived or real sexual orientation and gender identity in Africa*. 2013. Johannesburg: South Africa. Available at <http://www.amsher.org/amsher-press/publications/sogireport>. Accessed on 10 November 2015

270 African Commission on Human and Peoples' Rights Resolution 275 on Protection Against Violence on Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity. Available at <http://www.achpr.org/sessions/55th/resolutions/275/>. Accessed on 10 November 2015.

Resolution 275 was a bold pronouncement on the human rights, sexual orientation and gender identity by the African Commission. In four simple paragraphs, the African Commission acknowledged the following:

- That violence and other human rights violations based on sexual orientation and gender identity were indeed occurring across Africa and that the incidence was on the rise. A fact that States had actively denied and law enforcement agencies were indifferent to and sometimes active parties to;
- That State and non-State actors were perpetrators of these violence and violations, and that they were systematic;
- That human rights defenders working on these issues were targets of stigma, discrimination and reprisals and urged states to create an enabling environment for human rights defenders working on these issues;
- The need for enabling legislation and effective prosecution of perpetrators to address violence and violations based on sexual orientation and gender identity; and
- The need for the establishment of victim-centred judicial procedures

Although not legally binding, the resolution provides guidance on what the Commission thinks is the obligation of African States with respect to SOGI based violence and violations.

### *Granting of Observer Status to the Coalition of African Lesbians*

In April 2015, the African Commission reversed its earlier decision denying observer status to the Coalition of African Lesbians. In so doing, the Commission affirmed that the objectives of CAL were consistent with the African Charter.<sup>271</sup> With these two consecutive development, the African Commission seems to be once again regaining its reputation as an independent, human rights norm-setting body of the African Union.

This independence is currently being tested. The Executive Council of the African Union has directed the African Commission to reverse its decision on the observer status granted to CAL. African Charter requires the African Commission to submit its activity report to the political organs of the African Union for consideration.<sup>272</sup> The Executive Council of the African Union, after consideration of the 38th Activity Report of the African Commission directed it to

*Take into account the fundamental values, identity and good traditions, and to withdraw the observer status granted to NGOs who may attempt to impose values contrary to the African values; in this regard, to withdraw the observer status granted to the organisation called CAL in line with African values.*<sup>273</sup>

It remains to be seen how the African Commission will respond to this directive of the Executive Council of the African Union.

<sup>271</sup> n 27 above.

<sup>272</sup> Article 59 (3) of the African Charter on Human and Peoples' Rights

<sup>273</sup> Document Reference: Doc.Ex.Cl/Dec 887 (xxxvii). A copy of the Executive Council decision independently obtained from the Secretariat of the African Commission. At the time of writing, the decision has not yet been posted on the website of the African Union. See <http://www.au.int/en/decisions/council> for decisions of the Executive Council of the African Union.

## The Cost of Silence and Inaction

The Africa Commission needs to respond decisively to the issue of discrimination and violence on the basis of sexual orientation and gender identity in Africa. Beyond Resolution 275 addressing violence, the Commissioner needs to follow the example of other regional and international human rights bodies, and expressly recognise sexual orientation and gender identity as non-discrimination grounds under the African Charter. Silence and indecision on this issue comes at very high costs. These include -

- (a.) Undermines the mandate of the African Commission - By choosing to stay silent on a serious human rights violation, the African Commission is abdicating on its mandate as the interpretative body of human right protection and promotion in Africa. It further detracts from the mandate of the African Commission as the watchdog on human rights standards on the continent whose functions include standard-setting, giving advisory opinion to states, holding states accountable for human rights violations.<sup>274</sup>
- (b.) Incidents of violence and murder on the basis of sexual orientation and gender identity continue to be documented and reported across the continent.<sup>275</sup> In the absence of a clear recognition of discrimination and violence on the basis of sexual orientation as a human rights violation, and the consequent lack of protection by the State as the primary duty-bearer with responsibility to prosecute perpetrators of human rights abuses, a culture of impunity will pervade the continent and more persons on the continent will continue to fall victims of these hate-motivated attacks.
- (c.) Homophobia has been shown as a leading cause of forced migration and asylum.<sup>276</sup> Although sexual orientation and gender identity are not listed grounds for asylum claims under the international and regional refugee conventions, in recognition of developments in international law and the growing number of asylum seekers fleeing persecution the basis of sexual orientation and gender identity, the UN Refugee Agency and many states have recognised sexual orientation and gender identity-based persecution as grounds for the granting of asylum.<sup>277</sup> Although comprehensive data is unavailable on the number of Africans seeking asylum abroad on the basis of sexual orientation and gender identity, media reports of deportation of LGBT asylum seekers from the West remain a recurrent.<sup>278</sup> The implication of these migration figures on human capital development, cannot be overstated.
- (d.) Implication for good governance and democratic process, rule of law – Increasing Africa is witnessing a different type of politics where elected officials rather than focus on service delivery and other democratic dividends focus rather on galvanising public support by propagating hatred and inciting violence against LGBTI persons. Homophobic speeches and bills have tended to take centre stage during [re]election seasons or during investigations of allegation of massive corruption by public officials as a way of diverting attention over more pressing issues of

274 See Articles 45 – 59 of the African Charter on Human and Peoples' Rights for the full mandate of the African Commission.

275 Human Rights Watch, *More than a name: State Sponsored Homophobia and its consequences in South Africa*, 2003; Amnesty International, *Crimes of Hate, Conspiracy of Silence: Torture and ill-treatment based on sexual identity*, 2001.; S. Gear, *Behind the bars of masculinity: Male rape and homophobia in and about South African men's prisons*, 2007.; Human Rights Watch, 'We'll show you you're a woman: Violence and Discrimination against black lesbians and transgender men in South Africa', December 2011. [n 3 above].

276 S. Jansen & T. Spijkerboer, *Fleeing Homophobia: Asylum Claims related to sexual orientation and gender identity in Europe* 2011. Available at <http://www.ptpa.org.pl/public/files/Fleeing%20Homophobia.pdf>. Accessed 2 November 2012

277 UNHCR, *Guidance note on refugee claim relating to sexual orientation and gender identity* 2008. Available at <http://www.unhcr.org/refworld/pdfid/48abd5660.pdf>. Accessed 1 November 2012.

278 See media report of deportation of LGBT asylum seekers to Africa <http://swvg-refugees.org.uk/public/index.php/component/content/article/89-deportation-of-asylum-seekers>; <http://oblogdeeblogda.me/2012/10/31/uk-breaks-pledge-to-not-deport-gay-and-lesbian-asylum-seekers/>; <http://www.petertatchellfoundation.org/node/256>

good governance and rule of law.<sup>279</sup> While this continues, LGBTI persons continue to be victims of mob justice, police brutality and extortion, arbitrary dismissals from employment among others, thus promoting a general culture of impunity and disregard for human rights.<sup>280</sup>

- (e.) Another direct consequence of the use of LGBTI persons as scapegoat to deflect attention on poor governance issues, is the chilling effect that the attendance clampdown on human rights organisations perceived to affirming of the rights of LGBTI persons has on general civil society commitment to hold governments accountable for human right violations and service delivery. Uganda made headlines when the Government promised to de-register a broad spectrum of civil society organisation most of whom belong to Uganda's Civil Society Coalition on Human Rights and Constitutional Law on the grounds that these organisations were promoting gay rights in Uganda.<sup>281</sup> Many countries have enacted stiff civil society regulation laws to ensure that civil society organisations critical of governments are refused renewal of operational licences, access to funding etc.
- (f.) Public health implications especially in the context of HIV – The link between homophobia, discriminatory laws and policies and the rising incidence of HIV has been well documented.<sup>282</sup> Structural discrimination on the basis of sexual orientation and gender identity in the public healthcare sector especially with regard to access to HIV prevention, treatment and care remain a key driver of the epidemic among key populations.<sup>283</sup> There is general consensus on the need for a human rights-based approach to HIV programming in order to curb the spread of the epidemic.<sup>284</sup> The silence of the African Commission on this issue leaves the continent without authoritative direction from the regional human rights body. It is hoped that the establishment of the Committee on HIV within the African Commission will see more positive developments in this area.

## Conclusion

Discrimination and violence on the basis of real or perceived sexual orientation and gender identity is a reality in Africa which had been perpetuated by the continued reluctance of the African Commission on Human and Peoples' Rights to pronounce itself on the issue, and extend protection to the many persons on the African continent to face discrimination and violence on the basis of their real or perceived sexual orientation and gender identity or as a result of their association with those so perceived. Majority morality, religion, traditional and family values, public health concerns, neo-colonialism and political expediency can no longer be used as excuses for justification or inaction in

279 See various commentaries on the diversionary nature of anti-homosexuality bills - <http://latitude.blogs.nytimes.com/2012/02/22/gay-bashing-in-uganda-is-a-diversion-from-government-malfeasance/>; [http://www.huffingtonpost.com/damian-ugwu/nigeria-anti-gay-bill\\_b\\_2231999.html](http://www.huffingtonpost.com/damian-ugwu/nigeria-anti-gay-bill_b_2231999.html); <http://theliberiandialogue.org/2012/08/08/jewel-howard-taylors-anti-gay-bill-could-reopen-old-wounds/>.

280 See International Lesbian and Gay Association, *State-sponsored homophobia: A world survey of laws prohibiting same sex activity between consenting adults*, 2007. [n 10 above]; United Nations High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*. [n. 14 above]

281 <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/uganda/9344487/Uganda-bans-38-NGOs-for-promoting-homosexuality.html>

282 Global Commission on HIV and the Law, *HIV and the law: Risks, rights and health*, 2012. Available at <http://www.hivlawcommission.org/index.php/report>. Accessed 23 October 2012.

283 Global Forum on MSM and HIV, *Social discrimination against men who have sex with men [MSM]: Implications for HIV policy and programmes* 2012. Available at [http://www.msmsgf.org/files/msmgf/Advocacy/Policy\\_Briefs/Stigma\\_EN\\_hi.pdf](http://www.msmsgf.org/files/msmgf/Advocacy/Policy_Briefs/Stigma_EN_hi.pdf). Accessed 21 October 2012.

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addressing the question of sexual orientation and gender identity. While the recent developments at African Commission are commendable, there is a lot more that the African Commission should borrow a leaf from its Inter-American counterpart and set in motion activities aimed at promoting understanding of the sexual orientation and gender identity as a human rights issue.

At the very least, the African Commission should –

- (a.) Conduct public thematic hearings with the participation of civil society, human rights experts and other stakeholders on the issue of sexual orientation and gender identity in Africa with a view of informing itself of the full extent of the issues and its implication for the full implementation of the rights guaranteed by the African Charter.
- (b.) Commission a study or consolidate existent studies and reports on discrimination violence and other human rights violations on the basis of sexual orientation and gender identity in Africa, with a special emphasis on how States, their agencies and non-state actors with the condonation of the State perpetrate these violations.
- (c.) Finally, the African Commission must ensure that the directive by the political organ of the African Union does not force it to give up its independence as the standard and norm setting body for African States. It must ensure that subjective notions of 'African values' are not used to undermine universal human rights principles and standard.

The African Commission holds so much potential for the protection of the human rights of marginalised communities particularly those for who national institutions and systems have failed.

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# ABOUT AMSHeR

Established in 2009, AMSHeR is a coalition of MSM and LGBT-led organisations in 15 countries in sub-Saharan Africa. AMSHeR's mission is to promote non-discrimination, particularly based on sexual orientation and gender identity (SOGI), and to advance access to quality health services for MSM and LGBT individuals across the continent.

AMSHeR's most recent work on human rights includes work to secure resolutions condemning discrimination and violence on the basis of SOGI in regional and global human rights bodies; provision of technical support to LGBT-led organisations to challenge government-led deregistration efforts; development of MSM health score-cards to generate evidence on rights-based approaches to health services; and, technical and financial support to LGBT-led organizations to ensure inclusion of key health needs and human rights priorities in country-level processes of the Global Fund.

More information about the AMSHeR and its work is available at:

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