Flygtningenævnets baggrundsmateriale

Bilagsnr.:	**377**
Land:	Uganda
Kilde:	Human Rights Awareness and Promotion Forum (HRAPF)
Titel:	A Guide to the Normative Legal Framework on the Human Rights of LGBTI Persons in Uganda
Udgivet:	februar 2019
Optaget på baggrundsmaterialet:	21. maj 2021

HRAPF
HUMAN RIGHTS AWARENESS AND PROMOTION FORUM

A GUIDE TO THE NORMATIVE LEGAL FRAMEWORK ON THE **HUMAN RIGHTS OF LGBTI PERSONS IN UGANDA**

Second Edition, February 2019

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A publication of Human Rights Awareness and Promotion Forum (HRAPF), 2019
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LIST OF ACRONYMS

ACHPR:	The African Commission/Charter on Human and Peoples' Rights
AG:	Attorney General
AIDS:	Acquired Immuno-Deficiency Syndrome
CAL:	Coalition of African Lesbians
CEDAW:	Convention on the Elimination of All Forms of Discrimination Against Women
EACJ:	East African Court of Justice
GIZ:	Deutsche Gesellschaft für Internationale Zusammenarbeit
HIV:	Human Immuno-Deficiency Virus
HRAPF:	Human Rights Awareness and Promotion Forum
ICCPR:	The International Covenant on Civil and Political Rights
ICESCR:	The International Covenant on Economic, Social and Cultural Rights
LGBTI:	Lesbians, Gays, Bisexuals, Transgender and Intersex Persons
NGO	Non Governmental Organisation
NODPSP:	National Objectives and Directive Principles of State Policy
OAU:	Organisation for African Unity
UDHR:	The Universal Declaration of Human Rights
UN-CAT:	The United Nations Convention Against Torture
UN:	United Nations

Acknowledgments

HRAPF would like to acknowledge the role of the team that worked on reviewing this booklet, particularly, Ms. Linette du Toit, and Mr. Dan Bwambale.

In addition, HRAPF acknowledges the role of the initial project team: Mr. Adrian Jjuuko, Mr. Edward Mwebaza and Ms. Joaninne Nanyange; as well as Mr. Francis Tumwesige Ateenyi who stepped into the role of reviewers.

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PREFACE

The protection and recognition of LGBTI persons under Ugandan law remains a matter of great controversy. Many persons believe that Ugandan law does not protect LGBTI persons. This is based on the prohibition of same-sex marriages in the Constitution, as well as criminalisation of 'carnal knowledge against the order of nature' in the Penal Code Act. What is important to note is that these two provisions of the law only cover specific actions that are not legally permitted in Uganda, and do not prohibit being lesbian, gay, bisexual, transgender, or intersex. More so, at the international level, trends are more towards protection of LGBTI persons rather than exclusion.

This narrow interpretation of the law is dangerous. It deprives LGBTI people of legal protections that are available to them as of right, and which most importantly are available to other people. The law is used to justify denial of the most fundamental human rights to LGBTI persons. People can be wantonly deprived of their right to liberty, subjected to anal examinations and non-consensual HIV tests, paraded before the media as 'homosexuals', and prosecuted in courts of law for being who they are.

The purpose of this book is therefore to clarify the status of Ugandan law on the issue of homosexuality. It examines the domestic law in Uganda, the East African sub-regional instruments, the African regional instruments and the United Nations instruments that Uganda is party to, to show that indeed LGBTI rights are protected by the laws of Uganda.

The booklet is intended to provide a one-stop source for the legal standards applicable to Uganda on LGBTI rights at the domestic, sub-regional, regional and international levels.

The first edition of the booklet was released in 2015. Due to developments like the 2016 Constitutional Court decision in the case of *Adrian Jjuuko v Attorney General* on the powers of the Equal Opportunities Commission Act; the 2018 decision in *Frank Mugisha and 2 Others v Uganda Registration Bureau* on registration of LGBTI organisations; as well as the banning of debate on LGBTI rights in the InterParliamentary Union, there is need to update the booklet and cover these new developments.

We hope that this booklet will be useful to all those that are interested in the law as a protection mechanism for the rights of LGBTI persons in Uganda.

Dr. Adrian Jjuuko
Executive Director,
Human Rights Awareness and Promotion Forum

INTRODUCTION

The booklet is intended to be a one-stop reference publication on Uganda's legal and human rights regime regarding LGBTI rights. The existing literature on this subject is scattered in different publications and legislation, which poses numerous challenges to efforts to study and understand the LGBTI rights question in Uganda.

This booklet is intended to be a guide for members of the LGBTI community, academics and researchers, activists and human rights defenders, policy makers and the public who seek information on the legal standards applicable to LGBTI persons in Uganda.

It is not the aim of this booklet to make in-depth analysis of the provisions impacting upon LGBTI rights, but rather to state the law as it is and how it applies to LGBTI persons.

With regard to the hierarchy of laws in Uganda and to the role and recognition of international law within the domestic settings, and the tendency of Ugandan courts to give precedence to specific protections within the domestic law, this booklet starts with an analysis of the domestic legal framework. From the domestic framework, it shifts focus to the East African sub-regional system, the African regional system and then the international system.

Each of the systems is contained in a section of its own as follows:

The first section discusses the national legal framework of Uganda and how the laws have been interpreted and implemented regarding LGBTI persons. This part looks at different laws and provisions that specifically concern LGBTI persons.

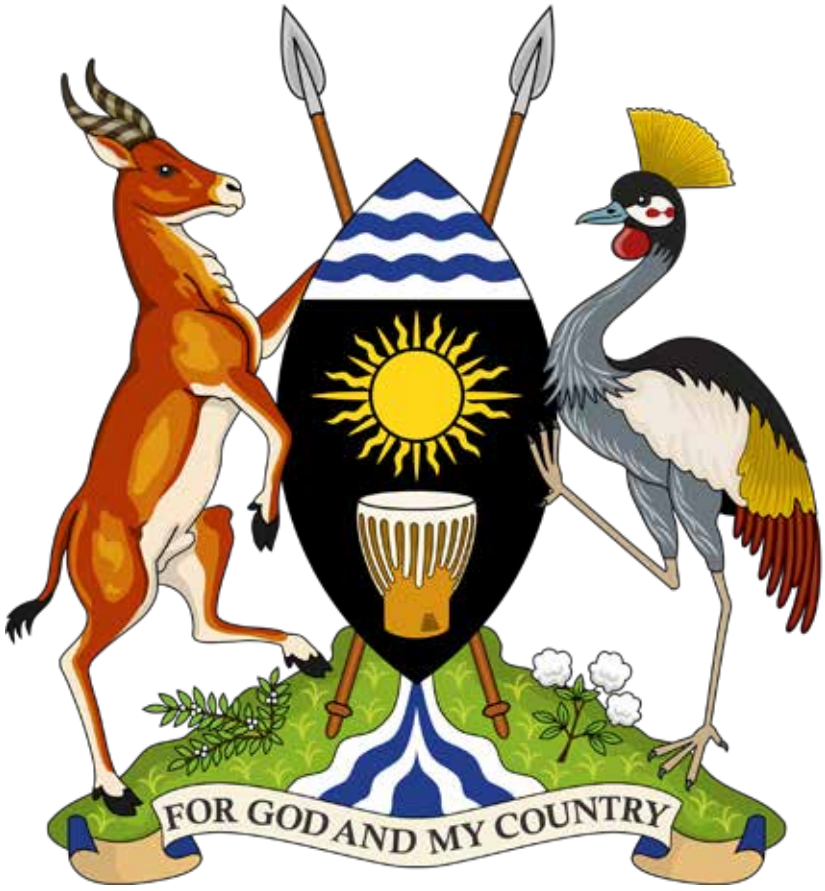
The second section discusses East African Community law and its relevance to LGBTI rights.

The third section discusses the African regional framework. It looks at the instruments ratified by Uganda at this level and how their provisions have been interpreted in view of rights of LGBTI persons.

The fourth section discusses the international perspective. This examines the international human rights instruments that are legally binding on Uganda, provisions relevant to LGBTI persons and their rights and how they have been interpreted. It also contains a discussion of the Yogyakarta Principles, a set of international guidelines that have been put in place to aid the interpretation of international human rights instruments in light of rights of LGBTI persons. Although these are not legally binding, they provide good guidance on how international human rights can be interpreted to include protection of LGBTI persons.

This is an updated and revised version of the booklet, first published in 2015. It states the position of the law as at February 2019.

SECTION I



NATIONAL LEGAL FRAMEWORK
ON THE HUMAN RIGHTS OF LGBTI PERSONS

1.1 Introduction

The majority of the population in Uganda does not recognise that LGBTI persons are entitled to the same rights as everyone else. There is a belief that the law does not protect LGBTI persons and that the rights recognised in the Constitution do not apply to LGBTI persons: that LGBTI rights are not human rights. This belief is based on the absence of a provision in the Constitution that expressly recognises that LGBTI rights are protected by the Constitution, and also on the constitutional provisions prohibiting same-sex marriages, the Penal Code provisions criminalising same-sex relations and on a few court cases which sanction the limitation of rights of LGBTI persons and groups on the basis that same-sex relations are criminalised in Uganda.[1]

Due to the absence of express protections of LGBT rights and the criminal laws, LGBTI persons have in practice been stopped from enjoying rights, which are available to everyone else. The most common human rights violations include: the right to privacy;[2] the right to freedom from inhuman and degrading treatment;[3] the right to freedom of association;[4] and the right to freedom of expression.[5] Fortunately, even within this limited environment, there are basic protections that are embedded in the Constitution and in other laws of Uganda which protect the rights of all persons. The position of the courts at the moment is that the rights in the Constitution apply to everyone including LGBTI persons,[6] and they can only be limited to the same extent as the rights of all other persons.[7] Also, except where there are specific restrictions in the laws for LGBTI persons, they are supposed to enjoy the same

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1 These cases are *Jacqueline Kasha Nabagesera, Frank Mugisha, Julian Pepe Onziema and Geoffrey Ogwaro v The Attorney General and Hon. Rev. Fr Simon Lokodo*, High Court Miscellaneous Cause No. 33 of 2012 (*Lokodo* case) in which the High Court held that the criminalisation of same-sex relations justifies the limitation of the enjoyment of human rights by LGBT people and *Frank Mugisha, Dennis Wamala, Ssenfuka Joanita Warry v Uganda Registration Services Bureau* High Court Miscellaneous Cause No. 96 of 2016 (*SMUG* case) in which the High Court held that the refusal of the registration of an LGBT organisation is justified on the basis that the objectives of the organisation contravenes the Constitution and the Penal Code.

2 For example, through forced searches of homes of LGBTI activists and publishing names, pictures and addresses of suspected LGBTI persons as was found by the High court in the *Victor Mukasa & Yvonne Oyoo v Attorney General*, High Court Misc Cause No. 24/06 (the *Victor Mukasa* case), and *Kasha Jacqueline, David Kato Kisule & Onziema Patience v Rollingstone Limited & Giles Muhame*, Miscellaneous Cause No. 163 of 2010 (the *Rollingstone* case) cases respectively.

3 For example, through the fondling of one of the plaintiffs in the *Victor Mukasa* case and denying her access to toilet facilities and exposing pictures of suspected LGBTI persons in the *Rollingstone* case.

4 For example, denial of registration of Sexual Minorities Uganda, a network of organisations for LGBTI persons by the Uganda Registration Services Bureau giving the reason that Section 145 of the Penal Code criminalises same-sex relations and the High Court subsequently upholding this refusal to register the organisation in the *SMUG* case.

5 For example the suspension of a talk show host by the Broadcasting Council for hosting homosexuals (see Anne Mugisa 'Gaetano suspended over homo talk show' *The New Vision*, 17th August 2007) and the leading media group, the state owned Vision Group's Editorial Policy which relies on the criminalisation of same-sex relations under the Penal Code to stop the publication or broadcasting of content including adverts that 'propagates' homosexuality and can only publish content from the President, Parliament and courts (see Vision Group, Editorial Policy, September 2014, Section 6.14, 31. Available at https://issuu.com/newvisionpolicy/docs/243661083-editorial-policy-complete. Accessed 18 February 2019).

6 The *Victor Mukasa* case, and the *Rollingstone* case n 2 above.

7 The *Lokodo* case, n 1 above.

rights as everyone else. The only right that is clearly denied to LGBTI persons in the Constitution is the right to marry a person of the same sex. Otherwise, similar specific limitations would have been included if the intention was to deny LGBTI persons the other rights. The Anti-Homosexuality Act, 2014, which was nullified by the Constitutional Court,[8] would have greatly reduced the extent to which LGBTI rights would have been enjoyed, since it targeted 'promotion' of homosexuality, which would include advocacy and support work for LGBTI rights. However, this does not form part of Ugandan law at present.

This section will give an overview of the relevant laws and their relevant provisions that have a bearing, express or implied, on the rights of LGBTI persons. It will cite jurisprudence in which these provisions have been interpreted in light of the rights of LGBTI persons. The section will also look at laws and provisions that have not been subject to judicial interpretation but are likely to affect rights of LGBTI persons. This interpretation will be given based on the interpretations courts have given in past judgments.

1.2 The Constitution of the Republic of Uganda 1995

The 1995 Constitution of the Republic of Uganda as amended in 2005 (the Constitution) is the supreme law of the country and it is the grundnorm from which all other laws derive their validity. Any law that is inconsistent with the Constitution is void to the extent of its inconsistency.[9]

The Constitution has various provisions that are relevant to the human rights of LGBTI persons, both in the National Objectives and Directive Principles of State Policy and in Chapter Four, which is the Bill of Rights. These are discussed in detail below.

1.2.1 The National Objectives and Directive Principles of State Policy (NODPSP)

According to Objective I, the National Objectives and Directive Principles of State Policy (NODPSP) are intended to guide all organs and agencies of the state, all citizens, organisations and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society. Despite this implementation guideline provided by the Constitution itself, the NODPSP are not traditionally regarded as justiciable. However, the 2005 amendment to the Constitution introduced Article 8A which provides that Uganda shall be governed in light of the NODPSP. This has led some commentators to argue that Article 8A makes the NODPSP justiciable.[10] The Supreme Court has also referred to them in the case of *Attorney General v Salvatori Abuki* [11] as one of the interpretation tools. This implies that the objectives contribute to the interpretation and implementation

8 In the case of *Prof. J. Oloka Onyango, Hon. Fox Odoi-Owyelowo, Prof. Morris Ogenga-Latigo, Andrew M. Mwenda, Dr. Paul Semugoma, Jacqueline Kasha Nabagesera, Julian Pepe Onziema, Frank Mugisha, Human Rights Awareness and Promotion Forum and the Centre for Health, Human Rights and Development (CEHURD) v Attorney General*, Constitutional Petition No. 008 of 2014.

9 Article 2 of the Constitution of the Republic of Uganda, 1995, as amended.

10 See C Mbazira *Public Interest Litigation and Judicial Activism in Uganda: Improving the Enforcement of Economic, Social and Cultural Rights*, Human Rights and Peace Centre Working Paper No. 24 (2009) 9.

11 *Attorney General v Salvatori Abuki*, Constitutional Appeal No. 1 of 1998.

of the Constitution as a whole and form part of the substantive protections that are guaranteed therein.

There are a number of principles that are relevant to LGBTI rights and these are:

Objective III

The objective provides that:

(i) Every effort shall be made to integrate all the peoples of Uganda while at the same time recognising the existence of their ethnic, religious, ideological, political and cultural diversity.
(ii) Everything shall be done to promote a culture of cooperation, understanding, appreciation, tolerance and respect for each other's customs, traditions and beliefs.

This objective urges all stakeholders to recognise the differences that are bound to exist within a population and treat such differences with understanding and tolerance. LGBTI persons are considered deviants from the known and acceptable views of the majority and most of the human rights violations they face are based on the fact that their views and lifestyles are considered different and unacceptable. However, going by this objective, the Constitution and laws thereunder should be interpreted and implemented in such a way as to understand and appreciate the differences that always exist among people and integrating all differences and all people for national unity and stability.

Objective V

The objective provides that:

(i) The State shall guarantee and respect institutions which are charged by the State with responsibility for protecting and promoting human rights by providing them with adequate resources to function effectively.
(ii) The State shall guarantee and respect the independence of nongovernmental organisations which protect and promote human rights.

This objective enjoins the State to respect the organs it puts in place to enhance the promotion and protection of human rights and also to guarantee and respect Non-Governmental Organisations (NGOs) that are established with the aim of promoting human rights. This is important since the major way through which LGBTI persons in Uganda are seeking protection of their rights is through civil society organising. The state is required by this objective to guarantee the existence and respect of these civil society organisations and their work. Refusal to register an LGBTI organisation could therefore be interpreted as unconstitutional under this objective. State established institutions like the Uganda Human Rights Commission (UHRC) have also come out to speak for the rights of LGBTI persons in particular circumstances. These institutions make recommendations to government concerning different laws and policies and the government is enjoined to respect such recommendations.

Objective XIV

The objective provides that:

The State shall endeavour to fulfill the fundamental rights of all Ugandans to social justice and economic development and shall, in particular, ensure that-

(a) All developmental efforts are directed at ensuring the maximum social and cultural well-being of the people; and

(b) All Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits.

This objective concerns some of the areas in which LGBTI persons in Uganda are most discriminated: education, health service provision and work. It is important especially regarding the right to health, which is not substantively protected in the Bill of Rights, and yet access to health care is one of the most relevant aspects of rights of LGBTI persons. The justiciability of these objectives therefore protects the rights of LGBTI persons to health and their access to other socio-economic services.

Objective XXVIII

The objective provides that:

(i) The foreign policy of Uganda shall be based on the principles of -

(a) ...

(b) respect for international law and treaty obligations.

...

(ii) Uganda shall actively participate in international and regional organisations that stand for peace and for the well-being and progress of humanity.

This objective emphasises Uganda's obligations under international law. Uganda has signed different international human rights instruments that provide protection for the rights of LGBTI persons and provide different obligations as will be discussed in a separate section in this booklet. This objective enjoins stakeholders to interpret and implement the Constitution in observance of the different obligations created under the international human rights law instruments that Uganda is a party to. It also enjoins the state to engage in foreign policy that is supportive of the well-being and progress of humanity. Considering that rights of LGBTI persons have come to the fore of the human rights debate recently, this objective creates the need to interpret and implement the Constitution progressively to include the different developments in the international arenas.

1.2.2 The Bill of Rights

The Bill of Rights is contained in Chapter Four of the Constitution. The Bill of Rights enumerates the various rights that all persons in Uganda are entitled to. One of the key characteristics of human rights is that they accrue to all human beings by virtue

of their being human. They are not the dictate of the state and should therefore not be taken away at its whims. Human rights are about human beings, and they find their application in human interaction.[12] In Uganda this principle is entrenched in Article 20 of the Constitution in the following terms:

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

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

Significantly, the Constitution does not stop at re-stating the inherent nature of human rights but goes ahead to impose obligations on the state and all persons to respect, promote and uphold the rights of all persons and groups.

All the rights espoused therein apply to LGBTI persons the same way they apply to all persons in Uganda. This has been the position stated in all the four cases concerning LGBTI rights in Uganda that have been decided by the High Court.[13] As such, this seems to be settled. Therefore for purposes of this compilation, only those rights that have a direct connection to sexual orientation and gender identity will be focused on. They include the following:

i) The right to equality and freedom from discrimination

The right to equality and freedom from discrimination is provided for under Article 21 of the Constitution. It provides:

(1) All persons are equal before and under the law and in all spheres of political, economic, social and cultural life and in every other aspect and shall enjoy equal protection of the law.

(2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on grounds of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

(3) For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

Article 21 is a protection against discrimination on grounds that largely have to do with inborn attributes of a person. No one can be treated differently based on those attributes.

The question that has arisen in respect of Article 21 is whether it extends to LGBTI persons. The main argument for the group that is opposed to recognition of LGBTI rights is that Article 21(2) does not list 'sexual orientation' or gender identity' as protected grounds. However, Article 21(1) uses the term 'all persons' which can be

12 F Viljoen *International Human Rights Law in Africa* (2012) 1.

13 The *Victor Mukasa* case (n 2 above) the *Rollingstone* case (n 2 above), the *Lokodo* case (n 1 above) and the *SMUG* case (n 1 above).

interpreted to include LGBT persons according to the cases decided in both Botswana and Kenya. The Botswana Court of Appeal case, *Attorney General v Thuto Ramogge & 19 Others*, dealt with the refusal of the Registrar of Societies to register an LGBT organisation - Lesbians, Gays, Bisexuals of Botswana (LEGABIBO).[14] The High Court had found that the refusal to register the organisation on the basis that its name was 'undesirable', violated the right to freedom of assembly and association as protected under section 13 of Botswana's Constitution.[15] The Court of Appeal confirmed that the refusal to register LEGABIBO on the basis that its objectives included protection of LGB persons was a violation of the right to freedom of assembly and association. The Court explicitly confirmed that section 3 of Botswana's Constitution, which states that 'every person' in Botswana is entitled to the fundamental rights and freedoms of the individual, includes homosexuals. Section 3 states that rights are an entitlement of all regardless of the individual's race, place of origin, political opinions, colour, creed or sex. The Court of Appeal removes all doubt as to whether or not LGBT persons are included under 'every person'. A similar case was decided by the High Court of Kenya in 2015. The decision of the National NGO Coordination Board to refuse to register an organisation named National Gay and Lesbian Human Rights Commission (NGLHRC) on the basis that Kenya's Penal Code criminalised same-sex conduct, was challenged.[16] Article 36 of Kenya's 2010 Constitution accords the right to freedom of association to 'every person'. The High Court held that 'every person', for the purposes of the Constitution, refers to an individual regardless of their sexual orientation.[17] On the strength of these two cases, Ugandan courts ought to follow suit and interpret 'all persons' in Article 21 to include LGBT persons.

A deeper examination of the provision also shows that the grounds listed are all based on natural attributes except perhaps the one on social-economic standing. As such, other analogous grounds can be accepted including sexual orientation and gender identity. The framers of the Constitution did not lay down a list that cannot be added to. To the contrary, they came up with a flexible list, and the language used in Article 21(2) clearly shows this. The provision makes reference to Article 21(1) and uses the words 'without prejudice to clause 1 of this article.' This clearly makes Article 21(1) the guiding clause as regards the extent of protection. Article 21(1) is a declaration that *'all persons are equal before and under the law... and shall enjoy equal protection of the law'*. This equality applies in *'all spheres of political, economic, social and cultural life and in every other aspect'*. This shows that Article 21 was intended to apply to all aspects and the grounds listed in Article 21(2) are simply examples of grounds and analogous ones can be added. As natural attributes, sexual orientation and gender identity would thus qualify as protected grounds. Again, the inclusion of sex as a protected ground can be understood in a broader sense beyond the state of being male or female or intersex to go into the arena of sexual orientation and gender identity. At the UN level, sex has already been declared by the Human Rights Committee to include sexual orientation under the International Covenant on Civil and Political Rights (ICCPR)[18] and since Article 21(2) is almost a repetition of Article 26 of the ICCPR, and Uganda is a state party to the ICCPR, then it is implied that sexual orientation would qualify as a protected ground under Article 21.

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14 (2014) CACGB-128-14.

15 *Thuto Ramogge & 19 Others v The Attorney General* MAHGB-000175-13.

16 *Eric Gitari v Attorney General* Petition 440 of 2013 [2015] eKLR.

17 As above at par 73.

18 *Toonen v Australia* Communication 488/1992, UN Doc CCPR/C/50/D/488/1992(1994).

ii) The right to liberty

Article 23 prohibits deprivation of personal liberty except under very specific exceptions authorised by the Constitution. These exceptions include: execution of lawful sentences imposed by court, bringing a person charged with a criminal offence for court proceedings and preventing the spread of infectious diseases. The other aspects of the right to liberty are: the right to apply to court to be released on bail; the right of a person in police custody to be brought before court within 48 hours of their arrest and detention. The other key aspect is the right to habeas corpus[19] which is stated to be inviolable and non-derogable. Habeas corpus is an order by court directing a person or authority to present an arrested person before court. The article also protects the right to counsel.[20] Further, detention must be in an authorised place of detention.[21] The phrasing of Article 23 begins with the words 'no person…' which is inclusive language that clearly shows that these rights apply to everyone.

This right is one of the most commonly violated rights in Uganda as regards LGBTI persons. Various practices including detention in police custody beyond the mandatory 48 hours, denial of access to a lawyer, denial of access to family members/ friends, detention of transgender persons with persons of a different gender, use of excessive force during arrest, arrest without a reason or charge, unauthorised search of body and property, and seizure of property are rampantly engaged in by Police.[22] It should be noted that the Constitution allows for the limitation of this right but this should be done for the reasons given therein and following the prescribed procedure. Most of the violations associated with the right to liberty are a result of deep-seated discrimination and marginalisation against LGBTI persons. However, even when someone is a criminal or suspected criminal, the provisions on the right to liberty provide certain guarantees for all persons that should be respected.

iii) The right to a fair hearing

Article 28(1) provides that

> *In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.*

As regards the rights of marginalised persons, including LGBTI persons, this right came under scrutiny in the case of *Jjuuko v Attorney General*.[23] The case concerned the Equal Opportunities Commission Act, 2007 which was passed with the aim of ensuring the elimination of discrimination against social groups that are marginalised by historical and other factors. The Act created the Equal Opportunities

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19 Art 23(9).

20 Art 23(5)(b).

21 Art 23(2).

22 For an overview of violations of this right suffered by LGBTI persons during 2017, see Consortium on Monitoring Violations Based on Sex Determination, Gender Identity and Sexual Orientation *Uganda Report on Violations Based on Gender Identity and Sexual Orientation 2017* (2018) 10-13 available at *https://hrapf.org/index.php/resources/violation-reports* (Accessed 19th February 2019). The Violations Reports released in 2017, 2016, 2015 and 2014 can also be accessed in following this link.

23 Constitutional Petition No. 001 of 2009.

Commission, a body to which cases of discrimination could be reported. During the second reading of the Bill which was later to become the Equal Opportunities Act in Parliament, a member proposed the inclusion of a provision that would prevent 'homosexuals and the like' from claiming protection under the Act.[24] This proposal was adopted and became section 15(6)(d) of the Act, which prevented persons who engage in practices that are regarded as 'immoral or socially unacceptable' from accessing the Commission. This provision was challenged in court by the Executive Director of Human Rights Awareness and Promotion Forum.

In a judgment delivered on 10th November 2016, the Constitutional Court struck down section 15(6)(d) of the Equal Opportunities Commission Act on the basis that it violated the right to a fair hearing. The Court held that the EOC was established to monitor, evaluate, investigate and redress discriminatory practices and tendencies. If the persons mentioned in section 15(6)(d) appeared before the Commission, they would likely be excluded from any form of hearing, which clearly restricts the right to a fair hearing. The Court held that the provision breached the Constitution in that it created 'a class of social misfits who are referred to as immoral, harmful and unacceptable'.[25] In particular, it held that '[a] law that precludes a group of people from adjudication on violation of their rights and does not create an alternative forum to hear them out breaches the right to a fair hearing'.[26] The Court considered the limitation clause and concluded that the limitation was not acceptable or demonstrably justifiable in a free and democratic society.

While the Court at no point explicitly referred to LGBTI persons, this was the elephant in the room, due to the history of the provision, the position of the petitioner as a prominent advocate for LGBT rights, and the activism that went on ahead of the hearing of the case. The judgment has direct bearing on the rights of LGBTI persons and confirms that society's disapproval of LGBTI persons' sexual orientation and/or gender identity cannot preclude them from exercising their right to a fair hearing on an equal footing with all other Ugandans.

iv) The right to freedom from inhuman and degrading treatment

This right is provided for under Article 24 of the Constitution, which reads as follows: *'No person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment'*.

This right encompasses seven different rights, namely the rights to: freedom from torture; freedom from cruel treatment; freedom from cruel punishment; freedom from inhuman treatment; freedom from inhuman punishment; freedom from degrading treatment; and freedom from degrading punishment. The ones most relevant to LGBTI persons within the Ugandan context are: the right to freedom from inhuman treatment, and the right to freedom from degrading treatment.

This is the provision that covers the concept of human dignity. It arises from the

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24 For a discussion of the process leading to the inclusion of the provision, see S Tamale 'Giving with one hand, Taking away with the other: The Uganda Equal Opportunities Commission Act, 2007' in Human Rights Awareness and Promotion Forum (HRAPF) *Still Nowhere to Run: Exposing the deception of minority rights under the Equal Opportunities Commission of Uganda* (2010) 19-22. http://hrapf.org/?mdocs-file=1604&mdocs-url=false (Accessed 20th February 2019).

25 *Adrian Jjuuko* case (n 23 above) line 371-374.

26 As above at line 286-289.

basic premise that all human beings are clothed with dignity and they should not be stripped of it.

In the context of LGBTI rights, this right was dealt with in the *Rollingstone* case.[27] In this case, the applicants' names, pictures and personal details were published in the Rollingstone tabloid. The headline of the edition was '100 pictures of Uganda's top homos leak' and this was followed by 'Hang them: They are after our kids'. The tabloid threatened to release more pictures and details in the next edition, which indeed they did. The applicants sought damages and an injunction to stop further publication. The respondents argued that they were exposing crime since homosexuality is criminalised in Uganda. The Court agreed with the applicants and awarded damages and the injunction. The judge held that even LGBTI persons were entitled to the protection of their right to dignity and protection from inhuman treatment. That the actions of the newspaper *'extracted the applicants from the other members of society who are regarded as worthy'*. He noted that the actions of the newspaper were to the effect that these people were only worthy of death and this put their human dignity at the lowest ebb which violated this right. The High Court also noted that section 145 of the Penal Code, which criminalised carnal knowledge against the order of nature, did not criminalise being gay but rather specific sexual acts.

As such, LGBTI persons are protected from cruel, inhuman or degrading treatment just like all other Ugandans.

v) The right to privacy

The right to privacy is protected under Article 27 of the Constitution. The provision reads as follows:

> *(1) No person shall be subjected to-*
>
> *(a) Unlawful search of a person, home or other property of that person; or*
>
> *(b) Unlawful entry by others of the premises of that person.*
>
> *(2) No person shall be subjected to interference with the privacy of that person's home, correspondence, communication or other property.*

The right to privacy as protected in Uganda protects all persons from unlawful searches of their homes or property and also unlawful entry by others onto the premises of that person. It also protects the person's home, correspondence, communications, and property from interference. The focus seems to be on the person's property and home rather than the body of the person themselves. The reference to the person is only in respect of searches. It thus seems to be narrower than the protection in the ICCPR, which covers the person's privacy, family, correspondence, and unlawful, attacks on his honour and reputation.[28]

As regards LGBTI persons, the right to privacy has been adjudicated upon by the High Court of Uganda and found to be applicable to them. In the *Rollingstone* case[29] where a newspaper had published the names, photos and addresses of actual and

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27 n 2 above.

28 ICCPR, article 17.

29 n 2 above.

perceived homosexuals and called upon the public to hang them, one of the rights that the court found to have been violated was the right to privacy. It was not enough for the respondents to argue that the applicants were self-proclaimed homosexuals who could not argue that their privacy had been infringed upon by the respondents. The judge held that using the objective test, the exposure of the identities of the persons and the homes of the applicants *'for the purposes of fighting gayism and the activities of gays'* threatened the right to privacy of those persons. He emphatically added *'They are entitled to it'*.

This was the same position that had been taken by the same court in the *Victor Mukasa* case,[30] which involved local council authorities and the police raiding the home of an LGBTI rights activist, forcing themselves into the house, and searching it on the basis that they were looking for incriminating material on homosexuality, and seizing documents. They then arrested a visitor at the home, took her to the LC chairman's office and later to the police station and in the process policemen undressed her purportedly because they wanted to determine her sex, fondled her and also denied her access to toilet facilities. The court found the unlawful search and the undressing to be violations of the right to privacy, and it made it clear that the sexual orientation or gender identity of the applicants was not an issue.

vi) The right to found a family

This is provided for in Article 31 of the Constitution. The provision under this Article that specifically concerns LGBTI persons is clause (2a), which provides that: *'Marriage between persons of the same sex is prohibited.'*

This is a clause that was introduced by the 2005 Constitutional amendment and it was largely fuelled by the fear of same-sex marriages happening in Uganda.[31] This is the only provision in the Constitution that expressly restricts the rights of LGBTI persons. It makes it very clear that although all persons in Uganda have the right to get married and found a family, this right is limited to persons of the opposite sex. However it is important to note that this provision only prohibits marriages and not orientation or identity. The courts have referred to it in one case concerning LGBT rights – the *SMUG Registration* case.[32] In that case, which concerned the refusal by the Uganda Registration Services Bureau (URSB) to register the organisation - Sexual Minorities Uganda, the judge in justifying the refusal based her decision partly on the fact that the Constitution prohibited same-sex relations.[33] This case was however not on the right to found a family, but it shows how a constitutional prohibition on same-sex marriages can have the impact of denying all other rights to LGBT persons - in this case, the right to freedom of association.

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30 n 2 above.

31 For a discussion of how this amendment came to pass, see JD Mujuzi 'The total prohibition of same sex marriages in Uganda' (2009) 23 *International Journal of Law, Policy and the Family* 277–288.

32 n 1 above.

33 n 1 above, para 30-33.

vii) The rights to freedom of expression, thought, opinion, assembly and association

These rights are protected in Article 29 of the Constitution. Clause (1) of the Article provides that every person shall have the right to:

(a) Freedom of speech and expression which shall include freedom of press and other media

(b) Freedom of thought, conscience and belief which shall include academic freedom in institutions of learning

(c) Freedom to practice any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organisation in a manner consistent with the Constitution

(d) Freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition; and

(e) Freedom of association which shall include the freedom to form and join associations or unions, including trade unions and political and other civic organisations.

Article 29 covers a wide range of conscientious rights. Those that stand out however and directly concern LGBTI persons are: the right to freedom of speech and expression; the right to freedom of thought, conscience and belief including academic freedom; the right to freedom of assembly; and the right to freedom of association. There have been documented incidents of the violation of these rights in Uganda despite their protection in the Constitution, and some of these violations have been brought to the attention of the courts.

An interpretation of the reach and limitation of these rights was done in the case of *Charles Onyango Obbo & Andrew Mwenda v Attorney General*,[34] which focused on freedom of expression. In that case, Mulenga JSC showed that these rights concern the conscience of the person and that they are very important. He addressed the limitation clause and stated that the right is more important than the limitation and that the limitation can only come in where the requirements of Article 43 have been fulfilled. He observed that:

> *'Limiting their [rights] enjoyment is an exception to their protection, and is therefore a secondary objective. Although the Constitution provides for both, it is obvious that the primary objective must be dominant. It can be overridden only in the exceptional circumstances that give rise to that secondary objective. In that eventuality, only minimal impairment of enjoyment of the right, strictly warranted by the exceptional circumstance is permissible. ... There does indeed have to be a compromise between the interest of freedom of expression and social interest. But we cannot simply balance the two interests as if they were of equal weight.'*

In essence, the case showed that the intention of the Constitution was to protect the rights rather than emphasise the limitation.

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

The first case on these rights in relation to LGBT persons was the *Lokodo* case.[35] This concerned the actions of the Minister of Ethics and Integrity of closing down a leadership and capacity building workshop organised for LGBTI persons. The applicants argued that these actions violated their fundamental rights and freedoms guaranteed under the Constitution of Uganda including the freedoms of assembly, speech and expression. The court however held that whereas the applicants were entitled to these rights, their enjoyment of them could be limited by the criminal law, which is one of the considerations under the public interest limitation in Article 43. Therefore, on a balance, the rights of the applicants were limited by the criminal law and holding such a meeting constituted incitement and conspiracy to commit a crime, which is prohibited under the Penal Code Act.[36]

The second case was the *SMUG Registration* case,[37] which was decided on 27 June 2018. This case challenged the refusal by the URSB to reserve the name 'Sexual Minorities Uganda' on the basis of section 145 of the Penal Code which criminalises consensual same-sex relations. The applicants argued that the refusal of registration violated their constitutional rights to freedom from discrimination and freedom of association. The objectives of the proposed company were about research and documentation of violations of fundamental human rights of LGBTI people in Uganda; promoting security, well-being and dignity of LGBTI persons; combating discriminatory laws and providing healthcare services and security in crisis situations. The URSB argued that the name 'Sexual Minorities Uganda' was undesirable and un-registrable under section 36 of the Companies Act, 2012, as the proposed company was to advocate for the rights and well-being of people engaged in 'criminal acts' including lesbians and gay persons. The High Court held that the refusal of the URSB to reserve SMUG's name, and consequently to register the proposed company, did not contravene the Constitution of Uganda, as the rights that the applicants claimed were capable of limitation under Article 43 of the Constitution. This article subjects rights to the public interest. It further held that the proposed company was formed to promote prohibited and criminal acts since Article 31(2)(a) of the Constitution, as amended by section 10 of the Constitution (Amendment) Act, 2005 prohibits same-sex marriages, and section 145 of the Penal Code Act prohibits 'having carnal knowledge against the order of nature'. The Court agreed with the judgement in the *Lokodo* case: that it is also prohibited to encourage or assist the commission of an offence or to conspire with others to do so. The Court also rejected the position in the *Rollingstone* case[38] that section 145 of the Penal Code is about specific acts and not about being gay generally. An appeal has been filed against this decision.[39]

It therefore appears that LGBTI persons are entitled to the exercise of their rights to the freedoms of association, opinion, assembly, and speech for as long as such exercise is not aimed at or does not result in the promotion of same-sex relations, which are criminalised in Uganda. This case is however on appeal,[40] and so this is not yet the final position of the law.

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35 n 1 above.

36 As above.

37 Miscellaneous Cause No. 96 of 2016.

38 Miscellaneous Cause No. 163 of 2010 (High Court of Uganda).

39 *Frank Mugisha, Dennis Wamala & Ssenfuka Warry Joanita v Uganda Registration Services Bureau (URSB)*, Appeal No. 338 of 2018.

40 *Kasha Jacqueline Nabagesera & 3 Others v Attorney General & Rev. Fr. Simon Lokodo*, Civil Appeal No. 195 of 2014.

viii) Affirmative action in favour of marginalised groups

The Constitution under Article 32 makes provision for the protection of marginalised groups of people in Uganda. It requires state agencies to provide affirmative action for all groups that are marginalised. It states that:

(1) Notwithstanding anything in this Constitution, the state shall take affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them.

(2) Laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any other marginalised group to which clause (1) relates or which undermine their status, are prohibited by this Constitution.

The Constitution therefore acknowledges the existence of marginalised groups in the country and provides for affirmative action for them. The article however does not specify what these groups are and merely lists some of the causes of their marginalisation. It remains for the legislature to decide which group of persons can be classified as being marginalised.

From the list provided in the Article on the causes of marginalisation, LGBTI persons can be classified as marginalised by reasons of gender as far as transgender and intersex persons are concerned; and history and tradition as far as lesbians, gays and bisexuals are concerned. However as already noted, same-sex relations are criminalised in Uganda and most of the protections afforded to other groups might not be readily availed to LGBTI persons, and so they may not be regarded as marginalised by the majority of the population.

ix) Right to civic participation

This right is provided for in Article 38, which states that:

1. *Every Uganda citizen has the right to participate in the affairs of government, individually or through his or her representatives in accordance with the law.*

2. *Every Ugandan has a right to participate in peaceful activities to influence the policies of government through civic organisations.*

This is one of the fundamental rights, which are restricted to only Ugandans. Beyond that, there is no further restriction and specifically there is no restriction based on one's sexual orientation or gender identity. The application of this provision to LGBTI persons was the basis of one of the submissions of the applicants in the *Lokodo case* contending that the actions of the Minister of Ethics and Integrity in closing a capacity building workshop for LGBTI persons violated their rights to participate in peaceful activities to influence government policies. Unfortunately, instead of pronouncing itself on the breadth of each individual right, the Court made a general holding to the effect that applicants were engaged in unlawful activities and could not benefit from the protections guaranteed under the various rights.

x) Other rights

Article 45 of the Constitution provides that:

> *The rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned.*

This implies that even other rights not mentioned in the Constitution are still recognised. This provision has not yet been interpreted by the courts but it can form the basis of rights claims by LGBTI persons in future cases.

1.2.3 Limitation of rights

The acceptable position in international human rights law is that human rights can be limited in particular circumstances. One person enjoys their rights in concert with other people's enjoyment of their rights. One's enjoyment of their rights can be limited in certain circumstances as provided for by the law. The Constitution of Uganda, under Article 43, provides for circumstances under which enjoyment of rights can be limited. Article 43 states that:

(1) In the enjoyment of the rights and freedoms prescribed in this chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.

(2) Public interest under this article shall not permit;

(a) Political persecution

(b) Detention without trial

(c) Any limitation of the enjoyment of the rights and freedoms prescribed by this chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.

The rights and freedoms discussed above are therefore capable of limitation with the exception of the right to a fair hearing, and freedom from torture and cruel, inhuman or degrading treatment or punishment which are classified as a non-derogable rights.[41] This means that their enjoyment can be limited as was held in the *Lokodo case*. However, this limitation is also limited. While the Article in clause (1) limits enjoyment of rights, clause (2) of the same Article limits the extent of such a limitation. In the case of *Charles Onyango Obbo & Anor v Attorney General*,[42] Justice Mulenga JSC called this 'a limitation within a limitation'. He held that:

> *'[T]he limitation provided in clause 1 [of article 43] is qualified by clause 2, which in effect introduces a 'limitation within a limitation.' It is apparent from the wording of clause (2) that the framers of the Constitution were concerned about a probable danger of misuse or abuse of the provision in clause (1) under the guise of public interest. For avoidance of that danger, they enacted clause (2) ... [T]hey provided in that clause a yardstick, by which to gauge any limitation imposed on rights in defence of public interest. The yardstick is that*

41 Art 44(a) and (c).

42 n 34 above.

the limitation must be acceptable and demonstrably justifiable in a free and democratic society. That is why I have referred to it as a 'limitation within a limitation.' The limitation on the enjoyment of a protected right in defence of public interest is in turn limited to the measure of that yardstick."

In the case of LGBTI persons, the High Court in the *Rollingstone* case held that:

> *'[it] does not agree that Section 145 of the Penal Code Act renders every person who is gay a criminal under that section of the Penal Code Act. The scope of section 145 is narrower than gayism generally. One has to commit an act prohibited under section 145 in order to be regarded a criminal'.*[43]

This would essentially imply that section 145 of the Penal Code Act cannot be used as a basis for limitation of rights unless the matter involves the specific acts prohibited under that section. This position was however distorted by the judgment in the *Lokodo case*, which seemed to agree with this principle but distinguished the facts of the two cases. Musota J in the latter case held that:

> *'[The Rollingstone case] involved determining whether the publication of a news Article identifying persons perceived to be homosexuals and calling for them to be hanged, violated their rights. The cited interpretation in relation to the scope of S.145 of the Penal Code Act was limited to whether in the absence of evidence of homosexual acts, persons "perceived" as homosexuals had committed any offence which would warrant such treatment by the Newspaper. In fact the above case did not involve any allegation of promotion of homosexual practices. Therefore the trial judge in that case was never called upon to consider other sections of the Penal Code Act relating to promotion or incitement of any offence".*[44]

It is also further watered down by the judge in the *SMUG Registration* case disagreeing with the decision on the *Rollingstone* case on the point that the Penal Code provisions only go to specific actions.

Therefore, anything incidental to homosexuality can be interpreted as inciting commission of a crime since it is apparent that homosexuality is criminalised in Uganda. The enjoyment of rights of LGBTI persons can therefore be justifiably limited on this basis. This case, however, is on appeal and this position may change.

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43 High Court Civil Division, Misc. cause No. 163 of 2010 (unreported).

44 High Court Civil Division, Misc. Cause No. 033 of 2012 (unreported) at 5-6.

1.2.4 Interpretation of the Constitution and enforcement of rights

The mandate of interpreting the Constitution, including the fundamental rights in Chapter Four, lies with the Constitutional Court in accordance with Article 137. The Constitutional Court is comprised of the Court of Appeal sitting with a quorum of five judges as opposed to the usual bench of three, which hears ordinary appeals.

On the other hand, enforcement of human rights and freedoms guaranteed under the Constitution is covered under Article 50, which entitles any person claiming violations of their rights to apply to a competent court for redress, which may include compensation. What amounts to a competent court for purposes of Article 50 has been addressed in a number of cases including *Attorney General v Maj. Gen. David Tinyefuza* where Kanyeihamba JSC referred to '*any courts of land and tribunals with the necessary jurisdiction.*'[45]

While initially there was confusion on whether the Constitutional Court can enforce human rights and award compensation, this too was settled in the *Tinyefuza case* where Justice Kanyeihamba further stated that the jurisdiction of the Constitutional Court as derived from Article 137(3) is concurrent with the jurisdiction of those other courts which may apply and enforce the articles, except that for the Constitutional Court to claim and exercise that concurrent jurisdiction the claim must be based on a petition seeking interpretation of a provision of the Constitution.

There is nothing under Articles 137 and 50 that stops LGBTI persons from claiming the remedies available under both channels of enforcement of human rights, and indeed both channels have been used before as already discussed above.

1.2.5 The Uganda Human Rights Commission and the rights of LGBTI persons

The Uganda Human Rights Commission (UHRC) is a constitutional body created by Article 51 and empowered to investigate complaints of human rights violations, promote human rights education and research and make recommendations to parliament. Besides courts, the Commission is the primary national human rights watchdog whose interpretation and application of the law and human rights standards is of great significance. Members of the Commission sit as a tribunal to adjudicate complaints presented to it. Complaints to the Commission are filed by way of an ordinary complaint form. It is important to note that the Commission's position on LGBTI laws has been largely progressive, with the Commission famously coming out to condemn the Anti-Homosexuality Bill, 2009.[46]

Two test LGBTI complaints have been filed with the Commission however these remain pending. The first complaint was by Jackson Mukasa and Kim Mukisa challenging actions of the Police when they arrested them in January 2014.[47] The two were arrested by the police in 2014 on charges of having carnal knowledge against the order of nature. They were beaten, forced to make incriminating statements,

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45 *Attorney General v Maj. Gen. David Tinyefuza* Constitutional Appeal No. 1 of 1997.

46 Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL) *Living up to our Human Rights Commitments: A compilation of recent statements by the Uganda Human Rights Commission on sexual orientation, gender identity and the Anti-Homosexuality Bill, 2009* available at http://www.ugandans4rights.org/attachments/article/396/Living_up_to_our_human_rights_commitments_Coalition_Booklet_30_07_12. pdf. Accessed 19th February 2019.

47 *Mukasa Jackson and Mukisa Kim v Attorney General* UHRC No. CTR/24 of 2016.

detained for more than the constitutionally allowed 48 hours and paraded before the media where a story about their HIV positive status was run in the *Red Pepper* tabloid, accusing them of infecting young boys with HIV/AIDS. The case challenges the actions of the police officers on the basis that they resulted in violations of the right to privacy, the right to dignity and freedom from torture, cruel and degrading treatment, the right to liberty and security of the person as well as the right to a fair trial. The second case arose from the police's stopping of the Mr/Ms/Mx Pride Beauty pageant during the 2016 Pride celebrations.[48] It challenges the actions of the then District Police Commander (DPC), Kabalagala Police Station of raiding the venue of the beauty pageant, brutally arresting some of the organisers and activists, detaining the rest of the attendees at the venue and harassing some of them, especially transgender persons by forcing them to undress and pulling at their hair. The Police also implicitly sanctioned the dehumanisation and violence against the arrested transgender persons in their custody by other persons in detention. All these actions resulted in a number of human rights violations including the violation of the right to dignity, the right to privacy as well as freedom from discrimination. Both cases are still pending before the Commission. The Commission has stated that the delay is due to the heavy case backlog that they have.

1.3 Legislation affecting LGBTI persons' enjoyment of human rights in Uganda

There are a number of laws that affect the day-to-day lives of LGBTI persons in Uganda. These flow from the Constitution and they ought to be in line with the Constitution, otherwise they would be declared unconstitutional. These laws can be classified under the following categories:

1.3.1 Criminal statutes

The main criminal statute in Uganda is the **Penal Code Act, Cap 120** and it has a number of provisions on same-sex conduct:

The *Penal Code Act* is the cardinal penal law of the country. It came into force in Uganda in 1950. It has provisions for different offences and their corresponding punishments. The Act does not have provisions that explicitly criminalise being 'homosexual' or 'homosexuality', but it does have provisions that criminalise conduct that has been almost exclusively attributed to homosexuality and those within whose coverage LGBTI persons are sometimes caught.[49]

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48 *Shawn Mugisha and 6 Others v Attorney General and the District Police Commander (DPC), Kabalagala Police Station* CTR/06/2017.

49 *See generally Civil Society Coalition on Human Rights and Constitutional Law and Human Rights Awareness and Promotion Forum (HRAPF) 'Protecting "morals" by dehumanising LGBTI persons? A critique of the laws criminalising same-sex conduct in Uganda' October 2013. Available at http://www.hrapf.org/sites/default/files/publications/section_145_.*

Provisions criminalising same-sex conduct

These are:

Carnal knowledge against the order of nature

Section 145

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

These sections do not expressly mention homosexuality or criminalise homosexuality per se, but is understood within its historical context to refer to same-sex sexual conduct.[50] The term 'carnal knowledge against the order of nature' is not defined in the Act and this section has not been the subject of substantive prosecution. The cases that have gone to court on charges under section 145 involving consensual same-sex relations have been dismissed for want of prosecution and those that have been completed involve non-consensual sexual relations.[51]

The High Court has however in the *Rollingstone* case made it clear that this offence only covers particular acts and does not extend to homosexuality as a sexual orientation. The authority of the decision was however watered down by the *Lokodo* and the *SMUG Registration* cases above.

The following offences under the Penal Code Act also have direct bearing on LGBTI persons:

Attempted carnal knowledge against the order of nature

> **Section 146**
>
> ***Any person who attempts to commit any of the offences specified in section 145 commits a felony and is liable to imprisonment for seven years.***

This provision is about attempting to commit 'carnal knowledge against the order of nature'. This provision has not yet been subjected to judicial interpretation in regard to LGBTI persons.

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50 M Kirby 'The sodomy offence: England's least lovely law export?' (2011) 1 *Journal of Commonwealth Criminal Law* 9-12.

51 CSCHRCL & HRAPF (n 49 above).

Indecent practices

Section 148

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

The section criminalises what it calls gross indecency with another person whether done in public or private. It also criminalises attempts to commit gross indecency. However, gross indecency is not defined. This provision has not yet been subjected to judicial interpretation as the cases under this charge have been dismissed for want of prosecution.[52]

Besides the provisions directly criminalising consensual same-sex relations, there are others that are used to prosecute LGBTI persons. In terms of scope, these provisions have some of the widest application in any penal law. This way of drafting has made the sections gain the notoriety for being used to arrest and charge LGBTI persons at the slightest suspicion of a moral wrongdoing. These are the offences of being a common nuisance, being idle and disorderly and being a rogue and vagabond.

Common nuisance

Section 160

(1) Any person who does an act not authorised by law or omits to discharge a legal duty and thereby causes any common injury, or danger or annoyance, or obstructs or causes inconvenience to the public in the exercise of common rights, commits the misdemeanour termed a common nuisance and is liable to imprisonment for one year.

(2) It is immaterial that the act or omission complained of is convenient to a larger number of the public than it inconveniences, but the fact that it facilitates the lawful exercise of their rights by a part of the public may show that it is not a nuisance to any part of the public.

On the face of it the section is a public order management provision without much to do with LGBTI persons. But its practical application has interfered with the rights of the LGBTI persons as it is one of the vagrancy offences that are used to justify arrests of LGBTI persons. In 2014, HRAPF handled a case in which a transgender woman was arrested and charged with the offence of being a 'common nuisance' because 'his behaviour of pretending to be a woman caused an inconvenience to the public in the exercise of their rights.'

52 Gross indecency cases are handled by HRAPF though they do not occur on a regular basis. One such case was *Uganda v Simon Nyombi & Anor*, Criminal case No. 654 of 2014, where the accused persons had allegedly been found naked in a bar.

Being idle and disorderly

Section 167

Any person who

(a) Being a prostitute, behaves in a disorderly or indecent manner in any public place;

(b) ...;

(c) ...;

(d) Publicly conducts himself or herself in a manner likely to cause a breach of the peace;

(e) Without lawful excuse, publicly does any indecent act;

(f) In any public place solicits or loiters for immoral purposes;

(g) ...;

shall be an idle and disorderly person, and is liable on conviction to imprisonment for three months or to a fine not exceeding three thousand shillings or to both such fine and imprisonment, but in the case of an offence contrary to paragraph (a), (e) or (f) that person is liable to imprisonment for seven years.

This provision is not often used by the Uganda Police Force, supposedly because of the President's criticism of the use of this provision to wantonly arrest people.[53] Its reference to 'prostitutes' could cover many LGBTI sex workers, and its reference to indecency would certainly cover acts associated with same-sex conduct.

Being rogue and vagabond

Section 168

(1) Every-

(a) Person convicted of an offence under section 167 after having been previously convicted as an idle and disorderly person;

(b) ...;

(c) Suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself or herself;

and such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose,

shall be deemed to be a rogue and vagabond, and commits a misdemeanour and is liable for the first offence to imprisonment for six months, and for every subsequent offence to imprisonment for one year.

53 See NTV 'Museveni criticises Police for unnecessary arrests' http://www.ntv.co.ug/news/local/16/may/2015/museveni-criticizes-policeunnecessary-arrests-6115#sthash.sdxyOB1A.dpbs. Accessed 5th August 2015 and 'Museveni vows to scrap idle and disorderly law' *Daily Monitor* 11 February 2016.

Being 'rogue and vagabond' is a colonial provision that was used to control 'undesirable' people by arresting them on the flimsiest of grounds – such as appearing to be homeless and being present in a public place. The provision is overly broad and leaves much room for law enforcers to carry out arbitrary arrests on just about anyone they wish to arrest. For this reason it is preferred by the police as they do not have to prove much. It is thus a very dangerous provision for LGBTI persons because many of them do not have a sustained means of subsistence due to the systematic discrimination and are likely to be found in places which are reputed to harbour 'rogues and vagabonds' since such places are cheaper and affordable to people who are unemployed. In 2016, HRAPF carried out a study to explore the impact of this provision, as well as the offence of 'being idle and disorderly' on marginalised groups.[54] The study found that at the five Kampala police stations surveyed there were a total of 957 charges laid under the rogue and vagabond provision for the period 2011 to 2015.[55] While many people are arrested under these provisions during mass arrests, few are charged and even fewer of these cases ever reach the courts.[56] The provision does not deter any discernible crime and persons arrested would often simply plead guilty in order to avoid a heavy prison sentence.[57] The study found that LGBTI persons arrested under this provision suffer multiple human rights violations, such as the violation of the right to be free from cruel, inhumane and degrading treatment when suffering assault during and after arrest; the violation of the right to liberty, freedom of movement and to a fair hearing. LGBTI persons also risk being 'outed' to the community after an arrest under this provision.[58] The study also found that LGBTI persons would often be charged with 'being idle and disorderly', even when someone is arrested on allegations of 'sodomy' since same-sex conduct would be extremely difficult to prove while the overbroad vagrancy provisions require a very low standard of proof.[59]

A petition has been instituted in the Constitutional Court of Uganda challenging section 168(1)(c) and (d) of the Penal Code Act which makes it a crime to 'wander upon a highway' in 'suspicious circumstances' and to be a 'suspected person or reputed thief' with no visible means of subsistence.[60] The petitioner seeks the nullification of the sub-sections on a number of grounds, including that it empowers the police to arrest and detain individuals that it finds objectionable, without reasonable suspicion of having committed or being about to commit an offence, as required by the Constitution and that it gives the police unchecked powers to limit people's freedom of movement at its own discretion. Should the Court find in favour of the petitioner, the most harmful part of the provision would no longer be available to justify the arrest and detention of LGBTI persons in Uganda.

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54 Human Rights Awareness and Promotion Forum *The implications of the enforcement of 'Idle and disorderly' laws on the human rights of marginalised groups in Uganda* (2016).

55 As above at 40.

56 As above at 40-41.

57 As above at 42-44.

58 As above at 51-55.

59 As above at 10.

60 *Francis Tumwesige Ateenyi v Attorney General* Constitutional Petition No. 36 of 2018.

Section 381-Personation

(1) Any person, who, with intent to defraud any person, falsely represents himself or herself to be some other person, living or dead, commits a misdemeanour;

(2) If the representation is that the offender is a person entitled by will or operation of law to any specific property, and he or she commits the offence to obtain that property or possession of it, he or she is liable to imprisonment for seven years.

HRAPF has so far only recorded one case of personation against an LGBTI person that has made it to the courts of law. As can be envisaged, the charge was against a transgender woman, and the case was dismissed for want of prosecution.[61] There are many arrests of transgender, and sometimes also gay and lesbian persons, on the strength of this provision though these cases usually end at the Police station.[62]

From the definition of 'personation' under the law, it is odd for a transgender person to be charged under it. Personation is about representing oneself to be 'some other person' and with an intention to defraud. Transgender people are not trying to be anyone else but themselves, and also they do not necessarily intend to defraud anyone. However, for the Police and most members of the public, the way they dress or act is seen as fraudulent and intended to misrepresent themselves as some other people. Transgender women are more vulnerable to this provision.

1.3.2 Laws on legal recognition and registration of individuals and organisations

Laws governing legal recognition and registration of persons have a huge bearing on LGBTI persons. These are:

The Registration of Persons Act, 2015

This Act repealed the Births and Deaths Registration Act, and is now the law that governs recognition and registration of persons in Uganda. It has provisions that affect the enjoyment of rights of LGBTI persons. These include provisions on change of name and change of sex. The most relevant provisions are:

Change of name of adults and children

Section 36

(1) Any person being over the age of eighteen years or a widower, widow, divorced person or a married person, who wishes to change his or her name, shall cause to be published in the Gazette a notice in the prescribed form of his or her intention to do so.

61 *Uganda v Boaz Kalyeija*, Criminal Case No. 18 of 2015.

62 For example In 2018, HRAPF handled seven cases in which transgender women or gay men were charged with the offence of personation on the basis of 'dressing like women while appearing to be men', which indicates a total misunderstanding of the purpose of the provision by the Police. Oftentimes, these arrests were occasioned with other human rights violations such as assault while in custody, being exposed to the media while in custody and detention far beyond 48 hours following arrest. (Cases on record with HRAPF).

(2) Not less than seven days after the publication of the notice, the person intending to change his or her name may apply in the prescribed form to the registration officer of the registration centre in which his or her birth is registered.

(3) The registration officer shall, upon being satisfied that the requirements of this section have been carried out and upon payment of the prescribed fee, amend the register accordingly and shall sign and date the amendment.

Section 37

(1) The parents or guardian of any child under the age of eighteen years may apply in the prescribed form to the registration officer of the registration centre in which the birth of the child is registered to change the name of the child.

(2) The registration officer shall, upon payment of the prescribed fee, amend the register accordingly and shall sign and date the amendment.

The provisions govern the change of name of both those above the age of 18 and those below the age of 18. They are important to LGBTI persons especially transgender and intersex persons who may wish to change their names to reflect their preferred sex or gender. The repealed Births and Deaths Registration Act provided age of adults as 21 years, which contravened the Constitution as the constitutional age of majority is 18. This was however rectified in the new law. Transgender and intersex persons can therefore change their names, if they satisfy the requirements stated in the above sections.

Many persons, especially transgender persons, have been able to change their names in accordance with this provision. However, HRAPF has registered one incident, from the time that the legal aid clinic for LGBTI persons was opened in 2008, in which a transgender woman was stopped by the Uganda Registration Bureau from changing her name, on grounds that her provided picture did not match the gender of the names to which she wanted to change. HRAPF notes that this contravened the provisions of this Act, as such a restriction is non-existent. HRAPF has also registered a case in 2019 where a transgender man who had been trained as a nurse was refused registration with the Uganda Nurses and Midwives Council (UNMC) on the basis that there was doubt whether he was the same person as the female names on his academic documents reflected. The UNMC did not take heed of the name change documents which the applicant had attached to his application. The same person was also denied admission to the Law Development Centre on the basis that the name change document would amount to a sex change. The case is currently being handled by HRAPF's legal aid clinic.

Change of sex

Section 38

If a child born a hermaphrodite, after being registered, through an operation, changes from a female to a male or from a male to a female and the change is certified by a medical doctor, the registration officer shall, with the approval of the Executive Director of the Authority upon application of the parents or guardian of that child update the particulars of the child, which appear on the register.

This provision concerns change of sex for children, and it is thus particularly important for intersex children who wish to undergo a sex change. It recognises that such children can change their particulars as regards sex provided they have had an operation to change their sex and provided that their parents or guardians have applied to have the particulars of the register changed. This is largely a positive provision, however, the downside with the provision is that it only covers children, and yet there is no other provision in the Act that covers adults. So in essence adults cannot change the particulars in the Births Register to reflect a change in sex.

This affects the ability of intersex persons over the age of 18 to get the necessary legal recognition.[63] It protects intersex children who undergo operations, presumably at a young age and either out of medical necessity or in order to 'normalise' their gender; unlike transgendered persons who are presumed to undergo such surgeries purely as a matter of choice. Furthermore, the fact that the Act provides for a change of particulars for 'hermaphrodite' children but not for 'hermaphrodite' adults strengthens the notion that operations ought to be performed on intersex persons at a young age in order to 'normalise' their sexuality as early as possible, which does not accord with international best practice.[64] The Act does not make it explicit that the details of intersex persons can be updated in the Births Register if they are over the age of 18.

In present practice, however, application can be made for a National Identity Card which could reflect the applicant's particulars of choice and which need not necessarily accord with the information stated on their birth certificate.[65] In fact, the National Identification Registration Authority (NIRA) is well aware of the fact that many Ugandans do not have birth certificates and therefore do not request this from applicants for National Identity Numbers and Cards.[66]

HRAPF has recorded a case in which three transgender persons in Kasese had trouble obtaining National Identity Documents due to the fact that local leaders refused to give them the letters that they needed to present to NIRA indicating their residence within their particular parish. The Gombolola Internal Security Officer refused the letters to the two transmen and one transwoman involved and asked them why they 'can't dress like proper boys and girls'. The three clients, however, approached the District Internal Security Officer who provided them with the needed letters and thereby enabled them to obtain National Identity Documents.

The Non-Governmental Organisations Act, 2016

The Non-Governmental Organisations Act, 2016 was signed into law on 30th January 2016 and it replaced the Non-Governmental Act, Cap 113. It is the law that governs registration and incorporation of entities as nongovernmental organisations in Uganda. It has provisions that restrict the operation of NGOs working on LGBTI

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63 For a deeper discussion of this provision, see generally, Human Rights Awareness and Promotion Forum *Submission on the Issues paper for the review of the Births and Deaths Registration Act* http://www.hrapf.org/sites/default/files/publications/14_04_15_hrapf_submission_on_the_births_and_deaths_registration_act.pdf Accessed 5th August 2015.

64 DC Ghattas 'Standing up for the rights of intersex people – how you can help' ILGA Europe (2015) 9.

65 Sec 62 of the Act creates a National Identification Register and sections 68 and 69 deals with the issuance of National Identification Numbers and National Identification cards to every citizen.

66 Interview with Manager of Legal and Advisory Services, NIRA, Kampala, 12th February 2019.

issues as follows:

Operation limited to only registered organisations

Section 29(1)

Any person or group of persons incorporated as an organization shall register with the Bureau.

This means that all organisations, including LGBTI organisations that intend to operate in Uganda as NGOs have to be registered with the NGO Bureau, after being incorporated as companies limited by guarantee by the Uganda Registration Services Bureau (URSB) or as trusts by the Ministry of Lands. The Act however also provides that an organisation shall not be registered with the Bureau if its objectives are in contravention of the law.[67] Considering the fact that same-sex conduct is criminalised in Uganda, this section could easily be interpreted to include prohibition of registration of LGBTI organisations by the board. As a result, LGBTI organisations may not easily register as NGOs and may thus not be able to operate without this formal registration.

Special Obligations

Section 44

An organisation shall...

(d) not engage in any act which is prejudicial to the security and laws of Uganda

(f) not engage in any act, which is prejudicial to the interests of Uganda and the dignity of the people of Uganda

The Act does not define what amounts to the 'dignity' or 'interests' of Ugandans which make the provisions broad, vague and open to abuse. Such provisions could easily be used to target organisations that work with unpopular and criminalised minorities like organisations working with LGBTI persons.[68]

The Companies Act, 2012

The NGO Act 2016 requires all organisations intending to register with the Bureau to be incorporated under the Companies Act. The Companies Act has provisions that have affected the establishment and operation of organisations working on LGBTI issues. The relevant provisions are the following:

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67 Sec 2(4) of the NGO Registration Act as amended.

68 See Human Rights Awareness and Promotion Forum (HRAPF) *Position Paper on the Non-Governmental Organisations Act, 2016* published in *The Human Rights Advocate* Issue III (2016) 60-61. Available at www.hrapf.org.

Companies limited by Guarantee

Section 4

> *(1) Any one or more persons may for a lawful purpose, form a company, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability.*
>
> *(2) The company may be—*
>
> *(a)...*
>
> *(b) a company having the liability of its members limited by the memorandum to the amount that the members undertake in the memorandum to contribute to the assets of the company if it is being wound up, in this Act referred to as "a company limited by guarantee";*

The import of Section 4 is that any one or more persons can form a company, and companies limited by guarantee are among such companies that can be formed. For an entity to be registered as a company limited by guarantee, it has to fulfill the requirements set out in the Act like having Articles of Incorporation and Memorandum of Association. It does not exclude any organisations and many LGBTI organisations have been able to register with broad objectives. However, one part of the registration process, namely the reservation of a name, has lead to a measure of difficulty of LGBT organisations seeking to register with the URSB in the past as will be explained in the discussion on section 36 of the Act below.[69]

Reservation of name and prohibition of undesirable names

Section 36

> *(1) The registrar may, on written application, reserve a name pending registration of company or a change of name by an existing company, any such reservation shall remain in force for thirty days or such longer period, not exceeding sixty days as the registrar may, for special reasons, allow and during that period no other company is entitled to be registered with that name.*
>
> *(2) No name shall be reserved and no company shall be registered by a name, which in the opinion of the registrar is undesirable.*

As part of the registration process for a company limited by guarantee, the organisation has to apply for the reservation of name under Section 36 of the Act. The same section grants the Registrar of Companies powers to refuse to reserve a name if in the opinion of the Registrar, such name is 'undesirable'. What 'undesirable' means has not been defined by the Act. The Registrar is thus given a very wide discretion. Indeed, in perhaps the first case under this Act and as discussed when considering the right to freely associate above, the Registrar refused to reserve the name Sexual Minorities Uganda (SMUG), stating that it was undesirable since

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69 See *SMUG Registration* case, n 1 above.

Section 145 of the Penal Code criminalises same-sex relations.[70] Therefore, as the law currently stands, an LGBTI organisation cannot reserve a name that has a reference to sexual minorities and as a result it cannot register as a company limited by guarantee as is required by the NGO Act prior to registration as a non-governmental organisation.[71]

1.3.3 Laws on Equal Opportunities and Access to Justice

The main law on equal opportunities in Uganda is The Equal Opportunities Commission Act 2007.

The Act establishes the Equal Opportunities Commission (EOC) in accordance with Article 32(3) & (4) of the Constitution. Its major aim is to address issues of marginalisation. The Commission's mandate is to *'eliminate discrimination and inequalities against any individual...and take affirmative action in favour of groups marginalised on the basis of sex, gender, age, disability or any other reason created by history, tradition or custom for the purpose of redressing imbalances which exist against them'*.

To realise its mandate, Section 15 of the Act gives the EOC powers of a court with authority to investigate actions of discrimination, marginalisation and denial of equal opportunities. The Commission can therefore constitute itself into a tribunal for purposes of receiving and investigating complaints from the general public involving discrimination and/or marginalisation. Since LGBTI persons are considered marginalised groups of people, the Commission presents a good platform for the enforcement and protection of their rights.

However, prior to its nullification, section 15(6)(d) of the Act imposed a restriction on the mandate and powers of the Commission which potentially shut the Commission's doors to LGBTI persons. It provided that:

> **Section 15(6)(d)**
>
> *The Commission shall not investigate 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.*

Parliamentary records reveal that the provision was introduced to prevent 'homosexuals and the like' from accessing the Commission by identifying with minorities.[72] Fortunately, the Constitutional Court struck down this provision in the case of *Adrian Jjuuko v Attorney General*[73] in a judgment delivered in November 2016.

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70 See *SMUG Registration* case, n 1 above.

71 According to section 29(2)(b) of the NGO Act, 2016, one of the requirements for an organisation to be registered with the NGO Bureau is a certificate of incorporation.

72 Parliament of Uganda *Parliamentary Hansard* 12th December, 2006.

73 See n 23 above.

1.3.4 Laws on Marriage

All the marriage laws in the country provide for marriage between a man and a woman. Article 31 of the Constitution not only restricts the right to marry to men and women of 18 years and above but also specifically prohibits marriage between persons of the same sex. The laws governing marriage in Uganda are: the Marriage Act Cap 251; the Customary Marriages Registrations Act Cap 248; the Marriage and Divorce of Mohammedans Act Cap 252; the Hindu Divorce and Marriage Act Cap 250; and the Marriage of Africans Act Cap 253. They do not contain specific prohibitions against same-sex marriages, but in light of Article 32A of the Constitution, no same-sex marriage can be celebrated under these laws.

In the case of transgender persons, it is unlikely that they would enjoy the same rights as other individuals in marriage. This is because as discussed above, the law in Uganda does not make provision for sex or gender change for adults. Therefore, if someone undergoes a sex change before getting married, or during the subsistence of the marriage, the marriage would likely not be recognised as it could be viewed as a marriage between persons of the same sex.

1.3.5 Laws on Divorce

The Divorce Act Cap 249 is the principal law that governs divorce in Uganda. Section 4 of the Divorce Act lists sodomy among the grounds for divorce. Use of this ground to seek divorce has not been regular but it remains on the law books. According to a study on the grounds of divorce in Commonwealth jurisdictions that have inherited English Law, the inclusion of sodomy, along with other grounds such as adultery, cruelty and bestiality, is based on the fact that they are criminal offences under the Penal Codes of those countries.[74] In fact, the corresponding provisions in the criminal and the matrimonial legislation in English and Indian law were so closely interlinked that the requirement for corroboration and the high burden of proof usually applicable to criminal trials were also applied in matrimonial causes. Sodomy as mentioned in section 4 of the Divorce Act is derived directly from section 145 of the Penal Code and was intended to target one and the same people. It is an extension of the discrimination within the criminal law into the sphere of domestic affairs.

1.3.6 Employment laws

Discrimination in employment is always a major issue for LGBTI persons. The main law applicable to this situation is the Employment Act 2006 and its provisions on discrimination:

Section 6

> *(1) In the interpretation and application of this Act it shall be the duty of all parties, including the Minister, labour officers and the Industrial Court to seek to promote equality of opportunity, with a view to eliminating any discrimination in employment.*
>
> *(2) ...*

74 PK Virdi *The grounds for divorce in Hindu and English Law, A Comparative study* (1972).

(3) Discrimination in employment shall be unlawful and for the purposes of this Act, discrimination includes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, the HIV status or disability which has the effect of nullifying or impairing the treatment of a person in employment or occupation, or of preventing an employee from obtaining any benefit under a contract of service.

Section 6(3) outlaws discrimination in employment on the following grounds: race, colour, sex, religion, political opinion, national extraction, social origin, HIV status or disability. These grounds appear to be closed and therefore grounds like sexual orientation and gender identity may not be included. However, the inclusion of sex as a protected ground may allow the inclusion of sexual orientation and even gender identity. There has been no authoritative court pronouncement on this provision in respect of sexual orientation and gender identity. In terms of practical realities, denial of employment and dismissals of LGBTI persons from employment exist. The 2015 Consortium report recorded three such violations in respect of which the victims were not accorded any remedies.[75] Therefore more, protection is needed in this respect.

1.3.7 Laws governing children

Under the Children Act Cap 59 as amended by the Children (Amendment) Act 2016, there are two important issues concerning LGBTI persons, the rights of children to stay with their parents and the ability of LGBTI persons to adopt children. The Act does not expressly talk about LGBTI persons but has sections that would imply their exclusion from exercising certain rights regarding adoption, parentage and custody of children. These are:

The child's right to live with their parents

Section 4

(1) A child is entitled to live with his or her parents or guardians.

(2) Subject to subsection (1), where a competent authority determines in accordance with the laws and procedures applicable that it is in the best interests of the child to separate him or her from his or her parents or parent, the best substitute care available shall be provided for the child.

Although section 4(1) gives every child the right to stay with his/her parents, section 4(2) would make it difficult for openly LGBTI parents to stay with their children. As already discussed, same sex relations are criminalised and so there is societal bias against LGBTI persons. If it comes to the knowledge of the relevant authorities that the parent or parents of a child are LGBTI, it is probable that section 4(2) can be invoked to take such a child away from its parent or parents because it can easily be said that living with an LGBTI parent is not in the best interests of the child.

75 The Consortium on Monitoring Violations Based on Sex Determination, Gender Identity and Sexual Orientation (2015) *Uganda Report on Violations Based on Gender Identity and Sexual Orientation* 35.

Adoption of children

As regards adoption, section 45 of the Children Act lays down conditions and restrictions:

Section 45

> *(1) An adoption order may be granted to a sole applicant or jointly to spouses where–*
>
> *(a) ...*
>
> *(b) in the case of an application by one of the spouses, the other has consented to the adoption.*
>
> *(2) ...*
>
> *(3) An adoption order shall not be made in favour of a sole male applicant in respect of a female child, or in favour of a sole female applicant in respect of a male child, unless the court is satisfied that there are special circumstances that justify, as an exceptional measure, the making of an adoption order.*

Section 45(1) allows for adoptions by individual persons or by married couples jointly. As regards individual persons, it is quite unlikely that a single person who identifies as LGBTI would be allowed to adopt a child.[76] Section 45(3) restricts adoption orders of applicants of a different sex from that of the child. This would prima facie imply that persons of the same sex as the child would be eligible. However, the intention of the drafters of the law was to ensure that adoptive parents do not sexually exploit their adopted children.[77] Therefore for LGBTI persons, persons of the same sex as the child would certainly be denied adoption rights.[78] The conflation of homosexuality with paedophilia in Uganda would simply compound the problem. Although the Act allows for exceptions to the sex consideration rule, it is highly improbable that such an exception would be made in favour of LGBTI persons.

Concerning joint adoptions, the provision seems to make no distinction between spouses in different sex marriages and persons in same-sex marriages. However, due to Article 32A, it is implied that the type of marriages recognised in Uganda are marriages between persons of the opposite sex and therefore same-sex couples would not qualify. This provision has not been tested before, but is almost certain that a same-sex couple would not be allowed to adopt a child.[79]

This section makes it almost impossible for LGBTI persons to adopt children in Uganda.

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76 For a more detailed discussion see A Jjuuko 'Beyond Court Victories: Using strategic litigation to stimulate social change in favour of lesbian, gay and bisexual persons in Common Law Africa' LLD Thesis, Centre for Human Rights, University of Pretoria, 2018, 195.

77 See SF Sigweni 'Adoption laws and procedures of Botswana: Questioning their effectiveness and compliance with regional and international human rights standards' Masters Dissertation, School for Advanced Legal Studies, University of Cape Town, July 2014, 43.

78 Above.

79 Above.

1.4 Conclusion

The protection of the rights of LGBTI persons is still at the very basic level in Uganda. Whereas there is no specific exclusion of LGBTI persons from the enjoyment of human rights except in relation to marriage, there are also no express guarantees of protection such as those that exist in many other jurisdictions. Same-sex relations still remain criminalised and as a result, LGBTI persons are in practice excluded from the enjoyment of many rights and freedoms accorded to 'everyone'. In the areas of registration of organisations, employment opportunities, adoption of children, and marriages among others, LGBTI persons are both in practice and in law excluded. Much needs to be done in terms of legislative advocacy and reform in order for LGBTI persons in Uganda to enjoy equality with other persons.

SECTION II

THE EAST AFRICAN SUB-REGIONAL LEVEL AND LGBTI RIGHTS

2.1 Introduction

The Treaty for the Establishment of the East African Community (The East African Treaty) signed on 30th November 1999 but entered into force on 7th July 2000 is the normative foundation of the East African sub-regional human rights system. Though largely an economic system, it has elements that qualify it as a human rights system. The system governs the East African Community, which is comprised of Burundi, Kenya, Rwanda, South Sudan, Tanzania, and Uganda. The Treaty does not provide for any specific rights but reinforces the obligations of member states to abide by the human rights standards created by the different human rights instruments they are party to especially the African Charter on Human and Peoples' Rights (African Charter). LGBTI rights have largely not been brought to this system except for the case challenging Uganda's now nullified Anti-Homosexuality Act, 2014 before the East African Court of Justice.[80] Even though this case was not decided on its merits, the system nevertheless has much potential for enforcement of human rights.

2.2 The normative framework and LGBTI rights

The Treaty establishes its own standards for the states parties to follow. The following are the relevant provisions on the rights of LGBTI persons:

> **Article 6**
>
> ***The fundamental principles that shall govern the achievement of the objectives of the community by the partner states shall include;***
>
> ***(a) ...***
>
> ***(b) ...***
>
> ***(c) ...***
>
> ***(d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.***
>
> **Article 7 (2)**
>
> ***The partner states undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.***
>
> **Article 8**
>
> ***(1) The partner states shall***
>
> ***(a) ...***

80 *Human Rights Awareness and Promotion Forum v Attorney General of Uganda*, Reference No. Const. Ref. No.6 of 2014 (*HRAPF* case).

(b) ...

(c) abstain from any measures likely to jeopardise the achievement of those objectives or the implementation of those of this Treaty.

The governing principles under the Treaty are very important. They are the fundamentals upon which the system is supposed to run. The emphasis on good governance and the rule of law alone would imply an introduction of human rights into the Treaty as it concerns the treatment of citizens and subjects, but the Treaty also specifically mentions human rights. The Treaty enjoins partner states to abide by the international human rights standards set by the different international human rights instruments that they are party to. There is specific mention of the African Charter on Human and Peoples' Rights (The African Charter). The African Charter protects rights of LGBTI persons as will be discussed in the next section. The Treaty also mentions adherence to accepted international human rights standards, which as will be discussed in the next section, provide protection to LGBTI persons.

The jurisdiction of the East African Court of Justice (EACJ) is provided for under Article 27 of the East African Treaty. It is responsible for the interpretation and implementation of the Treaty. The Court makes binding decisions, and this is very important since it implies that any decision made in favour of LGBTI rights by the court would have to be respected by Uganda. According to Article 27, the initial jurisdiction of the Court is over interpretation and application of the Treaty. Extended jurisdiction, which includes among others, jurisdiction over human rights, is to be determined by the Council of Ministers and a protocol passed by partner states to operationalise it. At present, the Court does not have a human rights jurisdiction. However, the Court has made pronouncements to the effect that it can entertain human rights matters if they concern violations of the Treaty principles. In *Katabazi and Others v Secretary General of the East African Community and Another (Uganda),*[81] the Court's jurisdiction over human rights complaints was directly in issue. The Court observed that it does not have a human rights jurisdiction and that such a jurisdiction requires determination by the Council and adoption of a protocol by the partner states. However, the Court declined to shy away from hearing the case reasoning that Article 27 empowers it to interpret and apply objectives and fundamental and operational principles of the Community enshrined in Articles 5, 6 and 7 of the Treaty which enjoin states to observe good governance, rule of law and social justice.

This was further discussed in the case of *Attorney General of Rwanda v Plaxeda Rugumba*[82] in which the government of Rwanda appealed a decision made by the Court against it on grounds that the Court lacked jurisdiction. The First Instance Division of the Court had held that the government of Rwanda had violated different rights of the applicant and her brother contrary to the Treaty and the African Charter. The Attorney General of Rwanda appealed contending that the Court had no jurisdiction over matters concerning human rights violations. The Appellate Chamber held that although the Court does not yet have jurisdiction to adjudicate disputes concerning human rights per se, Article 6(d) of the Treaty allows the Court to assert jurisdiction over such claims when they concern the basic principles of the Treaty.

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81 (2007) AHRLR 119 (EAC 2007).

82 Appellate Division, Appeal No. 1 of 2012.

From the above judgment, the Court acknowledged that it was entitled to investigate breaches of principles of good governance and the rule of law in Articles 6(d) and 7(2) of the Treaty and that these Articles also gave the Court jurisdiction to interpret whether the state had promoted or protected human and peoples' rights in accordance with the African Charter. This implies that the treaty offers protection to human rights of all people in member states including LGBTI persons.

One case that has direct bearing on LGBTI rights was heard by the EACJ. This is the case of *Human Rights Awareness and Promotion Forum (HRAPF) v Attorney General of Uganda*, Reference No. 006 of 2014. HRAPF originally filed the case at almost the same time as the case before the Constitutional Court of Uganda. The reference challenged almost all the provisions of the Anti-Homosexuality Act and argued that Uganda's Anti-Homosexuality Act 2014 and its passing contravened Articles 6(d) and 7(2) of the East African Treaty. It was argued that various sections of the law and the actions of the Ugandan Parliament passing it contravened the principles of good governance and the rule of law as enshrined in the East African treaty. The Attorney General responded arguing that the Court did not have the jurisdiction to hear such a matter since it concerned the Constitution of Uganda.

The case was later amended and restricted to three provisions of the nullified law and the action of passing it.[83] The three provisions that were pointed out are: Section 5(1) on the immunity of 'victims' of homosexuality to be tried for any offence committed when 'protecting' themselves against homosexuality; Section 7 on aiding and abetting homosexuality and Section 13(1)(b), (c), (d) and (e) on promotion of homosexuality which provisions are directly in violation of the fundamental principles of good governance, rule of law and human rights, enshrined in the EAC Treaty.

Two groups, UHAI-EASHRI and HDI Rwanda, applied to join the case as amici (friends of the court). The Court dismissed both applications on grounds that UHAI-ESHRI had too much interest in the case while HDI Rwanda had no interest in the case.[84] More amicus briefs were filed by UNAIDS, and the Centre for Human Rights, University of Pretoria, together with Dr. Ally Possi. The application by UNAIDS was allowed but the one by the Centre for Human Rights and Dr. Ally Possi was dismissed.

The Court, in a judgment delivered on 26 September 2016, decided that the case was moot as the Anti-Homosexuality Act had been nullified by the Constitutional Court of Uganda by the time that the case was heard in the EACJ. The Court relied on its earlier judgment in *Legal Brains Trust v Attorney General of Uganda*,[85] where it held that the Court would not adjudicate on hypothetical questions in which no 'live dispute' exists. The Court considered the public interest exception to the general rule against deciding moot cases and found that the evidence on record was not sufficient to '...establish the degree of public importance attached to the practice of homosexuality in Uganda....'.[86]

It should be noted that the case did not seek decriminalisation of homosexuality but rather declarations as to whether a state can pass laws that allow for immunity to persons who commit crimes against LGBTI individuals, and to persons who extend

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83 The amendment came after the Act was nullified by Uganda's Constitutional Court on 1st August 2014.

84 *UHAI EASHRI and HDI Rwanda v HRAPF and Attorney General of Uganda*, Applications No. 20 and 21 of 2014, East African Court of Justice.

85 EACJ Appeal No. 4 of 2012.

86 *HRAPF* case (n 79 above) at para 60.

health and other services to LGBTI persons.

Even though the case was not finally decided on its merits, it is nevertheless encouraging for the East African region that the Court was willing to hear a case concerning the human rights of LGBTI persons.

2.3 Conclusion

The East African sub-regional framework still lacks a protocol granting human rights jurisdiction to the East African Court of Justice but this has not prevented the Court from hearing cases involving human rights violations as was done boldly in the *Katabazi case*. While the only case that has been heard by the Court on rights of LGBTI persons was dismissed, this was not so on substantive issues and the initial willingness of the Court to hear the case on its merits even when it concerned LGBTI rights indicates that the sub-regional mechanisms may be a good avenue in protecting LGBT rights in Uganda and the East African region as a whole.

SECTION III

THE AFRICAN REGIONAL SYSTEM
AND THE HUMAN RIGHTS OF LGBTI PERSONS

3.1 Introduction

This section discusses the protection of human rights of LGBTI persons in the African regional human rights system. The African regional human rights system exists under the auspices of the African Union (AU). There are a number of human rights instruments that Uganda has ratified at this level, but the main and most relevant ones are: the African Charter on Human and Peoples' Rights (the African Charter), and the Protocol to the African Charter on the Rights of Women (the Maputo Protocol). Both documents contain human rights norms that are applicable to LGBTI persons. The African Commission on Human and Peoples' Rights (the African Commission) which is the body charged with the interpretation and implementation of the two instruments has also played an important role in further elaborating and defining the norms that are applicable, through its protection mandate, which includes decisions on communications, the work of Special Rapporteurs and Resolutions. The norms that are developing at this level will be fully examined in this section.

3.2 The different instruments under the African Regional system

The African Charter, also known as the Banjul Charter, is the principal human rights instrument on the African continent. The idea for its development first emerged in 1979 during the Organisation of African Unity (OAU)'s Assembly of Heads State and Government, when a resolution was adopted calling for the creation of a committee of experts to draft a continent-wide human rights instrument similar to those in different continents like Europe and the Americas. The committee drafted the instrument, which was subsequently approved by the OAU and later came into force on 21st October 1986. The Charter has a wide range of rights provisions for all persons. Uganda ratified the Charter on 10th May 1987, and it is therefore bound by the provisions of the Charter. The African Charter establishes the African Commission on Human and Peoples' Rights (the African Commission) as the body with an oversight role regarding the implementation and interpretation of the Charter. The African Commission is also the body that implements the Maputo Protocol. The African Union also established the African Court on Human and Peoples' Rights (The African Court) to ensure the protection of human rights in Africa.[87] The Court is charged with complementing the oversight role of the African Commission.

The Maputo Protocol is a supplementary treaty to the African Charter, which was adopted by the African Union in July 2003 as a result of intensive advocacy by mainly women's organisations from all over Africa. It entered into force on 25th November 2005 after securing 15 ratifications by AU member states. The Protocol was an important advancement in the protection and the promotion of the rights of women in Africa. It provides broad protection for women's human rights, including gender equality and justice. According to its preamble, the Protocol was adopted to address the concern that despite the ratification of the African Charter, and other international human rights instruments by the majority of states parties, women in Africa still continue to be victims of discrimination and harmful practices.[88]

There are a number of other instruments that also form part of the African regional normative framework. The African Charter on the Rights and Welfare of the Child was

87 The Court was established by the Protocol to the African Charter on the establishment of the African Court on Human and Peoples' Rights.

88 Viljoen (n 12 above) 17.

adopted to protect the rights of persons under the age of 18 in Africa.[89] This Charter makes provision for the protection of the right to privacy, which right is not included under the African Charter and the Maputo Protocol. The best interests of the child standard is of importance when it comes to decision-making in terms of gender identity and sex development of transgender and intersex children.[90] Other provisions of importance to LGBTI children are: the prevention of sale, trafficking and abduction of children;[91] protection against harmful social and cultural practices;[92] parental care, protection and responsibilities;[93] and protection against child abuse and torture.[94]

Another relevant instrument of the African Union is the African Youth Charter, which came into force in 2009.[95] Uganda ratified this instrument on 6th August 2008.[96] The African Youth Charter defines 'youth' and 'young people' as people between the ages of 18 and 35. The Charter protects private life, stating that no young person shall be subjected to the unlawful interference of their privacy, residence or correspondence and this includes attacks on their reputation and honour. This is a relevant provision to young LGBTI persons, especially considering that this right is not protected under the African Charter and the Maputo Protocol.[97] The Charter also has an expansive right to health which includes an obligation to involve youth in developing programmes to respond to the reproductive and health needs of vulnerable and disadvantaged youth in particular.[98] Provision is also made for HIV programming, voluntary testing and treatment.[99]

3.3 The normative content and LGBTI rights

The relevant provisions of the African Charter and the Maputo Protocol and how they apply to LGBTI rights will be discussed thematically:

3.3.1 The right to equality and non-discrimination

African Charter

Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present charter without distinction of any kind

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89 The African Children's Charter was adopted on 11th July 1990 in Addis Ababa, Ethiopia and entered into force on 29th November 1999.

90 See Art 4 of the African Children's Charter and A Jjuuko 'The protection and promotion of LGBTI rights in the African regional human rights system: Opportunities and challenges' in S Namwase & A Jjuuko (eds) *Protection the human rights of sexual minorities in contemporary Africa* (2017) 273.

91 Art 29.

92 Art 27.

93 Arts 19-20.

94 Art 16.

95 The African Youth Charter was adopted in Banjul, The Gambia,

96 African Union website 'African Youth Charter status list' available at https://au.int/sites/default/files/treaties/7789-sl-african_youth_charter_1.pdf (accessed 6th May 2019).

97 Art 7.

98 Art 16(b).

99 Art 16(d)-(g).

such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

Article 3

(1) Every individual shall be equal before the law

(2) Every individual shall be entitled to equal protection of the law

Article 19

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

Maputo Protocol

Article 2

1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:

(a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;

(b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;

(c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;

(d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;

(e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.

2. States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

Like all other international human rights instruments, the African Charter does not expressly prohibit discrimination on the grounds of sexual orientation and gender identity. However, the Charter expressly states that the rights enshrined therein are recognised and guaranteed to 'every individual' without distinction. The phrasing of the grounds given for non-discrimination is also indicative of the fact that the grounds are not exhaustive and can be interpreted to include other categories of discrimination

if they arise. The list of grounds is open-ended as indicated by the use of the words *'or any other status'* which leaves the possibility for inclusion of other grounds. This was recently affirmed by the African Commission when they adopted a Resolution in which they applied the above provisions to sexual orientation and gender identity.[100] In the Resolution, the Commission states that:

> *Recalling that Article 2 of the African Charter on Human and Peoples' Rights (the African Charter) prohibits discrimination of the individual on the basis of distinctions of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status;*
>
> *Further recalling that Article 3 of the African Charter entitles every individual to equal protection of the law…'*

Again, the African Charter protects against discrimination based on sex, and an argument can be sustained that sex includes sexual orientation,[101] which would be in line with the UN Human Rights Committee's position in *Toonen v Australia*.[102]

The African Charter, unlike other instruments, also possesses a unique feature of protecting *'peoples'***.** While it recognises individual rights, the Charter has a unique feature of providing collective protection of groups of people. Article 19 provides one such example where the Charter prohibits group dominance of some categories of people by others. This is important to LGBTI persons as it broadens their cover of protection under this Charter. LGBTI persons are a minority in Africa and Uganda who have been greatly marginalised as a result of views, beliefs and opinions held by the majority. Most of their human rights violations are attributable to this domination by the majority. This kind of domination is prohibited under the article.

The Maputo Protocol majorly contains obligations on states parties to ensure legal, cultural and policy frameworks that do not discriminate against women. Although sexual orientation is not specifically protected in the Protocol, the general approach is that of inclusion and protection. Discrimination of women is often exacerbated by other underlying factors like sexual orientation and gender identity. Lesbians and transgender women are subjected to various violations like 'corrective rape' based on these factors. The Protocol however has a clear stance against using culture as an excuse for the mistreatment and discrimination of women. The Protocol also expressly prohibits any form of discrimination against women, regardless of how such discrimination has been exhibited.

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100 The African Commission on Human and Peoples' Rights *Resolution on the Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity'*: Adopted at the African Commission on Human and Peoples' Rights meeting at its 55th Ordinary Session held in Luanda, Angola, from 28 April to 12 May 2014, Available at http://www.achpr.org/sessions/55th/resolutions/275/

101 See R Murray and F 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' (2009) 29 *Human Rights Quarterly* 86-111.

102 n 18 above.

3.3.2 The right to dignity and freedom from torture and cruel and degrading treatment

African Charter

Article 5

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

Maputo Protocol Article 3

1) ***Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights.***

2) ***Every woman shall have the right to respect as a person and to the free development of her personality.***

3) ***States Parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women.***

4) ***States Parties shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.***

There is no jurisprudence on this right regarding LGBTI persons. The African Commission has however used it to cover even LGBTI persons. This interpretation was implicitly provided in the Resolution adopted by the Commission on the protection of LGBTI persons.[103] The Commission in the Resolution states that:

> *Noting that Articles 4 and 5 of the African Charter entitle every individual to respect of their life and the integrity of their person, and prohibit torture and other cruel, inhuman and degrading treatment or punishment.*

In the Resolution, the African Commission acknowledges that the violence LGBTI persons are subjected to amounts to torture and cruel, inhuman and degrading punishment contrary to the Charter.

The Maputo Protocol protects women from being degraded and exploited. It also expressly protects women from violence: both verbal and sexual. As earlier noted, lesbian women are vulnerable to sexual violence in the form of 'corrective rape'. Transgender women are easy targets for attacks and suffer both physical and verbal violence. The Protocol therefore provides protection against such violence and provides the right for the free development of their personality. This means that women have the freedom to develop and freely express their sexuality and gender.

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103 n 99 above.

The recognition and protection of lesbian women has been an ongoing issue within the African Union, as played out in a drawn-out quest of an organisation advocating for the rights of lesbians to obtain observer status with the African Commission. Observer status refers to a type of registration with the African Commission which allows participation in activities and sessions that are not open to all.[104]

The Coalition for African Lesbians (CAL), a network of organisations which exist for the promotion of rights of all women in Africa and for the strengthening of activism and leadership of lesbian women in particular,[105] applied for observer status with the African Commission for the first time in 2008. The African Commission rejected the application on the basis that the organisation did not promote or protect any of the rights in the African Charter.[106] This refusal raised concerns that the African Commission was willing to contradict the very human rights norms on which the system is built and deny the recognition of LGBTI rights in the African Charter.[107] CAL submitted a second application for observer status in 2014, which the African Commission accepted.[108] However, this victory for LGBTI rights was short-lived.

The African Commission reports to the Executive Council of the African Union, which is made up of Ministers of Foreign Affairs.[109] In June 2015, the Executive Council requested the Commission to take into account 'the fundamental African values, identities and good tradition' and to withdraw the observer status granted to CAL.[110] The African Commission responded to this request by stating that they were to undertake a detailed legal analysis on the matter of granting and withdrawal of observer status, including the notion of African values and the legal basis on which observer status is granted.[111]

An advisory opinion on the matter was sought by non governmental organisations from the African Court on Human and Peoples' Rights (African Court), to clarify the powers of the Executive Council when 'considering' the report of the African Commission.[112] The African Court declined to give the opinion on the grounds that the entities bringing the case, namely CAL and the University of Pretoria's Centre for Human Rights, were not organisations 'recognised by the African Union'.[113] These organisations had observer status with the African Commission, but standing before the African Court is restricted to NGOs with observer status with the African Union

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104 International Justice Resource Centre 'African Commission bows to political pressure, withdraws NGO's observer status' 28th August 2018. Available at https://ijrcenter.org/2018/08/28/achpr-strips-the-coalition-of-african-lesbians-of-its-observer-status/ (accessed 30th April 2019).

105 Coalition for African Lesbians (CAL) website http://www.cal.org.za/ (accessed 6th May 2019).

106 African Commission on Human and Peoples' Rights, 28th Activity Report, para 33, EX.CL/600(XVII), 8.

107 Jjuuko (n 89 above) 280.

108 CAL received observer status at the 56th Ordinary Session on 25th April 2015.

109 Jjuuko (n 89 above) 260.

110 African Union Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights, DOC.EX.CL/Dec 887(XXVII), quoted in Jjuuko (n 89 above) 260.

111 African Commission on Human and Peoples' Rights, 39th Activity Report, para 50 .

112 *Request for Advisory Opinion by The Centre for Human Rights of the University of Pretoria and The Coalition of African Lesbians*, Request No. 002 of 2015 (African Court on Human and Peoples' Rights).

113 Centre for Human Rights 'African Court rejects Centre for Human Rights and CAL request, leaving political tension in AU unresolved' 6 October 2017 http://www.chr.up.ac.za/index.php/centre-news-a-events-2017/1930-press-statement-african-court-rejects-centre-for-human-rights-and-cal-request-leaving-political-tension-within-au-unresolved-.html (accessed 2 July 2018).

Commission, or which had entered into a Memorandum of understanding with the African Union Commission.[114]

The African Commission responded to the Executive Council's request by requiring of applicants for observer status to provide additional information about their activities and plans.[115] The African Commission also addressed the Executive Council's decision on CAL's observer status in its activity report prepared in the second half of 2017 and stated that the decision to grant observer status to CAL was taken in terms of the processes and criteria of the Commission.[116] It committed itself to continue to scrutinise the notion of 'African values' within the framework of its mandate to interpret the African Charter.[117]

In response to this, the Executive Council expressed concern about the African Commission's non-implementation of its 2015 decision.[118] A meeting was called between the African Commission and the Permanent Representatives' Committee (PRC) in order to resolve concerns surrounding the relationship of the African Commission with the AU's policy organs and member states.[119] After this meeting, the African Commission withdrew CAL's observer status in June 2018.[120]

The outcome of the debacle raises serious concerns about the independence and legitimacy of the African Commission which has been undermined by the AU's political organs.[121] The message is clear that there are little prospects for the African Commission to make decisions to protect the human rights of lesbian women and other LGBTI sub-groups where this is taken as contradicting 'African values' and overriding authority of the AU Executive Council.

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114 See *Request for advisory opinion by the Socio-Economic Rights and Accountability Project (SERAP)* No, 001/2013 (26 May 2017), Para 64.

115 See Resolution 361 *Resolution on the criteria for granting and maintaining observer status to Non-government Organizations working on human and people' rights in Africa* adopted at the 59th Ordinary Session of the African Commission on Human and Peoples' Rights held from 21st October to 4th November 2016 in Banjul, Islamic Republic of the Gambia.

116 See 43rd Activity Report of the African Commission on Human and Peoples' Rights (2017) para 51.

117 As above.

118 *See* Executive Council of the African Union, *Decision on the African Commission on Human and Peoples' Rights Doc. EX.CL/1058(XXXII)*, at EX.CL/Dec.995(XXXII), para. 3, *in Executive Council Decisions*, EX.CL/Dec.986-1007(XXXII), 32nd Ordinary Session, 25-26 January 2018.

119 *See* Executive Council, *Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR) DOC. EX.CL/1089(XXXIII) I*, at EX.CL/Dec.1015(XXXIII), paras. 1, 2.

120 International Justice Resource Centre, n 103 above.

121 Centre for Human Rights, University of Pretoria 'Centre calls on AU members state to recommit to the independence of the African Commission' 29th October 2018. Available at https://www.chr.up.ac.za/press-statements/1007-centre-calls-on-au-member-states-to-recommit-to-independence-of-african-commission (accessed on 7th May 2019).

3.3.3 The right to life

African Charter

Article 4

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Maputo Protocol

Article 4

Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.

1. States Parties shall take appropriate and effective measures to:

(a) Enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public;

(b) Adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women;

(c) Identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence;

(d) Actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women;

(e) Punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims;

(f) Establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women;

(g) Prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk;

(h) Prohibit all medical or scientific experiments on women without their informed consent;

(i) Provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women;

(j) Ensure that, in those countries where the death penalty still exists, not to carry out death sentences on pregnant or nursing women;

(k) Ensure that women and men enjoy equal rights in terms of access to refugee

status determination procedures and that women refugees are accorded the full protection and benefits guaranteed under international refugee law, including their own identity and other documents.

The African Commission on Human and Peoples' Rights has broadly interpreted the right to life and has held that it does not only refer to taking away of a person's life.[122] In the *Aminu v Nigeria case*, the complainant's client, who as a politician regularly criticised the government, was continually arrested and tortured by state authorities which forced him to go into hiding. The Commission held that this amounted to a violation of his right to life under Article 4 of the Charter. The Commission held that:

> *It would be a narrow interpretation of this right to think that it can only be violated when one is deprived of it. It cannot be said that the right to respect for one's life and dignity of one's person, which the article guarantees, would be protected in a state of constant fear and/or threats...*

From the above decision, the right to life can be violated if a person or particular group of persons constantly lives in fear for their life, as is the case with LGBTI persons in Uganda. This provision therefore protects the community against constant threats of arrest, torture and other violations from the state and its agencies as such conduct would be contrary to Article 4 of the African Charter.

The Maputo Protocol obliges states to protect women's lives and integrity by preventing, among other things, violence against them. The Protocol lists such examples to include verbal and sexual violence. Lesbian and transgender persons live with the constant risk of being subjected to violence both due to the prevailing negative public attitudes and prejudice in Uganda. This Article protects them against such violence.

3.3.4 Right to liberty

Article 6 of the African Charter states that:

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

This is another important right for LGBTI persons, and it applies specifically in situations where same-sex conduct is criminalised and LGBTI people are wantonly arrested even without any reasonable indication that there has been involvement in same-sex conduct. Such arrests amount to arbitrary arrests.

3.3.5 Freedom of association

This is provided for under Article 10 of the African Charter, which states that:

1) ***Every individual shall have the right to free association provided that he abides by the law.***

2) ***Subject to the obligation of solidarity provided for in 29, no one may be compelled to join an association.***

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122 *Aminu v Nigeria* (2000) AHRLR 258 (ACPHR 2000).

The freedom of association applies to any group of individuals or legal entities brought together in order to collectively act, express, promote, pursue or defend a field of common interests.[123] The Article provides for freedom of association but with a condition that such freedom should be enjoyed 'provided the person abides by the law'. This is a particularly strongly worded qualification and fear has been expressed that the term 'law' in this provision could be interpreted to justify and excuse any action whatsoever taken by governments, as long as such action is couched in legislation or otherwise conforms with 'law'.[124] The African Commission in interpreting the comparable claw back clause in Article 9(2) on freedom of expression and opinion made it clear that the law being referred to was international law and not domestic law.[125]

The African Commission has avoided a rigid and positivistic approach to its interpretation of this Article. In its Resolution on the Right to Freedom of Association, adopted at the 11th Ordinary Session,[126] the Commission called upon governments not to 'enact provisions which would limit the exercise of this Freedom.' The Resolution also stated that any regulation on the exercise of freedom of association 'should be consistent with States' obligations under the African Charter.' As Heyns notes, presumably the obligations referred to here are those relating to the enjoyment of the rights and freedoms guaranteed under the Charter, including the principal provision on freedom of association.[127]

It was also emphasised by the African Commission on Human and Peoples' Rights in the case of *Civil Liberties Organisation in Respect of the Nigerian Bar Association v Nigeria*[128] that there must always be a general capacity for citizens to join, without state interference, in associations in order to attain various ends. In regulating the use of this right, the competent authorities should not enact provisions, which would limit the exercise of this freedom. The competent authorities should not undermine fundamental rights guaranteed by the international human rights standards.

The rights identified in the Charter are expressly subject to the limitation clause in Article 27(2), unlike those in the Maputo Protocol which do not have an express limitation clause. Article 27(2) is as follows:

Article 27

1. ***Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.***

2. ***The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.***

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123 M Kiai *Report of the Special Rapporteur on the right to freedom of peaceful assembly and of association Maina Kiai* A/HRC/20/27, Para 51.

124 C Heyns (ed) *Human Rights law in Africa* (1977) 89.

125 Communications 105/93, 128/94, 130/94 and 152/96, *Media Rights Agenda and Constitutional Rights Project v Nigeria, Media Rights Agenda and Constitutional Rights Project*, Twelfth Activity Report 1998–1999.

126 Fifth Annual Activity Report, at 28.

127 Article 19 *Freedom of association and Assembly; Unions, NGOs and Political Freedom in Sub-Saharan Africa (2001)* 6.

128 Communication 101/93.

The African Commission has interpreted this clause and laid down parameters that have to be followed. The limitation should not have the effect of making the right illusory and the impact of the limitation must be proportional to the advantages sought to be obtained.[129]

The main argument against LGBTI rights would be the inclusion of morality, but the African Commission clarified that morality is not about the popular will or public interest.[130]

Therefore, the limitation should be able to apply to all other persons and not just LGBTI persons and should be clearly laid down in the law.

3.4 The political stand of the African Union on LGBTI rights

The political stand of the African Union in respect of LGBTI rights seems to be contradictory and uncertain: one the one hand, Resolution 275 was adopted in favour of protecting LGBTI rights and a lesbian-led network organisation (CAL) was initially granted observer status with the African Commission; on the other hand, immense political pressure was exercised over the African Commission by the AU's policy organs, which resulted in CAL's observer status being withdrawn. The Executive Council, that is made up of ministers of AU member states, are intent on refusing recognition of LGBTI rights beyond a bare minimum of protecting these groups from violence, citing the consideration of 'African values' as justification. Nevertheless, the African Charter guarantees human rights that it recognises to ALL, regardless of the sexual orientation and gender identity of the people involved.

3.5 Conclusion

The African Charter on Human and Peoples' Rights and the Maputo Protocol are some of the most pronounced, but by no means the only, human rights instruments at the continental level. None of them specifically mentions gender identity or sexual orientation as a basis for enjoyment of human rights guaranteed under the instruments, leaving the application and extent of the rights guaranteed as a matter of interpretation and implementation. The African Commission on Human and Peoples' Rights has, however, interpreted the Charter liberally and thereby makes provision for the enjoyment of rights by LGBTI persons. The recent decisions by the African Commission's Executive Council directing the African Commission on how to handle the CAL observer status matter, have led to the questioning of the independence of the African Commission. Also the stance taken by the AU's General Assembly of respecting traditional values seem to be targeted at opposing homosexuality and they also further put into question the ability of the African system to protect LGBTI persons.

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129 Communications 105/93, 128/94, 130/94 and 152/96, *Media Rights Agenda and Constitutional Rights Project v Nigeria, Media Rights Agenda and Constitutional Rights Project*, Twelfth Activity Report 1998–1999.

130 *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) Para 69.

SECTION IV

THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK
ON RIGHTS OF LGBTI PERSONS

4.1 Introduction

At the United Nations level, International human rights instruments provide human rights standards that countries that are state parties should aspire to reach. In addition to providing general standards, the provisions of these instruments are legally binding on states that ratify them. Uganda has ratified most of the key international human rights instruments and is therefore bound by their provisions. It has obligations to respect, protect, promote and fulfil these rights.

The discussion in this section will address some of the international human rights instruments with provisions that have an impact on rights of LGBTI persons. The discussion will highlight the normative human rights framework that has been created by these instruments in the international arena. It should be noted that LGBTI rights, just like many other categories of human rights, are not expressly mentioned in the instruments. However, different international mechanisms especially treaty monitoring bodies, have provided guidance and interpretation of these instruments and indeed LGBTI persons are shown to be included within these protections.

Due to the many different instruments within this system, the norms will be categorised into rights and the different provisions that address these rights highlighted.

4.2 The different human rights instruments within the international system

The following are the main human rights instruments within the international human right system that Uganda is a party to:

The Universal Declaration of Human Rights (UDHR)

This Declaration was adopted by the United Nations General Assembly in December 1948 as a non-binding declaration. It is considered the primary international human rights instrument that gave birth to all other international human rights instruments. It lays down the core foundation of the international standards that all countries in the world should strive to attain. It is one of the three instruments that form the International Bill of Rights. Uganda was not party to its adoption since at the time it was still a British colony and not an independent state, however most of its provisions are not included in the binding treaties and also some of the norms laid down in the UDHR have crystallised into customary international law and are therefore binding on all states including Uganda.[131]

The International Covenant on Civil and Political Rights (ICCPR)

The ICCPR was adopted by the United Nations Assembly on 16th December 1966 and came into force on 23rd March 1976. Uganda acceded to it on 21st June 1995. It is the main international instrument providing protections for civil and political rights and is also one of the three instruments that form the International Bill of Rights. The UN Human Rights Committee monitors its implementation and receives reports from states on the status of implementation of the Treaty, examines them and issue 'Concluding Observations'. It also develops General Comments providing guidelines

131 For a discussion of the UDHR as customary international law, see V Dimitrijevic *Customary law as an instrument for the protection of human rights* ISPI Working Papers, Working Paper 7 (2006) 8-10.

on how the ICCPR provisions should be interpreted and implemented.

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

The ICESCR is the third and final instrument that makes up the International Bill of Rights. It was adopted by the United Nations General Assembly on 16 December 1966 and came into force on 3rd January 1976. Uganda acceded to it on 21st January 1987. The Covenant provides protections for economic, social and cultural rights. Its implementation is governed by the Committee on Economic, Social and Cultural Rights, which receives and considers state reports on the implementation of the Treaty. The Committee also issues General Comments providing guidelines in the interpretation and implementation of the instrument.

The United Nations Convention Against Torture (CAT)

The Convention was adopted by the United Nations General Assembly on 10th December 1984 and it came into force on 26th June 1987. Uganda ratified it on 3rd November 1986. The Convention aims at prohibiting torture and inhuman or degrading treatment or punishment. It provides the generally accepted standards of what amounts to torture, and inhuman and degrading treatment or punishment. The Convention is monitored by the Committee Against Torture, which receives and considers state reports on the implementation of the Treaty and issues Concluding Observations. It also issues General Comments to guide the interpretation and implementation of the Treaty.

The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)

This Treaty was adopted in 1979 and came into force on 3rd September 1981. Uganda ratified it on 22nd July 1985. The Convention has been described as the International Bill of Rights for women as it solely focuses on protection of the rights of women. It is monitored by the Committee on the Elimination of all forms of Discrimination Against Women (CEDAW Committee), which receives and considers state reports on the implementation of the Treaty and issues 'Concluding Observations.' The Committee also formulates General Recommendations and suggestions on specific treaty provisions.

4.3 The normative framework and its application to LGBTI rights

The following rights within the different international human rights system, apply to LGBTI persons as follows:

4.3.1 Freedom from discrimination and equality before the law

This is provided for by different treaties with slight variations. The framing of the right is as follows in each of the treaties:

UDHR

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

ICCPR

Article 2(1)

Each state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26

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

ICESCR

Article 2

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

UN-CAT

Article 1(1)

For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information

or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

CEDAW

Article 1

For the purpose of the present Convention, the term discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The Human Rights Committee (HRC) and the Committee on Economic, Social and Cultural Rights (ESCR Committee) have defined discrimination to mean any distinction, exclusion, restriction or preference or other differential treatment that is directly based on a prohibited ground of discrimination and that has the effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of rights guaranteed under international law.[132]

From the provisions, no single provision expressly covers sexual orientation or gender identity as protected grounds. However, the drafting clearly shows that the list is not a closed list and that sexual orientation and gender identity may be analogous to the protected grounds. Indeed, implementing and monitoring bodies have interpreted these provisions to include sexual orientation and gender identity as a prohibited ground of discrimination. In the case of *Toonen v Australia*, the Human Rights Committee stated that the reference to 'sex' in Articles 2 paragraph 1 and 26 of the ICCPR is to be taken as including sexual orientation,[133] and affirmed this in *Young v Australia*.[134] Thus the prevailing position is to the effect that international instruments and national legislation which contain 'sex' as a protected ground and those which have a non-exhaustive list of anti-discrimination grounds may have sexual orientation read into them.

The same Committee in its Concluding Observations to Chile, urged states parties to guarantee equal rights to all individuals, as established in the Covenant, regardless of their sexual orientation.[135] The Committee has also emphasised that states have a legal obligation to ensure to everyone the rights recognised by the Covenant without discrimination on the basis of sexual orientation.[136]

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132 Human Rights Committee *General Comment No. 18, Non Discrimination HRI/GEN/1/Rev.9 (Vol. I), (1989), Para 7; Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)* E/C.12/GC/20 (2009), Para 7.

133 n 18 above.

134 *Young v Australia*, Human Rights Committee, U.N. Doc. CCPR/C/78/D/941/2000 (18 September 2003) Para 10.4.

135 UN Human Rights Committee *Consideration of reports submitted by States parties under Article 40 of the Covenant: International Covenant on Civil and Political Rights: Chile*, CCPR/C/CHL/CO/5), Para 16.

136 Human Rights Committee *Concluding Observations on the United States of America* CCPR/C/USA/CO/3 at Para 25.

The Committee on Economic, Social and Cultural Rights has also affirmed that the non-discrimination guarantee in the ICESCR includes sexual orientation in its General Comments relating to the right to work,[137] the right to water,[138] the right to social security,[139] and the right to the highest attainable standard of health.[140] The Committee also stated that the non-discrimination guarantee includes gender identity.[141] Also in its Concluding Observations, the Committee has expressed concern about discrimination against LGBT persons in the enjoyment of their Economic, Social and Cultural rights and has urged the adoption of legislation to protect them from discrimination.[142]

There is no list of prohibited grounds in the Convention Against Torture. However, the language used shows that it is broader in coverage than many other formulations. Article 1 provides that the intentional infliction of severe pain or suffering for a variety of purposes, including reasons 'based on discrimination of any kind' constitutes torture. 'Discrimination of any kind' would certainly include sexual orientation and gender identity as has been held by the Committee on Torture. It has acknowledged the widespread persecution of LGBTI persons and emphasised the obligations of states to 'protect all persons, regardless of...sexual orientation or transgender identity from torture and cruel, inhuman or degrading treatment or punishment.'[143] The Committee has further noted and warned that both men and women and boys and girls may be subjected to violations of the Convention on the basis of their actual or perceived non-conformity with socially determined gender roles.[144] The Committee has therefore acknowledged the fact that sexual orientation and gender identity could form a basis of discrimination leading to torture as envisaged by the definition in Article 1 of the Convention.

The CEDAW does not provide a list of prohibited grounds of discrimination but its prohibition of discrimination has been interpreted to include prohibition on the grounds of sexual orientation and gender identity. The Committee on CEDAW introduced the concept of intersectionality in discrimination as a way of understanding the scope of states' obligations contained in Article 2 of the Convention. It explained that the discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as sexual orientation and gender identity. It held that discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways. It therefore urged States Parties to legally recognise and prohibit intersecting forms of discrimination and the

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137 Committee on Economic, Social and Cultural Rights *General Comment No. 18 (Right to work)*, Para 12(b).

138 Committee on Economic, Social and Cultural Rights *General Comment No. 15, (Right to water)* Para 13.

139 Committee on Economic, Social and Cultural Rights *General Comment No. 19 (Right to social security)*, Para 29.

140 Committee on Economic, Social and Cultural Rights *General Comment No. 14 (Right to the highest attainable standard of health),* Para 18.

141 Committee on Economic, Social and Cultural Rights, *General Comment No. 20 (Non-discrimination in Economic, Social and Cultural Rights),* Para 32.

142 Committee on Economic, Social and Cultural Rights *Concluding Observations of the Committee on Poland* E/C.12/POL/CO/5; at Para 12 80 n74 above, 43.

143 Committee Against Torture *General Comment No. 2*, Para 21.

144 Above, Para 22.

compounded negative impact on the women concerned.[145] The CEDAW Committee has addressed Uganda in particular and in its Concluding Observations on Uganda in 2010, it expressed *'serious concern about reported harassment, violence, hate crimes and incitement of hatred against women on account of their sexual orientation and gender identity. The Committee is further concerned that they face discrimination in employment, health care, education and other fields*.' It further called on Uganda to '*provide effective protection from violence and discrimination against women based on their sexual orientation and gender identity, in particular through the enactment of comprehensive anti-discrimination legislation covering, inter alia, the prohibition of multiple forms of discrimination against women on all grounds, including on the grounds of sexual orientation and gender identity*.'[146]

As discussed above, most of the international human rights instruments with provisions on discrimination do not list sexual orientation and gender identity as prohibited grounds for discrimination. This could be explained by the fact that at the time of their inception, rights of LGBTI persons were not a matter of discussion in the arena of international human rights law. The subject has however increasingly taken centre stage in the international human rights debate prompting monitoring and implementation bodies to interpret the current global human rights framework as regards rights of LGBTI persons. As seen, the general view is that all these international instruments, although not expressly stated, prohibit all kinds of discrimination including discrimination based on sexual orientation and gender identity. These interpretations provide the current international human rights framework on rights of LGBTI persons regarding the non-discrimination guarantee.

4.3.2 The right to privacy

Consensual same-sex activity and bodily integrity fall into the realm of privacy and therefore the right to privacy is an important right for LGBTI persons. The relevant provisions on the various international human rights instruments are:

UDHR

Article 12

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

ICCPR

Article 17

(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and

145 Committee on the Elimination of Discrimination Against Women *Concluding Observations of the Committee on Turkey* CEDAW/C/TUR/CO/6 (2010) Para 38; CEDAW Committee *General recommendation No 28 on the core obligations of states parties under Article 2 of the CEDAW*, Para 18.

146 Committee on the Elimination of Discrimination Against Women *Concluding Observations of the Committee on Uganda* CEDAW/C/UGA/CO/7 (2010) Para 43-44.

reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks.

Interpretation of provisions

The right to privacy has been interpreted by the Human Rights Committee to mean a guarantee against interferences with one's privacy, home or correspondence whether they emanate from the state authorities or from natural or legal persons.[147] The Committee has urged States Parties to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.

As has been discussed, the provisions of the UDHR and ICCPR apply to all people without distinction regardless of their sexual orientation or gender identity and LGBTI persons are therefore entitled to this right. The Human Rights Committee has also on occasions affirmed that LGBTI persons are entitled to the right to privacy and that it should be protected. For example, the Committee noted that the continued criminalisation of same-sex conduct in Chile was a violation of the right to privacy.[148]

In *Toonen v Australia*[149] it was held that 'it is undisputed that adult consensual sexual activity in private is covered by the concept of privacy under Article 17 of the ICCPR.' The Committee emphasised that criminalisation of homosexuality for example violates the right to privacy regardless of whether such criminalising laws are enforced against LGBTI persons or not. The mere existence of the criminal law continuously and directly interferes with the right to privacy.[150]

The guarantee to privacy protects people from both unlawful and arbitrary interference with their privacy. The expression 'arbitrary interference' extends to interferences provided for under the law.[151] This means that even interferences provided for by law can be a violation of the right to privacy if such interference cannot be justified under the Covenant and cannot be deemed necessary in the circumstances of the case. In the case of *Toonen,* the Committee found that criminalising same-sex sexual activity was neither necessary nor proportional to cure any evil. From the above interpretation, the right to privacy of LGBTI persons is protected under the ICCPR and by extension, other instruments.

4.3.3 Freedom from torture, cruel, inhuman and degrading treatment

This is another important cache of rights for LGBTI persons. They are the embodiment of the principle of human dignity. The relevant provisions from each of the international instruments are:

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147 Human Rights Committee *General Comment No. 16* (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation) Para 1.

148 Human Rights Committee *Concluding Observations of the Human Rights Committee on Chile* (CCPR/C/79/ Add.104), at para. 20.

149 Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

150 Communication No 488/192, UN Doc CCPR/C/50/D/488/1992 Para 8.2.

151 Human Rights Committee *General Comment No. 16* Para 4.

UDHR

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

ICCPR

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

UN-CAT

Article 1(1)

For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Article 2(1)

Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

The Committee Against Torture has emphasised the applicability of the UN-CAT to LGBTI persons by stating that the principle of non-discrimination is a basic and general principle in the protection of human rights and fundamental to the interpretation and application of the Convention.[152] It was emphasised in a General Comment that the protection of certain minority or marginalised individuals or populations especially those at risk of torture is a part of the obligation to prevent torture or ill treatment.[153] The Committee has urged states to ensure that their laws are in practice applied to all persons regardless of their sexual orientation or transgender identity.

It was noted that both men and women and boys and girls may be subject to violations of the Convention on the basis of their actual or perceived non-conformity with socially determined gender roles. This was argued to be a result of discrimination on the basis of sexual orientation and gender identity which contributes to the process of the dehumanisation of the victim, which is often a necessary condition for torture

152 Committee Against Torture, *General Comment No. 2*, UN Doc CAT/C/2/CRP.1/Rev.4.

153 *General Comment No. 2* at Para 21.

and ill treatment to take place.[154] The protection from torture, cruel and inhuman or degrading treatment therefore extends to LGBTI persons.

4.3.4 Rights to freedom of expression, association and peaceful assembly

UDHR

Article 19

Everyone has the right to freedom of thought and expression; this right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas.

Article 20(1)

Everyone has the right to freedom of peaceful assembly and association.

ICCPR

Article 19(2)

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Article 21

The right to peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22(1)

Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

Freedoms of opinion and expression have been said to be indispensable conditions for the full development of a person. They constitute the foundation stone for every free and democratic society.[155] No person is supposed to be subjected to the impairment of any rights under the Covenant [ICCPR] on the basis of his or her actual, perceived or supposed opinions. The Human Rights Committee has emphasised that all forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature.[156] Any effort to coerce the holding or not holding of any opinion is prohibited. The freedoms of expression and opinion especially protect opinions

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154 Office of the High Commissioner for Human Rights *Interim report of the special rapporteur on torture, and other cruel, inhuman or degrading treatment or punishment* A/56/156 at Para 19.

155 Human Rights Committee *General Comment No. 34* Para 2, CCPR/C/GC/34.

156 As above at par. 9.

and expressions that others may find offensive.[157] The Human Rights Committee has explicitly stated that the right to freedom of expression and opinion protects the right of LGBTI persons to publicly give expression to their sexual orientation and gender identity and seek understanding for it.[158]

The right to freedom of peaceful assembly has also been recognised as one of the most important rights in modern democracies. Although the instruments do not expressly provide for the protection of LGBTI persons, the United Nations High Commissioner on Human Rights has recommended that states should ensure that individuals can exercise their rights to freedom of expression, association and peaceful assembly in safety without discrimination on grounds of sexual orientation and gender identity.[159] The Human Rights Committee emphasised in the case of *Fedotova v Russian Federation*[160] that the right is guaranteed regardless of the sexual orientation or gender identity of the participants and that it also protects expression related to issues of sexual orientation and gender identity. Like the freedoms of opinion and expression, the obligation to secure the effective enjoyment of the right to freedom of peaceful assembly is of particular importance to persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation.

The Committee was equally emphatic in the case of *Leo Hertzberg v Finland*[161] which concerned state sanctioned censure of homosexuality programs from being broadcast on the state owned Finnish Broadcasting Corporation. It observed that the conception and contents of 'public morals' referred to in Article 19(3) are relative and changing. It is of special importance to protect freedom of expression as regards minority views, including those that offend, shock or disturb the majority.

It is important to note however that these rights, particularly under Articles 19, 21 and 22 of the ICCPR, are not guaranteed in absolute terms. Their enjoyment can be limited. However the limitation should be provided by law, necessary in a democratic society and for a legitimate purpose.[162] As regards limitations being provided by law, such laws must themselves be compatible with the provisions, aims and objectives of the Covenant and must not violate the non-discrimination provisions of the Covenant.[163] Providing further guidance in the *Leo Herzeberg v Finland* case above, the Committee opined that even if restrictive laws (such laws as paragraph 9(2) of chapter 20 of the Finnish Penal Code) may reflect prevailing moral conceptions, this is in itself not sufficient to justify a limitation under Article 19(3).

In addition, it must also be shown that the application of the restriction is 'necessary'. The Committee specifically advised that the state authorities should be allowed a margin of discretion. As far as LGBTI rights are concerned, the United Nations special procedures have re-affirmed that these rights are held by everyone regardless of

157 Above, Para 1.1.

158 *Fedotova v Russian Federation*, CCPR/C/106/D/1932/2010 at Para 10.7.

159 Human Rights Committee (n 132 above) para 84(f).

160 CCPR/C/106/D/1932/2010.

161 Communication No. 61/1979, U.N. Doc. CCPR/C/OP/1 at 124 (1985).

162 Art 19(3).

163 Human Rights Committee *General Comment No. 34* (article 19), at para. 26; see also, General Comment No. 22 (article 18), at para. 8 (Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner).

sexual orientation or gender identity. Commenting on a draft law in Nigeria that would have penalised public advocacy supporting the rights of LGBTI persons, the Special Representative on Human Rights Defenders stated, 'in particular, serious concern is expressed in view of the restriction such a law would place on freedoms of expression and association of human rights defenders and members of civil society, when advocating for the rights of gays and lesbians'.[164] The rights of LGBTI persons to express themselves regarding their sexual orientation and gender identity, and their freedom to peacefully assemble are therefore within the protection of the international human rights instruments.

The above discussed rights are the rights protected under international law as far as LGBTI persons are concerned. The violation of other rights like health, education, housing is incidental to the violation of the above discussed rights especially the right to equality and non-discrimination. From the discussion, it is clear that although the international human rights instruments do not explicitly protect LGBTI persons, they have been interpreted to include such protection by their respective interpreting and implementing bodies.

4.4 Limitation of rights under international law

The rights protected in the various human rights instruments are not unlimited. Focus is going to be put on the ICCPR. Apart from the right to freedom from inhuman and degrading treatment or punishment, which is non-derogable under the ICCPR, the other rights are subject to limitation. The limitations are:

Article 19(3)

The exercise of the rights provided for in paragraph 2 of this article [right to freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 22(2)

No restrictions may be placed on the exercise of this right [right to freedom of association] other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

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164 United Nations *Report of the Special Representative of the Secretary-General on human rights defenders* (A/ HRC/4/37/ Add.1), at Para 511.

These are the limitations allowed under the ICCPR and freedom of expression and freedom of association. The key principles as stated by the Human Rights Committee are:

> *'Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality... Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.'*[165]

The protection of public health was given as a reason for criminalising same-sex relations in the case of *Toonen v Australia,* but the HRC rejected this reasoning and stated that 'Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus.'[166]

The other justification that is commonly given to criminalise homosexuality is morals. Protection of morals is accepted as a legitimate justification, however 'Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.'[167]

Therefore, whereas these rights may be limited, they cannot be limited solely on the basis of sexual orientation and gender identity.

4.5 The Yogyakarta Principles

The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles) were developed by a committee of experts with the major aim of addressing the deficiencies in understanding the international human rights regime and its application to issues of sexual orientation and gender identity.[168] They do not create new norms but simply summarise the different norms in international human rights law and how they apply to sexual orientation and gender identity. They currently do not form part of treaty law, but could qualify as soft law. The guidelines were developed and adopted by the committee in November 2006.

The principles explore the different obligations of states and non-state actors in the promotion and protection of human rights. They give different recommendations to states and non-state actors on how to improve the enjoyment of rights by LGBTI persons using the existent international human rights standards. Other actors to whom recommendations are made are the UN Human Rights system, the media, civil

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165 Human Rights Committee, General Comment No. 34, para 22.

166 *Toonen Communication* (n 18 above).

167 Human Rights Committee, *General Comment No. 34*, para 32. 107 The official version of the Yogyakarta Principles can be found at http://www.yogyakartaprinciples. org/principles_en.pdf

168 The official version of the Yogyakarta Principles can be found at www.yogyakartaprincples.org/principles_en.pdf

society, national human rights institutions among others. It should be noted that the Yogyakarta principles are not binding on states and merely provide guidelines on how international human rights instruments can be interpreted to extend their protection to LGBTI persons.

The principles define the terms 'sexual orientation' and 'gender identity'. Sexual orientation is defined as:

> *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.*[169]

Gender identity is defined as:

> *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.*[170]

The guidelines contain 29 principles and each principle explores a different area of human rights and recommendations are given thereunder. These are: the right to the universal enjoyment of human rights; the right to equality and non-discrimination; the right to recognition before the law; the right to life; the right to security of the person; the right to privacy; the right to freedom from arbitrary deprivation of liberty; the right to a fair trial; the right to treatment with humanity while in detention; the right to freedom from torture and cruel, inhuman or degrading treatment; the right to protection from all forms of exploitation, sale and trafficking of human beings; the right to work; the right to social security and to other social protection measures; the right to an adequate standard of living; the right to adequate housing; the right to education; the right to the highest attainable standard of health; protection from medical abuses; the right to freedom of opinion and expression; the right to freedom of peaceful assembly and association; the right to freedom of thought, conscience and religion; the right to freedom of movement; the right to seek asylum; the right to found a family; the right to participate in public life; the right to participate in cultural life; the right to promote human rights; the right to effective remedies and redress; and finally, accountability.

On 10 November 2017, 'Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles' were adopted. The development of a deepened collective understanding of violations suffered on the basis of sexual orientation and gender identity, as well as the recognition that there is a distinction between gender identity and sex characteristics, is stated as the motivation behind the adoption of the additional principles.[171] These additional principles are shortened as 'Yogyakarta Principles plus 10' or simply 'YP+10' and state 9 additional Principles and 111 additional State

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169 Yogyakarta principles.

170 Above.

171 'Introduction' *The Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* 10th November 2017.

Obligations, to be read alongside the original Yogyakarta Principles.

The 9 additional Principles set out in YP+10 includes the right to state protection; the right to legal recognition; the right to sanitation; the right to truth; and the right to bodily and mental integrity.[172] The YP+10 also recognise a right to protection from criminalisation and sanction on the basis of sexual orientation, gender identity, gender expression and sex characteristics.[173] The additional State Obligations relate to the original Yogyakarta Principles such as the right to privacy, the right to equality and non-discrimination and the right to education.[174]

The above are what make up the guidelines laid down by experts on how to apply international human rights law to the rights of LGBTI persons. They clearly show that international human rights law as it is at the moment protects LGBTI rights.

4.6 The Political status of LGBTI Rights within the United Nations

Whereas there is no political consensus at the United Nations on the recognition and protection of LGBTI rights, much progress has been made towards protection. At the General Assembly, a number of resolutions have been adopted on LGBTI rights. The first ever such resolution was in 2008 – the UN General Assembly's Declaration on Sexual Orientation and Gender identity at the UN, which condemned discrimination and violence based on sexual orientation and gender identity.[175] Since then, the General Assembly has adopted six other resolutions that expressly include protections based on sexual orientation, and they all concern protections against extra judicial, summary or arbitrary executions.[176] Similarly, at the UN Human Rights Council, three resolutions have been adopted on LGBTI rights.[177] The Human Rights Council recently renewed the mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.[178]

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172 Principle 30,31,32,35 and 37.

173 Principle 33.

174 Principle 6, 16 and 24.

175 P Worsnip 'U.N. divided over gay rights declaration' *Reuters* 19 December 2008, https://www.reuters.com/article/us-un-homosexuality/u-n-divided-over-gay-rights-declaration-idUSTRE4BH7EW20081218 (accessed 17 April 2018).

176 These are all resolutions on extrajudicial, summary or arbitrary executions. These are resolutions: A/RES/69/182; A/RES/67/168; A/RES/65/208; A/RES/63/182; A/RES/61/173; A/RES/59/197 and A/RES/57/214. These are all available at http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNResolutions.aspx (accessed 5 June 2018).

177 These are: Protection against violence and discrimination based on sexual orientation and gender identity (adopted 30 June 2016) - A/HRC/RES/32/2; Human rights, sexual orientation and gender identity (adopted 17 June 2011) - A/HRC/RES/17/19; and Human rights, sexual orientation and gender identity (adopted 26 September 2014) - A/HRC/RES/27/32. These are all available at http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNResolutions.aspx (accessed 5 June 2018).

178 United Nations Human Rights Council Resolution adopted by the Human Rights Council on 30 June 2016: Protection against violence and discrimination based on sexual orientation and gender identity A/HRC/RES/3/2/2, 15 July 2016.

4.7 Conclusion

The international human rights framework and jurisprudence are well developed. Enjoyment of human rights by LGBTI persons is well expounded by the various human rights committees. Equally significant, is the fact that the principles enshrined in most international instruments and the pronouncements of the human rights committees to differing extents form part of the regional, sub-regional and national frameworks. The authoritative reference to the women's rights principles contained in the CEDAW by Lady Justice Arach Amoko in the *Victor Mukasa* case is the case in point. Further, the adoption of the Yogyakarta Principles to guide interpretation and application of human rights to LGBTI persons is a milestone of which the full force and impact is yet to be realized.

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