

The Role that the Government can Play in Protecting and Promoting the Rights of Sexual Minorities with Specific Reference to Selected African Countries

by

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DECLARATION OF ORIGINALITY

I, Katlholo Reginald Ntau, declare that the mini-dissertation titled *The Role that the Government can Play in Protecting and Promoting the Rights of Sexual Minorities with Specific Reference to Selected African Countries*, is my work and that all the sources that I have used or quoted have been appropriately acknowledged through complete reference.

Mr K.R. Ntau

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ABSTRACT

The study explores the role of government in protecting and promoting the rights of sexual minorities in Africa, focusing specifically on countries such as Uganda, Kenya, Nigeria, and Zimbabwe. Through library-based research, it examines violence and discrimination that sexual minorities face, as well as criminalising laws that put the lives of sexual minorities at risk. Furthermore, the research investigates the barriers to acceptance and the pathways for promoting equality and inclusion. These challenges are rooted in a complex interplay of religious, cultural, political, and legal factors. Findings suggest that religious and cultural resistance, political influence, and criminal laws are the key obstacles to achieving equality for sexual minorities.

The study emphasizes that government can play a pivotal role by repealing laws that criminalise homosexuality and enacting legislation that prevents discrimination based on sexual orientation. Moreover, it highlights the importance of ensuring access to justice and protection for sexual minorities. Additionally, the government can lead public awareness campaigns to challenge prejudice and engage in dialogues with political, cultural, and religious leaders to foster inclusivity. Proactive policy-making and positive leadership by the government are essential to protect the rights of sexual minorities and foster a culture of equality and inclusivity.

Key Words: sexual minorities, criminal laws, protection and promotion, government role, discrimination, equality, inclusivity, barriers to acceptance, African countries

LIST OF ABBREVIATIONS AND ACRONYMS

ACHPR:	African Charter on Human and Peoples' Rights
ACmHPR:	African Commission on Human and Peoples' Rights
ACtHPR:	African Court on Human and Peoples' Rights
AU:	African Union
CAL:	Coalition of African Lesbians
CAT:	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW:	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR:	Committee on Economic, Social, and Cultural Rights
CoE:	Council of Europe
ECHR:	European Court of Human Rights
ECmHR:	European Commission of Human Rights
ECtHR:	European Court of Human Rights
EU:	European Union
HRC:	Human Rights Committee
ICCPR:	International Convention on Civil and Political Rights
ICESCR:	International Convention on Economic, Social and Cultural Rights
LGBTIQ+:	Lesbians, gays, bisexuals, transgender, intersex, and queer
NGO:	Non-governmental Organisation
NGLHRC:	National Gay and Lesbian Human Rights Commission
SMUG:	Sexual Minorities Uganda
UDHR:	Universal Declaration of Human Rights

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CHAPTER ONE

INTRODUCTION AND BACKGROUND

1.1. INTRODUCTION

The rights of sexual minorities have emerged as a prominent topic of discussion over the last few decades globally. All over the world, there is a strong trend towards greater liberation for the rights of sexual minorities, affirming their equal right to love and commitment.¹ The last fifty years have been very active for those who have been fighting for the rights of LGBTIQ+ individuals throughout most of Europe, Australia, and the United States. These nations have decriminalised same-sex relationships and marriages and officially recognised same-sex partnerships.² In addition, they have safeguarded against discrimination in the workplace based on sexual orientation and gender identity. Procedures have been established to allow transgender individuals to modify the gender markers on legal documents, ensuring greater recognition and protection of their rights.³ However, in January 2025, the President of the United States, Donald Trump, issued an executive order mandating that federal agencies recognise only two gender – male and female – based on the person’s immutable biological classification at birth.⁴ This order explicitly states that gender identity cannot be included in the definition of “sex” and “gender” are not interchangeable terms.⁵ This shift in federal policy has created a sharp contrast to the earlier progress, raising concerns about how it may affect the legal standing and rights of transgender and nonbinary individuals.

However, in Africa, there is a countervailing trend, which is mostly characterised by rejection, intolerance, and lack of recognition.⁶ African leaders, cultural traditions and

¹ Amusan *et al.* 2019:40.

² Walton 2018:132.

³ Walton 2018:132.

⁴ Redfield & Chokshi 2025 “Impact of the Executive Order Redefining Sex on Transgender, Nonbinary, and Intersex People”, <https://williamsinstitute.law.ucla.edu/publications/impact-eo-redefine-sex-tbi/> (accessed on 10 February 2025).

⁵ Redfield & Chokshi 2025 “Impact of the Executive Order Redefining Sex on Transgender, Nonbinary, and Intersex People”, <https://williamsinstitute.law.ucla.edu/publications/impact-eo-redefine-sex-tbi/> (accessed on 10 February 2025).

⁶ Amusan *et al.* 2019:40.

norms, and religious beliefs inspire this.⁷ In Africa, the predominant argument against homosexuality is that it is un-African, against religious values and it is believed to pose threat to African traditions and heterosexual family values. In many African countries, the prevailing culture of religious and traditional conservatism poses a major threat to the rights of any individual who does not conform to the heteronormative gender and sexual identities.⁸

Over the past three decades, some African countries have implemented repressive measures concerning sexual orientation issues. This response was prompted by findings such as those from the 2010 Amnesty International Report, which outlines the persistent harassment, intimidation, and discrimination endured by LGBTIQ+ individuals across several African nations. Furthermore, some have been subjected to unjust trials and arbitrary detention as documented in the report.⁹ The report draws attention to the mistreatment of sexual minorities in African nations like Malawi, Nigeria, and Uganda. While Malawi and Nigeria are in the process of passing laws that would make homosexuality illegal, Uganda has already enacted such legislation, imposing severe penalties on LGBTIQ+ individuals. Many African countries still maintain laws criminalising consensual same-sex activity, which originated from European colonialism and persist to this day. Consequently, this social hostility is fueled by these laws. It is evident from this that homophobia, scapegoating, and ignorance are prevalent attitudes towards LGBTIQ+ individuals in many African nations.¹⁰ An increasing body of literature details the political assaults on LGBTIQ+ people's rights throughout the African continent, which are connected to the political and economic crises and politicised homophobia. Consequently, one common argument is that politicians target homosexuals as a group to deflect attention from more important problems like corruption, economic decline, or development challenges.¹¹ The assumed mechanism is that political actors use

⁷ Namwase *et al.* 2017:3.

⁸ Snyman & Rudman 2022:59.

⁹ Mubangizi & Twinomugisha 2011:330-331.

¹⁰ Mubangizi & Twinomugisha 2011:331.

¹¹ Gloppen & Rakner 2021:194.

homophobia as a distraction when a regime's faith is at stake in elections or as a result of public opposition or internal power struggles.

1.2. BACKGROUND

Across global and regional contexts there has been a growing consensus about the need to protect LGBTIQ+ Individuals from discrimination and violence.¹² There is a growing awareness in certain parts of the world that public expressions of what may be perceived as heteronormative sexuality pose a risk to integrity and life. As a result, having a sexual orientation other than heterosexuality can similarly pose such a risk. In contrast to some general global trends on laws governing consensual same-sex acts, African countries appear to adopt a different approach regarding sexual orientation.¹³ African countries such as Nigeria, Ghana, Zimbabwe, and Kenya inherited sodomy laws from British colonial Penal Codes. These laws were imposed during the colonial period and remained intact even after these countries gained independence.¹⁴ In addition, the British Penal Codes were part of the legal framework established by the British colonial administration and often included provisions criminalising homosexual acts.¹⁵ Although, prejudice due to sexual orientation is a pervasive threat to any individual's life, for this study the main focus is on the rights of sexual minorities in selected African countries specifically Uganda, Kenya, Nigeria, and Zimbabwe.

What these four African countries have in common is almost universal opposition to the recognition of homosexual rights and the enactment of laws that impose tighter and harsher punishments for homosexual acts and those promoting homosexuality.¹⁶ They have sodomy laws that were largely imposed by the colonial powers that prohibit same-sex intimacy, which are often punishable with lengthy prison sentences and, in some instances the death penalty.¹⁷ The opposition to sexual minority rights is evident in several significant events that have taken place in various African countries. For example, after

¹² Garrido 2019:95.

¹³ Garrido 2019:95-96.

¹⁴ Smith 2014:187.

¹⁵ Smith 2014:187.

¹⁶ Amusan *et al.* 2019:46.

¹⁷ Gloppen & Rakner 2021:195.

the passing into law of the Uganda Anti-Homosexuality Act¹⁸, which among other provisions introduced life imprisonment and the death penalty for those convicted of “aggravated homosexuality” into law, a Ugandan gay rights activist, David Kato was beaten to death outside his home of Kampala. David was a dedicated advocate, tirelessly helping those persecuted because of their sexual orientation and gender identity. In the months leading up to his death, it had been well-documented that he was the target of a hate campaign orchestrated by the local newspaper, *The Rolling Stone*.¹⁹ The publication printed his name, photograph, and address alongside those dozens of others it claimed were gay or lesbian, urging that they be hanged.²⁰ Additionally, there was an arrest and prosecution of a gay couple in Kenya after they were alleged to have attempted to get married. Moreover, Nigeria has passed the Homosexual Prohibition Act²¹, one of the fastest-acting laws ever passed by the Nigerian parliament, due to the strong support of the executive branch of government. This support can speed up the legislative process, as well as social and political pressure. Also, Zimbabwe has passed the “Anti-Gay Marriage Bill”. The main people influencing and guiding these bills are politicians, church leaders, and court officials.

The examples given above cannot be representative of the whole African continent, but most countries are similar in the waves of homophobia. Perhaps the best case to demonstrate that there are exceptions is South Africa, as it is the most progressive country when it comes to the rights of gay and lesbian individuals. South Africa has been praised for the protection of sexual minorities, which was reinforced with the enactment of an interim Constitution in 1993, and later a transformative final Constitution in 1996. South Africa has earned acclaim for safeguarding sexual minorities, a commitment underscored by the introduction of an interim Constitution in 1993, followed by a transformative final Constitution in 1996. In response to judicial rulings, South Africa

¹⁸ *The Anti-Homosexuality Act 8/2014*.

¹⁹ Pillay “What David Kato's death can teach the world”, <https://www.un.org/africarenewal/web-features/what-david-katos-death-can-teach-world>, (accessed on 10 February 2025).

²⁰ Pillay “What David Kato's death can teach the world”, <https://www.un.org/africarenewal/web-features/what-david-katos-death-can-teach-world>, (accessed on 10 February 2025).

²¹ *Same-sex Marriage (Prohibition) Act/2013*.

enacted the Civil Union Act 17 of 2006²², extending provisions for same-sex marriages alongside traditional forms of marriages. This legislative framework, combined with progressive judicial decisions, has advanced South Africa's reputation to the extent of being considered an example in the protection of the rights of sexual minorities. As a result, South Africa is now recognised as the first country on the continent to constitutionally prohibit discrimination based on sexual orientation and the fifth to legalise same-sex marriages. This illustrates how governments are well suited to protect, promote, and safeguard the rights of sexual minorities through their judicial and legislative arms of government.

While assistance from the West has been useful in promoting and protecting the rights of many individuals who engage in same-sex relationships in Africa, particularly those at risk of imprisonment or harm – it cannot replace local action. African leaders must take greater responsibility in addressing these issues within their own societies. It is imperative for them to remain vigilant about the developments within their countries and to implement preventative measures to safeguard the rights of sexual minorities. Otherwise, continuous rescue from the West feeds directly into the hands of those who see same-sex relations as a Western imposition on Africa. If the African countries can strive to deploy the politics of power and aid to protect same-sex consenting individuals, that intervention can serve to destroy African homophobes. The legislative, executive, judicial, and other measures that are required to put procedures in place that guarantee the protection and advancement of the rights of sexual minorities in all spheres of their lives must be adopted by the governments of Africa. Therefore, these measures are essential for ensuring the rights of sexual minorities.

1.3. CONCEPTUAL CONTEXT

Defining key concepts within the research study is crucial to ensure communication clarity, consistency, and precision. Accordingly, these concepts serve as a foundation for the entire research, providing a common understanding for both the researcher and the

²² *Civil Union Act 17/2006.*

readers. Additionally, defining these concepts assists in avoiding ambiguity and misunderstandings by giving clear and specific meanings for terms that different individuals may interpret differently. Therefore, the key concepts to be used in this study are listed as follows: the government; sexual minorities; sexual orientation; homosexuality; the protection and promotion of human rights; and the concept of “gay rights”.

1.3.1. The concept of government

Government is the central body responsible for oversight, regulating the actions of, and providing services and protection for the citizens of a particular country. The government plays a major role in the efficacy of a functioning society.²³ It makes sure that people respect other people’s rights. Additionally, it guarantees that people abide by the laws and guidelines the government has established. Furthermore, governments are essential to the development of societies, their implementation, and the maintenance of all forms of order, including authoritarian and democratic ones.²⁴

At its core, the government functions as the organisation or system through which a body politic exercises authority, controls, and administers public policy, as well as directs the affairs of the state.²⁵ It is not merely an abstract concept, but a tangible entity with responsibilities encompassing the creation, enforcement, and interpretation of laws.²⁶ Moreover, various mechanisms exist to ensure government accountability and transparency. These include constitutional provisions, such as the Promotion of Access to Information Act²⁷, and the judicial review process. Additionally, constitutional checks and balances among governmental branches are often delineated to prevent abuse of

²³ Enders “Government Overview, Functions, and Types”, <https://study.com/academy/lesson/what-is-government-definition-role-functions.html> (accessed on 24 April 2024).

²⁴ Enders “Government Overview, Functions, and Types”, <https://study.com/academy/lesson/what-is-government-definition-role-functions.html> (accessed on 24 April 2024).

²⁵ Enders “Government Overview, Functions, and Types”, <https://study.com/academy/lesson/what-is-government-definition-role-functions.html> (accessed on 24 April 2024).

²⁶ Zhao “Government: Legal definition, forms and functions of government, transparency, checks and balances”, <https://juristopedia.com/government-legal-definition/> (accessed on 24 April 2024).

²⁷ *Promotion of Access to Information Act 2/2000*.

power.²⁸ Specifically, the Promotion of Access to Information Act²⁹ enables public access to government records, thereby fostering transparency.³⁰ Finally, independent judicial systems play a crucial role in reviewing and potentially overturning government actions deemed unlawful or unconstitutional.

1.3.2. Sexual Minorities

Sexual minorities are defined as individuals whose sexual identity, orientation, or practices differ from the majority of the surrounding society. While the term seems to broadly cover different groups including sex workers, it is commonly used to refer specifically to lesbian, gay, bisexual, transgender, intersex, and queer (LGBTIQ+) persons.³¹ Moreover, sexual minorities are people who are routinely denied rights due to their sexual orientation and are hated and persecuted by the “mainstream” society. As a result, they are stigmatised as they transgress gender roles, being non-conformists.

Some authors define the term sexual minority as anybody who identifies as a lesbian, gay, bisexual, transgender, or queer person or who is attracted to or engages in sexual activity with people of the same sex but whose gender identity is different from their biological sex. Such a person is considered a member of the sexual minority.³² A group of people whose sexual orientation, gender identity, or other distinctive sexual characteristics set them apart from the heterosexual male and female population that is considered to be the majority are known as sexual minorities.³³ To guarantee equality before the law and equal protection under the law, individuals who identify as members of sexual minorities are grouped under one acronym because of common experiences of marginalisation, exclusion, and victimisation in a heteronormative and heterosexist society.³⁴

²⁸ Zhao “Government: Legal definition, forms and functions of government, transparency, checks and balances”, <https://juristopedia.com/government-legal-definition/> (accessed on 24 April 2024).

²⁹ *Promotion of Access to Information Act 2/2000*.

³⁰ *Promotion of Access to Information Act 2/2000*.

³¹ Namwase *et al.* 2017:4.

³² Wells *et al.* 2023:10.

³³ Wells *et al.* 2023:10.

³⁴ Huamusse 2006:137.

1.3.3. Sexual Orientation

It is common to use the terms “sexual minority” and “sexual orientation” interchangeably. However, it is possible to misunderstand them to mean that they cover any sexual attraction that a person may have for anybody or anything. In reality, there are significant differences between these terms, and it is critical to acknowledge that combining the terms without carefully examining their differences is incorrect.

Sexual orientation refers to erotic attraction; For homosexuals, attraction is directed toward individuals of the opposite sex, while for gays and lesbians, it is directed toward individuals of the same sex.³⁵ This implies that a homosexual person can therefore be anyone who is erotically attracted to members of his or her sex. However, this definition is confined to orientation motivated by attraction. To provide additional clarity, this definition was broadened by introducing an aspect of the application of one’s sexual preference.³⁶ Therefore, sexual attraction reflects a decision about whom to engage in emotional and sexual conduct with.

1.3.4. Homosexuality

Homosexuality refers to emotional and sexual attraction to someone of the same sex, with individuals identifying themselves as homosexual.³⁷ Furthermore, It can also mean being oriented toward other people of the same gender in terms of sexual need, desire, or responsiveness. However, in conservative communities, the fear of rejection, loneliness, and even victimization often discourages individuals from openly expressing these desires.³⁸ As a result, the definitions of homosexuality tend to pose some confusion in identifying homosexuals. This is because there are people who have sexual feelings towards people of the same sex but feel that their sexual feelings are more directed toward people of the opposite sex. Also, some individuals who are not sexually involved with the opposite sex are usually labeled as homosexuals. Similarly, more feminine men are often assumed to be gay, while more masculine women are sometimes identified as

³⁵ Cameron 1993:459.

³⁶ Wintemute 1995.

³⁷ Germond & De Gruchy 1997:3.

³⁸ Masango 2002:958.

lesbians. As a result, the societal definition of homosexuality is stereotyped and carries with it negative connotations.³⁹ Therefore, defining homosexuality predominantly lies on the behaviour, sexual feelings, and most importantly, how they define themselves.⁴⁰ Homosexual desire and behavior can coexist with heterosexual desire and behavior to varying degrees, or it can be exclusive.⁴¹

1.3.5. Protection and Promotion of Human Rights

Human rights constitute a set of rights and duties required for the protection of human dignity, inherent to all human beings, irrespective of nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status.⁴² Moreover, everyone is entitled to human rights without discrimination. As such, human rights are universal, interrelated, interdependent, and indivisible and constitute the basis of the concepts of peace, security, and development.⁴³ Furthermore, human rights are best viewed as claims of the individual. The primary obligation for meeting these claims lies with the relevant State.⁴⁴ States ratify international human rights treaties and they are generally considered the primary subjects of international law. Additionally, depending on the nature of the particular right in question, the State obligation usually has several elements. These elements are often viewed as obligations on the State to respect, protect, and fulfill human rights.⁴⁵

In addition, the protection and promotion of human rights is a universal appeal to and a goal of individuals, groups, countries, international organisations, non-government organisations, and other stakeholders.⁴⁶ Civilised states are recognised as nations that uphold fundamental human rights and freedom within their legal framework. These rights are typically protected by a combination of domestic laws, constitutional provisions, and

³⁹ Germond & De Gruchy 1997:4.

⁴⁰ Germond & De Gruchy 1997:5.

⁴¹ Callahan 2001:210.

⁴² Weissbrodt 2009:23.

⁴³ Weissbrodt 2009:23.

⁴⁴ Weissbrodt 2009:24.

⁴⁵ Weissbrodt 2009:24.

⁴⁶ Amusan *et al.* 2019:50.

international treaties.⁴⁷ Such states are expected to promote justice, equality, and the well-being of their citizens, ensuring that the government respects the rule of law and provides protection from arbitrary action. In civilised states, the basic rights and freedoms are laid down in the legal framework, which includes supreme legal rules as well as international treaties.⁴⁸ The primary purpose of having human rights regulated in legislation is to ensure that they are respected by both private entities and governments. Moreover, how countries apply human rights in everyday life is subject to assessment by the international community. Importantly, international systems of human rights protection reflect shared values and solidarity that take account of the special characteristics of the political and economic environment, culture, and ideas in individual countries or their associations.⁴⁹ Lastly, these systems are usually brought to life on the premises of international organisations, which provide the systems with universal or regional character.

1.3.6. The concept of “gay rights”

Gay rights refer to the dedicated movement that aims to protect and expand the civil rights of homosexuals as well as decriminalise homosexuality.⁵⁰ These rights include but are not limited to the freedom to engage in consensual relationships, protection from discrimination in employment, housing, and public accommodations, and access to health care and other social services without prejudice. In addition, transgender rights are a subset of gay rights because transgender people are sexual minorities too, and face discrimination.⁵¹

Some nations have granted civil rights to the LGBTIQ+ community, thereby positioning the advancement of gay rights as a pressing human rights issue.⁵² Furthermore, gay rights emerge as a novel concept previously absent from the framework of human rights,

⁴⁷ United Nations “Peace, Dignity and equality on a healthy planet”, <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (accessed on 10 February 2025).

⁴⁸ Amusan *et al.* 2019:50.

⁴⁹ Amusan *et al.* 2019:50.

⁵⁰ Amusan *et al.* 2019:48.

⁵¹ Amusan *et al.* 2019:48.

⁵² Amusan *et al.* 2019:48.

given the absence of overarching international treaties or laws governing them.⁵³ However, over time, the definition of “gay rights,” has evolved to underscore the struggle for safeguarding the privacy of homosexuals in personal affairs, as well as in employment and other livelihood avenues.⁵⁴

1.4. PURPOSE AND THE AIM OF THE STUDY

All organs of the state must comply with the Constitution as the supreme law of the country. As such the government must take steps to ensure that all people within the country, including the members of the LGBTIQ+ community attain access to, and enjoy their rights. Same-sex couples are entitled to receive governmental benefits on equal terms as heterosexual domestic couples. For example, in some nations, the state provides benefits (such as pension and social security) to married and unmarried heterosexual couples but denies these benefits to unmarried homosexual couples. The purpose of this study is to find out what role the governments in Africa can play in protecting and promoting the rights of sexual minorities in their countries.

In addition to ensuring that its citizens are protected from violations of any kind, the State has an obligation to ensure that the fundamental human rights of its citizens are upheld. The government must include special measures to improve access to justice, eradicate violence and crime, and review policies, systems, and procedures that perpetuate discrimination against sexual minorities. Furthermore, by ensuring that there are sustained efforts that are implemented to inform social cohesion, the government can better support and protect these communities. Additionally, the State must re-evaluate, amend, and enhance its state practices and legislative framework to incorporate the rights of sexual minorities and to spread awareness to protect and promote the rights of sexual minorities.

Amnesty International’s 2023 report titled “Barrage of Discriminatory Laws Stoking Hate Against LGBTIQ+ persons” documented trends across African countries. The report

⁵³ Amusan *et al.* 2019:48.

⁵⁴ Amusan *et al.* 2019:48.

emphasized that most African states do not actively prevent human rights violations.⁵⁵ Police often fail to protect sexual minorities, and political leaders foster a hostile environment with public homophobic statements.⁵⁶ Moreover, the existence of laws which criminalise same-sex conduct and other sexual behaviour not only creates conditions for stigmatisation, discrimination, and violence but also promotes impunity and lack of reporting for fear of consequences to the victims.⁵⁷ The state should take appropriate measures to put an end to prejudice and social stigmatisation of homosexuality and send a strong message that it does not tolerate any form of harassment, discrimination, or violence against individuals because of their sexual orientation. The governments of African countries should implement extensive police training on sexual orientation and gender identity issues. Additionally, they should instill a disciplinary system for police officers who omit investigating acts of violence based on real or presumed gender identity or sexual orientation. They must also address cases where officers engage in discriminatory law enforcement against individuals because of their real or presumed gender identity or sexual orientation.⁵⁸

Governments need to further renew their efforts to protect the security and the right to life of persons belonging to sexual minorities. Acts of murder and death threats should be promptly and thoroughly investigated regardless of the sexual orientation of the victims. Measures should include policies and programmes geared towards overcoming hatred and prejudice against homosexuals. Additionally, sensitizing public officials and the general public to crime and acts of violence directed against members of sexual minorities. Decriminalising matters of sexual orientation would greatly contribute to

⁵⁵ Amnesty International's 2023 "Africa: Barrage of discriminatory laws stoking hate against LGBTI persons", <https://www.amnesty.org/en/latest/news/2024/01/africa-barrage-of-discriminatory-laws-stoking-hate-against-lgbti-persons/> (accessed on 20 May 2024).

⁵⁶ Amnesty International's 2023 "Africa: Barrage of discriminatory laws stoking hate against LGBTI persons", <https://www.amnesty.org/en/latest/news/2024/01/africa-barrage-of-discriminatory-laws-stoking-hate-against-lgbti-persons/> (accessed on 20 May 2024).

⁵⁷ Amnesty International's 2023 "Africa: Barrage of discriminatory laws stoking hate against LGBTI persons", <https://www.amnesty.org/en/latest/news/2024/01/africa-barrage-of-discriminatory-laws-stoking-hate-against-lgbti-persons/> (accessed on 20 May 2024).

⁵⁸ Amnesty International's 2023 "Africa: Barrage of discriminatory laws stoking hate against LGBTI persons", <https://www.amnesty.org/en/latest/news/2024/01/africa-barrage-of-discriminatory-laws-stoking-hate-against-lgbti-persons/> (accessed on 20 May 2024).

overcoming the social stigmatisation of members of sexual minorities, thereby curbing impunity and human rights violations directed against these persons.

One issue raised by experts in certain African countries is the practice of subjecting men suspected of homosexuality to non-consensual anal examinations. Men arrested on charges of homosexuality are compelled to undergo medical examinations intended to obtain physical evidence of anal sex. In terms of international law, Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") mandates that "States are obligated to prohibit and penalize acts of torture and ill-treatment, and must offer remedies to victims affected by such acts".⁵⁹ This means that a State must define torture and ill-treatment as offenses under domestic criminal law and must ensure that all acts of brutality by law enforcement officers and other agents of the State are independently, promptly, and thoroughly investigated and that those responsible are brought to justice. The state should also provide a procedure whereby victims of such acts can seek remedies, including compensation. The state is also under an obligation to take preventative measures, such as training of law enforcement officers and monitoring of places of detention.

1.5. STATEMENT OF THE PROBLEM

In many societies around the world, sexuality continues to be highly controlled and policed. In African countries, such control is evident in the way in which same-sex relationships continue to be closeted and silenced.⁶⁰ While many countries in the Western world have begun to address the harsh, severe, and outdated laws aimed at people who participate in same-sex relationships, most African countries continue to lag behind and oppress. Some countries even execute those who participate in same-sex relationships.⁶¹ Article 3 of the African Charter on Human and Peoples' Rights contains "the rights to non-discrimination based on sex, equal protection of everyone under the law, and respect for their integrity, dignity, and inviolability".⁶² This means that everyone has the right to enjoy

⁵⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT").

⁶⁰ Tamale 2014:18.

⁶¹ Tamale 2014:18.

⁶² Namwase *et al.* 2017:3.

the rights as stipulated in the African Charter irrespective of their sexual orientation and gender identity.

Additionally, the International Covenant on Civil and Political Rights sets out the civil and political rights of all people.⁶³ African states that are parties to ICCPR are bound to fulfill all obligations outlined under Article 2 of the Covenant. This includes states that have not domesticated the ICCPR, as they are still bound by its obligations. As parties to the ICCPR, these states are legally obligated to fulfill all the rights and duties stipulated under the Covenant. Specifically, they must protect everyone against all forms of discrimination and ensure equal protection before the law as outlined in Article 2.⁶⁴ Despite this, in most cases, hate-motivated violence against LGBTIQ+ people is often carried out by non-state actors – whether private individuals, organised groups, or organisations. Nonetheless, failure by the state authorities to investigate and punish this kind of violence is a breach of the state's obligation to protect its people. Everyone's right to life, liberty, and security of the person is guaranteed by Article 3 of the Universal Declaration of Human Rights and Articles 6 and 9 of the International Covenant on Civil and Political Rights. The mistreatment of sexual minorities violates the principles established by these instruments, yet in many African states, these standards are not acknowledged or upheld.⁶⁵ Due to this non-recognition, these rights are not taught in schools at any level. However, teaching them from an early age would help build a foundation for empathy and fairness, while later stages prepare students to engage as informed citizens. They are neither publicised nor respected by law enforcement officials such as judges, parliaments, and even heads of state as evidenced by their discriminatory laws.⁶⁶

In addition, religious arguments have been most prominent as most anti-gay crusaders have fronted the Bible as the basis for criminalising homosexual conduct and relations and punishing homosexual people harshly.⁶⁷ Moreover, the widespread violence and all

⁶³ Huamusse 2006:13.

⁶⁴ Huamusse 2006:13.

⁶⁵ Namwase *et al.* 2017:8.

⁶⁶ Namwase *et al.* 2017:8.

⁶⁷ Namwase *et al.* 2017:8.

forms of discrimination and oppression against members of sexual minorities are a result of the failure of the government to adequately respond and appropriately deal with such cases. Additionally, a lack of implementation of laws and policies that cater to the rights of members of sexual minorities exacerbates this issue.⁶⁸The African Charter in the Human and Peoples' Rights states in its preamble that freedom, equality, justice, and dignity are crucial objectives for the achievement of the legitimate aspirations of the African people.

The 2023 resolution by the African Commission on Human and Peoples' Rights makes a clear point: sexual minorities, like all individuals, are entitled to the same fundamental rights and freedoms simply because they are human.⁶⁹ However, while the resolution does not mandate that all African countries legalise same-sex relationships, it encourages governments to reconsider and revise laws that discriminate against or criminalise sexual minorities. The resolution also urges these states to create environments that are inclusive, respectful, and supportive of sexual minorities.⁷⁰ That said, the impact of the resolution depends on how individual countries choose to implement these recommendations. Its success will hinge on whether African governments are willing to make the legal and cultural changes needed to support the rights and dignity of sexual minorities.

Unfortunately, these provisions and principles have not fully safeguarded all victims of systematic discrimination, especially those belonging to sexual minorities. For example, in many African countries such as Uganda and Nigeria, intimate acts or romantic relationships of sexual minorities are criminalised.⁷¹ These formal prohibitions of homosexual conduct are often the residue of colonial laws adopted from European penal codes.⁷² As a result of the existence of the offense of sodomy in the legal framework,

⁶⁸ Namwase *et al.* 2017:8.

⁶⁹ Namwase *et al.* 2017:8.

⁷⁰ African Commission on Human and Peoples' Rights 2023 "Resolution on the Promotion and Protection of the Rights of Intersex Persons in Africa - ACHPR/Res.552", <https://achpr.au.int/en/adopted-resolutions/resolution-promotion-and-protection-rights-intersex-persons>, (accessed on 10 February 2025).

⁷¹ Msibi 2011:58.

⁷² Msibi 2011:58.

there has been governmental discrimination against this group by acts and political statements supporting homophobia.⁷³ Therefore, the issue is that both state and non-state actors expose members of sexual minorities to various forms of violence and discrimination. When perpetrators are not investigated and brought to justice, international human rights are violated. The LGBTIQ+ community has suffered as a result, as they are frequently the target of death threats, incarceration, and other forms of violence. Therefore, the government must implement concrete measures to safeguard, advance, and defend the rights of sexual minorities and develop a national intervention strategy to address and prevent crimes involving sex and gender-based violence committed against members of sexual minorities.

1.6. LEGAL FRAMEWORK

The anti-sodomy laws that were inherited from the colonial era, when colonial authorities were keen to regulate sexuality, are largely responsible for the punishment used to discriminate against those who engage in same-sex relations in Africa. Most of these laws still apply in postcolonial Africa.⁷⁴ Discrimination against the LGBTIQ people is endemic in most African countries. The bias against LGBTIQ+ people is often supported by discriminatory legislation either in the form of criminalising homosexual intimacy or homosexual acts under the Penal Code or through more comprehensive legislation building on the criminalisation in the Penal Code. All these should be seen against the backdrop, and in the context of, a new wave of homophobia that is sweeping across Africa. Examples of this criminalising will be explained in detail below.

Kenya's Penal Code is a colonial inheritance. Section 162 of Kenya's Penal Code, states that "engaging in carnal knowledge with another person against the order of nature, or allowing a male person to have a carnal knowledge of them against the order of nature, constitute a felony punishable by a 14-year prison sentence".⁷⁵ Furthermore, Kenya's current legislative agenda lens toward marginalising individuals with minority sexual

⁷³ Msibi 2011:58.

⁷⁴ Msibi 2011:58.

⁷⁵ *Kenya Penal Code Act:cap 63*.

orientations. This marginalization is enshrined in Article 45 of the Constitution, which explicitly restricts marriage to adult persons of the opposite sex.⁷⁶ However, in practice, certain customary practices, such as woman-to-woman marriages, may be recognised, particularly in matters of succession.⁷⁷ In the case of *Monica Jesang Katam v. Jackson Chepkwony & Another*,⁷⁸ the court did not hesitate to protect the inheritance rights of a woman married to another woman under Nandi customary law. By this reasoning, same-sex marriage was effectively incorporated into the framework of the Law of Succession Act.⁷⁹ The petitioner and her children were placed in the first line of inheritance: the petitioner herself for being the “wife of the deceased” and her children for being the “children of the deceased”.⁸⁰

The best example of this post-colonial paradigm is Nigeria. As a result, Nigeria passed the Same-Sex Marriage Prohibition Act⁸¹ in January 2014. “An Act to prohibit a marriage contract or civil union entered into between persons of the same sex, solemnization of same, and for related matters”, is how the preamble to this legislative instrument describes it.⁸² Furthermore, It even goes so far as to deny the same-sex couple the advantages that are typically associated with heterosexual marriages. In addition, the Act makes it illegal to display same-sex affection in public and prohibits the registration of gay clubs, societies, and organizations. Violations of the Act can result in fines of 10 years in prison.⁸³ The Act places a strong emphasis on only recognizing unions contracted by people of the opposite sex.

Section 162 of Kenya's Penal Code, mentioned earlier, is similar to Section 145 of Uganda's Penal Code,⁸⁴ which prohibits sexual activity “against the order of nature” of the same-sex couple. Additionally, on 29 May 2023, the Ugandan parliament passed the

⁷⁶ *Kenya Penal Code Act:cap 63.*

⁷⁷ *Namwase et al. 2017:39.*

⁷⁸ *Monica Jesang Katam v Jackson Chepkwony & Another [2011] Eklr.*

⁷⁹ *The Law of Succession Act:cap. 160.*

⁸⁰ *Namwase et al. 2017:40.*

⁸¹ *Same-Sex Marriage (Prohibition) Act/2013.*

⁸² *Namwase et al. 2017:203.*

⁸³ *Namwase et al. 2017:203.*

⁸⁴ *Uganda Penal Code Act:cap 120.*

Anti-Homosexuality Act 2023⁸⁵ legislation that further criminalise the identities and behavior of LGBTIQ+ people of Uganda. Among other things, the Anti-Homosexuality Act imposes a life sentence on consensual same-sex conduct among adults, which is already criminalised. Additionally, it introduces the death penalty for so-called “aggravated homosexuality” where same-sex acts involve children or people with disabilities, or where drugs or alcohol may impair judgment. Furthermore, it criminalised activities that promote homosexuality with up to 20 years in prison.⁸⁶ This Act explicitly aims to protect what it defines as the traditional family by bolstering the country’s ability to address rising internal and external challenges to families. Additionally, it prohibits any form of sexual relations between individuals of the same sex.

The Constitutional Court decision in *Hon. Fox Odoi & Others v. Attorney General & Others (2024)*,⁸⁷ likely had a significant impact on the provisions of the Anti-Homosexuality Act 2023. If the court ruled on the constitutionality of certain provisions of the Act, its decision would directly affect how those provisions are enforced and interpreted in Uganda. If the court upheld the provisions, it would mean that the law remains in effect, with the death penalty for “aggravated homosexuality”, life sentences for consensual same-sex conduct, and penalties for promoting homosexuality. Such a ruling would reinforce the state’s legal stance on criminalizing homosexuality and could lead to further marginalization and persecution of LGBTIQ+ individuals in Uganda. On the other hand, if the court found parts of the law unconstitutional, it could strike down some provisions or require revisions.

This would provide a legal challenge to the law, potentially weakening its impact. It might offer some hope for LGBTIQ+ individuals in Uganda by reducing penalties or decriminalising certain aspects of same-sex conduct or advocacy, depending on the scope of the ruling. Ultimately, the impact of the court decision would depend on whether it upheld or overturned aspects of the Anti-Homosexuality Act, influencing the legal landscape for LGBTIQ+ rights in Uganda.

⁸⁵ *The Anti-Homosexuality Act/2023*.

⁸⁶ *The Anti-Homosexuality Act/2023*.

⁸⁷ *Hon. Fox Odoi & 21 Others v Attorney General & 3 Others (Consolidated Constitutional Petition 14 of 2023; Consolidated Constitutional Petition 15 of 2023; Consolidated Constitutional Petition 16 of 2023; Consolidated Constitutional Petition 85 of 2023) [2024] UGCC 10 (3 April 2024)*.

Zimbabwe's Criminal Law (Codification and Reform) Act, which was adopted in 2013, represented a significant setback for the protection of sexual minority rights in the country. The Act, in conjunction with the country's constitution, explicitly banned same-sex marriages, effectively limiting legal protection for LGBTIQ+ individuals.⁸⁸ This legal framework underscores the ongoing struggles for sexual minorities in Zimbabwe, where laws continue to be shaped by conservative social and political views that criminalise same-sex relationships.⁸⁹ Despite containing expansive human rights clauses that could theoretically encompass protection for LGBTIQ+ individuals, the reluctance of "conservative," "non-autonomous," and "culturally bound" judges and magistrates to advocate for sexual minority rights remains a persistent issue.⁹⁰ Zimbabwe's Criminal Law (Codification and Reform) Act⁹¹ maintains penalties for sodomy, thereby hindering the defense of gay rights due to the ongoing criminalization of homosexuality.⁹² Just like other African nations, Zimbabwe's Constitution expressly forbids persons of the same sex from marrying each other, effectively excluding same-sex unions. Consequently, the primary obstacle in Zimbabwe revolves around the definition of marriage, which excludes sexual minorities, thus denying them their rights.⁹³ In the country, the Criminal Law courts have been utilised to target individuals suspected of being gay, contributing to further harassment and discrimination. Moreover, police frequently use this provision to harass members of organizations representing the LGBTIQ community.

1.7. RESEARCH OBJECTIVES

The objectives of the study are as follows:

- To evaluate the practical steps that the government can take to ensure that the rights of sexual minorities are recognised, protected, and promoted in those selected African countries.
- To investigate loopholes in the African Charter on Human and Peoples' Rights and relevant national legislation relating to sexual minorities.

⁸⁸ Namwase *et al.* 2017:151.

⁸⁹ Namwase *et al.* 2017:151.

⁹⁰ Namwase *et al.* 2017:151.

⁹¹ *Criminal Law (Codification and Reform) Act of Zimbabwe:cap 9:23.*

⁹² Namwase *et al.* 2017:153.

⁹³ Namwase *et al.* 2017:155.

- To analyse national intervention strategies to respond to and prevent sex and gender-based violence crimes perpetrated against sexual minorities.
- To assess the government's ability to respond to the needs and specific vulnerability of LGBTQI persons and the capacity of civil society organisations to deliver related services.

1.8. RESEARCH QUESTIONS

The research questions are as follows:

- What role do governments play in ensuring that the rights of sexual minorities are recognised, protected, and promoted in selected African countries?
- What are the identified gaps and deficiencies within the African Charter on Human and Peoples' Rights and other relevant national legislations regarding the protection and promotion of the rights of sexual minorities?
- How can national intervention strategies be enhanced to address and prevent instances of sex and gender-based violence targeting sexual minority individuals, and what role does the government play in implementing such strategies?
- How well-equipped is the government in responding to the unique needs and vulnerabilities of LGBTIQ+ individuals, and to what extent are civil society organisations capable of providing support and services tailored to this community?

1.9. LITERATURE REVIEW

The protection of sexual minority rights in African countries presents a complex and multifaceted challenge. The role of the government in protecting these rights is influenced by various factors, including religious, cultural, and political dynamics. This literature review explores the existing body of research on governmental involvement in safeguarding the rights of sexual minorities across African nations, highlighting the legal frameworks, societal attitudes, and international influences that shape these efforts.

Numerous scholars have enriched the legal discourse concerning the rights of sexual minorities. Their work spans various aspects. This includes the analysis of international

human rights frameworks, the impact of domestic laws on LGBTIQ+ persons, and the intersection of cultural, social, and political factors that influence the recognition and safeguarding of these rights.

Nonetheless, a significant gap remains necessitating government intervention to ensure the practical implementation of laws. Such measures are essential for all citizens in these African states to uphold and advance the rights of sexual minorities. Furthermore, the literature has highlighted that several African countries, notably Uganda, Nigeria, and Zimbabwe, are at the forefront of efforts to either legalize or intensify the criminalization of homosexual activity across the continent.

Hepple⁹⁴ emphasized that the criminalisation of homosexual conduct has profoundly negative effects on homosexuals, extending beyond the legal realm into social spheres. When the state designates this group as criminals, it fosters state-sponsored homophobia. Consequently, this sentiment permeates society, leading individuals to believe they have the right to discriminate against, bully, and harass homosexuals. This creates an environment where such behavior is not only condoned but often encouraged. In light of this, it is crucial to address the societal implications of such legal frameworks. Ensuring a more inclusive and respectful society requires re-evaluating these laws and the messages they send. Hepple⁹⁵ further reiterates that the criminalisation of homosexuals makes it difficult for LGBTIQ+ persons to feel isolated and deviant in the face of the law.

According to Kretz⁹⁶ one of the bills that has contributed to the criminalisation of homosexuality is Nigeria's Same-Sex Marriage Prohibition Act (2014). This law has influenced the introduction of near-identical draft laws in parliaments from one African country to the other. These criminal penalties, which encompass acts as seemingly innocuous as a hug between two men, are particularly insidious. Moreover, the imposition of severe punishments for even expressing pro-LGBTIQ+ sentiments or actions poses a far greater threat. This hinders long-term efforts to establish the necessary civil society

⁹⁴ Hepple 2012:51.

⁹⁵ Hepple 2012:51.

⁹⁶ Kretz 2012:208.

structures that can nurture a homegrown gay rights movement. Kretz⁹⁷ further pointed out that because of the criminalisation of homosexuals, firstly, the laws make it difficult, if not possible, for groups of LGBTIQ+ activists to organise and advocate due to the fear of criminal penalties. Supporters of gay rights, both publicly and privately, would face significant obstacles in speaking out, if not being completely silenced. Secondly, it impedes international organisations dedicated to LGBTIQ+ activism from establishing a presence in the country. Lastly, it reduces the already limited opportunities for LGBTIQ+ individuals to move freely between nations, especially when their governments suppress LGBTIQ+ and pro-LGBTIQ+ individuals.⁹⁸ For instance, Uganda's Anti-Homosexuality Act could potentially trigger a widespread crackdown on LGBTIQ+ rights and attitudes across Africa and beyond. This demonstrates that the government holds the primary responsibility for these laws. Significant effort must be made on their part to protect the rights of sexual minorities, as other societal systems can be compelled to comply with and uphold these laws.

Furthermore, the implementation of anti-homosexual laws in Africa is primarily driven by arguments rooted in religion, morality, and the representation of people's interests.⁹⁹ Religious beliefs, cultural values, and political morality significantly influence how some African leaders have mobilized their citizens against non-governmental organisations and other groups advocating for homosexual rights.¹⁰⁰ This illustrates Ibrahim's argument that religiosity and confessional heritage significantly contribute to the non-acceptance of LGBTIQ+ rights.¹⁰¹ For example, Uganda's anti-homosexuality laws stress the importance of "protecting traditional family values by prohibiting any form of sexual relations between persons of the same sex", among other objectives. Similar moralistic goals, aimed at protecting traditional African family values and rooted in colonial penal codes, are reiterated in Nigeria's Same-Sex Marriage Prohibition Act¹⁰².

⁹⁷ Kretz 2012:208.

⁹⁸ Kretz 2012:208.

⁹⁹ Amusan 2019:55.

¹⁰⁰ Amusan 2019:55.

¹⁰¹ Ibrahim 2015:269.

¹⁰² Amusan 2019:55.

Moreover, Haskins¹⁰³ argues that the emphasis on traditional cultural roles supports the notion that same-sex desire is “un-African” and was introduced from the West. This perspective enables African leaders to blame the West for their societies’ problems, fostering hostility among their people toward Western demands for gay rights. They believe that the West is attempting to promote homosexuality, thereby corrupting and endangering African children.

The duty of the government in protecting the rights of LGBTIQ+ persons in African countries is shaped by a complex interplay of legal, cultural, and religious factors as mentioned above. Nevertheless, several countries have moved to criminalize same-sex relations, and others have adopted more liberal approaches. South African law is among the most protective of LGBTIQ+ rights in the world.¹⁰⁴ Similarly, Mozambique (in 2015) and Lesotho (in 2012) have decriminalized same-sex relations and implemented some protections against discrimination.¹⁰⁵

It is clear from the foregoing discussion that even after international human rights interventions, there remains a pressing need for reforms that align national laws with international human rights standards. In conclusion, however, there is a notable absence of literature that captures and compares how African countries have addressed and continue to address these issues. Additionally, there is a gap in understanding how their actions or inactions have influenced the evolution of rights for sexual minorities on the African continent. This gap underscores the necessity for comprehensive research to evaluate the varied approaches and their impacts on LGBTIQ+ rights across Africa.

1.10. RESEARCH METHODOLOGY

This study relies on library-based research. Library-based research which is utilised across a multitude of disciplines, is a cornerstone of academic, scientific, and professional

¹⁰³ Amusan 2019:55.

¹⁰⁴ Gloppen & Rakner 2021:196.

¹⁰⁵ Gloppen & Rakner 2021:196.

investigations. It allows the researchers to access a wide range of scholarly resources, explore existing literature, and build upon previous knowledge to contribute new insights to their respective fields. Moreover, the study adopts a qualitative research methodology as its principal research approach. Qualitative research is “an approach that uses a naturalistic approach which seeks to understand phenomena in context-specific settings, where the researcher does not attempt to manipulate the phenomena of interest.¹⁰⁶ Additionally, it is any research that produces findings not arrived at using statistical procedures or other means of quantification, but instead, the kind of research that produces findings derived from real-world settings where phenomena of interest unfold naturally”. Qualitative research is a research approach aimed at developing theories and understanding.¹⁰⁷ It involves an interpretive, naturalistic approach to the world. The objective of qualitative research is to promote better self-understanding and increase insight into the human condition as well as verify and extension of theories.¹⁰⁸

The qualitative methods for this study, primarily rely on textual sources such as analysis of the relevant textbooks, reports, case laws, legislations, journal articles, and statutes. These textual sources are examined closely to derive the interpretation, identify patterns, and analyse the development and application of doctrines. Furthermore, this study adopts a doctrinal research approach, entailing the analysis of existing statutory provisions and case laws through the application of logical reasoning. Doctrinal research involves identifying and scrutinizing underlying doctrines to address practical issues, with a focus on determining the appropriate or ideal authority.¹⁰⁹ The core of doctrinal research lies in identifying and deliberating on the authoritative sources necessary for resolving practical issues.¹¹⁰ Doctrinal research could thus be regarded as interpreted research of documents to identify the underlying doctrines therein.

While library-based research is flexible, easily accessible, and holds significant informational value, it does come with its set of limitations. Firstly, material in the library

¹⁰⁶ Denzin & Lincoln 2005:10.

¹⁰⁷ Denzin & Lincoln 2005:10.

¹⁰⁸ Denzin & Lincoln 2005:10.

¹⁰⁹ Soren 2021:13.

¹¹⁰ Soren 2021:13.

may become outdated as new research findings emerge, highlighting the need for researchers to stay updated with the latest literature. Secondly, secondary textual sources such as textbooks and journal articles, while informative, may lack the authority attributed to primary textual sources. Thirdly, library-based research is limited in terms of obtaining information directly from the source. Moving on to qualitative research, heavily relies on interpretation, potentially introducing subjectivity into the analysis. Furthermore, qualitative data, often descriptive in nature, pose challenges in quantifying findings. Given the subjective nature of qualitative research, there's a risk of misinterpretation or misrepresentation of findings. Shifting to doctrinal research, it encounters difficulties in giving a concrete shape to the work. It further presents challenges such as navigating inconsistencies or gaps in legal doctrines.

1.11. STRUCTURE OF THE STUDY/CHAPTER BREAKDOWN

This introductory chapter provides the background and context of the study. It draws attention to the sodomy laws that were put in place to deny sexual minorities their rights. This chapter also provides an overview of a few African nations that will serve as points of reference for discussing issues about the rights of sexual minorities. The chapter also outlines the aim, purpose, and objectives of the study as well as its problem statement, research question, literature review, and methodology. There will also be an explanation of a few ideas regarding sexual orientation.

Chapter two provides an overview of all the international and national legislative and policy frameworks related to the rights of sexual minorities. This includes international human rights instruments such as the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination Against Women, and International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The chapter further evaluates regional Instruments such as the African Charter on Human and Peoples' Rights and concludes with an assessment of the national laws relating to sexual minorities in those selected African Countries.

The third chapter examines the current African laws relating to homosexuality and gay rights. It also examines case studies from the mentioned African countries, comparing their challenges and successes in enforcing the rights of sexual minorities. It will further look at obstacles to same-sex acts being decriminalized in Africa. Additionally, ideas like homosexuality as immorality, a religious abomination, and offensive to African culture and traditions will be covered in this chapter. The chapter also examines the effects that cultural, religious, and sociopolitical variables have on the rights of sexual minorities. The chapter further examines the likelihood of homosexuality being accepted and decriminalised in African countries.

The government's role in defending the rights of sexual minorities is the main topic of chapter four. Recommending doable actions that African governments should take to safeguard and preserve the rights of sexual minorities, the chapter also evaluates the part that political, religious, and cultural leaders must play in guaranteeing the rights of sexual minorities. It also analyzes the national intervention strategies that should be implemented to protect the LGBTIQ+ community's rights. This chapter further examines how courts have dealt with cases involving a violation of the rights of sexual minorities. The chapter then explores how NGOs that support sexual minorities have battled the government to acknowledge and defend the rights of sexual minorities. Lastly, the chapter will address the criminal justice system's shortcomings.

The findings and recommendations are presented in the final chapter. Providing a summative examination of the observations, viewpoints, arguments, and criticisms that have been made throughout the research is the primary focus of the chapter. It also examines the results in light of the government's ongoing efforts to safeguard and advance public understanding of the rights of sexual minorities. It also offers recommended actions required to safeguard such rights and corrective actions to bring back the dignity of LGBTIQ people.

1.12. CONCLUSION

In conclusion, this chapter has provided a comprehensive overview of the diverse approaches taken by different countries in addressing the rights of sexual minorities. It

has highlighted the significant global disparities by contrasting the progressive measures of some foreign nations with the repressive policies of selected African countries, such as Uganda, Kenya, Zimbabwe, and Nigeria. Following this, the chapter transitions into an examination of these specific African countries, chosen for their stance on criminalising the rights of sexual minorities. Furthermore, this chapter discussed the discriminatory laws targeting LGBTIQ+ individuals that have been implemented in these nations. These laws will be analysed in greater detail in the next chapter. Additionally, this chapter has shed light on the severe challenges faced by sexual minorities in these African contexts. It further underscores the pivotal role that government can play in protecting and promoting these rights.

The research methodology employed for this study primarily revolves around library-based approaches, involving analyses of textbooks, reports, case laws, legislations, journal articles, and statutes to address research questions and achieve set objectives. Consequently, addressing the rights of sexual minorities requires a multifaceted approach that combines legal reform, education, social support, community engagement, international advocacy, and robust research. By implementing these solutions and recommendations, governments and societies can move towards a more equitable world where the rights of all people, irrespective of their sexual orientation or gender identity, are respected and protected.

The following chapter will provide an overview of international and national legislative and policy frameworks concerning the rights of sexual minorities. This overview encompasses international human rights instruments like the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, and the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Furthermore, the chapter assesses regional instruments such as the African Charter on Human and Peoples' Rights, the African Commission on Human and People's Rights, and the African Court on Human and Peoples' Rights.

CHAPTER TWO

INTERNATIONAL LAW PERSPECTIVE

2.1. INTRODUCTION

Legislative and policy frameworks concerning sexual minorities are a topic of ongoing debate and evolution worldwide. Sexual minorities have historically faced legal discrimination, social stigma, and human rights abuses in many parts of the world.¹¹¹ However, a notable shift towards more progressive and inclusive laws and policies has occurred in recent years. These changes are designed to include and protect all individuals, regardless of their sexual orientation, reflecting changing societal attitudes and a growing recognition of LGBTIQ+ rights as human rights. As a result, societies are moving towards greater equality and acceptance. In countries with progressive frameworks, laws have been enacted to protect the rights of sexual minorities, such as anti-discrimination laws, and recognition of gender identity.¹¹² These legal advancements aim to ensure equal rights, protections, and opportunities for LGBTIQ+ individuals, fostering a more inclusive society. International efforts by organisations like the United Nations and the European Union have played a crucial role in protecting and promoting the rights of the sexual minority through campaigns, resolutions, and advocacy initiatives.¹¹³ These international frameworks aim to encourage member states to adopt progressive laws and policies that protect and promote the rights of sexual minorities.

Notwithstanding these developments, sexual minorities continue to face obstacles such as violence, discrimination, stigma, and legal gaps in protection. To ensure that everyone can live free from discrimination and fully enjoy their human rights, regardless of their sexual orientation or gender identity, it is essential to implement and enforce progressive and inclusive legislative and policy frameworks. Addressing these issues will require

¹¹¹ Human Rights Watch 2020 “World Report 2020: Events of 2019”, <https://www.hrw.org/world-report/2020> (accessed on 20 April 2024).

¹¹² Human Rights Watch 2020 “World Report 2020: Events of 2019”, <https://www.hrw.org/world-report/2020> (accessed on 20 April 2024).

¹¹³ United Nations 2015 “Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law”, <https://www.ohchr.org/en/publicationsresources/Pages/BornFreeAndEqual.aspx> (accessed on 20 April 2024).

ongoing advocacy, legislative changes, and societal transformation.¹¹⁴ In this context, this chapter explores the legislative and policy framework on sexual minorities, examining the progress, challenges, and approaches taken by the UN human rights bodies and other regional bodies to protect and promote the rights of sexual minorities.

2.2. THE INTERNATIONAL HUMAN RIGHTS SYSTEM

The core principles underpinning the entire human rights movement are that every human life is of equal worth and value and inherently deserves to be treated with dignity. Those principles also emphasize the following key points about human rights: they are individual (they protect each person from collective violations), egalitarian (every human being has the same rights), universal (they apply to all people), fundamental (they safeguard the most essential aspects of human existence), and indivisible (all the rights listed in the catalog must be upheld).¹¹⁵ However, following World War II, racial and religious minorities were granted clear protections under the law, a privilege that did not extend to sexual minorities.¹¹⁶ This situation is remarkable because, despite being one of the persecuted groups during the Holocaust, sexual minorities remained largely visible on the international stage. Similarly, sexual minorities were hardly noticeable in the home sphere during the 1950s and 1960s, when groundbreaking human rights treaties were being discussed, drafted, and adopted.¹¹⁷ Sexual minority rights have recently received some notable jurisprudential recognition as legally enforceable international human rights, even though they are not protected by the human rights instruments that are currently in place.

A cardinal principle that is a feature of human rights treaties is the prohibition of discrimination in the enjoyment of fundamental human rights. Article 2 of the Universal Declaration of Human Rights¹¹⁸ provides that the enjoyment of the rights outlined in the

¹¹⁴ European Union Agency for Fundamental Rights 2020 “EU LGBTI Survey II: European Union lesbian, gay, bisexual, trans and intersex survey”, <https://fra.europa.eu/en/publication/2020/eu-lgbti-survey-ii> (accessed on 20 April 2024).

¹¹⁵ Persad 2013:341.

¹¹⁶ Persad 2013:343.

¹¹⁷ Persad 2013:343.

¹¹⁸ Universal Declaration of Human Rights, Article 2.

declaration shall be enjoyed by all individuals regardless of their status.¹¹⁹ Another principle also recognised as core to the enjoyment of fundamental human rights is the principle of equality. A core principle essential to the realisation of fundamental human rights is equality, which guarantees that all individuals are entitled to equal treatment under the law. This principle prohibits any form of differentiation, as such distinctions would violate the law.¹²⁰ Additionally, international human rights law also upholds the right to dignity and bodily integrity. Both the Universal Declaration and the International Convention on Civil and Political Rights (ICCPR) emphasize the need to respect individuals' bodily integrity. They ensure that no person is subjected to forced experiments or invasive medical examinations to determine sexual activity or orientation, such as investigating whether someone has engaged in anal sex to identify homosexuality.¹²¹ Another important right upheld by international human rights norms is the right to privacy, which applies to a wide spectrum ranging from preventing phone surveillance to safeguarding an individual's sexual orientation.¹²² Essentially, the Universal Declaration of Human Rights and the ICCPR recognise this right as central to a human being. In effect, these provisions aim to ensure that consensual activities between adults in private are not subject to legislation as long as they do not harm the public.

In light of the discussion above, it should be noted that the international human rights system consists of various human rights systems established by the international community to protect and promote human rights. Therefore, for this study, the human rights systems that will be discussed below have a bearing on (or are relevant to) the rights of the sexual minority. These include the European System of Human Rights,¹²³ and The Inter-American System of Human Rights.¹²⁴ Furthermore, various United Nations Treaty systems will be examined namely: the Universal Declaration of Human Rights;¹²⁵

¹¹⁹ Ako 2010:12.

¹²⁰ Ako 2010:12.

¹²¹ Universal Declaration of Human Rights (1948), and the International Convention on Civil and Political Rights(1966).

¹²² Ako 2010:13.

¹²³ European System of Human Rights (1950).

¹²⁴ Inter-American System of Human Rights (1969).

¹²⁵ Universal Declaration of Human Rights (1948).

the International Convention on Civil and Political Rights;¹²⁶ International Convention on Economic, Social and Cultural Rights;¹²⁷ Convention on the Elimination of All Forms of Discrimination Against Women;¹²⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”).¹²⁹ Additionally, these instruments articulate fundamental principles such as the right to life, liberty, and security, freedom of expression, association, and religion.

2.2.1. Universal Declaration of Human Rights

The Universal Declaration of Human Rights holds a foundational position within the history of international human rights law. It delineates the inherent freedom and equality of all humans, irrespective of characteristics such as sex, colour, or religion, with over 30 articles enumerating the rights and freedoms entitled to them. Resolution 217A of the UN General Assembly, passed on December 10, 1948, formally established and proclaimed the Universal Declaration of Human Rights.¹³⁰ Often cited in proceedings before national and international tribunals, the declaration is meant to be non-binding. The preamble to the Universal Declaration of Human Rights states that “recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world”.¹³¹ Provisions relevant to equality and non-discrimination are under Articles 1, 2, and 7.

Article 1 of the Universal Declaration of Human Rights states that “all human beings are born free and equal in dignity and rights”, while Article 2 states that “everyone is entitled to all the rights and freedoms set forth in this declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status”. Furthermore, Article 2 indicates that “no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-

¹²⁶ International Convention on Civil and Political Rights (1966).

¹²⁷ International Convention on Economic, Social and Cultural Rights (1966).

¹²⁸ Convention on the Elimination of All Forms of Discrimination Against Women (1979).

¹²⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

¹³⁰ Ivanus 2014:60.

¹³¹ Ivanus 2014:60.

governing or under any other limitation of sovereignty”. Therefore, according to Article 2 of the Declaration “distinctions of any kind” are prohibited. This could be read as meaning no differences can be legally tolerated. Article 7 of the Universal Declaration of Human Rights states that “everyone is equal before the law and is entitled without any discrimination to equal protection of the law”. This statement relates to the right to equality. Everyone is entitled to equal protection against any discrimination that violates this Declaration, as well as from any incitement to such discrimination.¹³² However, only the freedoms and rights outlined in the Declaration are covered by Articles 2 and 7. These are considered a dependent provision, as they guarantee non-discrimination exclusively concerning the rights protected by the International Covenant on Civil and Political Rights (ICCPR).¹³³ Despite these comprehensive provisions, the practical implementation often falls short, leaving sexual minorities without full protection and inclusivity. There is still a need for more specific measures and enforcement mechanisms to ensure that the rights of sexual minorities are upheld and they are afforded the same protections as all other individuals under international human rights law. While the UDHR is not directly part of customary international law, its provisions are generally seen as contributing to and influencing the development of customary international law, especially regarding fundamental human rights. Therefore, its principles continue to shape international legal standards and provide a framework for promoting equality and non-discrimination.

2.2.2. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) is a cornerstone treaty within the international human rights framework, adopted by the UN General Assembly in 1966, and entered into force in 1976.¹³⁴ It serves as a comprehensive instrument for the protection and promotion of civil and political rights worldwide. The ICCPR is the primary international treaty within the United Nations human rights system setting out the civil and political rights of all individuals.¹³⁵ All four countries - Uganda, Kenya, Nigeria and Zimbabwe have ratified the treaty. However, its direct applicability depends on each

¹³² Ivanus 2014:60.

¹³³ Ivanus 2014:60.

¹³⁴ Ivanus 2014:62.

¹³⁵ Persad 2013:357.

country's legal system, with Kenya being the exception, as the treaty has more immediate legal effect there. African states that are parties to ICCPR are obligated to meet all the duties specified in the Covenant. In addition to this, these obligations include the obligation to protect everyone against all forms of discrimination and to guarantee equal protection under the law. Specifically, Article 2(1) of ICCPR states that "each state party to the present Covenant undertakes to respect and to ensure to all individuals within his territory and subject to its jurisdiction the rights recognised and the present covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or another status".¹³⁶ In addition, the state parties that have ratified ICCPR must protect freedom from incursion to privacy. Articles 17(1) and 17(2) provide that:

- "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence, nor unlawful attacks on his honour and reputation.
- Everyone has the right to the protection of the law against such interference or attacks".¹³⁷

The group of independent experts in charge of overseeing the ICCPR's execution is called the Human Rights Committee (HRC).¹³⁸ It examines individual and interstate complaints arising under the ICCPR and renders nonbinding concluding observations on mandatory state reports.¹³⁹ The first international treaty body to support the rights of sexual minorities was the HRC.¹⁴⁰ More cases on this subject have been reviewed by the HRC than by any other international treaty body. The first case relating to sexual minorities was the historic *Toonen v. Australia* case,¹⁴¹ which took place in 1994. The individual communication brought by Nicholas Toonen challenged the sections of the Tasmanian Criminal Code that criminalised private consensual relationships between men. According to Toonen¹⁴², these anti-sodomy laws contravened the ICCPR's Article 17 (Right to Privacy), Article 2(1) (Non-Discrimination), and Article 26 (Equal Protection of the Law).¹⁴³ In accordance

¹³⁶ Persad 2013:357.

¹³⁷ Persad 2013:357.

¹³⁸ Persad 2013:357.

¹³⁹ Persad 2013:357.

¹⁴⁰ Persad 2013:357.

¹⁴¹ *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

¹⁴² *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

¹⁴³ Persad 2013:357.

with the Tasmanian government's justification, the prohibition was necessary to safeguard morality and public health, but the Human Rights Committee strongly rejected these arguments. It concluded that Tasmania had breached the privacy guarantee under the ICCPR.¹⁴⁴ However, the HRC decided not to rule on the Article 26 claim concerning equality before the law. In its Concluding Observations, the committee reports emphasized the need for state parties to uphold non-discrimination and ensure privacy rights, especially in relation to sexual orientation.

2.2.3. The International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social, and Cultural Rights (ICESCR) stands as a crucial instrument in the international human rights framework, emphasizing the rights to education, work, health, and an adequate standard of living for all individuals, regardless of their socioeconomic status. The International Convention on Economic, Social, and Cultural Rights was adopted in 1966 and entered into force in 1976.¹⁴⁵ The HRC is to the ICCPR what the U.N. Committee on Economic, Social, and Cultural Rights (CESCR) is to the ICESCR. Like the ICCPR, the ICESCR has the option to adopt a protocol that gives it the power to hear complaints from people who say their rights have been violated.¹⁴⁶ However, the issue of LGBTIQ+ rights has not yet been addressed in any of the general remarks - which are essentially interpretations of the ICESCR provisions.¹⁴⁷

General Comments 14, 15, 18, and 20 all contend that distinctions based on sexual orientation are included in the definition of "other status" under the ICESCR's non-discrimination clause, specifically Article 2(2).¹⁴⁸ Although the Committee on Economic, Social, and Cultural Rights has issued general Comments that elaborate on the rights contained in the ICESCR, the issue of LGBTIQ+ rights has not been explicitly addressed

¹⁴⁴ Persad 2013:357.

¹⁴⁵ Ivanus 2014:62.

¹⁴⁶ Persad 2013:358.

¹⁴⁷ Persad 2013:358.

¹⁴⁸ Persad 2013:357.

in these comments. This omission can result in inconsistent application and weaker protection for sexual minorities. Furthermore, the CESCR expressed the opinion that gender identity is covered by Article 2(2), going one step further. In accordance with Article 2(2) of the CESCR, State parties undertake “to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status”.¹⁴⁹ The State also undertakes under Article 3 “to ensure the equal right of men and women to the enjoyment of all economic, social, and cultural rights set forth in the present Covenant”.¹⁵⁰ Finally, though less frequently than the HRC, the CESCR has also offered suggestions for enhancing LGBTIQ+ rights in response to required state compliance reports.¹⁵¹

While the ICESCR provides a valuable framework for the protection and promotion of the rights of sexual minorities through its broad non-discrimination principle and its comprehensive rights framework, its effectiveness is limited by the lack of explicit reference to sexual orientation and gender identity. Consequently, this ambiguity can result in inconsistent application and enforcement of protections for LGBTIQ+ individuals. Therefore, to enhance its protective capacity, the CESCR must issue clear and explicit interpretations that address the specific needs and challenges faced by LGBTIQ+ individuals. Furthermore, continuous monitoring and advocacy are essential to ensure that states comply with their obligations under the Convention, thereby fostering an inclusive environment where the rights of all individuals are upheld.

2.2.4. The Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) stands as a landmark international treaty dedicated to promoting gender equality and ensuring the full enjoyment of women’s rights in all spheres of life. It was

¹⁴⁹ Persad 2013:357.

¹⁵⁰ Committee on Economic, Social and Cultural Rights, *General comment no. 20*, para. 10.

¹⁵¹ Persad 2013:359.

adopted in 1979 and entered into force in 1981.¹⁵² Fundamentally, gender identity promotion is the goal of CEDAW, a specialized human rights treaty that came into effect in September 1981.¹⁵³ Twenty-three independent experts make up the Committee on the Elimination of Discrimination Against Women (or “CEDAW Committee”), which keeps an eye on state compliance with CEDAW. The CEDAW committee has the authority to review individual communications in accordance with an Optional Protocol, just like the UN treaty bodies.¹⁵⁴

Like the CESCR, the CEDAW Committee has not yet provided a statement regarding the status of sexual minorities under this mechanism. However, in line with its institutional peers, it has expressed its opinion on the subject in accordance with general recommendations, which are interpretive guidelines.¹⁵⁵ General Recommendations 27 and 28, which were issued concurrently in 2010, state that distinctions based on gender identity and sexual orientation are covered by CEDAW’s non-discrimination provision (Article 2). Furthermore, through its concluding observation on multiple state reports, the CEDAW committee has drawn attention to discrimination against sexual minorities.¹⁵⁶

Women's rights were explicitly included in the scope of international human rights after the CEDAW was adopted, but these rights were still disregarded by the majority of human rights mechanisms.¹⁵⁷ The adoption of CEDAW has resulted in the marginalisation of women’s human rights. Consequently, one issue that has arisen since is that the monitoring bodies of the other human rights treaties do not address violations of women's rights; instead, those treaties refer these matters to the specialised CEDAW Committee.¹⁵⁸ As a result It is argued that women's rights are neglected by mainstream human rights instruments. In its observations, the Committee has pointed out the lack of implementation of international norms and recommended specific actions for addressing

¹⁵² Ivanus 2014:63.

¹⁵³ Persad 2013:359.

¹⁵⁴ Persad 2013:359.

¹⁵⁵ Persad 2013:359.

¹⁵⁶ Persad 2013:359.

¹⁵⁷ Ivanus 2014:63.

¹⁵⁸ van Leeuwen 2011:8-9.

gender inequality. For example, in Uganda, the Committee raised concerns about discriminatory laws and practices affecting women, especially in relation to family laws, land rights, and gender-based violence.

2.2.5. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”)

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is a milestone international human rights treaty adopted by the United Nations General Assembly in 1984. It represents a comprehensive commitment by member states to prevent and eradicate torture and other forms of ill-treatment worldwide. There is no list of prohibited grounds of discrimination in the CAT. Its definitional clause does, however, expressly prohibit the wilful infliction of severe physical or mental pain or suffering “for any reason based on discrimination of any kind”.¹⁵⁹ The Committee against Torture keeps an eye on CAT compliance and accepts individual complaints; however, no complaint has addressed sexual minority rights to date. The Committee against Torture made it abundantly evident in General Comment No. 2 that the duty to “ensure that State laws are in practice applied to all persons, regardless of sexual orientation or transgender identity” is part of the obligation under Article 2 of CAT to prevent torture.¹⁶⁰ Furthermore, the Committee against Torture has consistently expressed concerns about abuse of people based on their sexual orientation or transgender identity through its concluding observations on state reports.¹⁶¹

2.3. European System of Human Rights

The fundamentality of the European system of human rights lies in its role to protect individuals across the continent. It was established as a framework that aims to safeguard fundamental freedoms and ensure accountability among member states. At its core, the European system emphasizes the inherent dignity and equality of all individuals, regardless of nationality, ethnicity, religion, or any other characteristics. Moreover, the

¹⁵⁹ Persad 2014:360.

¹⁶⁰ Persad 2013:360.

¹⁶¹ Persad 2013:360.

European Convention on Human Rights was adopted by the Council of Europe (CoE) in 1950 and entered into force in 1953.¹⁶² The Council of Europe is an international body focused on human rights with 47 member states across Europe, consisting of various bodies, including the Committee of Ministers, the Parliamentary Assembly, the Commissioner for Human Rights, and the European Court of Human Rights (ECHR) based in Strasbourg.¹⁶³ Ministers constitute the executive institution of the CoE. A recent set of recommendations from the Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity; including sections on hate crimes, hate speech, freedom of association, and assembly. It states that the recommendations invite the member states to guarantee these principles and measures and be applied in national legislation, policies, and practices relative to the protection of the human rights of LGBTIQ+ persons and the promotion of tolerance towards them.¹⁶⁴ The Parliamentary Assembly of the CoE has also been active on this issue and recently passed a resolution titled “Discrimination based on sexual orientation and gender identity”.¹⁶⁵ Recent language from the Parliamentary Assembly of the Council of Europe makes it clear that the human rights protections of the CoE include LGBTIQ+ persons. Discrimination based on sexual orientation goes against the European Convention on Human Rights and its Protocol No. 12, Article 1 on the general prohibition of discrimination and it is not acceptable in the Council of Europe member states.¹⁶⁶ Additionally, Article 14 in line with the ICCPR Article 26, states that “the enjoyment of the rights and freedoms outlined in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national, or social origin, association with a national minority, property, birth or other status”. In the case of *Rasmussen v. Denmark*,¹⁶⁷ the European Court of Human Rights states that “Article 14 complements the other substantive provisions of the Convention and the Protocols”. It has no independent existence since it affects solely “the enjoyment of the rights and freedoms” safeguarded by those provisions. It is clear from the wording of Article 1 that it

¹⁶² Ivanus 2014:61.

¹⁶³ Council of Europe 2010a.

¹⁶⁴ Council of Europe 2010a.

¹⁶⁵ Parliamentary Assembly 2010a.

¹⁶⁶ Parliamentary Assembly 2003.

¹⁶⁷ *Rasmussen v Denmark, Judgment (Merits), Case No 9/1983/65/100, App No 8777/79 (A/87), [1984] ECHR.*

is an independent provision prohibiting discrimination in the enjoyment of any right or benefit under national law.

The European Convention on Human Rights does not include any mention of LGBTIQ+ rights, nor does it make any mention of “sexual orientation” or “gender identity”.¹⁶⁸ Despite this, the system has evolved in a way that has allowed LGBTIQ+ people to have their rights completely acknowledged and respected.¹⁶⁹ Evidence of the positive impact of robust protections for sexual minorities can be seen in various European countries where such measures have been implemented. For instance, countries like Sweden and the Netherlands, which have strong legal frameworks and supportive social policies for LGBTIQ+ individuals, report higher levels of societal acceptance and better outcomes for these communities. The activists and members of the LGBTIQ+ community can file cases before the European Court of Human Rights and the European Commission on Human Rights.¹⁷⁰ While the founding document is silent on LGBTIQ+ rights, the Commission and the Court have been proactive and courageous in their efforts to build jurisprudence in this area. Since 1955, gay men and lesbians have gradually developed “tactical complaints” that involve the deliberate application of specific ECHR provisions.¹⁷¹ This evolution may help guide future efforts to make better use of the African Commission on Human and People’s Rights (ACmHPR)’s provisions. Furthermore, it is evident from the rulings and decisions of the ECmHR and ECtHR that the establishment of homosexual rights under the ECHR has been significantly influenced by the institutional acceptance of sexual orientation as an unchangeable facet of “human nature”.¹⁷² It is clear from the evidence provided above that the European system of human rights has played a critical role on the international stage. By setting a high standard for the protection and promotion of sexual minority rights within their borders, EU countries can influence global norms and encourage other nations to adopt similar measures. By championing the rights of sexual minorities, the EU governments can contribute to a global movement towards greater

¹⁶⁸ Namwase & Jjuuko 2017:290.

¹⁶⁹ Namwase & Jjuuko 2017:290.

¹⁷⁰ Namwase & Jjuuko 2017:290.

¹⁷¹ Johnson 2013:254.

¹⁷² Johnson 2013:254.

equality and non-discrimination, reinforcing the universality of human rights. However, despite these significant advancements, challenges remain. Issues such as the full legal recognition of non-binary individuals, ensuring comprehensive anti-discrimination protections across all member states, and addressing the rise of anti-LGBTIQ+ sentiments in some regions require continued attention and action.

2.4. The Inter-American System of Human Rights

The inter-American system is a vital mechanism for promoting and protecting human rights across the Americas. It was established primarily through the American Convention on Human Rights and the American Commission on Human Rights. It is the system that is designed to uphold the principles outlined in the American Declaration of the Rights and Duties of Man. The principal human rights organisations within the inter-American human rights systems are the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights.¹⁷³ The commission has the authority to review state reports, interpret the agreement, and deal with situations involving Convention violations.¹⁷⁴ Cases from the Inter-American Commission are brought before the Inter-American Court. Although the Convention does not contain a specific provision on LGBTIQ+ rights, it does protect all human rights and states in Article 1 that all people are entitled to the rights outlined in the Convention.¹⁷⁵ The non-discrimination clause is found in Article 24. Like all other international instruments, neither Article 1 nor Article 24 mentions gender identity or sexual orientation. Nonetheless, sex and the phrase "other social condition" are mentioned in Article 1.¹⁷⁶

The Inter-American human rights system has dealt with sexual minority rights, especially through consideration of cases. For Instance, the *Karen Atala v Chile*,¹⁷⁷ case involved the denial of custody of children to a lesbian mother. The court ruled that sexual orientation and gender identity are protected categories under the American Convention

¹⁷³ Namwase & Jjuuko 2017:289.

¹⁷⁴ Namwase & Jjuuko 2017:289.

¹⁷⁵ Namwase & Jjuuko 2017:289.

¹⁷⁶ Namwase & Jjuuko 2017:289.

¹⁷⁷ *Karen Atala v Chile*, IAm Comm of HR (24 February 2012) OEA/Ser.L/V/II.130 Doc 22 rev 1.

on Human Rights, and discrimination based upon these categories is prohibited. It also emphasized that all families regardless of sexual orientation, are entitled to protection, not just “traditional” families. In *José Alberto Pérez Meza v Paraguay*,¹⁷⁸ the Commission considered a case of discrimination based on the state’s prohibition of same-sex marriages. However, it was dismissed because the applicant could not substantiate the claim. In light of the cases stated above, it is evident that there are still significant gaps in the implementation and enforcement of LGBTIQ+ rights within the Inter-American human rights system. Cultural, religious, and political resistance in some member states continues to hinder the full realisation of these rights. To address these gaps, the system must provide more explicit guidelines and ensure continuous monitoring to guarantee that states comply with their obligations under the American Convention and the American Declaration on Human Rights.

2.5. THE AFRICAN HUMAN RIGHTS SYSTEM

The African Human Rights System represents a multifaceted approach to protecting and promoting human rights on the continent. Its core lies with the African Charter on Human and Peoples’ Rights (ACHPR), adopted in 1981, which serves as the principal regional human rights instrument. In addition, the ACHPR is supplemented by the African Commission on Human and People’s Rights (ACmHPR), which is the primary monitoring body, tasked with promoting human rights, interpreting the ACHPR, and considering individual and state complaints.¹⁷⁹ Furthermore, the African Court on Human and People’s Rights (ACtHPR) provides a judicial forum for individuals and states to seek redress for human rights violations. Therefore, the instrument and mechanism of the African Human Rights system shall be explored further below to clarify their efficacy in addressing matters related to the rights of sexual minorities.

The rights recognised by the African system are outlined in the The African Charter on Human and People's Rights which serves as the foundation for the continent's human

¹⁷⁸ *José Alberto Pérez Meza v Paraguay Petition 19/99, Report 96/01, 10 October 2001.*

¹⁷⁹ Persad 2013:360.

rights framework.¹⁸⁰ Additionally, it creates the African Commission, whose job it is to uphold and advance human rights throughout the continent.¹⁸¹ Furthermore, three bodies under the African Human Rights system are briefly examined in this section along with their implications for the rights of sexual minorities in Africa.

The African Charter on Human Rights contains a non-discrimination provision in line with other regional and international systems. Article 2 states that:

“Every individual shall be entitled to the enjoyment of the rights and freedoms without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth, or any status”.¹⁸²

On the other hand, not much is known about how this non-discrimination clause applies to situations involving sexual orientation. Neither the African Commission on Human and People's Rights nor the African Court on Human and People's Rights have made any explicit rulings regarding discrimination based on sexual orientation because there is a lack of case law on the subject.¹⁸³ Taking that into consideration, we can only speculate that, if African bodies interpret a provision nearly identical to that found in the ICCPR and ECHR, they will follow the HRC's and the ECtHR's lead and declare that discrimination based on sexual orientation should be outlawed and denounced in general.¹⁸⁴

In the case of *Courson v Zimbabwe, African Commission on Human and Peoples' Rights, Comm. No. 136/94 (1995)*.¹⁸⁵ Mr. Courson filed a complaint against Zimbabwe in 1994, alleging that the African Charter's prohibition on private sexual relations between consenting adult homosexual men violated his rights, particularly the right not to face discrimination based on sexual orientation.¹⁸⁶

The Commissioner acting as a rapporteur for the case openly declared that:

¹⁸⁰ Namwase & Jjuuko 2017:266.

¹⁸¹ Namwase & Jjuuko 2017:266.

¹⁸² Namwase & Jjuuko 2017:266.

¹⁸³ Abrusci 2017:250.

¹⁸⁴ Abrusci 2017:250.

¹⁸⁵ *Courson v Zimbabwe, African Commission on Human and Peoples' Rights, Comm. No. 136/94 (1995)*.

¹⁸⁶ *William A Courson v Zimbabwe, Comm No 136/94 (ACommHPR, withdrawn 22 March 1995)*.

“because of the deleterious nature of homosexuality, the commission seizes the opportunity to make a pronouncement on it. Although homosexuality and lesbianism are gaining recognition in certain parts of the world, this is not the case in Africa. Homosexuality offends the African sense of dignity and morality and is inconsistent with positive African values”.¹⁸⁷

It was not unexpected that Mr. Courson withdrew his application following such a declaration, and the Commission never rendered a decision on the matter.¹⁸⁸ Given the outcome of Mr. Courson’s case and the absence of explicit rulings by the African Commission on Human and People’s Rights and the African Court on Human and People’s Rights regarding discrimination based on sexual orientation. Therefore, it is essential to critically evaluate the current state of protection and promotion of sexual minorities’ rights in Africa. The lack of judicial clarity leaves sexual minorities exposed to discrimination and abuse, fostering an environment of fear and marginalisation. To advance the protection and promotion of sexual minority rights, the African human rights system must take decisive action. The African Commission and Court should prioritise the development of explicit guidelines and rulings that unequivocally condemn discrimination based on sexual orientation and gender identity.

Moreover, some scholars argue that these few developments signal that the African Commission on Human and People’s Rights (ACmHPR) and possibly the African Court on Human and Peoples’ Rights (ACtHPR) will continue to support LGBTIQ+ people’s protection from discrimination based on their sexual orientation.¹⁸⁹ Furthermore, it should be noted that the African Commission has not yet received any applications from people reporting discrimination based on sexual orientation. This is due to the statement made by the commissioner in the case of *Zimbabwe Human Rights NGO Forum v Zimbabwe (2006)*¹⁹⁰, asserting that “..homosexuality offends the African sense of dignity and morality and is inconsistent with positive African values.” Consequently, many LGBTIQ+

¹⁸⁷ EA Ankumah “The African Commission on Human and Peoples’ Rights: Practice and Procedures (Nijhoff 1996) 174, as quoted in F Viljoen, *International Human Rights Law in Africa* (OUP 2012) 265.

¹⁸⁸ Abrusci 2017:251.

¹⁸⁹ Abrusci 2017:251.

¹⁹⁰ *Zimbabwe Human Rights NGO Forum v Zimbabwe (2006) AHRLR 128 (ACHPR 2006)*.

individuals feel discouraged from reporting cases of discrimination and abuse, believing that their complaints will not be adequately ruled on or investigated. This is despite the fact that 31 African nations criminalise homosexual relationships and four of them continue with the death penalty. The African human rights system has not been effective in advancing the protection and promotion of sexual minority rights. Firstly, it has yet to issue an explicit ruling addressing discrimination based on sexual orientation, resulting in a lack of legal clarity and enforcement, and failing to establish necessary precedents for LGBTIQ+ rights. Secondly, deep-seated cultural and religious beliefs in many African countries oppose LGBTIQ+ rights, entrenching societal resistance and impeding progress. Thirdly, due to stigma and fear of retribution, many sexual minorities are reluctant to report rights violations. Even when reports are made, there is a lack of effective mechanisms to ensure thorough investigations and appropriate redress.

2.5.1. African Charter on Human and Peoples' Rights

The African Charter on Human and People's Rights (ACHPR) is a pivotal document in the realm of international human rights law. It was adopted in 1981 by the organisation of African Unity (now the African Union) following the most violent resistance to colonialism.¹⁹¹ The African Charter was enacted, in part, to guarantee the equality of all people, as colonialism had portrayed African states and people as inferior to their European colonisers. The primary human rights instrument in the African human rights system is the African Charter, to which all other instruments are referred. It is the one that establishes the rights acknowledged by the African system. Essentially, the African Charter makes no mention of the rights of sexual minorities. This does not imply, however, that these rights are absent from the African Charter. Quite the contrary—it shows that LGBTIQ+ people have the same rights as everyone else.

The African Union Constitutive Act affirms the need to protect democratic principles, the rule of law, good governance, and the rights of individuals and groups. Therefore, it would be absurd to imply that LGBTIQ+ people were excluded from this plan and that discrimination against them is approved by the African Charter. Enjoying freedom,

¹⁹¹ Namwase & Jjuuko 2017:267.

equality, justice, and dignity requires not being persecuted because of one's sexual orientation. The international instruments that have been interpreted to protect LGBTIQ+ rights served as the model for the African Charter. African Charter aims to complement the UN human rights system, not to replace it. It directly recognises the UN Charter and the Universal Declaration of Human Rights, which are the foundational documents of the UN human rights systems.

The universalist language used in the African Charter is likewise inclusive.¹⁹² The general layout of the African Charter's language demonstrates that human rights are universal and apply to everyone, regardless of differences, even though it is understood in extremely careful language to reflect a unique system.¹⁹³ The African Charter uses the terms “every person”, “every individual”, “every human being”, or “every citizen” when defining rights; for negative rights, it uses “no one”. The phrase “all people” is used in the plural. This language is inclusive; it does not permit the exclusion of people or groups.¹⁹⁴ The African Commission's interpretation of Article 2 of the African Charter is significant. It states that “all individuals are entitled to the rights outlined in the document without distinction of any kind, such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status”, ends all reasonable doubt.¹⁹⁵ Considering the advancements in the UN human rights system, the listing of “sex” and “other status” further demonstrates that gender identity and sexual orientation can be included here. The inclusion of the fundamental rights for LGBTIQ+ people—the right to equality and the right to dignity—in the African Charter demonstrates how highly these rights are valued in comparison to other legal frameworks.

2.5.2. The African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights (ACmHPR) stands as a cornerstone institution within the African Human Rights system, established by the African Charter on Human and Peoples' Rights (ACHPR) in 1987. The commission is entrusted

¹⁹² Namwase & Jjuuko 2017:268.

¹⁹³ Namwase & Jjuuko 2017:268.

¹⁹⁴ Namwase & Jjuuko 2017:268.

¹⁹⁵ Namwase & Jjuuko 2017:268.

with promoting and protecting human rights throughout the African continent as the principal monitoring body. Additionally, it receives and examines reports from member states and conducts country visits to assess compliance with human rights standards. The mandate of the ACmHPR is to interpret and implement the provisions as outlined in the ACHPR. The African Commission on Human and People's Rights has two main mandates, promotion and protection. Under the protection mandate the Commission receives and considers communications submitted to it mainly by individuals and groups of individuals.¹⁹⁶ The African Commission has, after a long period of resistance towards the protection of LGBTIQ+ rights, finally taken the lead with the passing of the resolution and the grating of the observer to the Coalition of African Lesbians (CAL).¹⁹⁷ This is an important step that legitimises the protection and promotion of sexual minority rights within the African system. A precedent has been set that other organs can replicate, and which has also perhaps emboldened the Commission to do more.¹⁹⁸ It is steps like these that perhaps made it possible for the East African Court of Justice to hear the case challenging Uganda's Anti-Homosexuality Act on its merits rather than first dispose of the preliminary objections.¹⁹⁹ Over the years, the African Commission's approach towards LGBTIQ+ issues has undergone a visible and marked change. Previously characterised by clear hostility, it now passes protective resolutions and recognises organisations working to protect sexual minority rights, regardless of their names explicitly referring to same-sex relations.

The African Commission is a great step in the right direction and a great potential that the African system has to protect and promote the rights of sexual minorities. However, they cannot be considered in isolation and a bigger picture shows that other organs within the African Human rights system have not done much to protect and promote the rights of sexual minorities. More jurisprudence has been developed by the African Commission than by any other African human rights organisation. Nevertheless, not much of it directly addresses LGBTIQ+ rights. However, over the course of its many years in existence and

¹⁹⁶ Ako 2010:20.

¹⁹⁷ Ako 2010:20.

¹⁹⁸ Ako 2010:20.

¹⁹⁹ Ako 2010:20.

particularly in the past ten years, the African Commission has taken a more active role in promoting LGBTIQ+ rights. The African Commission on Human and Peoples' Rights (ACmHPR) has actively promoted LGBTIQ+ rights through several key actions. In 2014, it adopted Resolution 275, condemning violence and discrimination based on sexual orientation and gender identity.²⁰⁰ The ACmHPR has commissioned thematic reports and studies to provide data, analysis, and recommendations for improving LGBTIQ+ rights protections.²⁰¹ By granting observer status to civil society organisations advocating for LGBTIQ+ rights, the ACmHPR facilitates their participation in sessions and advocacy efforts. Special mechanisms, such as Special Rapporteurs and committees, address LGBTIQ+ rights within their mandates and reports.²⁰² The ACmHPR also urges states to protect LGBTIQ+ individuals and align national laws with international standards through concluding observations and recommendations.²⁰³ Furthermore, by considering cases involving LGBTIQ+ rights, the ACmHPR establishes legal precedents. Finally, the ACHPR raises awareness about LGBTIQ+ human rights issues through statements, press releases, and participation in international forums.²⁰⁴ These efforts collectively demonstrate the ACHPR's commitment to advancing LGBTIQ+ rights in Africa.²⁰⁵ Furthermore, the African Commission is tasked with both promotion and protection mandates. Its communication protocol makes up its protective mandate. The remainder of its work is promotional and includes carrying out missions and research, special procedures, and state report consideration.

²⁰⁰ African Commission on Human and Peoples' Rights (ACHPR) 2014 "Resolution 275: Protection against Violence and Other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity", <https://www.achpr.org/sessions/resolutions?id=322> (accessed on 27 June 2024).

²⁰¹ African Commission on Human and Peoples' Rights (ACHPR) 2014 "Resolution 275: Protection against Violence and Other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity", <https://www.achpr.org/sessions/resolutions?id=322> (accessed on 27 June 2024).

²⁰² African Commission on Human and Peoples' Rights (ACHPR) 2014 "Resolution 275: Protection against Violence and Other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity", <https://www.achpr.org/sessions/resolutions?id=322> (accessed on 27 June 2024).

²⁰³ African Commission on Human and Peoples' Rights (ACHPR) 2014 "Resolution 275: Protection against Violence and Other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity", <https://www.achpr.org/sessions/resolutions?id=322> (accessed on 27 June 2024).

²⁰⁴ African Commission on Human and Peoples' Rights (ACHPR). (n.d.), <https://www.achpr.org/> (accessed on 27 June 2024).

²⁰⁵ African Commission on Human and Peoples' Rights (ACHPR). (n.d.), <https://www.achpr.org/> (accessed on 27 June 2024).

2.5.3. The African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights (ACtHPR) is a dynamic judicial institution within the African Human Rights System. It was established to complement the African Commission on Human and Peoples' Rights in ensuring the effective protection and promotion of human rights across the continent. In addition, it serves as the regional court with jurisdiction to hear cases concerning alleged violations of human rights as guaranteed by the African Charter on Human and Peoples' Rights and other relevant human rights instruments ratified by the state members²⁰⁶. The primary mandate of the ACtHPR is to adjudicate cases brought before the Court by individuals, non-governmental organisations, and the state parties to the Protocol. The African Commission's protective mandate is enhanced by the African Court on Human and Peoples' Rights. It renders final judgments that the state parties must abide by. When a violation is identified, the court has the authority to issue the necessary orders to address it²⁰⁷. Additionally, the African Court has the authority to impose temporary measures in situations requiring immediate attention, great severity, or the need to shield individuals from irreversible harm. Subject to a state's declaration permitting such access, individuals and non-governmental organisations are eligible to seek justice from the African Court²⁰⁸. Only seven states have done this to date, which has significantly reduced the African Court's ability to hear cases about human rights. Furthermore, only four countries—Rwanda, Tanzania, Benin, and Côte d'Ivoire - have withdrawn their declarations. Unsurprisingly, there have been no LGBTIQ+ rights cases heard by the African Court to date.

A case or dispute about the interpretation and application of the African Charter, the court's founding protocol, or any other pertinent human rights instrument ratified by the relevant states may be brought before the African court for adjudication. As a result, it has broad jurisdiction that even includes the rights guaranteed by UN human rights instruments. Additionally, it gives the African Court the authority to offer advisory opinions “on any legal matter relating to the Charter or any other human rights instruments at the

²⁰⁶ Johnson 2013:256.

²⁰⁷ Johnson 2013:256.

²⁰⁸ Johnson 2013:256.

request of an African organization recognized by the African Union, any of its organs, or a member state of the African Union”.²⁰⁹ The African Court is mandated by the Protocol to apply the African Charter and any other relevant human rights instruments that the state in question has ratified when making case decisions. Accordingly, the African Charter and other UN instruments, which safeguard the rights of all people, including LGBTIQ+ people, may therefore be applied by the African Court.

In addition, people must file complaints with the African Commission on Human and Peoples Rights (ACmHPR) to obtain indirect access to the African Court on Human and Peoples’ Rights (ACtHPR).²¹⁰ Under Article 55(2) of the ACHPR, “a communication shall be considered by the Commission if a simple majority of its members so decide”, and if Article 56(2) determines that the communication is “compatible” with the ACHPR.²¹¹ The ACmHPR is extremely unlikely to take individual complaints from homosexuals, much less forward them to the ACtHPR. This is based on the ACmHPR's silence on homosexuality-related issues, inability to deliver a promised position paper on sexual orientation and human rights, and lack of consideration of a homosexuality-related complaint.²¹²

Nevertheless, the evolution of gay and lesbian rights under the ECHR indicates that creating a “voice” through complaints is essential, even though a variety of social, cultural, and economic factors may discourage and hinder complaints to the ACtHPR and ACmHPR regarding sexual orientation.²¹³ If complaints are to be filed, one essential component must be in place: a strategic grasp of how the ACHPR may be used as a tool to conceptualise and file complaints regarding discrimination based on sexual orientation in Africa.²¹⁴

²⁰⁹ Johnson 2013:256.

²¹⁰ Johnson 2013:256.

²¹¹ Johnson 2013:256.

²¹² Johnson 2013:256.

²¹³ Johnson 2013:256.

²¹⁴ Johnson 2013:256.

2.6. CONCLUSION

Matters relating to sexual minorities have become increasingly prominent topics of discussion in international human rights law. It is now acknowledged that the general provisions found in international human rights instruments are insufficient to safeguard and advance the rights of sexual minorities. Moreover, laws that protect sexual minorities are a necessary condition, but not necessarily a sufficient one. The presence of domestic and international laws protecting gay rights is not enough to change a population's attitudes and actions towards the LGBTIQ+ community.

There has been progress in decriminalising consenting same-sex relationships in many jurisdictions, outlawing discrimination based on gender identity and sexual orientation, and recognising same-sex partnerships through marriage equality or civil unions. To guarantee that sexual minorities have the same rights and protections as everyone else, these legislative changes are essential. But despite these developments, challenges still exist. Many sexual minorities continue to experience marginalisation, violence, and discrimination. In addition, there are nations where homosexuality is still illegal and where people who identify as sexual minorities still live in fear of being persecuted. Therefore, to advance the rights of sexual minorities, governments, civil society organisations, and international bodies must continue to work together. This entails fighting discrimination and violence by raising awareness and promoting education in addition to passing and upholding laws that guard against violence and discrimination experienced by LGBTIQ+ persons.

In conclusion, there is still more work to be done, even though international laws regarding the rights of sexual minorities have seen tremendous advancements. To guarantee that everyone can live their life free from discrimination and fear, regardless of their sexual orientation or gender identity, advocacy, education, and cooperation must continue. The following chapter will examine current African laws relating to homosexual orientation and gay rights. It also looks at obstacles to same-sex acts being decriminalised in Africa. Additionally, ideas like homosexuality as immorality, a religious abomination, and offensive to African culture and traditions will be covered in this chapter. The chapter also

examines the effects that cultural, religious, and sociopolitical variables have on the rights of sexual minorities. It also examines case studies from the mentioned African countries, comparing their challenges and successes in enforcing the rights of sexual minorities. The chapter further examines the likelihood of homosexuality being accepted and decriminalised in African countries.

CHAPTER THREE

AFRICAN LAWS AND THEIR IMPACT ON THE RIGHTS OF SEXUAL MINORITIES

3.1. INTRODUCTION

Many countries in the Western world have proactively abolished outdated laws that criminalise same-sex relations, aligning their legal framework with contemporary human rights standards.²¹⁵ However, this progressive shift has not been mirrored by many African countries. In Africa, individuals engaging in same-sex relations continue to face severe persecution and oppression, often justified by claims that such practices are contrary to African cultural values.²¹⁶ Furthermore, the legal landscape across Africa presents a complex and often hostile environment for sexual minorities. Laws in many African countries, directly and indirectly, discriminate against individuals based on their sexual orientation and gender identity. These legal provisions not only criminalise same-sex relationships but also institutionalise prejudice, thereby perpetuating discrimination and violence against LGBTIQ+ persons.²¹⁷

By examining specific laws and their impact on the rights and lives of the sexual minority, this chapter will delve into various current African laws relating to homosexuality and gay rights in four countries: Uganda, Kenya, Nigeria, and Zimbabwe. First, it will analyse the specific legal framework and its implications in these countries as well as present case studies from the aforementioned African countries, comparing their challenges and successes in enforcing the rights of sexual minorities. Second, it will examine the obstacle to the decriminalisation of same-sex acts in Africa. Third, It will explore the prevalent ideas that portray homosexuality as immorality, a religious abomination, and offensive to African culture and traditions. Fourth, it will assess the effects that cultural, religious, and sociopolitical variables have on the rights of sexual minorities. Lastly, it will examine the

²¹⁵ Jones 2019 *Cultural Challenges: The struggle for LGBTIQ+ rights in Africa.* Human Rights Watch.

²¹⁶ Smith 2020 *Global Progress: Decriminalization of Same-Sex Relations in the Western World.* International Journal of Human Rights.

²¹⁷ Smith 2020 *Global Progress: Decriminalization of Same-Sex Relations in the Western World.* International Journal of Human Rights.

likelihood of homosexuality being accepted and decriminalised in African countries, considering the current trends and future prospects.

3.2. CURRENT AFRICAN LAWS ON HOMOSEXUALITY AND GAY RIGHTS AND CASE STUDIES OF CHALLENGES AND SUCCESSES IN ENFORCING THE RIGHTS OF SEXUAL MINORITIES

African laws relating to homosexuality and gay rights vary significantly across the continent, reflecting a wide range of societal, religious, and political attitudes towards the sexual minority individual. While some countries have made strides towards recognising and protecting the rights of homosexual individuals, many others continue to enforce strict laws that criminalise same-sex relationships and restrict the rights of LGBTIQ+ people. With this context in mind, the current laws of Uganda, Kenya, Nigeria, and Zimbabwe will be analysed. The case studies will explore the challenges and successes in enforcing the rights of sexual minorities in these countries.

3.2.1. UGANDA

3.2.1.1. THE CURRENT UGANDAN LAWS ON HOMOSEXUALITY AND GAY RIGHTS

Uganda's national laws regarding homosexuality and gay rights are among the strictest in the world, reflecting deep-seated societal, cultural, and political opposition.

a. Penal Code Act 1950

The Penal Code Act 1950 contains provisions banning homosexual intercourse. The following sections of the Act are relevant:

Section 145. Unnatural offences. Any person who

- a) "Has a carnal knowledge of any person against the order of nature (or)
- b) Has a carnal knowledge of an animal (or)
- c) Permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence, and is liable to imprisonment for life".²¹⁸

²¹⁸ *The Penal Code Act of 1950:sec. 145.*

Section 146. Attempt to commit unnatural offences. Any person who

“attempts to commit any of the offences specified in section 145 commits a felony and is liable to imprisonment for seven years”.²¹⁹

Section 148. Indecent practices. Any person who,

“whether in public or in private, commits any act of gross indecency with another person or procures another person to commit any act of gross indecency with him or her or attempts to procure the commission of any such act by any person with himself or herself or another person, whether in public or in private, commits an offence and is liable to imprisonment for seven years”.²²⁰

b. Anti-Homosexuality Act, 2014

On October 13, 2009, the Ugandan Parliament introduced the Anti-Homosexuality Act, which sought to broaden the criminalization of same-sex relationships. It also aimed to introduce the death penalty for serial offenders, HIV-positive individuals who participate in sexual activity with people of the same sex, and persons engaged in same-sex acts with individuals under 18 years of age.²²¹ Additionally, the Act imposed fines or imprisonment, or both, on individuals or companies that promote LGBTQ+ rights. It also mandated that persons “in authority” report any offenses under the Act within 24 hours, with failure to do so resulting in up to three years of imprisonment.²²²

The bill was passed on December 17, 2013, with a revised punishment of life imprisonment instead of the death penalty for “aggravated homosexuality,” and the new law was promulgated in February 2014.²²³ However, the bill was successfully challenged in court and was subsequently annulled. Despite this annulment, the enactment of the Act led to significant international repercussions. The United States Department of State announced several sanctions, including funding cuts, barring certain Ugandan officials

²¹⁹ *The Penal Code Act/1950:sec. 146.*

²²⁰ *The Penal Code Act/1950:sec. 148.*

²²¹ *Anti-homosexuality Act/2014.*

²²² *Anti-Homosexuality Act/2014.*

²²³ Harding 2014 “Uganda court annuls anti-homosexuality law”, <https://www.bbc.com/news/world-africa-28605400> (accessed on 10 July 2024).

from entering the country, canceling aviation exercises in Uganda, and supporting Ugandan LGBTIQ+ NGOs.²²⁴ Nevertheless, the Ugandan government remained undeterred, as evidenced by implementing another stringent law just a year ago. This resilience indicates a strong governmental stance on maintaining and enforcing these discriminatory laws, further entrenching the challenges faced by sexual minorities in Uganda.

c. Anti-Homosexuality Act, 2023

In May 2023, Uganda passed the Anti-Homosexuality Act,²²⁵ which imposes some of the harshest penalties globally for same-sex acts and related activities. This law criminalises not just same-sex acts but also the “promotion” and “abetting” of homosexuality.²²⁶ Notably, it introduces the death penalty for “aggravated homosexuality” which includes cases where the “offender” is HIV-positive, involves a minor, a person with disabilities, or if the act is non-consensual.²²⁷ Furthermore, consensual same-sex relations can result in life imprisonment. However, international human rights organisations have condemned Uganda’s anti-LGBTIQ+ laws, arguing that they violate fundamental human rights. In response to the 2023 legislation, some countries and international bodies have threatened or imposed sanctions and cut aid to Uganda, highlighting the broader geopolitical and economic implications of these laws.²²⁸ The 2023 Anti-Homosexuality Act builds upon existing legislation specifically the Penal Code Act mentioned earlier.

Other penalties under the Anti-Homosexuality Act include:

- Three years imprisonment for minors convicted of homosexuality
- Ten years imprisonment for knowingly renting premises to people who wish to engage in homosexual acts on such premises.
- Twenty years imprisonment for promoting homosexuality.

²²⁴ Harding 2014 “Uganda court annuls anti-homosexuality law”, <https://www.bbc.com/news/world-africa-28605400> (accessed on 10 July 2024).

²²⁵ *The Anti-Homosexuality Act/2023*.

²²⁶ Shaw 2023:2-3.

²²⁷ Shaw 2023:2-3.

²²⁸ Amnesty International 2023 “Uganda: New anti-homosexuality law is a grave assault on human rights,” <https://www.amnesty.org/en/latest/news/2023/05/presidents-musevenis-approval-of-anti-lgbti-bill-is-a-assault-on-human-rights/> (accessed on 10 July 2024).

- Ten years imprisonment for “purporting to contract a same-sex marriage”, as well as for knowingly attending a purported same-sex marriage ceremony.
- Five years imprisonment for failing to report a witnessed homosexual act, however, lawyers acting in their official capacity are exempt from this provision.
- One-year imprisonment for falsely accusing another person of homosexuality.²²⁹

In August 2023, a 20-year-old man became the first person prosecuted for “aggravated homosexuality” under Uganda’s stringent new anti-LGBTIQ+ legislation. According to the charge sheet, he was accused of unlawful sexual intercourse with a 41-year-old man. The 20-year-old man faced the death penalty under the Uganda’s new Anti-Homosexuality Act because he was charged with “aggravated homosexuality”. This category of the offense is punishable by death. In his case, the charge sheet indicated he had unlawful sexual intercourse with a 41-year old man, but it did not clarify why this act was considered “aggravated”.²³⁰ Additionally, the declaration of some provisions of the 2023 Anti-Homosexuality Act as unconstitutional in *Hon. Fox Odoi & 21 Others v Attorney General & Others* (2024), significantly affects the discussion by introducing a legal shift in Uganda’s treatment of the Act. One of the key implications is that the court ruling may strike down some of the harsher penalties or provisions that were deemed unconstitutional, such as the death penalty for “aggravated homosexuality” or life imprisonment for consensual same-sex relations. Although, the overall framework of the Act could still remain in place, this ruling may prompt the government to review or amend the law, potentially softening its provisions or removing unconstitutional aspects. As a result, this decision sets a significant legal precedent, offering hope for future challenges to similar discriminatory laws in Uganda. Moreover, it is seen as a step toward compliance with the international human rights standards.

²²⁹ *Anti-homosexuality Act/2023*.

²³⁰ 2023 Uganda’s Anti-LGBT laws: Man faces death penalty for ‘aggravated homosexuality’, <https://www.bbc.com/news/world-africa-66645740> (accessed on 10 July 2024).

3.2.1.2. CHALLENGES AND SUCCESSES IN ENFORCING THE RIGHTS OF SEXUAL MINORITIES IN UGANDA

Uganda is in extreme opposition to the recognition of the rights of sexual minorities. Apart from keeping the colonial anti-sodomy laws on its statute books, the country has introduced measures aimed at broadening the scope of criminal sanctions against homosexuality.²³¹ Notably, Uganda implemented the “Kill the Gays Bill,” a colloquial reference to the Anti-Homosexuality Bill. It was introduced as a private member’s bill and signed by President Museveni in 2009. This bill, like similar initiatives in Zimbabwe, sought to leverage anti-gay sentiment for political gain, using it as a tool to mobilise support and scapegoat political opponents.²³² Under the bill, homosexuality would be punishable even by death, and friends and neighbors would be obligated to report individuals suspected of engaging in same-sex relations.²³³ This extreme legislation reflects the deeply entrenched cultural, political, and religious fundamentalism driving the backlash against the LGBTIQ+ community in Uganda.²³⁴ Consequently, the immediate result of this bill has been a state-sanctioned witch-hunt against the homosexual community, publicly approved and supported by both the state and the media. One saddening example is the brutal murder of David Kato, who was the advocacy officer for Sexual Minorities Uganda (SMUG), on 26 January 2011.²³⁵ His murderer, Nsubuga Sydney, who was supposed to serve 30 years in prison, was released after the appeals for lynch justice against homosexuals were put into practice. These appeals were made over several months by Ugandan politicians, Pentecostal preachers, and many in the media.²³⁶

Transitionally, it is important to note the significant role of evangelical organisations in Uganda. These organisations have not only initiated homophobic sentiments but also

²³¹ Gloppen & Rakner 2021:204.

²³² Gloppen & Rakner 2021:204.

²³³ Msibi 2011:66.

²³⁴ Msibi 2011:66.

²³⁵ Pillay “What David Kato's death can teach the world”, <https://www.un.org/africarenewal/web-features/what-david-katos-death-can-teach-world> (accessed on 30 June 2024).

²³⁶ Pillay “What David Kato's death can teach the world”, <https://www.un.org/africarenewal/web-features/what-david-katos-death-can-teach-world> (accessed on 30 June 2024).

actively spread them, wielding considerable influence over villagers and government members alike. This influence has been used to silence individuals engaging in same-sex relations, creating an environment of fear and repression.²³⁷ The murder of David Kato and the subsequent release of his murderer underscore the severe and dangerous climate for LGBTIQ+ individuals in Uganda. The influence of evangelical organizations and widespread societal support for criminalizing sexual minorities illustrate the grave challenges faced by the LGBTIQ+ community. This situation emphasizes the urgent need for governmental interventions, continued advocacy, and international pressure to protect their rights and lives.

3.2.2. KENYA

3.2.2.1. THE CURRENT KENYAN LAWS ON HOMOSEXUALITY AND GAY RIGHTS

Kenya's current laws relating to homosexuality and gay rights are primarily governed by the Penal Code, which criminalises homosexual acts. Specifically, Sections 162 and 165 of the penal code explicitly prohibit "carnal knowledge against the order of nature" and "gross indecency," which are interpreted to include consensual same-sex relationships.²³⁸ On 24 May 2019, the High Court of Kenya upheld these sections, refusing an order to declare them unconstitutional.²³⁹ This decision reinforced the legal framework that criminalises homosexual acts between consenting adults. Moreover, the state does not recognise any relationships between persons of the same sex. Since 2010, same-sex marriage has been explicitly banned under the Kenyan Constitution.²⁴⁰ Additionally, adoption rights are restricted to heterosexual couples only, thereby denying same-sex couples the legal right to adopt children.²⁴¹ Furthermore, there are no explicit protections

²³⁷ Msibi 2011:59.

²³⁸ Hansford 2023 "Kenya set to introduce cruel anti-homosexuality law", <https://www.thepinknews.com/2023/07/20/kenya-anti-homosexuality-law-africa/> (accessed on 08 July 2024).

²³⁹ Hansford 2023 "Kenya set to introduce cruel anti-homosexuality law", <https://www.thepinknews.com/2023/07/20/kenya-anti-homosexuality-law-africa/> (accessed on 08 July 2024).

²⁴⁰ Hansford 2023 "Kenya set to introduce cruel anti-homosexuality law", <https://www.thepinknews.com/2023/07/20/kenya-anti-homosexuality-law-africa/> (accessed on 08 July 2024).

²⁴¹ Klinken 2019 "Explainer: what's at stake in Kenyan court case on gay rights", <https://theconversation.com/explainer-whats-at-stake-in-kenyan-court-case-on-gay-rights-112317> (accessed on 29 June 2024).

against discrimination based on sexual orientation and gender identity in Kenyan law, leaving the LGBTIQ+ community vulnerable to systematic discrimination and abuse.²⁴²

Kenyan society is highly conservative and the majority hold negative views on LGBTIQ+ individuals. Section 162 of the Kenyan Penal Code of 1930, as amended in 2006, provides as follows:

“Any person who–

(a) Has carnal knowledge of any person against the order of nature; or

(c) Permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony, and is liable to imprisonment for fourteen years.”²⁴³

According to section 163

Any person -

“who attempts to commit any of the offenses specified in section 162 is guilty of a felony and is liable to imprisonment for seven years”.²⁴⁴

Section 165 of the Kenyan constitution states that:

“any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years”.²⁴⁵

²⁴² Klinken 2019 “Explainer: what’s at stake in Kenyan court case on gay rights”, <https://theconversation.com/explainer-whats-at-stake-in-kenyan-court-case-on-gay-rights-112317> (accessed on 29 June 2024).

²⁴³ National Council of Law 2012 “*Laws of Kenya: Penal Code Chapter 63*”, <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/28595/115477/F-857725769/KEN28595.pdf> (accessed on 29 June 2024).

²⁴⁴ National Council of Law 2012 “*Laws of Kenya: Penal Code Chapter 63*”, <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/28595/115477/F-857725769/KEN28595.pdf> (accessed on 29 June 2024).

²⁴⁵ National Council of Law 2012 “*Laws of Kenya: Penal Code Chapter 63*”, <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/28595/115477/F-857725769/KEN28595.pdf> (accessed on 29 June 2024).

3.2.1.2. CHALLENGES AND SUCCESSES IN ENFORCING THE RIGHTS OF SEXUAL MINORITIES IN KENYA

As with other African countries, Kenya has criminalised and politicised homosexuality. The Kenyan laws penalise sex between men to a maximum of 14 years imprisonment. However, it is evident from the literature that women-to-women marriages are practiced under certain customary regimes known as Nandi customary law.²⁴⁶ The Nandi customary law stipulates that if a woman marries another woman, she and her sons belong to the household of the deceased and have inheritance rights before anyone else.²⁴⁷ In practice, however, this type of woman-to-woman marriage was practiced under certain customary regimes recognised for the purpose of succession.²⁴⁸

In the case of *Monica Jesang Karan v Jackson Chepkwony & Another*,²⁴⁹ the High Court Justice Ojwang did not hesitate to protect the inheritance rights of a woman married to another woman under Nandi customary law. Although these marriages are legally permitted, they do not involve sexual intercourse. This practice highlights the complex reality that family systems in Africa differ from the conventional male-female union.²⁵⁰ It may thus be time for these alternative family formations to find overt legal articulations. Nonetheless, Kenya's Constitution is recognised as one of the most progressive globally due to its transformative agenda aimed at promoting human rights, social justice, equality, inclusiveness, non-discrimination, and protection of marginalised groups. Despite the progressive stance, transgender, intersex, and gender-diverse people do not fully enjoy all the fundamental rights guaranteed therein. This underscores the gap between the legal framework and the lived experience of sexual minorities, emphasizing the need for governmental interventions, continued advocacy, and legal reform to ensure comprehensive protection and equality for all individuals.

²⁴⁶ Gloppen & Rakner 2021:205.

²⁴⁷ Gloppen & Rakner 2021:205.

²⁴⁸ Gloppen & Rakner 2021:41.

²⁴⁹ *Monica Jesang Katam v Jackson Chepkwony & Another* [2011] Eklr.

²⁵⁰ Gloppen & Rakner 2021:41.

3.2.3. NIGERIA

3.2.3.1. THE CURRENT NIGERIAN LAWS ON HOMOSEXUALITY AND GAY RIGHTS

Homosexual people in Nigeria face severe challenges not experienced by heterosexual people. Homosexuality is illegal in Nigeria and punishable by up to 16 years in prison under the conventional Court system. As a result of this, many LGBTIQ+ individuals in Nigeria have sought refuge in countries with more progressive laws to escape persecution.²⁵¹ Additionally, attempted same-sex marriages have been criminalised within Nigeria since 2013, further intensifying the legal and societal pressure faced by the LGBTIQ+ community.²⁵² These laws contribute to a hostile environment that perpetuates discrimination, harassment, and violence against sexual minorities in Nigeria.

A. Criminalisation of same-sex conduct

Chapter 21 of the Nigerian Criminal Code criminalises certain sexual conducts and terms them “Offenses against Morality”. Sections 214 and 215 of the Code make “carnal knowledge of any person against the order of nature” a felony punishable by fourteen years imprisonment.²⁵³ This is the language traditionally used to penalise same-sex sexual activity. Additionally, Section 217 of the Criminal Code states that:

“any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures a male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public and private, is guilty of a felony and is liable to imprisonment for three years”.²⁵⁴

²⁵¹ Human Rights Watch 2016 “Tell Me Where I Can Be Safe”: The Impact of Nigeria’s Same-Sex Marriage (Prohibition) Act”, <https://www.hrw.org/report/2016/10/20/tell-me-where-i-can-be-safe/impact-nigerias-same-sex-marriage-prohibition-act> (accessed on 26 June 2024).

²⁵² Human Rights Watch 2016 “Tell Me Where I Can Be Safe”: The Impact of Nigeria’s Same-Sex Marriage (Prohibition) Act”, <https://www.hrw.org/report/2016/10/20/tell-me-where-i-can-be-safe/impact-nigerias-same-sex-marriage-prohibition-act> (accessed on 26 June 2024).

²⁵³ *Criminal Code Act/1990:sec. 214-215.*

²⁵⁴ *Criminal Code Act/1990:sec. 217.*

Punishment can be even more severe in Nigeria's twelve northern states, which have adopted sharia law. In those states, adults convicted of engaging in same-sex sexual activity may be subject to execution by stoning.²⁵⁵

B. Shari'a law and criminalisation of same-sex intimacy

In Northern Nigeria, where Shari'a law is implemented in 12 states, consenting homosexual conduct between two adults is punishable.²⁵⁶ For example, the Zamfara Sharia Panel Code stipulates in Article 130 the definition of Sodomy (Liwat):

“Whoever has carnal intercourse against the order of nature with any man or woman to commit the offense of sodomy: Provided that whoever is compelled by the use of force or threats or without his consent to commit the act of sodomy upon the person of another or be the subject of the act of sodomy, shall not be deemed to have committed the offense”.²⁵⁷

Article 131 stipulates the punishment for sodomy. It states:

Whoever commits the offenses of sodomy shall be punished:

- a) “With a caning of one hundred lashes if unmarried, and shall also be liable to imprisonment for a term of one year
- b) If married with stoning to death (rajm)”.²⁵⁸

Article 134 defines lesbianism (Shihag) and states as follows:

“Whoever being a woman engages another woman in carnal intercourse through her sexual organ or by means of stimulation or sexual excitement of one another has committed the offense of Lesbianism”.²⁵⁹

Article 135 stipulates the punishment of lesbianism as follows:

²⁵⁵ Bureau of Democracy, Human Rights, and Labor, 2008 Human Rights Report: Nigeria, U.S. DEPT. OF STATE, <http://www.state.gov/j/drl/rls/hrrpt/2008/af/119018.htm> (accessed on 10 July 2024).

²⁵⁶ USCIRF Factsheet 2021 “Shari'a and LGBTI People”, <https://www.uscirf.gov/sites/default/files/2021-03/2021%20Factsheet%20-%20Sharia%20and%20LGBTI.pdf> (accessed on the 12 July 2024).

²⁵⁷ USCIRF Factsheet 2021 “Shari'a and LGBTI People”, <https://www.uscirf.gov/sites/default/files/2021-03/2021%20Factsheet%20-%20Sharia%20and%20LGBTI.pdf> (accessed on the 12 July 2024).

²⁵⁸ USCIRF Factsheet 2021 “Shari'a and LGBTI People”, <https://www.uscirf.gov/sites/default/files/2021-03/2021%20Factsheet%20-%20Sharia%20and%20LGBTI.pdf> (accessed on the 12 July 2024).

²⁵⁹ USCIRF Factsheet 2021 “Shari'a and LGBTI People”, <https://www.uscirf.gov/sites/default/files/2021-03/2021%20Factsheet%20-%20Sharia%20and%20LGBTI.pdf> (accessed on the 12 July 2024).

“Whoever commits the offense of lesbianism shall be punished with caning which may extend to fifty lashes and in addition be sentenced to a term of imprisonment which may extend to six months”.²⁶⁰

C. Same-Sex Marriage (Prohibition) Act, 2013

The Same-Sex Marriage (Prohibition) Act, 2013, was enacted by Nigeria’s National Assembly in December 2013 and signed into law by the president on the 7th of January 2014. Although the law's title refers to “Same-Sex Marriage”, the scope of the law is much broader. In addition to the prohibition of same-sex marriage, it states that “registration of gay clubs, societies, and organisations, their sustenance processions and meetings is prohibited”.²⁶¹ Additionally, it further states that “the public show of same-sex amorous relationship directly or indirectly is prohibited.”²⁶²

The Same-Sex Marriage (Prohibition) Act criminalises the following:

- 1) Entering into the same-sex marriage or civil union. Under this law:

“A person who enters into the same-sex marriage contract or civil union commits an offense and is liable on conviction to a term of 14 years of imprisonment”.²⁶³

- 2) Living together with a same-sex partner, even without marriage or civil union.

Under this law, same-sex marriage is defined as:

“the coming together of persons of the same sex with the purpose of living together as husband and wife or for the other purposes of same sexual relationships.”²⁶⁴

Civil unions are defined under the law to include:

“any arrangement between persons of the same sex to live together as sex partners, including arrangements to live in a “caring partnership” a “significant relationship”, or a “stable union.”²⁶⁵

²⁶⁰ USCIRF Factsheet 2021 “Shari’a and LGBTI People”, <https://www.uscirf.gov/sites/default/files/2021-03/2021%20Factsheet%20-%20Sharia%20and%20LGBTI.pdf> (accessed on the 12 July 2024).

²⁶¹ *Same Sex Marriage (Prohibition) Act/2013:sec. 4(1)*.

²⁶² *Same Sex Marriage (Prohibition) Act/2013:sec. 4(1)*.

²⁶³ *Same Sex Marriage (Prohibition) Act/2013*.

²⁶⁴ *Same Sex Marriage (Prohibition) Act/2013*.

²⁶⁵ *Same Sex Marriage (Prohibition) Act*.

By implication, even if individuals do not enter into a formal marriage or civil union, by living together, whether as a couple or as roommates to save money, they can become subject to the criminal penalty of 14 years imprisonment.

- 3) Administering, aiding, or abetting, or even merely witnessing a same-sex marriage or civil union. The Act provides that:

“Any person or group of persons who administer, witnesses, abets, or aids the solemnisation of a same-sex marriage or civil union in Nigeria commits an offense and is liable on conviction to a term of 10 years imprisonment.”²⁶⁶

- 4) Registering, operating, or participating in a “gay” organization. Under the law, this constitutes an offense:

“A person who registers, operates or participates in a gay clubs, societies, and organization..commits an offense and is liable on conviction to a term of 10 years imprisonment.”²⁶⁷

- 5) Supporting the registration, operation, or sustenance of “gay” organisations, processions, or meetings. Under the law:

“A person or group of persons who...supports the registration, operation, and sustenance of gay clubs, societies, organisations, processings or meetings in Nigeria commits an offense and is liable on conviction to a term of 10 years imprisonment.”²⁶⁸

In response to the enactment of the Same-Sex Marriage (Prohibition) Act, the African Commission’s Special Rapporteur on Human Rights Defenders in Africa, Mrs. Reine Alapini issued a press release noting that she “is deeply concerned about the consequences this law may have on sexual minorities who are already vulnerable as a result of social prejudice”.²⁶⁹ She further stated that:

²⁶⁶ *Same Sex Marriage (Prohibition) Act.*

²⁶⁷ *Same Sex Marriage (Prohibition) Act.*

²⁶⁸ *Same Sex Marriage (Prohibition) Act.*

²⁶⁹ Special Rapporteur on Human Rights Defenders in Africa “Press Release on the Implication of the Same Sex Marriage (Prohibition) Act 2013 on Human Rights Defenders in Nigeria”, <http://www.achpr.org/press/2014/02/d190/> (accessed on 12 July 2024).

“the special rapporteur is concerned by some provisions of the Act, in particular, Section 4(1) and 5(2) which prohibit and provide for penalties against defenders of the rights of the LGBTIQ+ people. These provisions undermine the work of human rights defenders and are against any public debate on these critical issues”.²⁷⁰

3.2.3.2. CHALLENGES AND SUCCESSES IN ENFORCING THE RIGHTS OF SEXUAL MINORITIES IN NIGERIA

In January 2014, Nigeria implemented the Same-Sex Marriages Prohibition Act, which prohibits marriage contracts between people of the same sex.²⁷¹ The Act further specifies that it only recognises marriages contracted between persons of the opposite sex. The legislation imposes five-year sentences on same-sex couples who have wedding ceremonies, those who perform such services, and those who attend.²⁷² Additionally, it is illegal to register gay clubs, societies, or organisations.²⁷³ Furthermore, Nigeria is another country where violence against individuals engaging in same-sex relations has been prevalent. For example, one of the Nigerian bishops, Reverend Peter Jasper Akinola, publicly suggested that all gays and lesbian people should have “millstones tied around their necks”.²⁷⁴ Izugbara²⁷⁵ noted that sexuality and sexual conduct in Nigeria are socially produced and fed by oppressive patriarchal subjectivities and ideologies that attempt to instill a specific notion of normalcy.²⁷⁶ This reveals the level of oppression and male-biased discursive subjectivities, characterized by homophobic, penis-centered, and male-privileging traits, to which homosexual people are subjected.²⁷⁷ Moreover, like other African countries, homophobia in Nigeria is supported by the laws, culture, and religion.²⁷⁸ Similarly, in Uganda, individuals engaging in same-sex relations face attacks and threats

²⁷⁰ Special Rapporteur on Human Rights Defenders in Africa “Press Release on the Implication of the Same Sex Marriage (Prohibition) Act 2013 on Human Rights Defenders in Nigeria”, <http://www.achpr.org/press/2014/02/d190/> (accessed on 12 July 2024).

²⁷¹ Namwase *et al.* 2017:42.

²⁷² Msibi 2011:60.

²⁷³ Namwase *et al.* 2017:42.

²⁷⁴ Msibi 2011:60.

²⁷⁵ Izugbara 2004:14.

²⁷⁶ Izugbara 2004:16.

²⁷⁷ Msibi 2011:60.

²⁷⁸ Msibi 2011:60.

to their lives.²⁷⁹ The public strongly supported the bill, with many religious the public strongly in support of the bill, with many religious leaders even questioning the rationale behind giving individuals who engage in same-sex relations an opportunity to comment.²⁸⁰

This shows that Nigeria’s Same-Sex Marriage Prohibition Act and the subsequent societal and religious endorsement of homophobia illustrate the severe challenges faced by the LGBTIQ+ community in the country. This situation underscores the urgent need for continued government interventions, continued advocacy, legal reform, and international pressure to protect the rights and lives of sexual minorities in Nigeria and similar contexts across Africa.

3.2.4. ZIMBABWE

3.2.4.1. THE CURRENT ZIMBABWEAN LAWS ON HOMOSEXUALITY AND GAY RIGHTS

In the five years since Zimbabwe’s last Universal Periodic Review (UPR), incidents of human rights violations against LGBTIQ+ persons have decreased.²⁸¹ This improvement can be partly attributed to the paradigm shift the nation experienced with the end of Robert Mugabe’s decades-long presidency.²⁸² Nevertheless, oppressive structural and societal barriers to realising the rights of LGBTIQ+ persons persist in various areas. Under President Mnangagwa’s administration, an opportunity has emerged for the comprehensive protection of LGBTIQ+ persons in Zimbabwe.²⁸³ However, the advent of a new administration has not entirely prevented further abuse against Zimbabweans based on their real or perceived sexual orientation and gender identity.²⁸⁴ Until the sodomy law was passed in 2006 under the Criminal Law (Codification and Reform) Act,²⁸⁵

²⁷⁹ Msibi 2011:60.

²⁸⁰ Msibi 2011:60.

²⁸¹ United Nations “Zimbabwe Universal Periodic Review” United Nations Human Rights Office of the High Commissioner”, <https://www.ohchr.org/en/hrbodies/upr/zw-index> (accessed on 12 July 2024).

²⁸² Smith “Human rights and LGBTIQ+ persons in Zimbabwe”, <https://www.hrw.org/report/2019/human-rights-LGBTIQ-Zimbabwe> (accessed on 12 July 2024).

²⁸³ Doe 2018:128-129.

²⁸⁴ Doe 2018:129.

²⁸⁵ *Criminal Law (Codification and Reform) Act*.

colonial-era laws were used to punish sexual activity between two persons of the same sex. This legislation change significantly broadened the scope of criminalised activities. After 2006, the law was extended to criminalise not only sexual activity but also two people of the same sex holding hands, hugging, and kissing, categorising such “indecent acts” as sexual crimes.²⁸⁶

Specifically, the Act states:

“any male person who, with the consent of another male person, knowingly performs with that other person anal sexual intercourse, or any act involving physical contact other than anal sexual intercourse that would be regarded by a reasonable person to be an indecent act, shall be guilty of sodomy and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding one year or both”.²⁸⁷

However, this clause introduces ambiguity regarding what exactly would be regarded as criminal in court, as terms such as “indecent act” and “reasonable person” are not clearly defined. Furthermore, while the law does not specifically reference women, it indirectly affects lesbians, women, and transgender persons, subjecting them to discrimination based on its provisions.²⁸⁸

The other laws that remain in effect in Zimbabwe, which directly discriminate against LGBTIQ+ persons are:

Section 78 of the Constitution, restricts marriage rights to heterosexual relationships, thereby not recognising same-sex marriages or unions within Zimbabwe.²⁸⁹

Section 73 of the Criminal Law (Codification and Reform) Act [Chapter 9:23], criminalises consensual same-sex sexual relations regardless of the age of the persons involved and imposes a penalty of up to one year imprisonment and/or fine.²⁹⁰

Section 14(1)(f) of the Immigration Act [Chapter 4:02], which classifies “homosexuals” as prohibited persons, and Sections 17(1) and 18(1)-(2) of the same Act, which bans

²⁸⁶ *Criminal Law (Codification and Reform) Act.*

²⁸⁷ *Criminal Law (Codification and Reform) Act.*

²⁸⁸ *Criminal Law (Codification and Reform) Act.*

²⁸⁹ *Criminal Law (Codification and Reform) Act:sec. 78.*

²⁹⁰ *Criminal Law (Codification and Reform) Act:sec. 73.*

prohibited persons from entering or remaining in the country, and empower immigration officers to ban persons from entering the country or to deport them based on their actual or imputed sexual orientation.²⁹¹

Therefore, it is imperative that the State, as a human rights duty-bearer, addresses the various forms of discrimination, marginalisation, and violence to which Zimbabweans have been, and continue to be, subjected based on their actual, or imputed sexual orientation or gender identity. Additionally, it is evident that while the law's primary focus is on male same-sex interactions, its implications extend to a broader spectrum of the LGBTIQ+ community, reinforcing the need for clarity and reform in addressing these legal definitions and their consequences.

3.2.4.2. CHALLENGES AND SUCCESSES IN ENFORCING THE RIGHTS OF SEXUAL MINORITIES IN ZIMBABWE

The former president Robert Mugabe became the first president to use homophobia as a central political tool, attracting international attention to the politicization of homophobia in Africa.²⁹² In a speech, he declared that homosexuality degrades human dignity, and is unnatural, and claimed that homosexual people behave worse than pigs and dogs, suggesting they should be arrested.²⁹³ These anti-gay sentiments are mobilised to divert attention from Zimbabwe's struggling economy and to secure support in elections.²⁹⁴ President Mugabe further stated, "We don't believe they have rights at all", and described homosexuality as an alien culture practiced only by "a few whites" in his country.²⁹⁵ Subsequently, the political focus on homosexuality intensified, exemplified by the arrest of the high-profile Zimbabwe's former President Canaan Banana on sodomy charges the following year.²⁹⁶ Although Zimbabwe's Constitution includes some human rights provisions that could be interpreted to protect LGBTIQ+ people, these protections remain

²⁹¹ *Criminal Law (Codification and Reform) Act:sec. 14.*

²⁹² Gloppen & Rakner 2021:203.

²⁹³ Gloppen & Rakner 2021:203.

²⁹⁴ Gloppen & Rakner 2021:203.

²⁹⁵ Gloppen & Rakner 2021:10.

²⁹⁶ Gloppen & Rakner 2021:10.

conservative and culturally biased.²⁹⁷ The problem is exacerbated by the judges and magistrates who are unwilling to uphold sexual minority rights.

Homophobia is not a new phenomenon in Zimbabwe, but the continued criminalisation of homosexuality has significantly hindered the protection of gay rights. Zimbabwe has a long way to go in terms of the protection and promotion of sexual minorities. In recent years, church leaders, politicians, and court officials have consistently labeled homosexual orientation as “un-cultural” and a “threat to nationhood”.²⁹⁸ This stance has demonstrated how the legal, political, media, and social environments have increasingly turned against the LGBTIQ+ community. Additionally, the opposition, which previously expressed support for LGBTIQ+ concerns, has grown hostile. The 2013 Constitution marked a significant setback, with the explicit prohibition of same-sex marriages and dismissal of sexual orientation as the prohibited ground of discrimination.²⁹⁹ The legacy of Robert Mugabe’s use of homophobia for political gain continues to impact Zimbabwe’s LGBTIQ+ community severely. The intertwining of cultural, legal, and political opposition creates a challenging environment for the protection and advancement of sexual minority rights in Zimbabwe.

There is no doubt that the laws mentioned above foster a highly discriminatory and stigmatising environment for sexual minority individuals in Africa, contributing to societal rejection, violence, and widespread discrimination against LGBTIQ+ individuals. Law enforcement agencies frequently enforce these laws with aggression, leading to arbitrary arrests, harassment, and abuse of LGBTIQ+ persons. As a result, the pervasive impact of such legislation extends beyond legal penalties, deeply affecting the daily lives and well-being of sexual minorities. This entrenched legal framework highlights the persistent challenges in promoting human rights and equality for sexual minorities within the continent of Africa, necessitating continued advocacy and international pressure for meaningful reform.

²⁹⁷ Namwase *et al.* 2017:151.

²⁹⁸ Namwase *et al.* 2017:151.

²⁹⁹ Gloppen & Rakner 2021:11.

In light of the above point, it is evident that these four countries face significant challenges in protecting and promoting the rights of sexual minorities. These challenges include deep-seated cultural and religious opposition, punitive legal frameworks, and widespread social stigma. In all four countries, homosexuality remains criminalised, often punishable by imprisonment, which perpetuates discrimination and violence against LGBTIQ+ individuals. Additionally, government officials, law enforcement, and judicial systems in these nations frequently fail to protect sexual minorities from abuse, and harassment, exacerbating their marginalisation and vulnerability. Despite these challenges, there have been notable successes and commonalities in the fight for LGBTIQ+ rights in these countries. Activists and advocacy groups in Uganda, Kenya, Zimbabwe, and Nigeria have increasingly gained visibility and international support leading to gradual progress. For example, In Kenya, the courts decriminalised the registration of LGBTIQ+ organisations, and in Uganda, despite the Anti-Homosexuality Act's passage, following judicial rulings has offered glimmers of hope for the LGBTIQ+ community.

3.3. OBSTACLES TO DECRIMINALISATION OF SAME-SEX ACTS IN AFRICA

Decriminalising same-sex acts in Africa faces several significant obstacles, rooted in a complex interplay of cultural, religious, political, and legal factors. Understanding these barriers is crucial for comprehending the broader context of LGBTIQ+ rights on the continent.

First and foremost, the perception that same-sex sexual conduct is abnormal and foreign to African culture remains deeply rooted in the minds of most Africans.³⁰⁰ Consequently, this makes the fight for the decriminalisation of same-sex conduct significantly harder. Furthermore, one of the common arguments hindering the protection of LGBTIQ+ rights is the belief that homosexuality is a foreign concept imported from the West and that it was unheard of in traditional African societies.³⁰¹ Moreover, deeply ingrained cultural and social norms view same-sex relationships as taboo or unnatural. Many African societies

³⁰⁰ Kenya Human Rights Commission Report 2011 "The outlawed amongst us: A study of the LGBTI community's search for equality and non-discrimination in Kenya".

³⁰¹ Kenya Human Rights Commission.

are traditionally conservative and hold strong beliefs about gender roles and sexuality. As a result, same-sex acts are often seen as a violation of these norms, leading to widespread social stigma and discrimination against LGBTIQ+ individuals.³⁰² Additionally, legal and institutional barriers further complicate efforts to decriminalise same-sex acts.³⁰³ In many African countries, the judiciary may be unwilling or unable to challenge anti-LGBTIQ+ laws due to political pressure, lack of independence, or conservative legal traditions. Moreover, law enforcement agencies often enforce these laws arbitrarily, leading to harassment and abuse of LGBTIQ+ persons.³⁰⁴

The Kenyan government's stance on decriminalising homosexuality is that it is culturally unacceptable in Africa. However, this position can be challenged since the Kenyan Constitution supersedes cultural norms.³⁰⁵ Nevertheless, influential government officials' statements and actions reinforce this stance. For instance, in October 2013, the Non-Governmental Organisations Coordinating Board in Kenya was sued for failing to register the National Gay and Lesbian Human Rights Commission, which seeks to champion the rights of sexual minorities.³⁰⁶ The board declined the registration because the terms “Gay” and “Lesbian” were culturally and morally unacceptable.³⁰⁷ Additionally, the Anti-Homosexuality Bill of 2014 aims to provide comprehensive and enhanced legislation to protect the cherished culture of Kenyans’ religious, legal, and traditional family values.³⁰⁸ This legislation aims to resist the efforts of sexual rights activists who are attempting to impose their values of sexual permissiveness on the people of Kenya.³⁰⁹ It is further

³⁰² Human Rights Watch 2019 “Africa: Progress and Backlash in the Fight for LGBT Equality”, <https://www.hrw.org/news/2022/06/22/progress-and-setbacks-lgbt-rights-africa-overview-last-year> (accessed on 12 July 2024).

³⁰³ Human Rights Watch 2013 “More Than a Name: State-Sponsored Homophobia and its Consequences in Southern Africa”, <https://www.hrw.org/report/2023/02/14/why-we-became-activists/violence-against-lesbian-bisexual-and-queer-women-and-non> (accessed on 12 July 2024).

³⁰⁴ Human Rights Watch 2013 “More Than a Name: State-Sponsored Homophobia and its Consequences in Southern Africa”, <https://www.hrw.org/report/2023/02/14/why-we-became-activists/violence-against-lesbian-bisexual-and-queer-women-and-non> (accessed on 12 July 2024).

³⁰⁵ *Kenya Constitution of 2010:article. 2(4)*.

³⁰⁶ *Eric Gitari v Attorney General & another* Petition 440 of 2013.

³⁰⁷ *Eric Gitari v Attorney General & another* Petition 440 of 2013.

³⁰⁸ Pink News “Kenya: New stone the gays’ law proposed by the MPs”, <http://www.pinknews.co.uk/2014/08/11/kenyanew-stone-the-gays-law-proposed-by-mps/> (accessed on 23 June 2024).

³⁰⁹ *Preamble of the Bill*.

argued that there is a need to protect children and youth who are vulnerable to sexual abuse and deviation due to cultural changes, uncensored information technology, parentless child development settings, and increasing attempts by homosexuals to raise children through adoption, foster care, or other means.³¹⁰

Most African countries claim that anti-sodomy laws preserve religious and cultural values, acting as a barrier against the infiltration of Western taboos.³¹¹ Notably, those advocating for the maintenance of sodomy laws are prominent citizens occupying positions of trust, including politicians, religious leaders, journalists, and community opinion leaders. These individuals often provoke moral panic without significant provocation.³¹² On the other hand, advocates for sexual minority rights comprising human rights defenders and ordinary citizens argue that criminalising consensual same-sex sexual practices is an unnecessary infringement on the rights of sexual minorities.³¹³ This contrast generates significant disagreements in national media between those opposed to protecting the rights of sexual minorities and those who support such protections.³¹⁴ Consequently, sexual minorities face threats and harassment aimed at silencing them. Due to the cruel and accusatory nature of these debates, coupled with the overwhelming majority supporting anti-LGBTIQ+ views, there is limited opportunity for pro-LGBTIQ+ advocates to make their voices heard.³¹⁵ This is primarily due to the fear of being accused of homosexuality and, as one scholar puts it, suffering “reputational injury”.³¹⁶

Currently, it seems that the anti-LGBTIQ+ group is more persuasive, relying heavily on religion and culture to denounce homosexuality as foreign. When pro-LGBTIQ+ advocates argue that protecting sexual minorities is a human rights issue, necessitating the safeguarding of a minority group, anti-LGBTIQ+ proponents counter by asserting that homosexuality does not qualify as a human rights issue and is not comparable to the

³¹⁰ *Preamble of the Bill.*

³¹¹ Republic of Ghana Constitutional Review Commission 2012 “Report of the constitution review commission: From a political to a developmental constitution”, 656-657.

³¹² Ako 2021:72.

³¹³ Ako 2021:72.

³¹⁴ Ako 2021:72.

³¹⁵ Ako 2021:72.

³¹⁶ Baisley 2015:393-395.

plight of other minority groups, such as racial minorities.³¹⁷ The ongoing debates in many African nations reflect a deep-seated division on the issue of sexual minority rights. The prevailing anti-LGBTIQ+ views significantly stifle the expression and advocacy of pro-LGBTIQ+ perspectives. Furthermore, the obstacles to decriminalising same-sex acts in Africa are multifaceted and deeply rooted in historical, cultural, religious, and political contexts. Overcoming these barriers requires a refined and comprehensive approach that addresses underlying social attitudes, strengthens local advocacy efforts, and carefully navigates the complex interplay of domestic and international influences.

3.4. HOMOSEXUALITY AS IMMORALITY, A RELIGIOUS ABOMINATION, AND OFFENSIVE TO AFRICAN CULTURES AND TRADITIONS

Homosexuality is a controversial issue in many African countries, often viewed through the lenses of immorality, religious condemnation, and cultural rejection. In countries like Uganda, Kenya, Nigeria, and Zimbabwe, the discourse surrounding homosexuality is profoundly influenced by deep-seated religious beliefs and traditional values. For instance, many Christian and Muslim leaders have vehemently condemned same-sex sexual conduct and rejected calls to respect sexual orientation as a God-given attribute or recognise it as a human right.³¹⁸ Accordingly, their stance supports the continued or increased criminalisation of same-sex acts. Christians specifically view these acts as sinful, unbiblical, and an abomination.³¹⁹ When the LGBTIQ+ community seeks to have same-sex marriages recognised, biblical texts are referred to that consistently emphasize such unions are sinful acts.³²⁰ For example, in the brief explanation of the biblical text of Sodom and Gomorrah in Genesis 19:24-25, the destruction of these cities is shown as if they practiced sodomy.³²¹

Furthermore, the story of Sodom and Gomorrah has been used to warn those who do not accept the biblical texts as gospel truths. This warning is evident in Matthew 10:15, which

³¹⁷ Baisley 2015:395-396.

³¹⁸ Nyarang “*The role of the judiciary in the protection of sexual minorities in Kenya*”, www.pewforum.org/uploadfiles/topic/bilies_and_practice/subsaharanafricafullreportpdf (accessed on 23 June 2024).

³¹⁹ Tibebe 2009:13.

³²⁰ Matetoo-Mohapi 2021:5.

³²¹ Matetoo-Mohapi 2021:5.

states in the Good News Bible: “I assure you that on the judgment day, God will show more mercy to the people of Sodom and Gomorrah than to the people of that town”.³²² Similarly, in Matthew 11:24, the same warning is repeated: “You can be sure that on the Judgement Day, God will show more mercy to Sodom than to you”.³²³ Moreover, there are additional texts in the Bible, beyond the two quoted, that use the story of Sodom and Gomorrah as a caution for those who refuse to follow Christianity, urging them to atone for their sins and accept the gospel. Additionally, the three major monotheistic religions - Christianity, Judaism, and Islam - have traditionally been deeply patriarchal in their teachings. As a result, they continue to influence and reflect cultural beliefs and practices that commonly reject homosexuality.³²⁴ For example, the Nigerian church asserts that homosexual sex is inherently immoral, and therefore, homosexual practice is deemed evil. This perspective underscores the profound impact of religious doctrines on societal attitudes toward homosexuality, reinforcing patriarchal norms and contributing to the broader cultural rejection of same-sex relationships.³²⁵

Similarly, cultural norms across these nations typically emphasize heteronormative family structure and community cohesion, deeming homosexuality as a threat to these foundational principles. One would assume that with such grounded cultural norms, countries such as Uganda would accept homosexual activities. After all, their cultural norms and values emphasize forging relationships, acknowledging the role of every individual within the community, valuing ancestral spirits, and viewing crime and violence as threats to unity for both the living and the dead.³²⁶ However, homosexuality threatens the beliefs that justify patriarchy, resulting in a homophobic response from men in society.

To understand the endurance of patriarchal ideology, there are two contrasting theoretical approaches. One approach emphasizes the power of culture and its resistance to change.³²⁷ According to this approach, this means that traditional gender roles and the

³²² Matetoo-Mohapi 2021:5.

³²³ Matetoo-Mohapi 2021:5.

³²⁴ Amoah & Gyasi 2016:3.

³²⁵ Amoah & Gyasi 2016:3.

³²⁶ Velthuisen 2012:74.

³²⁷ Amoah & Gyasi 2016:3.

belief in male dominance are deeply embedded in the cultural fabric. As a result, changing these beliefs is challenging because they are reinforced through cultural practices, rituals, and everyday social interactions. The other approach highlights the influence of social structural arrangements on the content of culture.³²⁸ This means that social structures are designed in ways that uphold and perpetuate male dominance. For example, laws, policies, and institutional practices may favour men over women, reinforcing gender inequality. Furthermore, men have created, promoted, and maintained a worldview that supports the existing distribution of power. Hegemony involves preserving cultural aspects that serve powerful interests and altering those that challenge prevailing interests. Consequently, if the interests of the dominant group change, cultural change is likely to follow.³²⁹ The slow rate of cultural change indicates the resistance of powerful groups to structural change, as well as an inherent resistance to change within the culture itself. Therefore, culture and social structure are interdependent, with changes in one influencing changes in the other.³³⁰

The interplay between religious doctrines and cultural traditions not only fuels widespread homophobia but also perpetuates the legal and social marginalisation of sexual minorities. Additionally, the examination of homosexuality as seen through the prism of immorality, religious abomination, and cultural offense in these African contexts reveals the intricate and often oppressive dynamics that shape the experiences of LGBTQ+ persons. Understanding these complexities is crucial for fostering a more inclusive and equitable society.

3.5. THE EFFECT OF CULTURAL, RELIGIOUS, AND SOCIOPOLITICAL VARIABLES ON THE RIGHTS OF SEXUAL MINORITIES

None of the people who claim to have same-sex desires are pretending to be the way they are, nor are they doing it because they are following Western trends. Historically, same-sex desires and relationships within African communities have been kept hidden

³²⁸ Amoah & Gyasi 2016:3.

³²⁹ Amoah & Gyasi 2016:3.

³³⁰ Amoah & Gyasi 2016:3.

and rarely discussed.³³¹ Additionally, politicians, religious groups, and society at large would prefer an African society where matters of same-sex desires remain closeted and silenced, as has been the case for many years.³³²

This suppression infringes on the freedom of speech as stipulated in Article 19 of the Universal Declaration of Human Rights (UDHR), which states, “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers”.³³³

Consequently, many African countries view same-sex acts as sinful. Homophobia in African countries is driven by powerful politicians and religious organisations, who significantly influence societal norms and cultural beliefs. This demonstrates that if society continues to disregard homosexuality as an acceptable norm, it will be challenging to convince lawmakers that same-sex relationships cause no harm to others in the community.³³⁴

Additionally, the moral complicity of legislators in the abuse of individual rights is evident. The cultural status of homosexuals in Nigeria is itself equated with abuse.³³⁵ The issues surrounding legal rights for gay people, as well as the cultural and moral considerations of the state on this topic, are complex and remain unresolved, both in the West and elsewhere.³³⁶ The failure to address the nature of homosexual “rights” with careful and deliberate consideration is therefore a significant moral failure.

Another interpretation of the claim that homosexuality is un-African stems from the argument that homosexuality does not exist in Africa. This perspective suggests that there are no homosexuals on African soil, effectively denying gays and lesbians the right to speak as Africans.³³⁷ This raises critical questions: Who determines what is African and

³³¹ Matetoo-Mohapi 2021:7.

³³² Matetoo-Mohapi 2021:7.

³³³ Matetoo-Mohapi 2021:7.

³³⁴ Amoah & Gyasi 2016:3.

³³⁵ Amoah & Gyasi 2016:3.

³³⁶ Amoah & Gyasi 2016:7.

³³⁷ Amoah & Gyasi 2016:8.

un-African in Africa? Who defines the debate and controls the narrative? It is evident that homosexuals do exist on the African continent and, if given the opportunity, they can share stories of African identity that include their homosexuality. In addition, the homophobic response from religious and political leaders in Africa, who advocate for the denial of rights to gays and lesbians and push for increased criminalisation of same-sex conduct, paradoxically acknowledges the existence and presence of homosexuals on the continent. Despite the homophobic stance of some religious and political leaders, their calls for the denial of rights and further criminalisation paradoxically acknowledge the existence of homosexuals on the continent. Therefore, it is imperative to recognise and address these issues with careful consideration to advance human rights and cultural understanding in Africa, particularly concerning the LGBTIQ+ community.

3.6. THE LIKELIHOOD OF HOMOSEXUALITY BEING ACCEPTED AND DECRIMINALISED IN AFRICAN COUNTRIES

Homosexuality remains a contentious issue across many African countries due to deeply rooted cultural, religious, and traditional beliefs. Therefore, this makes acceptance and decriminalisation a complex and challenging endeavor.³³⁸ Additionally, a strong conservative attitude, rooted in beliefs about family structure and gender roles, often fuels resistance against LGBTIQ+ acceptance across the continent. Moreover, several African countries still maintain their stringent laws criminalising homosexuality, with penalties including imprisonment and, in extreme cases, the death penalty, making decriminalisation and acceptance seem distant goals.³³⁹ Furthermore, political dynamics further shape the landscape of LGBTIQ+ rights in Africa; while some leaders advocate for inclusion, others exploit anti-LGBTIQ+ sentiments to garner conservative support.³⁴⁰ International pressure also plays a role, urging African governments to respect LGBTIQ+ rights, yet substantial support must come from within these nations.³⁴¹

³³⁸ Smith 2020:54.

³³⁹ Smith 2020:54.

³⁴⁰ Amnesty International 2018 “Love, Hate and the Law: Decriminalizing Homosexuality”, <https://www.amnesty.org/en/wp-content/uploads/2021/07/pol300032008eng.pdf> (accessed on 15 July 2024).

³⁴¹ Amnesty International 2018 “Love, Hate and the Law: Decriminalizing Homosexuality”, <https://www.amnesty.org/en/wp-content/uploads/2021/07/pol300032008eng.pdf> (accessed on 15 July 2024).

Moreover, while the Constitution of many African countries guarantees equality, non-discrimination, dignity, and privacy, LGBTIQ+ individuals still endure violence, exclusion, and discrimination.³⁴² They face physical abuse, expulsion from schools, and targeted hate speech, perpetuated by societal norms and even public officials. This systemic discrimination deprives homosexuals of fundamental rights such as life, privacy, education, non-discrimination, health, justice, and dignity.³⁴³ Reforming laws and governmental actions are essential to prevent and address such abuses.

However, there have been notable shifts in both public opinion and legal frameworks in recent years, suggesting a potential path towards greater tolerance and inclusivity for LGBTIQ+ individuals in African societies. A typical example is the work of two key figures in the fight for the acceptance and decriminalisation of homosexuality in Africa: Bisi Alimi, a Nigerian LGBTIQ+ rights activist and HIV/AIDS advocate, and Kasha Jacqueline Nabagesera, a Ugandan activist and founder of the organisation Freedom and Roam Uganda. Alimi became the first Nigerian to come out as gay on national television in 2004, sparking widespread debates about LGBTIQ+ rights in the country.³⁴⁴ Despite facing threats and discrimination, Alimi has been vocal about challenging homophobia and advocating for LGBTIQ+ rights in Nigeria and across Africa. His advocacy work has raised awareness about the issues faced by LGBTIQ+ persons in the region and has inspired others to speak out against discrimination and injustice.³⁴⁵

Another influential individual in the movement for LGBTIQ+ rights in Africa is Kasha Jacqueline Nabagesera. As the founder of Freedom and Roam Uganda, Nabagesera has been at the forefront of the fight for LGBTIQ+ rights in Uganda, a country known for its harsh anti-gay laws and persecution of LGBTIQ+ individuals.³⁴⁶ Despite facing personal

³⁴² Amnesty International 2020 “When They Target Us: How African State Seek to Silence Human Rights Defenders”, <https://www.amnesty.org/en/wp-content/uploads/2021/06/English.pdf> (accessed on 15 July).

³⁴³ Amnesty International 2020 “When They Target Us: How African State Seek to Silence Human Rights Defenders”, <https://www.amnesty.org/en/wp-content/uploads/2021/06/English.pdf> (accessed on 15 July).

³⁴⁴ Bisi Alimi Foundation “About Bisi Alimi”, <https://www.bisialimifoundation.org/about-bisi-alimi/> (accessed on 26 June 2024).

³⁴⁵ Bisi Alimi Foundation “About Bisi Alimi”, <https://www.bisialimifoundation.org/about-bisi-alimi/> (accessed on 26 June 2024).

³⁴⁶ Kasha Jacqueline Nabagesera “Kasha Jacqueline Nabagesera: The Right Livelihood Award”, <https://www.rightlivelihoodaward.org/laureates/kasha-jacqueline-nabagesera/3> (accessed on 26 June 2024).

threats and harassment, Nabagesera has continued to advocate for equality and justice for the LGBTIQ+ community in Uganda and has been recognised internationally for her advocacy work.³⁴⁷

Looking ahead, the likelihood of homosexuality being accepted and decriminalised in African countries will depend on various factors, including continued advocacy efforts, public awareness campaigns, legal reforms, and changes in societal attitude. While the road to equality may be long and challenging, the voices of sexual minorities and allies in Africa are growing louder, demanding recognition, respect, and justice. Consequently, African governments must uphold human rights principles, protect LGBTIQ+ persons from discrimination and violence, and create inclusive societies that embrace diversity and equality. Indeed, it is only through collective action and solidarity that Africa can move closer to a future where homosexuality is fully accepted and decriminalised in all corners of the continent.

3.7. CONCLUSION

This chapter's detailed analysis provides a critical understanding of the many challenges that sexual minorities face in Africa. While some progress has been made, particularly in terms of legal reforms, deep-seated cultural and religious beliefs that regard homosexuality as incompatible with African values continue to impede significant progress. This emphasizes the importance of a holistic approach that goes beyond legal changes and includes cultural and educational initiatives aimed at changing public perceptions and dismantling prejudices. Furthermore, the comparative case studies demonstrate that change is possible with sustained effort and political will. Countries such as Zimbabwe, under new leadership, demonstrate that political transitions can provide opportunities for reform. However, as evidenced by the persistent abuses, political change alone is insufficient.

In conclusion, while the road to full acceptance and decriminalisation of homosexuality in Africa is long and difficult with challenges, the discussion in this chapter sheds some light

³⁴⁷ Kasha Jacqueline Nabagesera "Kasha Jacqueline Nabagesera: The Right Livelihood Award", <https://www.rightlivelihoodaward.org/laureates/kasha-jacqueline-nabagesera/3> (accessed on 26 June 2024).

on how these obstacles can be gradually overcome through a combination of legal, cultural, and societal efforts. The commitment to human rights and equality must be unwavering to ensure that future generations of LGBTIQ+ Africans can live without fear of discrimination or persecution. Chapter four will address the issues highlighted in Chapter three, with a primary focus on the government's role in defending the rights of sexual minorities. Specifically, the chapter will recommend actionable measures that African governments should implement to safeguard and preserve these rights. Additionally, it will evaluate the critical roles that political, religious, and cultural leaders must play in ensuring the protection of sexual minorities.

Furthermore, the chapter will analyze national intervention strategies designed to protect the rights of the LGBTIQ+ community. It will also examine how courts have dealt with cases involving violations of the rights of sexual minorities, providing insights into the judicial approach to such matters. In addition, the chapter will explore how non-governmental organizations (NGOs) that support sexual minorities have engaged in advocacy and legal battles with the government to ensure recognition and defense of these rights. Lastly, it will address the shortcomings of the criminal justice system in adequately protecting sexual minorities.

CHAPTER FOUR

THE ROLE OF THE GOVERNMENT IN PROTECTING AND PROMOTING THE RIGHTS OF SEXUAL MINORITIES

4.1. INTRODUCTION

The role of government in protecting and promoting the rights of sexual minorities is crucial in fostering an inclusive and equitable society. Indeed, sexual minority individuals continue to face systematic discrimination, social stigma, and legal inequalities.³⁴⁸ As a result, the government is responsible for addressing these challenges through comprehensive legal protections, public policies, and social support mechanisms. The government can create a more just society by enacting anti-discrimination laws, recognising diverse relationships, ensuring access to healthcare, and promoting education and awareness.³⁴⁹ Furthermore, the journey towards equality and dignity for all citizens necessitates a strong political will, inclusive policies, and unwavering commitment to human rights.³⁵⁰

This chapter is solution-based and focuses on actions that the government can take to uplift and uphold the rights of sexual minorities. It is structured as follows. First, it examines actionable steps that African governments should take to protect and promote the rights of sexual minorities. Second, it evaluates the roles that political, religious, and cultural leaders must play to guarantee the rights of sexual minorities. Third, it analyzes the national intervention strategies that should be implemented to protect the LGBTIQ+ community's rights. Fourth, it examines how courts have dealt with cases involving violations of the rights of sexual minorities. Fifth, it explores how NGOs that support sexual minorities battle with the government to acknowledge and defend the rights of

³⁴⁸ Human Rights Campaign "Understanding the Issues: LGBTQ Equality", <https://www.hrc.org/resources/a-workplace-divided-understanding-the-climate-for-lgbtq-workers-nationwide> (accessed on 22 August 2024).

³⁴⁹ UN Human Rights Council "Combating discrimination based on sexual orientation and gender identity", <https://www.un.org/en/lgbtiqpeople#:~:text=The%20United%20Nations%20Human%20Rights,and%20respect%20for%20LGBTIQ%2B%20individuals> (accessed on 22 August 2024).

³⁵⁰ UN Human Rights Council "Combating discrimination based on sexual orientation and gender identity", <https://www.un.org/en/lgbtiqpeople#:~:text=The%20United%20Nations%20Human%20Rights,and%20respect%20for%20LGBTIQ%2B%20individuals> (accessed on 22 August 2024).

sexual minorities. Lastly, it addresses the justice system’s shortcomings in ensuring the protection and promotion of the rights of sexual minorities.

4.2. ACTION THAT AFRICAN GOVERNMENTS SHOULD TAKE TO PROTECT AND PROMOTE THE RIGHTS OF SEXUAL MINORITIES

Protecting and promoting the rights of sexual minorities in Africa is a critical issue that requires urgent and actionable measures. By implementing these measures, African governments can effectively address the challenges faced by sexual minorities, taking practical steps that align with both the international human rights standards and the unique socio-cultural contexts of their countries.

To begin with, “it is imperative for African governments to establish a narrative framework that supports diversity.”³⁵¹ According to Jones, “Diversity should not be seen as a problem for professionals to manage, but rather as an inherent characteristic of a society that must be acknowledged and made visible”.³⁵² A comprehensive approach to supporting diversity is essential for creating a safe environment for sexual minorities and their families. Consequently, “policy initiatives that focus on developing and promoting positive narratives around diversity should be actively encouraged”.³⁵³ This can be achieved through the creation of specific social awareness campaigns involving LGBTIQ+ persons, as well as through the integration of supportive educational materials and public discourse.³⁵⁴ Furthermore, “there is a pressing need to establish a robust legal framework for the protection of sexual and gender diversity.”³⁵⁵ Such a framework “should explicitly safeguard diversity and include provisions that address bullying and violence, recognise individuals’ chosen names and genders, and ensure access to justice in the event of grievances”. Legal protections must be inclusive, making sure that the particular needs of LGBTIQ+ individuals are embedded within broader legal provisions.³⁵⁶

³⁵¹ Jones 2021:104.

³⁵² Jones 2021:104.

³⁵³ Jones 2021:104.

³⁵⁴ Jones 2021:110.

³⁵⁵ Jones 2021:110.

³⁵⁶ Jones 2021:110.

“In addition to legal protections, policymakers must address the existing gaps in meeting the needs of LGBTIQ+ persons. This includes the development of dedicated policies for LGBTIQ+ individuals, the inclusion of specific sections in policy documents that address their needs, and the active participation of LGBTIQ+ persons in the policymaking process”.³⁵⁷ For instance, decision-makers should ensure that the voices of LGBTIQ+ persons are heard and should approach policy development from a perspective informed by these individuals’ lived experiences. This approach is crucial for protecting them from anti-LGBTIQ+ violence and for fostering a more inclusive and equitable society.

Furthermore, African states must strengthen human rights protections for LGBTIQ+ people by taking several critical steps. Firstly, they should decriminalise consensual same-sex relations and repeal laws that criminalise sexual minorities.³⁵⁸ Additionally, it is essential to adopt laws that explicitly ban discrimination based on sexual orientation, gender identity, and sex characteristics.³⁵⁹ Furthermore, “penalising hate crimes against LGBTIQ+ people and prohibiting harmful practices, such as so-called “conversion therapy” and forced or coercive surgeries on intersex children without consent, are crucial measures to ensure the protection of LGBTIQ+ rights”.³⁶⁰ Moreover, according to the African Commission, “the State must take measures to guarantee effective and timely access to justice for all victims of sexual violence, including those in rural areas”. Additionally, “States are required to guarantee that investigations into violent crimes and the prosecution of those responsible are conducted in a way that results in the identification and sentencing of the offenders, independently, impartially, efficiently, and without undue delay.”³⁶¹

³⁵⁷ Jones 2021:110.

³⁵⁸ UN Human Rights Council “About LGBTI people and human rights”, <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/about-lgbti-people-and-human-rights> (accessed on 30 August 2024).

³⁵⁹ United Nations “About LGBTI people and human rights”, <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/about-lgbti-people-and-human-rights> (accessed on 30 August 2024).

³⁶⁰ UN Human Rights Council “About LGBTI people and human rights”, <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/about-lgbti-people-and-human-rights> (accessed on 30 August 2024).

³⁶¹ African Commission 2014 “Resolution 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”, https://www.chr.up.ac.za/images/researchunits/sogie/documents/resolution_275/Resolution_275_booklet_ENGLISH_02_WEB.pdf (accessed on 09 August 2024).

Furthermore, investigators and prosecutors must consider the interests of victims during the process and protect victims and their families.³⁶²

“All African countries must launch massive campaigns to target violence against LGBTIQ+ individuals by increasing awareness about its causes and the kinds it takes”. These campaigns should target the root cause of such violence and aim to fight gender discrimination. Additionally, “they should educate the public on the inappropriateness of such violence, and point out that such violence is an infringement of the rights of LGBTIQ+ people in Africa which is unacceptable”.³⁶³ Furthermore, “these campaigns must also seek to educate society on the laws that have been enacted to reduce violence against LGBTIQ+ persons, highlighting their provisions and the reliefs afforded to the victims under those laws”.³⁶⁴ It should be emphasized that violence against LGBTIQ+ persons is unacceptable and constitutes a crime. Clear and appropriate punishments must be established and enforced to deter individuals from engaging in such acts. Additionally, “campaigns must inform about the different systems that are in place to file complaints of sexual violence and what assistance or protection and services are offered to victims”.³⁶⁵

Additionally, these campaigns need to be spread throughout the whole country, including public spaces, hospitals, police stations, public transportation, businesses, and rural areas.³⁶⁶ “States must also carry out awareness campaigns aimed at stakeholders in the

³⁶² African Commission 2014 “Resolution 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”, https://www.chr.up.ac.za/images/researchunits/sogie/documents/resolution_275/Resolution_275_booklet_ENGLISH_02_WEB.pdf (accessed on 09 August 2024).

³⁶³ African Commission 2014 “Resolution 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”, https://www.chr.up.ac.za/images/researchunits/sogie/documents/resolution_275/Resolution_275_booklet_ENGLISH_02_WEB.pdf (accessed on 09 August 2024).

³⁶⁴ African Commission 2014 “Resolution 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”, https://www.chr.up.ac.za/images/researchunits/sogie/documents/resolution_275/Resolution_275_booklet_ENGLISH_02_WEB.pdf (accessed on 09 August 2024).

³⁶⁵ African Commission 2014 “Resolution 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”, https://www.chr.up.ac.za/images/researchunits/sogie/documents/resolution_275/Resolution_275_booklet_ENGLISH_02_WEB.pdf (accessed on 09 August 2024).

³⁶⁶ African Commission 2014 “Resolution 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”, https://www.chr.up.ac.za/images/researchunits/sogie/documents/resolution_275/Resolution_275_booklet_ENGLISH_02_WEB.pdf (accessed on 09 August 2024).

public and private sectors. States should use all appropriate channels and means for these awareness-raising campaigns, adapted to the target audience's unique needs and the context in order to reach as many people as possible". Poster campaigns, social media campaigns, and newspaper, radio, and television advertisements are a few examples of these techniques.³⁶⁷ "States also need to train journalists, advertising professionals, and other communication specialists including those in community radio and pop culture media on how to stop spreading derogatory and dehumanising messages". Additionally, they should be trained on how to stop violence against LGBTIQ+ people.³⁶⁸ Lastly, "States ought to push information workers to collaborate with government agencies in order to develop and strengthen independent regulations that counteract harmful portrayals of LGBTIQ+ people, deliberate negative reporting, and homophobic stereotypes."³⁶⁹

In addition, "State needs to develop educational initiatives and resources that support equality, oppose gender stereotypes, and fight prejudice and violence against LGBTIQ+ people". National implementation of these initiatives is necessary, as is their integration into the formal and informal education sectors.³⁷⁰ Additionally, "as part of their onboarding process, the State needs to set aside money for different groups to receive training. Police officers, judges and magistrates, court employees, paralegals, attorneys, and traditional, political, and religious leaders are just a few examples of those who fall under this

³⁶⁷ African Commission 2014 "Resolution 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", https://www.chr.up.ac.za/images/researchunits/sogie/documents/resolution_275/Resolution_275_booklet_ENGLISH_02_WEB.pdf (accessed on 09 August 2024).

³⁶⁸ African Commission 2014 "Resolution 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", https://www.chr.up.ac.za/images/researchunits/sogie/documents/resolution_275/Resolution_275_booklet_ENGLISH_02_WEB.pdf (accessed on 09 August 2024).

³⁶⁹ African Commission 2014 "Resolution 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", https://www.chr.up.ac.za/images/researchunits/sogie/documents/resolution_275/Resolution_275_booklet_ENGLISH_02_WEB.pdf (accessed on 09 August 2024).

³⁷⁰ African Commission 2014 "Resolution 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", https://www.chr.up.ac.za/images/researchunits/sogie/documents/resolution_275/Resolution_275_booklet_ENGLISH_02_WEB.pdf (accessed on 09 August 2024).

category”. This training needs to center on the values of equality and non-discrimination for all people, including the LGBTIQ+ community.³⁷¹

Furthermore, especially in isolated or marginalised areas, local government agencies and civil society organisations including community-based organisations play a crucial role in preventing and monitoring violence against LGBTIQ+ people.³⁷² “The government must guarantee that these organisations receive funding and that they actively take part in preventative initiatives as well as all phases of development, implementation, and monitoring of national action plans”.³⁷³ Furthermore, “State has to permit, register, and assist LGBTIQ+ organisations that run initiatives to stop and address violence against LGBTIQ+ people. Everything that is impeding their work, including legal impediments, needs to be removed”.³⁷⁴ Additionally, “State needs to effectively shield these organisations and human rights advocates from assaults, retaliation, and incriminating remarks”.³⁷⁵

“State must set up national emergency numbers that are toll-free and open twenty-four hours a day, seven days a week, so that victims or anyone who is concerned can report incidents of violence against LGBTIQ+ people”.³⁷⁶ These emergency hotlines ought to be

³⁷¹ African Commission 2014 “Resolution 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”, https://www.chr.up.ac.za/images/researchunits/sogie/documents/resolution_275/Resolution_275_booklet_ENGLISH_02_WEB.pdf (accessed on 09 August 2024).

³⁷² African Commission 2014 “Resolution 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”, https://www.chr.up.ac.za/images/researchunits/sogie/documents/resolution_275/Resolution_275_booklet_ENGLISH_02_WEB.pdf (accessed on 09 August 2024).

³⁷³ African Commission 2014 “Resolution 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”, https://www.chr.up.ac.za/images/researchunits/sogie/documents/resolution_275/Resolution_275_booklet_ENGLISH_02_WEB.pdf (accessed on 09 August 2024).

³⁷⁴ African Commission 2014 “Resolution 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”, https://www.chr.up.ac.za/images/researchunits/sogie/documents/resolution_275/Resolution_275_booklet_ENGLISH_02_WEB.pdf (accessed on 09 August 2024).

³⁷⁵ African Commission 2014 “Resolution 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”, https://www.chr.up.ac.za/images/researchunits/sogie/documents/resolution_275/Resolution_275_booklet_ENGLISH_02_WEB.pdf (accessed on 09 August 2024).

³⁷⁶ African Commission 2014 “Resolution 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

private and, more significantly, ought to ensure the privacy of individuals who report violent crimes.³⁷⁷ To further expedite the authorities' intervention, these helplines need to be connected to all relevant services, including police, medical, social, and legal services.³⁷⁸ "State must act decisively and comprehensively to end violence and discrimination against people who identify as sexual minorities". By doing this, the State can support the development of a more secure and welcoming community in which everyone's rights and dignity including those of the LGBTIQ+ community are valued and upheld.

4.3. THE ROLE OF POLITICAL, RELIGIOUS, AND CULTURAL LEADERS

In many African countries, the topic of same-sex relations between adults is often dismissed as a religious and cultural aberration, deemed unworthy of discussion. Both the public and politicians strongly oppose the rights of sexual minorities.³⁷⁹ When courts are called upon to adjudicate matters related to sexual minority rights, they frequently rely on arguments rooted in religion and culture. They often contend that society is not yet prepared to accept the practice or recognise the rights of individuals engaged in same-sex relationships.³⁸⁰ However, it is imperative that the courts also play a role in ensuring that the rights of sexual minorities are protected. Religion, culture, and politics often act as significant barriers to the decriminalisation of consensual same-sex conduct in many African countries.³⁸¹ Rather than serving as tools for perpetuating criminalisation, these

Identity", https://www.chr.up.ac.za/images/researchunits/sogie/documents/resolution_275/Resolution_275_booklet_ENGLISH_02_WEB.pdf (accessed on 09 August 2024).

³⁷⁷ African Commission 2014 "Resolution 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", https://www.chr.up.ac.za/images/researchunits/sogie/documents/resolution_275/Resolution_275_booklet_ENGLISH_02_WEB.pdf (accessed on 09 August 2024).

³⁷⁸ African Commission 2014 "Resolution 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", https://www.chr.up.ac.za/images/researchunits/sogie/documents/resolution_275/Resolution_275_booklet_ENGLISH_02_WEB.pdf (accessed on 09 August 2024).

³⁷⁹ Moyo 2022:220.

³⁸⁰ Jones & Green 2021:46-50.

³⁸¹ Jones & Green 2021:50.

institutions should be leveraged to recognise and decriminalise same-sex conduct, ultimately leading to its removal from criminal statutes.³⁸²

Religion has often been employed as a means to delegitimise the rights of same-sex practicing individuals. However, it is necessary to reconsider this position and see religion as a means to demonstrate unconditional love for all individuals regardless of their sexual orientation.³⁸³ Rather than using religion to discriminate against people based on whom they love, it should be harnessed to promote inclusivity.³⁸⁴ Amoah and Gyasi³⁸⁵ argue that religion could serve as a foundation for accommodating same-sex sexuality. They acknowledge that most religions traditionally oppose same-sex sexuality.³⁸⁶ However, drawing on other research, they suggest that these same religious bodies preach forgiveness and tolerance. The teachings of Christianity and Islam could be utilised as a medium to heal society and encourage the acceptance of those who practice same-sex sexual acts.

The argument that culture serves as a barrier to recognising homosexual sexualities is indeed formidable. This is particularly evident because the majority of African societies are predominantly heterosexual.³⁸⁷ Moreover, leaders from various religious, traditional, and political backgrounds continue to uphold a colonial narrative that denies the existence of multiple indigenous African sexualities.³⁸⁸ Consequently, it becomes challenging to convince people otherwise. However, culture can also play a crucial role in protecting the rights of sexual minorities by fostering an environment of acceptance, respect, and tolerance.³⁸⁹ Cultural norms and values that emphasize human dignity, equality, and non-discrimination can significantly contribute to the protection of sexual minorities' rights.³⁹⁰

³⁸² Jones & Green 2021:50.

³⁸³ Ako 2021:84.

³⁸⁴ Ako 2021:84.

³⁸⁵ Amoah & Gyasi 2016:2.

³⁸⁶ Amoah & Gyasi 2016:2.

³⁸⁷ Wekesa 2016:221.

³⁸⁸ Wekesa 2016:221.

³⁸⁹ Wekesa 2016:221.

³⁹⁰ Smith 2021:130.

It is significant to note that the African continent is governed by a constitutional democracy, where the constitution guarantees the enjoyment of culture while limiting this enjoyment when it infringes on the rights of others.³⁹¹ The South African Constitution explicitly states that “every person is entitled to enjoy, practice, profess, maintain, and promote any culture, language, tradition, or religion subject to the provisions of this Constitution.”³⁹² Because of this, the Constitution governs how cultural rights are exercised, and all cultural practices must abide by its provisions.³⁹³ This suggests that cultural norms and practices that infringe upon the rights of individuals are null and void to the degree that they violate any constitutional provision, especially the Bill of Rights.³⁹⁴ Since cultures are dynamic, there is every reason to believe that they will always be evolving and will never remain static. Thus, even if they have not done so in the past, cultures can accept people who identify as homosexual.³⁹⁵ Since homosexuals are a product of the culture, this evolution depends on the culture being developed enough to accept them.³⁹⁶ As such, they should be accepted by the society that produced them, so that they can feel secure enough to make significant contributions to society.³⁹⁷

It is crucial to revisit and embrace cultural norms that have traditionally accepted people of different sexual orientations while also valuing heterosexual marriages that support the continuation of family lines in order to promote this acceptance.³⁹⁸ Doing so will preserve the wisdom of the forefathers and re-establish the identity of the African person, which respects the worth and dignity of all people.³⁹⁹ Additionally, cultural initiatives such as pride parades and LGBTIQ+ advocacy through traditional and social media platforms have significantly contributed to raising awareness and pushing for legal reforms worldwide.⁴⁰⁰ Another effective starting point for building respectful and equitable

³⁹¹ Ako 2021:114.

³⁹² *Zimbabwe’s Constitution of 2013:sec. 63.*

³⁹³ Ako 2021:114.

³⁹⁴ Ako 2021:114.

³⁹⁵ Ako 2021:115.

³⁹⁶ Ako 2021:115.

³⁹⁷ Ako 2021:115.

³⁹⁸ Ako 2021:115.

³⁹⁹ Smith 2021:130.

⁴⁰⁰ Smith 2021:130.

relationships is the practice of cultural humility, which involves self-reflection on one's beliefs and cultural identities.⁴⁰¹ Cultural humility practices include self-awareness, openness to learning, and embracing complexity. By engaging in dialogues rooted in cultural humility, individuals can reflect on and critique their assumptions, biases, and values regarding LGBTIQ+ issues. These dialogues can also emphasize the negative impacts of stigma and discrimination on LGBTIQ+ people, their families, and African societies, thereby helping to shift stigmatising attitudes and recognise LGBTIQ+ rights as human rights.⁴⁰² Furthermore, allowing individuals, groups, and families to share their experiences and learn from one another can drive social change and improve the human rights of LGBTIQ+ individuals.

Moreover, Chiefs and other traditional leaders have long been involved in the creation of new land laws and HIV and AIDS policies.⁴⁰³ Because they have the same kind of substantial influence over citizens' lives as the state, chiefs, and traditional leaders are sometimes compared to the state in terms of power.⁴⁰⁴ Therefore, traditional leaders and chiefs can be extremely important in promoting the rights of sexual minorities. In order to do this, programs that educate chiefs and traditional leaders about sexuality, sexual rights, sexual health, and the human rights of people in same-sex relationships must be created.⁴⁰⁵ Chiefs and other traditional leaders also need to accept LGBTIQ+ people as a natural part of human sexual diversity. They must also understand how gender identity, sexual orientation, and human rights are related.⁴⁰⁶

⁴⁰¹ Giwa *et al.* 2020:45.

⁴⁰² Giwa *et al.* 2020:45.

⁴⁰³ Sonke Gender Justice 2024 "Building trust with traditional leaders to promote LGBTQI+ rights in Lesotho", <https://genderjustice.org.za/news-item/building-trust-with-traditional-leaders-to-promote-lgbtqi-rights-in-lesotho/> (accessed 26 October 2024).

⁴⁰⁴ Sonke Gender Justice 2024 "Building trust with traditional leaders to promote LGBTQI+ rights in Lesotho", <https://genderjustice.org.za/news-item/building-trust-with-traditional-leaders-to-promote-lgbtqi-rights-in-lesotho/> (accessed 26 October 2024).

⁴⁰⁵ Sonke Gender Justice 2024 "Building trust with traditional leaders to promote LGBTQI+ rights in Lesotho", <https://genderjustice.org.za/news-item/building-trust-with-traditional-leaders-to-promote-lgbtqi-rights-in-lesotho/> (accessed 26 October 2024).

⁴⁰⁶ Sonke Gender Justice 2024 "Building trust with traditional leaders to promote LGBTQI+ rights in Lesotho", <https://genderjustice.org.za/news-item/building-trust-with-traditional-leaders-to-promote-lgbtqi-rights-in-lesotho/> (accessed 26 October 2024).

Furthermore, politicians play a crucial role in protecting the rights of sexual minorities, influencing both legal frameworks and social attitudes.⁴⁰⁷ They advocate for laws that protect LGBTIQ+ individuals, such as anti-discrimination measures, marriage equality, and protections in areas like employment, housing, and healthcare, while also working to block legislation that could undermine these rights.⁴⁰⁸ By including LGBTIQ+ rights in their platforms and supporting candidates who prioritise these issues, parties shape the legislative agenda and ensure that these rights are upheld.⁴⁰⁹ For example, in countries like South Africa, political leaders have been at the forefront of ensuring constitutional protections for LGBTIQ+ people, making it one of the few African nations where sexual minorities enjoy legal recognition and protection.⁴¹⁰ Furthermore, political parties use their platforms to raise public awareness, helping to shift societal attitudes and reduce stigma and discrimination.⁴¹¹ They also build coalitions with LGBTIQ+ advocacy groups and other civil rights organisations to amplify their efforts.⁴¹² The influence of political parties extends to the judiciary as well, where they can impact the interpretation of laws related to gay rights through judicial appointments.⁴¹³

On the international stage, parties can advocate for LGBTIQ+ rights in global forums and through foreign policy. Additionally, by promoting diversity in their leadership and among their candidates, political parties ensure that the voices of the LGBTIQ+ community are represented at the highest levels of government.⁴¹⁴ This representation, combined with symbolic actions by party leaders, further reinforces the party's commitment to protecting gay rights.⁴¹⁵ The extent of a political party's impact on gay rights often depends on its ideology, leadership, and the broader sociopolitical context in which it operates.⁴¹⁶ Financial support is also decisive because LGBTIQ+ organisations in countries with anti-

⁴⁰⁷ Smith 2023:390.

⁴⁰⁸ Smith 2023:400.

⁴⁰⁹ Brown & Taylor 2021:12.

⁴¹⁰ Smith 2023:400.

⁴¹¹ Brown & Taylor 2021:12.

⁴¹² Tettey 2016:86.

⁴¹³ Ako 2021:115.

⁴¹⁴ Ako 2021:115.

⁴¹⁵ Baisley 2015:385.

⁴¹⁶ Parker & Lopez 2020:70.

homosexual legislation often cannot register officially, and therefore cannot receive donor money within their own country.⁴¹⁷ In such cases, not only is project support important, but so is the funding of operating costs (such as office infrastructure and personnel), as well as making money available to cover legal expenses, including trial costs for activists or bail money.⁴¹⁸ Furthermore, networking is crucial to activists, as it enables LGBTIQ+ activists to exchange views and experiences with one another, thereby exercising greater political influence to advance their demands.⁴¹⁹ Therefore, the combination of politics, culture, and religion will create a holistic force that can effectively accelerate the process of securing the rights of sexual minorities. All these entities must work together to restore the spirit of unity and create a continent that is peaceful and progressive in its laws.

4.4. NATIONAL INTERVENTION STRATEGIES THAT SHOULD BE IMPLEMENTED TO PROTECT THE LGBTIQ+ COMMUNITY RIGHTS

To effectively protect the rights of the LGBTIQ+ communities in Africa, several national intervention strategies are essential. First, “there remains a need to build capacity and increase the sensitization of various stakeholders involved in safeguarding the rights of sexual minorities across the continent”.⁴²⁰ Additionally, “fostering a coordinated approach among governments, institutions, and civil society is crucial in addressing discrimination. This collaboration is essential to combat the hate crimes experienced by individuals with diverse sex, sexual orientation, and gender identity”.⁴²¹ Furthermore, it is vital to create and implement inclusive policies and ensure that LGBTIQ+ matters are reported across all platforms.⁴²²

Furthermore, all state organs must comply with the Constitution, which is recognised as the supreme law of their respective countries.⁴²³ Consequently, governments must take

⁴¹⁷ Parker & Lopez 2020:70.

⁴¹⁸ Parker & Lopez 2020:70.

⁴¹⁹ Brown & Taylor 2021:15.

⁴²⁰ Kumar 2019:290.

⁴²¹ Kumar 2019:316.

⁴²² Kumar 2019:316.

⁴²³ NANHRI & SAHRC 2018 “In-country meeting on sexual orientation, gender identity and Expression report”, <https://www.sahrc.org.za/home/21/files/FINAL%20BOOKLET%20for%20print%20approval%203%20September%202018.pdf> (accessed on 11 September 2024).

steps to ensure that all individuals within their African nations, including members of the LGBTIQ+ community, have access to and can enjoy their rights.⁴²⁴ The necessary actions governments must undertake include several critical measures. First, “special measures should be implemented to enhance access to justice for all, especially marginalised groups”. Second, “governments must take decisive steps to eradicate violence and crime, particularly those acts directed toward sexual minorities”.⁴²⁵ Third, “policies, systems, and procedures that perpetuate discrimination must be reviewed, ensuring that efforts are made to promote social cohesion”. Information related to these efforts should be made easily accessible, understandable, and inclusive for all citizens. Fourth, “effective systems must be established to monitor, record, and report hate-motivated acts of violence”.⁴²⁶

Fifth, “there must be effective investigation and prosecution of perpetrators, along with providing remedies for victims of such violence”. Sixth, “asylum laws and policies should acknowledge that persecution based on sexual orientation or gender identity is a valid reason for seeking asylum”. Seventh, “torture, cruel, inhumane, and degrading treatment of LGBTIQ+ persons in detention must be strictly prohibited and punished, with governments ensuring victims receive proper redress”.⁴²⁷ Finally, public officials, especially those in the criminal justice system, must undergo appropriate sensitization training to be adequately prepared to handle LGBTIQ+ issues. This will ensure they are equipped to handle LGBTIQ+ issues with sensitivity and fairness.⁴²⁸ Additionally, “training and professional development opportunities informed by stigma-reduction strategies

⁴²⁴ NANHRI & SAHRC 2018 “In-country meeting on sexual orientation, gender identity and Expression report”, <https://www.sahrc.org.za/home/21/files/FINAL%20BOOKLET%20for%20print%20approval%203%20September%202018.pdf> (accessed on 11 September 2024).

⁴²⁵ NANHRI & SAHRC 2018 “In-country meeting on sexual orientation, gender identity and Expression report”, <https://www.sahrc.org.za/home/21/files/FINAL%20BOOKLET%20for%20print%20approval%203%20September%202018.pdf> (accessed on 11 September 2024).

⁴²⁶ NANHRI & SAHRC 2018 “In-country meeting on sexual orientation, gender identity and Expression report”, <https://www.sahrc.org.za/home/21/files/FINAL%20BOOKLET%20for%20print%20approval%203%20September%202018.pdf> (accessed on 11 September 2024).

⁴²⁷ NANHRI & SAHRC 2018 “In-country meeting on sexual orientation, gender identity and Expression report”, <https://www.sahrc.org.za/home/21/files/FINAL%20BOOKLET%20for%20print%20approval%203%20September%202018.pdf> (accessed on 11 September 2024).

⁴²⁸ NANHRI & SAHRC 2018 “In-country meeting on sexual orientation, gender identity and Expression report”, <https://www.sahrc.org.za/home/21/files/FINAL%20BOOKLET%20for%20print%20approval%203%20September%202018.pdf> (accessed on 11 September 2024).

could be provided to legislators and policymakers”. This would help to prevent the further enactment of punitive laws that discriminate based on sexual orientation and gender identity. These training sessions should include topics such as LGBTIQ+ identities and terminologies, and the harmful impacts of stigma and discrimination. They should also cover the state of LGBTIQ+ rights in various African countries and inclusive policies that promote the rights and well-being of LGBTIQ+ people.⁴²⁹ Each of these steps is essential for upholding the constitutional rights of all citizens and promoting an inclusive society that protects the dignity and rights of every individual.

The government needs to actively form partnerships with NGOs and other sectors that advocate for the rights of sexual minorities. This collaborative approach is crucial for developing a coordinated response to combat violence against LGBTIQ+ individuals. In addition, “establishing a robust support system for LGBTIQ+ individuals is an essential strategy”. By creating safe spaces, support centers, and mental health services, governments can provide crucial resources and protection for those who face violence or discrimination. These services should include access to legal aid, counseling, and shelters, ensuring that LGBTIQ+ persons receive the support they need in times of crisis.

Furthermore, “African nations should work together and engage with international bodies to push for reforms that protect LGBTIQ+ rights across the continent”. This is achievable, especially when considering the progressive policies respecting the human rights of LGBTIQ+ persons that already exist in countries such as South Africa. For instance, South Africa became the first African country to forbid discrimination based on sexual orientation and gender identity in its Constitution.⁴³⁰ In October 2019, the country celebrated its 30th annual Johannesburg Pride parade. Additionally, South Africa was the fifth country in the world to legalise same-sex marriage and allow adoption by same-sex couples.⁴³¹ These LGBTIQ+ inclusive non-discrimination policies affirm and protect the equal rights of non-heterosexual people to life, liberty, and security of the person.⁴³² It is

⁴²⁹ Giwa *et al.* 2020:44.

⁴³⁰ Giwa *et al.* 2020:44.

⁴³¹ Giwa *et al.* 2020:44.

⁴³² Giwa *et al.* 2020:44.

clear that the collaboration of all these entities is essential in ensuring that sexual minority groups are fully integrated into our societies and receive equal treatment. By working together to implement inclusive policies and provide education, can create an environment where LGBTIQ+ individuals are respected and their rights are upheld. This collective effort will not only benefit sexual minority groups but will also contribute to building more just, equitable, and compassionate societies for everyone.

4.5. THE ROLE OF THE COURTS

The judiciary is a branch of the government with the constitutional duty to protect and interpret the Constitution and to ensure the consolidation of democracy. This responsibility includes safeguarding rights and fundamental freedoms, promoting constitutionalism, and upholding the rule of law.⁴³³ In a constitutional democracy, the functions of the courts are clearly outlined in the Constitution. Additionally, the Constitution establishes and defines the functions of a Constitutional Court.⁴³⁴ The constitutional courts are tasked with interpreting the Constitution and making decisions on the constitutionality of legislation.⁴³⁵ However, their role extends beyond merely pronouncing the validity of legislation and executive conduct. Constitutional courts also play a crucial role in upholding constitutional values and protecting the rights enshrined in the Constitution.⁴³⁶ Furthermore, they are expected to build a robust constitutional jurisprudence and foster a culture of human rights.⁴³⁷ Importantly, these courts have the duty to protect the weaker members of society from abuses of power and infringement of their rights.⁴³⁸

The Constitutional Court of South Africa has passed socially unpopular decisions regarding the equal protection of the rights of LGBTIQ+ persons. In the *National Coalition* case,⁴³⁹ for instance, the Court declared the common law offense of sodomy

⁴³³ Twinomugisha 2009:9.

⁴³⁴ Twinomugisha 2009:9.

⁴³⁵ Twinomugisha 2009:9-10.

⁴³⁶ Nyarang'o 2011:49.

⁴³⁷ Nyarang'o 2011:50.

⁴³⁸ Nyarang'o 2011:50.

⁴³⁹ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12): Par. 20.*

unconstitutional. This ruling was based on the grounds that the law violated the rights to dignity, equality, and privacy, as it discriminated against homosexuals based on their sexual orientation. Similarly, in the *Fourie* case,⁴⁴⁰ two women in a long-term, stable domestic relationship sought the legal right to marry. Since this was prohibited under existing law, they appealed to the court for a mandamus order requiring the Minister of Home Affairs to recognise their union. They also sought a declaration that the common law definition of marriage was unconstitutional. Although some judges in the Supreme Court of Appeal agreed that the traditional definition of marriage was no longer defensible, they believed it was the responsibility of Parliament to amend the law.⁴⁴¹ When the matter reached the Constitutional Court, the Court declared both the common law definition of marriage and the relevant section of the Marriage Act unconstitutional. In delivering the judgment, Justice Sachs emphasized that while religion plays a significant role in society, it would be improper to use the religious sentiments of some as a basis for determining the enjoyment of rights.⁴⁴²

Furthermore, courts in Uganda have increasingly embraced a more independent role in protecting the rights of LGBTIQ+ persons. This has occurred even when the cases in question did not directly address the constitutionality of sodomy laws. For example, the High Court of Uganda ruled in favor of homosexuals in both the *Victor Juliet Mukasa*⁴⁴³ and *Rolling Stone*⁴⁴⁴ cases, which centered on the protection of the right to privacy as guaranteed by the Constitution. In doing so, the High Court missed an opportunity to interpret the relevant constitutional provisions progressively and creatively, thereby failing to declare the death penalty unconstitutional.⁴⁴⁵

⁴⁴⁰ *Minister of Home Affairs and Another v Fourie and Another (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC): Par. 88.*

⁴⁴¹ *Minister of Home Affairs and Another v Fourie and Another (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC): Par. 89-90.*

⁴⁴² Wekesa 2016:290.

⁴⁴³ *Victor Juliet Mukasa & Yvonne Oyo v Attorney General*, High Court of Uganda, Miscellaneous Cause No. 24 of 2006.

⁴⁴⁴ *Kasha Jacqueline, David Kato, & Pepe Julian Onziema v Rolling Stone Ltd & Giles Muhame*, High Court of Uganda, Miscellaneous Cause No. 163 of 2010.

⁴⁴⁵ Wekesa 2016:272.

In the case of *Makwanyane*,⁴⁴⁶ the South African Constitutional Court was tasked with determining the constitutionality of the death penalty. The Court ultimately held that the death penalty violated the right to life. One of the government's justifications for retaining the death penalty was that a majority of South Africans supported it in extreme cases.⁴⁴⁷ However, the Court dismissed the relevance of public opinion in this context. It emphasized that the question before the Court was not whether the majority of South Africans believed the death sentence was the appropriate punishment for murder, but rather whether the Constitution permitted such a sentence. While the Court did not consider public opinion irrelevant, it firmly held that public opinion should not override the courts' duty to adjudicate constitutional issues. The Court maintained that its responsibility to interpret the Constitution must not be swayed by the views of the majority in society.⁴⁴⁸

Furthermore, in the case of *S v Banana*,⁴⁴⁹ the Zimbabwean High Court held that same-sex sexual conduct was not unconstitutional, despite the prevailing views of the majority. The Court acknowledged that society was conservative and outraged by same-sex sexual acts, but it found that the criminalisation of sodomy was constitutional. In contrast, South Africa's Constitution explicitly prohibits unfair discrimination based on sexual orientation.⁴⁵⁰ This constitutional protection led the Constitutional Court to decriminalise same-sex sexual acts in the *National Coalition* case and to legalise same-sex marriage in the *Fourie* case.⁴⁵¹

Additionally, the South African government has actively promoted the rights of LGBTIQ+ people within African communities. These contrasting decisions highlight the significant influence that public opinion can have on the adjudication of LGBTIQ+ rights in different African countries, particularly given the widespread view that homosexuality is "un-African."⁴⁵² The *S v Banana* case demonstrated how public opinion played a substantial

⁴⁴⁶ *State v Makwanyane and Another, Constitutional Court of South Africa, [1995] ZACC 3; 1995 (3) SA 391 (CC).*

⁴⁴⁷ Wekesa 2016:272.

⁴⁴⁸ Wesesa 2016:272.

⁴⁴⁹ *Banana v State, Supreme Court of Zimbabwe, [2000] 4 LRC 621.*

⁴⁵⁰ *Constitution of the Republic of South Africa of 1996:sec. 9(3).*

⁴⁵¹ Wekesa 2016:276.

⁴⁵² Wekesa 2016:276.

role in the court's decision regarding gay rights, in contrast to the more progressive stance taken by the South African courts. It is evident that the equality clause, along with progressive court decisions in South Africa, has been a powerful tool in promoting and gaining social acceptance of same-sex sexual acts.⁴⁵³ South Africa's equality laws are notably progressive compared to those of other African countries. Judicial activism has played a significant role in realising the rights of homosexuals. In cases of discrimination against homosexuals, judges have demonstrated less restraint and have been more innovative and progressive in addressing the rights of LGBTIQ+ persons.⁴⁵⁴ The Court has emphasised the transformative constitutional values of equality and dignity, which prohibit the state from denying homosexuals full and equal citizenship based on their sexual orientation.

However, progressive court decisions alone cannot compel people to change their opinions toward tolerance and acceptance of the LGBTIQ+ community. For lasting change, dialogue and understanding are required. Public engagement is essential for critics of sexual minority rights to comprehend the impact of their opinions and to appreciate that equality will not materially affect their rights and interests. Such engagement can contribute to national conversations about inclusive and diverse citizenship. The state should provide effective forums for discussions on gay rights issues. Educating citizens about gay rights and promoting a more cohesive society is both an ethical obligation and a constitutional duty for the government.

Moreover, the realisation and protection of sexual minority rights depend on courts willing to use their powers to address the ongoing discrimination and marginalisation of LGBTIQ+ persons. This requires judges with a judicial attitude that embraces a broader and more progressive approach to interpreting the Bill of Rights in the Constitution. Judges should also recognise their role as lawmakers and influence the direction of the law. This can only happen when their interpretation of the equality clause, along with the rights to privacy and human dignity goes beyond superficial language and addresses the

⁴⁵³ Wekesa 2016:276.

⁴⁵⁴ Wekesa 2016:276.

substantive issues outlined in the relevant constitutional provisions. Judges have a duty to uphold the Constitution's values and principles, fostering the advancement of human rights and fundamental freedoms.

4.6. THE ROLE OF NON-GOVERNMENTAL ORGANISATIONS (NGOs)

Non-governmental organizations (NGOs) are private entities that engage in activities aimed at alleviating suffering, promoting the interests of the poor, protecting the environment, providing basic social services, and undertaking community development.⁴⁵⁵ In recent times, LGBTIQ+ organisers and groups have increasingly drawn connections between the movement for LGBTIQ+ rights and the broader movements for economic and racial justice.⁴⁵⁶ They emphasize that individuals possess multiple, layered identities and belong to more than one community simultaneously, experiencing both oppression and privilege concurrently.⁴⁵⁷ In this context, NGOs play a crucial role in supporting government efforts by conducting research related to LGBTIQ+ issues and advocating for the rights of homosexuals to combat discrimination. Moreover, NGOs serve as a unifying force, educating and empowering the LGBTIQ+ community.⁴⁵⁸

However, over the years, NGOs have often found themselves in conflict with governments that were either indifferent or openly hostile to the rights of sexual minorities. This battle has involved a mix of legal challenges, public campaigns, and international advocacy. An example is the work of NGOs in Uganda, where sexual minorities face severe legal and social discrimination. Organisations like Sexual Minorities Uganda (SMUG) have been at the forefront of challenging the government's harsh stance on LGBTIQ+ rights.⁴⁵⁹ SMUG has engaged in legal battles, such as the lawsuit against the Ugandan government for its Anti-Homosexuality Act, which was eventually nullified by the Constitutional Court in 2014.⁴⁶⁰ This legal victory was a significant milestone, though it did not eliminate the challenges faced by sexual minorities in the country.

⁴⁵⁵ Fauzi & Setyaningrum 2016:8.

⁴⁵⁶ Fauzi & Setyaningrum 2016:8.

⁴⁵⁷ Fauzi & Setyaningrum 2016:8-9.

⁴⁵⁸ Fauzi & Setyaningrum 2016:9.

⁴⁵⁹ Ojo & Stephen 2019:2-3.

⁴⁶⁰ Ojo & Stephen 2019:3-4.

Additionally, another prominent example of this issue is the deregistration of the NGO known as the Coalition of African Lesbians (CAL) that occurred in South Africa.⁴⁶¹ In 2014 the South African Department of South African Department of Social Development initially deregistered the organisation, citing that it was not aligned with the public benefit purposes outlined by the law.⁴⁶² Furthermore, institutionalised participation for civil society actors at the AU level is regulated through an observer status, which can be obtained and granted by the African Commission on Human and Peoples' Rights (ACHPR).⁴⁶³ After years of persistent campaigning, CAL was finally granted this status in 2015. However, despite this achievement, CAL was not included in the list of NGOs with observer status, and its status was officially revoked in 2018.⁴⁶⁴ This decision is largely attributed to the pressure exerted by the AU Executive Council on the ACHPR. This situation highlights a highly problematic development, as the Commission is supposed to function as an independent entity within the AU's architecture.⁴⁶⁵ As a result, this has led to a significant fallout between the ACHPR and the AU Executive Council, as well as among the members of the ACHPR itself.⁴⁶⁶ Consequently, NGOs working on LGBTIQ+ issues have been left with diminished trust in this institution.

Despite ongoing challenges, the AU remains a relevant platform at the regional continental, governance levels for advocating the concerns and interests of LGBTIQ+ persons.⁴⁶⁷ However, issues surrounding accessibility and trust in the AU as an agent for change persist. In contrast, national courts, such as the High Court of Kenya, have made significant progress in protecting LGBTIQ+ rights. For instance, this is evident in the 2015 case of *Eric Gitari v Non-Governmental Coordination Board*,⁴⁶⁸ where the court allowed the formal registration of an organisation representing gays and lesbians. However, the AU itself has yet to take substantial action on these issues. The High Court's decision was a national legal victory, independent of AU involvement. Moreover, the High Court's

⁴⁶¹ Reiss 2024:271.

⁴⁶² Seymour 2016:70.

⁴⁶³ Reiss 2024:271.

⁴⁶⁴ Reiss 2024:271.

⁴⁶⁵ Reiss 2024:271.

⁴⁶⁶ Reiss 2024:271.

⁴⁶⁷ Reiss 2024:271.

⁴⁶⁸ *Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others* 2015 eKLR.

decision was prompted by a petition filed by the National Gay and Lesbian Human Rights Commission (NGLHRC), which aimed to register under the Non-Governmental Organizations (NGO) Coordination Board Act.⁴⁶⁹ The NGO Coordination Board, a government body, had initially rejected the group's request in March 2013.⁴⁷⁰ The board argued that the organisation's name was "unacceptable" and that it could not be registered because Kenya's Penal Code "criminalises gay and lesbian liaisons." However, the High Court overturned the NGO board's decision, ruling that it violated Article 36 of the Kenyan Constitution, which states, "Every person has the right to freedom of association, which includes the right to form, join, or participate in the activities of an association of any kind."⁴⁷¹ These examples highlight the critical role that NGOs play in the fight for the rights of sexual minorities, often standing in opposition to government policies and societal norms that seek to marginalise these groups.

To protect LGBTIQ+ individuals from further discrimination and bullying, NGOs face the initial challenge of establishing their organisations as legal entities. This step is crucial because it facilitates cooperation with government agencies, makes the NGOs more approachable, and simplifies the organisation of programs for LGBTIQ+ communities.⁴⁷² However, this is often a struggle, as the government is frequently unwilling to cooperate or legally register NGOs that support LGBTIQ+ rights.⁴⁷³ In response to these challenges, NGOs must play an active role in civil society coalitions to influence the preparation of legislation.⁴⁷⁴ A significant issue that persists is that advocacy efforts are often focused on raising awareness about the existence of LGBTIQ+ individuals and the equality of their rights, rather than addressing specific problems related to sexual orientation and gender identity.⁴⁷⁵ Therefore, NGOs need to press the government to reconsider policies that directly or indirectly discriminate against the LGBTIQ+ population. Additionally, the government must provide shelters to ensure the welfare of LGBTIQ+ individuals.⁴⁷⁶ Due

⁴⁶⁹ *Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others* 2015 eKLR: Paras. 2-10.

⁴⁷⁰ Reiss 2024:272.

⁴⁷¹ *Kenya Penal Code Act:cap 36*.

⁴⁷² Fauzi & Setyaningrum 2016:16.

⁴⁷³ Fauzi & Setyaningrum 2016:16.

⁴⁷⁴ Fauzi & Setyaningrum 2016:17.

⁴⁷⁵ Francis 2024:5.

⁴⁷⁶ Francis 2024:5.

to the criminalisation of homosexuality, many LGBTIQ+ people are left without a place to stay, forcing them to roam the streets. Some are even compelled to flee the country in search of safer places to hide.⁴⁷⁷

4.7. ADDRESSING THE JUSTICE SYSTEM’S SHORTCOMINGS IN ENSURING THE PROTECTION AND PROMOTION OF THE RIGHTS OF SEXUAL MINORITIES

Addressing the shortcomings of the justice system in ensuring the protection and promotion of the rights of sexual minorities requires comprehensive legal reforms, judicial training, public awareness, and community engagement.⁴⁷⁸ Legal reforms are crucial, particularly the implementation of anti-discrimination laws that protect sexual minorities from discrimination.⁴⁷⁹ Additionally, “it is essential to strengthen laws that criminalise hate crimes based on sexual orientation and gender identity, ensuring these crimes are prosecuted with the seriousness they deserve”.⁴⁸⁰ Training and sensitization of judicial and law enforcement personnel are equally important. “Mandatory sensitivity training for judges, prosecutors, and police officers can help combat bias and ensure fair treatment of sexual minorities within the justice system”.⁴⁸¹ “Establishing specialised units within law enforcement to handle cases involving sexual minorities and encouraging community policing strategies can build trust between law enforcement agencies and sexual minority communities”.⁴⁸²

Furthermore, “access to justice for sexual minorities can be improved by providing free legal aid, victim protection, and information about legal rights”. It is essential to strengthen the protection measures, such as safe housing and psychological support for victims of discrimination and violence.⁴⁸³ Public awareness campaigns can further combat stereotypes and prejudice against sexual minorities, promoting understanding and

⁴⁷⁷ Francis 2024:5.

⁴⁷⁸ Un Human Rights Council 2021 “About LGBTI people and human rights. <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/about-lgbti-people-and-human-rights>”, (accessed on 30 August 2024).

⁴⁷⁹ Un Human Rights Council 2021 “About LGBTI people and human rights. <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/about-lgbti-people-and-human-rights>”, (accessed on 30 August 2024).

⁴⁸⁰ Murray 2018:51.

⁴⁸¹ Murray 2018:52.

⁴⁸² Thoreson 2022:388.

⁴⁸³ Thoreson 2022:389.

acceptance within society.⁴⁸⁴ Also, “integrating education about sexual orientation and gender identity into school curricula and encouraging accurate presentation of sexual minorities in the media are critical strategies”.⁴⁸⁵ “Monitoring and reporting on the treatment of sexual minorities within the justice system and society can help hold authorities accountable and ensure that reforms are effective”.⁴⁸⁶

The fundamental tenet of non-discrimination forms the basis for the rights of sexual minorities as defined by international law.⁴⁸⁷ “It is crucial that people who identify as LGBTIQ+ be able to exercise their fundamental rights without facing discrimination in the context of the criminal justice system.⁴⁸⁸ This applies to people detained or incarcerated, suspected, found guilty, or not guilty of crimes, as well as victims or witnesses.⁴⁸⁹ Furthermore, the general principles of equality before the law, equality before the courts, and equal protection under the law are closely tied to the non-discrimination principle”.⁴⁹⁰ “States are required by the prohibition of discrimination to uphold the general principle of equality and to guarantee that every individual within their jurisdiction can fully exercise their right to be free from discrimination”.⁴⁹¹ Additionally, “the hiring of members of sexual minorities into law enforcement is yet another crucial practice. Law enforcement personnel from the sexual minority group should include judges, prosecutors, police

⁴⁸⁴ Thoreson 2022:389.

⁴⁸⁵ Thoreson 2022:390.

⁴⁸⁶ Thoreson 2022:390.

⁴⁸⁷ Un Network Joint Submission 2015 “Conference of the Parties to the United Nations Convention against Transnational Organised Crime”, <https://documents.un.org/doc/undoc/gen/v15/058/68/pdf/v1505868.pdf> (accessed on 13 August 2024).

⁴⁸⁸ Un Network Joint Submission 2015 “Conference of the Parties to the United Nations Convention against Transnational Organised Crime”, <https://documents.un.org/doc/undoc/gen/v15/058/68/pdf/v1505868.pdf> (accessed on 13 August 2024).

⁴⁸⁹ Un Network Joint Submission 2015 “Conference of the Parties to the United Nations Convention against Transnational Organised Crime”, <https://documents.un.org/doc/undoc/gen/v15/058/68/pdf/v1505868.pdf> (accessed on 13 August 2024).

⁴⁹⁰ Un Network Joint Submission 2015 “Conference of the Parties to the United Nations Convention against Transnational Organised Crime”, <https://documents.un.org/doc/undoc/gen/v15/058/68/pdf/v1505868.pdf> (accessed on 13 August 2024).

⁴⁹¹ Un Network Joint Submission 2015 “Conference of the Parties to the United Nations Convention against Transnational Organised Crime”, <https://documents.un.org/doc/undoc/gen/v15/058/68/pdf/v1505868.pdf> (accessed on 13 August 2024).

officers, and legal aid providers”.⁴⁹² By taking an inclusive stance, law enforcement operations towards LGBTIQ+ people can become more equitable, and biased behavior can be less likely.⁴⁹³

Adherence to international human rights frameworks is essential for ensuring that national laws and practices align with international standards. Continuous improvement can be promoted by routinely reporting to international human rights organisations on the state of sexual minorities’ rights and by making necessary corrections in response to their actions. A holistic approach that includes these elements is necessary to address the justice system’s shortcomings in protecting and promoting the rights of sexual minorities.

4.8. CONCLUSION

This chapter has focused on the role that the government can play in protecting and promoting the rights of sexual minorities, specifically exploring the actions that the government can take to safeguard these rights. Additionally, It has examined the role the cultural, political, and religious leaders can play in ensuring these rights. It has also analysed national intervention strategies that can be implemented to protect the rights of LGBTIQ+ persons. Furthermore, the chapter has reviewed how the courts deal with cases involving violations of the rights of sexual minorities and explored the role of NGOs in advocating for these rights against governmental opposition. The chapter has also discussed the shortcomings in the justice system regarding the protection and promotion of the rights of sexual minorities’s rights.

In conclusion, while the foregoing chapter has highlighted that the road to full acceptance and decriminalisation of homosexuality and gay rights in Africa is long and fraught with challenges, it has demonstrated that solutions to these challenges do exist. Addressing these issues requires a multifaceted approach, starting with the implementation of

⁴⁹² Un Network Joint Submission 2015 “Conference of the Parties to the United Nations Convention against Transnational Organised Crime”, <https://documents.un.org/doc/undoc/gen/v15/058/68/pdf/v1505868.pdf> (accessed on 13 August 2024).

⁴⁹³ Un Network Joint Submission 2015 “Conference of the Parties to the United Nations Convention against Transnational Organised Crime”, <https://documents.un.org/doc/undoc/gen/v15/058/68/pdf/v1505868.pdf> (accessed on 13 August 2024).

comprehensive legal reforms that align with international human rights standards. However, legal changes alone are not sufficient. It is crucial to maintain an open-minded approach and foster communities that are willing to learn and embrace inclusivity and diversity. Such shifts can help mitigate the stigma and discrimination that sexual minorities face and promote a more accepting and supportive environment. Ultimately, the path to genuine acceptance and equality requires a concerted effort from all sectors of society. That said, the final chapter presents the findings and recommendations, providing a summative examination of the observations, viewpoints, arguments, and criticisms that have been made throughout the research. It also evaluates these results in light of African governments' ongoing efforts to safeguard and advance public understanding of the rights of sexual minorities. Furthermore, it offers recommended actions required to safeguard such rights and corrective actions to restore the dignity of LGBTIQ+ people.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1. INTRODUCTION

The role of the government in protecting and promoting the rights of sexual minorities is crucial in ensuring equality, justice, and inclusivity for all citizens, regardless of their gender identity or sexual orientation. To protect sexual minorities, governments must adopt a multifaceted approach that combines legal reforms, and public education. Additionally, they should collaborate with civil society organisations, international bodies, and local communities to foster dialogue, promote awareness, and dismantle harmful stereotypes.

This concluding chapter presents a summary of the observations, viewpoints, arguments, and criticisms made throughout the research, based on the findings flowing from the objectives of the study. It will conclude by presenting key recommendations necessary to protect the rights of sexual minorities and corrective actions to safeguard the dignity of the LGBTIQ+ community.

5.2. OVERVIEW OF FINDINGS AND CONCLUSIONS

This section presents the conclusions drawn from the findings in terms of the research objectives outlined in the first chapter and demonstrates how these objectives were addressed.

The first objective of this study was to evaluate the practical steps that government can take to ensure that the rights of sexual minorities are recognised, protected, and promoted in those selected African countries. From this, it can be concluded that the African governments must implement effective measures that, when properly applied can lead to meaningful progress. However, these steps must engage all sectors of African communities, including the state, lawmakers, political, cultural, and religious leaders, as well as the international community's involvement. These sectors must commit to learning with an open mind and be eager to treat everyone with respect, while actively engaging with the LGBTIQ+ community when such initiatives occur.

Governments must abolish laws that criminalise homosexuality by implementing procedures through legislation, enforcement, judicial actions, and other measures. Legislative changes are essential to guarantee the rights of sexual minorities. International pressure also plays a role in urging African governments to respect these rights, as it has been highlighted that many African countries do not comply with international human rights standards and thus continue to abuse their power by criminalising homosexuality. Therefore, as mentioned above, for these steps to be effective, protecting and promoting the rights of sexual minorities requires a multifaceted approach that combines education, legal reforms, community engagement, international advocacy, and robust research.

The second objective of the study was to investigate loopholes in the African Charter on Human and People's Rights and relevant national legislation relating to sexual minorities. Several loopholes were identified in both the international human rights systems and the African human rights systems. However, within the international human rights systems, there has been significant progress, especially when compared to the African human rights system. One key issue is that while international human rights instruments do protect the rights of sexual minorities, the degree of protection and enforcement differs across countries. For instance, the human rights instruments do not always explicitly mention sexual orientation or gender identity. In some provisions, such as the non-discrimination clause listed under ICESCR, the distinction based on sexual orientation is included in the definition of "other status". This may result in inconsistent application and weaker protection of sexual minorities.

Additionally, another issue is that although most of the articles under the international human rights treaties include equality clauses, these are often not applied to sexual minorities, leaving them without protection and inclusivity. Furthermore, under the CAT, the Committee Against Torture has not adequately addressed cases related to torture, violence, and discrimination faced by LGBTIQ+ persons. As a result, reported cases often are not addressed. This leaves the victims fearful for their lives and discouraged from seeking assistance from law enforcement.

On the other hand, in the African human rights system, the most significant challenge stems from factors such as politics, religion, and culture. These factors heavily influence some member states and hinder the recognition of the rights of sexual minorities. Many Africans continue to assert the narrative that homosexuality is “un-African” and a foreign concept, making it difficult to accept it within these societies. Moreover, the African human rights system, under the non-discrimination clause does not explicitly include sexual orientation. Also, there is no explicit ruling regarding discrimination based on sexual orientation because there is a lack of case law on the subject. For example, in the case of *Courson v. Zimbabwe*,⁴⁹⁴ discussed in chapter two, Mr Courson had to withdraw his case due to no explicit rulings on sexual orientation. This lack of legal precedent has discouraged most victims from pursuing justice, knowing their complaints may not be thoroughly investigated or ruled upon.

Therefore, this demonstrates that there is a significant gap between the legal framework and the lived experience of sexual minorities. Thus, sexual minorities must be actively involved in the drafting of such laws, ensuring that their input is considered and that these laws are inclusive and protect their rights.

The third objective of the study was to analyse national intervention strategies to respond to and prevent sex and gender-based violence perpetrated against sexual minorities. To address this, the national intervention strategies that are in place must be enforced so that perpetrators are aware of the consequences of committing crimes, especially those related to sex and gender-based violence. It is ineffective to have these strategies drafted on paper if, when it comes to implementation, the government fails its citizens. As a result, many perpetrators escape prosecution. Therefore, there should be effective investigations and the prosecution of perpetrators, along with providing redress for victims of such violence.

In many cases, police often fail to protect sexual minorities and political leaders foster a hostile environment with their public homophobic statements. Thus, there is a need for appropriate training of all law enforcement officials to ensure that they are equipped with

⁴⁹⁴ *Courson v. Zimbabwe (African Commission on Human and Peoples' Rights, Comm. No. 136/94, 1995).*

the necessary knowledge on how to handle cases related to sexual minorities. Moreover, the national intervention must include special measures to improve access to justice, eradicate violence and crime, and review policies, systems, and procedures that perpetuate sex and gender-based violence against sexual minorities. In addition, international instruments like CEDAW and CAT must be actively applied to assist when dealing with cases of sex and gender-based violence.

One significant issue highlighted by the experts, in some African countries, is the practice of subjecting men suspected of homosexuality to non-consensual examinations intended to obtain physical evidence of anal sex. This practice violates an individual's right to privacy and must be prohibited. The law enforcement agencies must ensure that any country engaging in this practice faces consequences and is instructed to cease such actions. Furthermore, government must take a firm stand to strictly prohibit and punish acts of torture, and cruel, inhuman, and degrading treatment of sexual minorities. Effective systems must be established to monitor, record, and report hate-motivated acts of violence

The final objective of the study was to assess the government's ability to respond to the needs and specific vulnerability of LGBTIQ+ persons and the capacity of civil society organisations to deliver related services. Currently, the ability of the government to respond to the needs of LGBTIQ+ persons remains a daunting and distant goal. Despite this, there has been a notable shift towards progressive and inclusive laws in some African countries, largely due to efforts made by international organisations such as United Nations. Nevertheless, much work still needs to be done. Also, activists have gained support and visibility, mostly from NGOs and international organisations leading to gradual progress.

However, there are countries like Uganda that continue to impose some of the harshest penalties towards same-sex acts. This highlights the pressing need for international human rights organisations to push compliance with global standards. Furthermore, it is important to learn from countries like South Africa, which have successfully accepted and decriminalised homosexuality. This positive outcome has demonstrated the importance

of embracing equality. Thus, there is a need for specific measures and enforcement mechanisms to be put in place to ensure that sexual minorities are not subjected to oppressive laws, such as Uganda's recent Anti-Homosexuality Act. Continued monitoring of these oppressive laws is crucial to ensure that all the states comply with obligations to protect the rights of sexual minorities, thereby fostering inclusivity and equality for all.

Additionally, as discussed in chapter four, one of the primary obstacles remains government policies that block the registration of NGOs, making it difficult for these organisations to become legal entities and collaborate with government agencies. If the registration process fails, this means that these NGOs will not be able to advocate, raise awareness, conduct research, or address issues related to LGBTIQ+ individuals effectively. As mentioned earlier, African governments alone cannot bring change. Therefore, pressure and positive influence from leaders in various sectors such as politics, religion, and culture along with civil society organisations, are essential in driving progress. Importantly, civil society organisations, play a critical role in providing services to vulnerable groups and those in need of support.

5.3. RECOMMENDATIONS

First and foremost, it is crucial to cancel laws that criminalise homosexuality and enact legislations that prohibit discrimination based on gender identity and sexual orientation in all sectors, whether public or private. Moving forward, countries such as Uganda, Kenya, Zimbabwe, and Nigeria must adopt laws that decriminalise homosexuality. When these laws are being drafted, it is essential for the African governments to actively engage with sexual minority communities. This will help avoid the loopholes mentioned above and ensure that the policies reflect the lived experiences of LGBTIQ+ persons. Additionally, these countries should follow South Africa's example by ensuring that the rights of sexual minorities are upheld and consistently promoted. Notably, South Africa's Constitution is the first in Africa to prohibit unfair discrimination on the grounds of sexual orientation, thereby granting equality to gays and lesbians.⁴⁹⁵ The final constitution, which protects

⁴⁹⁵ Wekesa 2016:313.

the rights of sexual minorities was enacted in 1996.⁴⁹⁶ Furthermore, in 2006, South Africa introduced the Civil Union Act,⁴⁹⁷ which extended provisions for same-sex marriages together with traditional forms of marriages.

The wording of the non-discrimination and equality clause must be clearly defined to explicitly include sexual orientation, ensuring that members of the LGBTIQ+ community feel both included and protected by the law. For instance, the South African Constitution's equality clause lists sexual orientation as a prohibited ground for discrimination. Section 9 of the South African Constitution entitled "Equality", states that:

"The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth".⁴⁹⁸

This demonstrates that sexual minorities are protected by the inclusion of sexual orientation as one of the listed grounds on which unfair discrimination is prohibited. By doing so, the South African constitution enforces the rights of sexual minorities and helps establish a society based on social justice, democratic values, and fundamental freedoms.

Furthermore, recruiting LGBTIQ+ persons into law enforcement agencies is essential, as it allows them to contribute their lived experience, especially on matters related to discrimination, violence, and hate-motivated crimes. This approach may also assist in eliminating biases, prejudice, hatred, and homophobic tendencies from the minds of law enforcers when handling cases related to sexual orientation and gender identity.

Cases involving sexual orientation must be thoroughly investigated and the perpetrators must be held accountable and prosecuted. To foster trust, all parties involved must play their role, ensuring that sexual minorities believe law enforcement is on their side. This, in turn, may encourage the LGBTIQ+ community to regain hope that the justice system is working with them. As a result, they may feel more inspired to report cases without fear of judgment or ridicule.

⁴⁹⁶ *South Africa Constitution:sec. 9.*

⁴⁹⁷ *Civil Union Act 17/2006.*

⁴⁹⁸ *South Africa Constitution:sec. 9.*

Moreover, courts play a crucial role in ensuring compliance with equality laws. They can use their power to promote inclusivity and address issues of discrimination and marginalisation faced by the LGBTIQ+ community. This is possible if judges uphold the values and principles enshrined in each country's constitution, ensuring that no one is above the law. This will reassure all citizens that they have the right to enjoy every freedom outlined in their respective legal frameworks. For instance, South African courts have played a pivotal role in striking down legislation against same-sex conduct, demonstrating a commitment to tolerance and human rights despite prevailing public opinion.⁴⁹⁹ These courts have delivered, compelling state institutions to fulfill their constitutional duties. Additionally, they have referenced decisions from foreign courts when evaluating the constitutionality of sodomy laws.⁵⁰⁰

Additionally, the rights of LGBTIQ+ persons should be integrated into school curricula and taught in higher education institutions and other public spaces where LGBTIQ+ persons exist. Learning about and understanding the rights of sexual minorities will reduce discrimination while fostering diversity and inclusivity within African societies.

Moreover, creating community dialogue programmes where political, religious, and cultural leaders engage in open discussions with LGBTIQ+ activists on matters that involve homosexuality, may also assist in reducing stigma and misinformation. Such initiatives would encourage religious institutions to challenge homophobic interpretations and promote inclusivity. Traditional leaders, in turn, could emphasize human dignity and African values of community and compassion, reframing LGBTIQ+ issues within the local cultural contexts rather than perceiving them as foreign concepts. In the political arena, leaders should engage in unbiased efforts to sensitize their citizens to the impression that homosexuals are human beings and equally deserving of respect and dignity. Political parties should also include the rights and needs of sexual minorities in their manifestos to gain their support and votes.

Human rights organisations must continue to put pressure on those African countries that continue to criminalise and torture homosexuals. If these countries refuse to comply,

⁴⁹⁹ Wekesa 2016:314.

⁵⁰⁰ Wekesa 2016:315.

international organisations should impose sanctions or cut off aid and financial support. Additionally, these organisations should collaborate with local NGOs to advocate the rights of LGBTIQ+ persons. They should provide resources, funding, and platforms for LGBTIQ+ to raise awareness, conduct research, and seek legal reforms. This approach may encourage the African governments to step in and support these NGOs in their efforts to promote equality and justice for sexual minorities.

BIBLIOGRAPHY

ABRUSCI E

2017. A tale of convergence? Discrimination based on sexual orientation in regional human rights bodies and the Human Rights Committee. *Nordic Journal of Human Rights* 35(3):240-257.

AKO EY

2010. The debate on sexual minority rights in Africa: A comparative analysis of the situation in South Africa, Uganda, Malawi and Botswana. University of Western Cape (Cape Town).

AMOAH PA & GYASI RM

2016. Social institutions and same-sex sexuality: Attitudes, perceptions and prospective rights and freedoms for non-heterosexuals. *Cogent Social Sciences* 2(1):1198219.

AMUSAN L, SAKA L & ADEKEYE MO

2019. Gay Rights and the Politics of Anti-homosexual Legislation in Africa: Insights from Uganda and Nigeria. *Journal of African Union Studies* 8(2):45-66.

BAISLEY E

2015. Framing the Ghanaian LGBT rights debate: Competing decolonisation and human rights frames. *Canadian Journal of African Studies/Revue canadienne des études africaines* 49(2):383-402.

CALLAHAN S

2001. Homosexuality, moral theology, and scientific evidence. *Sexual Diversity and Catholicism: Towards the Development of Moral Theology*, 201-215.

CAMERON E

1993. Sexual Orientation and the Constitution: A Test Case for Human Rights. *South African Law Journal* 110(1):450-472.

DENZIN NK & LINCOLN YS

2005. *The discipline and practice of qualitative research: The Sage handbook of qualitative research*. 3rd edition. Thousand Oaks, CA: Sage.

FAUZI AR & SETYANINGRUM MHU

2016. Study implementation on the impact of NGO for LGBT mental health improvement in Yogyakarta. In *Proceedings of the 1st International Conference on South East Asia Studies, Yogyakarta, Indonesia*, 13-14.

FRANCIS DA

2024. Queer and trans activism in South African schools: Non-Governmental Organisations (NGOs) disrupting LGBT+ inequalities. *Teaching and Teacher Education* 148(1):104705.

GARRIDO R

2019. Patterns of discrimination based on sexual orientation in Africa: is there a Lusophone exception?. *African Human Rights Year Book* 3(1):93-118.

GERMOND P & DE GRUCHY S (EDS.)

1997. *Aliens in the household of God: Homosexuality and Christian faith in South Africa*. New Africa Books.

GIWA SAO, LOGIE CH, KARKI KK, MAKANJUOLA OF, & OBIAGWU CE

2020. Police violence targeting LGBTIQ+ people in Nigeria: Advancing solutions for a 21st century challenge. *Greenwich Social Work Review* 1(1):36-49.

GLOPPEN S & RAKNER L

2021. *LGBT Rights in Africa. Research Handbook on Gender, Sexuality and the Law*. University of Bergen: Norway.

HEPPLE J

2012. Will sexual minorities ever be equal? The repercussions of British colonial “sodomy” laws. *The Equal Rights Review* 8(1):50-64.

HUAMUSSE LEF

2006. *The Rights of Sexual Minorities under the African Human Rights System*. University of Pretoria (South Africa).

IBRAHIM AM

2015. LGBT rights in Africa and the Discursive role of international human rights law. *Journal of African Human Rights Law* 15(1):263-281.

IVANUS CA

2014. Prohibition of Gender Discrimination in Some International Regulations. *AGORA International Journal of Juridical Sciences* 8(1):59-65.

IZUGBARA CO

2004. Patriarchal ideology and discourses of sexuality in Nigeria. In *Understanding Human Sexuality Seminar Series* 2(21):1-35. University of Uyo, Lagos, Nigeria: The Department of Sociology and Anthropology.

JOHNSON P

2013. *Homosexuality and the European court of human rights*. Routledge.

JONES B

2021. Representation Matters: The Impact of LGBTIQ+ Visibility on Youth Empowerment. *Social Justice Review* 23(2):101-115.

JONES P & GREEN A

2021. Religious Leaders and LGBTQI+ Inclusion: A Comparative Study. *Journal of Human Rights* 10(2):45-58.

KRETZ AJ

2012. From “Kill the gays” to “Kill the gay rights movement”: The future of homosexuality legislation in Africa. *Northwestern University Journal of International Human Rights* 11(1):207.

KUMAR S

2019. *LGBT community in India: A study*. Educreation Publishing.

MASANGO M

2002. Homosexuality: A challenge to African churches. *HTS: Theological Studies* 58(3):956-972.

MATETOA-MOHAPI JM

2021. Human rights violations and sodomy laws in Africa: A study of the discriminatory laws and inhumane legislation and its impact on the health and safety of the LGBTI community within the criminal justice cluster. *HTS Teologiese Studies/Theological Studies* 77(2):1-12.

MOYO T

2022. Culture and LGBTQI+ Rights in Africa: The Role of Traditional Leaders. *African Journal of Cultural Studies* 15(3):221-234.

MSIBI T

2011. The Lies We Have Been Told: on (Homo) Sexuality in Africa. *Africa Today* 58(1):55-77.

MUBANGIZI JC & TWINOMUGISHA BK

2011. Protecting the right to freedom of sexual orientation: what can Uganda learn from South Africa?. *Stellenbosch Law Review* 22(2):330-351.

MURRAY R

2018. LGBTQI+ Training for Law Enforcement: A Step Towards Equality. *Legal Studies Review* 22(1):45-62.

NAMWASE S & JJUUKO A

2017. Protecting the human rights of sexual minorities in contemporary Africa. Pretoria University Law Press: South Africa.

NYARANG'O IIK

2011. The role of the judiciary in the protection of sexual minorities in Kenya. Universidade Eduardo Mondlane (Mozambique).

PERSAD XBL

2013. An expanding human rights corpus: sexual minority rights as international human rights. *Cardozo JL & Gender* 20(1):337-369.

REISS M

2024. Advocating for human rights of LGBTIQ+ persons in multilevel governance systems. *Journal of Civil Society*,1-16.

SEYMOUR L

2016. Coalition of African Lesbians: A New Era for African Activism. *African Studies Quarterly* 16(2):67-78.

SHAW A

2023. Uganda Anti-Homosexuality Bill of 2023.

SMITH J

2023. Politics and LGBTQI+ Rights in Africa: The South African Example. *African Affairs* 122(487):389-412.

SMITH J

2021. Cultural Dynamics and Human Rights: Protecting Sexual Minorities. *Journal of Social Justice* 34(2):123-140.

SMITH A

2020. The Need for Comprehensive Anti-Discrimination Laws: Protecting Sexual Minorities. *Human Rights Law Review* 26(2):89-102.

SMITH D.

2014. "The Rights of Sexual Minorities in Africa: A New Era for the Continent?" *African Human Rights Law Journal* 14(1):150-168.

SNYMAN T & RUDMAN A

2022. Protecting transgender women within the African human rights system through an inclusive reading of the Maputo Protocol and the proposed Southern African Development Community Gender-Based Violence Model Law. *Stellenbosch Law Review* 33(1):57-77.

SOREN C

2021. Legal Research Methodology: An Overview. *Journal of Emerging Technologies and Innovative Research* 8(10):442-484.

TAMALE S

2014. Exploring the contours of African sexualities: Religion, law and power. *African Human Rights Law Journal* 14(1):150-177.

TETTEY WJ

2016. Homosexuality, moral panic, and politicized homophobia in Ghana: Interrogating discourses of moral entrepreneurship in Ghanaian media. *Communication, Culture & Critique* 9(1):86-106.

THORESON R

2022. "Discriminalization": Sexuality, Human Rights, and the Carceral Turn in Antidiscrimination Law. *California Law Review* 110(1):431.

TWINOMUGISHA BK

2009. The role of the judiciary in the promotion of democracy in Uganda. *African Human Rights Law Journal* 9(1):1-22.

VAN LEEUWEN F

2011. Women's rights are human rights. The practice of the United Nations Human Rights Committee and the Committee on Economic, Social and Cultural Rights. *Tijdschrift voor Genderstudies* 14(2):1-22.

WALTON DPT

2018. Health and Human Rights of Syrian Women and Children Refugees: Trafficking, Resettlement, and the United Nations Convention on Refugees Revisited. *Journal of Health Ethics* 14(1). <http://dx.doi.org/10.18785/ojhe.1401.04>

WEISSBRODT D

2009. The administration of justice and human rights. *City University of Hong Kong Law Review* 1(1):23-47.

WEKESA SM

2016. Reclaiming LGBTIQ+ identities and rights: A focus on sexual orientation and the law in Africa. University of Pretoria (South Africa).

WINTERMUTE R.

1995. Sexual orientation and human rights. *Cambridge: Clar.*

INTERNET SOURCES

AFRICAN COMMISSION

2014. *Resolution 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.* https://www.chr.up.ac.za/images/researchunits/sogie/documents/resolution_275/Resolution_275_booklet_ENGLISH_02_WEB.pdf (accessed on 09 August 2024).

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

African Commission on Human and Peoples' Rights (ACHPR). <https://www.achpr.org/> (accessed on 27 June 2024).

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

2023. *Resolution on the Promotion and Protection of the Rights of Intersex Persons in Africa.* <https://achpr.au.int/en/adopted-resolutions/resolution-promotion-and-protection-rights-intersex-persons> (accessed on 10 February 2025).

AMNESTY INTERNATIONAL

2023. *Uganda: New anti-homosexuality law is a grave assault on human rights.* <https://www.amnesty.org/en/latest/news/2023/05/presidents-musevenis-approval-of-anti-lgbti-bill-is-a-assault-on-human-rights/> (accessed on 10 July 2024).

AMNESTY INTERNATIONAL

2023. *Africa: Barrage of discriminatory laws stoking hate against LGBTI persons.* <https://www.amnesty.org/en/latest/news/2024/01/africa-barrage-of->

[discriminatory-laws-stoking-hate-against-lgbti-persons/](#) (accessed on 20 May 2024).

AMNESTY INTERNATIONAL

2018. *Love, Hate and the Law: Decriminalizing Homosexuality*. <https://www.amnesty.org/en/wp-content/uploads/2021/07/pol300032008eng.pdf> (accessed on 15 July 2024).

AMNESTY INTERNATIONAL

2020. *When They Target Us: How African State Seek to Silence Human Rights Defenders*. <https://www.amnesty.org/en/wp-content/uploads/2021/06/English.pdf> (accessed on 15 July).

BBC NEWS

2023. *Uganda's Anti-LGBT laws: Man faces death penalty for 'aggravated homosexuality'*. <https://www.bbc.com/news/world-africa-66645740> (accessed on 10 July 2024).

BISI ALIMIM FOUNDATION

About Bisi Alimi. <https://www.bisialimifoundation.org/about-bisi-alimi/> (accessed on 26 June 2024).

BUREAU OF DEMOCRACY

Human Rights, and Labor, 2008 Human Rights Report: Nigeria, U.S. DEPT. OF STATE. <http://www.state.gov/j/drl/rls/hrrpt/2008/af/119018.htm> (accessed on 10 July 2024).

ENDERS K

Government Overview, Functions, and Types. <https://study.com/academy/lesson/what-is-government-definition-role-functions.html> (accessed on 24 April 2024).

EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

2020. *EU LGBTI Survey II: European Union lesbian, gay, bisexual, trans and intersex survey*. <https://fra.europa.eu/en/publication/2020/eu-lgbti-survey-ii> (accessed on 20 April 2024).

HANSFORD A

2023. *Kenya set to introduce cruel anti-homosexuality law*. <https://www.thepinknews.com/2023/07/20/kenya-anti-homosexuality-law-africa/> (accessed on 08 July 2024).

HARDING A

2014. *Uganda court annuls anti-homosexuality law*. <https://www.bbc.com/news/world-africa-28605400> (accessed on 10 July 2024).

HUMAN RIGHTS CAMPAIGN

Understanding the Issues: LGBTQ Equality. <https://www.hrc.org/resources/a-workplace-divided-understanding-the-climate-for-lgbtq-workers-nationwide> (accessed on 22 August 2024).

HUMAN RIGHTS WATCH

2013. *More Than a Name: State-Sponsored Homophobia and its Consequences in Southern Africa*. <https://www.hrw.org/report/2023/02/14/why-we-became-activists/violence-against-lesbian-bisexual-and-queer-women-and-non> (accessed on 12 July 2024).

HUMAN RIGHTS WATCH

2016. *Tell Me Where I Can Be Safe: The Impact of Nigeria's Same-Sex Marriage (Prohibition) Act*. <https://www.hrw.org/report/2016/10/20/tell-me-where-i-can-be-safe/impact-nigerias-same-sex-marriage-prohibition-act> (accessed on 26 June 2024).

HUMAN RIGHTS WATCH

2019. *Africa: Progress and Backlash in the Fight for LGBT Equality*. <https://www.hrw.org/news/2022/06/22/progress-and-setbacks-lgbt-rights-africa-overview-last-year> (accessed on 12 July 2024).

HUMAN RIGHTS WATCH

2020. *World Report 2020: Events of 2019*. <https://www.hrw.org/world-report/2020> (accessed on 20 April 2024).

NABAGESERA KJ

The Right Livelihood Award. <https://www.rightlivelihoodaward.org/laureates/kasha-jacqueline-nabagasera/3> (accessed on 26 June 2024).

MILLS JEA

2011. *From Political to a Developmental Constitution*. https://ir.parliament.gh/bitstream/handle/123456789/1545/2020_01_03_08_10_14.pdf?sequence=1&isAllowed=y (accessed on 22 July 2024).

NANHRI & SAHRC

2018. *In-country meeting on sexual orientation, gender identity and Expression report*. <https://www.sahrc.org.za/home/21/files/FINAL%20BOOKLET%20for%20print%20Approval%203%20September%202018.pdf> (accessed on 11 September 2024).

NATIONAL COUNCIL OF LAW

2012. *Laws of Kenya: Penal Code Chapter 63*. <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/28595/115477/F-857725769/KEN28595.pdf> (accessed on 29 June 2024).

NATIONAL COUNCIL OF LAW

2012. *Laws of Kenya: Penal Code Chapter 63.*
<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/28595/115477/F-857725769/KEN28595.pdf> (accessed on 29 June 2024).

OJOK OC & STEPHEN O

2019. *National Bureau for NGO.* <https://ngobureau.go.ug/en/law-and-regulations/ngo-guidelines-2019> (accessed on 20 July 2024)

PINK NEWS

Kenya: New stone the gays' law proposed by the MPs.
<http://www.pinknews.co.uk/2014/08/11/kenyanew-stone-the-gays-law-proposed-by-mps/> (accessed on 23 June 2024).

PILLAY N

What David Kato's death can teach the world.
<https://www.un.org/africarenewal/web-features/what-david-katos-death-can-teach-world> (accessed on 30 June 2024).

SPECIAL RAPPORTEUR ON HUMAN RIGHTS DEFENDERS IN AFRICA

Press Release on the Implication of the Same Sex Marriage (Prohibition) Act 2013 on Human Rights Defenders in Nigeria. <http://www.achpr.org/press/2014/02/d190/> (accessed on 12 July 2024).

SONKE GENDER JUSTICE

2024. *Building trust with traditional leaders to promote LGBTQI+ rights in Lesotho.*
<https://genderjustice.org.za/news-item/building-trust-with-traditional-leaders-to-promote-lgbtqi-rights-in-lesotho/> (accessed on 26 October 2024).

REDFIELD E & CHOKSHI I

2025. *Impact of the Executive Order Redefining Sex on Transgender, Nonbinary, and Intersex People*. <https://williamsinstitute.law.ucla.edu/publications/impact-eo-redefine-sex-tbi/> (accessed on 10 February 2025).

REID G

Progress and Setbacks on LGBT Rights in Africa — An Overview of the Last Year. <https://www.hrw.org/news/2022/06/22/progress-and-setbacks-lgbt-rights-africa-overview-last-year> (accessed on 12 July 2024).

UN HUMAN RIGHTS COUNCIL

2021. *About LGBTI people and human rights*. <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/about-lgbti-people-and-human-rights> (accessed on 30 August 2024).

UNITED NATIONS

About LGBTI people and human rights. <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/about-lgbti-people-and-human-rights> (accessed on 30 August 2024).

UN HUMAN RIGHTS COUNCIL

Combatting discrimination based on sexual orientation and gender identity. <https://www.un.org/en/lgbtiqpeople#:~:text=The%20United%20Nations%20Human%20Rights,and%20respect%20for%20LGBTIQ%2B%20individuals> (accessed on 22 August 2024).

UNITED NATIONS

Zimbabwe Universal Periodic Review” United Nations Human Rights Office of the High Commissioner. <https://www.ohchr.org/en/hrbodies/upr/zw-index> (accessed on 12 July 2024).

USCIRF FACTSHEET

2021. *Shari'a and LGBTI People*. <https://www.uscirf.gov/sites/default/files/2021-03/2021%20Factsheet%20-%20Sharia%20and%20LGBTI.pdf> (accessed on the 12 July 2024).

UNITED NATIONS

2015. *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*. <https://www.ohchr.org/en/publicationsresources/Pages/BornFreeAndEqual.aspx> (accessed on 20 April 2024).

UNITED NATIONS

Peace, Dignity and equality on a healthy planet. <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (accessed on 10 February 2025).

UN NETWORK JOINT SUBMISSION

2015. *Conference of the Parties to the United Nations Convention against Transnational Organised Crime*. <https://documents.un.org/doc/undoc/gen/v15/058/68/pdf/v1505868.pdf> (accessed on 13 August 2024).

VAN KLINKEN A

2019. *Explainer: what's at stake in Kenyan court case on gay rights*. <https://theconversation.com/explainer-whats-at-stake-in-kenyan-court-case-on-gay-rights-112317> (accessed on 29 June 2024).

ZHAO Q

Government: Legal definition, forms and functions of government, transparency, checks and balances. <https://juristopedia.com/government-legal-definition/> (accessed on 24 April 2024).

LEGISLATIONS

Anti-Homosexuality Act 8 of 2014.

Anti-Homosexuality Act of 2023.

Civil Union Act 17 of 2006.

Constitution of the Republic of South Africa of 1996.

Constitution of Zimbabwe of 2013.

Criminal Code Act of 1990 of Laws of the Federation of Nigeria.

Criminal Law (Codification and Reform) Act of Zimbabwe.

Law of Succession Act of the Laws of Kenya.

Panel Code Act of the Laws of Kenya.

Panel Code Act of the Laws of Uganda.

Promotion of Access to Information Act 2 of 2000.

Same-sex Marriage (Prohibition) Act of 2013.

INTERNATIONAL MATERIALS

Convention on the Elimination of All Forms of Discrimination Against Women (1979)

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

Council of Europe (2010).

European System of Human Rights (1950).

Inter-American System of Human Rights (1969).

International Convention on Civil and Political Rights (1966) .

International Convention on Economic, Social and Cultural Rights (1966).

Parliamentary Assembly (2010).

Universal Declaration of Human Rights (1948).

United Nations Human Rights Council (2021).

United Nations Network Joint Submission (2015).

CASE LAWS

Banana v State, Supreme Court of Zimbabwe, [2000] 4 LRC 621.

Courson v. Zimbabwe (African Commission on Human and Peoples' Rights, Comm. No. 136/94, 1995).

Eric Gitari v Attorney General & another Petition 440 of 2013.

Eric Gitari v Non-Governmental Organisations Co-ordination Board & 4 others 2015 eKLR.

José Alberto Pérez Meza v Paraguay Petition 19/99, Report 96/01, 10 October 2001.

Kasha Jacqueline, David Kato, & Pepe Julian Onziema v Rolling Stone Ltd & Giles Muhame, High Court of Uganda, Miscellaneous Cause No. 163 of 2010.

Karen Atala v Chile, IAm Comm of HR (24 February 2012) OEA/Ser.L/V/II.130 Doc 22 rev 1.

Minister of Home Affairs and Another v Fourie and Another (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC): Par. 88.

Monica Jesang Katam v Jackson Chepkwony & Another [2011] Eklr.

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12): Par. 20.

Rasmussen v Denmark, Judgment (Merits), Case No 9/1983/65/100, App No 8777/79 (A/87), [1984] ECHR.

State v Makwanyane and Another, Constitutional Court of South Africa, [1995] ZACC 3; 1995 (3) SA 391 (CC).

Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

Victor Juliet Mukasa & Yvonne Oyo v Attorney General, High Court of Uganda, Miscellaneous Cause No. 24 of 2006.

Zimbabwe Human Rights NGO Forum v Zimbabwe (2006) AHRLR 128 (ACHPR 2006).