

THE DANISH
INSTITUTE FOR
HUMAN RIGHTS

GETTING TO RIGHTS

THE RIGHTS OF LESBIAN, GAY,
BISEXUAL, TRANSGENDER AND
INTERSEX PERSONS IN AFRICA

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ABBREVIATIONS

ACHPR	African Commission on Human and People's Rights
AG	Attorney General
AHB	Anti-Homosexuality Bill (Uganda, 2009/ 2012)
AI	Amnesty International
AIC	African Initiated Church
AIDSETI	AIDS Empowerment and Treatment International
AU	African Union
CAL	Coalition of African Lesbians
CEDAW	Convention on the Elimination of Discrimination against Women
CHRAJ	Commission on Human Rights and Administrative Justice (Ghana)
CHRI	Commonwealth Human Rights Initiative
CIDTP	Cruel, Inhuman and Degrading Treatment or Punishment
CSW	Commercial Sex Worker(s)
CONTRALESA	Congress of Traditional Leaders of South Africa
CORMSA	Consortium for Refugees and Migrants in South Africa
DOJCD	Department of Justice and Constitutional Affairs (South Africa)
EU	European Union
ESC	Economic, Social and Cultural (rights)
FGM	Female Genital Mutilation
HSRC	Human Sciences Research Council (South Africa)
HRW	Human Rights Watch
HIV / AIDS	Human Immunodeficiency Virus / Acquired Immune Deficiency Syndrome
HRCSL	Human Rights Commission of Sierra Leone
GALA	Gay and Lesbian Memory in Action (South Africa)
GALCK	Gay and Lesbian Coalition of Kenya
GALZ	Gays and Lesbians of Zimbabwe
IASC	(UN) Inter Agency Standing Committee

ICJ	International Commission of Jurists
ICCPR	International Covenant on Civil and Political Rights
KHRC	Kenya Human Rights Commission
KNCHR	Kenya National Commission on Human Rights
MARP	Most at Risk Population
MBDHP	Mouvement Burkinabe des Droits de l'Homme et des Peuples
MSM	Men who have sex with men
NASCOP	National Aids and STI Control Programme (Kenya)
NANHRI	Network of African National Human Rights Institutions
NGLHRC	National Gay and Lesbian Human Rights Commission (Kenya)
PAMAC	Programme d'Appui au Monde Associatif et Communautaire de Lutte Contre le VIH / SIDA, la Tuberculose et le Paludisme (Burkina Faso)
PEPFAR	President's Emergency Plan for Aids Relief (USA)
SAHRC	South African Human Rights Commission
SAPS	South Africa Police Service
SGBV	Sexual or Gender Based Violence
SIPD	Support Initiative for Persons with Atypical Sex Development (Uganda)
SOGI	Sexual Orientation and Gender Identity
SR ESAE	(UN) Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions
SR VAW	(UN) Special Rapporteur on Violence against Women
SSA	Same Sex Attraction
TEA	Transgender Education and Action (Kenya)
SMUG	Sexual Minorities Uganda
UHRC	Uganda Human Rights Commission
UNHCHR	UN High Commissioner for Human Rights
UNHCR	UN High Commissioner for Refugees
UNFPA	UN Population Fund
URCB	Union des Religieux et Coutumiers du Burkina Faso pour le Développement et la Santé
WGAD	(UN) Working Group on Arbitrary Detention
WSW	Women who have sex with Women
ZHRC	Zambia Human Rights Commission

INTRODUCTION

This study takes its point of departure in human rights, equality and personal freedom, including support for the rights of LGBTI persons. Its intention is to combine these principles with respect for African communities, cultures, and the fortitude with which Africans face many challenges.

Human rights law demands that people be protected against human rights violations committed by private actors. The Human Rights Based Approach to Development (HRBA) looks at the potential of non-state actors as partners. In contexts where many public services are delivered by non-state actors, many areas of family and private law are governed by customary or religious institutions and norms, and where the outreach of the state is limited, examining the roles of non-state actors takes on a particular urgency. Thus, this study devotes as much or more attention to structures and norms based in religion and society as in the state. In practice, these various norm sets are very often mixed together with one another.

Some may argue that African societies are not yet ready to take on the challenges of a debate on issues such as sexual orientation and gender identity. There are many responses to this. Most obviously, African societies are taking on this challenge, either on their own account or as a consequence of living in our globalized world. African LGBTI persons and activists, like those in other parts of the world, are not waiting for a date in the future to start challenging prejudice. Neither are their opponents. All sectors of society, including media, politics, religion and the education and health sectors are increasingly addressing these issues. Representatives of all of these sectors testify to the public's thirst for knowledge, as well as for a firm moral foundation on which communities can live together. African societies and the deeply human values they embody contain resources to face challenges, including in this sensitive domain.

EXECUTIVE SUMMARY

1. Current scientific knowledge on sexual orientation, gender identity and sexual prejudice

The study of sexuality helps in providing foundations for advocacy for rights in relation to sexual orientation and gender identity. Scientific research in this field can be broadly divided into two areas. One is biological, the other social and psychological. These two are sometimes classified as “essentialist” and “social constructionist” perspectives. Each provides valuable perspectives for a greater understanding of these issues. Each can be used and abused in social, legal and political debates.

Psychotherapeutic attempts to change sexual orientation have fallen into disfavour with leading psychological bodies on both scientific and value-based grounds. Adherents of some religious faiths promote the idea that sexual orientation can be changed through prayer. Instances of “situational” same-sex relations are observable in almost all cultures and historical periods, and some research does suggest that the social environment can play a role.

The current revisions to the American DSM (DSM V/5) will mean that **Transgender** conditions will no longer be considered a “mental disorder”. While a (new) diagnosis of “gender dysphoria” will be relevant for qualification for gender reassignment treatment, gender dysphoria is an indication of the difficulties that individuals face in relation to society and the difficulties caused to transgender individuals of not having their gender identities confirmed in social life. This is consistent with Principle 18 of the Yogyakarta Principles.

Scientific knowledge in this field is not sufficiently well-known among many African medical and psychological professionals. While knowledge still leaves room for normative and scientific disagreements, it is important that this is addressed.

Homophobia

Sexual prejudice / homophobia is widespread in human culture, perhaps especially among males. The role of feelings of disgust at some physical functions and fear, both of one’s own unexamined or unrevealed feelings, and of loss of status and identity are often discussed among researchers and can be empirically observed in campaigns against LGBTI persons. Sexual acts are often overly emphasized, and emotional and other aspects of same-sex relationships omitted. The biological imperative of reproduction and an inherent fragility of socially constructed male identity are relevant. It is still fairly rare for gender related development programming in African contexts to address masculinity (or masculinities).

The slur of “recruitment” by homosexuals: In some highly politicized contexts, including Uganda, the allegation that gays and lesbians are attempting to “recruit” children are often made. No evidence has been produced. Numerous studies show that LGBTI persons are no more likely than other people to commit pedophilia. The allegation of “recruitment” may be (deliberately or not) confused with “promotion”, which can mean either the exercise of rights of freedom of association, assembly and expression by LGBTI persons, or the production of advocacy or public information material that tries to encourage understanding and tolerance. Sex-education material targeted at young people is especially sensitive in these contexts.

Especially among men, same sex relationships, like those between people of opposite sex, have often reflected inequalities of power in social and economic relations, including those based on age. In some contexts, homosexuality might be understood as implying pederasty. There is historical and social evidence that this was socially accepted in some contexts in Africa, as in other parts of the world. This happened in social contexts that also tolerated arranged marriages of child or adolescent girls.

2. African social and cultural dimensions and the rights of LGBTI persons

The centrality of the family and clan influences many aspects of the lives and rights of LGBTI persons in Africa. Economic and social protection, status, identity and social prestige are bound up with the completion of family obligations including marriage and reproduction. This is caught up with African ideas of “Ubuntu” and identity and the self being developed through social relations rather than individual consciousness.

Fears related to the family: Fears that homosexuality poses a threat to the continuation and survival of the family and tribe, or even of the nation as a whole, are often raised in African debates.

Most adult gay and lesbian Africans (both male and female) are in heterosexual marriages. Many can conduct same-sex affairs with relative freedom as long as they comply with outward social obligations of marriage and reproduction. Thus “situational bisexuality” is widespread. Especially in the case of homosexual men, this has consequences for patterns of HIV transmission and may endanger wives. In some cases the spouse knows of the transgender or same sex orientation and conduct, and may even assist (for example, in helping to cross-dress). Where the same-sex conduct is not known to the spouse or family, the risk of exposure creates a risk of extortion blackmail (see below).

“Coming out” in the western sense places many gay and lesbian Africans at risk of being cut off by families and incurring severe social isolation with consequences far more severe than would be the case in individualized western society. Likewise, a gay or lesbian African must consider that going public about their sexual orientation or gender identity may have serious consequences for members of their family, and not only for themselves. LGBTI people may to some extent be able to mitigate these problems by

attempting to show that they are good members of the family and of society irrespective of their sexual orientation or gender identity.

Although **same sex marriage** is neither demanded by international human rights law or by the vast majority of LGBTI activists in Africa (except in South Africa, where it is legal), it is often brought up in debates by opponents of decriminalization. Rumours and scares about same-sex marriages have been behind a surprising number of incidents of mob violence and increased repression

Behaviour and identity

Concepts of sexual orientation and gender identity contain cultural specificities that may not be applicable in all situations. Human rights law places the foundation of non-discrimination on the idea of a fixed identity that is based on the gender of the person that one is attracted to. Scholars point out that constructions like this can “constitute” identity rather than simply reflecting it. It may displace other ideas of identity that are based in local culture.

In order to avoid the label of “homosexual” which many African men who engage in same-sex behaviour are not willing to take on, the phrase “men who have sex with men”, or “MSM” has been coined in the context of public health work and especially HIV / AIDS. This is an attempt to describe behaviour as opposed to identity. Likewise, the term WSW is now also used. In many African social contexts, a distinction is made between the partners in MSM relationships, with different roles and words being assigned to the two, and shame being attached mostly to the receptive person. A few examples can be found in anthropological literature of gender identity being based on work and social (rather than sexual) roles, though these do not appear to have been widespread in Africa.

African societies do not generally encourage public displays of affection even among heterosexual couples. Thus, any hope of greater toleration of same-sex behaviour or attraction, if achieved, may look rather different in Africa than it does in western countries. Some political and social leaders evoke this by admitting that same sex behaviour may have existed in traditional African society, but that it should not be displayed publicly.

The experience of HIV / AIDS organizations working at community level is among the most valuable in gauging social attitudes and how to navigate them. Bringing these experiences into dialogue with human rights activism can give a basis for ways forward that can be productive. Dialogue of this kind is important in finding ways to solve one of the dilemmas that most concerns governments: how to square the exercise of rights of freedom of expression, association and assembly with the maintenance of peace and public order. Since human rights work is often state-centered rather than being strongly anchored in society, it needs to take these voices into account.

The media are often an unpredictable joker on this question. Popular television and especially radio have played an inflammatory role in many of the flare-ups of mob violence and political campaigns against LGBTI. On the other hand can media play a much more positive role in creating debate, increasing knowledge etc.

3. The Religious Sphere

Christian congregations or groupings that do not interpret the bible as condemning homosexuality are in a tiny minority in Africa. While the two traditionally largest Christian denominations, Anglicanism and Catholicism, both present serious opposition to a wide acceptance of the rights of LGBTI persons, there are important needs and opportunities for advocacy in relation to both of these churches. In respect of each of them, the African branches belong to the doctrinally conservative wing on this issue. Representatives of Evangelicalism or Pentecostalism (for present purposes the two are treated together here), the third important branch of Christianity in Africa, are generally among the leaders of Christian opposition to any liberalization of laws or social attitudes.

Anglicanism suffered a serious divide on the issue of homosexuality (the ordination of gay bishops) in the early 2000s, with almost all African churches taking the conservative side against liberal North American and to some extent British, Australian and New Zealand churches. Most senior Anglicans in Africa support continued criminalization of same-sex conduct, and some have led the way in advocating even stricter laws. South Africa is an exception.

Nevertheless, Anglican resolutions on the issue (agreed to by the African churches) leave room for dialogue that should be explored. In most African Anglican churches, more tolerant voices are to be found. They coherently present a different interpretation of biblical scriptures and the Christian message that is too little heard. These groups are working and organizing to propagate a voice of tolerance of sexual diversity within Anglican Christianity in Africa that is based on Christian teaching. They maintain links to persons and organizations abroad as well as to some members of their own churches in Africa. Their message is extremely important not only for many LGBTI people but in order to counter a general impression that religious condemnation is universal. Groups like these have received some external support. This needs to be continued and built upon.

Catholicism, based on a more centralized hierarchy and doctrine, shows fewer signs of open disagreement on the issue than the Anglican one. Advocacy in relation to the Catholic Church could usefully focus on the official position of the Catholic Church, voiced on several occasions by the Holy See, that criminal penalties are not an appropriate way of dealing with homosexual conduct. The Catholic Archbishop of Kampala in a 2009 statement was almost alone among major Christian leaders in opposing the Anti-Homosexuality Bill. Catholic leaders in other countries do not always

respect this position. Catholic organizations are important providers of care and support in relation to HIV / AIDS.

Evangelical and Pentecostal churches (some of them linked to similar bodies in the USA) are among the fiercest opponents of the rights of LGBTI persons in Africa. Their conservative agenda also opposes many aspects of women's reproductive rights, especially abortion. Representatives of some USA based religious conservatism / fundamentalism have combated attempts at decriminalization and spread highly dubious information such as the unfounded allegation that LGBTI people are deliberately "recruiting" children. Nevertheless, it would be a mistake to be blind to the agency of African actors in this regard.

By appealing to homophobia, prejudice and nationalistic sentiment, these groups have tapped into the discourse that homosexuality is "unAfrican" and being promoted by western (especially northern European) NGOs and governments. Showing the African public and leadership that this is not the case will require determination, long term work and considerable skill. It is important not to fall into the trap of appearing to be neocolonialist. Some African and US based organizations attempt to track the activities of these groups and to expose the "neocolonial" aspects of their own messages and tactics.

Islam

It has been noted that prior to the modern era, out of the three Abrahamic religions, Islamic societies were historically the most tolerant of same-sex behaviour. In recent times, this tolerance has been eclipsed by the growth of more conservative and fundamentalist tendencies. Moderate forms of Sufi Islam that were widespread in West Africa have faced competition from more conservative and some extreme tendencies in recent decades. The popularity of the latter has to some extent been linked to economic crises and state failures.

Compared to Christian churches, fewer Islamic religious groupings find a base for tolerance of gender and sexual diversity in religious scripture. Nevertheless, these do exist and are working in some contexts. As is the case with Christianity, there are many examples of religion being mobilized for homophobic purposes, or of particular representatives of Islam using homophobia to mobilize popular action.

There are examples of Muslim and Christian community leaders allying with one another to drive out or intimidate homosexuals. This happened in Mtwapa in Kenya in 2010. Among those promoting tolerance however, there is also cooperation between Muslims and Christians. Organizations such as "Other Sheep" in Kenya cooperate with "Inner Circle", a Cape Town based Muslim organization. In Burkina Faso, a quasi-public body that unites representatives of various faiths, as well as traditional leaders, appears to be a relatively moderate (if not obviously tolerant) voice.

4. Politics

The study identifies six tendencies in African politics on issues of sexual orientation and gender identity.

i) Caution of moderates

Some moderate African leaders privately point out that LGBTI persons are not unduly harassed by state agents (few or no prosecutions), and that public opinion will not permit decriminalization. In these circumstances, and in order to avoid threats to social peace and public order they argue, it is best to “let sleeping dogs lie”. For activists, an important question is whether this pragmatic approach will allow HIV / AIDS outreach and public advocacy for change. A further question is whether conservative forces will refrain from campaigning for increased repression.

ii) The mobilization of homophobia for political purposes

Since the early 1990s, homophobia has been mobilized for political purposes. The initial instances of politically motivated homophobia were all made by political leaders who had personally fought against white racial domination. Later, the rhetoric was picked up by other politicians, often with an anti-western echo. Homophobia can be mobilized to portray political opponents as weak or as stooges of western interests. It can also be used as a political distraction or as part of a more general campaign to limit civil liberties.

iii) The politicization of religion

Religion is often useful to African political leaders to create a feeling of national unity in a context where people are not united by language or ethnicity and where the credibility of secular state institutions and projects has suffered. The post-1994 South African state, founded on an explicitly civic compact that recognizes diversity, is a political rarity, contrasting with for example the constitutional designation of Zambia as a “Christian nation.” A more extreme politicization of religion is found among the Evangelical promoters of the Anti-Homosexuality Bill in Uganda. Many of these are linked to fundamentalist Christian movements in the USA who dream of Christian “dominionism”, where all important areas of society are governed according to Christian ideas. For these, homosexuality plays a symbolic role as a visible face of modern western liberalism. Ugandan President Museveni seems to have moderated his position and moved away from the promoters of these tendencies.

iv) Weak or opportunistic liberal commitment

There are some similarities between this tendency and the first one. Here, moderate political leaders up against hardliners are often forced to make gestures of support towards western liberal values because they are in need of western economic or

political support or media goodwill. Their relative liberalism in relation to LGBTI issues is usually not insincere, but is shallow and soon dropped after obtaining power because they know it remains unpopular at home. Moreover, reform in this area is a low priority in comparison with other pressing issues.

v) Genuine commitment

There have recently been a few examples of political figures or candidates who voice a genuine commitment to the rights of LGBTI persons. They remain in a small minority. Some former leaders who no longer hold political office are prepared to speak out on the damaging effects of criminalization, especially on the combat against HIV / AIDS.

Political and human rights priorities

Crude political conditionality on the sole issue of the rights of LGBTI persons has generally not been a success. It has caused misunderstandings and has usually arisen out of media statements rather than fully developed policies or strategies. There are nevertheless examples of conditionality and arm-twisting that have achieved results in extreme situations. Such strong-arm tactics come at a price, however, and are likely to provoke cynicism among African publics.

Short of outright conditionality and threats, western leaders and officials can make their message heard in a number of ways. They should continue to do so.

5. Justice Systems

The principles of separation of Church and State, and the differences between crime and sin, are insufficiently understood and too little heard in the public debate in Africa. The post-colonial states inherited from British colonialism are a particular focus in this regard. Unlike the former French colonies where republican secularism prevailed, British colonial legal systems did not make a clear distinction between law based on secular humanist principles as opposed to religious ones.

In much of the world, the struggle to decriminalize same-sex acts between consenting adults has taken place in the context of legal systems on the British common law model. Decriminalization has been based on two main legal planks. One is the right of privacy, the other is the notion of equality and non-discrimination. The second of these two is more far reaching. Where it has occurred, decriminalization has come about through judicial, legislative and constitutional processes. The pros and cons of these different avenues are discussed in the report. Too great a focus on judicial and international mechanisms is likely to be divisive. The international human rights framework could be used somewhat more in relation to African states where homosexual acts are criminalized, but its limitations (non-binding decisions and a lack of enforcement measures) should not be forgotten. Litigation and legislative efforts do not necessarily

have to tackle decriminalization first. In some contexts, there may be good reasons and better chances of success through taking on other issues as a first step.

6. Human Rights Standards and Systems

The human rights based approach (HRBA) and the respect, protect, fulfill framework should be combined as an analytical and programmatic framework to address these issues. This entails a focus on state as well as non-state actors. Some prioritization of human rights issues is acceptable based on a calculation of the severity of violations, the number of victims and the criterion of vulnerability. Rights to life, personal integrity (including protection from violence) and liberty and security of the person are a priority. Non-discrimination in relation to health services and HIV / AIDS should be combined with public health approaches. Especially at community level, it is important to be aware of the need to build further on the progress that has been made in reaching out to communities and to be sensitive to social attitudes.

Violence against LGBTI persons takes various forms and demands appropriate responses. Mob violence, individualized hate crimes and state abuses are present. In practice, impunity often reigns for incitement to violence against LGBTI persons. Increased visibility of LGBTI persons, organizations and issues has led to or been associated with higher levels of insecurity and violence, and programmatic approaches to the rights of LGBTI persons should plan to meet challenges in this area. A key point in this regard is the strengthening of links between mainstream human rights organizations and protection mechanisms and defenders of the rights of LGBTI persons.

Analysis and programming on sexual and gender based violence (SGBV) generally does not include violence against LGBTI, although there are some exceptions. Blackmail and extortion takes place both within the LGBTI community (especially among MSM) and with the collusion of corrupt police. Strategies to combat this have been developed, but require capacity building to be applied.

Discrimination against LGBTI persons takes place mostly in the social sphere rather than through the state, but there are few examples of anti-discrimination legislation or mechanisms being applied to LGBTI persons.

Freedoms of association, expression and assembly for LGBTI persons are a particular battleground, both at national and international levels. Some mechanisms of the UN human rights system have addressed these questions. National laws on freedom of association are generally not respected when it comes to LGBTI persons and organizations, but there is at the same time a significant increase in associational life. Paradoxically, this is more evident in many Anglophone countries where same-sex acts remain criminalized.

Mechanisms such as the UPR and the examination of state reports by UN treaty bodies have widely taken on LGBTI questions. The potentials of further progress in the UN, including voting patterns in UN bodies, are analyzed.

The African human rights system is, despite its challenges, an important forum for discussion of this issue. The NGO forum, held in connection with the sessions of the African Commission on Human and Peoples' Rights, in particular has been a centre of development of African human rights thinking, advocacy and action. Mainstream African human rights NGOs have gradually become more open to LGBTI issues through this forum, and some members of the African Commission have also been supportive

National human rights institutions (NHRIs) have begun to consider LGBTI issues. There are examples of courageous work (Kenya), standing up for principle in difficult circumstances (Uganda) and valuable research and advocacy (South Africa). Others have been more circumspect, and some have been negative. There is an unexplored potential for NHRIs to be convenors of national dialogues on these issues. As well as institutional will, this would in many cases require capacity building

7. Policies and Entry Points in Development Programming

Guidelines developed by a number of western countries on programming in relation to LGBTI issues are examined. Programme staff in the field are often challenged in implementing these policies because of taboos, lack of knowledge and the perception that this issue is a low priority. There is some potential to discuss LGBTI in gender oriented policies, but it may be easier to approach this through opening a discussion on masculinities than through moving directly to LGBTI questions.

Norway, the Netherlands, Sweden and Canada have been leading state actors in civil society support to LGBTI causes and organizations. A number of private organizations and funds are also important actors. LGBTI organizations and supporters based in South Africa and western countries have been successful in partnering with organizations at national level. The building of civil society organizations, networks and capacities is likely to remain the largest and most viable avenue in the coming years. An important component of this is to enable outreach and linkages to mainstream human rights organizations.

CHAPTER 1

1 HUMAN RIGHTS AND SOCIAL & BIOLOGICAL PERSPECTIVES ON SEXUALITY

Some initial reservations and observations are necessary. The authors are not qualified professionals in the area of studies on sexuality, and this section does not purport to be more than a layperson's attempt to summarize current knowledge and discussion. Research and debate on sexual orientation and gender identity often takes place in a strongly politicized atmosphere. In the USA, two clearly identifiable sides in a "culture war" have battled for the past few decades. Prominent debaters have sometimes experienced prejudice and discrimination or feel that their deeply cherished moral and social order is threatened.

The research related to brain structure and neurological responses described below is at most two decades old. Its implications remain tentative, and much still needs to be learnt. Homosexual men have probably been the object of most medical studies, followed by homosexual women. The approach of the medical and psychological professions to transgender conditions has remained controversial among some members of transgender communities. One does not have to go far back in time to find examples of treatment and approaches that appear seriously misguided today, based more on social prejudices than on the innate well-being of the persons concerned.

While some African societies escaped the prejudices found in the West on these issues, they are hampered in developing and articulating their own perspectives by a lack of resources for research. It is difficult to discuss issues such as transphobia and homophobia without addressing the cultural and cross-cultural aspects of transgender, intersexuality and homosexuality themselves, but achieving a truly cross-cultural perspective is no easy matter.¹ American political and social debates spill over into Anglophone Africa in particular, which also has its own set of issues. This chapter reflects this politicization. The prioritization of issues may not necessarily reflect those of greatest concern to LGBTI persons, but rather those that are often heard in social and political discussions. Thus, this study addresses some prejudices (for example in relation to child sexual abuse) because myths are better addressed than allowed to thrive in silence. The same is true of some social and historical truths about same-sex practices.

¹ Eprecht, Marc, Understanding homophobia in Africa today in Perspectives, 4.10, Heinrich Böll Stiftung, 2010

1.1 SEXUAL ORIENTATION AND GENDER IDENTITY

“Sexual orientation is understood to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.”

“Gender identity is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.”

Yogyakarta Principles, introduction

While the foundations of sexual attraction or orientation, whether homosexual, bisexual or heterosexual remain uncertain, it seems clear that they have no single “cause”. Approaches to studying sexuality are sometimes classified as either “essentialist” or “social constructionist” depending on whether they take their outset in biology or social science and psychology. Science and politics are intertwined in these discussions.

Natural science or biological approaches include genetic, endocrine, evolutionary psychology and brain research (Delamater and Hyde, 1998). Critics of these approaches have categorized them as “essentialist,” especially when they unquestioningly reproduce currently dominant social understandings. For some, these ways of addressing gender and sexuality may hark back to the days when homosexuality or gender non-conformity were pathologized as illness, or evoke a world of rigid gender roles that are discredited today. Fears have occasionally been expressed of development of medical procedures that might attempt to eliminate purported “gay genes”, or to manipulate the biochemical balance in a mother’s womb. Nevertheless, a more modern school of natural scientists does not come to the biological approach with the baggage of outmoded ideas about gender binaries. On the contrary, it tends to illustrate the many nuances that exist along various scales. Work for the legal recognition of the rights of LGBTI persons, especially in North America, has often emphasized biological explanations of homosexuality that most clearly deny an element of choice.²

Social constructionism, on the other hand, refers to the social and cultural context in which commonly used concepts and categories are developed and used. It tends to show that these concepts are “contingent” and to some extent arbitrary rather than universally valid. As with biological approaches, this thinking can be exercised in an open-minded or repressive manner. It can allow us to lift the veil of assumptions that turn out to be no more than prejudices - for example that women are poor drivers or that a particular race or nationality is lazy or dishonest. Viewing assumptions or statements of this kind with suspicion has been of vital importance in overcoming discrimination and racial conflict, and in making progress towards women’s liberation.

² President Obama stated his belief in 2010 that discrimination against LGBTI people was wrong because sexual orientation is innate. <http://edition.cnn.com/2010/POLITICS/10/14/obama.homosexuality/index.html>

On the other hand, some opponents of SOGI liberalization have often favoured social and psychological explanations of homosexuality that suppose a degree of choice and malleability. They struggle to maintain the social and legal repression of homosexuality and gender non-conformity, sometimes believing that sexuality is chosen, that choices can be changed, that homosexuality can be eliminated or radically limited in society, or on the other hand, that it will run rampant and cause evil if allowed to come to the surface.

Thus, it would be wrong to say that essentialism or social constructivism unequivocally supports liberalization while the other opposes it. Strict binary divisions (i.e. between “heterosexuals” and “homosexuals” regarding SOGI have been rejected by sexuality research ever since Kinsey’s scale in 1948. It may be equally incorrect to impose a clear binary division between biological and social influences on sexuality, or between “constitutional” and “situational” homosexuals. Evidence in recent decades of biological correlates for same sex-attraction (SSA) do not exclude “nurture” and social environment as influences. Most leading researchers fully recognize that many factors play a role. Enlightened use of a variety of approaches is possible and necessary.

1.2 “ESSENTIALIST” APPROACHES: BIOLOGICAL EVIDENCE IN BRAIN ANATOMY AND FUNCTIONING

The past two decades have seen a strengthening of biological research on sexual orientation and gender identity. It is recognized that early gender non-conformity in childhood is the most reliable predictor of adult homosexuality. Studies have shown that up to 75% of gender non-conforming children (usually identifiable as such by the age of 3) grow up to be gay or lesbian.³ Far from all lesbian or gay adults showed this tendency as children, and some heterosexual adults also recall engaging in gender non-conforming behaviour.

Medical research appears to show observable anatomical differences in the brains of gay and straight men. Le Vay (1991) found that certain nuclei in the hypothalamus of the brains of homosexual men had a size more typical of brains of females. Witelson (2008) found that the corpus callosum that links the two halves of the brain was larger in groups of both females and gay men than in groups of straight men, suggesting greater symmetry between the two sides of the brain. Brain scans carried out by Swedish researchers Savic and Lindstrom (2008) showed average right and left brain sizes in samples of homosexual men and women that appeared to show similarity to those typical of the opposite sex, as well as gay men and women appearing more likely to show more balance in right and left brain functions than straight men and (to some extent) lesbians, who are more likely to show a dominance of functions typical of the right brain. Differences in the amygdala favoured more emotional responses to certain

³ Bailey J. M., Zucker K. J. (1995). "Childhood sex-typed behavior and sexual orientation: A conceptual analysis and quantitative review". *Developmental Psychology* 31: 43–55. [doi:10.1037/0012-1649.31.1.43](https://doi.org/10.1037/0012-1649.31.1.43).

situations by gay men and straight women, whereas the responses of straight men and lesbians were more likely to be of the “fight or flight” type.

2007 research by Ponseti also found differences between lesbians and heterosexual women in an area of the brain concerned with the olfactory sense (smell). Research on task performance by the groups of heterosexual and homosexual men and women studied appeared to show that gay men and straight women have similar profiles, performing better than straight men and lesbian women at a number of verbal and memory tasks, while gay women showed resemblance to many straight men in performing generally better at spatial tasks. Lesbian women studied also appeared on average to resemble men and differ from most heterosexual women in their responses to startling noises and index to ring finger ratio. (The latter is a well-known difference between men and women generally (and a marker of pre-natal testosterone exposure.) It goes without saying that these differences are extremely unlikely to have any other origin than a strictly biological one.⁴ The Stockholm researchers have also shown that responses to testosterone and estrogen derived compounds (which may be pheromones) appear to differ according to the sexual orientation of the subject.⁵ This appears to be further evidence that sexual responses are autonomic, and not chosen.

In German and Swedish research, transgender people also appear to show differences in brain anatomy, though there are differences in this regard between androphilic and gynephilic transsexuals, with the latter not exhibiting signs of brain structure typical of females, but also differing from most heterosexual males. Androphilic transsexuals (male to female, or transwomen) displayed sex-atypical brain anatomy and responses to erotic material that were more characteristic of females.⁶ Gynephilic transmen (female to male) showed some cerebral patterns more typical of men. Generally, these results were evident even where the people involved were not taking hormone treatment, which can influence brain anatomy.⁷

A large study conducted on twins in Sweden indicated that “the environment shared by twins (including familial and societal attitudes) explained 0-17% of the choice of sexual partner, genetic factors 18-39% and the unique environment 61-66%. The individual's unique environment includes, for example, circumstances during pregnancy and childbirth, physical and psychological trauma (e.g., accidents, violence, and disease), peer groups, and sexual experiences. “

⁴ Much of this research can be seen in an excellent online video presentation by leading academic Prof. Glenn D. Wilson at: <http://blip.tv/greshamcollege/born-gay-the-origins-of-sexual-orientation-professor-glenn-d-wilson-gresham-college-lecture-4561308>

⁵ <http://www.pnas.org/content/102/20/7356.abstract>

⁶ See Gizewski, E. R., Krause, E., Schlamann, M., Happich, F., Ladd, M. E., Forsting, M., & Senf, W. (2009). Specific cerebral activation due to visual erotic stimuli in male-to-female transsexuals compared with male and female controls: An fMRI study. *Journal of Sexual Medicine*, 6, 440–448.

⁷ Rametti, G., Carrillo, B., Gómez-Gil, E., Junque, C., Zubiarrre-Elorza, L., Segovia, S., Gomez, Á, & Guillamon, A. (2011). [White matter microstructure in female to male transsexuals before cross-sex hormonal treatment. A diffusion tensor imaging study. *Journal of Psychiatric Research*, 45, 199-204. doi:10.1016/j.jpsychires.2010.05.006](https://doi.org/10.1016/j.jpsychires.2010.05.006)

Evidence from natural science points at a number of factors, both genetic and hormonal. Studies show a disproportionately high rate of concordance of sexual orientation among monozygotic twins. Scientists such as Dean Hamer have pointed to some genes on the X chromosome, though it seems very clear that there is no single “gay gene”. Pre-natal exposure and responsiveness to testosterone (with epigenetic “switches” being significant) may play an important role, and “causality” may vary significantly from one person to another. Qazi Rahman, a leading UK based scientist researching in this area attributes roughly 30% of the influence on sexual orientation to genetic factors.⁸ Some research has focused on fraternal birth order with increasing incidence of homosexual orientation in males depending on the number of older biological brothers.⁹ The effect is not present in regard to non-biological brothers, thus discounting rearing or family circumstances as a cause. Neither is this effect present in girls, which tends to reinforce the hypothesis that the increase is due to an immune system reaction to male hormones in the mother’s womb.

The results of the biological research seem convincing, but not all experts find them to be completely so, pointing out potential problems with sample types and sizes.¹⁰ Some point out that this science is in its infancy and that results show correlation rather than cause. Some argue that future research may show that differences and responses of the kinds described above can be a consequence of conditioning and behaviour, and not simply a cause.

1.3 SOCIAL CONSTRUCTIONIST APPROACHES

Humanity does not possess terms to describe sexuality that fully transcend cultural and temporal boundaries. Language – the use of particular terms and concepts - is a cultural process that is tied to particular times, places and forms of social order, including power relations. Michel Foucault wrote of “sexuality” as a field of enquiry that is linked to the historical rise of the bourgeoisie and their exercise of power. Cultural structures, assumptions and biases of time and place reproduce themselves in psychological, political and social discourses that contain an exercise of power in how the terms of debates, contests and self-understandings are set. Social constructionists examine language and culture, on the premise that reality is constructed by societies rather than being founded only in objective “truth”. They are wary of “essentialists” uncritical use of terms that reproduce dominant understandings, and the repressive elements that these may contain. Thus words or categories like “heterosexual”, and “homosexual” should be subject to critical analysis, as implying a binary understanding that confirms the normative status and dominant position of “heterosexual”, including the implication that those experiencing same-sex attraction will always be in a small minority, and perhaps even that they are to be considered “abnormal”.

⁸ http://www.qmul.ac.uk/research/mind_society/mind_society_stories/65407.html

⁹ <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1626369/>

¹⁰ See Osmundsson, <http://sites.harvard.edu/icb/icb.do?keyword=k78405&pageid=icb.page414413>

The term “homosexual” was first used in Western Europe about 140 years ago¹¹, gradually becoming current in the succeeding decades. The words “lesbian”, “gay”, “bisexual,” “transgender”, “gender identity” and “sexual orientation” all have rather recent western linguistic and cultural origins, and the understandings that they evoke are most often of social relations found in modern or postmodern societies. Whether they can accurately describe same-sex relationships, attractions and behaviour, or notions of a “third gender” in other cultures is open to question. As one study noted, the phrase “sexual orientation” assumes that *“the gender of the sexual partner is the crucial issue in sexuality, and that individuals link their (different or same) sex practice in a consistent way to their affections and their public identity. Yet many women and men do not organise their lives in this manner, yet engage in same and different sex partner behaviour”*. In some contexts, people might not make the currently orthodox neat separations between sexual orientation and gender identity. Feminist thought has shed light on the arbitrariness of gender categories that were previously assumed to be “natural” or God-given. As the US scholar Alice Miller has written:

“much legal work and advocacy on sexuality draws on older, perhaps more comfortable thinking that assumes most people across the world “naturally” have settled identities. The modern, apparently progressive version of this naturalised story is that some people are just ‘born gay’, as some are just ‘born straight’, and that women’s sexuality is fused with their reproductive capacity. “Natural” models of this sort tend to assume that all human bodies simply produce sex and gender expression; that same sex behaviour automatically equates with a gay identity; that same sex and heterosexual identities and behaviours are clearly distinct (or even that these terms are equally intelligible or meaningful in different local frameworks); and that male and female bodies are organised in a rigid binary system as a matter of biology.”

Moreover, *“heterosexuality” is left untouched, as if it were a single set of practices and beliefs*”.¹²

Thus, the idea of sexual attraction being used to identify of a person is modern and western in origin. Michel Foucault thought that defining or identifying people according to their desires and fantasies risked placing unduly heavy burdens upon them.¹³ Many prominent Africans reject the public expression of identity based on sexuality as something foreign.

It should be emphasised again that the social constructivist approach is not an alternative to a biological one. *“Social constructionism does not offer alternative*

¹¹ The term was first used in 1869 in two pamphlets written and published anonymously by Károly Mária Kertbeny, an Austro-Hungarian man of letters. See http://www.glbtc.com/social-sciences/kertbeny_km.html

¹² See Miller, *Sexuality and Human Rights*, International Council on Human Rights Policy, 2009, p.18.

¹³ See e.g. <http://www.lrb.co.uk/v03/n09/michel-foucault/sexuality-and-solitude>

answers to questions posed by essentialism: it raises a wholly different set of questions.” As such, *“it can never be rendered incompatible with the essentialist project”*.¹⁴ Social constructionists point out that essentialist approaches rely on positivist, empirical scientific method and an outset in individualism.¹⁵ Many social constructionists accept that these paradigms have been useful in achieving results in the political and legal spheres, especially where it has been necessary to contradict arguments based on sinfulness and choice.

*“For psychologists wanting to change the world, positivist rhetoric offers legitimation, and in rejecting it, critical psychologists are, in effect, undermining their own position as authorities. ... critical psychologists lose the power to intervene effectively in real world politics: they cannot issue authoritative statements (backed up by `science`) on matters of public policy; they don’t make credible expert witnesses in court; they become (often quite literally) unintelligible.”*¹⁶

While the weakness of “essentialism” may be a temptation to reduce, that of “social constructionism” may be the criticism that is frequently levelled at postmodernism: endless and ever more abstract and unintelligible speculation, and sometimes an unproductive denial of the possibility of truth.

The importance of arguments based on biology maybe diminishing in the western world. More recent case law on equal treatment from the USA is showing signs of a move away from reliance on biological immutability. Recent jurisprudence tends towards the view that it would be wholly unreasonable to expect a person to attempt to change such an important part of their identity, and that psychological evidence shows this to be impossible in any case.¹⁷ This reasoning draws an analogy to religious belief which, though generally considered to be a matter of choice, is a prohibited ground of discrimination. In previous times, it was thought that “race” had a basis in natural science. This assumption is generally considered dubious today.¹⁸

1.3.1 “NATURALNESS”

Western discourses on the supposed “unnaturalness” of homosexuality often derive from Thomist (see Chapter Three) ideas of natural law rather than from what does or does not occur in nature, or mix these two elements together in the discussion of naturalness. Some anthropologists acknowledge that fears regarding survival and ideas of naturalness can stand in the way of accepting homosexual relationships.¹⁹ (Particularly) male homosexual activity is sometimes condemned as “unnatural”, and this language is frequently found in the colonial era laws discussed below. Scientists and

¹⁴ Kitzinger, Social Constructionism: Implications for Lesbian and Gay Psychology, in d’Augelli and Patterson, Lesbian, Gay, and Bisexual Identities over the Lifespan, 1995.

¹⁵ Sheila Kitzinger, Annual Review of Critical Psychology, 1999, Vol. 1, pp. 50-66

¹⁶ Ibid.

¹⁷ Osmundsson, op cit, referring to the case of Perry v Schwarzenegger, 2010.

¹⁸ Jorde, Lynne B., and Stephen P. Wooding. 2004. Genetic variation, classification and “race.” Nature Genetics 36(11 Suppl): S28-33

¹⁹ <http://76crimes.com/2012/05/08/traditional-african-homosexuality-has-learned-from-west/>

LGBTI activists refute this claim by pointing to the frequent instances of same sex activity, pairing or occasionally bonding in the animal kingdom.²⁰

“Unnaturalness” arguments are sometimes made on Darwinian grounds, and there is a genuine research question concerning the survival of SSA in human beings in spite of the obvious genetic disadvantage – non-procreation in homosexual relationships and gay people having fewer children (before the advent of IV fertilization²¹). Different hypotheses have been advanced to try to explain the survival of SSA, including various benefits that might be conferred on the relatives of gay people, such as increased fertility among the female relatives of gay men. Some anthropologists point to the contribution of gender “non-conforming” *Fa’afafine* in Samoa²² to the care and rearing of members of the extended family.

Some arguments against homosexuality are based on assertions that practices of anal sex are physically harmful and involve a greater risk of disease than vaginal intercourse. Anal intercourse between heterosexuals is formally banned by sodomy laws in many countries. In practice though, there are almost no calls for investigation or prosecution of heterosexual conduct. Moreover, other sexual practices (oral sex for example) that would be legal if carried out between people of different sexes are likely to be interpreted as illegal when done by members of the same sex. (On the vagueness of indecency laws, see below, Chapter five.) It is also undeniable that MSM are disproportionately represented in HIV / AIDS statistics, but it is also true that decriminalization, combating stigmatization and prevention campaigns can significantly lessen this vulnerability. Health based arguments sometimes equate homosexual practice with promiscuity. These arguments are weakened: i) where there is a committed exclusive relationship, ii) where the comparison is made to promiscuous heterosexuals, or iii) where lesbians, rather than gay men are involved.

1.3.2 WESTERN BIASES IN TERMINOLOGY, AND THEIR CONSEQUENCES

The present study is unlikely to be free of cultural bias or assumptions founded in western thought and society, especially as it uses words such as “homosexual” or “homosexuality” to include same sex relations in African contexts. African researchers and activists often try to use terms from their own cultural contexts (Hungochani in Shona, Kuchu in Swahili) or rehabilitating terms seen as abusive (like “Moffie” in South Africa). While the term “intersex” describes sets of physical characteristics in the human body that are not culture-specific, it too, may imply ways of thinking about these characteristics that arose in one cultural context and that carry normative assumptions that may carry risks.

²⁰ <http://phys.org/news164376975.html>

²¹ As seen in this study, it is the sociocultural advent of exclusively homosexual persons that is relatively new and western. Most persons with homosexual tendencies have in the past also had heterosexual relationships involving childbirth and rearing.

²² Birth Order and Avuncular Tendencies in Samoan Men and Fa’afafine. Vanderlaan DP, Vasey PL. Arch Sex Behav. 2012 Dec 15; . Epub 2012 Dec 15.

As scholars point out though, the language and mechanisms of the international human rights system do not float in a neutral space above local culture. They are “*constitutive*”, in that they create incentives for people to formulate their claims - and their identities - in particular ways: as rights holders, as defenders, as victims, or as being a person with a “*sexual orientation*” or “*gender identity*”, that is *assumed to be settled and fixed*.

Thus, law, including human rights law, is intertwined with culture, modifying and creating it. Modern legal systems use positivist and empirical methods of argumentation and determination of facts. As such they favour views and understandings that are themselves positivistic. That these terms have a western or positivistic origin is not to deny all validity to them in non-western contexts. To do so would be to engage in cultural “*essentialism*”. Both human rights as a normative framework and the medical and social sciences as methods, while acknowledging the importance and particularities of culture and social context, attempt to achieve a validity that transcends these specificities. Today, both social and natural science and the international human rights system are global, rather than specifically western forums. They are porous, proactively curious and generally remain open to critical examination and discourse. The weaknesses they have are a reason to keep an open mind, not to dismiss them as useless.

In an African context, discussions about these perspectives need to be brought down to earth. In heated political discussions, Christian religious conservatives reject the innateness argument as a lie propagated by liberals promoting a “*gay agenda*”. Instead, they focus mostly on male homosexuality – specifically on “*sodomy*” - positing that same-sex conduct is a choice, or a sinful bad habit that people have been drawn into and can be cured of. Several interlocutors interviewed for the study, including government and UN officials, discussed sexual orientation in terms of a “*choice*”. This often appeared to be a simple assumption rather than the expression of a strong conviction. There was very little knowledge of transgender issues.

Views and debates on the causes of SSA have real consequences for people’s daily lives. Altogether apart from legal issues, LGBTI youth may be subjected to “*psychotherapy*” of very dubious value by families who believe that this can change sexual orientation or gender identity. Families may resort to intense prayer activities (often costing money) or traditional healing practices in the belief that this will create character change. Families may take these steps out of feelings of guilt at their own perceived “*failings*”. In the past, state authorities subjected LGBTI persons to forced “*aversion treatment*”, as happened in apartheid South Africa as late as the 1980s. These issues are discussed in later chapters.

The possibility of changing sexual orientation through psychotherapeutic treatment has been increasingly rejected by professionals. In a 2009 review, the American Psychological Association concluded that: “*the results of scientifically valid research indicate that it is unlikely that individuals will be able to reduce same sex attractions or*

increase other-sex sexual attractions through SOCE” (sexual orientation change efforts). The review found some evidence of harm resulting from treatments of this kind,²³ though the more harmful kinds of treatment are far rarer in western countries today than they were a few decades ago.

This research is not particularly well-known even in western countries, and far less so in Africa. GALA in South Africa has researched and advocated for greater visibility of sexual minorities in education curricula at various levels.²⁴ The role of ignorance in anti-LGBTI prejudice is illustrated in the documentary film *“The Kuchus of Uganda”* which features scenes of SMUG activists visiting the Makerere University Medical School. A medical school staff member purporting to be “an authority” on the subject of homosexuality presents a caricature of outdated Freudianism to students as an explanation of homosexuality. Somewhat more optimism can be gained from the reported support by Ugandan medical professionals for the inclusion of MSM in the national HIV / AIDS strategy.²⁵ All medical personnel interviewed for this study were clear on the need for pragmatic approaches on these lines as the only effective strategy against the disease. Not a single African interviewed for this study questioned that homosexuality existed in pre-colonial Africa (though it has to be admitted that most interviewees were educated and relatively sympathetic). Medical professionals emphasized that culture may contain and reproduce views based on ignorance. Unfortunately, they, like justice professionals, are not in themselves a constituency that can produce such a significant change in policy. This illustrates that the battle is not always between western and African culture, but sometimes between different versions of modernism, post-modernism etc, where different understandings are instrumentalized by one side and the other in defence of positions that their proponents are unwilling to critically examine.

The Psychological Society of South Africa (PSSA) issued a statement in 2010 strongly criticizing the Anti-Homosexuality Bill (hereinafter the AHB) in Uganda, noting that *“psychiatry, psychology and sociology, do not consider homosexual orientation to be a disorder, but rather view it as a naturally occurring variation of normal human sexuality”*, and that the discriminatory measures the Bill proposed would *“result in profound physical and psychological harms to the already vulnerable lesbian, gay and bisexual youth in the very population the legislation claims to protect”*.²⁶

The PSSA has made some attempts to promote contemporary understandings of SOGI among professional bodies at the continental level. There can be a lot of resistance among psychiatrists and psychologists. The Chief Psychiatrist of Ghana was recently

²³ APA Task Force on Appropriate Therapeutic Responses to Sexual Orientation. (2009). *Report of the Task Force on Appropriate*

Therapeutic Responses to Sexual Orientation. Washington, DC: American Psychological Association.

²⁴ Notes on interview with Mr. Gabriel Hoosain Khan, GALA, Johannesburg, South Africa, 7 Feb. 2013.

²⁵ <http://archive.globalgayz.com/africa/uganda/ugandas-health-professionals-finally-recognise-need-for-lgbti-inclusion-in-hiv-programmes/>

²⁶ An Open Statement from the Psychological Society of South Africa to the People and Leaders of Uganda Concerning The Anti-Homosexuality Bill 2009, <http://www.psyssa.com/documents/Open%20Statement%20from%20PsySSA%2023-02-10.pdf>

quoted by Ghanaian media as saying that “gays were freaks of nature” that should not be accepted as normal.²⁷

1.4 NURTURE, SOCIAL ENVIRONMENT AND SEXUAL BEHAVIOUR²⁸

Persons opposed to homosexuality may fear that greater tolerance will “lead to more homosexuality”. This fear seems to ignore the experience of most societies – that homosexuality seems to be immune to all attempts to repress it. At first sight, homosexuality happens in spite of, rather than because of social influences. Until very recently in western countries, “coming out” demanded the will and strength to withstand strong pressure to conform to heterosexual norms. This remains the case for most people and societies in the world today. On the other hand, there are many examples of “situational homosexuality” - social environments in which people who might normally prefer opposite sex partners nevertheless engage in same-sex sexual behaviour, without necessarily taking on a homosexual identity. Well-known examples include enforced same-sex environments in prisons, boarding schools or where (as in ancient Greece) women were sequestered until marriage age or unavailable to men because of polygamy, or onerous bride price arrangements. In these contexts, male same-sex relations were sometimes age-structured (and sometimes pederastic) or dependent on social status. Pederasty as a social practice is discussed below. Same-sex intimacy between women was frequently ignored in anthropological research.

1.4.1 EFFECTS OF GROWING UP IN AN LGBTI POSITIVE ENVIRONMENT

One question is whether people who grow up in an environment that is tolerant of LGBTI identities and practice are more likely to thrive as human beings. The American Psychological Association states that:

“On the basis of a remarkably consistent body of research on lesbian and gay parents and their children, lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children. ..” the adjustment, development and psychological well-being of children are unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish.”

Further, adolescents reared in lesbian families were also less likely than their peers to be victimized by a parent or other caregiver. US conservatives have attempted to contest findings of this kind, as seen in a 2012 study by the Texas based Christian academic Mark Regnerus, but its methods and validity were heavily criticized.²⁹ Unfortunately,

²⁷ <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=276181>, accessed 7.6.2013

²⁸ “Environment” in this study is most often used to describe only post-natal environment.

²⁹ http://www.nytimes.com/2012/10/13/us/mark-regnerus-and-the-role-of-faith-in-academics.html?_r=0

A catch-all approach was used that compared persons whose parents’ marriages had broken up because of a single incident of same-sex infidelity to those in “intact, biological families”, and could not thus function as a study of long-term

controversies of this kind simply illustrate the tendency to conduct highly tendentious research that is skewed to produce the desired result in a debate culture that seems to owe more to heated courtroom battles than to scientific enquiry.

Greater openness to same-sex attraction and behaviour?

African leaders may also want to know whether growing up in an environment tolerant of LGBTI people will make people more likely to engage in same sex behaviours. It is not easy to find a fully neutral overview. Some research advanced by conservatives is rather blatantly partisan and subject to methodological problems.³⁰ Some liberal researchers acknowledge a tendency to de-emphasise data showing a greater likelihood on the part of the children of gay and lesbian parents to experiment with same-sex relationships.³¹ This tendency is understandable due to persistent prejudice and discrimination, but scientifically regrettable.

Some research findings do point to the children of lesbian couples – particularly daughters - reporting higher rates of self-identification as other than heterosexual, as having experienced SSA or having had a homoerotic relationship.

The 2001 Biblarz and Stacey review of a number of studies cites a 1997 UK (Tasker and Golombok) study as support for a significantly higher number of young adults raised by lesbian mothers reporting having had a homoerotic relationship (24%), as well as being open to the possibility of having one. The sample size was however rather small.³² 13% of 17-year-olds in the US National Longitudinal Lesbian Family Study self-identified in the LGB spectrum, with the remainder considering themselves predominantly to exclusively heterosexual.³³ This can be compared with the 1996 US National Longitudinal Survey of Adolescent Health, where 6% reported having experienced same sex attraction. (While it is true that experience of SSA and sexual orientation identification are not identical categories, the former is a wider, rather than a narrower category.) A 2006 Dutch study also found lower levels of heterosexual identity among daughters of lesbian mothers than among children of heterosexual couples, though it is pointed out that this needs to be controlled for the effects of the gender, as opposed to sexual orientation of caregivers. A meta-study carried out by researchers from the University of Bergen in Norway on the other hand found no significant differences between children raised by lesbian or gay parents on a range of parameters, including sexual orientation.³⁴ There is apparently some indication that women's sexuality may be more susceptible to

same sex relationships. The same methodology applied to breakup of heterosexual relationships would also yield troubling statistics.

³⁰ Studies by Cameron (2006) and to a lesser extent Schumm (2010) have been criticized in this regard.

³¹ (How) Does the Sexual Orientation of Parents Matter? Judith Stacey; Timothy J. Biblarz, *American Sociological Review*, Vol. 66, No. 2. (Apr., 2001), pp. 159-183

³² [Arch Sex Behav](#). 2011 Dec;40(6):1199-209. doi: 10.1007/s10508-010-9692-2. Epub 2010 Nov 6.

³³ *Journal of Homosexuality*, 59:1211–1229, 2012

³⁴ Anderssen N, Amlie C, Ytterøy EA. Outcomes for children with lesbian or gay parents. A review of studies from 1978 to 2000. [Scand J Psychol](#). 2002 Sep;43(4):335-51.

influence by parenting, and / or more fluid generally. Biblarz and Stacey (2010) note that lesbian parenting did not diminish heterosexual desires in sons. This supports a thesis of greater fixity in male and fluidity in female sexual desires over the life course that has been posited by other researchers (Diamond, 2008³⁵). As pointed out in Chapter Two below though, males may be subject to greater pressure to conform than females.

1.4.2 THE FEAR OF CYCLES OF CHILD SEXUAL ABUSE

Somewhat related to the above is the assumption of cycles of sexual abuse of children, where victims become perpetrators. It is necessary to discuss this because of fears and accusations in some African (and other) countries that associate homosexuality with pedophilia. However unfounded these accusations are against homosexuals in general, they are a central part of the popular discussion in some African debates.

There is no doubt about the harmful effects of child sexual abuse. For present purposes, the question is whether it leads victims into homosexual behaviour or child sexual abuse. A 2001 British study observed that there was comparatively little empirical evidence for the widely held view that perpetrators of child abuse had themselves been victims. The study's own figures showed that a minority - 35% - of male perpetrators of child sexual abuse (pedophilia and incest) had themselves been victims. The highest correlation between perpetration and victimization was found to be among those men who had been sexually abused by females. Of 24 men (a rather small sample) who had suffered child sexual abuse by women, 19 (79%) became perpetrators of abuse (seven of these had also been abused by men). There is little evidence of a cycle of this kind in relation to female perpetrators.

The study's authors concluded that *"the data do not provide strong support for a cycle of sexual abuse encompassing a substantial proportion of male perpetrators, prior victimisation may have some effect in a minority of perpetrators, and can be viewed as one mediating factor which enhances the probability of subsequent perpetrator behaviour."*

This study, like others in the area, cautioned against drawing over-generalized conclusions from particular sample groups. They wrote that *"when seeking causal links, the focus should be on multifactorial origins, but with the expectation that some factors will be more powerful than others."* They point to *"a host of other contributory factors... including physical abuse leading to family separation or disintegration; dysfunctional family relationships; and parental psychiatric illness."*³⁶

A separate question is whether victims of child sexual abuse have a greater likelihood of becoming homosexual (rather than child abusers). A prospective study was published in

³⁵ L. Diamond, *Sexual Fluidity: Understanding Women's Love and Desire*, Harvard University Press, 2008.

³⁶ <http://bjp.rcpsych.org/content/179/6/482.full>

the USA in 2009 where the child sex abuse survivors surveyed had an average age of 6.3 years at the time of the abuse.³⁷ This study did provide *“tentative evidence of a link between childhood sexual abuse and same-sex sexual partnerships among men, although further research is needed to explore this relationship and to examine potential underlying mechanisms.”* Thus, *“men with histories of childhood sexual abuse were significantly more likely than controls to report same-sex sexual partners”*. There was no evidence of a similar influence on women. While there are few studies of this kind from African countries, there are social situations (among street children for example), where same sex sexual abuse is found.

1.4.3 RESEARCH ON TRANSGENDER ISSUES AND POPULATIONS

The American Psychological Association notes that *“transgender is an umbrella term for persons whose gender identity, gender expression, or behavior does not conform to that typically associated with the sex to which they were assigned at birth. Gender identity refers to a person’s internal sense of being male, female, or something else; gender expression refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice, or body characteristics. Not everyone whose appearance or behavior is gender-nonconforming will identify as a transgender person.”*

As also noted by the APA, difficulties of definition mean that there are very few estimates of the transgendered population. Estimates are much lower than those for gays and lesbians. Official figures from the USA estimated that one in 30,000 biological males and one in 100,000 biological females undergo sex reassignment surgery. This figure is strongly contested by some transgender advocates and researchers, who argue for a far higher prevalence.³⁸

In December 2012, the American Psychiatric Association approved changes to the Diagnostic and Statistical Manual of Mental Disorders (for what will become the DSM V / DSM -5) to the effect that there will no longer be a diagnosis of “Gender Identity Disorder”. Instead, the new classification of “Gender Dysphoria” will acknowledge the emotional distress that can arise from incongruence between the gender identity that a person experiences and expresses, and the one assigned to them (usually since birth). This will still permit recommendations of sexual reassignment surgery and other treatment while avoiding the stigma of mental disorder, which is sometimes used in a derogatory way against transgender persons. The World Health Organization (WHO), in its International Statistical Classification of Diseases and Related Health Problems (the current version is known as the ICD-10) still classifies transsexualism among Gender identity Disorders, under mental and behavioural disorders. The ICD is due to be revised

³⁷Wilson HW, Widom CS. *“Does physical abuse, sexual abuse, or neglect in childhood increase the likelihood of same-sex sexual relationships and cohabitation? A prospective 30-year follow-up.”* Arch Sex Behav. 2010 Feb;39(1):63-74. doi: 10.1007/s10508-008-9449-3. Epub 2009 Jan 7.

³⁸ See <http://ai.eecs.umich.edu/people/conway/TS/TSprevalence.html>

in 2015. Amnesty International supports the reclassification of gender identities so as to remove stigmatizing elements.³⁹

The change in the DSM is seen as an important victory and a milestone in the understanding of transgender persons. LGBTI activists note however that “ex-gay” religious ministries arose after the removal of homosexuality as a mental disorder. These religious approaches are often criticized for tending to respond to the worries of families and parents of LGBTI persons rather than being based on the informed consent of the LGBTI person.

³⁹ See for example AI’s statement of 20.11.12, “Europe has still a long way to go to combat violence against transgender people”.

CHAPTER 2

2 AFRICAN SOCIAL AND CULTURAL DIMENSIONS

2.1 THE FAMILY AND THE CONSTRUCTION OF IDENTITY

The centrality of the family, and the relative unimportance of the state are of key importance in understanding the challenges facing LGBTI persons in Africa. Attitudes to sexual orientation or unconventional gender identity may be more fully understood in the light of social constraints that exist generally for all or most members of society, but that affect LGBTI persons in a particular way. It is often said that in Africa, marriage and procreation are not seen as individual choices, but social obligations. Marriage is traditionally conceived of as a union between two families more than between two individuals. This view of marriage and family aligns with the idea of “*Ubuntu*”, where identity – the self - is conceived as being formed and maintained socially rather than only through individual consciousness or attributes. Engelke discusses the interpretations and meanings given to the concept of “human” (the word “*unhu*” in Shona) in Zimbabwe, referring to a general idea that personhood is “acquired” through social relationships like marriage and parenthood, rather than being obtained by the mere fact of birth.⁴⁰ This is a two-way process - individuals gain social identity, status (as an adult or a community elder) and protection in return for fulfilling predetermined roles and functions that contribute to communal goals. Social status remains largely dependent on fulfilment of these obligations.⁴¹ Africans make sacrifices for families and community members in ways that have fallen away in western capitalist and welfare societies.

“Marriage is a tool in service of purposes much broader than the immediate interests of the couple.” Gender and sexuality are subordinate to marriage, procreation and family life rather than being elements of individual identity. Adopting a non-conforming sexual orientation or gender identity, may appear alien and selfish. As Marc Epprecht notes, *“Sexuality was thus not regarded as an individual choice or orientation but in a sense belonged to the wider community.”*

⁴⁰ Matthew Engelke, ‘We Wondered what Human Rights He Was Talking About’ Human rights, homosexuality and the Zimbabwe International Book Fair, University of Virginia, Critique of Anthropology, Vol 19(3) 289–314 , 1999

⁴¹ Nhlapo, Third World Legal Studies, Vol. 13, Article 3 (1995). Indigenous Law and Gender in South Africa: Taking Human Rights and Cultural Diversity Seriously.

Traditional reverence towards ancestors extends this sense beyond the present, so that the social domain merges with the spiritual: *“Social obligations to marry and have children even extended beyond the grave. Ancestors required abundant offspring to maintain their memory and power as benevolent spirits down through the generations.”*⁴¹

When people in Africa reject “a right to be homosexual”, or to practice homosexual sex, they may be doing so from a sense of a far narrower range of choice for individual human beings than westerners are accustomed to thinking of. They may inwardly acknowledge that feelings of emotional and sexual attraction cannot be changed, but that the acknowledgment of those feelings, and acting upon them is anathema to their values. To heed inner feelings over responsibilities and social expectations is in this view the exercise of a “choice” that many people do not have. To western human rights activists, the lack of choice about sexual orientation has often been a central plank of arguments for equality for sexual and gender minorities. This argument has somewhat less force where much of the population accepts marriage and reproduction – and perhaps a particular marital partner - as the fulfillment of obligations to family. This is a moderate conservative version of the discussion regarding choice. More extreme versions posit the deliberate adoption of sinful ways of life that require punishment. There are many similarities between social and religious discourses. The Catholic Church acknowledges that some individuals have very deep seated homosexual feelings, but teaches that these feelings should be repressed rather than acted upon.

2.2 SOCIAL SANCTIONS

Participants in focus groups in Burkina Faso (both women and men)⁴² said that exclusion or ostracism by the family is among the worst fears of African LGBTI persons – often worse than any risk of state sanctions or even violence. While physical violence is often short lived, exclusion and ostracism may endure for a lifetime. For a married person carrying on a same-sex relationship, discovery can even mean being deprived of access to their home and children by the extended family. Especially in patrilineal societies, women are likely to be far more vulnerable than men in this regard. It is unsurprising that (as in western countries), LGBTI people often gravitate towards urban areas where there is a money economy, the possibility of personal autonomy and more social anonymity.⁴³ Successful LGBTI persons interviewed for the study tended to emphasise the link between economic autonomy (and even the ability to provide for families) and freedom to express their sexuality.

Further, an LGBTI person may be prepared to face social prejudice and even discrimination on a personal level, but may be more reluctant to subject her or his family to social opprobrium. Social disapproval of an LGBTI person may affect the reputation not only of the individual person, but of his or her family. Thus, the aunt of a Ugandan man who was arrested and held on sodomy charges fears that this will become part of the communal history of the village, so that the family will be held in disapproval

⁴² The groups also included transgender persons. Field notes, February 2013.

⁴³ Notes on meeting with Gabriel Hoosain Khan, GALA, Johannesburg, 7.02.13

for generations because of it.⁴⁴ This can affect the standing of the family in relation to many aspects of social and economic life in a village setting, including things like being nominated as a village elder, or even allocation of land, and may induce the family to disown an LGBTI person. One activist in Kenya (who was otherwise grateful for his supportive family) explained the gratitude of members of his family when he publicly stated that his homosexuality was his personal business, and had nothing to do with his family.⁴⁵

2.3 CHANGING SOCIAL CONTEXTS

Traditional ideas and patterns of life coexist with social changes that may make parents feel insecure about the safety of their children and the stability of their families. Child marriage has declined in most of Africa. This seems to correlate with an increase in premarital sex that is linked to economic development, higher rates of education, literacy, and wage earning. The independence that wage earning brings enables a freer choice of marital partners by young Africans (i.e. a move away from arranged marriages). Young urban men can finance bride price themselves, and parents fear that greater choice on the part of their daughters is associated with more “experimentation” – premarital sex. Thus a perceived loss of parental control over teenagers’ sexual conduct may provoke a conservative backlash. In urban areas, there may be a rather extreme generation gap between teenagers and their parents. The former have grown up in an era of rapid economic growth and change, including access to the internet, social media and pop culture that provocatively promotes and uses sexuality. Ugandan print media (particularly Red Pepper and the now defunct Rolling Stone use(d) graphic language to describe gay sex that would not be found in newspapers in western countries and would be likely to shock a more prudish older generation.⁴⁶

MSM in Ouagadougou confirmed that social media are often used to establish contacts. GALA in South Africa stressed the importance of social media as a space where members of sexual minority communities can provide each other with mutual support and advice, as well as to organize campaigns, particularly where transport funds and physical meeting spaces may be unavailable.

Changing social contexts have seen a marked success for Evangelical or Pentecostal Christianity in Christian societies and of a strengthened piety in Muslim ones. New religious movements have done well in the urban environments dominated by young people, using media and popular messages that connect with the younger generation. For some young people, homosexuality may function effectively as an evil “other.” Rejecting it may be a way of signalling that, while they are no longer as bound as their

⁴⁴ See the UK Channel Four documentary programme “Africa’s Taboo”, concerning the 2009 case of Frederick Wasukira.

⁴⁵ Personal interview with the author, February 2013.

⁴⁶ See <http://economist.com/node/18111806>

parents were by traditional ways of life, they nevertheless remain true to Biblical morality.

Some researchers examining patterns in parts of Africa point to the phenomenon of men having concurrent long-term sexual partnerships, interpreted as a modern carry-over from traditions of polygamy. They emphasise the importance of understanding these patterns to the fight against AIDS.⁴⁷ Evangelical Churches promote a culture that is in some views progressive as compared to these traditions of a *deuxième bureau*. They emphasise monogamy, marital fidelity, respect for women and the nuclear family. Unsurprisingly, this message often has a strong appeal for wives and mothers.

2.4 FERTILITY

*"Who's going to occupy Uganda 20 years from now if we all become homosexuals? We know that homosexuals don't reproduce."*⁴⁸

African societies have not had long to adapt to the change from very high historical rates of infant mortality to the vastly improved nutrition, health and medical care of the past fifty years. High birth rates and lower infant mortality have allowed high population growth. Social attitudes may view a high birth rate as a sign of national well-being of the kind that GDP and employment does in the media in western countries. Arguments about social change and population growth may not overturn visceral attitudes, at least in the short term.

Concerns about the relative position and power of an ethnic group within a modern state may also be relevant. Kristen Cheney notes that *"With the third highest total fertility rate in the world (Ugandan women give birth to an average 6.77 children), Ugandans take fertility very seriously. During 2009 fieldwork for a study on orphans, I was repeatedly struck by the recurring theme of fertility as a barometer of social stability, by the nation and individuals."*⁴⁹

As Cheney notes, in this context, homosexuality is often perceived as a threat to reproduction: several informants mentioned a threat to the continuation of the family, clan, tribe or even the human species that might be posed by non-procreating homosexuals.⁵⁰ The fear that decriminalization will lead to mass conversion to same-sex

⁴⁷ An article by Helen Epstein in the NY Review of Books provides the following references: Hudson, "AIDS in Rural Africa: A Paradigm for HIV-1 Prevention," *International Journal of STD & AIDS*, Vol. 7, No. 4 (1996), pp. 236–243; Morris and Kretzschmar, "Concurrent Partnerships and the Spread of HIV," *AIDS*, Vol. 11, No. 5 (1997), pp. 681–683; and Halperin and Helen Epstein, "Concurrent Sexual Partnerships Help to Explain Africa's High HIV Prevalence: Implications for Prevention," *The Lancet*, July 3, 2004, pp. 4–6.

⁴⁸ (Former Ugandan Minister for Ethics, James Nsaba Buturo, Oct. 2008 Reported by Agence France Presse: http://afp.google.com/article/ALeqM5i_Vvh-afaH30C28nlscaqql8RtnA The Ghana Constitutional Review Commission report the same arguments in submissions to it.

⁴⁹ Kristen Cheney, *African Studies Review* volume 55, issue 2 pp 77-95, Jan. 2012.

⁵⁰ Notes from field studies, Feb. 2013.

intercourse is easily rebutted. Advocates can point to a steady growth in the population of France for example for 150 years after same sex relations were decriminalized.

2.5 SITUATIONAL BISEXUALITY

Murray (1998: 273) observes that in contrast to the homophobia Western homosexuals confront, the social pressure on Africans who desire same-sex relations is not concerned with their masculinity or femininity, their mental health, their sexual object preference and its causes, or the moral status of their sexual preference – but *primarily with their production of children*, especially eligible heirs – and the maintenance of a conventional image of married life”.

Interviews with male and female LGBTI informants confirmed the vital importance of social expectations in regard to procreation. Tolerance of same-sex relationships is greater if it happens on the margins of life where social norms of marriage and reproduction are outwardly complied with.⁵¹ Many MSM in a survey in Senegal (see below) reported seeing their own sexual behaviour as “temporary”, and saying they expected to renounce it later in their lives. Eighty per cent of MSM interviewed reported having had sex with a woman, 25% had children and 15% were (heterosexually) married at the time they were interviewed.⁵² Similar figures are reported throughout Sub-Saharan Africa⁵³ and confirmed in interviews and focus group discussions for the present study. Both MSM and WSW were very often married in heterosexual relationships and were the biological parents of children.⁵⁴ Particularly for the female partners of MSM, this pattern poses challenges in relation to state obligations and efforts to secure human rights in the area of health. There are no signs that this pattern is significantly different in countries where same-sex behaviour is or is not criminalized, except perhaps among some sectors in South Africa and among a small number of urbanites.

Advocacy for greater acceptance of LGBTI persons could use persons who exemplify the social and economic contributions made by LGBTI people although they forego the status and power attained through procreation. A gay community leader in Burkina Faso emphasized this point in a focus group meeting, arguing persuasively that the best way forward towards acceptance was to have success and win respect in the wider community.

⁵¹ Interview notes with Minority Women in Action, Kenya and focus group in Burkina Faso, Feb.- March 2013. The Crane Survey in Uganda showed that 38% of MSM interviewed were living with women. [http://www.aidstar-one.com/sites/default/files/day_2-28_hladik%20\(1\).pdf](http://www.aidstar-one.com/sites/default/files/day_2-28_hladik%20(1).pdf)

⁵² Niang, Niang et al, 2002. Op cit.

⁵³ See UNAIDS, Global Report on Prevention, 2010, Chapter Five.

⁵⁴ Focus group sessions in Burkina Faso, and interviews in Kenya, February 2013.

2.5.1 HISTORIES OF SAME SEX RELATIONS

One anthropologist doing work among the Hausa in Northern Nigeria found local masculine identified MSM (known as *masu harka*) who were astonished to hear that white men also engaged in sex with other men.⁵⁵

Ward writes that “*silence in African history on the matter of same-sex desire can be read as indicating absence, or unspoken tolerance*” and that “*various forms of same-sex relations have always been part of various African societies, though usually defined in terms of behaviour or stage in life, rather than seen as a stable individual identity on the model of Northern gay or lesbian identities today*”.⁵⁶

Murray quips that “*Absence of evidence, particularly an absence proclaimed in official ideology, should not be taken as evidence of absence*”. He notes that the lack of a written record prior to colonialism in most of Africa means that the main observations accessible are those written by colonial anthropologists who were part of the colonial system.⁵⁷ A number of researchers, many of them non-Africans, have in recent years mined material such as court records and the reports of colonial administrators for information on sexual practices, including same sex relations. As more anthropological and linguistic work has taken place on this theme, the very idea that there is a lack of evidence of same-sex relations in African culture is shown to be false.

Research on these topics needs of course to be carried forward by African researchers who can bring greater understandings of the social, linguistic and cultural backgrounds to these questions. They can also be instrumental in bringing these understandings from the narrow academic sphere into wider African public debate. As pointed out by the Coalition of African Lesbians and a representative of Minority Women in Action in Kenya⁵⁸, the case for discussion of women’s sexuality as a development issue needs to be backed by research and data. The work of scholars such as Sylvia Tamale in Uganda on these issues needs to be supported and carried forward. At present, there are too few resources available for this work.

2.5.2 SITUATIONAL SAME-SEX BEHAVIOUR AND HIERARCHICAL SOCIAL RELATIONSHIPS

Examples of this include miners in Mpondo, South Africa, where same-sex marriages were known and accepted⁵⁹, as well as among the Mossi of Burkina Faso, the Azande of Eastern and Central Africa and Nubian peoples of the Sudan. In other contexts, marriages between women were described by anthropologists. These took place between wealthy women in need of offspring who obeyed social conventions such as

⁵⁵ Rudolf Pell Gaudio, *Allah Made Us*, Wiley Blackwell 2009.

⁵⁶ Kevin Ward, Same-Sex Relations in Africa and the Debate on Homosexuality in East African Anglicanism. *Anglican Theological Review*, 2002 (Winter)

⁵⁷ Op cit.

⁵⁸ Interview notes from meetings in Johannesburg and Nairobi, February 2013.

⁵⁹ Murray, text to footnotes 67 et seq.

paying bride price to obtain a fertile wife.⁶⁰ Information is not available as to whether these relationships involved sexual intimacy. Colonial era anthropologists were mostly males who had little access to female environments. Not for the first time, female sexuality was neglected.

In Africa, as in other parts of the world, situational same sex conduct has sometimes included socially tolerated pederasty (age structured male same sex relationships where the junior partner is generally an adolescent, and not considered an adult). For present purposes, the issue of pederasty is important because it may be the default image that many people have of homosexuality. The role of pederasty in the early story of Ugandan colonization (the Kabaka of Buganda and the Uganda Martyrs – see Chapter Four) is well-known in East Africa. It is invoked both by LGBTI activists to show that homosexual behaviour existed prior to European influence, and by (mainly Christian) opponents to associate it with child abuse. In view of the frequent scaremongering about “recruitment” of children, it is important to be aware of this context.

While modern mores and law often do not make distinctions, it is necessary to distinguish pederasty from pedophilia (a sexual attraction to pre-pubescent children⁶¹). Acceptance of pederasty was not equivalent to acceptance of pedophilia in the diverse societies that tolerated pederastic relationships.⁶² It should also be recalled that the age at which such same sex relationships were accepted or tolerated often paralleled those for heterosexual sex or marriage, and that the same societies permitted age disparities and arranged marriages without considering the consent of the bride. Early marriages remain a problem that most African governments are committed to combating. Condemnation of historical pederasty that fails to account for this context risks being seriously misleading. Equating historical pederasty with modern pedophilia is even more unfounded.

Anthropological writings describe same sex marriage among young adult Azande men and younger adolescents that included the payment of the equivalent of bride wealth and even the possibility lawsuits for adultery in the case of infidelity. The “boys” married were socially regarded as women for the duration of the marriage, which lasted until the husband could afford to marry a female.⁶³ The male “wife” would then join the band of warriors and take a boy wife of his own.

Azande interviewed by anthropologists attributed these arrangements to the shortage of available women. Here, there are some similarities to cultural practices among the

⁶⁰ See Herskovits, *A Note on 'Woman Marriage'* in *Dahomey: Journal of the International African Institute* Vol. 10, No. 3 (Jul., 1937), pp. 335-341

⁶¹ See <http://www.ncbi.nlm.nih.gov/pubmed/18686026>

⁶² These distinctions were discussed in evidence given by the American philosopher Martha Nussbaum in a case before the Colorado District Court in the USA. See: Clark, Randall Baldwin (2000) "Platonic Love in a Colorado Courtroom: Martha Nussbaum, John Finnis, and Plato's Laws in *Evans v. Romer*," *Yale Journal of Law & the Humanities*: Vol. 12: Iss. 1, Article 1. Available at: <http://digitalcommons.law.yale.edu/yjhl/vol12/iss1/1>

⁶³ See <http://www2.hu-berlin.de/sexology/GESUND/ARCHIV/GUS/ZANDE.HTM> or E. Evans Pritchard, *Sexual Inversion Among the Azande*, *American Anthropologist*, New Series, Vo. 72, no. 6, 1972.

ancient Greeks and Japanese Samurai, where the pederastic relationship extended beyond sex. These cultural settings did not accept same-sex partnerships between adult males or of the sexual abuse of pre-pubescent children. Anthropological writing on the Azande also described how large polygamous households and the unavailability of male attention led some women to practice lesbian sex, though this tended to be carried on in the secrecy of family compounds. The overt Azande pederastic practices disappeared in the first half of the twentieth century under the influence of Christian missionaries and the decline of polygamy. While these practices were perhaps especially institutionalized and well-documented among the Azande, they are known to have taken place among many peoples in Africa. Far from being exceptional in sexual expression, African cultures exhibit patterns that are familiarly human.

2.5.3 ALTERNATIVE GENDER IDENTITIES

In non-western societies where gender non-conformity is accepted, (such as with the “Fa’afafine” in Samoa), the feminine gender identity is acknowledged long before adolescence and overtly sexual behaviour. It arises out of an observed preference for labour and household tasks that are more typically feminine rather than out of sexual preference.⁶⁴

The great diversity of African traditional cultures also provides examples of same-sex conduct that appears to be based on sexual orientation or gender identification. Murray mentions examples from *inter alia*, Ethiopia, Kenya and Sudan. “*Ibbis*” in Senegal may occupy positions of high regard in certain circles. For example, *Ibbis* often have close relationships with women who have political or economic power, for whom they carry out important social ceremonies and functions. In several neighbourhoods, *Ibbis* enjoy the protection of the entire community. In other contexts, same-sex experimentation among adolescent males appears to have been tolerated with amusement. In still other examples, male priests of female deities habitually don female attire, though apparently without engaging in same-sex acts.⁶⁵ As discussed elsewhere in this study (Chapter Four), these cultural and historical antecedents are sometimes acknowledged even by fierce opponents of liberalization.

2.6 CONTEMPORARY ATTITUDES

As for attitudes today, few African voices are raised in favour of the rights of LGBTI persons. Peer pressure probably plays a role in preventing more tolerant voices from being heard. Nevertheless, even surveys where people respond anonymously show low acceptance of homosexuality in Africa:

Attitudes	to	South Africa	28%
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⁶⁴ See Redefining Fa’afafine: Western Discourses and the Construction of Transgenderism in Samoa intersections.anu.edu.au/issue6/schmidt.html

⁶⁵ Essien and Aderinto, op cit. p.126.

homosexuality. Responses to questions should homosexuality be accepted? ⁶⁶	Côte d'Ivoire	11%
	Ghana	4%
	Kenya, Tanzania, Uganda	3%
	Senegal	3%
	Ethiopia	2%
	Nigeria	2%
	Mali	1%

For Sweden and the USA, the figures were 86% and 49% respectively.

The West African network QAYN conducted a study on knowledge and attitudes of university students to SOGI issues in Burkina Faso.⁶⁷ A number of interesting findings emerged. About half of the students were familiar with the terms “sexual orientation” and “gender identity” (58% of women and 50% of men). Most of those responding positively to this question attempted to define the phrases in terms of a “choice” made by sexual minorities. About 40% of both men and women had previously discussed the topic of homosexuality in the framework of school. 69% of men and 46% of women had followed public debates on this question, mostly in relation to other countries.

62% of women thought that homosexuality was a bad thing, whereas 7% saw it as a question of personal liberty. 7% condemned it as “an abomination”. Interestingly, only 4% of women and 9% of men thought that homosexuality was a western invention. About 9% of men and women thought that homosexuality had a place in African culture. 64% of men thought it was a bad thing to be eradicated, an abomination, unnatural etc. 29% of males thought it should be banned by law and 4% considered it to be a matter of personal freedom. 75% of women and 71% of men accepted that homosexuality existed in Burkina Faso. Levels of tolerance were somewhat contradictory. 36% of women and 38% of men said that they would be able to live or work in the same place as a homosexual person, but 72% of women and 84% of men were in favour of the laws against homosexuality that exist in other African countries.

In South Africa, the Human Sciences Research Council (HSRC) has undertaken surveys to document homophobia in public institutions. The Department of Home Affairs (including the police) has had challenges with high rates of homophobia.⁶⁸

2.7 HOMOPHOBIA AND TRANSPHOBIA

Many experts agree that the term “homophobia” is actually a misnomer, as what is encountered often has the character of prejudice rather than fear as such, and some of the fears that lead people to prejudice may not be of homosexuality as such, but of

⁶⁶ Pew Global Attitudes study, 2007. Accessed at: <http://pewglobal.org/files/pdf/258.pdf>

⁶⁷ HOMOSEXUALITÉ, QU'EN PENSES-TU? Un Sondage d'opinion en milieu universitaire de Ouagadougou, Burkina Faso,

QAYN, 2013, <http://www.qayn-center.org/>

⁶⁸ Interview with Mr. Gabriel Hoosain Khan, GALA, Johannesburg 7.2.2013.

being labeled as gay. Thus, some leading experts (such as Gregory Herek) sometimes use terms such as “sexual prejudice” rather than homophobia, or use the term “homophobia” with reservations. Prejudice - against sexual or gender difference may cover a variety of emotional reactions. Fear and disgust are often prominent among these.

2.7.1 HONOUR, SHAME AND THE FEAR OF LOSS OF STATUS

One hypothesis for homophobia among adult men, associates being sexually penetrated with submissiveness, which is deemed inconsistent with the qualities of manliness demanded of a warrior who can assist in protecting the group.⁶⁹ The writer here was not referring specifically to Africa, but to males more generally. The association of shame with a man adopting what is perceived to be the female role is of course not unique to Africa, nor is the idea that it is only the passive, recipient party who is homosexual.⁷⁰ As Lawrence Thomas observes *“for human beings, (sexual) penetration is fraught with symbolic significance, not least of which is that penetration is done by persons in power, whatever the power configuration might be. Women do not penetrate with their bodies, and so in the minds of some men the bodies of women do not raise the issue of power in sexual intercourse. ... With men, by contrast, the issue of loss of power immediately presents itself; male heterosexuality is as much defined in terms of penetration as it is in terms of anything else.”*

Many instances of male situational homosexuality reflect hierarchical social structures and reproduce “heteronormative” roles. Where power relations between men and women are highly unequal, it is shameful for a man to be given the status of a woman. Society and culture may thus attribute no shame to the supposedly dominant, insertive or “penetrating” party, (including not seeing him as homosexual) and give different names to the two persons involved in the sexual act (putatively one involving anal intercourse).

A survey in Senegal revealed that at least three different Wolof words were in use to label men who have sex with men (MSM), among fishermen at sea.⁷¹ The commonly used word *“Gor jigeen”* is not used by the MSM community and is perceived by them as pejorative and even threatening. The word *Yoos* may be used describe the more dominant, sometimes older and more socially senior partner, who may also be the insertive partner during anal sex. The word *Ibbi* on the other hand describes those who *“are more likely to adopt feminine mannerisms and be less dominant in sexual interactions”*. According to the survey, *Yoos* do not consider themselves to be

⁶⁹ <http://www.fordham.edu/halsall/med/thorp.asp>. Admittedly, this reference is to Aristotelian Greece rather than modern Africa, but the difficulties of overtly masculine environments in accepting homosexuality are well known in many cultures.

⁷⁰ See for example Mc Kee Irwin, *Mexican Masculinities*, University of Minnesota Press, 2003.

⁷¹ Niang, Niang, Moreau, Gomis, Diouf Seck, Wade Tapsoba & Castle, 2002: Meeting the Sexual Health Needs of Men Who Have Sex With Men in Senegal, Institute of Environmental Sciences, Cheikh Anta Diop University, Senegal National AIDS Control Council (CNLS), Horizons Program

homosexuals. As with heterosexual relationships, there is often a relationship of unequal power between the parties, with one (typically the *Yoos* in the above context) being older, more powerful and / or wealthier, providing financial inducements or benefits. Beyond these broad categories, there are additional subcategories based on age, status, and type of relationship. These categories can risk overemphasizing one kind of sexual behaviour between MSM and playing into a mobilization of disgust.⁷²

Patterns of this kind show similarities to those found on the Swahili coast of Kenya and Tanzania, where the less dominant, perhaps receptive partner is referred to as a *shoga*, the insertive as a *basha*. The same pattern is found among Hausa in Northern Nigeria, where *masu harka* take on the masculine role in relation to typically effeminate “*yan daudu*.” As the Senegal report points out, identification with a particular group is not a good predictor of individual sexual practices. Some may preserve the appearance of only being *Yoos*, while occasionally adopting the role of an *Ibbi* in secret. *Ibbis* may have a junior partner with whom they adopt the senior, dominant role of a *Yoos*.

Thomas observes that male identity is inherently more fragile than female. He posits that female identity is defined above all else not by the receptive role in intercourse, but pregnancy and childbirth. A man who is not interested in penetrating, or opts for being penetrated, rejects male identity by rejecting “*the only thing that is truly definitive of manhood*.” There is no shame for the male who penetrates another male while in prison because he is doing his best under the circumstances. Shaming persons merely on account of their belonging to a certain group typically bespeaks a fear of losing what one takes to be a defining feature of one’s self-identity. A further hypothesis is that homophobia is explained by fear on the part of the homophobic person of his or her own homophilic feelings. As noted by researchers since Kinsey, these exist to a greater or lesser extent in most human beings.⁷³

Shaming that is based on a fear of being perceived by others as gay may be particularly dangerous, as it has the potential to give rise to “witch-hunts” and violence are used to demonstrate or perform group identity. US research confirms that some men use hostility and violence to homosexuals to reassure themselves about their own sexuality.⁷⁴ In the context of South Africa, psychologist and researcher Kgamadi Kometsi explored masculinities and their links to power, violence, HIV / AIDS sexual promiscuity and self-esteem for South African men.⁷⁵

Homophobia or sexual prejudices are not confined to heterosexuals. They are also manifested internally in LGBTI persons. The scholar and activist Gregory Herek found that fewer lesbians (in the USA) suffered from internalized negative feelings regarding

⁷² <http://www.good.is/posts/gay-sex-is-not-anal-sex>

⁷³ One example cited recently is the controversy surrounding UK Cardinal O’Brien’s alleged sexual advances towards young priests and his admissions of impropriety has been contrasted with his record of strong condemnations of homosexuality. This is consistent with particular condemnation of what are felt to be the vices that are most tempting and threatening.

⁷⁴ <http://www.nytimes.com/1990/07/10/science/homophobia-scientists-find-clues-to-its-roots.html?pagewanted=print&src=pm>

⁷⁵ (Un)Real, University of Pretoria, AIDS review 2004.

their sexual orientation than gay men. This is consistent with the greater importance attached to identity by men and Thomas's observations as to the fragility of masculine identity. Despite the close relationship between conceptions of masculinity and prejudice and even violence against LGBTI persons, much gender programming does not yet address masculinity (masculinities). This is discussed in Chapters Six and Seven below.

Researchers and traditional leaders interviewed in Burkina Faso also mentioned other fears. Among uneducated people in some communities there were sometimes fears of anyone who appears different, such as albinos or twins. LGBTI persons might also be feared in this way, leading to stigma that could sometimes lead to violence. The fear that homosexuals may be responsible for child sexual abuse is discussed below.

2.7.2 DISGUST

The American philosopher Martha Nussbaum has written about "the Politics of Disgust" in anti-homosexual movements in the USA. Mobilization of feelings of disgust is evident in the wildly exaggerated focus on sex of pastors such as Martin Ssempe in Uganda, who deliberately associates homosexuality with excretion in a way that is calculated to provoke disgust.⁷⁶

Some conservative thinkers⁷⁷ have even posited that a dislike of (male) homosexuals may be evolutionary, linked to risks of disease associated with homosexual promiscuity or anal penetrative sex.⁷⁸ Such speculations can be rejected as unverifiable "just so" stories or discussed as hypotheses. In theory, they might not necessarily be an expression of prejudice. In practice, they are likely to be used that way, and there is no doubting the power of this emotion. Nussbaum points out that disgust at male-male sex is not universal in human beings, and can be overcome. She sees the mobilization of disgust as a denial of truths about the human condition, and dangerous because it blocks the possibility of empathy for other persons, denying their humanity.⁷⁹ Lesbianism does not seem capable of provoking the same level of antipathy. Facilitation of calm discussion of physical, bodily realities may thus be a powerful antidote to attempts to mobilize disgust. In previous times, emotions were raised against the idea of interracial marriage or sexual relations.⁸⁰

Although HIV / AIDS has generally not been seen mainly as a disease of gay men in Africa, this association is not completely absent. LGBTI organizations are aware that MSM projects targeting male sex workers may lead to homosexuality being associated

⁷⁶ The scenes of this pastor displaying homosexual hard pornography to an Evangelical Congregation (including children) in Kampala became an infamous "viral" hit on youtube.

⁷⁷ See Thomas and Levin, *Sexual Orientation and Human Rights*, 1999, Rowman and Littlefield.

⁷⁸ On disgust at fa <http://www.bbc.co.uk/science/humanbody/mind/articles/emotions/disgust.shtml>

⁷⁹ This recalls the notorious statement of Zimbabwean President Mugabe about homosexuals being "worse than pigs and dogs" that has been repeated and echoed by numerous other political leaders. See Chapter four below.

⁸⁰ See e.g. http://www.ohs.org/education/oregonhistory/historical_records/dspDocument.cfm?doc_ID=16C5ABED-9813-9D2E-ED436C14E69E026B

with promiscuity and disease. There is a vicious circle of MSM and transwomen being stigmatized, circulating in urban underground environments and being pushed by poverty and the temptation of easy money or gifts into sex work. It is in these environments that blackmail and extortion also typically arise. Some aspects of HIV / AIDS programming are discussed in the final two chapters of this study.

2.7.3 IGNORANCE

During the country visits, many experts, especially those working with health, stressed widespread popular ignorance of many aspects of sexuality and sexual health. In some contexts, even some health workers might not understand how HIV is or is not transmitted. A lack of visibility of LGBTI persons, itself partly the result of legal prohibitions and social taboos, perpetuates ignorance and makes proactive attempts to combat fear more difficult. Turning these negative cycles into positive ones is the greatest single challenge to progress on LGBTI rights.⁸¹ A great many unsubstantiated rumours, half-truths and outright lies are allowed to flourish in conditions of poor understanding and a lack of information about sexuality in general and SOGI issues in particular. Even well-educated Ugandans spoken to repeat urban legends put about by sensationalist media or fundamentalist pastors as truths (that most gay men have to wear diapers, that LGBTI organizations are “recruiting” children that levels of homosexuality are increasing dramatically etc).

2.8 THE ALLEGED “RECRUITMENT” OF CHILDREN

The problem of “defilement” of underage girls is a serious and well-known problem in many African countries. Ugandan parents faced with the threat of “defilement” of children (forced or statutory rape) may be fearful of other real or perceived threats to their children. Failing to recognize these fears would be a mistake. There is no disagreement that the acts of pedophiles who try to tempt minors into giving sexual services in return for goods, services favours etc should be investigated and severely punished.

Pedophiles often do abuse children of their own (most often male) sex. This is often misinterpreted to imply that persons who practice adult consenting homosexuality are likely to abuse minors. In other parts of the world, research has disproved any allegation that homosexuals are any more likely to target minors than heterosexuals are.⁸² The slur that homosexuals are engaged in campaigns to “recruit” children originated in the USA in the 1970s.⁸³ Unfortunately, in the early 1990s, the international movement for LGBTI rights was set back by the failure of the ILGA to act in time to exclude an organization

⁸¹ Interview with Mr. Modeste Yaméogo, UNICEF Burkina Faso, 31.1.2013.

⁸² McConaghy, N. (1998). Paedophilia: A review of the evidence. *Australian and New Zealand Journal of Psychiatry*, 32(2), 252-265.

⁸³ The first use of this term seems to have been by the born again Christian singer and political activist Anita Bryant in 1977 in Florida. See: *Gay Rights and Moral Panic: The Origins of America's Debate on Homosexuality*. Fred Fejes, Palgrave MacMillan New York, 2008.

advocating pedophilia from its membership. This cost ILGA its observer status at the UN, which was not regained until 2006.⁸⁴

The “recruitment” allegation was repeated in Uganda in connection with the visit by US Evangelists in 2009. In some contexts, public statements of this kind would fall foul of anti-hate speech legislation.⁸⁵ In Uganda unfortunately, they are part and parcel of public debate. Pastor Martin Ssempe publicly used this allegation in a press conference, the notorious Rolling Stone newspaper wrote about it in articles calculated to whip up fear. Unfortunately even the Church of Uganda statement on the AHB referred explicitly to “recruitment”, and President Museveni did the same in a BBC interview.⁸⁶ Opponents have repeatedly challenged religious fundamentalists in Uganda to produce evidence of recruitment. They have never been able to do so. SMUG and defenders of LGBTI rights – in Uganda as elsewhere in the region - make their condemnation of pedophilia clear on all possible occasions, but others shout louder.

In 2012, the Uganda Human Rights Commission (UHRC) considered carrying out a study into these allegations. This would require a calm and highly professional approach to research methods and public communication to avoid contributing to myths and misperceptions. (I.e. it would have to be careful to avoid misrepresentation by extremists.) It would have to clearly define what is meant by “recruitment”, distinguishing it from the provision of information, facilitation of discussion or advocacy for tolerance. It would have to live up to high standards of rigour in evidence gathering, consultation and assessment, and it would demand that the Commission carefully manage communication with the public during and after the study. Under the right conditions, it could potentially lead to a clearing of the air. In the wrong ones, it could become extremely difficult to remain objective and calm.

2.8.1 FEAR OF “PROMOTION” OF HOMOSEXUALITY

When does providing information to young people who think that they may be gay or transgender become “promotion”?

The danger of setbacks and backlashes is particularly large in regard to information targeting young people. Some Evangelicals and anti-LGBTI campaigners sometimes confuse “recruitment,” “promotion” and advocacy and outreach activities, particularly those intended to reach young people. Some religious conservatives may view any tolerance of homosexuality – especially among young people - as “promotion” or even “recruitment” - luring children into sexual abuse. Extremists deliberately play on this confusion. A religious conservative may be unlikely to accept that an organization that provides supportive counselling to teenagers to accept their own sexuality or to come

⁸⁴ <http://www.un.org/News/Press/docs/2006/ecosoc6242.doc.htm>

⁸⁵ I.e. Canada: see <http://www.scc-csc.gc.ca/case-dossier/cms-sgd/sum-som-eng.aspx?cas=33676>

⁸⁶ <http://www.bbc.co.uk/programmes/p00nw591>

out has not “recruited” a child into homosexuality. SMUG Uganda representatives told how fears like these make it almost impossible for them to have cooperation with any NGOs that work with young people. Workers at Ishtar, a Kenyan NGO working against HIV / AIDS said that they were able to get permission to sensitise students at university level, but not in schools.⁸⁷

Development partner organizations are likely to be included among those accused of “promoting” homosexuality, as happened in statements like this one by proponents of the Anti-Homosexuality Bill in Uganda: *“In the early months of 2009, information came to light that our children were being molested and recruited into gay activities (homosexuality and lesbianism). This was being carried out by well-organized and well-trained homosexual groups operating in our schools and institutions of higher learning with funding and backing from some Western governments and international organizations.”*⁸⁸

One example of a programme where development organizations were brought into the fray was the UNICEF supported handbook for teenagers in Uganda. UNICEF sponsored the production and distribution of a “Teenagers’ Toolkit” in Uganda. This was criticized by conservatives, including the Minister for Ethics, because of its supportive tone and message in relation to young people who experience same-sex attraction.⁸⁹ (The section dealing with same-sex attraction was short and by no means overemphasised in the publication.) Battles such as this concerning sex education closely mirror similar struggles in the USA. One of the critics of the publication was Steven Langa, a close associate of the US preacher Scott Lively in connection with the March 2009 Kampala conference that led to the drafting of the Anti-Homosexuality Bill (see below).

It is obvious that work with schools or young people in this area is sensitive, and depending on the context, risks being misinterpreted. Sequencing of programmatic and development initiatives is important, so that any such activities are preceded by dialogue and the reaching of certain understandings among parents and community leaders. Especially for hierarchical structures, dialogue in local settings needs to be linked to or preceded by national dialogue, and this needs to occur outside the glare of media where people defensively maintain their positions and try to gain support. Nevertheless, certain risks have to be taken. As a representative of UNICEF in Burkina Faso pointed out, discussion of FGM was taboo not long ago, and this has been broken largely as a result of development programming that recognized and took advantage of the high levels of tolerance in the country, bringing religious leaders into the discussion.⁹⁰

⁸⁷ Notes on interview with Peter Njane and Jeffrey Walimbwa, Ishtar, Nairobi, 20.2.2013

⁸⁸ <http://sebaspace.wordpress.com/2012/11/09/a-freshly-rejuvenated-uganda-homophobic-lobby-goes-to-work/>

⁸⁹ <http://www.newvision.co.ug/D/8/12/676939>

⁹⁰ Interview with Mr. Modeste Yaméogo, UNICEF, Burkina Faso, 31.1.2013.

2.9 BEHAVIOUR AND IDENTITY, PRIVATE AND PUBLIC SPHERES

2.9.1 SEXUALITY, THE PRIVATE SPHERE AND THE USES OF DENIABILITY

It is probably exaggerated to claim widespread acceptance of sexual and gender non-conformity in pre-colonial African societies. As shown below, Ethiopia, which was not greatly touched by colonialism, shows only 2% of the population being accepting of homosexuality (though Ethiopia has very old Christian and Muslim traditions). Members of some African societies appear at times to be more open and frank than some western societies on discussions of bodily functions, including sexuality. Descriptive openness may not amount to normative acceptance. While the (European imported) law and morality typically punishes behaviour rather than identity, traditional African attitudes may often require conformity on the levels of norms and identity and be more tolerant in relation to behaviour, particularly of those in positions of power.⁹¹ “Don’t ask don’t tell” has been practiced for a long time in Africa.

A Botswanan man is cited as saying that: *“What a man does, what he wants to do, what his self-concept is and the way he leads his life are four different but related things.”*⁹² Likewise, a medical doctor interviewed in Burkina Faso pointed out that very few people are very open about matters of sexuality: *“Even the most honest person in the world will not tell you the truth when it comes to sex”*. Families and communities may often be willing to turn a blind eye to discreet marital infidelity, whether heterosexual or homosexual, particularly by persons enjoying high status, as long as family obligations are met. One key informant in Burkina Faso said that poor people often view homosexuality as “an illness of the rich”.⁹³ The misuse of sodomy legislation in order to blackmail suspects for money reflects the concern with identity and reputation (see Chapter Six).

While divergences between behaviour and public admission may be seen as hypocritical, they serve the social purpose of maintaining peace and accommodating contradictory impulses. A reduction of the space for “hypocrisy” may force people to take definitive positions where they might have preferred to maintain some space for creative flexibility. HIV / AIDS workers are well-aware of the importance of the behaviour / identity distinction in their attempts to combat infections. The phrase *“men who have sex with men”* was coined by them to describe same sex behaviour, as opposed to gay identity.

⁹¹ See Epprecht, 1998, *Journal of Southern African Studies*.

⁹² Dunston and Palmberg 1996

⁹³ Interview with Mr. Modeste Yaméogo, UNICEF, Burkina Faso, 30.1.2013

2.9.2 THE IMPORTANCE OF SYMBOLS AND RESISTANCE TO SEXUALITY INTO THE PUBLIC SPHERE

The open proclamation of sexuality – even of the heterosexual kind – may be what particularly strikes people as culturally foreign. The open display of sexuality that many people associate the LGBTI rights movement are easily linked to the overt sexuality of western commercial culture. Both are lumped together as a threat to the family and to African values. HIV / AIDS workers in Burkina Faso said that LGBTI people sometimes offend sensibilities through public acts, such as acting in a gender non-conforming manner, making sexual gestures or showing affection in ways that even most heterosexuals would not. President Museveni of Uganda’s invocation of this argument is discussed in Chapter Four. According to informants, public displays of affection in Wemtenga in Ouagadougou in 2012, led local residents to force a group of MSM out of their house and neighbourhood. The implications that this may have for the strategies of LGBTI organizations are discussed in Chapters Seven and Eight. It is possible that assurances to the authorities that such overt displays will not take place can ease the way to official acceptance.

The HIV / AIDS workers in Burkina Faso thought that words (a person saying that he or she is LGBTI) might be less risky than gestures. Nevertheless, even certain words, without any overt behaviour, may violate cultural norms. Some scholars emphasise the strongly oral element of African cultures.⁹⁴ Verbalization can represent a shift from the sphere of (deniable) private behaviour to public discourse and identity. Activists and foreign well-wishers need to navigate these waters with great sensitivity. The battle concerning decriminalization is highly symbolic. Decriminalization is understood as tantamount to social acceptance. It is interesting to observe that Danish lawmakers in the 1930s had the exact opposite understanding, but also wanted to avoid publicity regarding same sex behaviour.⁹⁵

Open toleration of homosexuality is used as a symbol of succumbing to licentious, decadent western culture, an abandonment of all self-restraint in sexuality. In this vein a senior Ugandan official wrote that *“this alleged right is pure sexual hedonism or the relentless pursuit of sexual pleasure for its own sake”*.⁹⁶ As described in Chapter Four below, Ugandan President Yoweri Museveni also evoked the Uganda martyrs in a speech in 2010 as the polar opposite of licentious homosexuality.

2.9.3 THREATS TO THE MORAL UNIVERSE

As well as posing threats to social status, homosexuality and gender non-conformity can threaten the moral universe. The monotheistic religions provide a framework for the understanding of life and the world, in which gender plays an important part (“male and female he created them” Genesis 5:2). According to the anthropologist Constance

⁹⁴ Engelke 1999, op cit.

⁹⁵ See infra, Chapter 5.

⁹⁶ J.s. Mayanja-Nkangi, Kampala (Chairperson of the National Land Commission) New Vision (Kampala) OPINION 16 December 2007,

Sullivan-Blum, *“The Genesis narrative presents gender as one of the primary ways by which God orders creation. As such, the possibility that Christianity might embrace same-sex marriage is profoundly destabilizing to the Evangelical worldview.”*⁹⁷ The role of religion is explored below.

The problem of violence against LGBTI, and particularly lesbians in South Africa, though its perpetrators are seldom religious, would seem to exemplify these two tendencies. The perpetrators of the rather offensively named “corrective rape” are, according to some studies, often either young black men in townships whose social and economic status is threatened and who are unable to fulfil cultural requirements of masculinity.⁹⁸ Some rapists come from the families of lesbian women, feeling that her identity expression and conduct affront their expectations of her.⁹⁹ More overtly masculine lesbians¹⁰⁰ and more effeminate men are said to be at greater risk.¹⁰¹

2.9.4 NORTHERN PUBLIC DEBATES AND SAME-SEX MARRIAGE

“In the end, you’ll succeed in imposing this on us too”

Health official involved in HIV / AIDS programmes, Burkina Faso¹⁰²

International human rights law currently contains no state obligation to make same sex marriage available.¹⁰³ There is thus no obstacle to assuring African governments and the public that decriminalization is not tantamount to permitting same sex marriage.

Fear of destruction of the family is invoked in both Northern and Southern countries as an argument against same-sex marriage. Few African LGBTI activists or human rights campaigners outside of South Africa make same sex marriage an issue, let alone a priority. Legal recognition of same-sex marriage is a distant prospect for most African societies. Nevertheless, globalization has brought North American and European debates on same-sex marriage into the everyday consciousness of the urban and educated Africans who have most power in society. Thus, in almost every recent constitution making exercise in Africa, same-sex marriage has been addressed and in several cases excluded.¹⁰⁴ In Ghana and Kenya, two countries that have seen significant

⁹⁷ Hassett, 2009, makes this citation from a conference paper with the following reference: Sullivan-Blum, Constance R. 2002 “The Two Shall Become One Flesh”: Why Same-Sex Marriage Threatens Evangelical Christians. Paper presented at the Biennial Meeting of the Society for the Anthropology of Religion, Providence, RI, April 2002

⁹⁸ Thanks go to Mr. Pierre Brouard, Centre for the Study of AIDS, University of Pretoria, South Africa, for these and other insights.

⁹⁹ http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=749:perpetrators-of-corrective-rape-uncertainty-and-gender-in-the-21st-century-&catid=59:gender-issues-discussion-papers&Itemid=267

¹⁰⁰ HRW 2011, p.12.

¹⁰¹ Interview with Mr. Lee Mondri and Mr. Jon Campbell, HIVOS, Johannesburg, 7.2.3013.

¹⁰² Personal interview, Ouagadougou, Feb. 2013.

¹⁰³ UN Human Rights Committee: Ms. Juliet Joslin et al. v. New Zealand, Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002), ECHR caselaw, including Schalk and Kopf v Austria (2010), Gas and Dubois v France (2012).

¹⁰⁴ Examples include: Report of Ghana’s Constitution Review Commission, December 2011 and Government White Paper, June 2012 (W.P. No. 1/2012), Kenya (2010), Zambia (2009 – 2013), Zimbabwe (2013), COPAC, Final draft of 31.12013,, Malawi, Report of the Law Commission (No. 8), Aug. 2007 (p.32). Uganda revised its constitution in 2006 to make same-sex marriages illegal. The draft of Burkina Faso’s new constitution reportedly also excludes same-sex marriage.

constitutional development and democratic progress, formulations were adopted that neither recognize same sex marriage, nor definitively close the door on it. Thus the 2010 Kenyan Constitution provides (Art. 45 (2) that *“Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.”* Scholars such as Makau Mutua argue that this, taken together with the interpretation of other parts of the Constitution’s Bill of Rights, could permit recognition of same sex marriage.¹⁰⁵

Those opposing decriminalization often equate decriminalization with same-sex marriage in public debates. At times this appears to be a deliberate obfuscation. Sheikh Mohammed Dor, the Secretary General of Kenya’s Council of Imams, opposing the KNCHR’s recommendation to decriminalize homosexual acts, said that the country’s Constitution does not permit same sex marriages.¹⁰⁶ During the 2009 – 2010 UPR review of Kenya, several countries made recommendations to Kenya to decriminalize same-sex sexual relations. None of them specifically called for recognition of same-sex marriages. Nevertheless, the Government of Kenya’s response was that same sex unions were culturally unacceptable in the country.¹⁰⁷ The word “union” is sufficiently broad and ambiguous to cover both sexual liaisons, civil partnerships and marriage, making it useful for purposes of obfuscation.

It is probably true that activists will demand same sex marriage in their campaigns for equality in the longer term if they are successful with more immediate aims. Nevertheless, since many gay and lesbian people in Africa are likely to be in heterosexual marriages, even a hypothetical legalizing of same sex marriage would be unlikely to lead to many actual marriages at present. While it may be true that a more permissive social environment generally will correlate with a loosening of marital bonds, there are few credible grounds for a direct link between same-sex marriage and a weakening of conventional marriage. However, demonstrating that such fears are baseless is often less a matter of rational proof than of allaying fears.

2.9.5 AFRICAN CUSTOM

Discussion of same-sex marriage, if it takes place, will, at least for some, likely take place according to an African cultural and social template of what marriage means, rather than a contemporary western one. Thus, as discussed above, even if fewer African marriages are of this type today than in the past, marriage is often the outcome of a negotiation between families, sometimes takes place between an older man and a younger woman, where gender roles of the two are clearly understood.

To illustrate this slightly crudely, consider how the debate on same-sex marriage would have a different character if we were discussing the giving away of a teenage boy to an adult man, negotiated by the parents of the two parties, where the agreement is sealed

¹⁰⁵ Daily Nation, May 12 2012.

¹⁰⁶ <http://en.radiovaticana.va/in2/articolo.asp?c=586472>

¹⁰⁷ UNGA Document A/HRC/15/8

by the payment of money or cattle to the “bride’s” family, where the two parties have unequal rights in the relationship, including the possibility that more wives might be brought into the family. When the cultural expectation of a man is that he be strong, forthright and capable of providing sustenance and offspring, it is not surprising that emotional reactions to the idea of a male wife are often strongly negative.

Conversely, African customary law is noted for its flexibility and adaptability. Customary authorities in recent times have been reported as hostile to homosexuality and gender non-conformity.¹⁰⁸ (See Chapter Six). Especially in the democratic conditions of South Africa, minorities are combining democracy and human rights with custom and culture to challenge the monopoly of traditional leaders on the interpretation of custom. An interesting example of this was seen when a marriage recently took place between two young Zulu men in South Africa, using customary ceremonies to invoke the protection of ancestors.¹⁰⁹ Other Zulus have entered into marriages where gender roles prevailing in the society generally are reproduced – thus with one party adopting the role of a traditional wife - and customary rites and beliefs maintained.¹¹⁰

Even if same-sex marriage remains off the agenda for most African LGBTI and human rights organizations, (usually sensationalist) media reports of same sex marriage ceremonies have often been the spark that set off controversy as seen in Nigeria in the 1990s, Malawi in 2010, Uganda as early as 1999 and Zambia in 2013. On some occasions, these reports have led to serious violence, as in Senegal in 2008 and Mtwapa in Kenya in 2010.¹¹¹

Based on discussions during the missions, most representatives of LGBTI organizations are unlikely to advocate public displays of sexuality or public announcements of same-sex marriage ceremonies that have been conducted. As discussed above, it is generally not LGBTI organizations that link decriminalization to same-sex marriage in Africa, but their opponents. Sometimes individual LGBTI people do flaunt sexuality or gender non-conforming behaviour. Whether this provokes amused toleration or hostility and outrage depends on context. At times, these displays may be a step on the way to greater acceptance. In other contexts, they can lead to violent reactions, as seen above. The question of public events is discussed in Chapter Six.

¹⁰⁸ http://gbcghana.com/new_site/index.php?id=1.483553

¹⁰⁹ http://www.youtube.com/watch?v=jH-D0Pk_3Ws

¹¹⁰ Stephanie RUDWICK, *Nordic Journal of African Studies* 20(2): 90–111 (2011), *Defying a Myth: A Gay Sub-Culture in Contemporary South Africa*, University of KwaZulu-Natal, South Africa

¹¹¹ Senegal: http://www.huffingtonpost.com/2010/04/12/gay-mens-bodies-desecrate_n_533916.html, Uganda: <http://news.bbc.co.uk/2/hi/africa/460893.stm>, Kenya: <http://www.nation.co.ke/News/-/1056/860810/-/vqhvrh/-/index.html>, Zambia: <http://www.zambianwatchdog.com/pf-govt-orders-arrest-of-same-sex-marriage-couples-in-zambia/>, and Malawi: <http://www.nytimes.com/2010/02/14/world/africa/14malawi.html>

2.10 MEDIA: VIEWS OF KEY INTERLOCUTORS ON VISIBILITY AND PUBLIC SENSITIZATION

2.10.1 GOVERNMENT OFFICIALS

A government Minister interviewed in Burkina Faso felt that in the current context in the country it was best to start by sensitising particular groups – mostly by state agents - rather than the public at large, which might give negative reactions. The wish to maintain state control seemed to be symptomatic of a certain lack of trust between the government and non-governmental actors, also seen in the reluctance to permit LGBTI identified NGOs to register (see Chapter Six). In accordance with this, officials had at times blocked television and radio programmes on the subject directed at the general public. The recent arrest of a Zambian HIV / AIDS activist who called for decriminalization is discussed in Chapter Six. Print media has faced fewer constraints.

2.10.2 JOURNALISTS

Within the state electronic media, journalists were at times directly forbidden by their superiors from addressing these issues, more often a culture of self-censorship prevailed, particularly at senior levels. Self-censorship and taboos make it hard to separate risks for interviewers, interviewees, politicians and public order. Each of these concerns might have more or less validity, but as long as they are joined together and not examined individually, progress in media will be difficult. A journalist interviewed suggested that in Burkina's context, radio would be less risky for interviewees.

Most often, sober and responsible discussion – especially in print media - has not led to disturbances, whereas “yellow journalism” with sensationalist reports of gay weddings and “increases in homosexuality” has. Irresponsible and sensationalist radio programmes led to serious violence in Mtwapa in Kenya in February 2010.¹¹² Sensationalist and misleading articles concerning a party that had taken two years previously caused a wave of violence and repression in Senegal in 2008.¹¹³ Even fairly neutral reporting can nevertheless lead to serious consequences for activists. Representatives of LGBTI organizations in Sierra Leone were forced out of their homes by family after a radio appearance.¹¹⁴ In Kenya, the media have become more mature in their dealing with these issues. One journalist familiar with these questions recounted how radio staff in 2000 were physically frightened of a transgender person who was interviewed, and comparing this to the situation today.¹¹⁵ On themes like this however, media are very dependent on funding. Much of the increased openness came from funding of HIV / AIDS related programming.

¹¹² See *infra*, Chapter Six.

¹¹³ See Chapter Six.

¹¹⁴ See references to prideequality.org in footnotes to Chapter Six below.

¹¹⁵ Notes on interview with Mr. Patrick Rukwaro, Internews, Kenya.

2.10.3 LGBTI ACTIVISTS

From the point of view of LGBTI activists, media exposure is a double-edged sword that requires skill in choosing which journalists are sober and reflective enough – even if not sympathetic - to handle this subject, as well as in responding to questions and explaining issues. Experience shows positive and negative examples of media appearances and reporting. A spokesperson for the country's NHRI on the programme did not seem to have been adequately prepared for the complexity and sensitivity of this question.¹¹⁶ More positive examples are the 2011 interview with the Malawian CEDEP activist Gift Trapence¹¹⁷, the Ugandan activist Pepe Onziema¹¹⁸ or the 2012 TV interview with Kenyan activist David Kuria Mbote¹¹⁹, who despite difficult questioning, were able to respond well and counter many accusations and misperceptions.¹²⁰ GALA in South Africa stressed the importance of organization and visibility for accessing funding opportunities and public spaces.

It has been remarked by observers in a number of countries¹²¹ that even predominantly negative media discussion can open up public discussion and break taboos. Commercial media organizations, in Africa as elsewhere, are aware that this controversial subject can sell newspapers and attract viewers. Essien and Aderinto found that: the Ghanaian press *"... by capturing the voices of both support and dissent, and making such views accessible to a wider public... created a platform for Ghanaians and the rest of the world to express opposing views and to engage verbally with each other."*

2.10.4 A FILM DIRECTOR

Mme. Fanta Regina Nacro, well-known film director in Burkina Faso, who has been praised for her work in sensitizing the public towards a greater understanding of controversial issues including HIV / AIDS, marital rape, domestic violence and the position of women in society provided valuable insights. Her view was that there is too much emphasis on the sexual aspect of LGBTI issues.¹²² Film and drama can show the complexity of the issue, showing that relationships of LGBTI people may be just as much about love, affection and intimacy on a number of levels. While one film will not change everything, a story that touches people can make a valuable contribution. Further work must take its outset in people's tolerance and their wish to understand more. Even the

¹¹⁶ See Chapter Six on the HRCSL under NHRIs.

¹¹⁷ <http://www.youtube.com/watch?v=sXqpv6g6xeQ>

¹¹⁸ <http://www.youtube.com/watch?v=LKP-PUAI96U>

¹¹⁹ http://www.youtube.com/watch?v=Tmh8jGw1Q_c

¹²⁰ <http://www.youtube.com/watch?v=sXqpv6g6xeQ>, accessed 29.5.2013

¹²¹ Uganda: notes on discussion with Frank Mugisha of SMUG, Copenhagen, October 2012. Zimbabwe: Dunton and Palmberg (1996, op cit) and Ghana: Essien and Aderinto, "Cutting the Head of the Roaring Monster": Homosexuality and Repression in Africa, African Study Monographs, 30(3): 121-135, September 2009 121

¹²² LGBTI activists in all three countries visited were of the same view. CEDEP in Malawi has stressed relationships and commitment in its public advocacy. (Meeting with IGLHRC, Johannesburg, 5.2.2013).

Minister did recognize that people have an intense curiosity about this taboo subject. She noted that when she had made one remark about this issue in a wide ranging public talk, all of the public responses and questions had been about this question.

2.10.5 HEALTH AND HIV / AIDS WORKERS

“You can’t enjoy the fruits of the (human rights) tree unless you have the roots” – HIV / AIDS activist in Burkina Faso.¹²³

Members of the Burkina Faso AIDSETI network, who have worked with public health and HIV / AIDS prevention for a decade or so, agreed that greater understanding is a key to tolerance, both in relation to HIV / AIDS and MSM. Activists have achieved a significant success in gaining public support for clinics in the communities where they work, and the inclusion of MSM as a MARP in the national HIV / AIDS strategy shows how far they have come. In Burkina Faso, as in some other countries, traditional leaders might double as mayors or members of parliament. The signal given by the Head of State that MSM need to be included as a MARP in the national HIV / AIDS strategy is an important achievement. Local officials and NGO activists are able to use it as a reference point. Government and donors had recognized the key contribution of CSOs, including religious and customary authorities, through the PAMAC programme.

HIV / AIDS activists said that members of local communities often know or suspect that a person is involved in same sex activities. They will often be relatively tolerant about this as long as it remains unspoken. People often have incorrect ideas about LGBTI persons. If they are properly informed, members of the public can accept LGBTI persons as ordinary people like everyone else. They said that in promoting understanding, it is very important to proceed carefully and with sensitivity. An approach that is too blunt or too hurried can be counterproductive, provoking negative reactions. Outreach associations and public officials in Burkina Faso feared that violence of the kind that erupted in Senegal in 2008 could damage the progress made. Violence or threats may make it impossible for community outreach centres to operate, driving MSM underground, putting HIV / AIDS outreach work in jeopardy and increasing risks for MSM, their wives and partners.

In the experience of these organizations, community HIV / AIDS outreach centres often succeed best if they can attract a cross-section of the community to their activities. In the experience of the outreach workers, most MSM appreciate this way of doing things. If an outreach centre becomes “an identity centre” (i.e. associated with a gay identity), many MSM will not want to attend it, for risk of being labelled as homosexual. As long as it attracts a broad public, going to the centre is not synonymous with being gay. Staff at centres had to be trained and aware that they should never do anything that would publicly identify people as “MSM” or gay. These outreach workers thus generally advise

¹²³ Notes from focus group meeting, February 2013.

MSM to be careful about how they present themselves. If outreach centres become too narrowly identified with MSM, or if MSM come to public information events dressed flamboyantly as women for example, the risk may increase. Activities, clients and NGO staff could all be put at risk if they are not careful. Although this was slightly less of an issue in urban Nairobi, where clients of one centre visited were predominantly male sex-workers, the issue of good relations to neighbours and local police was never far away. During periods of heightened tension (such as election times), it was often wise to keep a low profile.

These activists agreed that once a platform has been built in terms of community outreach, taking the next step and addressing SOGI issues might become more possible. They emphasised the need for care and patience so as not to lose the progress that has been made. Activists in Burkina Faso were relatively unfamiliar with a human rights based approach where expression, the formation of associations and holding of assemblies based on gender identity and sexual orientation, are human rights that the state and society are obliged to respect. They did not oppose the creation of organizations based on LGBTI identity, but neither were they unreservedly in favour. The community activists found these approaches intriguing, but thought that they depended ultimately on community acceptance to succeed. They emphasised that formal permissions will not mean much on the ground without the cooperation of local leaders, whether formal (such as a neighbourhood *chef du quartier*) or informal ones such as religious figures or traditional leaders.

Leaders of the PAMAC programme agreed that a Human Rights Based Approach, and the public health approach that has delivered results in terms of community outreach and gains in public tolerance, must complement each other. There is a need to proceed prudently. In Senegal, setbacks had been encountered because of public attitudes. In African states, where police and other public authorities, even assuming full commitment to protecting rights in this area, might lack the resources to do so effectively, they felt that some concessions must be made to the realities of ignorance and social prejudice. Open discussion of homosexuality that is not carefully thought out will provoke reactions by religious leaders, and public opinion can easily become inflamed. Religious leaders had so far been a partner to some extent in combating HIV / AIDS. The existence of a national structure where representatives of different religious and customary groups met and discussed positions (including with state representatives)- the URCB – was seen by some as a moderating influence.

2.10.6 THE BUSINESS SECTOR

The scope of this study did not permit an analysis to be undertaken of the business sector in relation to the rights of LGBTI persons. Some observations on employment law and non-discrimination provisions are made in Chapter Six. Some international businesses operating in Africa have adopted strong non-discrimination and pro-inclusion corporate policies at an international level. Some corporations were lobbied by western

NGOs and social movements to make their position known to the Government of Uganda in relation to the AHB.¹²⁴ The passing of such legislation – especially its provisions on the obligation to report on suspected homosexuals – would put corporations and their employees in an extremely difficult situation. Barclay’s bank issued a statement saying that they had made their views on the proposed legislation known to the Government.¹²⁵

Beyond steps of this kind though, businesses may be unwilling to rock the boat by going against strongly held views and powerful lobbies. Western banks may not always be willing to take on LGBTI organizations as customers or to employ qualified LGBTI persons.¹²⁶

¹²⁴ <http://www.change.org/petitions/citibank-and-barclays-condemn-uganda-s-kill-the-gays-bill>

¹²⁵ <http://www.pinknews.co.uk/2012/12/03/barclays-discusses-anti-gay-bill-with-ugandan-officials/>

¹²⁶ Discussions with activists in Kenya, Feb. 2013.

CHAPTER 3

3 THE RELIGIOUS SPHERE

Religious organizations exert substantial control over the framing of issues concerning sexuality and morality and play a central role in debates on legislation and policy. The mobilization of homophobia in Africa that began in the 1990s did not originate among religious leaders, but political ones (see next chapter), but many religious leaders have adopted it in one way or another. Religious leaders have been closely associated with campaigns of increased repression of LGBTI persons, and occasionally with violent incidents.

LGBTI persons and activists in African countries are likely to be as religious as most of the population. It is more likely that the struggle to win respect for LGBTI rights in many predominantly Christian African countries will, at least for the foreseeable future, be won or lost within an overall framework of Christianity than in any large scale adoption of a more secular philosophy of life. Even in South Africa, the Constitutional Court heard arguments based on Christian theology that were favourable towards LGBTI rights when deciding a case on same sex marriage.¹²⁷

Opposition to consenting adult male homosexuality in the world today comes mostly from cultures dominated by two of the three Abrahamic religions, Christianity and Islam. These religious traditions derive prohibitions on male homosexual sex from stories and sayings found in the Hebrew Scriptures, known to Christians as the Old Testament.¹²⁸ Traditionally, these religious creeds ignored female sexuality: same-sex relations among women escaped condemnation. African traditional religions are not considered in this section. Neither is Hinduism, which is found among people of Indian background living in Africa.

3.1 CHRISTIANITY

¹²⁷ 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) (1 December 2005)

¹²⁸ As Judaism is scarcely present in Africa compared to the other two religions, it is not considered here. Like Christians, Jews are divided on the issue, with Orthodox Jews opposing homosexuality and Reform and some Conservative Jews tolerating it, all based on their understanding of scriptures. The American Jewish World Service has provided support to African LGBTI organizations.

http://ajws.org/who_we_are/news/archives/features/supporting_lgbti_rights_in_the_developing_world.html

This section deals primarily with Anglicanism, Catholicism, and the more diffuse Evangelicalism. For purposes of convenience (rather than strict accuracy), Evangelicalism will be treated as a single third category comprising many AICs as well as Evangelical and Pentecostal Churches headquartered in the USA or Europe. Occasional reference will also be made to Christian churches outside of these three.

Anglicanism

Anglicanism emphasises reason and church tradition alongside Scripture as pillars of faith. This incorporates the learning of Christian scholars through the centuries who have used their knowledge and reason to arrive at what they consider to be a correct understanding of Christianity. It allows for dynamism, as well as some diversity in interpretation. Thus, both very liberal and rather conservative trends of thought on issues such as homosexuality are found within Anglicanism.

The Anglican Communion comprises over 40 separate churches and some 80 million members from New Zealand to Nigeria. Over half of all Anglicans live in Africa. The Nigerian Anglican Church is the largest, with 18 million members. Next largest is the Church of Uganda, with 10 million, making these two Churches powerful forces within world Anglicanism.¹²⁹ In contrast to the centrally governed and hierarchical Roman Catholic Church, Anglicanism has until recently combined a degree of unity through common beliefs and principles with decentralized decision making and a great diversity of contexts. As discussed below, the past decades have seen this unity challenged, not least by the issue of homosexuality.

3.1.1 CATHOLICISM

The Catholic Church in Africa, though challenged by Evangelicals, continues to grow in membership. According to the Vatican, there are about 180 million Catholics in Africa – about 15 - 16% of the total population of the continent.¹³⁰ Both in doctrine and structure, the Catholic Church is centralized and hierarchical. The Vatican plays a role in the appointment of all bishops, and Cardinals are chosen by the Pope. Religious doctrine is set out in Canon Law and in authoritative statements by the Pope. Representatives of the Vatican are present in countries having a national church. Thus, the Catholic position on issues such as homosexuality is in principle the same all over the world.

3.1.2 EVANGELICALISM

Because of the thousands of different Evangelical Churches in Africa it is difficult to estimate the number of Evangelical Christians on the continent. Many African Independent Churches (AICs) today can be identified as Evangelical and/or Pentecostal. The Association of Evangelicals in Africa claims a membership of 100 million.¹³¹ Other estimates put the figure more than twice as high. Irrespective of numbers, there is

¹²⁹ <http://www.pewforum.org/Christian/Global-Anglicanism-at-a-Crossroads.aspx>

¹³⁰ <http://www.economist.com/news/middle-east-and-africa/21573599-vatican-franchise-going-strong-despite-fierce-competition-boomtown-church>, or <http://www.bbc.co.uk/news/world-21443313>

¹³¹ <http://www.aeafrica.org/aboutus/history.htm>

agreement that the number of Evangelicals on the continent has grown dramatically in recent decades.

Evangelicalism has historically included movements both within and outside the Anglican Church. It includes Baptists and Methodists. Whereas Anglicanism and Catholicism emphasise tradition and reason as pillars of faith alongside Scripture, Evangelicalism has emphasised Scripture alone as the main source of doctrine. Missionary work has historically been a strong component of Evangelical life. In the early 20th Century, Evangelicalism came to be dominated by fundamentalist tendencies that rejected modern, liberal understandings of Biblical texts informed by studies of literature, history and culture. It insisted instead on the literal truth of Scripture, both in factual and normative senses. While Evangelicalism and fundamentalism cannot be equated with one another, both are theologically and socially conservative.

Pentecostalism is generally considered a form of Evangelical Christianity that emphasises Scripture and the Holy Spirit and is also identified with social conservatism. While some churches can be identified as specifically Pentecostal, Pentecostalism has also had influence within Catholicism and Anglicanism. Pentecostalism in Africa presents features that are very modern as well as others that are rooted in African tradition and culture. Faith healing and speaking in tongues are for Pentecostals a sign of the presence of the Holy Spirit. Some see a continuity between African traditional religion and these aspects of Pentecostalism.¹³² Some highly successful Pentecostal churches are organized as or like firms under the control of their leaders.¹³³ Larger churches are often led by university graduates, using modern marketing strategies, spreading their message through television and the internet and the sale of books and DVDs. Followers of these churches are reportedly not limited strictly to their actual membership, but include many (especially younger) members of more established churches, but who like the entertainment, drama and powerful delivery offered by the Evangelicals or Pentecostals.¹³⁴ They often spread a message of individual success based on hard work, piety and self-discipline that is in tune with the demands of a modern society. The lack of hierarchical structures and entry barriers (anyone displaying initiative and faith can found a Pentecostal church) make them adapted to urban environments and modern economic conditions.

Unlike some Protestant and especially Catholic organizations, Evangelicals were not initially greatly involved in the provision of health care and services in relation to HIV / AIDS. Some of their organizations increased their involvement when they benefitted from funding under the Bush administration's PEPFAR programme. Health and prosperity are often central parts of the message promoted by the Pentecostals.

The centrality of the literal word of the Bible (see below) by Evangelicals make them among the most resolute and visible opponents of homosexuality. Evangelicals play

¹³² See generally Wikipedia entries on Evangelicalism and Pentecostalism.

¹³³ Asonzeh Ukah, Working Paper Nr. 79, African Christianities: Features, Promises and Problems. Institut für Ethnologie und Afrikastudien, Johannes Gutenberg-Universität, 2007, p.15

¹³⁴ See e.g. <http://www.ft.com/cms/s/0/6f9793aa-a22f-11dd-a32f-000077b07658.html#axzz2BIFv0vY6>

active roles in opposing any form of liberalization regarding homosexuality. Just as liberal human rights activists do, African Evangelicals seek alliances and support for their views and causes in the west. While the influence of US based Evangelicals has been rightly emphasised, this does not necessarily mean that African churches are not agents in their own right. African pastors often play a key role in ensuring that politicians are forced to take a stance and praising those that do.¹³⁵ Evangelicals publicly protested a recent EU call for proposals on LGBTI rights in Zambia¹³⁶ and law reform in Ghana, calling on Christians to vote against politicians “who promote and support homosexuality”.¹³⁷

It should be remembered that Pentecostalism is not by definition conservative or even anti-LGBTI. Pentecostal churches in the USA were among the first to be racially integrated. In Brazil¹³⁸, North America and South Africa¹³⁹ there are LGBTI friendly Pentecostal churches.

3.2 THE CHRISTIAN CHURCHES SINCE INDEPENDENCE: A SNAPSHOT

In the post-colonial period, the Europe-based mainstream churches realigned themselves to an increasing African leadership. In some cases, this happened very quickly, as when foreign Catholic missionaries were expelled from Nigeria in the 1970s after the Biafran War, leaving space for African leadership. Some northern European church based organizations focused increasingly on general development questions rather than only on Christian proselytizing. US Evangelical movements continued old-style missionizing. The Southern Baptist Convention sends some 5,000 missionaries abroad every year, establishing churches and baptizing converts.¹⁴⁰ Generally aligned to the American political right, these movements provided ideological support in the anti-communist struggle. Some leading US evangelists supported the apartheid government against the ANC almost until its final fall.¹⁴¹

After the fall of the Amin regime in 1979, US Evangelicals began working in Uganda, cooperating not only with independent fellow Evangelicals, but with the mainstream Anglican Church of Uganda.¹⁴² Since the fall of the Berlin Wall and of Africa’s socialist and one party states, missionary activities increased. The US-African conservative Christian alliance was strengthened in the late 1990s as US evangelical Christians, disaffected by the liberalizing trend of the American Episcopal Church, made common cause with conservative African Anglicans.¹⁴³ A further boost came with the Bush Presidency, and its financing of faith based organizations, together with increased US

¹³⁵ <http://www.guardian.co.uk/world/2013/may/01/zambian-vicepresident-south-africans-backward>

¹³⁶ <http://www.zambianwatchdog.com/church-body-preaches-to-european-union-on-gay-support/>

¹³⁷ The undated statement is available on the CCG website: <http://www.christiancouncilofghana.org/>

¹³⁸ <http://www.globalpost.com/dispatches/globalpost-blogs/belief/lgbt-inclusive-pentecostal-churches-growing-brazil>

¹³⁹ http://www.gaychurch.org/Find_a_Church/foriegn_nations/africa_middle_east.htm

¹⁴⁰ <http://www.sbc.net/missionswork.asp>

¹⁴¹ See for example: <http://www.nytimes.com/1988/02/13/us/robertson-comments-on-south-africa-unrest.html>

¹⁴² See Gifford, *African Christianity, its Public Role*, Hurst, London, 1998.

¹⁴³ This is documented by Hassett (2009). Further trends in this direction, this time including conservative Catholics and Evangelicals, are examined by Kaoma (2009 and 2012).

funding to combat HIV / AIDS. Free of centralized and hierarchical structures, many Evangelical pastors are quite free to build their own congregations and adapt their messages and styles to local circumstances. Some become very successful, using radio and television to expound their message. On the other hand, the lack of a hierarchy, specific educational requirements and a larger organizational structure can mean over dependence on the abilities, charisma and networks of a single leader, as well as vulnerability to personal weaknesses and scandals. Of course not all Evangelicals are one-man operations. Many are substantially supported by or dependent for survival on US Evangelicals. Competition for church members in Africa is often fierce. Churches may be subject to the same dynamic as politicians, where perceived “softness” on homosexuality may be associated with a fear of loss of membership to advocates of more hardline positions. It is perhaps not coincidental that it is the two strongest African Anglican Churches that have been strongest in opposing homosexuality.

3.2 BIBLICAL CONDEMNATION OF HOMOSEXUALITY?

The Book of Leviticus (chapters 17 – 27) prohibits acts seen as impure. These concern diet, speech sexuality and other conduct. The text sets out penalties that are extreme by today’s standards. Translations of chapter 18:22 use the word “an abomination”¹⁴⁴ to “*lie with mankind, as with womankind*”. Chapter 20, verse 13 calls for both parties to the act to be put to death. There are also Biblical prohibitions on what we would today call transvestism. (Deuteronomy 22 verse 5.) No specific punishment is prescribed.

In Genesis 19 God tells Abraham of his intention to destroy the towns of Sodom and Gomorrah for their immorality. God and Abraham negotiate about acceptable levels of “collateral damage” in God’s planned punitive action against the cities. Abraham shows courage and compassion, pleading with God to save the cities if righteous men can be found. He succeeds in bargaining God down from fifty righteous men to as few as ten. God sends two angels, who stay in the house of Lot. A crowd of inhabitants demand sex with the two attractive males staying with Lot. Lot refuses to hand the two over to violent rape, eventually even offering his virgin daughters to the crowd in their place. As punishment, God rains fire and sulphur upon the cities, killing the inhabitants. Lot and his daughters escape to safety. The American philosopher Susan Neiman writes of the significance of this story in showing that in the Hebrew conception, morality should come not only from God, but from within human beings, who have a duty to stand up for justice and to bring a better world into being. This is an interesting contrast to the simplistic view of a righteous, all knowing God and an obedient humanity often found in Christian fundamentalism. Others point out that this is a story about a threat of violent

¹⁴⁴ 20:18 calls for ostracization or banishment of the couple engaging in sex during menstruation, 20: 9 death for cursing one’s father or mother and 20:10 death for adultery. Verse 27 of the same chapter, calls for the death penalty by stoning for those practicing wizardry or having a “familiar spirit”. Elsewhere in the same book, prohibitions that seem remote to Christians today are encountered, such as against eating shellfish and wearing cloth of mixed fabrics.

rape, having nothing to say about loving and committed relationships.

The Christian New Testament does not record Jesus as having said anything at all about same sex relations, still less about homosexuality as we understand it today. The letters of St. Paul on the other hand do contain condemnations of male same sex relations.¹⁴⁵ The use of particular interpretations of Christian doctrine as a basis for law is discussed in chapter five below.

Critics point out that the Bible is seldom invoked to demand draconian punishment for adultery or disrespect towards parents, although these are also called for by the Bible. These arguments have so far not had a great impact however, and literal interpretations of Biblical pronouncements and stories remain important reference points in debates. Thus, a recent study by the US based group Political Research Associates cites a paramount Chief in Malawi referring to the destruction of Sodom and Gomorrah “As chiefs we will not allow such acts to continue in our country. It is an abomination.” The Chief, like so many others, linked decriminalization to same-sex marriage: “We will not accept this. It is better to remain poor than to accept same sex marriage.”

3.3 ANGLICANISM

In the USA, Canada, Australia and New Zealand, Anglican churches generally belong among the most liberal of religious organizations on issues of sexuality and women’s rights. The Bible is seen as embodying spiritual truths interpreted by church members - most western members doing so in the light of modern scientific knowledge, including Darwinism and modern insights on Biblical literary criticism and history. Because of the overall leadership of the Archbishop of Canterbury and the need to preserve worldwide unity, English Anglicanism tends to be less progressive than its North American cousin.

The damage to Anglican unity caused by disagreements over homosexuality have been extensively reported on and researched. They emerged fully at the 1998 13th Lambeth Bishops Conference. The Conference¹⁴⁶ rejected homosexual practice as incompatible with scripture, noting that same sex unions or the ordination of persons involved in them could not be legitimised. Some balancing language condemned irrational fear of homosexuals, committed participating bishops to openness to the experience of homosexual persons, assuring them that they are members of the Church.

182 bishops – mostly from Western countries, but including representatives from Brazil and South Africa who had opposed parts of the resolution, issued an apology to gay and lesbian Anglicans. The rift widened with acts by both sides. In 2003, an openly gay bishop was ordained in the USA¹⁴⁷ and the Church in Canada adopted a rite of blessing

¹⁴⁵ See esp. Romans, 1: 26 – 27, 1 Corinthians 6, 9 – 10 and 1 Timothy 1, 9-10. While there are interpretations of these texts that do not see them as condemning homosexual conduct as such, these tend to be modern, minority views. See http://en.wikipedia.org/wiki/Homosexuality_in_the_New_Testament#Romans_1:26-27. For the purpose of the present study, it is not necessary to discuss the various interpretations.

¹⁴⁶ Resolution 1.10. See <http://www.anglicancommunion.org/windsor2004/appendix/p3.6.cfm>. Anglican Church resolutions are apparently not seen as strictly binding on members.

¹⁴⁷ Gene Robinson, in New Hampshire.

for same sex unions. The Archbishop of Canterbury tried to moderate, engineering the withdrawal of the candidacy for bishop of a priest in a long term same sex relationship. Some Anglican churches in the South declared a state of “impaired communion” with Anglican churches in the north.

The split worsened in 2008, when, drawing attention away from the 14th Lambeth Conference, several hundred bishops from the South attended a rival “Global Anglican Futures” conference held in Jerusalem (GAFCON). The Anglican Communion has since gone through a so-called “realignment”, with some African branches of the Anglicanism declaring themselves in communion with a newly formed conservative “Anglican Church in North America” (ACNA), rather than with the older Episcopal (US Anglican) Church. Some North American churches have placed themselves under the authority of the Nigerian Anglican Church, while the Anglican Church in Tanzania has stopped receiving contributions or assistance from the Episcopal Church. The USA has seen a number of lawsuits where church real and personal property has been in dispute between individual churches seeking to break away and the overall Episcopal Church. A similar dispute has arisen in Zimbabwe. There it took on a political dimension linked to tensions between President Mugabe and British institutions generally. In 2007 the Archbishop of Harare broke away to establish his own Anglican church, allegedly due to the pro-gay stance of the worldwide Anglican church, but kept control of all church property while pledging his allegiance to President Mugabe. The law suits were finally decided by the Zimbabwe Supreme Court in 2012 in favour of the original Anglican church.

Trying to avert new unilateral and controversial moves, church leadership promoted an Anglican Covenant that aimed to introduce disciplinary measures against non-conforming provinces. In 2012, this Covenant was rejected by individual dioceses in England. Some have predicted that this will lead to the gradual dissolution of the global Anglican Communion.¹⁴⁸ Others are less pessimistic, welcoming a more open debate within Anglicanism and the finding of a voice by African churches within a church formerly dominated by the wealthy, powerful and knowledgeable North.¹⁴⁹

3.3.1 SCRIPTURAL LITERALISM AND THE DEBATE ON HOMOSEXUALITY WITHIN AFRICAN ANGLICANISM

The fear referred that toleration of homosexuality will bring divine punishment upon society, and not merely on individual homosexuals, is not confined to the fringes of society, but voiced at high levels of the Anglican Church. Archbishop Peter Akinola, (Anglican) Primate of All Nigeria in a statement supporting criminalization of same sex marriage, echoed the same threat of divine destruction: *“This bill therefore seeks to shield Nigeria from the complete annihilation that will follow the wrath of God should this practice be accepted as normal in this land”*.¹⁵⁰ Akinola’s dire warnings of divine

¹⁴⁸ <http://www.guardian.co.uk/commentisfree/andrewbrown/2012/mar/26/anglican-communion-schism>

¹⁴⁹ Hassett, 2009, op cit.

¹⁵⁰ Then head of the Anglican Church of Nigeria, whose membership is estimated by the Church to be 18 million. Kaoma (2012) cites the former head of the Liberian Truth and Reconciliation Commission for similar statements.

retribution were echoed by a Muslim scholar and have also been voiced by Evangelicals in other contexts.¹⁵¹

Informants were asked if they thought Akinola and others genuinely believed these threats. Akinola's Biblical literalism brings him closer to the Evangelicals than to Anglicanism's reliance on tradition and reason as well as Scripture. The fear he evokes may seem very remote to secular liberals, but it is also found among Evangelicals and fundamentalists in western countries.¹⁵² One key informant from an Anglican religious background said that statements of this kind reflected a limited theological understanding. Some people had reached positions of leadership in their churches through force of character, charisma and hard work, but this did not always go together with deep theological understanding. Too many Anglican leaders lacked a thorough grounding in theology, he felt. It should be noted that criticisms of this kind are often heard from African Anglicans, but there can be great sensitivity when they are voiced by westerners.¹⁵³

Some of the strongest Anglican condemnation of homosexuality comes from the Churches of Nigeria and Uganda, two of the numerically strongest and most politically powerful Anglican Churches in Africa. Some point to African Anglicans throwing off the colonial inheritance – Anglican tradition may be too much *English* tradition to mean much in Africa. The more liberal Archbishop Ndungane of Cape Town considered that scriptural literalism is alien to Africa, and that African tradition could contribute to a proper understanding of African Christianity just as English tradition had done for the English.¹⁵⁴

Commentators have described the activism and efforts of conservative US based Evangelicals in Africa as an attempt to consolidate a conservative alternative to the liberal trend in Anglicanism. Whether in religion or politics, the issue of homosexuality has a special power to divide. It is hard not to conclude that efforts by some of the more extreme US-based religious figures deliberately mobilized this power.

However nefarious, the role of American conservatives and even extremists should not obscure African agency. Some AICs have today become global enterprises.¹⁵⁵ Many are powerful organizations led by highly competent and dynamic persons, and a number of African prelates are senior figures within mainstream churches. Religious revivalism with puritanical strains has a long history in East Africa. Movements such as the *Balokole* in

¹⁵¹ <http://dailytimes.com.ng/article/islamic-scholar-seeks-death-penalty-homosexuals&date=2011-12-05> See statement by Christian Council of Ghana, op cit.

¹⁵² Representatives of the more extreme branches of all three major monotheist faiths in the US blamed Hurricane Katrina on a failure to obey God. See http://en.wikipedia.org/wiki/Hurricane_Katrina_as_divine_retribution

¹⁵³ Statements on superstition in African Christianity made by US Bishop Spong at the 1998 Lambeth Conference were a case in point.

¹⁵⁴ See Rubenstein, Anglicans in the Postcolony: On Sex and the Limits of Communion, *Telos* 143 (Summer 2008): 133–60

¹⁵⁵ A frequently cited example is the Nigeria based Redeemed Christian Church of God, which claims to have 2000 parishes in Nigeria, as well as in eleven other African countries, and in England, France, Germany and the USA.

Uganda placed a strong emphasis on the confession of sins – particularly those of a sexual nature. The movement was highly critical of many aspects of local African culture.¹⁵⁶ To people steeped in evangelical Christianity, evidence of homosexuality in pre-colonial Africa may be initially resisted, and even if conceded, may not be very persuasive.

3.3.2 LESSONS LEARNED FROM THE ANGLICAN SPLIT?

Some observers feel that the damage to Anglican unity may not be as great as feared, and that these difficult debates have to some extent furthered a process of north-south dialogue and coming together on a basis of greater equality than before. To some extent, a process of African self-assertion – as the largest geographical grouping within the Anglican Communion – is a positive step.

The experience of international Anglicanism may call for a degree of patience and caution about attempting to put international human rights pressure on African governments. International debates and forums on human rights are no less political than those in the Anglican Communion. Overly aggressive stances - by either conservatives or liberals - in those forums may prove just as divisive to the human rights movement as they have been to Anglicanism. It may be that it is necessary to do a great deal more work on the domestic front in many African countries before real change can result from resolutions at the UN. On the other hand, continued discussion and debate in these forums is both useful and necessary. Neither does this mean that there is not room for some human rights issues to be taken up in UN forums.

3.3.3 PROPONENTS AND SOURCES OF A MORE ACCEPTING VIEW OF LGBTI WITHIN ANGLICANISM

Not all Christians, either in Africa or elsewhere, necessarily reject the sexuality and gender identity of LGBTI persons as sinful. Many of the proponents of a different view come from the Anglican tradition. They may rely on the person of Jesus and the command to love one's neighbour as oneself for the message of tolerance for committed same sex relationships. The sins of Sodom and Gomorrah were, according to this view, gluttony, idolatry, inhospitality and sexual violence. Holders of this view may point to the Gospels of Matthew and Luke where Jesus is recorded as emphasising the failure to extend hospitality and accept the message of love.¹⁵⁷ In this view, many of the apparent condemnations of homosexual conduct are concerned with practices such as temple prostitution, found in Eastern Mediterranean religions of the time.¹⁵⁸ The universality of the Christian message is emphasised,¹⁵⁹ whereby all are welcome.

¹⁵⁶ A brief online history of the Balokole revival by the historian of East African Christianity Kevin Ward can be found at: <http://www.dacb.org/history/uganda-balokole.html> See also: Studies in World Christianity. Volume 18, Page 254-268 DOI 10.3366/swc.2012.0024, ISSN 1354-9901

¹⁵⁷ Matthew 10:14-15 and Luke 10:7-16

¹⁵⁸ For these interpretations, see for example: <http://whosoever.org/bible/conclude.shtml>

¹⁵⁹ Galatians 3:28 that emphasises the unity of all Christians is often cited.

Likewise, the Christian emphasis on love, acceptance, forgiveness towards others, “not casting the first stone” are central. Some interpreters of the bible point to other stories of the Old Testament for more positive views of same sex love, including the relationships between the figures of David and Jonathan¹⁶⁰ and those of Ruth and Naomi.¹⁶¹ Needless to say, these last interpretations are rejected by conservative and even most mainstream Christians, as well as by official theologies.

Anglicanism in Africa today contains strains of evangelical literalism as well as of a view more informed by reason and tradition. The latter are more likely to evolve towards tolerance of LGBTI expression or behaviour. Many of the LGBTI positive Christian movements come from within the Anglican family. There are several such churches and organizations in a number of African countries. “Other Sheep” East Africa is part of an international ecumenical organization that conducts advocacy and training throughout Eastern and Southern Africa. The House of Rainbow Metropolitan Church in Lagos, Nigeria has operated despite physical attacks on its members in 2008.

Anglican and other churches are often strictly hierarchical organizations that demand strict discipline and obedience towards superiors. Priests and bishops who step out of line on the issue of homosexuality risk losing their positions and their livelihoods. Bishop Ssenyonjo’s involvement (in the 1990s) with Integrity Uganda, an Anglican group that provided religious counselling to LGBTI persons led Archbishop Orombi to accuse him of doing this for the money and to ban him from preaching.¹⁶² He was reportedly seen by many Ugandans as having been “bought” by westerners in favour of lesbian and gay rights. Bishop Ssenyonjo was reportedly denied a pension despite having served the COU for 50 years.¹⁶³ The harsh treatment given to Ssenyonjo and other dissenting clerics may actually mean that the appearance of a unified anti-LGBTI front is more apparent than real. Other sympathetic clergy may be present in the churches, but feel unable to speak out because of the consequences. For programmatic purposes, this means that individual priests would not be able to participate in dialogue processes on this issue without the permission of a bishop. It is thus necessary to open doors at the senior level.

Some Anglican groups that do not have a specific LGBTI constituency have nevertheless been supportive. Anglican Bishops of Southern Africa issued a statement condemning the AHB in Uganda.¹⁶⁴ Many of the foremost and most courageous advocates of tolerance in Africa today are religious figures, including prominent ones such as Ugandan Bishop Christopher Ssenyonjo, Archbishop Desmond Tutu, as well as authors and campaigners such as Fr. Kapyra Kaoma, who recommends that:

“Religious-based human rights groups and leaders can play a vital role in defending sexual minorities and women by locating their commitments in sacred scriptures. Secular advocates should take care not to degrade the Bible, the Quran, or faith traditions more generally when challenging religious justifications for denying human rights.” Kaoma

¹⁶⁰ Biblical scholar Susan Ackerman is cited for this view. See *When Heroes Love: The Ambiguity of Eros in the Stories of Gilgamesh and David* (Columbia University Press, 2005)

¹⁶¹ See Rebecca Alpert in Reading Ruth *contemporary women reclaim a sacred story*, 1st ed. Ballantine, New York, 1994.

¹⁶² http://listserv.virtueonline.org/pipermail/virtueonline_listserv.virtueonline.org/2004-December/007527.html

¹⁶³ <http://www.churchtimes.co.uk/articles/2006/31-march/news/ssenyonjo-banned>

¹⁶⁴ <http://archbishop.anglicanchurchsa.org/2010/02/statement-on-ugandan-homosexuality.html>

also recommends making the actions of US religious fundamentalists more visible.

Gender aspects within Anglicanism provide an extra footnote to this account. English Anglicanism failed to legislate for female Bishops whereas North American Episcopalians and Antipodean Anglicans have welcomed them since the late 1980s or early 1990s. In Africa, Southern African Anglicans have accepted women bishops, electing the first one in 2012. The Church of Uganda has no principled objection to women bishops, but has so far not elected one, whereas Nigerian Anglicanism does not authorize females to be priests or bishops.¹⁶⁵ Overall, Anglicanism in Africa remains very male dominated. One author notes that the Anglican Women's Network – representing the same geographical diversity as Anglicanism generally – has consistently opposed the split on the issue of homosexuality, rightly insisting that there has been far too great a focus on this divisive issue by male church leaders, to the detriment of issues like hunger and the health and education of children.¹⁶⁶ Thus it is possible in this case that greater empowerment of women within Anglicanism will lead to a moderation of positions (though any women elected as Bishops would of course have to contend with conservative constituencies, as do moderate male bishops).

3.3.4 ANGLICAN POSITION ON CRIMINALIZATION / DECRIMINALIZATION

For present purposes, what is important is not whether Anglicans accept homosexual pastors or bishops, or bless committed same-sex relationships. The key issue is whether Anglican churches in Africa will continue to demand and support criminal penalties for same sex sexual acts between consenting adults. It is hard to see how this is compatible with the 1998 Lambeth Declaration. Unfortunately, Anglicanism has not had a separate reasoned debate on the specific issue of the morality or advisability (from the Church's point of view) of criminalization, or the separation of sin from crime. In the West, it is a non-issue and in Anglophone Africa, criminalization is taken for granted as the status quo. African Anglicanism is in need of a reasoned debate on the specific issue of its support for criminalization. Many Anglican leaders, like Catholic, Evangelical and Muslim ones, typically invoke threats to the family and the morality of society as reasons to oppose decriminalization. The question of how to begin addressing these fears is discussed at the end of this chapter.

3.4 CATHOLICISM

The Catholic Church in Africa has so far more or less escaped the scandals of child abuse that damaged its reputation in western countries such as *inter alia*, the USA, Mexico and Ireland. The highly centralized making of doctrinal rules and leadership structure of the Roman Catholic Church ensures greater consistency than is the case with Anglicanism.

¹⁶⁵ See:

http://en.wikipedia.org/wiki/Ordination_of_women_in_the_Anglican_Communion#First_woman_bishop_and_primate,
<http://www.rawstory.com/rs/2012/11/19/anglicans-ordain-africas-first-woman-bishop/>

¹⁶⁶ See Rubenstein, op cit. Statement From the Anglican Women gathered at the 51st of the United Nations Commission on the Status of Women," March 3, 2007, available at the International Anglican Women's Network website, http://www.iawn.org/2007From_the_Anglican_Women_gathered_at_the_51st_UNCSW.htm.

As shown below however, Catholicism does allow leeway to its leaders when it navigating national social and political contexts.

3.4.1 CATHOLIC DOCTRINAL VIEW

The Catholic view of homosexuality is linked to conservative views on social and sexual issues such as abortion, contraception and divorce. Saint Paul indicates that celibacy is generally to be preferred for all men.¹⁶⁷ Official Catholic thinking in this regard is still largely based on the blending of natural law and Christian theology in the ideas of thirteenth century Italian philosopher Thomas Aquinas, according to which the essential purpose or “nature” of sex is not only reproduction, but the creation of new eternal souls.¹⁶⁸ It is from this point of view that sex acts that are not of a generative type are considered by Catholics to be “unnatural”, and a union that does not unite the symbolical opposites of male and female to be “disordered”.¹⁶⁹ Many arguments can be made against this natural law view, including the obvious one that sex serves many other good human purposes than reproduction. Both Aquinas and Saint Augustine, while condemning prostitution as sinful, argued that it should be legal.¹⁷⁰

The Catholic Church rejects a concept of human identity that is based on sexuality, whether hetero- or homosexual, but it nevertheless acknowledges the deep-seatedness of sexuality, speaking of “homosexual persons”.¹⁷¹ Homosexuality is viewed as a *tendency* that, even if inborn, should be resisted, including with the help of spiritual counselling. Homosexuals are officially accepted as persons deserving of profound respect, while considering homosexual acts to be gravely sinful and unacceptable.¹⁷² According to the official Catholic view, persons with homosexual tendencies should, like all unmarried people, abstain from sexual relations.

The Catholic Church is a leading provider of care for persons living with HIV and or suffering from AIDS in Africa.¹⁷³ In an interview given in 2010, Pope Benedict XVI stated that the use of condoms by sex workers to prevent HIV infection could be a first step in the direction of a moral life. This did not amount to a change in the policy of the Church to favour distribution of condoms through its clinics. At the operational level, Catholic organizations are among the most experienced and dedicated in providing health care

¹⁶⁷ 1 Corinthians 7.

¹⁶⁸ For a concise account, See Janet E. Smith, *The Thomistic Natural Law Understanding of Homosexuality*, <http://www.archdioceseofdetroit.org/aodonline-sqlimages/shms/faculty/SmithJanet/Publications/MoralPhilosophy/ThomisticNaturalLaw.pdf>

¹⁶⁹ See also Stanford Encyclopedia of Philosophy : <http://plato.stanford.edu/entries/homosexuality/#NatLaw>

¹⁷⁰ <http://www.illinoismedieval.org/ems/VOL13/13ch4.html>

¹⁷¹ http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19861001_homosexual-persons_en.html, Para. 16.

¹⁷² *Catechism of the Catholic Church, editio typica* 1997, no. 2358, says that: A not-negligible number of men and women present deeply rooted homosexual tendencies. This objectively disordered inclination is for most of them an ordeal. They must therefore be accepted with respect, compassion, delicacy. Any sign of unjust discrimination towards them is to be avoided.

¹⁷³ A study commissioned by the Gates Foundation cites estimates that between 25 and 70% of health service infrastructure in Africa is owned by or health services are provided by FBOs, with the Catholic Church being the largest provider. Schmid B, Thomas E, Olivier J and Cochrane JR. 2008. The contribution of religious entities to health in sub-Saharan Africa. Study commissioned by B & M Gates Foundation. Unpublished report. ARHAP

and social services to the victims of HIV / AIDS and their families. They have worked to reduce the stigma attached to HIV / AIDS. Structures like CARITAS, or the Catholic Commissions on Justice and Peace, while usually working under the authority of particular bishops at diocese level, are also a part of the international policy discussion. CARITAS has concluded a MOU with UNAIDS that includes advocacy and consultations on combating stigma and discrimination.¹⁷⁴ Representatives of these organizations may be able to introduce a perspective anchored in the declared position of the Holy See rather than in that of national prelates and political and social attitudes. This is discussed under the right to health in Chapter Seven.

3.4.2 CATHOLIC VIEW ON CRIMINALIZATION

In connection with the December 2008 session of the UN General Assembly (63rd session), and the Declaration on Human Rights, Sexual Orientation and Gender Identity, the Holy See did not support the resolution itself because of its disagreement with the categories of 'sexual orientation' and 'gender identity', used in the text. In what has become a familiar line of argument, It said that these *"find no recognition or clear and agreed definition in international law. If they had to be taken into consideration in the proclaiming and implementing of fundamental rights, these would create serious uncertainty in the law as well as undermine the ability of States to enter into and enforce new and existing human rights conventions and standards."*

Those who disagree with the Holy See point to the decisions, General Comments and resolutions of organs of the UN human rights system, as well as the jurisprudence of the European Court of Human Rights.

On the other hand, the Holy See¹⁷⁵ stated that it *"appreciates the attempts made to condemn all forms of violence against homosexual persons as well as urge States to take necessary measures to put an end to all criminal penalties against them."*[Emphasis added.] Further, the Holy See *"continues to advocate that every sign of unjust discrimination towards homosexual persons should be avoided and urges States to do away with criminal penalties against them."*

It is unclear if the Catholic position actually endorses a human right to privacy that includes homosexual conduct between consenting adults or whether it advocates decriminalization for other reasons. An official position from 1986 speaks of *"behavior to which no one has any conceivable right"*. While this is unsatisfactory from the point of view of Danish policy and human rights law, the Holy See's statement provides an opportunity for a consensus on a vast improvement of the legal situation in many African countries. With close to 180 million members in Africa, many in the countries where homosexuality is criminalized, its support for decriminalization is an evident avenue to explore.

¹⁷⁴ <http://www.caritas.org/upload/aid/aids-ing.qxd.pdf>

¹⁷⁵ 18 December 2008.

Catholic support for decriminalization seems to be lukewarm at best in many countries. Thus, Catholic leaders in the Central American country of Belize actively opposed decriminalization.¹⁷⁶ They reportedly feared it would lead to adoption by same sex couples and gay marriage. Similarly, in 2012, Cardinal John Njue, Archbishop of Nairobi and the leader of the Catholic Church in Kenya, went against the Vatican position. He opposed the Kenyan National Commission on Human Rights recommendation to decriminalize homosexual relations, saying that this would be “a total destruction of the family.” The Cardinal urged parliament to assist the Church campaign against decriminalization. His stance was backed by the Muslim Council of Imams and Preachers of Kenya (CIPK), an organization whose head has previously stated that homosexuals deserve the death penalty.¹⁷⁷ Rhetoric used by the Catholic Archbishop of Yaounde in Cameroon is discussed below. The Nigerian Bishops Conference praised the country’s Senate and strongly supported the prohibition of “same-sex unions”.¹⁷⁸ A senior Catholic official in Malawi on the other hand seemed to be following the Vatican position in a statement to the media in 2011, saying “*we cannot punish those caught in the act but God will*”.¹⁷⁹

The position of the Holy See is not the whole picture in relation to Catholic involvement in conservative causes in Africa. Kaoma (2012) notes the influence of US based conservative Catholic organizations such as Human Life International that campaign against contraception and abortion. The Nigerian Branch of this organization has actively supported the criminalization of same sex marriage in Nigeria.¹⁸⁰

There are limits to the usefulness of the Holy See’s position in advocating for decriminalization. The Catholic Church will not work with LGBTI organizations unless they recognize that homosexuality is immoral.¹⁸¹ Nevertheless, there are opportunities for human rights activists to proactively use the Holy See’s position on decriminalization, including where local Catholic Church leaders do not fall into line. LGBTI and human rights advocates could usefully confront the Cardinal and the Catholic Church in Kenya and other countries, asking the Church to distinguish between the personal opinions of particular leaders and the official position of the Catholic Church, and whether the Catholic Church wishes to be associated with extremism in the name of morality. Pointing out these inconsistencies may have greater impact in international forums than in local ones in Kenya, as many conservatives on the national level might be inclined to applaud the hardline stance of local clergy.

¹⁷⁶ The UNIBAM case.

¹⁷⁷ <http://www.bbc.co.uk/news/10320057>

¹⁷⁸ http://en.radiovaticana.va/news/2011/12/16/nigeria_bishops_on_the_situation_in_the_country/en3-546889

¹⁷⁹ <http://www.nyasatimes.com/national/malawi-religious-leaders-resolute-against-gay-sex.html>, accessed on

<http://www.boxturtlebulletin.com/tag/malawi>

¹⁸⁰ Letter to the Nigerian Senate dated 27.10.2011 from HLI Nigeria President Chizoba Nnagboh.

<http://www.hliworldwatch.org/wp-content/uploads/2011/11/HLI-Nigeria-Letter-to-Senate.pdf>

¹⁸¹ http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19861001_homosexual-persons_en.html, Para. 15

3.5 OTHER CHURCHES

In a parallel to tensions in the Anglican Communion, the Evangelical Lutheran Church of Tanzania criticized the Swedish Lutheran Church for having conducted a same sex marriage.¹⁸² A number of LGBTI friendly churches exist in South Africa. The Dutch Reforming Church (a breakaway from the more conservative Dutch Reformed Church) played an important role in advocating for the rights of LGBTI persons (especially for the Afrikaner community) in the country. Support to religious groups such as these has been provided by western organizations. Working with groups of this kind is an important element of any longer term campaign for change.

3.6 CASE STUDY: RELIGIOUS GROUPS AND THE AHB IN UGANDA

The Catholic Church initially took the most unequivocal position of all the Churches against the AHB in Uganda. Archbishop Lwanga unequivocally condemned the Bill in his 2009 Christmas broadcast.¹⁸³

“The ... Bill does not pass a test of a Christian caring approach... The targeting of the sinner, not the sin, is the core flaw ... The death penalty and imprisonment ... targets people rather than seeking to counsel and to reach out in compassion to those who need conversion, repentance, support and hope. The bible says in Luke 6:36-37 “Be merciful just as your Father is merciful. Do not judge and you will not be judged. Do not condemn and you will not be condemned. Forgive and you will be forgiven.”

... the Proposal to prosecute those who fail to disclose information regarding homosexual acts puts at risk of the breach of confidentiality and professional ethics of persons such as Parents, Priests, Counselors, Teachers, Doctors and Leaders, at a time when they offer support and advise for rehabilitation of homosexuals. The ... Bill does not contain clauses encouraging homosexuals to be rehabilitated. As a Catholic Church, we have a mission to reach out to all of the people of God as Christ showed no one is beyond God’s mercy and love” ... The criminalizing of such reaching out is at odds with the core values of the Christian faith.”

More recently however, the Catholic Archbishop of Uganda is reported as having backed away from open criticism of the Bill, with his seeming endorsement in June 2012 of a joint statement by the Uganda Joint Christian Council (UJCC).¹⁸⁴ Archbishop Orombi of

¹⁸² <http://thecitizen.co.tz/component/content/article/37-tanzania-top-news-story/1109-elct-voices-a-big-no-to-same-sex-marriages.html>

¹⁸³ The source is the Archbishop’s 2009 Christmas message. Media recordings of the speech are available on the internet. See: <http://www.boxturtlebulletin.com/2009/12/24/18804>

¹⁸⁴ <http://www.monitor.co.ug/News/National/Bishops+want+shelved+anti+gay+Bill+dusted/-/688334/1424158/-/lec25uz/-/index.html>

the (Anglican) Church of Uganda (COU) has been a leading conservative within Anglicanism, even inviting conservative US clergy to place themselves under his spiritual guidance rather than that of their own church. The COU is the second largest religious denomination in the country after Catholicism, but has traditionally been closer to political power in Uganda, providing all of the country's Heads of State except Amin.¹⁸⁵ President Museveni regularly attends Anglican events such as the investiture of Bishops.

In contrast to the Catholic Archbishop, the COU supported the AHB, though it seemed at least to oppose the death penalty by calling for amendments of existing law rather than a new bill.¹⁸⁶ In early 2010, Archbishop Orombi issued a letter¹⁸⁷ expressing "*particular appreciation*" of the objectives of the Bill, including penalizing homosexuality, prohibiting licensing of any organizations "promoting homosexuality" and opposing accession to any international agreements having the contrary effect. The letter also supported the need for criminalization of lesbianism (not covered by current law).

The COU advocated legal protection of confidentiality for "medical, pastoral and counselling relationships that disclose homosexual practice", but did not seem to see any difficulty in compelling family members, teachers or ordinary people to report suspected homosexuals to the police. It recommended insertion of language in the law to "*prohibit procurement of material and promotion of homosexuality as normal or as an alternative lifestyle*" and to ensure that "*homosexual practice or the promotion of homosexual relations is not adopted as a human right*".

Opposition to homosexuality has become a cause that unifies diverse groups of Christians, as well as bringing Muslims and Christians together. The Uganda Muslim Supreme Council gave its clear support to the Bill.¹⁸⁸ In June 2012, the UJCC, an ecumenical body bringing Catholic, Anglican and Orthodox churches in Uganda together adopted a set of resolutions seemingly taking a hard line on homosexuality. The resolution does not endorse decriminalization, but is somewhat equivocal. On the one hand, it: "*Reiterates ... total rejection and condemnation of the phenomena of homosexuality, lesbianism and other forms of sexual perversion.*" At the same time it appeals to the faithful to *reach out in love to those who are associated with these phenomena*. The resolution then asks the UJCC Committees on Gender and Family Development and on Human Rights and Good Governance to "*engage Parliament on the issue of Anti-Homosexuality Bill which is before the 9th Parliament.*"

The resolutions do not make it clear what position its two committees should take in relation to the various human rights problems presented by the bill. Ugandan media interpreted the resolutions as reflecting possible support by the Catholic archbishop for an amended version, with some of the most extreme provisions removed.

¹⁸⁵ Gifford, African Christianity, Hurst and Co., London, 1998, p.139 The COU's membership is estimated at over 9 million, or ??% of Ugandans.

¹⁸⁶ Archbishop Orombi has also stated that "violence against homosexuals is wrong"- see <http://churchofuganda.org/faq/faq-about-church-of-uganda-gafcon-and-the-anglican-communion>

¹⁸⁷ <http://churchofuganda.org/wp-content/uploads/2010/02/COU-official-position-on-the-Anti-Homosexuality-Bill-2009..pdf>

¹⁸⁸ <http://www.newvision.co.ug/D/8/13/699520>

3.6.1 AFRICAN AND US EVANGELICALS

The most extreme expressions of anti-gay sentiment, and strongest support for the AHB came from popular urban Pentecostal or Evangelical churches, several of which have strong links to American Evangelicals. These churches adopt the lively preaching styles, aggressive media and political strategies that are familiar from the American context. Some have a blatant emphasis on money raising and crowd-pleasing messages of “prosperity gospel.” The US links are well-described in other studies (Kaoma, 2012).

Some Pentecostal churches appear to deliberately seize on homosexuality as an emotive issue in order to gain attention and mobilize support. Within Ugandan Evangelicalism, competition for adherents is intense and occasionally vicious. Preachers such as Moses Male and Martin Ssempe publicly attacked the “Miracle Centre” Cathedral, accusing its leader Kayanja of sodomy against young men.¹⁸⁹ The accusers were convicted of conspiring to tarnish Kayanja’s reputation in October 2012.¹⁹⁰

Prominent religious promoters of anti-gay sentiment in Uganda, including Martin Ssempe, had close and well documented links to the influential American preacher Rick Warren’s Saddleback Church. Steven Langa was associated with the notorious Scott Lively, and a number of other American conservative evangelicals have fanned the fires of anti-gay sentiment in Uganda. Other evangelical preachers associated with the Anti-Homosexuality Bill include Joseph Mulinde and Julius Oyet, who were associated with the American Lou Engle’s visit to Uganda and anti-gay preaching. Nevertheless, it would be overly simplistic to see African Christian conservatives as merely the instrument of wealthy American evangelicals. The relationship goes both ways.

The US Evangelicals have not confined their attentions to religious partnerships in Uganda, but sought contact to political leaders. During the Bush Presidency, these relationships flourished. Some Ugandan leaders may have seen right-wing Christianity as a way of gaining access to powerful circles in Washington. As described in Chapter Seven, Groups and individuals sponsored by the Ugandan First Lady that promote homophobic agendas and policies received US government funding during the Bush Presidency, while the Ugandan President adopted stances against condoms that were popular among US religious conservatives.¹⁹¹ A Wikileaks cable quoted a senior adviser to the Ugandan President as saying that the First Lady was “ultimately behind” the Anti-Homosexuality Bill.¹⁹²

David Bahati, First Lady Janet Museveni, and via her, President Museveni himself, as well

¹⁸⁹ <http://ssempanews.blogspot.dk/2009/05/pastor-ssempas-response-on-sodomy-and.html>

¹⁹⁰ <http://www.monitor.co.ug/News/National/Six--Pastor-Kayanja-accusers-convicted-/-/688334/1523898/-/lbfab/-/index.html>

¹⁹¹ Joseph Tumushabe, United Nations Research Institute for Social Development, Social Policy and Development Programme Paper Number 28 August 2006

¹⁹² <http://dazzlepod.com/cable/09KAMPALA1409/>

as former ethics minister Buturo were reported to be members of the politically influential and shadowy US group “The Family¹⁹³”, with Buturo as organizer of a Ugandan version of the group’s US “National Prayer Breakfast”.¹⁹⁴ US Presidents since Eisenhower, including President Obama, have spoken at the US national prayer breakfast. In 2010, Obama used his speech at the event to describe the AHB in Uganda as “odious”.

For US Christian conservatives, opposition to gay rights does not stand alone. As with the Catholic Church, Evangelical Christians strongly promote sexual abstinence. They found political support in the USA during the presidency of George W. Bush. US funding for combating HIV / AIDS increased significantly under the PEPFAR programme, simultaneously with increased support to faith based organizations that promoted these values and a US legislative requirement earmarking one third of the HIV / AIDS funds to “abstinence only” programmes.¹⁹⁵ The role of conservative Christian movements in mobilizing against homosexuality, abortion and contraception in Africa has been documented in a number of studies.¹⁹⁶

The influential US Pastor, Rick Warren is quoted as having declared during a visit to political leaders in Rwanda that “*Homosexuality is not a natural way of life and thus not a human right*”.¹⁹⁷ The main sponsor of the AHB in the Ugandan parliament, David Bahati is on record as saying that the idea for the Bill first sprang from a conversation with members of the US group “The Fellowship”, in 2008, because “*it was too late to propose such legislation in America*”. The former president of the Fellowship has denied that the organization took an “*official position*” on the legislation.¹⁹⁸ The Bill followed soon after a notorious conference in March 2009 in Kampala entitled “*Exposing the Truth behind Homosexuality and the Homosexual Agenda*.” This event was organized by Stephen Langa’s Family Life Network.¹⁹⁹ The American preacher and lawyer Scott Lively separately addressed the conference and Parliamentarians and the Minister for Ethics and held a lengthy meeting with Ugandan Christian activists immediately following the conference. Prominent in these discussions was the subject of legislation and what the speakers saw as “*promotion*” of homosexuality. A few weeks later, Ethics Minister Buturo reportedly promised “*stern action*” by the government against homosexuality.

¹⁹³ Also known as “The Fellowship”. See Sharlet, 2009 *The Family: The Secret Fundamentalism at the Heart of American Power.* Harper

¹⁹⁴ <http://www.npr.org/templates/transcript/transcript.php?storyId=120746516>

¹⁹⁵ http://www.carnegiecouncil.org/publications/journal/21_3/essay/001.html

¹⁹⁶ Kaoma, 2010 and 2012.

¹⁹⁷ <http://www.ipsnews.net/2012/07/film-murder-and-threats-cant-stop-fight-for-gay-rights-in-uganda/>

¹⁹⁸ http://www.nytimes.com/2012/02/29/world/africa/ugandan-lawmakers-push-anti-homosexuality-bill-again.html?pagewanted=all&_r=2&

¹⁹⁹ http://www.nytimes.com/2010/01/04/world/africa/04uganda.html?_r=0;

[http://www.defendthefamily.com/pfrc/archives.php?id=2345952;](http://www.defendthefamily.com/pfrc/archives.php?id=2345952) <http://www.boxturtlebulletin.com/slouching-toward-kampala#2009.03.04>

The first proposals for the AHB were made the following month.²⁰⁰

Some Uganda-linked US conservatives may have been naïve about the fire that they were playing with in Uganda and surprised by the severity of the AHB. Some moved to limit the damage that the AHB could do to them at home in the USA. Rick Warren issued a statement after the AHB became news saying that he had broken off his contacts with Pastor Ssempe.²⁰¹ Scott Lively's statements about how to address homosexuality prior to 2009 - however distasteful and conspiratorial they may appear - do not show advocacy of extreme punishments.²⁰² Nevertheless, Lively continued to voice support for the AHB as late as December 2012.²⁰³ He sees his struggle in the warlike, even apocalyptic terms adopted by some American fundamentalist Christians, using phrases like putting a "*nuclear bomb against the gay agenda*" and combating a "*global network of sexual revolutionaries bent on remaking the entire world in their own perverted image*".²⁰⁴ Other US (neo)Pentecostals – so-called "dominionists" are animated by an idea of society where all important spheres of social life are governed by Christian leadership and doctrine.²⁰⁵ Like many westerners before them, these Evangelicals nourished dreams of cultivating their ideal society in fertile Ugandan soils.

Some American religious extremists have gone even further than the notorious AHB. A person associated with an extreme anti-abortion movement that attacked abortion clinics in the USA²⁰⁶ moved to Kenya and established a website called "ProjectSee" displaying pictures of Kenyan LGBTII activists with messages threatening death - in Kiswahili - drawn from biblical texts and the text "Not Wanted". Personal details such as telephone numbers and email addresses were publicized. In a context where violent attacks against LGBTII activists have taken place in the region, hate speech of this kind is of great concern and would seem to warrant investigation by the police.²⁰⁷ That religious extremists from the USA feel entitled to pronounce on who is or is not wanted in African countries shows an astonishing and dangerous degree of self-righteousness. It is a measure of the imbalance in the "neo-colonialism" discourse that they can take actions such as these without being accused of "neo-colonialism". Similarly, although conservatives within the Anglican church and other churches have received large amounts of money from US Evangelicals since the 1980s, their institutional power and the popularity of their position has so far kept them largely immune to the charge of being "bought" with western money.

An American struggle over values is being played out partly on African soil, just as the East-West cold war was often fought with proxies in developing countries. Battle lines in the US have long since been drawn and a familiar set of rhetorical and public relations

²⁰⁰ References and links for the chain of events surrounding the conference and the AHB can be found at:

<http://www.boxturtlebulletin.com/slouching-toward-kampala#2009.03.13a>

²⁰¹ <http://wthrockmorton.com/2009/10/rick-and-kay-warren-issue-statement-regarding-martin-ssempas-activities-in-uganda/>

²⁰² See Lively's 2007 letter to the Russian people at <http://www.defendthefamily.com/pfrc/archives.php?id=5225300>

²⁰³ <http://www.wnd.com/2012/12/support-ugandas-revised-anti-gay-bill/>

²⁰⁴ <http://www.defendthefamily.com/pfrc/newsarchives.php?id=5422609>

²⁰⁵ See Kaoma, 2012, Colonizing African Values, Political Research Associates.

²⁰⁶ The "Army of God".

²⁰⁷ Note for example the brutal murder of Tanzanian activist Maurice Mjomba.

positions are staked out before the opposition can claim them. A (putative) African sense of what belongs in the private sphere and is passed over in silence is translated into a more typically American puritanical abhorrence of “sin”.

3.7 THE CHURCHES AND DANGEROUS RHETORIC

While only a small minority of religious people actively expresses hatred of sexual minorities, fear, ignorance and the religious rhetoric of sin are widespread, without a corresponding recognition of the separation of church and state, or sin and crime. Churches need to do more to combat the misuse and misunderstanding of religion that further hate by politicians and media. In the 2013 Kenyan Vice Presidential debate, Mr. Ruto, now Vice President, used the Bible to compare homosexuals to dogs.²⁰⁸ The senior Anglican Church hosts and Catholic hierarchy attending the debate do not seem to have disavowed this dangerous and dehumanizing rhetoric. Given Kenya’s experiences of mass violence, statements of this kind should not pass without criticism.

The Catholic Archbishop of Yaounde, Tonye Bakot, has contributed to a climate of fierce state repression of LGBTI persons. In December 2012, the Archbishop used rhetoric calling same-sex marriage a “crime against humanity”.²⁰⁹ In the context of imprisonment of adults for alleged consenting same-sex behaviour, shockingly unfair trials and violence and threats against LGBTI persons, their families and even their lawyers²¹⁰, indulgence in inflammatory and overblown rhetoric of this kind instead of standing up for human rights is extremely disappointing from a senior Catholic figure.

Christian leaders – like anyone else - should be called to account for slanders that LGBTI sexually abuse children or for highly tendentious references to the Bible that dehumanize LGBTIs. They should be engaged in dialogue about the dangers of highly selective and misleading use of fragments of religious scripture. Nevertheless, strategies would do well to distinguish between actual hate speech and sincerely felt religious fear. Characterizing religious fears and taboos as hatred is only likely to increase polemics and will make it more difficult to identify and combat “genuine” hate speech. In this regard, care needs to be taken in using western standards and concepts to judge African contexts.

3.8 ISLAM

As with Christianity, scriptural and doctrinal texts contain passages used to condemn homosexual activity. The Quran (7:80) also refers to the story of Lot (or Lut), but does

²⁰⁸ <http://www.kenyan-post.com/2013/02/william-ruto-in-trouble-from-gays-and.html>, last accessed 15.5.2013

²⁰⁹ <http://www.reuters.com/article/2012/12/25/us-cameroon-homosexuality-idUSBRE8BO05O20121225>, accessed 15.5.2013

²¹⁰ See: Guilty by Association, Human Rights Violations in the Enforcement of Cameroon’s Anti-Homosexuality Law, HRW, Alternatives-Cameroun, ADEFHO, CAMFAIDS, March 2013

not explicitly outlaw or prescribe punishment for what might today be called homosexual conduct or identity. A few reformist Islamic scholars in recent years have questioned simplistic conventional interpretations of the Lut story, saying that what it condemns is the abuse of power – male rape- against peaceful strangers rather than homosexuality as such.²¹¹ Indeed, given the lack of other provisions such as those referred to in the Hebrew Old Testament, the Quran provides even less of a foundation than Christianity or Judaism for an explicit condemnation of same sex relations. Some studies point to a greater historical tolerance in Islam.²¹² As with Christianity, the Lut story in the Quran is still a central reference point. In Sudan, the word “luti” is reportedly used to describe MSM.²¹³

Renowned Sunni scholars (Islam Malik) declared that Islam prescribed capital punishment for homosexuality. In Africa, this position is followed as a matter of state law by Mauritania, Sudan, some states of Northern Nigeria and parts of Somalia. Beyond Africa, it is also found in Saudi Arabia, Yemen and Iran (though with Shia sources). Support for these extreme penalties can be heard even in countries such as Malawi, where the Secretary General of the Muslim Association of Malawi (MAM) was reported as saying that *“Homosexuality is sin and is punishable by beheading. The Holy Koran clearly states that any community which indulges in these acts is calling for calamities like those that happened to Sodom and Gomorrah.”*

3.8.1 LIBERAL AND PROGRESSIVE INTERPRETERS

Like the reformist Christian scholars who favour interpretations of the Lot story that focus on other offences (inhospitality, other sexual offences, rejection of a prophet), Muslim LGBTI activists point at other interpretations of religious texts. They point out that Islamic prohibitions and penalties come rather from the secondary source of the hadith (recorded sayings of the Prophet) and Islamic learning, rather than from the Quran itself. Different collections of hadith and the work of various ancient religious scholars contain sayings that can be used in support of conservative positions or more moderate ones. Other scholars point out and question the cultural, social and historical context within which the conventional Islamic understanding of the “Lut” story arose.²¹⁴

As with Evangelical Christians, the lack of a single seat of Islamic authority means that there is no single source that can be referred to for an authoritative position. Islamic Scripture – the Quran – is often seen as being less open to interpretation based on reason and tradition than Anglican or Catholic Christianity. Some progressive Muslim scholars point to the general uncertainties surrounding Hadith, noting how the first

²¹¹ See Muhsin Hendricks, “Islam and Homosexuality”, ILGA preconference on religions, 2007 Accessed at: <http://doc.ilga.org/content/download/4522/27322/version/1/file/ILGA-July06-Religions.pdf>.

²¹² See International Commission of Jurists, Practitioners Guide No. 4 on Sexual Orientation and Gender Identity.

²¹³ <http://www.ilgrandecolibri.com/2013/01/gay-rights-sudan.html>

²¹⁴ See works such as Habib, *Islam and Homosexuality*, Praeger, 2009. The SAFRA website contains a number of useful papers on these subjects: http://www.safraproject.org/bibliography_sgib.htm

initiative to write them down occurred a century or so after the death of the Prophet Muhammad.²¹⁵ Muhsin Hendricks, an Imam from Cape Town in South Africa, notes that *“Hadith contain many inconsistencies, contradictions and distortions of facts. As definitive and reliable sources of Islamic law they are deeply problematic. It is no surprise that hate crimes against homosexuals, including the justification for their execution, stems largely from the hadith.”*²¹⁶ Hendricks also refers to other Hadith that indicate tolerance shown by the Prophet Muhammad towards effeminate, often cross-dressing males who were nevertheless Muslim believers, refusing the exhortation of followers around him to kill one of them.²¹⁷

The alternative viewpoint is smaller and organizationally weaker in Islam than within Christianity. Voices such as that of Hendricks are in a tiny minority among African Muslims and are not often heard. Hendricks’ Inner Circle Movement, like the LGBTI positive Christian groups, has benefitted from financial support from US and European based funders, but this funding is minuscule in comparison to the funding of conservative Islam that comes from other sources.

International political representation of views attributed to Muslims is seen in the positions taken by the Organization of the Islamic Conference (OIC), although strictly speaking this is a political rather than a religious body. In 2012, the OIC took a position similar in on respect to that of the Holy see in that it referred to sexual orientation and gender identity as “controversial notions” thus not accepting their validity in international human rights law. The OIC thus opposed the consideration of these issues in the Human Rights Council, and notified the President of the Council that the OIC would not accept the recommendations of the Panel established under Resolution 17/19 on Discrimination and Violence based on Sexual Orientation and Gender Identity. The OIC position is a far more complete rejection of the HRCs work in this area than the Holy See’s. While the latter may question “sexual orientation” as a notion in international law, it nevertheless refers to “homosexual persons”, condemning violence against them and calling for decriminalization, the OIC speaks only of their “abnormal behaviour”. Predominantly Muslim African countries supported the OIC statement. African voting on UN resolutions is discussed in more detail in Chapter Six.

Just as a large variety of Christian sects promote their various views of Christianity, so have Saudi Arabia, Libya and Iran promoted their own particular religious views in Africa with money, exchange visits and education and social programmes. Some commentators have observed that the promotion of conservative Wahhabism through wealthy Saudi Arabian and Gulf State financed organizations²¹⁸ has diluted the influence of the more moderate Sufi Islam that traditionally predominated in parts of Africa. As

²¹⁵ The initiative was by Ummayyad Caliph Umar ibn Abd al-Aziz, in order to preserve this wisdom and/ or to guard against greater uncertainty.

²¹⁶ Islamic Texts: A Source for Acceptance of Queer Individuals into Mainstream Muslim Society, Muhsin Hendricks, <http://www.safraproject.org/downloads/MushinHendricks.pdf>

²¹⁷ Sunan Abu Daawud, Book 41, No. 4910.

²¹⁸ Organizations such as the World Muslim League, World Assembly of Muslim Youth have reportedly disbursed large sums since the 1970s to build mosques, train religious officials, and fund religious and humanitarian activities. The WML has offices in 16 countries in Sub-Saharan Africa, covering all regions of the continent. The same can be said of the promotion of Shia Islam by Iran or the pre-2011 financing of activities by Col. Ghadaffi’s “World Islamic Call Society”.

with Christianity though, it would be a mistake to see the increased conservatism only as an expression of foreign influence. African social and cultural trends are important on their own account. HIV / AIDS has also strengthened the conservatism of recent decades. Since the 1970s, Islam in Nigeria has gained adherents due to its opposition to corruption and “immorality” in the face of a loss of credibility by government. Opposition to liberal acceptance of homosexuality fits in with this general conservatism of the movement. As with Christianity, conservative movements should be distinguished from extremist ones, such as the murderous Boko Haram organization.

A more tolerant approach to same sex relations can be found in practice. Thus Dakar, which was reportedly well-known as the “gay capital” of West Africa until recent times has become noticeably more conservative. Written reports referring to “*goorjigeen*” or “*gordigen*” (now considered to be a pejorative word) in Dakar go back to early colonial times, with writings by French authors on the subject. European observers writing in the 1930s reported a lack of social consequences for homosexual activity, though noting religious sanctions in the form of the refusal of Muslim burial. Male prostitution seems to have been common. Very high levels of tolerance, and even a high percentage of both males and females admitting to having had same sex experiences was noted in a scientific study in the 1970s. Likewise, there are well-documented accounts of tolerance of same-sex subcultures among Hausa men in Northern Nigeria. Reports say that the tolerant attitudes began to disappear in the past decade with the growth in power and influence of religious fundamentalism.^{219 220} A number of factors have contributed to this, possibly including the more visible and explicit international activism for LGBTI rights that arose in the same period.²²¹ The same pattern was seen in Sudan, where older people report a significant tolerance of LGBTI people until the introduction of strict Islamic government in the 1980s.

Senegal’s law against homosexuality (forbidding immodest acts with individuals of the same sex with a penalty of up to five years imprisonment) dates from the post-independence period, and not to the Islamic revivalism of recent decades. Nevertheless, both politicians and fundamentalist Islamic clerics were quick to invoke Islamic values and the threat posed to them by a supposed incursion of western decadence. The law forbidding homosexual acts was thus apparently unused and almost forgotten until recent years. Activists in Kenya noted that rights work among LGBTI is more difficult in Muslim dominated coastal areas than in Nairobi. This cannot be attributed solely to religious factors, as Nairobi is a cosmopolitan city. It is perhaps to be expected that people will continue to turn primarily to religion as a source of authority and law for as long as states fail to establish credibility. Nevertheless, religious people should also be aware of the dangers of a crude politicization of their faith and a mobilization of it in the service of prejudice, and even hatred.

3.9 CONCLUSIONS: POSITIONS ON CRIMINALIZATION AND

²¹⁹ Dakar from Africa’s gay capital to centre of homophobia” <http://www.afrol.com/features/36319>

²²⁰ Pell Gaudio, 2009, op cit.

²²¹ See infra, Chapter two on the uses of hypocrisy.

POSSIBLE WAYS FORWARD

It is important that other voices and interpretations within the Islamic schools begin to be heard, though there is no doubt that, as with Christianity, this is a long term project.²²²

While there thus are particular differences of doctrine and of the origin of the actors promoting religious conservatism, there are more similarities than differences between Christian and Muslim contexts in dealing with the issue of sexual minorities in Africa. There are similar issues of competition at stake, with a fear that “softness” will see the emergence of others ready to take up more extreme positions and recruit members. It is not only in UN meetings and resolutions that a rare Christian –Muslim unity emerges on this issue, but in national statements like those referred to in Kenya, Nigeria and Uganda, as well as in bursts of local rage like that described below in Mtwapa in Kenya.

3.9.1 RELIGION AND THE SECULAR STATE

In some contexts religious leaders can argue – often quite correctly – that the rights of LGBTI persons is far from the most urgent of human rights issues in Africa. Where matters are brought to a head as in Uganda, mainstream religious organizations will have to make their positions clear on criminalization. That they, with the exception of the Catholic Archbishop, failed to address the clear dangers posed by the AHB contains a clear warning. It points to a serious need to engage African religious leaders on the relationship between faiths and the secular state. Religions benefit from the Bills of Rights contained in most African constitutions. There is a danger that they see the freedom of religion only as guaranteeing some form of fairness among different religions, and not as imposing a responsibility on all of them to refrain from persecuting the dissenters that are rejected by most of them.

Fundamentally, this would involve the construction of the state on non-religious values, where faith is a choice like many others – albeit one of absolute importance for people – rather than an indispensable pillar of the nation. While Islamic doctrine does not provide a clear basis for the separation of religion and state, the scholar Abdullahi An Na'im has urged Muslims to accept that the secular state is in the interest of believers, so that faith is based on sincere conviction rather than compulsion.²²³ Unlike many states in the Middle East, most predominantly Muslim African countries are secular republics rather than states founded explicitly on Islam. This important difference is a vital plank for dialogue. Beyond Africa, Turkey and Indonesia are leading examples. Christians in Anglophone Africa – politicians as well as religious leaders - need to fully absorb and defend this principle. In predominantly Christian countries, quotations from the words of Jesus in the Bible give support to this separation.²²⁴

²²² See Safra website, and sources there. Western based Islamic scholars who challenge traditional interpretations include Scott Siraj al-Haqq Kugle and Kecia Ali.

²²³ <http://www.law.emory.edu/aannaim/pdfiles/heresy.pdf>

²²⁴ See for example John 18:36 “My Kingdom is not of this world”, or Matthew 22:21 “Render unto Cæsar the things that are Cæsar’s and unto God the things that are God’s”.

3.9.2 PROTECTION OF THE FAMILY

What unites most Anglicans, Evangelicals and Muslims, and perhaps many Catholics as well (explaining their lukewarm commitment to the Vatican position on decriminalization) is that they see decriminalization as the first step down a slippery slope that will inevitably be followed by increased visibility and acceptability of LGBTI, and then by ever expanding demands for equal treatment, leading to same-sex marriage and a kind of modern moral neutrality exemplified by liberalism.

A key point of dialogue with mainstream religious people in Africa must take place on the issue of protection of the family. In order to create a middle ground where dialogue is possible, LGBTI and human rights activists, as well as western donors who provide funding and support, must work to strengthen dialogue on the protection of the family. Thus, convincing arguments - and people who can deliver them - to the effect that decriminalization will not lead to a weakening or destruction of the family are perhaps the most important that can be made on this issue in Africa. Arguments imported from the West will be of only limited use. African political and social dialogues on these issues - with broad participation -- are a necessity. Nevertheless, the threat to the family posed by homosexuality or transgender persons may be more symbolic than real. In most African countries (with the exception of Uganda and perhaps Cameroon), mainstream religious communities do not call for active legal repression of homosexual behaviour. They are more concerned with the symbolic value of the law and to deny LGBTI people the freedom to organize that would come with decriminalization. LGBTI activists and those committed to a secular state must challenge religious leaders to stand on their faith and not rely on the criminal law to impose their values on society. African LGBTI people can rightly show themselves as upholders of the family in many cases. They can also argue that criminalization is doing more harm than good to families.

Human rights principles demand that a measure that limits important freedoms must be subject to tests of necessity and proportionality. Limits on the freedom of consenting adults - especially in such a private and important area as sexuality - should be rigorously scrutinized. Proponents should be asked to show that criminalization achieves an alleged goal of protecting (a particular model of) the family, and that it is necessary and proportionate to this end. As discussed in Chapters 6 and 7, criminalization has already failed this test at the UN Human Rights Committee, but African societies will need to have this discussion for themselves.

CHAPTER 4

4 POLITICS

This chapter distinguishes a number of tendencies to be found in African politics on SOGI issues and the law and on the responses to these contexts by a number of western donor countries. The main focus is on countries where laws criminalizing same-sex acts are in place. Policies on HIV / AIDS are discussed in chapter six.

It is important to remember that many African countries where same sex acts are illegal were not themselves the architects of sodomy legislation, and that securing majorities to change the law is no easy matter. We need also to remember that internationally, social change on this issue has not been led by politicians (South Africa is an exception). Where it has occurred, change has most often come through activism, culture and social influences, only later leading to changes in the law. In many cases, it makes no more sense to “blame” politicians than other members of society for the existence of sodomy laws.

4.1 FIRST TENDENCY: MODERATE POLITICAL REALISM

To support LGBTI rights is a dangerous political stance. In private, many moderate African leaders (and western diplomats) are realists, acknowledging that decriminalization and removal of the colonial anti-sodomy laws is unlikely to win either popular or parliamentary support.²²⁵ There may also be a worry that the country is not ready for a civil public debate on this issue, and that attempts to open one up will lead to disorder. They thus argue that the best strategy is to keep this question out of the public space while making no particular effort either to enforce the laws or to expend political capital for their gradual repeal. Political realism makes open support for the rights of LGBTI people unlikely. Candidates taking such a position can expect to see popular prejudice on this issue being used against them by opponents. Within this position, the most important question for LGBTI and human rights activists is whether there is room for civil society activism to work for gradual change. A further question is whether conservative and religious forces will also refrain from pressing for repression of homosexuality.

²²⁵ Notes from meeting with senior representatives of the Ministry for Foreign Affairs of an African country, Copenhagen 2011. Names and country withheld but in the possession of the author.

4.2 SECOND TENDENCY: POLITICAL MOBILIZATION OF HOMOPHOBIA

The mobilization of anti-gay sentiment for the assertion of national identity or as a way towards political popularity or to weaken opponents at home or abroad is by now a well-worn political tactic in Anglophone countries in Africa. It may correlate with a personal dislike of homosexuality. It is instructive to look closely at the genealogy of the political discourse on “unAfricanness” that has arisen in the past two decades. One of the early manifestations of this trend took place at the 1991 trial for assault of Winnie Mandela. Her defence involved a portrayal of a (white) Methodist Minister with whom black township youths were staying as homosexual. The Minister was accused of sexually abusing black youths and Ms Mandela’s supporters outside the courtroom invoked homophobic stereotypes, mixing these with South Africa’s ugly racial politics. The Minister was cleared of any suspicion on these charges.²²⁶ President Mugabe of Zimbabwe picked up on this mixture of race, homophobia and politics in 1995, infamously referring to gays as “worse than pigs”.²²⁷ Apparently well-founded charges relating to rape of male employees were brought against former Zimbabwean president and potential political rival to Mugabe, Canaan Banana. His conviction and imprisonment ended his political career.

Mugabe’s use of anti-gay sentiment as distance himself from the “decadent” west was quickly followed by President Nujoma of Namibia. It is striking that in all three of these early instances, homophobia was invoked by leaders who had directly participated in armed struggles against racist government. Mugabe’s explicit denial of rights (“I don’t believe they have any rights at all”) gained currency among homophobic politicians in a number of countries. The trend was described by HRW and IGLHRC in 2003²²⁸. The same homophobic rhetoric was adopted by others including Presidents Museveni of Uganda, Mutharika of Malawi and Jammeh of the Gambia. These are by no means the only examples. The President of newly independent South Sudan made a similar statement in 2011.²²⁹

Anti-gay statements are unfortunately a staple feature of many political campaigns in Anglophone Africa, particularly presidential ones, where “softness” on homosexuality is used in attempts to portray the opposing candidate as suspect or a tool of the west.²³⁰ In

²²⁶ Rachel Holmes, *De-segregating sexualities: sex, race, and the politics of the 1991 Winnie Mandela trial*, Evanston, IL: Program of African Studies, Northwestern University, no. 5, pp. 10, 12-14, 1993

²²⁷ <http://www.irinnews.org/report/62628/zimbabwe-homophobia-raises-hiv-risk-for-gays>

²²⁸ HRW (in cooperation with IGLHRC), 2003, *More than a Name*. Available at www.hrw.org

²²⁹ <http://www.ipsnews.net/2011/08/executed-for-being-gay/>

²³⁰ In the contest between Zanu PF and the MDC in Zimbabwe, each party accused the other of being sympathetic to homosexuals See: <http://www.guardian.co.uk/commentisfree/2010/mar/23/homophobia-africa-gay-rights>. See: <http://www.zambianwatchdog.com/?p=54744&cpage=1>

the 2011 Zambian presidential campaign, the outgoing President's website during election campaign posted a news item suggesting that his rival (now President) Sata supported gay rights. A journalist making this claim was sued by the (later victorious) opposition PF party. The efforts of politicians in Zambia to tarnish each other with accusations of "gay friendliness" continue in everyday politics.²³¹ The logic of this kind of politics is that even moderate leaders may sometimes feel compelled to make hostile sounding statements or gestures to prevent opponents from opening up a front on this issue.²³² It is not only governments with conservative philosophies that are opposed to LGBTI rights. In revolutionary Mozambique, a government inspired by Marxist ideology propagated the myth that homosexuality was a symptom of capitalist decadence.²³³

However repugnant, some of these statements are made opportunistically in the heat of political campaigns and should be seen as a symptom of general prejudice rather than a campaign of persecution. Sometimes though, they are part of a gathering fire of prejudice fed by sensationalist media and hotheaded religious leaders.²³⁴ It is important to distinguish between statements that most often do not translate into tougher legislation or policy measures against LGBTI, and those where state machinery is being mobilized, in the form of tightened laws, increased prosecution or police harassment, or where there is a danger of mob violence.

Sexual minorities may be used as scapegoats when other serious problems confront society. Activists in Namibia associated homophobic rhetoric with political efforts to divert attention from the failure to deliver prosperity in the mid-1990s.²³⁵ Tightening of anti-homosexual laws is often symptomatic of increasing political repression more generally. This has been the case in Zimbabwe, Malawi under Mutharika, Uganda, Cameroon and The Gambia. HRW pointed out how gays were the first to feel the bite of repression that later affected others (white farmers, MDC activists, foreign journalists and NGO workers).²³⁶ The use of emotive "culture war" issues (including homosexuality) can be a convenient distraction from other pressing issues.²³⁷ Nigerian Nobel prize winner Wole Soyinka noted how political focus on combating same sex marriages coincided with the unpopular removal of subsidies on oil in his country in 2012.²³⁸ Links are also made between increased application of anti-gay laws and a general climate of economic and social uncertainty.²³⁹

Politicians in western countries are not immune from using the issue of LGBTI rights (particularly in faraway African countries) to portray themselves in a progressive spotlight, concerned with human rights on the international stage, sometimes as a distraction from difficult issues closer to home. This kind of involvement is not cost-free

²³¹ <http://www.lusakatimes.com/2012/03/01/constitution-committee-include-gay-rightshh/>, accessed 29.5.13

²³² See Chapter Six below, and the arrest of HIV / AIDS activist Kasonkomona.

²³³ Steven O. Murray, *Homosexuality in "Traditional" Sub-Saharan Africa and Contemporary South Africa*, 1998.

²³⁴ HRW, Senegal 2010. See below in Chapter Six.

²³⁵ http://www.washingtonpost.com/wp-dyn/content/article/2005/10/23/AR2005102301163_3.html

²³⁶ HRW 2003, p.277.

²³⁷ (<http://www.boxturtlebulletin.com/tag/yoweri-museveni>)

²³⁸ <http://www.ynaija.com/wole-soyinka-gays-lesbians-and-legislative-zealotry/>

²³⁹ WLUM text on Senegal. Find reference.

and may sometimes be counterproductive. If the intention is really to contribute to lasting change, there is a need for a good understanding of domestic politics in the country concerned. This is discussed below.

4.3 THIRD TENDENCY: THE POLITICIZATION OF RELIGION

There are more and less dangerous versions of the third tendency, which is a political mobilization of a crude version of the Christian religion. The AHB, representing the more dangerous version, was the most visible and extreme example of state repression against LGBTI people that included new legislation in Malawi, Burundi and Nigeria, campaigns of repression in Cameroon, Uganda and Zimbabwe and proposed bills in the DRC²⁴⁰ and a number of other countries.²⁴¹ The politicization of homosexuality in Uganda, together with repression of activists for the rights of LGBT persons began long before the AHB. Broadcasters and organizations that raised these issues were the targets of government repression in 2004 and 2005.²⁴² The provisions of the AHB in Uganda go further than conservatism, threatening a witch-hunt that would engulf large sectors of society and subject LGBTI people to draconian punishments.

For a number of reasons, Uganda presented ideal conditions for a moral panic to thrive. These included the war and displacement of the 1970s and 1980s that resulted in many social upheavals, the strength of and competition among religious organizations, the HIV / AIDS crisis and the funding it produced, and new possibilities for democratic, populist politics and human rights activism. Some politicians and religious figures tend to lump sex education, contraception, abortion and activism for the rights of LGBTI people together with commercial phenomena such as pornography and the sexualisation of pop culture. For some, these are all symptoms of a godless liberalism promoted by governments, human rights organizations and UN agencies. Conservative forces have mobilized and created alliances at home and abroad, and homosexuality serves a symbolic purpose as the visible face of the enemy.

Nevertheless, as elsewhere different political tendencies on these issues exist side by side in Uganda. The politics surrounding the AHB in Uganda shows elements of political opportunism, as well as of more repressive government policies generally. Individual politicians have used this issue to gain prominence, both within and outside of President Museveni's NRM. Uganda also shows exemplary mobilization of opposition to the Bill among a broad coalition of civil society activists (see below), while most mainstream Churches failed to criticize this dangerous mixing of religion and politics. The question of an incomplete or poorly understood separation between Church and State is discussed in Chapter Five. The role of HIV / AIDS funding in strengthening conservative positions in Uganda is discussed in Chapter six.

²⁴⁰ <http://ilga.org/ilga/en/article/mHeu4Tr1Ps>

²⁴¹ See Kaoma, 2012.

²⁴² See HRW's reporting from 2005 (<http://www.hrw.org/reports/2005/uganda0305/uganda0305.pdf>), letter to President Museveni in 2007: <http://www.hrw.org/news/2007/08/21/letter-ugandan-president-regarding-homophobia-and-hiv>

4.3.1 RELIGION, PURITY AND NATIONAL IDENTITY

In addition to the behaviour- identity distinction (see Chapter Two), national identity also plays a role where real or perceived western influence is present. Hassett (2009) found that: *“even the Ugandans who believe that there has always been some homosexuality in Africa share the perception that there is growing pressure from the global North to spread the view of homosexuality as an acceptable alternative lifestyle.”*²⁴³

The massive influence of western commercial culture cannot be discounted. Much of it conforms to materialistic, individualistic and semi-pornographic stereotypes. As long as the West is seen as pushing LGBTI rights agendas, resistance is easily portrayed as anti-western, and hence “African”. Religion, political identity and culture are mixed with national identity in complex ways. South Africa and Uganda present interesting contrasts. How South Africa’s post -1994 dispensation came to be built on civic rather than cultural values is discussed in Chapter Five.

In Uganda, the story of the Uganda Martyrs has in some respects attained the status of a foundational national myth. Martyr’s Day (on the 3rd of June) is a national holiday. In the most commonly told narrative, young male Christian converts refused the Buganda Kabaka Mwanga II’s homosexual demands and were put to death for doing so. Rejection of sinful (and abusive) homosexuality led to martyrdom, out of which a new identity as pure and holy Christians was born. The story contains dimensions of identity that are too numerous and complex to be explored in detail here. Simply put, the converts, as individual souls, choose loyalty to a transcendent creator rather than to the earthly representative of their spiritual ancestors. The social loyalty due to the Kabaka was weakened. Ultimately though, the Baganda and most other Ugandan Kingdoms embraced Christianity, so as to remove any contradiction between Christian loyalties on the one hand and loyalties to clan and kingdom on the other. The notion of citizenship based on equality was more or less absent.

President Museveni invoked the narrative of Christian purity in a speech in 2010: *“These young men (martyrs) stood for cleanliness, truth and righteousness... “I hear there was homosexuality in Mwanga’s palace. This was not part of our culture. I hear he learnt it from the Arabs. But the martyrs refused these falsehoods and went for the truth, which is why we are honouring them today.”* Museveni further commended the martyrs for rejecting the *“dehumanisation of people through homosexuality”* and advised gay rights

²⁴³ Miranda K. Hassett, *Anglican Communion in Crisis: How Episcopal Dissidents and Their African Allies Are Reshaping Anglicanism*, Princeton University Press, 2009

activists that Africa's resistance against homosexuality is historical.²⁴⁴

The same rhetoric of *dehumanization* had already been used by the ZANU PF aligned Women's League in Zimbabwe in 1995.²⁴⁵ From this viewpoint, it is human rights groups' promotion of liberalism that "dehumanize[s] us to the status of beasts."²⁴⁶ As elsewhere in the world, homosexuality is portrayed by Museveni as a vice of the other, of foreigners corrupting pure national society.²⁴⁷ While not always stated explicitly, homosexual practice may be seen by many nationalists as the personal weakness that led to the effective downfall of the Kabaka and the loss of sovereignty to the British.

Some historians, both Ugandan and foreign – not necessarily supporters of LGBTIs - may have a different understanding of the Uganda Martyrs, acknowledging a far larger context than one of homosexual acts. Many Ugandan nationalists see the events and the Martyrs in a somewhat dubious light for having gone against their tradition and ruler. It is thus only in relatively recent times that the pederastic element has been stressed to such a degree.²⁴⁸

Not all African countries have such traumatic cultural myths at the centre of their modern identities. Nevertheless, the comparatively recent adoption of Christianity in many predominantly Christian African countries means that the break with the pre-Christian past is still fresh in the cultural and historical memory. The need of African leaders for unifying ideologies that transcend linguistic and ethnic diversity can make political mobilization of religion very tempting. Zambia's former President Chiluba, who came to power in 1991, declared the country to be a Christian Nation, and had this written in to the country's constitution.²⁴⁹ The declaration has entered into popular parlance in the country. It is often evoked in debates, particularly by its Evangelical supporters. Not all churches in Zambia were positive about this. The Jesuit Centre for Theological Reflection in Zambia called for the removal of this declaration, calling it discriminatory.^{250 251}

The use of religion as an explicit base for political unity contrasts with post-apartheid South Africa, where equality within diversity is perhaps the fundamental value of an explicitly *political* community (as opposed to a religiously identified one). In countries where national unity is founded on religion, history or language (even a non-indigenous one) more than constitutional politics, it may be more difficult for equality to serve as

²⁴⁴ The New Vision Online : Museveni warns on dangers of sodomy <http://www.newvision.co.ug/PA/8/12/721699>

²⁴⁵ See also Engelke, 1999. Op cit.

²⁴⁶ Mugabe, 1995, quoted in HRW, 2003.

²⁴⁷ Murray notes how homosexuality is almost universally portrayed (by its opponents) as alien. An interesting example of this is seen even within Nigeria, where Northern and Southern interviewees each attributed it to the other group. See: Cesnabmihilo Dorothy Aken 'Ova, Preliminary Survey of Homosexuality in Nigeria, presentation at "Obstacles to Organizing for Sexual Rights" panel at the Commission of the Status of Women, March 7, 2000.

²⁴⁸ Hassett, 2009, op cit, cites a number of authors on this. Kevin Ward, 2002 Same-Sex Relations in Africa and the Debate on Homosexuality in East African Anglicanism. Anglican Theological Review Vol. 84, No. 1

²⁴⁹ 1996 Constitution, Preamble.

²⁵⁰ See Gifford, op cit. P.198 et seq, showing how the Catholic Church and the Christian Council were not consulted, and how Danish apostolic missionaries may have played a role in the move.

²⁵¹ <http://www.lusakatimes.com/2012/08/22/catholic-bishops-oppose-inclusion-christian-nation-clause-draft-constitution/>

the basis for national identity. Francophone states in West Africa, with their republican and secular traditions, have to some extent avoided the temptation to use religion for political purposes.

The principle of human rights limitations on the power of majorities, sometimes also difficult to swallow even in western countries, may be incompletely understood and accepted in these young democracies. In this regard, there are similarities to issues of women's rights where conservative coalitions can defeat "progressive" HR friendly legislative change. In 2011 – 2012 for example, progressive and egalitarian changes to the Family Code in Mali, though supported by the government, were defeated in Parliament.

4.4 FOURTH TENDENCY: WEAK OR OPPORTUNISTIC LIBERAL COMMITMENT

A fourth tendency is a lukewarm openness towards recognition of the rights of LGBTI persons. This may be superficial and perhaps opportunistic. At times the commitment of political leaders who express moderate positions (especially to western media) crumbles in the face of political realities. In 2010, Prime Minister Morgan Tsvangirai in Zimbabwe said that gay rights were not up for discussion.²⁵² In a BBC interview in 2011, he expressed hope that the constitution would respect freedom in respect of sexual orientation that did not interfere with others, saying that this was a human right.²⁵³ Thus, it was ZANU PF, and not the MDC that pressed for a ban on same-sex marriage in the new constitution.²⁵⁴ In statements made to a home audience in 2013, Tsvangirai again made remarks critical of homosexuals.²⁵⁵ Likewise Malawian President Banda promised urgent law reform for LGBTI in 2012. Without guessing at her intentions, it is unquestionable that she did so at a time when she urgently needed international support. As described below, there is now little or no political momentum for this in Parliament or in her government.

Before criticizing African leaders unduly for opportunism, it is well to remember that western leaders are no more immune to it than African ones. This is seen in relation to the discussion on reactions to African laws later in this chapter. For better or worse, western aid and support is a factor in African politics. Western politicians and organizations that want to see results from moderate African leaders need to understand their dilemmas on this issue rather than simply trying to trap them into losing positions. A commitment to moderate respect for human rights that can be the basis for further work by civil society is worth more than an unrealistic promise.

²⁵² <http://www.rnw.nl/africa/article/tsvangirai-backs-mugabe-gay-rights-issue>, last accessed 26.5.2013

²⁵³ <http://www.bbc.co.uk/news/world-africa-15431142>, last accessed 26.5.2013

²⁵⁴ Report of the Constitution Parliamentary Select Committee (Copac), presented to Parliament on 7 February, 2013, available at: <http://www.copac.org.zw/>

²⁵⁵ http://www.herald.co.zw/index.php?option=com_content&view=article&id=69703:tsvangirai-denounces-homosexuality&catid=37:top-stories&Itemid=130

4.5 FIFTH TENDENCY: GENUINE COMMITMENT?

It is probably too early to speak of a genuine commitment to LGBTI as a firm tendency in African political life, but there are some hopeful signs. In Kenya in 2012, David Kuria Mbote, former general manager of GALCK, ran for office in the Kenyan Senate, openly declaring his sexuality. Nana Oye Lithur, a Ghanaian human rights defender who recently (2013) became Minister for Gender, Children and Social Protection in her country, did not disavow her position of support for the constitutional rights of all persons, including LGBTI, at the time of her confirmation by Parliament, though she declared that she would not “promote homosexuality”.²⁵⁶ These examples may represent the outer limit of what is currently possible outside South Africa.

In calibrating political approaches to the criminalization of homosexual conduct or LGBTI activism in Africa, it is important that the distinctions between these tendencies are kept in mind. Public international pressure has arguably been necessary as a last resort in the Ugandan case. In most other circumstances, national actors must take the lead. Many in the West will have sympathy with the argument that African societies and leaders need time to deal with this issue. This argument will be more credible if African politicians refrain from fanning the flames of hatred and disgust in Africa, and if their western counterparts refrain from simplistic characterizations of Africa.

4.6 HUMAN RIGHTS PRIORITIES

On one hand, African leaders cannot be surprised if aid is called into question when recipient countries do not respect western values. This is discussed below. On the other hand, it is important to understand a certain cynicism among Africans about the choice of which human rights issues gain the attention of western media, political leaders and human rights organizations.

Dr. Kizza Besigye, Ugandan Opposition leader, who opposed the AHB in 2011 nevertheless criticized some westerners for their failure to pay attention to other issues in Uganda, including the firing on peaceful civilian demonstrators.²⁵⁷ *“There are more obvious, more prevalent and harmful violations of human rights that are glossed over, ... their zeal over this matter makes us look at them with cynicism to say the least”*.²⁵⁸ Besigye is far from alone in this. The scholar Sally Engle Merry, (2006)²⁵⁹ observed that the *“...contemporary human rights projects take place in an ever-increasing situation of global inequality. This inequality determines which countries can pressure which other ones to change, where the funding for Non-Governmental Organization (NGO) activism*

²⁵⁶ <http://graphic.com.gh/General-News/i-will-not-promote-homosexuality-in-ghana-nana-oye-lithur.html> Religious groups criticized her nomination.

²⁵⁷ <http://www.amnesty.org/en/news-and-updates/uganda-urged-halt-police-attacks-peaceful-protesters-2011-04-21>

²⁵⁸ http://www.nytimes.com/2012/02/29/world/africa/ugandan-lawmakers-push-anti-homosexuality-bill-again.html?pagewanted=all&_r=0

²⁵⁹ Human Rights And Transnational Culture: Regulating Gender Violence Through Global Law, *Osgoode Hall Law Journal*, Vol. 44, No. 1, (2006)

comes from and who receives it, and which offences are foregrounded and which ignored.”

Even some leading LGBTI activists make the same point. Representatives of the Coalition of African Lesbians saw lesbian rights primarily as a feminist issue, emphasizing the link between sexuality and poverty, patriarchal societal structures and the political and economic context of relations between the global north and south.²⁶⁰

4.6.1 RESPONSES OF AFRICAN LEADERS TO INTERNATIONAL PRESSURE FOR LGBTI RIGHTS

There is no simple answer to whether international pressure for more respect for the rights of LGBTI “works”. Most international political attention has been in the nature of firefighting rather than long term strategy. Pertinent questions might be for what or whom such pressure works. Is the purpose to limit damage in the short term or to truly achieve change in the target country? To satisfy a domestic audience? Does it have a short term or a lasting effect in the target country? Are there side effects?

4.6.2 THREATS TO IMPOSE CONDITIONALITY

In October 2011, some few months after the historic adoption of Resolution 17/19 by the UN Human Rights Council, British PM Cameron stated at the Commonwealth Heads of Government Meeting that the UK would condition budget support to a number of African countries on adherence to human rights, including those of LGBTI. Cameron’s promise of greater engagement with LGBTI rights was initially praised by some LGBTI activists at home, but his threat of conditionality quickly ran into trouble internationally. President Mugabe of Zimbabwe was characteristically brusque in his response to Cameron, describing the suggestion as “satanic” and “diabolical” and that Cameron could go “to hell”. Moderate figures, such as President Mills of Ghana, came out against Cameron, and may have hardened his position against homosexuality, declaring that he would never make any move to legalize homosexuality in Ghana.²⁶¹ The Government of South Africa, which had provided important support to the resolution, was not happy with the suggestions of conditionality.²⁶²

Kretz, 2012 lists some of the principal criticisms of this UK approach to conditionality:

- i) Selectivity: the policy seemingly applied only to African aid recipients. No sanctions were suggested towards countries like Saudi Arabia, which applies the death penalty for homosexual acts.
- ii) The lack of specific guidelines;
- iii) The threat backfired, prompting some African governments to push ahead with repressive measures or say they would do without aid;
- iv) Representatives of some countries whose aid was cut for other reasons

²⁶⁰ Interview with CAL representatives, Johannesburg, Feb. 2013.

²⁶¹ <http://www.dailyguideghana.com/?p=43822>

²⁶² Notes from meeting with Department of International Relations and Cooperation, Pretoria, 8.2.2013.

- (Malawi) blamed LGBTI advocates for the cut;
- v) The policy did not win the support of LGBTI organizations, especially in the South; There was no consultation with these prior to its adoption;
- vi) The greatest victims of the policy would be ordinary poor Africans.
- vii) Much more sophisticated policy measures were available;
- viii) Change in this area cannot be won through a quick fix. Homophobia is not simply government policy, but reflects social attitudes that have become ingrained, partly through the experience of British colonialism.²⁶³

While the main criticism of the UK in this regard related to the Commonwealth, some activists in South Africa (including LGBTI activists) questioned the aggressive stance of the USA and France in UN forums on this issue, some seeing it as a way of appearing progressive without probing deeper issues.²⁶⁴ CAL and IGLHRC, while recognizing the need for work at the international level, considered that the greatest area for support should be at the national level. IGLHRC thought that some international statements that were not accompanied by work on the ground had been damaging.²⁶⁵

4.6.3 POSITIVE AND NEGATIVE EFFECTS OF INTERNATIONAL PRESSURE IN UGANDA

There can be little doubt that the sustained international pressure on Uganda since 2009 has been a key factor preventing adoption of the Anti-Homosexuality Bill, though the role of national activism should not be discounted. President Museveni halted debate on the Bill by saying that it was a matter of foreign policy.²⁶⁶ If one compares the Ugandan President's recent statements to those made in 2010, or in 1999, where the President called for homosexuals to be locked up²⁶⁷, there is evidence of a difficult, but positive evolution. In 2009, at the time of the publication of the AHB, he gave support to the "recruitment by Europeans" slur.²⁶⁸ In 2012, Museveni stated in a BBC interview – this time primarily to a British and international audience - that homosexuals were accepted by society, but that this way of life was not "promoted".²⁶⁹ Recently (in 2013), Museveni used an argument frequently heard from others for this study: that even heterosexual displays of public affection are relatively unknown and frowned upon in African society. There is some indication that Museveni may be attempting to accustom the Ugandan public to the idea that consenting sex between adults in private is not a matter for the state: *"You have a lot of room in your house, why don't you go there. Sex is a bilateral issue, not a multilateral one"*.²⁷⁰ One can only speculate as to how much these new signals are a response to the new winds blowing from Washington D.C. and are capable

²⁶³ Kretz, Adam, *Is Aid Conditionality the Answer to Antigay Legislation? An Analysis of British and American Foreign Aid Policies Designed to Protect Sexual Minorities*, Vienna Journal of International Constitutional Law, Vol. 7, 2013

²⁶⁴ Notes on meetings with CAL and government officials in South Africa.

²⁶⁵ Notes from meeting with Ms. Kate Muwoki, IGLHRC Johannesburg, 5.2.2013.

²⁶⁶ <http://www.irinnews.org/Report/87728/UGANDA-Museveni-distances-himself-from-cruel-anti-gay-bill>

²⁶⁷ <http://news.bbc.co.uk/2/hi/africa/460893.stm>

²⁶⁸ Wall Street Journal, Dec. 2009 "U.S. Assails Uganda Plan to Toughen Antigay Law",

<http://online.wsj.com/article/SB126110531128296635.html>

²⁶⁹ <http://www.presidentmuseveni.com/Media/News/HardtalkInterview.aspx>

²⁷⁰ <http://www.newvision.co.ug/news/640814-museveni-speaks-out-on-homosexuality.html>

of surviving a more conservative shift there.

4.7 PUBLIC CRITICISM

There is a constant risk that discussion both in the west and in Africa on this sensitive issue will be dominated by a set of well-established stereotypes. Canada's Foreign Minister seemed to have a genuine concern to promote the rights of LGBTI people around the world.²⁷¹ However, his public criticism of the Ugandan Speaker of Parliament at the IPU meeting in Canada in October 2012 seemed to be an illustration of how not to proceed. The sight of a male western host of an international meeting publicly attacking his female African guest – the neutral speaker of Parliament, for a private member's bill that enjoys wide public support in Uganda - sent mixed signals at best. Baird's speech also linked the murder of David Kato to the publication of Kato's name and photograph by the Ugandan Rolling Stone paper²⁷², not mentioning the confession, conviction and sentencing of a male prostitute whom Kato had allowed into his house on the day of the murder. In the eyes of some, this implicit casting of suspicion on the result arrived at by the Ugandan justice system fit into unfortunate western stereotypes. Speaker Kadaga returned to a heroine's welcome in Uganda and resolved to speed up the handling of the Anti-Homosexuality Bill in Parliament, although she had not previously been among its main promoters.²⁷³ Her defence of her country even earned praise from LGBTI commentators in Uganda.²⁷⁴

4.7.1 US POLICY AND CONDITIONALITY IN MALAWI

In Malawi, the effect of international influence is also very clear. In 2010, a couple (a transwoman and a man) that had been convicted after undergoing a "same sex" marriage ceremony was pardoned and released from prison following the appeal by UN Secretary General Ban Ki Moon to then Malawian President Mutharika. In early 2011, President Mutharika signed into law an amendment to the Penal Code that criminalized sexual relations between women.

Although there has been a marked difference between the prominence given to this issue under the Obama / Clinton foreign policy and the support given to religious agendas under the Bush administration, reporting on LGBT issues by the US Department of State in its annual human rights country reports began in 2005. In December 2011, US President Obama issued a memorandum instructing US foreign aid officials to take the protection of LGBTI rights into account when making decisions on foreign aid. Secretary of State Clinton made a well-publicized speech on the subject on international human rights day in the same month. (According to news reports, the US was then giving about \$200m annually to Malawi, the UK £19m.)

²⁷¹ <http://news.nationalpost.com/2012/01/23/john-baird-points-finger-at-gay-rights-abuses-in-african-caribbean>

²⁷² <http://www.international.gc.ca/media/aff/speeches-discours/2012/10/22a.aspx>

²⁷³ See <http://sebaspace.wordpress.com/2012/10/30/canadas-baird-gives-ssempa-and-bahati-a-new-lease-on-life/>

²⁷⁴ See Uganda 3: Canada 0 at: <http://sebaspace.wordpress.com/2012/10/25/kadaga-uganda-3-baird-canada-0/>

Days after the US announcement and speech, Malawi's justice minister announced that the relevant laws would be "reviewed". The US White House also made it clear that the new US policy did not specifically tie US assistance to this issue, and that anti-LGBTI laws would not result in cutting off of aid.²⁷⁵ Kaoma (2012) reports that Malawi again shelved its legislative review after this clarification was made.

After Mutharika's sudden death in 2012, newly appointed President Banda announced that the laws against unnatural acts and indecency would be reviewed as a matter of urgency. In its response to the UN Human Rights Committee's call for decriminalization, the Government of Malawi stated that the matter had been referred to the Law Commission.²⁷⁶ However, a report by the IBAHRI issued in August 2012 found that no review of these laws was being carried out by the Malawi Law Commission or had indeed been requested.

The Attorney General was quoted in news reports as having stated that there would be a moratorium on application of the relevant laws, saying that police had been ordered not to arrest or prosecute homosexuals until parliament had debated the issue. For this, he was criticized by the Law Society, which maintained that a Government Minister had no authority to suspend the application of national laws, fearing that this precedent was damaging to the rule of law in the country. The Law Society said that the only options open to the Government were a judicial challenge to the law or resubmission of it to Parliament. The Attorney General was then reported as having denied suspending the law. A week later, the Malawi Council of Churches²⁷⁷ issued a communique of Nov. 16 2012 in which it opposed legalizing "homosexuality" (although "homosexuality" is not illegal – same sex acts are). The Catholic Church in Malawi did not explicitly give its support to this statement, but it has not publicly thrown its weight behind decriminalization either, despite the Vatican position described in Chapter Three.

4.7.2 US POLICY AND CONFUSION IN LIBERIA

While Secretary of State Clinton did not direct her remarks at Liberia (or any particular country), her speech on the issue coincided in time with the award of the Nobel Peace Prize to President Sirleaf Johnson and with Clinton's attendance at Johnson's second term inauguration. LGBTI activists in Liberia took the initiative to press for removal of legal sanctions against homosexual behaviour (as a misdemeanour, with relatively mild penalties compared to other countries). There had been no reports of prosecutions or convictions of homosexuals for a number of years.

Media reports in Liberia talked of a threat to cut American aid to the country if it did not change its laws on homosexuality, although the US had issued no such threat. President Sirleaf Johnson clearly stated that she would veto any attempt to legalize homosexual acts. After media attention to the issue there were attacks on the gay activists that had

²⁷⁵ <http://www.voanews.com/content/us-policy-on-gays-draws-strong-mixed-reactions-135348253/149357.html>

²⁷⁶ UN Doc. CCPR/C/MWI/CO/1

²⁷⁷ The MCC groups the country's main protestant churches, with over 8 million members. About four million Catholics make up about one third of Malawi's 12 million Christians. (Kaoma, 2012).

advocated greater respect for LGBTI rights and new legislation was proposed to increase penalties for homosexual acts from one to ten years in prison.²⁷⁸

4.8 ANALYSIS – THE PROS AND CONS OF WESTERN VOICES IN AFRICAN SOCIAL DEBATES

Liberia shows the risk of misunderstandings and harmful effects arising from western statements that take place without a policy and communication strategy. Short term political attention and media storms are unlikely to yield a positive result. They can just as easily result in increased penalties, more prosecutions or an increase in private violence.²⁷⁹ There may in some circumstances be strong arguments for “letting sleeping dogs lie”, at least until a proper strategy and the means to implement it are in place.

Danish and European officials and leaders need to be well-informed as to the wishes and intentions of African political leaders. It is necessary to try to make allies of progressive African leaders on this issue, to support them in taking steps that are politically feasible rather than placing them in a position where their political credibility depends on denouncing western attempts to “impose” homosexuality. Where public and parliamentary opinion are clearly opposed to decriminalization, statements by western leaders that sound like imperial demands are unlikely to yield positive long term results and may be counterproductive. The positive steps taken by Mozambique and Botswana (discussed elsewhere in this study) in forbidding employment discrimination based on sexual orientation were taken relatively quietly and not in response to international pressure.

The intervention by UN Secretary General Ban Ki Moon in Zambia in favour of decriminalization was not taken up by any well-known figures in Zambia. A government spokesman rejected the recommendation, and evangelical Christian leaders seemed to fan the flames of opposition²⁸⁰ Nevertheless, it may be that as part of a long-term strategy, these statements help to open up a discussion that would otherwise not take place, and create space for diverging points of view.

New repressive legislation deserves a different response than colonial laws that are politically hard to get rid of. The Ugandan case, where few options remained, more obviously required international pressure than most others. While Uganda and Malawi are examples of a positive effect, many nationals of these countries will view them as showing a depressing subservience to foreign pressure. In Uganda, international pressure has (at least at times), been coordinated with an impressive campaign by Ugandan civil society organizations. The challenge though, is how to avoid more “Ugandas” from arising rather than to use Uganda as a model for international engagement. As the Malawi case may illustrate, positive measures taken as a result of foreign pressure risk being superficial, dropped again as soon as is politically convenient.

²⁷⁸ <http://www.siecus.org/index.cfm?fuseaction=Feature.showFeature&featureID=2126>

²⁷⁹ This danger exists beyond Africa. AI point out how a Sri Lankan bill in 1995 that aimed at decriminalization actually resulted in criminalization being extended to lesbians.

²⁸⁰ http://www.publiceye.org/magazine/v27n3/Culture_Wars.html

A lack of realism about the limited possibilities for manoeuvre of African leaders on this subject will make western politicians, eager to please constituencies at home, vulnerable to an unproductive cycle of pressure followed only by backlashes or the achievement of results that are rarely more than superficial.

Foreign pressure is a poor substitute for a real debate at home. For most people, western political pressure confirms that LGBTI rights are a foreign imposed agenda. This provides ammunition for a backlash, where opposition to liberalization is a badge of African identity, an almost perfect political weapon to portray opponents as western stooges.

Western countries have rightly spent large sums of money on trying to consolidate democracy in Africa's fragile and difficult conditions. Short-circuiting national democracy through crude conditionality does little to demonstrate Western respect for African democracy, or the real needs of the African poor. Western publics and politicians need to get used to African countries being democracies subject to the rough and tumble of electoral politics and parliamentary manoeuvring. The subject of LGBTI rights and of sexuality in the modern world has been hotly debated in western countries for decades. We cannot expect that it will not also be in African ones.

Without stepping into stereotyped roles that religious fundamentalists and nationalists would have them play (including crude conditionality), African leaders and publics can nevertheless usefully be told that there are limits to what Danish or European publics will allow their aid to be used for; that aid is the subject of public and political debate in a democratic framework, that precisely the sections of public opinion that support foreign aid are often also those who deplore human rights violations against LGBTI persons, and that it is hardly surprising that aid will be brought into question if draconian laws against LGBTI persons are adopted or enforced.

4.8.1 SOME KEY POINTS FOR WESTERN REPRESENTATIVES

Western experts and representatives can nuance positions and greater understanding of SOGI issues, and what human rights law actually demands. This is discussed in Chapter Six, but in many public debates, a few key points are all that is required:

- i) Human rights law demands decriminalization, but not same sex marriage;
- ii) Freedoms of expression, association and assembly can allow for some accommodation of community standards (even rather conservative ones), but not incitement to violence or hatred.
- iii) Human rights law does not demand that people, communities or cultures "like" homosexuality, but merely that they do not imprison or persecute homosexuals or deny them their rights.
- iv) Religions are free to continue to advocate personal and social discipline in the area of sexuality and even to express their own disapproval of homosexuality or non-conforming gender identities.
- v) All persons, including members of sexual minorities, have legal rights that

protect them against abuse and discrimination in the public and private spheres.

Western officials addressing African publics or gatherings could do well to make a distinction between “*the rights of gays*” and “*gay rights*”. The subtle but important differences between these two provide a dividing line between the above five points, which concern the rights of all human beings and to which LGBTI people are also entitled, and legal developments in western countries that provide rights to marriage, adoption etc. It is important to make it clear that no international bodies are demanding that African countries take any of these steps.

In many sections of the public, many people may not know that international human rights bodies and even many churches have called for decriminalization. The challenge for western leaders is to communicate with African audiences on how to square respect for parliamentary decision making with the exercise of restraint and respect for the rights of unpopular minorities. Parliamentarians should be reminded of the separation of church and state as a key element of the rule of law and democracy and asked to think its consequences through. Loud” and quiet diplomacy are not alternatives. They are both necessary and appropriate in the right circumstances. The question is of getting different kinds of statements, demarches and quiet discussions to work in harmony with one another. It is trite to say that statements need to be based on a clear understanding of domestic political contexts. It is important to analyse who is using this issue in the national political context and for what purpose (Kaoma: 2012)²⁸¹

4.8.2 CONSIDERATIONS OF TIMING AND STRATEGY

The timing of going public on the rights of LGBTI persons is not for western donors or organizations to decide, but for national activists. The issue may become public in a more or less deliberate and planned manner (as in Zimbabwe in the early 1990s) or it may flare up rather haphazardly as happened in Senegal in response to a magazine article. Denmark should thus be prepared for the situation of defending human rights defenders who incur risks when the issue does arise. Where intervention in national debates is more likely to strengthen stereotypes about western agendas (or “gay agendas”, “neo-colonialism” etc), and even to produce backlashes, silence may sometimes be the better course, while giving and showing support to African leadership on this issue. On the other hand, silence should not amount to complicity. Where serious protection issues arise, there may be a role for diplomatic demarches. This is discussed in relation to human rights protection below, though statements and interventions should be coordinated with national activists.

In annual bilateral meetings and other occasional discussions, concerns can be raised more openly, though of course always with respect for differences of opinion as well as political realities. Here, there should be a particular focus on any patterns of violation of

²⁸¹ http://www.publiceye.org/magazine/v27n3/Culture_Wars.html

the rights of LGBTI persons or organizations, whether those concerned with physical safety and security or with rights in the areas of free expression, association and assembly.

4.8.3 PUBLIC GESTURES

Many embassies exert influence informally through (for example) establishing contacts to national LGBTI leaders, accepting invitations to participate in their events, or inviting them to public functions at embassies, where they meet senior officials of their own country and break down barriers. Diplomats and political leaders can, where they judge it to be useful, make public statements. Where national officials are slow to respect the legal rights of LGBTI activists (to register their NGOs for example), this is a matter that can be raised by western diplomats. Grant making, study tours and dialogue forums, whether local or through mechanisms in the donor's home country are discussed later in this study.

4.9 COMBATING POLITICAL HATE SPEECH AND PROMOTING TOLERANCE

South Africa initially hesitated to give international support to the position espoused by its own constitution before finally and emphatically doing so in 2010 / 2011. Individual African leaders have spoken out against prejudice – most often after leaving office. The elevated status of Nelson Mandela and Desmond Tutu allows them to defy received norms. Both have forthrightly supported LGBTI rights across the continent. Former President Thabo Mbeki publicly criticized the AHB in Uganda.²⁸² Former Botswanan President Festus Mogae (now a member of the International Aids Law Commission) favours decriminalization, though freely admitting that he did not support this while in office because of the high political cost.²⁸³ (He did work vigorously to combat HIV / AIDS in other ways.) Influential outsiders such as these might sometimes be able to convince the opposing sides in a political campaign to refrain from engaging in damaging rhetoric on this issue. In the recent Kenyan electoral campaign, the African Union called on leaders of political parties to urge their supporters to avoid resorting to hate speech, and to media outlets to avoid being used to propagate it.²⁸⁴

²⁸² <http://www.thepost.co.za/mbeki-slams-uganda-s-anti-gay-bill-1.1218973#.UaleJBjU9jo>

²⁸³ http://www.weekendpost.co.bw/index.php?option=com_content&view=article&id=830:mogae-unmoved-on-homosexuality-prostitution

²⁸⁴ African Union, PRESS RELEASE, The Africa Union Election Observation Mission applauds preparation towards the Republic of Kenya's 4 March 2013 General Elections

CHAPTER 5

5 LAW, JUSTICE AND THE CRIMINALIZATION OF SAME-SEX RELATIONS

Internationally, legal doctrines and philosophies continue to play a vital role in efforts towards decriminalization of homosexual sex. Meanwhile, some of the (natural law) arguments that criminalization was partly based on are poorly known and understood, so that they are seldom even evoked for the purpose of legal argument. There is a key distinction to be made between law on the one hand as an instrument to promote human well-being as defined on the basis of laws democratically made by human beings, and on the other, as an instrument to uphold putative divine principles for the religious salvation of individuals or society. In the latter view, the state should protect society against sin and moral contamination as defined by religion.

5.1 SIN AND CRIME

The prohibition of sex acts between consenting adults of the same sex can be seen as one of the few survivors in western legal systems of a legal order built on explicitly religious notions. The criminalization of homosexuality in English statutory law is traced to the “Buggery Statute” of the reformation period, in 1533 under the reign of Henry VIII. Under this and various succeeding statutes, the death penalty was prescribed for the offence until 1861. The older legislation was brought to the English colonies in America. There was a gradual lessening of penalties in the nineteenth century in American states, led by Pennsylvania. English law was substantially amended in 1861 when the penalty for sodomy was changed to life imprisonment. Subsequent changes in 1885 broadened the reach of the law from sodomy (anal intercourse) to acts of “gross indecency”.²⁸⁵ Versions of the post-1861 English legislation were laid down in the Indian Penal Code

²⁸⁵ In connection with the codification of its criminal law in 2006, Zimbabwe extended the criminal prohibition from sodomy to cover, as well as anal intercourse, “any act involving physical contact other than anal sexual intercourse that would be regarded by a reasonable person to be an indecent act”.

and later in British colonies in Africa, Asia, the Pacific and the Caribbean.²⁸⁶

The legal systems of western countries today universally subscribe to a separation of church and state (though with degrees of completeness). A deep cultural acceptance of this principle is a foundation for legal tolerance of difference as a fundamental social value. Legalization of homosexual acts in western Europe is historically linked to an increasing separation of church from state. The UK was far slower than its continental neighbours in accepting this principle, which remains far from absolute in Northern Europe today (including Denmark).

When religion has served as an important national unifier, it is more difficult to insist on a secular state. The symbolic importance of the law, as a visible marker of approval or disapproval, is tremendously important in many African countries. In public discussions in Africa, the very fact of criminalization is often invoked in a circular argument as a reason for why homosexuality is wrong. While most African states seem to be secular creations, confusion between the moral sphere of sin and righteousness on the one hand and crime and justice on the other is often apparent. No distinction is made between sin and crime. A long tradition in the English common law supported the enforcement of morality through the criminal law until quite recently.²⁸⁷

Mention has already been made of the declaration of Zambia as a Christian nation, while a former Catholic priest serving as Minister for Ethics in Uganda threatened to ban activities contrary to “the morals of the country” and to ban short skirts.^{288 289} This is an echo of similar laws and patriarchal attitudes in Malawi under its first President, Kamuzu Banda. State initiated and supported faith based organizations promoting sexual abstinence campaigns in Uganda (this time promoted by a modern woman rather than an old fashioned patriarch) further blurred this picture.²⁹⁰

Enlightenment figures such as Montesquieu and Beccaria warned of the difficulties of proof of homosexual acts and the danger of abusive accusations by tyrants, while Voltaire was one of the first to argue explicitly for decriminalization of homosexual conduct on the grounds that non-parties were not harmed by it.²⁹¹ Revolutionary France abolished the prohibition against homosexual sex. Many Latin American countries took their inspiration from these French republican principles, abolishing criminal penalties in the 1800s. Nineteenth century French colonialism did not export criminalization of homosexuality. West African francophone states have insisted more on secularism than Anglophone Eastern and Southern ones. Penalization of homosexual acts in former French colonies in Africa, where it exists, dates from the post-independence period. In

²⁸⁶ In Denmark, the “Danske Lov” of 1683 likewise prescribed the death penalty by burning for “intercourse against nature” Danske lov af 1683 6-13-15: “Omgængelse, som er imod Naturen, straffis med Baal og Brand.”

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²⁸⁸ <http://www.irinnews.org/Report/95844/UGANDA-New-LGBTI-clinic-faces-fierce-government-criticism>

²⁸⁹ <http://www.bbc.co.uk/news/world-africa-22375730>

²⁹⁰ The Ugandan First Lady’s “Youth Forum” is discussed in Chapter Seven.

²⁹¹ See generally Crompton, *Homosexuals and the Death Penalty in Colonial America*, University of Nebraska – Lincoln, 1976, Available at <http://digitalcommons.unl.edu/englishfacpubs>

contrast to the older, English inspired laws, penalization in these countries is usually gender neutral, penalizing same sex conduct by both men and women.²⁹² Looking at the map of Africa today, the legality or illegality of homosexual acts is to some extent as arbitrary as driving on the right or left hand side of the road. Unfortunately, this kind of observation can be used by conservatives arguing for criminalization, as well as by liberals arguing against it.

Mozambique and Angola, former Portuguese colonies, still have colonial era legislation providing penalties (confinement in a labour camp) for “habitually practicing acts against the order of nature”, but they do not specifically mention homosexual sex. Mozambique’s Minister for Justice has categorically stated that homosexuality is not illegal in the country.²⁹³

5.1.1 LEGAL / PHILOSOPHICAL ARGUMENTS FOR DECRIMINALIZATION

Chapter three mentions some of the weaknesses of the natural law arguments against homosexuality that criminalization legislation is based on. Denmark decriminalized homosexual acts between consenting adults in 1933, long before the liberalizing trend of the 1960s. Decriminalization in Denmark did not amount to social approval, though it may have helped it along in the longer run. The preparatory works for the law argued that criminalization was unnecessary because men over the age of 21 could be expected to defend themselves against unwanted advances. They voiced a continuing disapproval of homosexuality, and wanted to avoid public trials of homosexuals so as not to spread knowledge and risk the “contamination” that this might bring.²⁹⁴

In the Anglophone world, on foundations similar to Voltaire’s, John Stuart Mill’s famous *harm principle*, according to which the only justification for legally forbidding any conduct is harm to others, gradually win ground over religious morality as a basis for law.²⁹⁵ This placed the prohibition of “private immorality” in matters of sex outside the function of the law. In Britain and other English speaking countries though, it took several generations before these philosophical principles became law. In the 1960s, the role of morality in law was the subject of a famous debate between the conservative British judge Lord Devlin and the legal philosopher H.L.A. Hart. Hart questioned the assumption that community moral standards were in and of themselves a reliable basis for law. In some areas, including the prohibition of suicide and drug abuse, morality still exerts influence over the law. As seen below, the viewpoint of Devlin still holds sway among many jurists in Anglophone Africa.

²⁹² See ILGA, State Sponsored Homophobia report 2011. Examples include Benin, 1996, Cameroon, 1967 – 1972, Senegal, 1965. Other Francophone countries have adopted more recent legislation.

²⁹³ See Agencia de Informacao de Mocambique (1 March 2011), Praise for Recognition That Gay Sex Not Illegal. See also Report of the Working Group on the Universal Periodic Review: Mozambique, March 2011.

²⁹⁴ Straffelovens § 225 - en overflødig bestemmelse? Speciale fra Københavns Universitet (2005) Michael Bo Hansen, citing U1. motiv. 207

²⁹⁵ Though some of the northern new England colonies established by religious puritans adopted legal prohibitions taken directly from the biblical Old Testament.

As many have pointed out, the human rights system built after World War II initially passed over the question of sexual minorities in silence. Activism for the rights of LGBTI persons did not come from international human rights processes, but from below. Visibility of sexual minorities was a part of the powerful wave of liberalizing social change that swept over western countries from the late 1960s to the early years of the new millennium. Taking inspiration from struggles for the equality of women, and racial, religious and political minorities, sexual minorities came into the open and demanded equal rights and respect. In countries where criminal penalties had already been removed, the focus was on non-discrimination and increased visibility. Liberalization took place gradually, through internal democratic processes involving a broad societal discussion. Greater cultural acceptance went hand in hand with the gradual abolition of repressive criminal laws and other public expressions of inequality.

5.2 DECRIMINALIZATION THROUGH LEGISLATIVE PROCESSES

The English-speaking world was rather slow in this regard. The prohibition of homosexual conduct was abolished in England and Wales in 1967 (ten years after decriminalization of prostitution) based on the recommendations of the Wolfenden report a decade earlier, which relied on privacy arguments. Britain's failure to fully separate religion from the state was reflected in the legislation it brought to colonies in Africa. It is conceivable that quicker action on the report – before decolonization – could have brought decriminalization to Africa and the Caribbean and thus saved some countries from this colonial inheritance.

At the federal level, the USA took even longer to reach the same result, and characteristically did so through the judiciary rather than the legislature. While more liberal states of the USA had already taken the legislative route to repeal laws penalizing homosexuality, it took a decision by the federal Supreme Court to declare unconstitutional the prohibitions that more conservative southern states retained or had enacted as late as the 1970s. A majority of the US Supreme Court finally declared sodomy laws unconstitutional in 2003, basing itself on the protection of a constitutional right to engage in non-harmful conduct in private.²⁹⁶

For much of the period of liberalism from the 1960s and 1970s, many countries in the global South were not governed democratically and popular movements of all kinds were tightly controlled. Homosexual sex was criminalized in China and the former USSR until the 1990s, but not in most of Eastern and Central Europe. Democratization of socially diverse countries in the global South such as Brazil (where homosexuality had not been criminalized) and South Africa (where it was decriminalized after the abolition of apartheid) made it possible to avail of new freedoms and to begin to speak of a global campaign against criminalization of harmless sexual conduct between consenting adults.

Some countries have adopted legislation in recent years penalizing same-sex behaviour, providing for harsher criminal penalties for same sex acts, or extending the categories of

²⁹⁶ See the Lawrence v Texas decision of 2003, [539 U.S. 558](#) (2003). One justice (O'Connor) relied on grounds of equal protection rather than privacy, but this was not adopted by the majority.

acts or persons included. These include Burundi, Zimbabwe, Malawi and Nigeria. The Nigerian Bill imposes prison sentences of three years on persons contracting such unions, and five years on witnesses, as well as outlawing “gay” associations.²⁹⁷ Rwanda resisted the trend in 2009 when the country’s Minister for Justice resisted attempts to criminalize same sex acts.²⁹⁸ There do not appear to have been any prosecutions in Burundi as yet, and LGBTI organizations operate in the country.²⁹⁹ Apart from South Africa, two states in continental Africa have taken legislative steps to improve the rights of LGBTI persons. The labour and employment laws of Mozambique³⁰⁰ and Botswana adopt³⁰¹ the principle of non-discrimination based on sexual orientation, as do the island nations of Cape Verde, Mauritius and the Seychelles. Cape Verde decriminalized homosexual acts during a review of its Penal Code in 2004. In the same year, Namibia adopted a new Labour Act that dropped a requirement of Section 107 of the previous act of 1992 to refrain from discrimination on grounds of sexual orientation.³⁰²

5.3 JUDICIAL ROUTES TO EQUALITY / DECRIMINALIZATION – DOMESTIC AND INTERNATIONAL

In two cases from Southern Africa, the *Banana* case from Zimbabwe in 2000³⁰³, and the *Kanane* case in Botswana from 2003³⁰⁴ higher courts referred explicitly to public opinion (Zimbabwe) and the attitude of society (Botswana) as reasons to declare sodomy laws constitutional. The judgments in both of these cases refer to developments in public opinion over time. The *Kanane* decision in particular seems to suggest that the court is open to interpreting the constitution differently if evidence of a change in public opinion could be shown. As some African legal scholars point out, reasoning like this is problematic in a number of ways. The law forms public opinion, as well as being led by it. Secondly, the function of judiciaries is not to gauge public opinion (which they are very poorly equipped to do), but to interpret and apply the law. Thirdly, and perhaps most importantly, the very purpose of constitutional guarantees of human rights is to shield people – including unpopular minorities – from the whims of public opinion.³⁰⁵

In Kenya, there are hopes that the new constitution of 2010 and its extensive bill of rights will provide a basis for litigation to strike down criminal provisions against same-sex relations. Jurists with experience of strategic litigation were nevertheless of the view

²⁹⁷ Nigeria, Same Sex Marriage Prohibition Bill (SB 05), sections 4(1) and 4 (2).

²⁹⁸ <http://www.newtimes.co.rw/news/index.php?i=14895&a=49882>

²⁹⁹ Interview with Mr. Nyonzima, UNAIDS, Ouagadougou, Jan. 2013.

³⁰⁰ Adopted by Parliament on 11.5.2007.

³⁰¹ Act no. 10 of 2010 amended the Employment Act to prohibit dismissal on account of sexual orientation and HIV status.

³⁰² ILGA, State Sponsored Homophobia, 2012,

<http://www.ilo.org/dyn/natlex/docs/WBTEXT/29328/64850/E92NAM01.htm>

³⁰³ *Banana v The State*, 2000, 4 LRC 621 (ZSC)

³⁰⁴ *Utjiwa Kanane v. The State* Criminal Appeal No 9 of 2003

³⁰⁵ See Babafemi Odunsi, in *Human Rights Under Threat: Four Perspectives on HIV, AIDS and the Law in Southern Africa*, Viljoen and Precious (eds.), Pretoria University Law Press, 2007.

that it might be wise to start by litigating some cases in areas that are not quite as controversial or high profile, such as equality and non-discrimination in regard to employment, health services, education or housing. An over-eager rush to take a case on criminalization could lead to a bad precedent that will be harder to overcome.³⁰⁶ An additional problem however is that LGBTI organizations will not necessarily have the luxury of waiting for the best case. A foreign national running an orphanage for handicapped children in Kenya has challenged provisions of the Sexual Offences Act after being accused of having had sexual relations with young people in his care.³⁰⁷

The US example illustrates the use of constitutional or international human rights guarantees where prospects of legislative reform are weak in domestic contexts (in the US, the federated states). A weakness of judicial approaches is that change may lack the popular legitimacy given by legislative and public debate. It is striking that the major case law on decriminalization in the European and UN human rights systems comes from common law countries (the Dudgeon, Norris and Modino cases in the European system, the Toonen case from Tasmania). Likewise, the judicial victories of the past decade or so in South Africa, the USA, Nepal and India all involve the common law tradition.

The High Court of Delhi invoked a dual reasoning, relying both on considerations of **equality** on one hand, and **privacy and dignity** on the other, in striking down colonial era legislation that criminalized “carnal intercourse against the law of nature”.³⁰⁸ The High Court referred to recommendations of the Law Reform Commission to repeal section 377 of the Penal Code. The decision of the High Court, while not based explicitly on the right to health, makes reference to the right in the UN Covenant on Economic, Social and Cultural Rights and finds that criminalization of same-sex conduct fails to pass a reasonable test as a public health measure. The Supreme Court of Nepal relied on both equality and privacy guarantees to declare state obligations to protect sexual minorities and to recognize a third gender.³⁰⁹ Follow-up research among LGBTI people in Delhi shows that the LGBTI community has benefitted from the judgment in terms of greater social and self-acceptance. This is consistent with findings in other countries.³¹⁰

The European Court of Human Rights, like the USA, invoked privacy grounds, relying on the protection of the right to privacy and family life in Art. 8 of the European Convention on Human Rights to find that laws criminalizing adult, consenting homosexual acts were a violation of the convention in Northern Ireland, this was followed by a similar decision in respect of the Republic of Ireland.³¹¹

³⁰⁶ Notes on interview with Ms Monica Mbaru, Nairobi, Feb. 2013. Discussion with Ms Allison Jernow, ICJ Geneva, May 2013.

³⁰⁷ http://www.standardmedia.co.ke/?articleID=2000083271&story_title=australian-wants-homosexuality-legalised-in-kenya&pageNo=1, accessed 12.6.2013

³⁰⁸ *Naz Foundation v. Govt. of NCT of Delhi*, 160 Delhi Law Times 277 (Delhi High Court 2009)

³⁰⁹ Supreme Court of Nepal, *Pant v Nepal*. Writ No. . 917 of the year 2064 BS (2007 AD)

³¹⁰ <http://ualr.edu/socialchange/2013/01/13/impact-of-the-decriminalization-of-homosexuality-in-delhi-an-empirical-study/>

³¹¹ *Dudgeon v. United Kingdom*, Appl. No. 7525/76, Council of Europe: European Court of Human Rights, 22 October 1981

While the right to privacy has been a key plank in the characterization of criminalization as a human rights violation, learned commentators note its limitations and potential drawbacks. There may sometimes be an implication that LGBTI persons should confine any expression of this aspect of their identity to the private sphere.³¹² This view is seen in the attempts of some countries (notably in Central and Eastern Europe) to ban public expressions of homosexuality without criminalizing same-sex behaviour. (See discussion of freedom of expression in the following chapter.) Other grounds than privacy may be less confining. As Murray and Viljoen put it *“Invoking the right to equality as the basis for recognizing rights related sexual orientation, by contrast, affirms the entitlement of a minority group to full and equal respect.”*³¹³

5.3.1 THE UN HUMAN RIGHTS COMMITTEE

The UN Human Rights Committee interpreted “sex” to include “sexual orientation” as a prohibited ground of discrimination in the 1994 Toonen case involving Tasmania (Australia),³¹⁴ thus relying on equality and non-discrimination grounds, in respect of a right to privacy protected by the UN Covenant on Civil and Political Rights. The Human Rights Committee rejected health and public morality as justifications for a criminalization of private homosexual acts. The Committee reasoned that every other part of Australia, a multicultural society requiring accommodation of a diversity of moral viewpoints, had abolished criminal penalties. The federal Australian authorities were critical of Tasmania’s law on the issue. Even Tasmania had not applied them in many years, preventing it from arguing that these provisions were “necessary” to uphold public morality. Scholars noted that it could not be taken for granted that this reasoning would be applied universally.³¹⁵ These arguments would be weaker in a context of a homogeneous culture that disapproved of homosexual conduct, and perhaps more so in a state where laws against homosexual conduct were consistently applied.³¹⁶ On the other hand, human rights developments since 1994 tend towards a less restrictive interpretation. The Human Rights Committee has expressed “deep concern” about criminalization in its concluding observations to Cameroon and called for its removal.³¹⁷ The Committee made the same call for decriminalization to countries including Botswana on its 2008 report³¹⁸, in Malawi in 2012³¹⁹ and included this question on its list of issues for Kenya to respond to.³²⁰

³¹² See e.g. Edwin Cameron, *Sexual orientation and the Constitution: A Test Case for Human Rights*, 110 S. Afr. L. J. 450, 464 (1993)

³¹³ Murray and Viljoen 2007. Op cit.

³¹⁴ *Toonen v. Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994

³¹⁵ See e.g. Helfer and Miller, Harvard Human Rights Journal no. 9 (1996).

³¹⁶ Frederick Cowell and Angelina Milon, *Decriminalisation of Sexual Orientation through the Universal Periodic Review*, Human Rights Law Review 12:2 (OUP).

³¹⁷ UN Doc. CCPR/C/CMR/CO/4, 4 August 2010.

³¹⁸ UN Doc. CCPR/C/BWA/CO/1

³¹⁹ UN Doc CCPR/C/MWI/CO/1, 18 June 2012, see also discussion in Chapter Four.

³²⁰ UN Doc. CCPR/C/KEN/Q/3, of 22. 11.2011

Other parts of the UN human rights system, including the WGAD (see below) have taken *Toonen* to mean that criminalization is a violation of human rights per se. Other treaty bodies such as the UN Committee on the Elimination of Discrimination against Women have also taken up the rights of LGBTI persons in its examination of some countries, including Uganda.³²¹ The 2011 resolution of the UN Human Rights Council³²² and the report subsequently made by the UN High Commissioner with its unequivocal call for decriminalization³²³, reinforce the legal basis for considering criminalization a human rights violation under the ICCPR.

This opens the possibility of more complaints based on the *Toonen* precedent to the UNHRC. Nineteen African states where homosexual sex is penalized³²⁴ have ratified the first Optional Protocol to the ICCPR, permitting individual complaints to be made to the UN Human Rights Committee. These countries are: Algeria, Angola, Benin, Cameroon, The Gambia, Ghana, Guinea, Lesotho, Libya, Malawi, Namibia, Senegal, Seychelles, Sierra Leone, Somalia, Togo, Tunisia, Uganda and Zambia.³²⁵

This could have value for advocacy purposes, though it should be remembered that decisions of the Human Rights Committee are not legally binding on states parties to the ICCPR. Depending on the circumstances of the particular country, a decision by the Human Rights Committee could either contribute to a push for decriminalization or provoke adverse reactions. For many of the countries above, applicants would have to exhaust domestic remedies. For some, an argument could be made on the basis of domestic legal precedents that domestic remedies are unavailable on this issue. In countries such as Cameroon, where there have been a number of prosecutions and convictions, the possibility of finding an appropriate case seems even stronger. Apart from the clarification referred to above however, new cases would not necessarily add to human rights law.

The work of the African Human Rights system has so far not yielded jurisprudence on the issue of criminalization and is discussed in the following chapter. It is probable though that in any case brought before the UN HRC, the particularities of African human rights law – for example on the right to privacy - would be invoked.

5.4 DECRIMINALIZATION THROUGH CONSTITUTIONAL PROCESSES

In South Africa, political advocacy by LGBTI organizations in the constitution-making process set the stage for abolition of criminal penalties by the judiciary and the later adoption of far reaching legislation providing for the equal rights of sexual minorities. In hindsight, South Africa could easily have missed this opportunity. The ANC was far from

³²¹ CEDAW/C/UGA/CO/7. More generally, see: General Comment No. 2 of the Committee against Torture CAT/C/GC/2, at para. 21; General Comment No. 4 of the Committee on the Rights of the Child, CRC/GC/2003/4, at para.6.

³²² A/HRC/RES/17/19, 14 July 2011.

³²³ A/HRC/19/41

³²⁴ IGLHRC, *State Sponsored Homophobia*, 2012. op cit.

³²⁵ Source: UN Treaty Series: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-5&chapter=4&lang=en

unanimous in its support for the rights of LGBTI. Given that global precedents such as *Toonen* had not been established at the time of inclusion of sexual orientation in 1993, the achievement is all the more remarkable.

In the first half of the 1980s, there was no obvious alliance between gay and racial liberation movements in South Africa. Some members and factions of the (then exiled / prohibited) ANC opposed liberalization and adopted the well-known rhetoric of “unAfricanness of homosexuality.”³²⁶ South African LGBTI organizations were dominated by white South Africans who did not wholeheartedly support the liberation struggle. The divide between these two movements was bridged by the efforts of black LGBTI organizations such as LAGO and GLOW and activists such as Simon Nkoli who were also part of the liberation struggle. Sympathizers abroad also played their part, criticizing statements by some ANC representatives for failure to live up to principles of equality shared by most anti-apartheid supporters abroad. Senior ANC leaders such as Thabo Mbeki led the way on equality and combating prejudice, also within their own ranks.³²⁷ By the early 1990s, ANC policy had moved to support for constitutional protection against discrimination on the basis of sexual orientation. Advocacy led to a victory for in this position, and the 1996 Constitution made South Africa the first country in the world to constitutionally guarantee equality for sexual minorities, including sexual orientation among prohibited grounds of discrimination.³²⁸ Most other political parties also supported the provision.³²⁹

The broad consultation process regarding the draft constitution showed significant support for equality for sexual minorities that ultimately outweighed opposition to it.³³⁰ The broad and popular process of drafting and debating the constitution and the express prohibition of discrimination against sexual minorities gave the South African judiciary an incontestable platform for its later decisions on decriminalization and same-sex marriage. Without this, there can be no certainty that the courts would have felt at ease going against the strongly conservative sectors of public opinion against homosexuality. It cannot be taken for granted that social acceptance will follow from legislation, and even less so from a judicial decision, especially one that is based on rather vague and general international standards. Even with the express constitutional backing in South Africa, there are high levels of private violence against sexual minorities.³³¹

³²⁶ See http://www.petertatchell.net/LGBTI_rights/history/anc.htm

³²⁷ Dunton, Palmberg, 1996, p.48.

³²⁸ Section 9 (3).

³²⁹ Notes on interviews with Mr. Pierre Brouard, Centre for the Study of AIDS, Pretoria, South Africa, Feb. 2013. See also Christiansen, 32 *NYU Journal of International Law & Politics* 997 (2000), *Ending the Apartheid of the Closet: Sexual Orientation in the South African Constitutional Process*.

³³⁰ Dunton and Palmberg, p. 48

³³¹ See: “We’ll Show You You’re a Woman” Violence and Discrimination against Black Lesbians, and Transgender Men in South Africa, Human Rights Watch, 2011

Even today, support for the rights of sexual minorities cannot be taken for granted at high levels of the ANC, but legal change appears irreversible, and party discipline is generally made to bear on dissenters.³³² Post-apartheid legislation or jurisprudence adopted in various fields since 1996 includes same-sex equality in regard to dependants' medical benefits, housing, asylum claims and the adoption of children. Importantly, there was an express recognition that South Africa was a *political* community of diverse social, ethnic and religious communities. Semi-mystical notions of the nation as a cultural body or a Christian or Muslim nation that have arisen in other contexts³³³, and that demand uniformity, and "moral health" would not have sufficed.

As discussed, many African countries have undergone processes of constitutional review in recent years. Most of them have discussed same-sex marriage, mostly for the purpose of expressly prohibiting it. Ghana's Constitutional Review Commission reported in 2012 that most submissions to the Commission that addressed the issue clearly opposed giving constitutional recognition to the rights of lesbian and gay persons. Nevertheless, the Commission rejected proposals to explicitly exclude the possibility of same sex marriage, leaving it to litigation at the Supreme Court to resolve issues of this kind. The understanding of the state as a political, religiously neutral (secular) creation may ultimately be the strongest single argument for decriminalization. It should thus be emphasised in debates.

5.5 EXECUTIVE ACTION AND EXERCISE OF PROSECUTORIAL PUBLIC INTEREST DISCRETION

The declaration by Mozambique's Minister for Justice that homosexual acts are not illegal in the country is an example of executive action to improve the legal protection of LGBTI, in the form of an authoritative interpretative declaration on the law. Former President of Botswana Festus Mogae stated during a BBC programme that he instructed police not to carry out arrests during his term of office.³³⁴ A representative of the Government of Namibia reportedly made a similar undertaking.³³⁵

Reference has also been made to the actions of the President and Attorney General of Malawi, indicating their intention not to prosecute under anti-LGBTI laws. In common law legal systems, Directors of Public Prosecution (DPPs) and State Attorneys often have considerable discretion in deciding whether or not to prosecute cases, based on their assessment of the public interest, as well as on the sufficiency of evidence. This discretion could be the basis for a policy of not prosecuting many cases of private and consenting adult same-sex relations. The Attorney General of Ghana was quoted as

³³² President Zuma's early condemnation of homosexuality was criticized, leading him to issue an apology. See <http://news.bbc.co.uk/2/hi/5389378.stm> More recently, he criticized Malawi for arresting gays: <http://globalequality.wordpress.com/2010/05/27/zuma-slams-malawi-imprisonment-of-gays/>. In 2012, CONTRALESA, the ANC affiliated organization of traditional leaders submitted proposals to remove "sexual orientation" as a prohibited ground of discrimination in the constitution, see: <http://www.mambaonline.com/article.asp?artid=6912>

³³³ Dunton and Palmberg, 1996, p.19.

³³⁴ <http://www.youtube.com/watch?feature=endscreen&v=iFLc-P4e3Wc&NR=1>, at 1:30. Accessed 29.5.2013.

³³⁵ Notes on interview with Mr. Gabriel Hoosain Khan, GALA, Johannesburg, South Africa, 7.2.13.

saying that the legal prohibition on homosexual acts did not extend to acts done in the privacy of the home.³³⁶ Prosecutorial discretion is often exercised away from the public eye. It is thus not easy to document on this issue. Executive policies or legal interpretations like this could usefully be promoted where formal decriminalization is still some time away.

5.6 LEGISLATIVE PROHIBITION OF “UNNATURAL ACTS”

In the light of current scientific knowledge, the word “unnatural” as used in this legislation cannot be used to mean “not occurring in nature”. As many biologists and naturalists have pointed out, examples of same sex sexuality in nature are abundant.³³⁷ As discussed in Chapter three, “natural” and “unnatural” have normative rather than descriptive meanings based on Christian (Thomist) ideas of natural law. Typically, not all judges or prosecutors in Africa or elsewhere will be aware of this background.

Penalties for so-called “unnatural acts” (meaning anal sex) were increased from 14 years to life imprisonment in Uganda through changes to the Penal Code in the early 1990s in the context of heightened fears concerning HIV / AIDS. This legislation came just some two years before the decision of the Human Rights Committee in *Toonen*, which explicitly found that the threat of HIV / AIDS did not justify criminalizing homosexual conduct. Section 145 of Uganda’s Penal Code criminalizes both the active and passive parties to the “unnatural act” of sodomy, but the offence would only appear to be committed where the penetration is done with the penis. Thus, the act can be committed between two males or a male and a female, but not between two females. The same is true of section 162 of Kenya’s Penal Code.³³⁸ Under section 73 of Zimbabwe’s Criminal Code on the other hand, the offence can only be committed between two males (“Any male person who, with the consent of another male person, knowingly performs with that other person anal sexual intercourse”³³⁹).

Section 174 of the Ghanaian Criminal Code makes it a misdemeanour “to have unnatural carnal knowledge” of a person, defined as sexual intercourse in an unnatural manner.³⁴⁰ The wording of this section could be interpreted as meaning that it is only the active party who is committing a crime, though there is no jurisprudence on this.

5.6.1 “INDECENCY” TYPE PROVISIONS

Legislation in most of the common law countries prohibits both “unnatural acts” and “indecent” or “gross indecent”, to cover sexual behaviour that does not amount to

³³⁶ <http://www.dailyguideghana.com/?p=43822>

³³⁷ Bailey, N.W. and Zuk, M. 2009. Same-sex sexual behavior and evolution. *Trends in Ecology & Evolution* 24: 439-446

³³⁸ Laws of Kenya, Cap. 63, Rev. 2009.

³³⁹ Criminal Law (Codification and Reform) Act [Chapter 9:23] Act 23/2004, Sec. 73

³⁴⁰ Sec. 296 (4) of the Criminal Procedure Code states that misdemeanours are punishable by up to three years in prison. This is significantly milder than provisions found in the laws of Uganda, Zambia, Kenya etc.

intercourse / penetration. Sometimes this is a lesser offence. For example, section 156 of Malawi's Penal Code³⁴¹ provides for a penalty of five years imprisonment for the felony of gross indecency, less than the fourteen years for "*carnal knowledge against the order of nature*" set out in section 153. In the well-publicized case involving a same-sex marriage of Steven Monjeza and Tiwonge Chimbalanga³⁴², the two were convicted of both offences. The Malawian Court used the Oxford Dictionary to legally define indecent as meaning to contravene "accepted standards".

Section 73 of the Zimbabwean Penal Code on the other hand, defines sodomy to include "*any act involving physical contact other than anal sexual intercourse that would be regarded by a reasonable person to be an indecent act.*"

Some former French colonies that have criminalized same-sex conduct have adopted similarly general language. Article 319.3 of Senegal's Penal Code prohibits "*improper or unnatural acts with a person of the same sex*". In Cameroon, the law prohibiting same sex behaviour is actively enforced, with a number of cases of imprisonment in the past decade.^{343 344} Article 347 *bis* of the Penal Code simply prohibits sexual relations between persons of the same sex.

The generality of the law's wording makes it easier for prosecutors and courts to prosecute and convict, sometimes on flimsy evidence such as allegedly having worn women's clothes. Thus, should state authorities be inclined to prosecute, there is probably a greater danger of successful prosecutions and convictions under "indecency type" provisions than for "unnatural acts".³⁴⁵ According to the British campaigner Peter Tatchell, a wave of moralistic politics under the Conservative government meant that there were more successful prosecutions for indecency in the 1980s than there were in the 1950s.³⁴⁶ It is thus important that campaigns for decriminalization do not ignore "indecency" provisions.

A recent report by HRW points toward additional problems with both sodomy and indecency provisions. Where prosecution takes place under these provisions, there is often no complainant. This means that provisions of criminal procedure law that call for the dropping of a case where a complaint is withdrawn do not apply³⁴⁷. A further problem is that some African countries lack criminal law provisions against same-sex rape. If police prosecute same-sex rape under provisions on homosexual behaviour, there is a conflation of these two entirely different acts, and same-sex rape is treated differently than rape of someone of the opposite sex.

Even where same-sex sexual behaviour is not criminalized, there are often legal

³⁴¹ Found online at: http://ppja.org/countries/malawi/Malawi_penal_code_pdf_14611.pdf

³⁴² See e.g. <http://www.amnesty.org/en/news-and-updates/malawian-men-facing-trial-gross-indecency-must-be-released-2010-03-22>

³⁴³ <http://www.amnestyusa.org/our-work/cases/cameroon-jean-claude-roger-mbede>

³⁴⁴ <http://www.bbc.co.uk/news/world-africa-15871386>

³⁴⁵ Both Alan Turing and Oscar Wilde were in their time convicted of gross indecency.

³⁴⁶ http://www.petertatchell.net/lgbt_rights/criminalisation_of_gays/criminal_injustice.htm This information has not been independently verified for this study.

³⁴⁷ HRW, Guilt by Association, March 2013. Available at www.hrw.org

provisions that could be used against LGBTI persons by police, prosecutors and judges. Thus Article 410 of the Penal Code of Burkina Faso criminalizes acts contrary to morality (*bonnes mœurs*) that take place in public or in a private place open to public view. The country mission to Burkina Faso did not uncover reports of LGBTI persons being prosecuted under this section / article, though all LGBTI and other persons met were acutely aware of the need for discretion. One interviewee stated that some police officers might not be aware that same-sex acts were not criminal. Reference has been made to the Nigerian Same Sex Marriage (Prohibition) Bill of 2011 which not only criminalizes same-sex marriages, but – in one version - would prohibit the registration and operation of any gay organization or club in the country.

5.6.2 UNCONSTITUTIONALITY BECAUSE OF VAGUENESS?

There are important legal arguments against (especially criminal) legislation containing vague language that calls for subjective assessments of what is “indecent”, “improper” or “unnatural”. It is a long established principle of American constitutional law that criminal statutes (and increasingly even civil obligations) must be sufficiently clear as to allow a reasonable person to know with certainty what kinds of conduct are permitted or forbidden. Legislative provisions that are overly broad give unwarranted authority to judges or government officials, creating the risk of arbitrary prosecutions and convictions. They thus lack the essential quality of law and are therefore unconstitutional.³⁴⁸ Most newer African constitutions underline the fundamental principle of the rule of law and thus contain a basis for recognition of a rule against vague criminal legislation. It is up to lawyers and jurists to develop this principle.

5.7 SOME IMMEDIATE EFFECTS OF CRIMINALIZATION

The country visits and literature review showed that, with the exception of Cameroon, relatively few prosecutions are brought under these laws. Criminalization nevertheless sends a signal to the population that sexual minorities are outlaws. This is often used to justify violence, social discrimination and the denial of other basic rights. People engaging in homosexual behaviour are made vulnerable to blackmail and extortion. Members of sexual minorities are also deprived of legal protection against private attacks against them because they fear arrest or prosecution on the basis of their sexuality.

Criminalization is used as an argument against the provision of condoms, whether in connection with HIV / AIDS programming generally or in particular settings such as prisons (where HIV / AIDS rates are disturbingly high) because to do so would be to facilitate the commission of a criminal offence. It is common knowledge among law enforcement and prison personnel that same-sex acts take place in prisons, and the risk of HIV infection is considerable. Despite this, very few countries facilitate or permit the distribution of condoms in prisons. This is the case even in Burkina Faso, where

³⁴⁸ See http://www.law.cornell.edu/wex/vagueness_doctrine

homosexual sex is not illegal. According to a USAID AWARE study there, prison officials prohibit condoms in prisons based on an interpretation of Penal Code provisions that deny enjoyment of civil rights – including sexual relations – to prisoners.³⁴⁹ In some contexts, there may be a possibility of carrying out strategic litigation on the issue of condom provision in prisons. Given that a great many persons in African prisons are pre-trial detainees, prohibitions on the enjoyment of civil rights may not apply. Another approach could be to try to compel prison systems to comply with a due diligence demand to protect prison inmates against a demonstrable risk of infection based on nationally or internationally protected health rights.

Gay Kenya Trust has engaged in high quality advocacy by producing a publication outlining the economic costs of criminalization, especially as regards HIV / AIDS. It makes convincing arguments to national policymakers on how prevention and treatment efforts are undermined by criminalization, and show the benefits of engaging MSM communities in prevention efforts.³⁵⁰

Beyond its immediate effects, criminalization casts a deep shadow over the lives of LGBTI persons that affects all aspects of their lives and on discussion of this aspect of sexuality by society more generally. While decriminalization is in no way a panacea in relation to these problems, it has the potential to alleviate most of them and to permit the carrying out of vital work towards a more enlightened life in this important area of human life.

³⁴⁹ Duvall, Beardsley et al, 2012 op cit.

³⁵⁰ See Kuria Mbote, “Breaking the Wall of Criminalization”, Gay Kenya, 2011.

6 THE HUMAN RIGHTS FRAMEWORK AND SYSTEMS

6.1 THE OBLIGATIONS TO RESPECT, PROTECT AND FULFIL AND THE HUMAN RIGHTS BASED APPROACH

State obligations under human rights treaties are of three kinds. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.³⁵¹

The Human Rights Based Approach to development (HRBA) emphasizes how development should be explicitly based in international human rights standards, and on values including participation, accountability, empowerment, transparency and non-discrimination. These values are interlinked, so that public participation in policy processes depends on transparency in state action, decision-making and policy development. The Danish development strategy includes³⁵² other actors than states who have a stake in whether human rights are respected or not, hence the focus on this study on social and religious actors, media, etc.

6.1.1 THE OBLIGATION TO RESPECT THE RIGHTS OF LGBTI PERSONS

As discussed in the previous chapter, the obligation to respect demands *inter alia*, decriminalization homosexual acts between consenting adults.³⁵³ On the surface, this obligation, being economically “cost-free” is the easiest for state parties to accept and is thus a priority for international advocacy.

³⁵¹ Office of the High Commissioner for Human Rights. See <http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx>

³⁵² The Right to a Better Life, 2012 p.11.

<http://amg.um.dk/en/~media/amg/Documents/Overall%20Policies/Strategy%20-%20The%20Right%20to%20a%20Better%20Life/The%20right%20to%20a%20better%20life.jpg>

³⁵³ OHCHR, Born Free and Equal, 2012.

Criminalization is a key concern, but the obligation to respect does not stop there. States are obliged to ensure to LGBTI persons the same rights as other persons, including to be free from discrimination and to freely assemble, associate with others and to express themselves. The issue of discrimination is far-reaching in scope. The obligation of the state to respect equal treatment applies to the state's dealings with semi-state and private bodies that carry out functions on behalf of the state. This may include all kinds of CSOs and firms that provide public services by agreement with the state. Depending on the nature of such agreements or by-laws, treatment of LGBTI persons may or may not be indirectly attributable to the state, and may thus fall either within the "respect" or "protect" obligations. Even where homosexual acts remain criminalized, human rights organizations should document and campaign against prosecutions and the abuse of police power against suspected members of sexual minorities. Transparency should be demanded in relation to the use of sodomy laws and other legal provisions as a way to hold authorities to account.³⁵⁴

6.1.2 THE OBLIGATION TO PROTECT LGBTI PERSONS: EQUAL PROTECTION

Meaningful protection requires prior fulfilment of the obligation to respect. As long as there is criminalization of consenting adult homosexual conduct, LGBTI persons (especially homosexual men) remain unprotected by the law in important ways.

The rights of LGBTI persons ought to be examined in the context of enjoyment of the same rights by other members of society. Most LGBTI activists in Africa recognize that their protection is only one of many human rights issues facing African societies, and not always the most urgent one. The issue is *equal protection* of the rights of LGBTI persons. Because of poverty, challenges of state building and capacity gaps, the unfortunate reality is that *equal protection* does not always amount to adequate protection, either for LGBTI or for other members of society. In many areas, LGBTI persons must hope to benefit from improvements in protection by the justice system rather than special treatment, though there are areas where the latter is warranted. In countries such as Uganda, the judiciary, the Bar and the Ugandan Human Rights Commission have in recent years taken steps to defend the rights of LGBTI Ugandans.

The problems of African justice systems in ensuring protection to many vulnerable groups, including poor widows, victims of gender based violence, trafficking and sexually abused children are well-known. While protection against these phenomena is, as a matter of international law, supposed to be provided here and now rather than subject to "progressive realization" (like many economic, social and cultural rights³⁵⁵), the reality is that state resources are limited and subject to budgetary and political prioritization, so some resort to utilitarian criteria is inevitable, whether acknowledged or not. The most urgent human rights priorities can be determined according to the seriousness of the violations, the number of victims and the vulnerability of the groups concerned.

³⁵⁴ Nevertheless, LGBTI organizations may not think that it makes tactical sense to generate publicity in this regard. Sodomy laws are difficult to enforce because of the privacy surrounding sexual acts, and there are few convictions (see *infra*). Activists with anti-LGBTI agendas may use such statistics as a tool to call for a tightening of laws.

³⁵⁵ See ICESCR Art. 2.

Western actors and commentators need to avoid giving the impression that they are seeking a greater use of public resources for LGBTI persons than for other vulnerable groups. The lack of documentation makes it hard to measure the seriousness of human rights violations (even those only involving liberty and security of the person) against LGBTI persons as compared to other sections of society or vulnerable groups. Better documentation of violations can lead to a more qualified discussion in this regard. Naturally, this requires sufficient respect for rights of freedom of association for LGBTI organizations to operate and document problems. Following on this, it requires recognition of these groups in state policies and indicator systems. The issue of documentation is discussed below.

6.1.3 SPECIAL PROTECTION

Where LGBTI persons are especially vulnerable to certain types of violence or discrimination, particular efforts to protect them are required, as is the case for other vulnerable groups. One example of this is protection against hate crimes, homophobic bullying etc. This is discussed below, especially in regard to South Africa. Reports in Kenya and elsewhere document how LGBTI people may be vulnerable to discrimination in employment, housing and education. During interviews conducted in Burkina Faso, both gay men and lesbians stated that they had not encountered severe discrimination in employment or housing, but that this was to some extent conditioned on their remaining discreet about their sexual orientation. People around them might be aware of their sexual orientation, but as long as a “don’t ask don’t tell” code prevailed, discrimination was often absent. One well-known incident in regard to housing in Burkina Faso is mentioned in Chapter Two above. None of these interviewees mentioned discrimination in education as a problem, though the same code of silence prevailed. In Kenya, several activists mentioned being forced by landlords to move away from their houses because of their sexual orientation. KHRC reports that there has been no systematic documentation of this.³⁵⁶

Conditioning tolerance on silence is ultimately unsatisfactory, but a gradually increasing openness accompanied by tolerance is arguably better than forcing an openness that may provoke increased intolerance. Assessments of the best way forward in this regard are best made by nationals, on the basis of human rights.

6.1.4 THE OBLIGATION TO FULFIL

State law and institutions cannot be the only locus of efforts to improve respect for the rights of LGBTI. The obligation to “fulfil” the rights of LGBTI persons needs to address social attitudes that enable discrimination. Among the greatest problems for LGBTI people in Africa is the risk of social exclusion and ostracism by families. As discussed below, African social and economic structures are such that this can enable discrimination in regard to many social and economic rights. Promotion of greater

³⁵⁶ KHRC, *The Outlawed Among Us*, 2011, p.7.

understanding of SOGI issues by NGOs and public bodies is necessary to combat these problems. Instruments have been developed and applied to measure stigma in relation to HIV / AIDs, but not specifically to LGBTI persons.

The respect, protect and fulfil framework can be applied to any right or category of rights. In regard to the rights of LGBTI persons, UN resolutions and the UN High Commissioner place an immediate focus on rights related to physical security. The table below sets out how the respect, protect and fulfil trio can be combined with HRBA principles in relation to human rights related to personal liberty and security.

Right to liberty and security of the person			
	Respect	Protect	Fulfil
Transparency	Documentation of numbers of arrests, prosecutions and convictions for homosexual acts;	Documentation of incidents of private violence against sexual minorities	Government action to facilitate discussion of the problem of private violence in society.
Accountability	Documentation of abuse of police power against sexual minorities and action taken to prevent and punish such acts.	State action to punish perpetrators of private violence or intimidation against sexual minorities	Government action to ensure that redress mechanisms are in place in institutions to prevent and punish acts of private violence or intimidation.
Non-discrimination	Removal of Legislation that makes consenting same sex acts between adults criminal, or that treats same-sex relationships more harshly	Ensuring that sexual minorities enjoy the same protection against violence as others in society	Government action to ensure that campaigns against private violence or intimidation do not exclude sexual minorities
Vulnerable groups	Combat double-victimization of hate crime victims	Special attention to combating any patterns of violence or intimidation	Mostly contained in the above
Internationally recognized rights	ICCPR Art. 6 - 13 African Charter Art. 4 - 6		

6.2 MAJOR HUMAN RIGHTS ISSUES FACING LGBTI PERSONS IN AFRICA

While categories of rights are considered separately in this text, they are closely linked in practice. As stressed many times herein and elsewhere, criminalization enables

discrimination, even if it is not its only cause. Exercise of civil and political rights by LGBTI persons may be a “downstream” effect of increased organization around issues like HIV / AIDS. Visibility may lead to an increase in incidents of violence in the short term. In the longer term, the hope is that increased space for civil society advocacy and the removal of legally mandated prejudice will lessen violence.

6.3 LIFE, LIBERTY AND SECURITY OF THE PERSON AND BODILY INTEGRITY

6.3.1 THE OBLIGATION TO RESPECT THE RIGHT TO LIFE AND THE DEATH PENALTY

Imposing the death penalty for consenting same sex conduct is a violation of international human rights law on the right to life. The UN General Assembly³⁵⁷, Human Rights Committee, and the Human Rights Commission, have all taken the clear position that the ICCPR obligation to apply the death penalty only to the most serious crimes obliges states not to impose the death penalty for homosexual acts, especially consenting homosexual acts between adults.³⁵⁸ The UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions (SRESAE, or in this section, the Special Rapporteur) has included consideration of the death penalty under this mandate since at least 2000.³⁵⁹ The Special Rapporteur recommended that the Nigerian Federal Government should reiterate to its federated states that legislation imposing the death penalty for same-sex acts is unconstitutional and should undertake a legal challenge against this state legislation.³⁶⁰ The specific issue of this offence is however part of a larger constitutional difficulty in posed by Sharia criminal law in Nigeria, and there is no immediate prospect of such a challenge.

We have not found precise statistics on application of the death penalty from the relevant African states. These are Mauritania, and Sudan, and parts of Nigeria and Somalia. During the one year period that northern Mali was controlled by Islamists, the death penalty was reportedly decreed for homosexual acts. French troops reportedly saved two men in the town of Gao from execution.³⁶¹ News reports from Somalia confirm recent executions,³⁶² while a UK newspaper reported in 2012 that no stonings have taken place for this in Nigeria, although there have been some convictions.³⁶³ Mauritania reported to the UN Human Rights Council in 2010 that no-one had been executed for any criminal offence since at least 1990. The US Embassy in Mauritania

³⁵⁷ See the 2012 Resolution of the UNGA, A/C.3/67/L.36, para. 5.

³⁵⁸ The 2012 report of the UN Special Rapporteur provides the following references: Human Rights Committee: homosexual acts, (CCPR/C/79/Add.85, para. 8), illicit sex (ibid.), Human Rights Commission: sexual relations between consenting adults (resolution 2005/59 of the Commission on Human Rights, para. 7 (f)).

³⁵⁹ UN Doc. E/CN.4/2000/3, para. 70.

³⁶⁰ UN Doc. E/CN.4/2006/53/Add.4, 7 January 2006

³⁶¹ <http://www.reuters.com/video/2013/02/03/escape-from-execution-in-mali?videoId=240917961&videoChannel=1>

³⁶² <http://www.advocate.com/news/world-news/2013/03/20/gay-somali-teen-stoned-death-village-forced-watch>

³⁶³ <http://www.guardian.co.uk/world/2012/sep/21/nigeria-court-jails-actor-gay-offence>

reportedly stated in December 2009 that it was not aware of any prosecutions ever having taken place under Article 308 of the Criminal Code³⁶⁴ and that despite the harsh law, there was a level of social toleration.

In Sudan, the death penalty is applicable for a third conviction for sodomy under Article 148 of the 1991 Penal Code, introduced after the move to Islamic law in the country. Literature and internet searches did not reveal any reports of executions. The African Commission has recommended to Sudan that it introduce a moratorium and take steps to abolish the death penalty for all offences.³⁶⁵ The proposal to introduce the death penalty in the AHB in Uganda for “aggravated homosexuality” does not need detailing here. Sponsors of the Bill said it would be removed, but – contrary to news reports in November 2012 - this had reportedly not been done at the time of its reintroduction in Parliament in February 2012.³⁶⁶

6.3.2 THE OBLIGATION TO PROTECT: MURDER OF LGBTI PERSONS AND ACTIVISTS

In a number of reports since 2002, the UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions has paid particular attention to the vulnerability of sexual minorities as a group that is particularly vulnerable to threats to their life because of stigmatization and prejudice.³⁶⁷ The subject of African votes on this issue by the UNGA’s Third Committee is discussed below. As with other killings, human rights law demands that states show diligence in preventing, investigating, prosecuting and judging killings of LGBTI persons. Failure to do so, and particularly any indication that LGBTI who are the victims of acts or threats do not receive the same protection as others is likely to amount to a violation of international human rights law. (In particular, Article 6 of the ICCPR and Article 4 of the African Charter.)³⁶⁸

The 2011 murder of David Kato in Uganda received publicity internationally due to his fame and achievements as an activist, and the threats he had been exposed to because of publication of his details by a Ugandan newspaper. No evidence has so far been produced to undercut the finding of the Ugandan justice system that he was murdered by a male prostitute in an ordinary crime.

The disturbing July 2012 murder of the Tanzanian LGBTI activist and HIV / AIDS worker Maurice Mjomba, for whom no-one has been arrested, illustrates the fear in which activists in some countries live. In what appeared to be a hate crime, Mjomba had reportedly been bound and gagged with tape and savagely beaten in his own home. The murder does not appear to have been given great attention in the Tanzanian media or

³⁶⁴ <http://www.cablegatesearch.net/cable.php?id=09NOUAKCHOTT815>

³⁶⁵ <http://www.achpr.org/states/sudan/reports/4thand5th-2008-2012/>

³⁶⁶ <http://www.boxturtlebulletin.com/2012/11/30/51480>

³⁶⁷ See UN Documents E/CN.4/2002/74.9, E/CN.4/2004/7

³⁶⁸ See International Commission of Jurists, *Sexual Orientation, Gender Identity and International Human Rights Law*, Practitioners Guide No. 4, pp. 88 – 90.

among Tanzanian human rights organizations. At time of writing, there have been no reports of any arrests for the murder. This unfortunately echoes the course of murders of activists in other countries, such as Sierra Leone.³⁶⁹

6.3.3 MURDERS OF LGBTI GENERALLY

Of the three countries visited for the study (Kenya, Burkina Faso and South Africa) it was only in South Africa, the country with the most liberal legislation, that killing of LGBTI persons – especially lesbians and transmen is a current human rights issue. South Africa’s attempts to tackle hate crimes are discussed below.

6.4 NON-LETHAL VIOLENCE

Focus group members and organizations met in Burkina Faso did not mention grave violence as among their main fears and concerns. The lack of any organizational structure and documentation of violations means however that it is possible that there is underreporting of such problems, even in Burkina Faso. While only anecdotal evidence is available in most contexts, the reality in the continent generally is probably that small scale violence of this kind is pervasive and grossly underreported.

6.4.1 THE ROLE OF HUMAN RIGHTS DEFENDERS

Even most conservatives who are opposed to decriminalization condemn violence. The issues of violence by state agents, and private violence with a failure to protect may be one of the best issues on which to make human rights progress for LGBTI people at national levels as well as forums such as the African Commission on Human and People’s Rights. In Kenya, the 2011 report by the KHRC³⁷⁰ describes many incidents of violence against LGBTI. The reported incidents involving police include illegal arrest and detention, extortion and homosexual rape. Non-state perpetrators of violence include the Mungiki criminal gang, religious leaders (incitement and threats) and others such as nightclub bouncers, as well as ordinary members of the public. The KHRC report is an important start in the effort to bring the problem of homophobic violence to light, documenting types of violence and its prevalence by region.³⁷¹ SMUG in Uganda has also begun to document violations of this kind,³⁷² and a recent report by Pride Equality in Sierra Leone does the same.³⁷³

African civil society organizations who are sympathetic to the rights of LGBTI are working to improve documentation in this area with a view to presenting it at the

³⁶⁹ <http://news.bbc.co.uk/2/hi/africa/3716768.stm> There were reports of an arrest in the case, but no conviction.

³⁷⁰ The Outlawed Among Us, 2011, op cit.

³⁷¹ Ibid, p.32.

³⁷² Conversation with Frank Mugisha, Copenhagen, October 2012.

³⁷³ <http://www.prideequality.org/discrimination.pdf>

African Commission.³⁷⁴ Some hope that this may in time lead to a resolution by the African Commission.³⁷⁵ Plans in this regard by African civil society are discussed below. Tackling anti-LGBTI violence as a human rights issue is central to the strategy that has been pursued in other contexts, including in Latin America by OAS organs.³⁷⁶ From there, the link can be made to a demand to punish perpetrators of such violence and a greater attention to the issue by law enforcement and justice officials.

Despite the very serious problem posed by homophobic violence, it is important to avoid fatalism. While there are many reasons to proceed carefully, there is no inevitability to hate crimes or anti-LGBTI violence. In many historical and contemporary settings, a lack of full acceptance is not equivalent to a culture of personal violence. Societies where there are reports of high levels of anti-LGBTI violence (for example Colombia or South Africa) have high rates of violent crime generally and issues of problematic masculinities. In these circumstances, LGBTI people are often particularly vulnerable. In African conditions, with high levels of prejudice against LGBTI and low capacity among of state agencies to provide protection and promote tolerance, the risk of violence associated with greater visibility is high. Greater visibility must go hand in hand with plans and mechanisms for legal and physical protection.

6.4.2 GENDER BASED VIOLENCE AND LGBTI PERSONS

The issue of sexual and gender based violence was brought onto the international human rights agenda in the 1990s as a result of sustained critical analysis and advocacy by women's rights activists. There are some possibilities that this development can become inclusive of LGBTI persons and the human rights violations that they are subject to. The UN Declaration of the Elimination of Violence Against Women (DEVAW) states that: *"violence against women means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life"* (UNGA DEVAW 1993:Art. 1).

This definition would strictly speaking only cover lesbians (and perhaps transgender women, if this concept is recognized officially in the country concerned) as survivors / victims. The 2006 report by the UN SG mentioned violence against lesbians as an issue of concern, but not transgender women.³⁷⁷ The UN Special Rapporteur on Violence against Women (SR VAW) generally takes up the issue of violence specifically directed at

³⁷⁴ Interview with Prof. Frans Viljoen, Centre for Human Rights, Pretoria University, Feb. 2013.

³⁷⁵ Notes on interview with Kene Esom, Amsher, Johannesburg, 5.2.2013.

³⁷⁶ http://www.oas.org/en/iachr/media_center/PReleases/2012/146.asp

³⁷⁷ Ending violence against women From words to action Study of the Secretary-General, 2006 ISBN-10: 92-1-112703-3, ISBN-13: 978-92-1-112703-4

sexual minorities in her country visit reports.³⁷⁸ This is however typically one issue among many of concern and it cannot take centre stage in the work of this mandate.

The more recent definition adopted by a technical committee in the UN, the IASC, (2005): defines gender based violence as “any harmful act that is perpetrated against a person’s will and that is based on socially ascribed (gender) differences between males and females”.³⁷⁹ Thus the “SGBV” abbreviation is open to inclusion of violence based on sexual orientation or gender identity. International studies of this issue have often omitted African countries, principally because of the lack of a legislative and institutional framework that makes collection of data possible.³⁸⁰ CAL has worked for inclusion of violence based on SOGI in studies, discussions and programmes on sexual and gender based violence.³⁸¹ As the table below illustrates, this has hitherto rarely been the case.³⁸² Of the multilateral agencies, UNHCR is so far the only one to specifically address LGBTI under this rubric. UNFPA is reportedly considering doing so in connection with its development of a new strategy.³⁸³ UNFPA and some other agencies have attempted to address “masculinities” in their work. UNFPA, the World Bank and UNDP succeeded in bringing LGBTI themes and activists onto the agenda of an African regional consultation on HIV / AIDS and the law in 2009.³⁸⁴ There are still few examples of openings like this for the “L, B, T and I” minorities. Donor organizations funding and engaging with studies of this kind need to work with national partners to make sure that violence against LGBTI persons is considered.

There are manifestations of violence, even including murder, that are barely touched upon in existing literature. KHRC mentions the abandonment or killing of intersex children, though without providing figures or referring to research.³⁸⁵

Country	Organization	Type	Year	Mention of LGBTI
Burkina Faso	Interagency Working Group	Baseline study	2008	No
Burkina Faso	Gov.t. / UNFPA	Survey of schools	2009	No
Rwanda	UNIFEM / NUR	Baseline survey	2008	No

³⁷⁸ UN Doc. E/CN.4/2005/72, para. 27

³⁷⁹ UN Interagency Standing Committee: Guidelines for Gender Based Violence Interventions in Humanitarian Settings. http://www.humanitarianinfo.org/iasc/documents/subsidi/tf_gender/GBV/GBV%20Guidelines%20Definitions.pdf

³⁸⁰ Human Rights First, Violence Based on Sexual Orientation and Gender Identity Bias 2008 Hate Crime Survey

³⁸¹ Discussion with CAL representatives, Johannesburg, February 2013.

³⁸² This list is not intended to be exhaustive, but to be sufficiently representative to illustrate a trend. It is confirmed by larger studies: <http://genderjustice.org.za/projects/international-programmes/conflict-a-post-conflict/unfpa-study-on-gbv.html>

³⁸³ A 2012 – 2013 UNFPA brochure on GBV “Addressing Gender Based Violence” discusses many relevant issues, including men and boys as victims of GBV and notions of masculinity, but there is no mention of LGBTI or SOGI as such. According to a UNFPA interviewee in Burkina Faso, this is expected to change

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<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/EXTAFRHEANUTPOP/EXTAFRREGTOPHIVAIDS/0,,contentMDK:22159598~pagePK:34004173~piPK:34003707~theSitePK:717148,00.html>

³⁸⁵ KHRC The Outlawed Among Us, 2011, p.25, op cit.

Kenya	FIDA Kenya	Survey	2011	No
Kenya	ACCORD		2010	No
South Africa	Genderlinks	Survey	2012	Yes
Uganda	ACFODE		2009	No
Uganda	UWONET	Capacity Assessment	2011	No
Uganda	National Bureau of Statistics	Situation Analysis	2009	No
Regional	Population Council	Literature Review	2008	Yes
Regional	Raising Voices / UN Habitat Safer Cities	Organizational survey & Dialogue		No
Regional (Francophone West Africa)	Oxfam Quebec	Synthesis of studies	2006	No
Regional West Africa	UNICEF / Action Aid, Plan, Save the Children (Swe)	Qualitative study of schools	2010	No
Global	UNHCR	Strategy	2011	Yes
Global	IASC		2005	Implicitly included
USAID recipient countries	US DOS	Strategy	2011	Yes

6.4.3 HATE CRIMES

Hate crimes against LGBTI persons are a particularly serious human rights issue in South Africa, both in terms of the seriousness of the violations and the number of cases. Lesbians and transgender people are particularly at risk of rape and other violence, as a number of reports have shown.³⁸⁶ As the KHRC study showed, gay males may also be the victims of sexual abuse by other males. Given the extremely high rates of rape in South Africa, the reluctance of victims to reveal their sexual orientation or gender identity to police and the lack of disaggregated statistics for the sexual minorities most at risk, it is not possible to provide an authoritative comparison between these and women in the population generally. As an aside, it can also be noted that neither the South African Department of Home Affairs nor the NGO Consortium for Refugees and Migrants in South Africa have disaggregated statistics showing the numbers of LGBTI asylum seekers

³⁸⁶ "We'll Show You You're a Woman", HRW 2011, op cit. As regards transgender, see e.g. Trans-hate at the core of gender based violence? Liesl Theron, <http://concernedafricascholars.org/docs/Bulletin83-8theron.pdf>. In Sierra Leone, transgender women are also reported to be at greater risk: see Prideequality.org, 2013, op cit.

in the country. LGBTI asylum seekers report a reluctance to reveal their sexuality in connection with claims for asylum in South Africa.³⁸⁷

Following an outcry concerning hate crimes against lesbians and transgender in South Africa, a civil society working group was set up. Later, a working group with civil society participation was established by the Department of Justice and Constitutional Development (DOJCD) in 2011. Amid concerns about the handling of these cases by the justice system, a study was undertaken to provide a snapshot of the court process in these cases. This revealed that the particular “hotspots” for these crimes are Cape Town, Gauteng and KwaZulu Natal. Programmatic efforts - including efforts to track the numbers of cases - have focused especially on these provinces and areas. At the same time, the Ministry is aware that the lower figures for rural areas could also be due to a lack of awareness and legal support from NGOs. Under reporting due to a fear of the consequences of identifying oneself as LGBTI is also an issue. The South African Police Service (SAPS) has tried to create victim-friendly rooms at police stations and to train officers on equality principles in order to avoid secondary victimization. In relation to transgender, there are issues with case dockets that identify complainants as male or female.³⁸⁸ Collection of statistics is hampered by the lack of legislation on hate crimes against LGBTI. The SAPS would be in favour of legislation of this kind.³⁸⁹ AMSHeR criticized the lack of an LGBTI desk in the SAPS.³⁹⁰

One of the aims of hate crimes research is to discover the extent of secondary victimization when crimes are reported to the police. While there are occasional reports of physical abuse by police, secondary victimization in South Africa is more likely to take the form of prejudice (sometimes gross) insensitivity, a lack of respect for privacy and confidentiality and failure to investigate the crime.³⁹¹ Importantly, it leads to non-reporting of crime and thus a continuation of a sense of impunity.³⁹²

The DOJCD has embarked on training of magistrates in order to address the lack of knowledge of LGBTI issues. 1200 judicial staff have been trained. The SAPS acknowledges the need for training in this area, but has not yet been able to provide it. Similar training has taken place in Kenya, with the blessing of the Chief Justice. The DOJCD has also engaged in public advocacy, with the Deputy Minister speaking at a Pride March and staff having participated in radio programmes on this issue.³⁹³ Despite good intentions, progress towards legislation on hate crimes in South African has been slow. The DOJCD has not made significant progress with its intention to engage civil society in its attempts to develop legislation to combat hate crimes. Such legislation

³⁸⁷ Interview with GALA, Johannesburg, 7.2.13.

³⁸⁸ Interview with representatives of the SAPS, Pretoria, 8.2.2013.

³⁸⁹ Ibid.

³⁹⁰ Notes on interview with Mr. Kene Esom, IGLHRC, Johannesburg, 5.2.2013.

³⁹¹ HRW 2011, *We'll Show You You're a Woman*, pp. 52 – 53, op cit.

³⁹² Duncan Breen and Juan A. Nel: *SOUTH AFRICA – A HOME FOR ALL? The need for hate crime Legislation*, SA Crime Quarterly no 38 December 2011

³⁹³ Interview with Ms. Siphwe Ntombela, DOJCD Pretoria, 4.2.13. Interview with Ms. Monica Mbaru, High Court, Nairobi. 18.2.2013.

would facilitate the documentation of crimes based specifically on anti-LGBTI prejudice, which is not done at present. As well as legislation and training of personnel, continuing efforts are needed to convince victims that they can feel confident in the police, prosecution and courts.

While levels of violence appear to be lower outside of South Africa, the effort to tackle anti-LGBTI prejudice in law enforcement has not begun in most countries. MWA in Kenya also mentioned a threat of violence and rape against lesbians by heterosexual men, especially in poorer urban areas where there is little protection available from police.

6.4.4 MOB VIOLENCE, POLICE PROTECTION AND IMPUNITY

Impunity often reigns for those inciting and perpetrating mob violence against LGBTI persons. In February 2010, a campaign called “Operation Gays Out” was reportedly initiated by Christian and Muslim religious leaders in Mtwapa in Kenya following a (false) report on a local radio station about a gay marriage at a local hotel. A violent mob of 200 – 300 people, some armed, turned against the hotel and a medical research centre working on HIV / AIDS.³⁹⁴ Police did intervene and provide some protection, but also arrested the allegedly gay men. No apparent attempt was made by police to arrest the attackers. The life of one alleged LGBTI person was threatened. He was saved by police intervention.³⁹⁵

Local Officials and Chiefs were reportedly involved in the campaign.³⁹⁶ As reported, the facts seem to warrant a police investigation and possible prosecution for incitement to violence by one or both of the religious leaders involved (one Christian, one Muslim). The two are convincingly reported as having played a role in inciting a mob to attack a KEMRI health centre. Kenyan activists are reluctant to take a complaint against these figures for fear of reprisals. The exact reasons why the authorities failed to do so have not been stated. A lawyer from Mombasa, asked what would happen if police investigation and prosecution were to proceed against these figures said that “*the building would be burned down*”. That incidents of this kind are allowed to take place without legal repercussions are an indication of the fear and reluctance that politicians and police are subject to, as much as of their own anti-LGBTI prejudices. Similar protest events have occurred in other countries including Ghana and Sierra Leone. In Ghana, as in Kenya, the protest united Christian and Muslim groups in common opposition to public or publicized events relating to LGBTI rights.

It is important, but difficult to build wide coalitions against violence. A Catholic Church statement from 1986 deplored violence: “*It is deplorable that homosexual persons have*

³⁹⁴ <http://www.hrw.org/news/2010/02/17/kenya-halt-anti-gay-campaign>

³⁹⁵ A People Condemned, The Human Rights Status of Lesbian, Gay, Bisexual, Transgender and Intersex Persons In East Africa, UHAI, 2009-2010

³⁹⁶ <http://news.bbc.co.uk/2/hi/africa/8511321.stm>

*been and are the object of violent malice in speech or in action. Such treatment deserves condemnation from the church's pastors". The statement nevertheless expresses some understanding of its occurrence: "when homosexual activity is ... condoned, ... neither the Church nor society at large should be surprised when other distorted notions and practices gain ground, and irrational and violent reactions increase"*³⁹⁷

For present purposes it is thus considered a given that visibility will lead to more tension and the risk of violence. The strategic implications of this for NGOs and others, and the importance of "doing no harm" are discussed in Chapter Eight. The USA based Kenyan academic and writer Keguro Macharia points to the flowering of activism among LGBTI activists in Kenya in recent years as a contributory factor in regard to homophobia and violence.³⁹⁸ The UN SR VAW notes the escalation in such violence in South Africa despite progressive legislation.³⁹⁹ These risks make it vital that LGBTI leaders make informed decisions and are well-prepared for the consequences of the approaches they adopt, including insecurity, social isolation and public and private vilification. A few are lucky in having supportive relatives. Others may be able to hide their activism from their families. While human rights makes demands on the authorities for protection and non-discrimination, experienced activists are aware of the limits of what to expect. Building of capacities and networks of support are of key importance. This is addressed in Chapter Seven.

Police and district officials must take proactive steps to be particularly aware of high risk targets, especially in urban areas where latent prejudice can flare up into violence. These should include contingency plans for the protection of outreach centres and similar locations. They should engage with religious and traditional leaders to remind them of their obligations under the law, and with LGBTI leaders to listen to their concerns.

6.5 LIBERTY AND SECURITY OF THE PERSON -FREEDOM FROM ARBITRARY ARREST AND DETENTION

The UN Working Group on Arbitrary Detention (WGAD) considers that arrest (of adults, presumably) for homosexual conduct is *per se* arbitrary, and a violation of the right to liberty and security of the person guaranteed by Article 9 of the ICCPR. This applies irrespective of the legality or illegality of homosexual conduct in national law.⁴⁰⁰ Organizations such as IGLHRC assisted Cameroonian activists to bring a complaint based on this principle before the WGAD. The Working Group found the complaint to be well-founded, but this did not bring Cameroon to change its practice.

³⁹⁷ 1986 Letter to Bishops from the Congregation of the Faith, op cit.

³⁹⁸ See: <http://www.guardian.co.uk/commentisfree/2010/may/26/homophobia-africa-not-single-story>

³⁹⁹ UN Doc. A/HRC/20/1

⁴⁰⁰ UN WGAD, Opinion No. 7/2002 U.N. Doc. E/CN.4/2003/8/Add.1 at 68 (2002).

Few arrests and prosecutions actually take place on these charges due to the private nature of the acts concerned and difficulties of proof. This can change with the political and social climate, so that LGBTI people face risks and insecurity. Even in countries that are generally tolerant, arrests and prosecutions do take place.⁴⁰¹

6.5.1 TARGETING OF LGBTI HUMAN RIGHTS DEFENDERS BY LAW ENFORCEMENT

It is the established practice of the WGAD that arrest for exercise of internationally protected human rights is arbitrary and in breach of international standards including Article 9 of the ICCPR. Criminalization is the umbrella that allows state agents to repress defenders of the rights of LGBTI persons. Beyond sodomy and similar laws, a variety of legal provisions are typically used to harass LGBTI activists.

LGBTI organizations and activists are often a particular object of repression under the same vague laws that can be used against political opponents or government critics generally. GALZ in Zimbabwe and SMUG in Uganda have faced state harassment for many years.⁴⁰² In 2012, GALZ was the object of arrests, seizures of equipment and a threat of prosecution for running an unregistered organization.⁴⁰³ This may have been connected to GALZ's use of the constitution drafting process to push for recognition of the rights of LGBTI persons.

Although mild in comparison to incidents and campaigns elsewhere, a recent incident in Zambia illustrates how governments often use law enforcement and vague provisions to punish attempts at public debate. In April 2013, the well-known Zambian HIV / AIDS activist Paul Kasonkomona was arrested by police immediately after a television appearance in which he called for decriminalization of same sex behaviour as a necessary step in combating HIV / AIDS in the country. He was reportedly charged with "inciting the public to take part in indecent activities." Government statements made it clear that the fear of criticism by religious conservatives drove them into repressive reactions.⁴⁰⁴ As discussed in Chapter Four, it is likely that opposition attempts to portray the government as "gay friendly" also played a role. Attempts to link SOGI issues to the struggle against SGBV are discussed below.

6.6 TORTURE AND CIDTP

⁴⁰¹ Including Ghana, for example. See http://www.irb-cisr.gc.ca:8080/RIR_RDI/RIR_RDI.aspx?id=454127&l=e. In Kenya, the 2012 KNCHR report on Sexual and Reproductive Rights (op cit) refers to another source (unavailable to the author) citing police statistics that report 198 sodomy cases recorded in 2007.

⁴⁰² <http://www.hrw.org/news/2012/08/27/zimbabwe-end-attacks-lgbt-people>

⁴⁰³ <http://www.gaystarnews.com/article/zimbabwe-shuts-sues-and-persecute-gay-association100912>

⁴⁰⁴ <http://www.amsher.net/news/ViewArticle.aspx?id=1358>

Accounts of torture against LGBTI persons as such were not directly encountered during the country visits to Burkina Faso, South Africa and Kenya carried out for this study. KHRC describes incidents of abuse of police power against gay men in particular, as well as sexual abuse, and extortion.⁴⁰⁵ NGO representatives considered these incidents to be scattered rather than systematic.⁴⁰⁶ Lesbian women may face fewer difficulties at present on this score. MWA representatives mentioned positive interactions with the police.⁴⁰⁷ The UN Special Rapporteur on torture has described the risks of torture that face LGBTI persons under detention or imprisonment, pointing out the particular vulnerability of transgender persons in this regard.⁴⁰⁸ There are many accounts of sexual minorities being subjected to degrading treatment, either in connection with arrest⁴⁰⁹ (treatment such as forced examinations), or sometimes in connection with attempts to access health services.⁴¹⁰ Many studies in connection with HIV / AIDS have emphasised the need to educated health workers to respect human rights and professional standards of confidentiality and dignity in the provision of health services.

6.7 BLACKMAIL / EXTORTION

The English criminalization of gross indecency in 1885 was famously referred to as “a Blackmailer’s Charter.” The unfortunate truth of this prediction is borne out by the experiences of LGBTI persons in Africa today. Criminalization is an incentive to extortion and police corruption. IGLHRC has done very valuable work in documenting the problem of extortion against LGBTI persons in a number of African countries and in spreading knowledge of strategies to combat the problem.⁴¹¹ While the problem is probably worst for men in terms of the number of cases and the potential consequences, the fear of exposure has crippling consequences for lesbian women too. The problems faced by women may differ from those that confront men. They may often involve demands for sexual favours or being held in deeply oppressive patriarchal structures of authority.⁴¹² For women, blackmail and extortion can often come from friends or family members, as well as their lesbian partners.

Men are more often vulnerable to deliberate schemes of blackmail and extortion, often coming from within the LGBTI community, sometimes in collusion with corrupt members of the police. Most gay men interviewed were familiar with the problem of extortion. One or two admitted to having engaged in it. The IGLHRC study produced statistics showing that close to a quarter of extortion attempts were made by MSM

⁴⁰⁵ The Outlawed Among Us, KHRC, 2011.

⁴⁰⁶ Notes on interview with Ishtar representatives, Nairobi, 20.2.2013.

⁴⁰⁷ Notes on interview with Ms. Rhoda Awino Odhiambo, 19.2.2013.

⁴⁰⁸ See OHCHR, “Born Free and Equal”, 2012.

⁴⁰⁹ See HRW, Cameroon 2013, Guilt by Association.

⁴¹⁰ Duvall, Beardsley et al, 2012. Op cit.

⁴¹¹ See “Nowhere to Turn”, IGLHRC, 2011. Available at: <http://www.iglhrc.org/sites/default/files/484-1.pdf>

⁴¹² Ibid, see Unoma Azuah.

against other MSM.⁴¹³ Some thought that setups of this kind have become more frequent due to anonymous dating over the internet.

While the IGLHRC study discusses the benefits of publicly acknowledging sexuality as a way of rendering oneself “immune” to extortion (which some have called “Outsurance”), Beyrer et al report from a three country study that persons who reveal their sexual orientation to health care workers, friends and family may be more vulnerable to blackmail. At first sight, this would appear to contradict assumptions behind “Outsurance”.⁴¹⁴

The IGLHRC study also sets out some tactics for dealing with extortion. In Ghana, the LGBTI community has launched a website called Fakers2Go, which posts the photos and tactics used by well-known blackmailers – particularly those who entrap their victims on popular dating websites – and equips the community to recognize and avoid serial perpetrators. Legal services and advice are very important in assisting victims of blackmail. This is one of the important services offered by LGBTI organizations to their members in Kenya. Often, victims do choose to pay or comply with blackmailers’ demands.

6.8 FREEDOMS OF EXPRESSION, ASSOCIATION AND ASSEMBLY

Article 19 (3) of the ICCPR allows states to place limitations on freedom of expression that are provided for by law and necessary for the protection of national security or of public order (ordre public), or of public health or morals. In a 1982 case involving Finland, the UN Human Rights Committee found that a law providing for imprisonment for up to six months for “*publicly encourage[ing] indecent behavior between persons of the same sex*” was within the public morals exception of this provision and was thus not a violation of the Covenant.⁴¹⁵

6.8.1 FREEDOM OF EXPRESSION

The increased openness of the UN human rights system towards the rights of LGBTI persons was seen in 2012 with the UN Human Rights Committee’s decision in the *Fedotova* case.⁴¹⁶ Effectively overturning its 1982 decision, the Committee found that the Russian Federation violated the Covenant’s guarantee of freedom of expression by discriminating against homosexual persons. The public morals exception did not apply in

⁴¹³ Ibid, see statistics on p.98.

⁴¹⁴ HIV prevalence risks for HIV infection, and human rights among men who have sex with men (MSM) in Malawi, Namibia, and Botswana, <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0004997>

⁴¹⁵ Communication No. 61/1979, *Hertzberg et al. v. Finland*, Views adopted on 2 April 1982.

⁴¹⁶ *Fedotova v Russian Federation*, Communication No. 1932/2010, views adopted by the Committee at its 106th session (15 October – 2 November 2012)

this case, at least partly because a distinction was made between heterosexuals and homosexuals.

No decisions on these issues have been made by the African Commission under the African Charter, though the wording of the rejection of CAL's application for observer status could be taken as indicating that a majority of the Commission's members considered that the Charter does not cover discrimination based on sexual orientation. Neither does there seem to be much in the way of national jurisprudence from most African superior courts on this issue, particularly as it relates to LGBTI issues. Criminalization severely limits the possibilities of court action on many rights issues, though legal creativity can still find worthwhile avenues. The African Commission's special rapporteurs on the Freedom of Expression and on Human Rights Defenders could be availed of for some of these issues or incidents.

The freedom of expression in matters related to SOGI, especially for LGBTI activists is subject to tight controls in many African countries. Vague laws can be used to penalize attempts to conduct public advocacy. Examples include the conviction of an activist in Malawi in 2010 for putting up posters in support of gay rights,⁴¹⁷ the closing down of a workshop by Minister for Ethics Lokodo in Uganda in 2012,⁴¹⁸ the closing of a play in Uganda⁴¹⁹, the 2013 arrest of activist Paul Kasonkoma in Zambia following a TV interview where he advocated decriminalization⁴²⁰, and raids on GALZ offices in Zimbabwe.⁴²¹

6.8.2 FREEDOM OF ASSOCIATION AND PARTICIPATION: "NOTHING FOR US WITHOUT US"

Activists met in all three countries were clear and insistent on the need to take the lead themselves. References are made throughout this study to the vital importance of freedom of association to the development of stronger networking, improved public dialogue and understanding and protection and promotion of the rights of LGBTI persons.

As described below, governments and even the African Commission on Human and People's Rights are reluctant to give full recognition to these rights. LGBTI organizations face a number of difficulties, ranging from hindrances in obtaining legal registration if they openly declare their purposes and organizational identity to raids and seizure of equipment. Well-known organizations and networks such as GALZ, SMUG, LEGABIBO, QAYN and others are not officially registered due to the recalcitrance of public authorities on this issue. The National Gay and Lesbian Human Rights Commission in

⁴¹⁷ <http://edition.cnn.com/2010/WORLD/africa/02/07/malawi.posters/index.html>

⁴¹⁸ <http://www.bbc.co.uk/news/world-africa-17032804>

⁴¹⁹ <http://www.scotsman.com/lifestyle/performing-arts/david-cecil-deported-from-uganda-over-gay-play-1-2787190>

⁴²⁰ <http://www.bbc.co.uk/news/world-africa-22069904>

⁴²¹ http://www.crisiszimbabwe.org/index.php?option=com_content&view=article&id=1344%3A22-august-2012-zlhr-condemns-galz-raids-and-state-sponsored-homophobia-against-lgbts&Itemid=205

Kenya was refused registration in 2013 with specific reference to the Criminal Code. The governmental NGOs Co-Ordination Board urged that the name of the NGO.⁴²² Judicial review of this decision could be sought.⁴²³ Where some space has opened up, it may be dependent on organizations adopting neutral sounding names or in avoiding advocacy work to concentrate on service delivery. Organizations working specifically with HIV / AIDS may be forced to choose between refraining from advocacy work or jeopardizing their important outreach to vulnerable communities. Paradoxically, LGBTI organizations appears to be more visible and forthright about their identity in the Anglophone countries of Eastern and Southern (though especially Eastern) Africa where homosexual behaviour is criminalized.

In Burkina Faso, freedom of association is protected by the admirably clear law on associations. The requirements for registering an NGO are not onerous in principle. In practice however, organizations of LGBTI persons that want to obtain official status are discouraged from adopting purposes that involve the assertion of an LGBTI identity or from trying to promote understanding of SOGI issues as such. The application of one organization that would not consent to drop these purposes from its statutes had been pending for approximately two years at the time of the visit to the country⁴²⁴, while others, anxious to conduct their HIV / AIDS outreach work, acceded to official demands to modify their proposed statutes.⁴²⁵

Even the Human Rights Ministry seemed to accept this status quo as a fact rather than questioning its legality or propriety in terms of human rights.⁴²⁶ The good offices of embassies could be productive in questioning government officials about failures to respect the law on freedom of association. Diplomatic officials may be able to play a constructive role in brokering a constructive discussion which may reassure state officials that they perhaps do not have so much to fear from complying with the law and allowing organizations to legally register and operate. In these sensitive contexts, mature and responsible leadership from within the LGBTI movement is highly important. As detailed earlier in this study, health (especially HIV / AIDS) workers also need reassurance from LGBTI activists that their painstaking efforts to gain acceptance in communities will not be jeopardized.

The legal right to freedom of association – like those of expression and assembly – requires responsible and sensitive exercise if it is not to lead to harm. In the ICCPR it is, like a number of other rights, subject to a limitations clause that includes public order as a potentially permissible ground to limit the exercise of the right. Any limitations must be: i) prescribed by law, ii) be necessary in a democratic society and iii) be demonstrably necessary to achieve a legitimate public order purpose. This means that any restrictions must be shown to be *necessary*, (i.e. that without them, there will be a risk to public

⁴²² Letter of the NGOs Co-Ordination Board, 25.3.2013, copy in possession of the author.

⁴²³ Notes on interviews with Mr. Eric Githari, 18.2.2013, and 14.6.2013, Nairobi.

⁴²⁴ Notes from interview with Ms. Mariam Armisen, Director, QAYN, Ouagadougou, Jan. 2013.

⁴²⁵ Notes from interview with an activist from an association in Burkina Faso, Jan. 2013, name and details with the author.

⁴²⁶ Notes from meeting at the Ministry of Human Rights,

order), *proportionate* (that they do not limit the exercise of the right more than is necessary to achieve the stated purpose and consistent with the values of a democratic society.⁴²⁷ For human rights defenders, it should be seen together with the 1998 UN Declaration on Human Rights Defenders.⁴²⁸

The author is unaware of any attempt to invoke public order as a ground for denying registration to an LGBTI NGO (this would more typically be invoked in relation to assemblies and other public events). Given the risk of social instability, it is not unthinkable that this could be invoked by a state as a ground. Although not made explicit, it seems to lie behind the refusal to register organizations that express an LGBTI identity in Burkina Faso. The public order issue has not been the object of a decision by the UN Human Rights Committee. It seems very unlikely that the Committee would endorse such a far reaching restriction as the complete refusal of registration. The UN Special Rapporteur on Human Rights Defenders has dealt with a refusal by state authorities to register LGBT NGOs and has addressed communications to states in this regard, though apparently to no avail.⁴²⁹ If no solution is found at a national level, NGOs should make use of this mechanism. Donor stances on this issue in cooperation countries are discussed in Chapter Eight.

In Kenya organizations could also face difficulties of these kinds, so several NGOs were not officially registered, although the country now has an impressive number and geographical spread of LGBTI NGOs. In Uganda – threats to deregister foreign and domestic NGOs suspected of promoting homosexuality were made in 2012 by the Minister for Ethics.⁴³⁰ In Botswana, the Southern African Litigation Centre is assisting the LGBTI organization LEGABIBO to seek judicial review of the ministerial decision to deny NGO registration.⁴³¹

LGBTI organizations are frequently the victims of what appear to be ordinary crimes, where computers and valuable equipment is stolen. These incidents often appear to coincide in time with arrests and police action.⁴³² The AHB in Uganda and the Same-Sex Marriage Bill in Nigeria would go a step further than the above examples by explicitly banning associations that support the rights of LGBTI persons.⁴³³ The version of the Bill passed by the country's House of Representative on 30.5. 2013 appears to be identical to that passed by the Senate in November 2011.⁴³⁴ This prohibits "*the registration of gay clubs, societies and organizations, their sustenance, processions and meetings.*" It also prohibits "*the public show of same sex amorous relationship directly or indirectly*". At

⁴²⁷ See Generally M. Nowak, *CCPR Commentary* (N.P.Engel, 2005), p.271-272

428 General Assembly Resolution A/RES/53/144

⁴²⁹ A/HRC/13/22/Add.1, Page 261

⁴³⁰ <http://www.bbc.co.uk/news/world-africa-18531948>

⁴³¹ <http://www.southernafricalitigationcentre.org/cases/ongoing-cases/botswana-high-court-challenge-to-refusal-to-register-lgbt-organisation/>

⁴³² <http://www.towleroad.com/2012/12/ugandan-gay-groups-office-burgled-as-bishop-claims-they-dont-exist.html>

⁴³³ Uganda: see above. Nigeria:

⁴³⁴ <http://jurist.org/paperchase/2013/05/nigeria-house-approves-bill-criminalizing-same-sex-marriage.php>

time of writing, the Bill awaits the signature of the President in order to become law. The Nigerian Commission on Human Rights predicted court challenges to it.⁴³⁵

6.8.3 FREEDOM OF ASSEMBLY AND PUBLIC EVENTS

In Ghana, an international conference that was planned by LGBT activists was banned by the Government in 2006.⁴³⁶ The Kenyan organization National Gay and Lesbian Human Rights Commission achieved a significant success in 2012 with the organization of the first “Gay and Lesbian Awards” at City Hall in Nairobi. Activists are optimistic that this will be able to continue as an annual event. Ugandan LGBTI organizations held a Pride Parade for the first time in 2012 in Entebbe.

Some people were arrested by police in connection with the event. Events like this can give publicity to an LGBTI movement, but can also be an obvious target for opponents. Photographs can also bring unwanted publicity to participants who have not openly declared their sexuality. How LGBTI organizations should advise their members in relation to provocative displays of sexuality in public events is a matter of tactics for activists and leaders to discuss. In reality, an insistence on rights comes with a price. In practice, activists must choose the strategies that are more likely to increase the space for the assertion and exercise of their rights. Images of “transgressive” sexuality will tend to confirm stereotypes for some and are likely to make some state officials – even moderate ones – nervous about possible backlashes. (This is of course the case far beyond Africa.) In Zimbabwe, organizations have held other events which are less public, but which have nevertheless become well-known, such as an annual drag show (Jacaranda Queen).

In Burkina Faso, some health workers and officials expressed the fear that freedom of association would be, or would be perceived as meaning that events like pride marches would be held, provoking negative reactions that jeopardize their HIV / AIDS outreach work and might strengthen the hand of religious fundamentalists. As mentioned elsewhere, fears like this can best be countered through dialogue and responsible leadership by CSOs. If LGBTI organizations are brought into the dialogue, they may be able to effectively counter such fears. LGBTI organizations may be able to play a useful role in debating strategy and making their own LGBTI communities more aware of what they consider to be the most productive ways forward to achieve greater public acceptance and in avoiding negative reactions. If Governments want to influence public discourse and expression, they must be prepared to enter into dialogue with LGBTI organizations. Thus freedom of association and a setting aside of personal prejudices on the part of officials are of key importance.

⁴³⁵ <http://www.theafricareport.com/Soapbox/nigerian-lawmakers-on-traditions-and-human-rights.html>

⁴³⁶ C:\Users\User\Documents\183304 LGBT Udredning Afrika\Activities and additional material\Countries - Africa\Ghana\BBC NEWS World Africa Ghanaian gay conference banned.mht

6.8.4 LEGAL PROTECTION AGAINST HATE SPEECH

In South Africa, statements of this kind fall foul of national law. Elsewhere throughout the continent, such dehumanizing speech by politicians is unfortunately widespread and at times almost casual. Reports of the UN Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions have emphasised the danger posed to the safety of LGBTI persons by sensationalist claims in the media. In a case brought against the publisher of the Rolling Stone paper in Uganda, the Kampala High Court found that the paper had infringed the constitutional rights to privacy and dignity of a number of persons and ordering a permanent injunction and payment of compensation to the plaintiffs.⁴³⁷ Effectively, this meant the closure of the paper.

6.9 EQUAL TREATMENT AND NON-DISCRIMINATION

It is an obligation under the ICCPR to guarantee individuals equality before the law. Sexual orientation is an impermissible ground on which to violate this obligation.⁴³⁸ The UN Committee on Economic, Social and Cultural Rights considers that the guarantee of non-discrimination in Article 2 of the Covenant prohibits discrimination on the basis of sexual orientation and gender identity in the enjoyment of ESC rights.⁴³⁹ General Comment no. 20 makes reference to the Yogyakarta Principles for definition of these terms. The African Charter provides for the African Commission to draw inspiration from instruments and bodies of the UN system in interpreting the guarantees of the Charter, including the protection from discrimination in Article 2.

There can be little doubt that violations of ESC rights against LGBTI people are widespread. For the most part, they are undocumented. Organizations such as the KHRC (and courageously, the KNCHR) have made a valuable start in bringing them to light.⁴⁴⁰ In the African context, many aspects of rights to a livelihood, housing and property, but also rights to a family life, are regulated and adjudicated by customary rules and procedures that are unwritten. Depending on the particular context, the authority of traditional leaders and family councils may be relatively unchecked or subject to control by communities and a set of known rules. There is very little information available on the treatment of LGBTI identified people by customary

⁴³⁷ Kasha , Onziema & Kato v. Giles Muhame and The Rolling Stone Publications Ltd., Civil Society Coalition on Human Rights & Constitutional Law, Press release of 4.1.2011, <http://wthrockmorton.com/wp-content/uploads/2011/01/11-01-03-Court-Ruling.pdf>

⁴³⁸ Concluding observations of the Human Rights Committee: Chile, U.N. Doc. CCPR/C/CHL/CO/5, 18 May 2007, para. 16.

⁴³⁹ See General Comments of the Committee, numbers 14, 15 and 20.

⁴⁴⁰ Kenya Human Rights Commission, *The Outlawed Amongst Us*, 2011.

systems. Where central governments exercise significant influence over traditional leaders, there is a risk that the flexibility and unwritten character of custom can allow for new, pernicious interpretations that could permit almost unchecked discrimination. In a worrying signal, the Zimbabwean ZANU PF Minister for Local Government in 2012 was reported as urging traditional leaders to banish not only homosexuals, but “people who support them” from their land.⁴⁴¹ Reference has been made in Chapter Five to the opposition of CONTRALESA in South Africa to legal protection of sexual minorities.⁴⁴² Bodies of traditional leaders in other countries, including Ghana, have also been hostile.⁴⁴³

6.10 RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH AND HIV / AIDS

The respect, protect and fulfil framework also provides a lens for the examination of health services for LGBTI people in Africa. The obligation to respect demands equality and non-discrimination in the provision of public health services, for prevention or treatment. In regard to the obligations to protect and fulfil, the UN human rights system has placed particular emphasis on participation of persons and groups living with or most vulnerable to HIV / AIDS, obviously including sexual and often gender minorities. Receptive parties to unprotected anal sex are among those at the highest risk.

There is ample evidence that criminalization in (primarily) Anglophone Africa makes HIV / AIDS prevention work among MSM more difficult.⁴⁴⁴ While there is no human rights jurisprudence in the international system that addresses the issue of criminalization as a right to health issue, this tendency is seen in a number of UN statements and declarations. The UN Special Rapporteur on the Right to Health⁴⁴⁵ (SRRH) criticized the AHB in Uganda and underlined the importance of recognition of the rights of sexual minorities in successfully combating HIV and AIDS:

“Lessons from the last 30 years of the HIV epidemic have shown us that recognition of the rights of people with different sexual identities is a necessary component for a successful HIV and health response,” stressed the UN expert. “In many countries where sex between men is not criminalized and where stigma and discrimination have been reduced, men who have sex with men are more likely to take up HIV prevention, care and support and treatment services.”⁴⁴⁶

This statement by the UN Special Rapporteur is borne out by a comparison of countries visited for the present study. Burkina Faso has succeeded in reducing its

⁴⁴¹ <http://allafrica.com/stories/201205160217.html>, accessed 29.5.2013

⁴⁴² See also: <http://constitutionallyspeaking.co.za/traditional-leaders-caught-in-a-colonial-time-warp/>

⁴⁴³ http://gbcghana.com/new_site/index.php?id=1.483553, accessed 29.5.2013

⁴⁴⁴ UNAIDS, Global Prevention Report, 2010 p. 128.

⁴⁴⁵ Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

⁴⁴⁶ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9763&LangID=E>

overall rate of HIV prevalence to 1.2%. In South Africa on the other hand, there are many reasons why infection rates have remained shockingly high despite more liberal official attitudes.

Addressing populations at higher risk of HIV / AIDS (MARPs) is a human rights issue not only for the population concerned, but for the public in general. It should be recalled that in the *Toonen* case, the Tasmanian authorities in Australia tried (unsuccessfully) to justify the prohibition of sodomy on public health grounds. The UN Human Rights Committee explicitly rejected this argument on the grounds that criminalization impeded public health programmes by pushing people underground. As pointed out above, the introduction of higher penalties for “unnatural carnal knowledge” in Uganda was linked to the spread of AIDS. Legally or politically, African governments may try to justify criminalization on public health grounds. The availability or accessibility of preventive care to MSM as a MARP – as well as its effectiveness - may thus take on a legal importance.

6.10.1 GENDER ASPECTS OF HIV / AIDS

Particularly in Africa, HIV / AIDS is a strongly gendered phenomenon. Overall, women in Sub-Saharan Africa are at much greater risk of HIV infection than men. UNAIDS reports that 80% of all women in the world living with HIV are in this region. Female to male infection ratios are 1:22 to 1 in West and East Africa and 1:33 to 1 in Southern Africa.⁴⁴⁷ Heterosexual women are at overall greater risk than WSW, though the factor of “situational bisexuality” discussed in chapter two above modifies this picture. Men, on the other hand, are less likely to be tested or to seek and comply with treatment, are more likely to voluntarily engage in risky behaviours and have higher mortality rates. On the other hand, they are more likely to know of the benefits of using a condom and to use them.⁴⁴⁸ Women’s lack of power reduces their choices in this, as in so many other regards.

While not at the same risk of HIV / AIDS as MSM, WSW also have specific health needs in the context of HIV / AIDS.⁴⁴⁹ Transgender people are especially vulnerable to HIV infection and to suffer the effects of stigma. The phenomenon of transgender persons (particularly transwomen) becoming sex-workers because of social rejection and limited options seems to be almost universal. In Africa, the situation of transgender persons in this, as in other areas, is poorly documented. The 2012 South African Aids report specifically mentions transgender persons as a MARP and deals with the need for greater attention to them.⁴⁵⁰ Outside of South Africa, national HIV / AIDS strategies, even where they mention MSM, are unlikely to address transgender persons specifically.⁴⁵¹

The UN SG has noted the agreed international target to reduce HIV infections

⁴⁴⁷ 2010 UNAIDS *Report on the global AIDS epidemic*, Chapter 5.

⁴⁴⁸ 2012 UNAIDS Global Report.

⁴⁴⁹ <http://www.irinnews.org/Report/85268/SOUTH-AFRICA-Lesbians-and-HIV-low-risk-is-not-no-risk>

⁴⁵⁰ 2012 Global Aids Response Progress Report, Republic Of South Africa

⁴⁵¹ 2012 UNAIDS Global Report.

through sexual transmission by 50% by 2015. This demands greater focus on the sectors in which new infections are occurring: *“We can only reach that goal if we reach out to people at risk: sex workers, men who have sex with men, people who inject drugs, women and youth”*.⁴⁵² The Secretary General is here echoing the 2011 UN Political Declaration on HIV / AIDS, that specifically mentions MSM as a most at risk population. It also emphasizes the need to combat gender discrimination and the need to address laws that impede access. The UN system and UNAIDS thus now makes human rights a central plank of addressing AIDS.

The issue of equality and non-discrimination in the provision of HIV / AIDS testing, prevention and treatment is of primary relevance to women, and also affects LGBTI persons. The issue of equality is relevant in relation to the overall, macro level in terms of policies and spending, but also in relation to the treatment received by individual persons and the attitudes of health workers. The 2011 report of the OHCHR⁴⁵³ states that many countries have not taken sufficient action or set aside budgetary means to address HIV related discrimination. LGBTI persons living with HIV / AIDS may be doubly vulnerable. The High Commissioner called for a strategic reorientation of services to reach the most vulnerable, and points at the necessity for decriminalization of homosexual sex and sex work. Gender discrimination is also a particular concern, and there is a need to increase and improve sex education.

In many countries, there are disturbing reports of health professionals refusing medical treatment to LGBTI persons⁴⁵⁴, breaching their obligations of confidentiality, or subjecting them to verbal abuse. In a recent survey in Sierra Leone, 58% of 80 medical practitioners interviewed said that they would be unwilling to provide services to LGBTI persons.⁴⁵⁵ Many of those turned or scared away self-medicate or seek the assistance of traditional healers.

Particularly in public institutions, medical personnel who abuse their positions may be violating obligations under national law, as well as medical ethics. If this treatment is due to ignorance or pervasive social attitudes, the best solutions to such medical misbehaviour may be education and sensitisation rather than legal actions. If the conduct persists however, legal measures or complaint procedures may be appropriate.

HIV / AIDS prevalence has also a strong link to poverty. In South Africa, studies by the HSRC show HIV infection rates approaching 50% among young black men in townships.⁴⁵⁶

6.10.2 MSM AND HIV / AIDS

⁴⁵² <http://www.unaids.org/en/resources/presscentre/featurestories/2012/june/20120611unga/>

⁴⁵³ UN Doc. A/HRC/19/37

⁴⁵⁴ See for example Sierra Leone, prideequality.org, 2013, op cit. Kenya, KHRC The Outlawed Among Us, 2011, p.37.

⁴⁵⁵ Ibid (Sierra Leone).

⁴⁵⁶ Notes on interview with Mr. Pierre Brouard, Centre for the Study of AIDS, University of Pretoria, 6.2.2013. HSRC's research in this area can be accessed at: <http://www.hsrc.ac.za/en/media-briefs?page-num=9>

Experts have noted how stereotypical views of African male sexuality led to the belief in the 1980s that HIV / AIDS in Africa – in contrast to the rest of the world - was largely a heterosexual phenomenon. According to Johnson (2007) the existence of same-sex sexuality among African males and its importance for the AIDS epidemic was ignored and hidden through the maintaining of this conventional wisdom, hindering a more properly focused approach to the epidemic on the continent.⁴⁵⁷ He cites a number of reasons why this was the case.

The following table provides some figures on HIV infection rates among MSM in a number of African countries. It should be remembered that these figures are often based on small sample sizes, and may not be nationally representative. The lack of resources and restrictive climate surrounding MSM in most of the continent means that few studies of this kind have been conducted.

HIV Infection rates, selected countries in Sub-Saharan Africa⁴⁵⁸			
Country	Prevalence: MSM	Prevalence (adult pop.)	Inclusion of MSM as MARP
Burkina Faso	1,2% ⁴⁵⁹	1.2%	Yes
Malawi	21.4%	11.4%	Yes
Nigeria	13.5%	4.1%	Yes
Kenya ⁴⁶⁰	18.2%	6.2%	Yes
Senegal ⁴⁶¹	21.8%	0.7%	Yes
South Africa ⁴⁶²	16.9%	9.9% / 15.8%	Yes
Sudan	8.8% ⁴⁶³	1.2%	No
Tanzania	12.4%	5.8%	No
Uganda ⁴⁶⁴	13.7%	6-7%	No
Zambia ⁴⁶⁵	32.9%	14.3%	No

In Burkina Faso, the UNAIDS Global Report for 2012 shows almost identical rates among MSM and the general population – both comparatively low for the region at slightly over 1%. A report by the USAID funded AWARE II programme appears to cast some doubt on the figure for MSM, referring to 2008 surveys showing a rate of about

⁴⁵⁷ Cary Alan Johnson, IGLHRC, 2007, Off the Map: How Hiv/Aids Programming is Failing Same-Sex Practicing People in Africa, also citing Eprecht.

⁴⁵⁸ Except where otherwise indicated, figures are from Baral et al. 2009. http://www.jhsph.edu/research/centers-and-institutes/center-for-public-health-and-human-rights/_pdf/Baral_GlobalArcOfJustice_AfricaMSM_Mar09.pdf

⁴⁵⁹ See notes in main text on these figures.

⁴⁶⁰ The Kenya AIDS Epidemic, Update 2011, National AIDS Control Council / NASCOP, p.27.

⁴⁶¹ Rapport De Situation Sur La Riposte Nationale A L'épidémie De Vih/Sida, Sénégal : 2010-2011, Mars 2012

⁴⁶² 2012, S.A. Global Aids Response Progress Report. The 15.8% figure is taken from Baral et al, 2009.

⁴⁶³ GARP report for 2010 – 2011, submitted in 2012 gives a figure of 3.5%.

⁴⁶⁴ Crane Survey Report, 2009.

⁴⁶⁵ GARP report submitted 2012, citing figure for 2007.

19% among MSM in some towns and generally emphasising the lack of reliable data. (The officially estimated number of MSM in the country is improbably low at 3,174.)⁴⁶⁶ Some interlocutors interviewed considered that the rate among MSM was actually considerably higher.

Figures of this kind were not available for other sexual and gender minorities. In other regions, transgender people were shown to have very high vulnerability to HIV infection.⁴⁶⁷ It is probable that African transgender people are also subject to higher levels of HIV infection. A report by the South African group GenderDynamix noted how stigma and a lack of understanding hinders transgendered persons from seeking medical care. While inclusion of transgendered persons as a specific MARP is positive, in practice they are often lumped together with MSM and/or WSW, leading to a lack of attention to their specific needs.⁴⁶⁸

A 2007 report by IGLHRC noted that very few African countries (Nigeria, Senegal and Kenya) mentioned MSM in their national AIDS strategies. There have been some improvements in this regard. HIV / AIDS activists in Burkina Faso saw the inclusion of MSM in the 2011 – 2015 national strategy as an important victory, but one that would still demand a lot of work to secure acceptance among the public and health providers.

In most of the world, spending on prevention efforts among MSM is severely under-prioritised in proportion to the risk / prevalence of infection.⁴⁶⁹ While few African countries responded to a request for information on this question, there is every indication that the severe underfunding of prevention among MSM is pronounced in African countries. Most MSM are not receiving even the most basic of HIV prevention interventions, including information about risky behaviours and how to avoid them.
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The UN Global Fund, in its Round Ten application process, made funds available for work specifically targeting sexual minorities, doing so on the basis of a strategy adopted in relation to these target groups.⁴⁷¹ The funding available under this heading may in some circumstances constitute a “carrot” to encourage programming in this area.

6.10.3 RELIGIOUS AND PRAGMATIC APPROACHES - UGANDA

⁴⁶⁶ Duvall, S., K. Beardsley, C. Compaoré, P. Sanon and D. Bassonon. 2012. *Assessment of Gaps in Policies, Policy Implementation and Programs for Key Populations in Burkina Faso*. Accra, Ghana: Action for West Africa (AWARE II), p.15.

⁴⁶⁷ Marion Stevens, Gender Dynamix / Amfar, 2012, Transgender access to sexual health services in South Africa: findings from a key informant survey.

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⁴⁶⁹ Saavedra J, Izazola-Licea JA, Beyrer C. Sex between men in the context of HIV: The AIDS 2008 Jonathan Mann Memorial Lecture in Health and Human Rights. *J Int AIDS Soc* 2008; 11(1):9.

⁴⁷⁰ Beyrer, *Clinical Infectious Diseases* 2010; 50(S3):S108–S113

⁴⁷¹ Available at: www.theglobalfund.org

US aid policy in sensitive matters of population, sexuality and reproductive health has bounced back and forth between liberal and conservative positions since the presidency of Ronald Reagan in the 1980s. These divisions have been reflected in US approaches to the struggle against HIV / AIDS and, in a globalized world, are reflected in countries like Uganda, with support for provision of condoms during the 1990s during the Clinton period being replaced by an emphasis on sexual fidelity and abstinence after the election of George W. Bush. This approach came to dominate aspects of US public policy on HIV / AIDS. While the Bush administration's commitment to fighting HIV / AIDS was welcomed by both liberals and conservatives in the USA, some US commentators saw PEPFAR as deliberately boosting the strength of US Evangelicals and their African allies.⁴⁷² US religious and political conservatives who emphasised abstinence over condom promotion found willing allies in Uganda. Uganda's successes in reducing HIV infection rates in the 1990s were attributed by some Ugandan and US religious leaders and Bush administration officials as being mostly due to the promotion of abstinence.⁴⁷³ A more sober, evidence based approach to policy might have recognized that a number of factors, including both condom availability and the promotion of abstinence in a way that made sense in the context of Ugandan culture, played a role.⁴⁷⁴

There can be little doubt that these ideological battles and policy inconsistency has been harmful, both from human rights and public health points of view. In some settings, the "worst of both worlds" may prevail. Sexual promiscuity combined with prohibitive religious ideologies against prevention efforts may produce particular problems. HIV prevalence on the Kenyan coast and in Mombasa is far higher than in the rest of the country, both among MSM (43% according to one study) and the general population.⁴⁷⁵

The HIV / AIDS pandemic was seen as providing grounds for a new wave of missionary activity by US religious organizations, especially during the Bush Presidency. One prominent Christian was quoted as saying that: "*AIDS has created an evangelism opportunity for the body of Christ unlike any in history,*"⁴⁷⁶

In Uganda, the strong religious views of government ministers and the close relations between religious fundamentalists, such as Pastor Ssempe, and powerful political figures, including the First Lady led to condoms being "de-emphasised". These actors

⁴⁷² See John Dietrich, The Politics of PEPFAR, http://www.carnegiecouncil.org/publications/journal/21_3/essay/001.html/_res/id=sa_File1/Dietrich.pdf

⁴⁷³ Ibid.

⁴⁷⁴ See Helen Epstein, <http://www.nybooks.com/articles/archives/2005/apr/28/god-and-the-fight-against-aids/?pagination=false&printpage=true>

⁴⁷⁵ Kenya Progress report 2011, op cit.

⁴⁷⁶ *The Hope Factor: Engaging the Church in the HIV/AIDS Crisis*, edited by T. Yamamori et al. (Authentic Media, 2003) p. 250, quoted in Epstein, op cit.

focused on abstinence and virginity, suspecting that distribution of condoms promoted sexual promiscuity. Both the Ugandan First Lady and Pastor Ssempea's church received US PEPFAR funding.⁴⁷⁷ At one point, government incineration and withdrawal of condoms led to a severe shortage in the country causing a senior UN official to publicly criticise the US government policy.⁴⁷⁸ The same influences were important in ensuring that MSM would not be included as a MARP in the national HIV / AIDS strategy.⁴⁷⁹ A senior Ugandan government health official was reported as saying that homosexuals "*don't deserve a special message. They shouldn't exist, and we hope they are not there. If they do exist they are covered under the three-pronged approach of ABC and should be content with that.*"⁴⁸⁰ It has often been pointed out that "abstinence outside of marriage" approaches ignore sexual minorities.⁴⁸¹ It goes without saying that they are entirely irrelevant to commercial sex workers, another MARP.

Even where religious attitudes are less overtly hostile, they have challenges in separating morality from public health. UNAIDS attempt to find a strategic framework for working with FBOs, holding a strategy meeting to deal with this aspect in 2008. At the very least, it seems as though most agencies are of the view that MSM are difficult to address through HIV / AIDS programmes conducted in partnership with FBOs.⁴⁸²

As discussed earlier in relation to politics, there is now tentative evidence that the Government of Uganda – perhaps also influenced by the new climate in Washington - is backing away from these highly ideological positions. The Ugandan National Strategic Plan for HIV / AIDS for 2011 – 2015 recognizes that the HIV infection rate is rising in the country. This is difficult not to interpret as a failure for "abstinence only" approaches and indicates a new, tentative pragmatism.⁴⁸³

Civil society efforts to have the National Strategic Plan mention MSM as a MARP did not succeed, but the document does give positive mention to regional efforts and developments in this regard and speaks of addressing the sexual behaviour of key populations based on evidence. This and other specific actions under the plan may allow for leeway in addressing MSM and other sexual and gender minorities in practice, but whether this takes place or not depends on will and attitudes. It does not mean that the battle on this issue has been won. Some activists point to a shift in Africa by religious fundamentalists away from the issue of condoms and towards a deliberate mobilization of homophobia. Opposition to homosexuality is seen as strengthening patriarchal ideas and social structures and thus an issue of concern to

⁴⁷⁷ <http://www.hrw.org/legacy/english/docs/2007/10/11/uganda17080.htm>

⁴⁷⁸ Scott H. Evertz, Center for American Progress / Council for Global Equality, January 2010: How Ideology Trumped Science : Why PEPFAR Has Failed to Meet its Potential

⁴⁷⁹ <http://www.hrw.org/news/2007/10/10/letter-congressional-caucus-about-us-support-ugandan-homophobia>

⁴⁸⁰ <http://www.irinnews.org/Report/39429/UGANDA-Stuck-in-the-closet-gays-left-out-of-HIV-AIDS-strategy>

⁴⁸¹ <http://www.iglhrc.org/content/united-states-promote-inclusive-approach-sexual-and-reproductive-health-programs>

⁴⁸² A 2012 consultation document by the US PEPFAR programme does not mention MSM. (See *The PEPFAR Consultation on the Role of Faith-based Organizations in Sustaining Community and Country Leadership in the Response to HIV/AIDS*).

⁴⁸³ See Dietrich, Carnegie Council, op cit.

feminists.⁴⁸⁴

6.10.4 BEYOND UGANDA

The combination of religious, political and aid agendas with the heady populism of democratic politics archaic laws, modern media, public fears and traditional customs made Uganda near a “perfect storm” for the issue of homosexuality. It is still unclear whether political and religious leaders and other policymakers will take the Ugandan experience as a salutary lesson in how not to manage this issue or a source of tactical experiences and tools.

6.10.5 HEALTH SERVICES: MAINSTREAMING AND / OR STAND-ALONE CLINICS?

Some organizations and projects specifically target male CSW. Others are more broadly targeted towards MSM. Health projects targeting LGBTI as a general group were not encountered in the countries visited, though this approach was taken in Uganda in 2012 (see below). Separate clinics for MSM and or CSW, many of which are run by activists within the LGBTI community will generally be far less prone to stigmatizing and discriminatory attitudes, and may thus be better at engaging with the communities they serve. This approach also involves risks: i) that clinics will be vulnerable to various forms of threat or attack ii) that MSM or LGBTI will become identified with HIV / AIDS iii) that LGBTI will be seen as being outside the normal health care system or iv) that users of the clinics will risk being exposed as MSM / LGBTI or that LGBTI will be seen as equivalent to CSW etc.

The mob attack against the KEMRI clinic in Mtwapa in Kenya has already been referred to. In 2012 Ugandan Ethics Minister Lokodo threatened to close a specialized clinic in Kampala.⁴⁸⁵ This echoes the conviction (subsequently overturned on appeal) of nine Senegalese HIV / AIDS activists who were arrested while conducting a workshop on prevention in 2009.⁴⁸⁶ It is hardly necessary to underline how damaging attacks or threats of either kind are in regard to public health and the protection of the rights of LGBTI groups.⁴⁸⁷

6.10.6 BEYOND HIV / AIDS

As discussed, it is important that the necessary focus on MSM does not lead to neglect of the health rights and needs of other sexual minorities. There are helath

⁴⁸⁴ See J. Horn, AWID, 2012, “Not as Simple as ABC: Christian fundamentalisms and HIV and AIDS responses in Africa”

⁴⁸⁵ <http://www.irinnews.org/Report/95844/UGANDA-New-LGBTI-clinic-faces-fierce-government-criticism>

⁴⁸⁶ <http://www.irinnews.org/Report/84064/SENEGAL-Relief-as-gay-activists-are-released>

⁴⁸⁷ See Poteat T, Diouf D, Drame FM, Ndaw M, Traore C, et al. (2011) HIV Risk among MSM in Senegal: A Qualitative Rapid Assessment of the Impact of Enforcing Laws That Criminalize Same Sex Practices. PLoS ONE 6(12): e28760.

doi:10.1371/journal.pone.0028760: See also Beyrer, Baral et al, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3164959/>

issues that are specific to other sexual minorities. MWA in Kenya noted reports at least 4 suicides of lesbian women in 2012.⁴⁸⁸ For intersex persons, it is important for parents and families, as well as intersex persons themselves, to be made aware of the possibility of medical treatment, including corrective surgery.

For transgender persons, there are issues of gender reassignment surgery. This was available to some degree in Kenya, far more so in South Africa, and not mentioned in Burkina Faso. Criticisms of arbitrariness in granting or refusing surgery have been made in Kenya.⁴⁸⁹ There, Transgender Education and Advocacy (TEA) is lobbying the Kenya Medical Practitioners and Dentist's Board, which is developing guidelines on treatment of gender identity disorders. Transgender activists fear that the removal of gender identity disorder as a diagnosis will mean that sex-change surgery will be considered a cosmetic treatment.

In Kenya, KHRC reported instances of forced medical examinations by police, and non-consensual hormonal, electro-shock and psychological treatments, as well as exorcisms. These were seemingly imposed by family members rather than state agents, but the complicity of medical care personnel in them is a matter of serious concern.⁴⁹⁰ Steps like these could affect any or all sexual minorities.

6.10.7 RIGHTS AND RESEARCH ON HIV / AIDS

A great many myths flourish in the area of sexuality. Research – both medical and sociological - is necessary to orient and focus programmatic interventions, to debunk myths and to develop facts-based discussion. In health programmes targeting MSM or LGBTI more generally, it is vital that trust be established between government authorities and the LGBTI community. Research or studies of this kind are easily misinterpreted by sensation-hungry media, or religious and political actors, and may also be initially mistrusted by LGBTI communities themselves. There are unfortunately examples of statements by officials in charge of HIV / AIDS programmes that might lead to mistrust of the intentions of the authorities. LGBTI communities need assurances that any information given will not be misused and does not lead to any form of persecution or threats. Ultimately, this can only be achieved through dialogue and engagement directly with LGBTI representatives. Burkina Faso is an example of tentative constructive practice in this area, though also of the need to proceed to the next step of a more wide-ranging and inclusive debate.

6.11 RIGHTS TO EDUCATION, HOUSING AND EMPLOYMENT

The report of the UN High Commissioner for Human Rights pursuant to Human Rights Council resolution 17/19 of 2011 points to practice of the Human Rights Committee

⁴⁸⁸ <https://identitykenya.com/index.php/gender/1371-global-violence-against-lbt-women-to-be-addressed-at-un-women-session>

⁴⁸⁹ KNCHR, 2012, op cit.

⁴⁹⁰ KHRC, *The Outlawed Among Us*, 2011, op cit.

and the Committee on Economic, Social and Cultural Rights affirming that guarantees of non-discrimination in regard to ESC rights obliged states not to discriminate on grounds of sexual orientation. The latter body has also mentioned gender identity in relation to the right to health. Charter based mechanisms such as the mandate of the Special Rapporteur on the Right to Education have taken up the issue of sexuality education, and the need for understanding of human diversity and tolerance. Mention was made above of the difficulties of introducing materials for teenagers in Uganda that incorporated this aspect of education. According to one informant, the Kenyan primary school curriculum teaches that homosexuality is social deviance.⁴⁹¹

A UNESCO global study on homophobic bullying noted that little information was available from Africa on this subject. South Africa was to some extent an exception.⁴⁹² GALA in South Africa organized a forum on this issue and succeeded in engaging the Ministry for Education.

6.12 THE RIGHT TO PRIVACY AND TO A FAMILY LIFE

As noted in Chapter Five, the right to privacy has been an important foundation for the judicial recognition of the human rights of LGBTI in a number of settings. The issue is also discussed in relation to the African human rights system below. Since many LGBTI persons in Africa are in heterosexual marriages, special concerns arise in the African context. The problem of extortion can involve threats to deprive people of access to their children.⁴⁹³ Since many aspects of family life in African countries are regulated by customary rather than statutory law, the role of family councils and traditional leaders assumes great importance. As with other human rights issues, there is little systematic documentation of these challenges.

6.13 RIGHTS ESPECIALLY RELEVANT TO TRANSGENDER PERSONS

As yet, the UN human rights system has not developed extensive doctrine or jurisprudence on the particular issues that are of most concern to transgender persons, including the legal recognition of name and gender that the person identifies with. The European Human Rights system has developed jurisprudence on this as a privacy issue under Article 8 of the European Convention. The Human Rights Committee has nevertheless expressed concern when some countries have not taken these steps. Admittedly, these observations were made in regard to western countries.⁴⁹⁴ As in other areas, South Africa has progressive legislation on this issue

⁴⁹¹ Notes on interview with Mr. Eric Githari, NGLHRC, Kenya.

⁴⁹² Review of Homophobic Bullying in Educational Institutions Prepared for the International Consultation on Homophobic Bullying in Educational Institutions, Rio de Janeiro, Brazil, 6-9 December 2011, p.10. Studies on hate crimes against lesbian and transmen in South Africa have noted this aspect. (See HRW, 2011).

⁴⁹³ See IGLHRC, *Nowhere to Turn*, p.16.

⁴⁹⁴ E.g. Ireland. See UN Doc. CCPR/C/IRL/CO/3

that allows for a change in sex-description without a requirement of surgery, by virtue of the Alteration of Sex Description and Sex Status Act, No. 49 of 2003. According to a 2009 article, this is not followed in practice by the Department of Home Affairs, which persists in using surgery as a condition for legal alteration.⁴⁹⁵ Intersex and transgender persons were brought within the protection of South Africa's equality legislation through an amendment of section 1 of Act 4 of 2000 (the PEPUDA - Promotion of Equality and Prevention of Unfair Discrimination Act).

Kenya's National Commission on Human Rights reported incidents of refusal to change gender in various identity documents and personal records.⁴⁹⁶

6.14 NATIONAL HUMAN RIGHTS INSTITUTIONS (NHRIS)

The efforts of LGBTI organizations to engage the African human rights movement that began in the past decade began with mainstream human rights organizations. Some NHRIs have responded positively on this issue. The regional NGO AMSHeR is attempting to engage NHRIs, national HIV / AIDS commissions and ministries of justice and health in regional dialogue workshops that it has hosted, where officials can hear about the experiences of other countries in addressing these issues.

Ghana has rather vague legislation (prohibiting "unnatural carnal knowledge") and comparatively mild criminal penalties⁴⁹⁷ for same-sex behaviour. As in many other countries, this law is rarely enforced. Representatives of the country's highly respected national human rights institution, the CHRAJ, have walked a careful line on SOGI issues – affirming the universality of human rights to include everyone, while avoiding being seen to "promote" behaviour or a "lifestyle" that society does not accept. CHRAJ representatives appear to have avoided taking the issue up, but have voiced moderate (and rather legalistic) positions when publicly questioned.⁴⁹⁸ In 2003, the Commissioner was quoted as saying that the CHRAJ "*would not advocate for gay rights*". His acting successor took a bolder line in an interview in 2010, arguing for respect for the right of privacy and for non-discrimination, seemingly extending to decriminalization.⁴⁹⁹ She went still further in a 2011 interview, criticizing hate speech, arguing for tolerance⁵⁰⁰ and pointing to far more harmful behaviours. Her successor has continued to promote tolerance, while avoiding support for same sex marriage.⁵⁰¹

495 Thamar Klein, 2009, Intersex and transgender activism in South Africa, *Liminalis*, 2009, 03, http://www.liminalis.de/2009_03/Artikel_Essay/Liminalis-2009-Klein.pdf

496 KNCHR, 2012, op cit.

497 Section 104 81 (b) of the Criminal Code treats the offence as a misdemeanour when committed between consenting adults.

498 <http://www.modernghana.com/news/46137/1/chraj-wont-advocate-gay-rights-short.html>

499 <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=199877#>,

500 <http://www.modernghana.com/news/337739/1/homosexuality-stop-the-double-standards-anna-bossm.html>

501 <http://ilga.org/ilga/en/article/n7JBMyp14S> See also: <http://news.peacefonline.com/news/201108/61962.php>

CHRAJ's work is weighted more towards complaint handing than human rights promotion. No complaint appears to have been received by the CHRAJ or action taken in relation to well-publicized events such as the banning of a conference in Accra in 2006. It is possible that the NGO that planned the event was not aware of the possibility of complaining to CHRAJ.

Uganda: The UHRC devoted a chapter of its 2009 Annual Report⁵⁰² to its response to the AHB. The Commission's many criticisms of the Bill are a strong statement of human rights principle. In its 2011 annual report⁵⁰³, the UHRC referred to the CEDAW Committee recommendation against the AHB. The possibility of conducting a study of allegations of "recruitment" is discussed in Chapter Two above. LGBTI and human rights advocates have unfortunately made only limited use of the Commission's stance for advocacy purposes.⁵⁰⁴

Kenya: In what is a first for African NHRIs outside of South Africa, the KNCHR 2012 report on Sexual and Reproductive Rights⁵⁰⁵, includes a Chapter on the rights of sexual minorities. The report recommends decriminalization.⁵⁰⁶ As emphasised elsewhere in this report, such moves do not come out of nowhere, but are the result of personal commitment, work to encourage others to overcome prejudices and a will to take risks. KNCHR began working with GALCK and its member organizations, who then saw that the KNCHR's complaint mechanism was open to them as much as to other citizens. Documentation of complaints led to intense internal discussions on inclusion of SOGI issues in the Commission's workplan for 2012 – 2013. The KNCHR has faced considerable backlash for its stance in the 2012 report. The importance of an African NHRI taking this courageous and forthright stance should be recognized by the Kenyan Government, as well as donors and the international human rights community. Support should be given to state structures that dare to take the step of speaking out on LGBTI issues, such as KNCHR.

Sierra Leone: A representative of the Human Rights Commission of Sierra Leone (HRCSL) on a radio programme took the stance that it could not advocate for decriminalization. He appeared to assume that the provisions of the criminal law penalizing same-sex acts were constitutional under the 1991 Constitution (though this has not been tested, and the penal provisions date from a British law of 1861 that is not enforced).⁵⁰⁷ Neither were relevant international standards and the work of the UN human rights system taken into account. More positively, the HRCSL official declared that the Commission was open to examining any claims of discrimination based on sexual orientation. This shows the problems inherent in

⁵⁰² Uganda Human Rights Commission, 12th Annual Report, 2009.

⁵⁰³ Uganda Human Rights Commission, 14th Annual Report, 2011.

⁵⁰⁴ <http://www.hrw.org/news/2011/05/12/uganda-parliament-committee-backs-anti-homosexuality-bill>, http://www.ugandans4rights.org/attachments/article/396/Living_up_to_our_human_rights_commitments_Coalition_Booklet_30_07_12.pdf, accessed 5.6.2013

⁵⁰⁵ Realising Sexual and Reproductive Health Rights in Kenya: A myth or reality? A Report of the Public Inquiry into Violations of Sexual and Reproductive Health Rights in Kenya, KNCHR, April 2012

⁵⁰⁶ Ibid, p. 103.

⁵⁰⁷ Discrimination on the Basis of Sexual Orientation, and Gender Identity in Access to Health Care and Violence/Bias A Sierra Leone Case Study, <http://www.refugeelegalaidinformation.org/sierra-leone-lgbti-resources>

making poorly considered statements on a radio programme without full preparation to tackle a difficult and sensitive issue.

South Africa – The SAHRC’s efforts in this area include work on hate crimes legislation and reporting under national equality legislation (PEPUDA), as well as on a planned national action plan to combat discrimination. The Commission initiated a dialogue with traditional leaders – with the participation of LGBTI activists - in the Eastern Cape after the CONTRALESA leadership proposed removing sexual orientation as a protected category from the constitution in 2012.⁵⁰⁸ The SAHRC considers that creating space for in-depth discussion in relatively free and confidential forums is vital when the gulf between the two sets of values is so wide. The workshop revealed that not all traditional leaders are implacably hostile. The Commission pursued a case against Mr. Jon Qwelane for hate speech in response to an article he published in favour of removing the constitutional protection. The cartoon was accompanied by an offensive cartoon that seemed to equate homosexuality with bestiality.⁵⁰⁹

Zambia: The Zambia Human Rights Commission had the opportunity to take a stance on the issue of the rights of LGBTI persons at the time of its submissions to the Technical Committee on drafting the Zambian Constitution in 2012.⁵¹⁰ Unlike the Sierra Leonean case, the ZHRC’s position was prepared in advance. Unfortunately, its stance reproduced taboos rather than questioning them with an outset in human rights. The ZHRC, acting on what it felt was its obligation to act *“in the interests of the Zambian people”* recommended that certain amendments be made to the draft for the specific purpose of limiting the rights of LGBTI persons under the constitution. The ZHRC stated that *“the Commission does not view this as a legitimate group that can have sexual persuasion related rights recognised”*. The Commission thus recommended removing certain grounds of prohibited discrimination to avoid *“a danger that such groups could have these rights recognised on these bases”*.

The ZHRC did not discuss cases such as Toonen or the recommendations of the UN HRC in concluding observations to end the criminalization of same-sex acts in Zambia’s Penal Code.⁵¹¹ seem to consider that LGBTI persons were part of the Zambian people whose interests should be acted upon. Neither did it examine or state how it felt the interests of the Zambian people would be harmed by the recognition of the human rights of LGBTI persons, or what kind of a “danger” was present. The disappointing ZHRC stance must be seen in the context of even more restrictive proposals from other parties in the constitution-making process.⁵¹² As mentioned elsewhere in this study, most mainstream Zambian CSOs have not been bold enough to stand up for human rights in this area. The Commission was at least

⁵⁰⁸ Notes on discussion with Dr. Kgamadi Kometsi, SAHRC, 5.2.13

⁵⁰⁹ Mr. Qwelane was later appointed as ambassador to Uganda.

⁵¹⁰ Submission to the Technical Committee Drafting the Zambian Constitution: The 1st Draft Constitution, July, 2012, available at: <http://www.hrc.org.zm/>

⁵¹¹ CCPR/C/ZMB/CO/3/CRP.1, 23 July 2007, p.8.

⁵¹² <http://www.southernaficalitigationcentre.org/2013/04/17/delegates-at-the-national-constitution-convention-in-zambia-lose-the-plot-on-human-rights/>

clear that LGBTI persons, like all others, should enjoy protection from discrimination on grounds other than their sexual orientation.

NANHRI: The Network of African National Human Rights Institutions has not formally taken up SOGI issues. Its agenda is set by the members and governing organs of the network. The SAHRC has engaged in dialogues with some other African NHRIs on these issues. It hosted the UHRC (Uganda) during the latter’s exploratory visit to South Africa on this issue in 2010.⁵¹³

The Kenyan Commission (KNCHR) faced criticism and internal dissent for its courage in calling for decriminalization in 2012. The NHRIs of Zambia and Sierra Leone seem either fearful of national public and political reactions if they challenge criminalization, or led by officers with very conservative views on this issue. In neither case does the NHRI appear to have produced a study or research to support their conservative position.

6.15 OTHER NATIONAL AGENCIES WITH SPECIALIZED MANDATES, INCLUDING GENDER EQUALITY INSTITUTIONS

The National Gender Equality Commission in Kenya was still in the setup phase and is in the process of developing its strategy. It was not possible to hold a meeting with representatives of the Commission. It is as yet unclear whether SOGI issues will be addressed as part of its strategy, though the organization’s leadership was among those who were positively disposed towards these issues while at the KNCHR.

Note the Equal Opportunities Commission Act in Uganda, section 6 of which prevents the Commission from investigating “(d) any matter involving behaviour which is considered to be— (i) immoral and socially harmful, or (ii) unacceptable, by the majority of the cultural and social communities in Uganda.

6.16 THE RIGHTS OF LGBTI PERSONS AND THE POLITICS OF THE UN HUMAN RIGHTS SYSTEM

In 2008 AI noted fears that the issue of LGBTI rights would threaten the human rights movement. As pointed out by AI in 2008⁵¹⁴, LGBTI and human rights activists have turned to the international human rights system precisely because of the difficulty of achieving progress on the home front. Sally Engle Merry explores nationally based NGOs use of international standards and systems in contexts where there is less domestic support. She contrasts the example of lesbian activists in India with activism on the issue of dowry murders. There is significant local concern and

⁵¹³ Notes on interview with Dr. Kometsi, SAHRC, 5.2.2013.

⁵¹⁴ AI, Love, Hate and the Law, 2008, POL 30/003/2008

support for campaigns on the latter issue, and less need to refer to international standards to gain legitimacy and support. The activists for lesbian rights use Indian transcriptions of the word “lesbian” rather than using a word with roots in one of the three relevant Indian languages.⁵¹⁵

Thus LGBTI rights activists are likely to appeal to international standards and partners for support in contexts where there is little domestic support. They are also more likely to be more dependent on international funding sources (though this stands out perhaps less in Africa, where most NGOs are heavily reliant on international funds). With this, there is an inherent danger of a widening gulf between the parties and less dialogue. There may be a risk of a counter reaction where conservative forces are likely to play the national sovereignty card or make appeals to indigenous cultural values. Whether or not these values are genuinely indigenous is secondary, as long as appealing to them is a successful political strategy in a heated debate carried out in the media. How can this be countered? How can LGBTI activists attempt to avoid being on the defensive in this regard? One possibility is to appeal to an assertion of cultural values that would support their cause. African culture does contain values of privacy (a separation between public and private spheres) and equality.

As noted in 2003 how governments had *systematically written out references to "sexual orientation" and "gender identity" from proposed human rights texts.*” It was thus not until 2011 that a resolution on the subject could be (narrowly) adopted in the UN Human Rights Council, and disagreements remain deep. In international bodies as well as in most national contexts, continued progress depends on maintaining dialogue.

6.16.1 POSITIONS TAKEN IN THE UN ON THE SUBJECT OF DECRIMINALIZATION

African Countries favourable to LGBTI rights in relevant statements and resolutions		
2008 / 2011 Statement in UNGA that HR include protection regardless of		
<u>Position</u>	<u>No.</u>	<u>States</u>
<u>Supporting, 2008</u>	<u>5</u>	Cape Verde, Gabon, Guinea Bissau, Mauritius, Principe ⁵¹⁶
<u>Additional supporting, 2011</u>	<u>5</u>	Central African Republic, Rwanda, Seychelle, South Africa ⁵¹⁷
UN HRC Resolution A/HRC/17/L.9/Rev.1 (June 2011)		
<u>Supporting</u>	<u>2</u>	<u>South Africa, Mauritius</u>

⁵¹⁵ 2009 AV talk available online at Univ. of Windsor, Centre for Studies in Social Justice, Unpacking the Vernacularization Process, http://www.youtube.com/watch?v=9IECQNSR_ak

⁵¹⁶ <http://www.hrw.org/news/2008/12/18/un-general-assembly-statement-affirms-rights-all>

⁵¹⁷ <http://geneva.usmission.gov/2011/03/22/lgbtrights/>

Abstaining	<u>2</u>	Burkina Faso, Zambia
2010 UNGA Resolution on Summary, Arbitrary and Extrajudicial Executions⁵¹⁸		
Supporting inclusion of LGBTI (UNGA plenary)	<u>5</u>	Angola, Cape Verde, Mauritius, Rwanda, South Africa
2012 UNGA Resolution on Summary, Arbitrary and Extrajudicial Executions⁵¹⁹		
Supporting inclusion of LGBTI (Third Committee)	<u>5</u>	Malawi, Mauritius, Rwanda, Seychelles, South Africa,
Abstaining	<u>19</u>	Angola, Benin, Burkina Faso, Burundi, Central African Republic, Congo, Democratic Republic of the Congo, Ethiopia, Gabon, Ghana, Guinea-Bissau, Kenya, Mali, Mozambique, Nigeria, Togo, United Republic of Tanzania, Zambia, Zimbabwe.
Against	<u>13</u>	Algeria, Morocco, Egypt, Libya, Botswana, Cameroon, Djibouti, Mauritania, Namibia, Senegal, Sudan, Swaziland, Uganda,

At a vote in the Third Committee of the 2010 / 2011 UNGA no African states initially supported the inclusion of language mentioning SOGI in the resolution on summary, arbitrary and extrajudicial executions.⁵²⁰ The initial text of the resolution emanating from the Third Committee did not mention these grounds. An extraordinary effort was then made in the plenary UNGA session to restore the mention of these grounds. The five countries mentioned above supported the changes⁵²¹, and the resolution adopted in the plenary session did finally include SOGI.

Some countries seem to wish to maintain nuances of difference between their positions in the Human Rights Council and the UNGA. South Africa has been more positive about supporting LGBTI in the HRC in Geneva than at the UNGA in New York. While ultimately voting in favour, it criticized western countries for introducing SOGI language in New York. South Africa sees an incremental approach as necessary on this issue rather than what some would see as a precipitated one. It has hesitations about a mechanism such as a Special Rapporteur on this theme, as this may lend itself more to naming and shaming than dialogue.⁵²² Angola, on the other hand, supported the resolution at the UNGA while not supporting the 2011 statement. Similarly, Burkina Faso abstained at the HRC in June 2011 but opposed the inclusion of SOGI language at the UNGA in New York earlier the same year. Some countries have zig-zagged in curious ways. Sierra Leone, despite its colonial era criminal provisions, supported the 2011 statement. It did not support the inclusion of SOGI language at the UNGA in 2012.

African states where there may be hope of a more liberal tendency:

⁵¹⁸ UN Doc. A/RES/65/208

⁵¹⁹ See UN Doc.

⁵²⁰ See UN Doc. A/65/456/Add.2 (Part II)

⁵²¹ See UN Doc. A/65/PV.71

⁵²² Notes from meeting with DIRCO, Pretoria, 8.2.2013.

Namibian leaders seem to have moved away from the hardline rhetoric of a decade or so ago. Botswana and Mozambique have, as noted elsewhere in this study, adopted employment law that protects against discrimination based on sexual orientation. Botswana has supported hardline positions at the UNGA that go against this domestic trend, whereas Mozambique has abstained at the UNGA. There may be possibilities of activists succeeding in bringing the international stances of these states into line with the progressive trends seen in national policy Burkina Faso abstained on the 2011 Human Rights Council resolution rather than voting against it. It was not possible to speak to an official of the country's foreign ministry during the mission. Zambia's hardline stance at home ran counter to its abstention at the Human Rights Council in 2011. Sierra Leone's support for the 2011 statement has so far not been matched by votes on resolutions. Angola voted to include LGBTI in the 2010 – 2011 UNGA resolution on extrajudicial executions.

6.16.2 WORK OF CHARTER BASED MECHANISMS / SPECIAL PROCEDURES

The Special Rapporteur on the situation of human rights defenders, and on the promotion and protection of the right to freedom of opinion and expression also criticized the AHB.⁵²³ Note interventions by UN Special Representatives in regard to the Nigerian Same Gender Marriage Bill.⁵²⁴

6.16.3 THE UNIVERSAL PERIODIC REVIEW

References are made above to the UPR recommendations to Kenya in regard to decriminalization and national responses. Zambia likewise rejected UPR recommendations in this area. While it is unlikely that recommendations will bring change, the processes themselves can provide space for dialogue and advocacy.⁵²⁵

6.17 THE AFRICAN HUMAN RIGHTS SYSTEM

The African Charter on Human and People's Rights prohibits contains and expansive and open ended guarantee of equality and non-discrimination in the enjoyment of

⁵²³ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9855&LangID=E>

⁵²⁴ <http://www.hrw.org/news/2011/11/01/joint-memorandum-government-nigeria-same-gender-marriage-prohibition-bill-2011-viola>

⁵²⁵ This was skilfully used by the Malawian organization CEDEP. See reference to interview with Gift Trapence, Chapter Tw.

the rights guaranteed by the Charter. The Charter mentions the right of every individual to take part in the cultural life of his community (Article 17.2) and the duty of the state to promote and protect morals and traditional values recognized by the community (Article 17.3). The charter seems to see tradition and human rights as being consistent with one another, speaking in the preamble of the importance traditionally attached to human rights and freedoms in Africa. It has been noted that the African Charter lacks a specific mention of the right to privacy. Nevertheless, this may arguably be inferred from other rights, as well as from more recent developments in the African human rights system.⁵²⁶ Perusal of African constitutions gives support to general acceptance of a right to privacy.⁵²⁷

As with the UN human rights system, the African system offers a number of ways in which rights issues typically are raised: i) Individual complaints ii) the examination of state reports and iii) the work of special procedures, principally thematic rapporteurs.⁵²⁸ In addition, there are the possibilities of resolutions by the African Commission and of making statements by organizations having observer status before the Commission. Outside the framework of the Commission itself, the NGO forum

As previously mentioned, there have as yet been no decisions by the African Commission on Human and Peoples' Rights or the African Court of Justice and Human Rights that deal with the issue of criminalization of same sex relations, or of SOGI issues more generally.⁵²⁹ One decision of the ACHPR does contain a mention of sexual orientation as a prohibited ground of discrimination under the Charter.⁵³⁰ The statement is however at best an *obiter dictum*. It may have been included without full consideration by the Commission. The procedure for handling of complaints by the Commission is less than fully satisfactory. In 2000, IGLHRC generally advised against use of the complaint procedure under the Charter because of the risk of poorly prepared cases leading to bad precedents that would be difficult to change.⁵³¹

The examination of state reports that members of the African Commission have shown a degree of openness towards consideration of the rights of LGBTI persons. The Commission is typically composed of a mix of progressive and conservative

⁵²⁶ See Murray and Viljoen, 2007, op cit.

⁵²⁷ Selected examples include Kenya (2010), Art. 31, Uganda (1995) Article 27, Malawi (1995) Article 21, Zambia, (1996), Article 11, Senegal, Article 13, Burkina Faso Article 6, Nigeria, Article 37, South Africa, Article 14, Zimbabwe, Article 57. Zimbabwe is of particular importance, as this provision restores a right of privacy that was removed from the constitution by Constitutional Amendment no. 14 of 1995. See *Human Rights and Zimbabwe's Draft Constitution*, Matyszak, March 2013, <http://www.hrforumzim.org/wp-content/uploads/2013/03/HUMAN-RIGHTS-AND-THE-DRAFT-CONSOLIDATEDfinal-edit-for-posting.pdf>

⁵²⁸ The possibility of complaints between states is also present, but unused in practice.

⁵²⁹ See generally Murray and Viljoen, *Towards Non-Discrimination on the Basis of Sexual Orientation: The Normative Basis and Procedural Possibilities before the African Commission on Human and Peoples' Rights and the African Union*, *Human Rights Quarterly*, Volume 29, Number 1, February 2007, pp. 86-111

⁵³⁰ Communication 245/2002, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Decided at the 39th ordinary session, May 2006, 21st Activity Report

⁵³¹ IGLHRC, cited in Murray and Viljoen, 2007.

members. All members of the Commission can ask questions of the country delegations that appear before them to present and defend state reports. Commissioners often rely on NGO submissions to provide them with information as the basis for the questions they pose. IGLHRC and other organizations have assisted national LGBTI NGOs to prepare and present submissions to the Commission in advance of the hearing of national reports. Thus, members of the Commission have questioned Cameroon on its detention and prosecution of LGBTI persons and Nigeria and Uganda on their legislative proposals.⁵³²

Experts and NGO representatives said that the African Commission on Human and People's Rights can neither be characterized as clearly closed or clearly open to consideration of SOGI issues. Issues relating to the lack of full independence of the political structures of the AU mean that the ACHPR may have to exercise a certain self-censorship on this and other very controversial issues. On the positive side, the Commission has questioned states such as Cameroon on its prosecution and detention of LGBTI persons, though there is no follow up mechanism in relation to any recommendations that might be made.

6.17.1 RAPORTEURS AND SPECIAL MECHANISMS

The Special Mechanisms of the African Commission are also a worthwhile avenue to explore. It is not possible to describe the work of the various mechanisms in detail here, but the Commission's Committee on the Rights of Persons Living with HIV / AIDS⁵³³, and its rapporteurs on Freedom of Expression and Access to Information, on Prison Conditions and Conditions of Detention, on Human Rights Defenders, and on the Rights of Women could be of particular relevance to the issues described herein. In a number of areas, there is potential for greater cooperation between rapporteurs of the African system and those of the UN system.

6.17.2 CIVIL SOCIETY PARTICIPATION

Since 2006, a number of African CSOs working to protect and promote the rights of LGBTI persons have succeeded in opening up a space to voice their concerns at the Commission and to gain support from them from civil society more widely, as well as from a number of Commissioners.⁵³⁴ Their strategies have included the presentation of alternative reports, lobbying of Commissioners and active participation in the NGO forum.

The denial by the ACHPR of observer status to the Coalition of African Lesbians (CAL) in 2010 was seen by civil society activists as a severe disappointment and an indication of where the lines are drawn. The explicit inclusion of the "lesbian" label

⁵³² Murray and Viljoen, 2007, op cit.

⁵³³ <http://www.achpr.org/mechanisms/hiv-aids/>

⁵³⁴ Sibongile Ndashe, *Feminist Africa*, 15, Seeking the protection of LGBTI rights at the African Commission on Human and Peoples' Rights, http://agi.ac.za/sites/agi.ac.za/files/2_case_study_sibongile_ndashe.pdf, accessed 29.5.2013

was reportedly seen as a bridge too far for some of the Commissioners, which refused registration. No reasons were provided to CAL, but an ACHPR activity report to the AU claimed that CAL “do not promote and protect any of the rights enshrined in the African Charter”.⁵³⁵ This wording gives cause for concern as it could be interpreted as meaning that the Commission does not consider the Charter to protect the rights of sexual minorities. On the other hand, too much should not be read into a formulation in an activity report that does not have the status of a decision of the Commission as such. The rejection of registration of organizations declaring an LGBTI identity is similar to the case in Burkina Faso.

Despite this setback, the CAL and other CSOs working with the rights of LGBTI continue to see the ACHPR as a worthwhile forum for activism and presence. The NGO forum has matured in its own attitude to SOGI issues, though opposition still remains among some.⁵³⁶ In a sign of the increasing support, eighteen organizations made statements to the Commission criticizing the denial of observer status to CAL. The critics included not only NGOs, but the Kenyan National Commission for Human Rights.⁵³⁷

Observers at sessions of the ACHPR have sometimes noted that members of the Commission lack knowledge of SOGI issues and display a genuine interest in knowing more about this subject. Like many other persons in policymaking positions, they could benefit from the chance to learn more. This can take place both in a relatively confidential, non-threatening environment through seminars and visits, or through more public events organized by NGOs in countries that are less hostile to this issue, possibly in connection with Commission sessions. The Centre for Human Rights at the University of Pretoria also produced a background paper on SOGI for use by the African Commission, but unfortunately it was not discussed by the Commission. A possibility that is so-far unexplored is to expose key persons in the African system to developments within the Inter-American Human Rights System, which has made very significant progress on this issue in recent years. There is greater similarity between the conditions of work of these systems than there is between the African and European ones.

This handling of this issue by the ACHPR must also be seen in the light of decisions at the AU political level. The issue of SOGI in international law was raised by Egypt in a resolution adopted at the 2010 Kampala Summit of AU leaders. The Assembly stated its rejection of *“any attempt to undermine the international human rights system by seeking to impose concepts or notions pertaining to social matters, including private individual conduct, that fall outside the internationally agreed human rights legal framework”*.⁵³⁸

⁵³⁵ 28th Activity Report of the African Commission on Human and Peoples’ Rights (ACHPR), para. 33.

⁵³⁶ Notes on interview with Amsher, Johannesburg, 5.2.2013.

⁵³⁷ 48th Activity Report of the African Commission on Human and Peoples’ Rights (ACHPR), para. 41.

⁵³⁸ Decision on the Promotion of Cooperation, Dialogue and Respect For Diversity in the Field of Human Rights Doc. Assembly/Au/17(Xv) Add.9

Given the political constraints on the Commission and its lack of full independence as a human rights body⁵³⁹, it cannot be expected that dramatic change will come from any such exposure, but it may contribute to increasing the space for moderates and developing thinking.

6.18 REGIONAL ECONOMIC COMMUNITIES (“RECS”)

IGLHRC is attempting to create dialogue spaces at regional bodies such as SADC, ECOWAS and the East African Community. At present, there is little to point to in terms of policy resolutions or dialogues, or of cases from judicial bodies, but there appears to be increasing readiness to hear arguments based on a social and economic rationale, such as those put forward by the Global Commission on HIV / AIDS and the law in its 2012 report.

6.19 THE COMMONWEALTH

At first sight, the Commonwealth seems an appropriate forum to address the legacy of Victorian sodomy laws. Out of 54 Commonwealth countries, 41 reportedly still criminalize homosexual acts.⁵⁴⁰ Attempts by Britain, Australia, Canada and New Zealand to press for change have so far been unsuccessful.⁵⁴¹ The tensions between Canada and Uganda, and Prime Minister Cameron’s singling out of Africa in 2011 mainly concerned Commonwealth nations.

In 2011 the Commonwealth Human Rights Initiative (CHRI) produced a paper recommending that Commonwealth states prioritize decriminalization.⁵⁴² Justice Kirby, the former Australian Supreme Court Justice, attempted to bring up the issue at the 16th Commonwealth Law Conference in Hong Kong in April 2009, but this effort was not well-received by participants.⁵⁴³

⁵³⁹ See *inter alia* Murray and Viljoen, 2007, op cit.

⁵⁴⁰ <http://www.bbc.co.uk/news/uk-15511081>

⁵⁴¹ <http://www.pinknews.co.uk/2011/10/19/australian-foreign-minister-to-call-on-commonwealth-to-repeal-anti-gay-laws/>

⁵⁴² http://www.humanrightsinitiative.org/index.php?option=com_content&view=article&id=780:lgbrights&catid=43:london-office&Itemid=579

⁵⁴³ 16th Commonwealth Law Conference, Hong Kong, 8 April 2009, Homosexual Law Reform: An Ongoing Blind Spot of The Commonwealth of Nations, The Hon. Michael Kirby Ac Cm g

CHAPTER 7

7 ENTRY POINTS IN DEVELOPMENT PROGRAMMING

7.1 STRATEGIC AND POLICY FRAMEWORKS

A number of policy and strategic frameworks have been developed on SOGI or LGBTI issues. The EU Strategic Framework commits the Council of the EU to (a) develop public guidelines on the enjoyment of human rights by LGBTI persons by June 2013 and to (b) Develop an EU strategy on how to cooperate with third countries on human rights of LGBTI persons, including within the UN and the Council of Europe. This includes promoting adoption of commitments in the area of human rights of LGBTI within the OSCE, including through organisation of a public event in the OSCE framework.

Norway has a National Plan of Action that includes a section on foreign aid. SIDA, the Netherlands and France established a fund to support activism in this area.⁵⁴⁴ As referred to in Chapter Four, the USA also established its own Global Equality Fund.⁵⁴⁵ US embassies have begun designating a staff focal point on LGBTI issues.

France convened a conference in Paris in 2009 with the Netherlands and Norway. In Sweden, work is in progress on a policy document. An analysis was made in 2005, and a first action plan developed for the period 2007 – 2009 that included financing of educational courses on the rights of LGBTI persons.⁵⁴⁶

The Netherlands produced a handbook for embassies and consulates on Sexual Orientation and Human Rights⁵⁴⁷ and has adopted LGBTI rights as a priority area of its human rights work for the coming years.⁵⁴⁸ Section 4.3 of the Dutch strategy addresses the issue of counterproductive consequences, reminding readers of social and political sensitivities and warning against careless and inadequately prepared actions that might jeopardize the willingness of governments to cooperate and to consider changes and place persons and LGBTI organizations at risk, as well as putting the Netherlands embassies in a negative light.

⁵⁴⁴ <http://www.diplomatie.gouv.fr/en/global-issues/human-rights/sexual-orientation-and-gender/>

⁵⁴⁵ <http://www.state.gov/globalequality/>

⁵⁴⁶ <http://www.internationalpeaceandconflict.org/forum/topics/call-for-applicants-sida-1>

⁵⁴⁷ <http://www.minbuza.nl/en/news/2010/09/handbook-on-defending-gay-rights.html>

⁵⁴⁸ <http://www.minbuza.nl/en/news/2011/04/rosenthal-compact-human-rights-policy-for-concrete-results.html>

The 2010 EU Toolkit is among the most comprehensive of these documents in that it sets out a wide range of actions and steps that EU and member state institutions can undertake to protect and promote the human rights of LGBTI people.

7.2 BEGINNING THE WORK OF MAINSTREAMING LGBTI ISSUES

While there are many obstacles, there are also opportunities to begin addressing these issues in sector programmes. AMSHeR urged sympathetic donors to work to create space for discussion of LGBTI issues in justice and education programmes, and to broaden discussion in health programmes from HIV / AIDS to other issues and from MSM to other sexual minorities.

Embassy and development staff interviewed for this study frankly admitted the difficulties of implementing some aspects of development policies in this area. An official of SIDA in Burkina Faso had made attempts to further the Swedish policy on LGBTI, but felt that these had, despite his best efforts, been rather unsuccessful.⁵⁴⁹ In the area of human rights, national government emphasis, primarily by the Ministry of Human Rights, is very much on promotion.

Government priority as regards gender is on the empowerment of women. Attempts to raise SOGI themes during meetings on gender tended to be met with an awkward silence and little visible support from other participants. As discussed above, staff of many development organizations are not fully equipped to tackle this issue. The link between gender equality and the rights of lesbians, transgender and other sexual minorities is poorly made or non-existent in most countries in the region. The effort to include sexual minority rights in women's and gender programming may be suffering from some of the same constraints that the HIV / AIDS issue encounters. Programmes in this area are comparatively well funded, and state machinery is engaged in their implementation. These conditions entail a certain conservatism in setting the agendas of these programmes and in deciding which organizations to admit to the discussion. CAL praised the EU for recent openings in this regard. UNFPA and some other organizations have tried to address notions of masculinity, which may be an entry point to a more general discussion of gender. The Centre for the Study of AIDS in Pretoria, South Africa, also suggested this approach.⁵⁵⁰

The Centre for Human Rights at the University of Pretoria is conducting one-week courses for representatives of mainstream human rights NGOs and some state officials on SOGI issues. They stressed the need to target the recipients who are best placed to use this training.

⁵⁴⁹ Notes on interview with M. Francois Landiech, Ouagadougou, January 2013. The SIDA efforts in this regard were also mentioned by other donor representatives, including UNDP and Danish Embassy officials.

⁵⁵⁰ Notes on interview with Mr. Pierre Brouard, Centre for the Study of AIDS, 6.2.2013.

7.3 CIVIL SOCIETY BASED EFFORTS

Many civil society activists take the view that the main priority for the next few years for LGBTI rights in Africa is still to forge and strengthen civil society organization and capacity, including networking. Many LGBTI organizations still lack basic facilities such as meeting places and offices. This does not by any means exclude continuing to reach out to state bodies that might be ready to engage in a discussion of these issues.

The human rights of equality, free association, assembly and expression provide the direction that state policy must follow in allowing civic initiatives to work with the public, building tolerance and understanding of sexual minorities and the principles of the state, including the rule of law, the separation of powers and the separation of church and state. There is no question that prudence and carefulness are necessary in order to avoid greater discrimination, social unrest and even violence. National and international human rights law however, by providing for these freedoms, means that this discretion should be exercised through mature judgment by private actors, not through far reaching limits on public freedoms. It can be pointed out that the unrest that occurred in Senegal and Kenya did not result from LGBTI activism or outreach, but from sensationalist journalism and incitement to violence, including by religious leaders.

Religious feelings and religious leaders should not justify or have a veto over public liberties. Nobody can know exactly what the effects – both intended and unintended - of particular actions or campaigns will be, but legitimate government worries about social unrest or disturbances to the effort to combat HIV / AIDS can be met in any number of ways short of denying public liberties. Best among these are a close dialogue and coordination. Government and donors can also exercise influence through agreements on priorities for civil society grants in this area. LGBTI organizations want to be brought in to policy discussions in some areas. Admission and continued membership demands responsibility and dialogue with other participants.

Public health approaches should give results in terms of human rights – particularly the right to health, and vice versa. HIV / AIDS work has given a platform for social research that needs to be carried out, describing behaviours of MARPs. One difficulty here – and where a rights based approach can contribute - is the necessity to avoid omitting women. The inclusion of MSM as an MARP is positive, but it should not mean that men's concerns are researched to the detriment of women's. Research in this area should also increase awareness of transgender and intersex people. There may also be some differences in views and approach between African and Western based LGBTI organizations in relation to HIV / AIDS and the struggle for rights. In the African context, the need to give recognition to the high rates of HIV / AIDS that afflict MSM in particular is a primordial concern.

7.3.1 CIVIL SOCIETY PARTNERSHIP APPROACHES: CHANNELLING DONOR SUPPORT THROUGH LGBTI SPECIFIC ORGANIZATIONS AND NETWORKS

A number of donors are providing support to LGBTI organizations via western or international LGBTI structures. This has been successfully done by Norway through LLH Norway, SIDA through IGLHRC and the Netherlands through HIVOS and COC. Hands-on capacity building of the GALCK network provided through the LLH Norway support seems to be yielding results in Kenya, despite the difficulties encountered. LGBTI organizations face the same, or even more severe, challenges that civil society coalition building generally encounters. Donor support must also take care to ensure that the various communities classed together under the “LGBTI” umbrella are covered in various interventions. Coalition building among the various groups of sexual minorities is necessary and valuable, but making coalitions work is an effort that demands time, effort and great sensitivity. Concerns often emerge that lesbians, transgender, bisexual and intersex persons are lost in the focus on MSM, HIV / AIDS, sodomy laws. Transgender persons have often felt that their issues are forgotten, or that, in a context of widespread public ignorance, transgender persons will be seen as a subgroup of homosexuals.

LGBTI organizations from countries that have been through these processes may often be among the best positioned to support the development of coalitions in an inclusive and equitable manner. Donors should continue to facilitate partnerships of this kind, but it cannot be taken for granted that they will be free of some biases.⁵⁵¹ At the same time, they should encourage coalition building with wider human rights, development and women’s organizations. Organizations for intersex persons are rare, and none were met during the country visits. One organization that has worked impressively to combat prejudice and ignorance and to provide support to parents of intersex children is SIPD in Uganda.⁵⁵²

Good work is also being undertaken through Africa based civil society structures like GALA, AMSHeR, IGLHRC and HIVOS, as well as through a large number of Europe and North America based organizations and foundations. The four Africa based organizations stressed the importance of understanding the context through well-established relationships or preliminary studies.⁵⁵³ In some cases, it has become increasingly possible for them to engage with non-LGBTI specific organizations and state structures.

⁵⁵¹ It should be emphasised that nothing is implied by this statement in relation to LLH Norway or its work in Kenya.

⁵⁵² <http://sipd.webs.com/>

⁵⁵³ Notes from meetings with GALA, AMSHeR, IGLHRC and HIVOS, Johannesburg, Feb. 2013.

7.3.2 GENERALIZED PUBLIC CALLS FOR PROPOSALS IN TARGET COUNTRIES

Recently EU has publicized the availability of funding for LGBTI rights projects. An example is an EU call for proposals in the highly conservative environment of Zambia in 2013. Such a call for proposals leads to public debate. Projects in this area are social experiments in contexts where indirect results – positive as well as negative - cannot be predicted with any certainty. Positive impacts can potentially include increased space for public debate, and advancement of liberal positions and strengthened protection for activists. Negative ones may include strengthening and consolidation of conservative forces, increased repression against activists, the introduction of restrictive provisions in legislation and the constitution. Measuring these two against each other is difficult. It needs to be clearly understood that there is no guarantee of positive results. A large structure such as the EU is perhaps more immune to some negative effects for the donor than individual countries. Dialogue needs to be a key part of any such project if the divisive potential of this issue is to be kept to a minimum.

Given the difficulties that many LGBTI organizations have in obtaining official registration and therefore a legal existence, donors should be flexible in regard to the way applications and funding mechanisms are structured, especially where small grants are concerned. Fledgling LGBTI organizations that lack project management and bookkeeping capacity should be encouraged to partner with more established organizations.

NGO efforts were somewhat more successful than state centred approaches in Burkina Faso, but even here there were many obstacles. Some civil society representatives referred to the rejection of a visiting expert who did not hide his same-sex liaison, making it virtually impossible for him to continue working with national partners. Given the very limited space available through state partnerships on this issue, priority in Burkina Faso should probably be given to assisting CSOs to avail of their rights to freedom of association, assembly and expression, while benefitting from links to mainstream human rights organizations and trying to forge similar links to women's and mainstream development organizations. Links to subregional, continental and western based LGBTI and human rights organizations have been shown to be useful and productive (drawing from experience in other African countries). In addition to promotion of more open discussion and building of understanding, documentation of human rights violations should be addressed, especially violence or deprivation of liberty of LGBTI persons. Insofar as possible, donors should assist LGBTI organizations to gain space in development discussions and forums.

7.3.3 THE IMPORTANCE OF PARTICIPATION

African LGBTI activists are well aware that western approaches cannot be simply copied in Africa. In many countries, they have become sophisticated in many areas of work, but as yet, there are few comprehensive strategies to respond to specifically African conditions. Member organizations of GALCK in Kenya – especially Gay Kenya Trust - have

recognized this need and are developing a so-called “Multi-tiered Approach” that addresses media, internal stakeholders within the human rights movement, the health sector, society broadly, the legal system and religious bodies. KHRC is also incorporating SOGI issues into general organizational strategies on non-discrimination and equality that would attempt to address various sectors, including education and employment. Developing and implementing a strategy on this level is something that requires time and patient coalition building, with a number of inevitable setbacks along the way.

7.3.4 OFFENSIVE AND DEFENSIVE LITIGATION STRATEGIES

Strategic litigation is generally less relevant as a strategy in Francophone countries because of the less prominent role of judicial precedent in legal systems. In Anglophone countries, going directly to the “big issue” of decriminalization at a time when most judges are not ready to declare penal provisions unconstitutional is a risky strategy that may produce bad precedents. Many activists were of the view that it may be productive to build slowly towards equality, availing of human rights guarantees in ESC areas such as employment, health, housing and education, in relation to civil rights of freedom of assembly, association and expression, and on issues like private violence and abuse of police power. Kenyan legislation provides opportunities for tackling employment discrimination against LGBTI persons, owing to the inclusion of an “other status” category of prohibited discrimination in the Employment Act.⁵⁵⁴

In countries where the climate is more hostile, including Uganda and Zimbabwe, LGBTI organizations have become used to using the law defensively rather than offensively, to combat repression. In the case of *Victor Mukasa and Yvonne Oyo v. Attorney General*, the Court upheld a challenge to the arrest of Oyo at Mukasa’s home, demonstrating that gays and lesbians – like anyone else – could challenge the unlawful conduct of the authorities. The Court awarded damages to Oyo for the violation of her right to protection from torture, cruel, inhuman and degrading treatment under Art. 24 of the Ugandan Constitution. The Court also awarded damages to Mukasa for the violation of his right to privacy of person, home and property guaranteed by Art. 27 of the Constitution.

7.3.5 MORE OR LESS VISIBILITY, AND KINDS OF VISIBILITY

Beginning in the 1990s, LGBTI communities in Africa have become more visible in asserting their identity and demanding respect for their rights. In this, they have followed a trajectory familiar from western countries since the 1960s, but in a much more hostile social environment and in a context where the protection of the law often cannot not be relied upon, with poor police resources to offer protection and, an uncertain commitment to protect on the part of many government and justice officials.

⁵⁵⁴ Discussions with Ms. Monica Mbaru and KHRC, Nairobi, Feb. 2013.

In Kenya some activists trace events at 2005 World Social Forum as a major milestone in their movement.

Both silence and visibility come at a price. Visibility is sometimes at once the *sine qua non* of working for increased acceptance in the public sphere and a strategy that involves high risks for advocates of more repression and private violence. In this context, finding the right approaches to increased visibility is vital. The temptation to import campaigns from western countries may be great. Financing and technical expertise usually come from the west, and African LGBTI activists may have benefited from educational opportunities and exposure visits to western countries.

It is instructive to note that in the USA, the successes of the LGBTI movement in recent years may have been the result of a change in approach from a rather defensive or confrontational stance (“We’re here, we’re queer, get used to it”), to one that addresses mainstream views on love and commitment. This was necessary to counter the narrative of gay rights being potentially harmful to children put forth by opponents, and of an overemphasis on sex.⁵⁵⁵ On both sides, PR campaigns were expensive and extensively researched.

Doing no harm: minimizing the risk of violence in connection with greater visibility

There is a significant and foreseeable risk that increased visibility and campaigning by LGBTI persons and groups will be accompanied by an increase in intolerance and violence against them. This can involve state repression, sensationalist media campaigns, religious condemnation, social exclusion and the risk of violence, both on a small and individual scale and in the form of mob incidents.

While violence is not an inevitable consequence of visibility, the link is uncontroversial. In a 2009 report, HRW noted that “*Almost every time LGBT activists in a country between the Limpopo and the Sahara have first gained public visibility, a crackdown followed.*”⁵⁵⁶ In Senegal, HRW also made a link between increased visibility through HIV / AIDS outreach to MSM and incidents of violence, though as in Kenya and Uganda, sensationalist media and inflammatory rhetoric by local religious leaders played an important role. The increased visibility is portrayed by sensationalist media and interpreted by excitable religious leaders and members of the public as an increase in homosexual behaviour.⁵⁵⁷ Politicians fear criticism for “being soft” or even for having allowed these trends, and often react with promises of a crackdown. Thus in any context where claims for LGBTI rights are made, preparation for a backlash must be an integral part of planning and preparation.⁵⁵⁸

⁵⁵⁵ <http://www.nytimes.com/2012/10/10/us/politics/frank-schubert-mastermind-in-the-fight-against-gay-marriage.html?pagewanted=all>

⁵⁵⁶ HRW, 2009 “Together Apart: Organizing Around Sexual Orientation and Gender Identity Worldwide”. Available at www.hrw.org

⁵⁵⁷ HRW 2010, *Fear for Life: Violence against Gay Men and Men Perceived as Gay in Senegal*, p.3, p.7.

⁵⁵⁸ Notes on interview with GALA, Johannesburg, S.A. Feb. 2013.

7.3.6 ISSUES OF PERSONAL SAFETY AND SECURITY

It was not possible within the scope of the present study to discuss emergency protection mechanisms for LGBTI persons in detail. Insofar as possible, they need to engage with police and justice agencies to pre-empt and counteract threats. They need to be vigilant in monitoring hate speech. They also need to take measures to protect the confidentiality of information contained in computers and files. Organizations like Frontline Defenders, ARC, KHRC and EHAHRD have worked with activists to develop strategies and contingency plans in this area. GALCK was still working on an emergency response programme.

Organizations need to obtain financing and develop routines for the personal security of their staff and offices. They need to have contingency plans for safe houses, and in the extreme, evacuation and familiarity with the possibilities to obtain asylum in other countries.⁵⁵⁹ New York based Human Rights First and San Francisco based ORAM International⁵⁶⁰ have researched protection issues for LGBTI refugees in Africa, IDPs and asylum seekers. GALA in South Africa has carried out work to research and occasionally assist in developing asylum in South Africa. UNHCR was perhaps the earliest UN Agency to work for the legal protection of persons facing persecution on SOGI grounds. The Refugee Law Project at Makerere University in Kampala, Uganda has played an important role as noted elsewhere herein. The role of media in relation to visibility is discussed in Chapter Two above.

7.3.7 ALLIANCES, SUPPORT NETWORKS AND ENGAGEMENT BY MAINSTREAM HR ORGANIZATIONS

Combating state harassment requires that organizations have lawyers or cooperative links to mainstream human rights organizations. There will thus be a need to build and maintain protection systems. LGBTI organizations need functioning links and good working relationships with HR defenders generally. In Kenya, an important factor in the growth of LGBTI organizations is the consistent support given to their cause by human rights NGOs such as the Kenya Human Rights Commission (KHRC).⁵⁶¹ In Burkina Faso, the country's largest human rights NGO, the MBDHP, responded positively to requests for help from NGOs such as QAYN. The EHAHRD network has consistently engaged with LGBTI human rights issues in East Africa and the Horn.

The more successful and resilient LGBTI organizations and movements have used the law to defend their rights, usually through alliances with mainstream human rights organizations. The Legal Resources Foundation (LRF) supported GALZ in challenging government attempts to exclude them from the Zimbabwe International Book Fair in

⁵⁵⁹ GALCK previously had a safe house, but had to close it for budgetary / administrative reasons.

⁵⁶⁰ <http://www.oraminternational.org/en/publications>

⁵⁶¹ Notes on meeting with Julie Kingsland, KHRC, 19.2.13.

the 1990s.⁵⁶² SMUG in Uganda has also won important legal victories in the area of personal liberty. The Southern African Litigation Center, based in South Africa, is providing support to a number of important legal challenges to repressive laws in the region, including the denial of registration to LEGABIBO in Botswana.⁵⁶³

In a 2007 presentation to the “Changing Faces, Changing Spaces” conference in Nairobi⁵⁶⁴, Cary Alan Johnson (then working for the IGLHRC) noted the reluctance of mainstream HR NGOs to engage with this issue in Uganda. One of the positive things to come out of the AHB in Uganda was the emergence of a broad civil society coalition against the Bill, now comprising fifty one organizations, encompassing the areas of women’s rights, development, HIV / AIDS and human rights.⁵⁶⁵ The Coalition was a party to the successful case filed against the Rolling Stone paper for publicizing the names and details of persons alleged by the paper to be LGBTI. It is important to remember that an effort like this did not arise “out of the blue”, but happened thanks to the courage and commitment of particular persons prepared to take risks and build consensus. The Refugee Law Project in Uganda played a leading role in this regard. The Uganda Law Society also issued a statement against the Bill.⁵⁶⁶ In Mozambique, the Human Rights League (LDH) carried out a study on discrimination and social attitudes in regard to LGBTI people.⁵⁶⁷ Mainstream human rights NGOs in Nigeria have also given support to the rights of LGBTI persons and organizations.⁵⁶⁸ In some other countries, whether out of timidity or bias against sexual minorities, mainstream HR NGOs have remained silent on this issue. In Zambia, national CSOs did not seem to come to Mr Kasonkomona’s defence⁵⁶⁹, and the main criticisms of the arrest came from regional organizations.⁵⁷⁰ At times it is necessary for partners of human rights NGOs to remind them that human rights are indeed for everyone.

7.3.8 WOMEN’S ORGANIZATIONS AND THEIR SUPPORT FOR LESBIAN, BISEXUAL AND TRANSGENDER PERSONS

The CAL clearly viewed the rights of lesbians as a feminist issue, and linked their struggle to the struggle for women’s rights. In other countries though, women’s movements and organizations do not always seem to be ready to understand and take on the struggle of their lesbian sisters. CAL found that many women’s organizations that were Christian in ethos did not necessarily consider themselves to be feminist and had difficulty integrating the perspective of minority sexuality into their thinking. FIDA Uganda and a

⁵⁶² Dunton and Palmberg, op cit.

⁵⁶³ <http://www.southernafricalitigationcentre.org/2013/04/09/salc-in-the-news-legabibo-challenges-refusal-to-register-organisation/>

⁵⁶⁴ Op cit.

⁵⁶⁵ See <http://www.ugandans4rights.org/index.php/action-point/join-us.html>

⁵⁶⁶ <http://wthrockmorton.com/2012/02/uganda-law-society-opposes-the-anti-homosexuality-bill/>

⁵⁶⁷ HRBA and the Rights of LGBT Persons in Mozambique, Revised 2011-01-30 NIDS/MSC, RFSL and Annika Nilsson

⁵⁶⁸ Johnson, Changing Faces, Nairobi 2007, op cit.

⁵⁶⁹ <http://www.southernafricalitigationcentre.org/2013/04/17/delegates-at-the-national-constitution-convention-in-zambia-lose-the-plot-on-human-rights/>

⁵⁷⁰ <http://www.zambianwatchdog.com/southern-african-litigation-centre-osisa-demand-release-of-kasonkomona/>

number of other women's organizations in Uganda, as well as respected academics and activists have come out in opposition to the AHB.

In Kenya, a representative of Minority Women in Action (MWA), an organization that also emphasises the feminist aspect of the struggle of sexual minority women, had initially focused on creating safe spaces for lesbian women. It then used these to explore policy issues, especially in regard to health and the law, attempting to bring others into the discussion and link to policy agendas. The link to issues of women's sexual and reproductive health generally is important, and state policy on these issues is an indicator of openness on themes affecting lesbian and bisexual women. The KNCHR was responsive to requests for engagement, but asked for data, which MWA then provided. MWA thought that greater support should be forthcoming from some mainstream women's organizations, including FIDA. Others including Maendeleo Ya Wanawake, had been more supportive. The CREA Feminist Leadership Institute, now regularly invites MWA to participate in training seminars.

While working to engage with the women's movement generally, MWA did not see this as lessening the organization's commitment to working as part of the LGBTI movement in Kenya. While there were occasional disagreements on emphasis and problems to iron out, MWA saw it as being important to continue working for the unity of the movement.

7.4 ATTEMPTS TO BUILD REGIONAL AND SUB-REGIONAL NETWORKS

A number of organizations are working to build regional and sub-regional networks of LGBTI NGOs. QAYN is working in this direction in Anglophone and Francophone West Africa. In East Africa, the Eastern and Horn of Africa Human Rights Defenders Project (EHAHRDP), a regional mainstream human rights defenders organization based in Kampala, has been consistent in working on LGBTI issues at the sub-regional level and in with the African Commission. There is a high level of communication and understanding among activists in Kenya and Uganda, and to some extent Tanzania. KHRC, though not a regional organization as such, has awareness of the situation on a regional level. It notes (anecdotally) what it perceives to be an increase in repression in the region generally in recent years. The Kenyan CBO Ishtar has mentored HIV / AIDs organizations in several countries in the region.⁵⁷¹

7.4.1 SOUTHERN AFRICA

Many international or African based organizations that work in a number of countries or on a regional level are based in Gauteng, South Africa, including AMSHeR, the Coalition of African Lesbians, GALA, HIVOS, and IGLHRC. From here, they provide support to organizations working with LGBTI and HIV / AIDS issues across the region. Many of CAL's

⁵⁷¹ Ishtar is in the process of seeking to be redesignated as an NGO instead of a CBO. The former status will permit work across a wider geographical area. Interview, 20.2.2013.

member organizations are LGBTI organizations generally, not specifically lesbian. “Positive Vibes” based in Namibia promotes an educational / empowerment model that combats internalized prejudice among LGBTI persons.

7.4.2 RESEARCH

As mentioned elsewhere in this study, it is important to support African researchers and institutions in the necessary work of exploring issues of sexuality, religion and theology, family structure and attitudes, both historically and in today’s society. This aspect is under-prioritized at present. Too many gifted African academics need to go abroad to be able to access funding and research resources. While the impacts of this work take longer, they may provide a more solid foundation than more quick-impact approaches. It is important that research of this kind is encouraged to take an outset in human rights.

ANNEXES

[Text]

END NOTES

THE DANISH
INSTITUTE FOR
HUMAN RIGHTS