

**FROM THE TELLING SOUND OF SILENCE TO THE TOLLING BOOM OF ACTIVISM:
KEY TOOLS OF ENGAGEMENT IN ENSURING THE RIGHTS TO EQUALITY AND NON-
DISCRIMINATION FOR LESBIAN, GAY, BISEXUAL, TRANSGENDER AND INTERSEX
PERSONS IN KENYA¹**

Lawrence Mute²³

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² LLB: University of Nairobi; LLM (Law in Development): Warwick University; Advocate: High Court of Kenya; Commissioner: Kenya National Commission on Human Rights; email: lamumu07@gmail.com

³ With additional research by Monicah Kareithi, LLB: Catholic University of eastern Africa; LLM: Bristol University; email: monakareithi@gmail.com

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The most important thing we do as advocates is to contribute to social change that positively affects the lived realities of those we care about, those whose voices are muffled by racism and sexism, those who have asked us for our help. It is all very well to know you have the right to equality as expressed in the Universal Declaration on Human Rights or the right to life guaranteed in your national constitution or the right to health guaranteed in the African Charter on Human and Peoples' Rights, but ... none of this means anything if you aren't able to see those rights manifest – through having a roof over your head, through consistent and respectful employment, through being able to have a family ... through being able to access health care that responds to the realities of your physical, psychological and sexual needs...and through just plain feeling safe on the street. ... For most LGBT people, these rights are far from realized.⁴

⁴ Cary Alan Johnson in his keynote address at Harvard Law School's Conference on Diverse Sexualities/Disparate Laws: Sexual Minorities, the State and International Law, available at <http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/iglhrcscommentaries/1110.html> (accessed on 8 October 2010)

Section I: Introduction

The principles of equality and non-discrimination are espoused universally by states, human rights advocates and activists, and rights-based organisations as cardinal to the effective exercise of human rights by individuals and groups. Yet many otherwise ardent human rights protectors have declined to undertake protection work of the rights to equality and non-discrimination of all on the ground of sexual orientation and gender identity. Such individuals and organisations have cited a range of justifications for their inaction or outright hostility: essentially that the religious, cultural or historical particularities existing in their communities stop them from taking proactive steps to protect the rights of sexual minorities, and in particular those of lesbian, gay, bisexual, transgender or intersex ('LGBTI') persons.

Kenya's human rights sector has remained decidedly conflicted or even hypocritical in effecting to their full logic the exhortations to be found in the universality, interdependence and interrelatedness of human rights principles.⁵ A key consequence of this today is that sexual minorities in Kenya have relatively few individual or institutional champions who can advocate for their human rights. The space for LGBTI persons to exercise their rights remains impeded by social, economic and political hurdles which have been expressed via criminal and civil sanctions, as well as through mob justice, blackmail and repression of self-identity.⁶ These hurdles have in turn impacted negatively on society generally when pressure on LGBTI persons to conform to heteronormativity has engendered risky behaviour patterns such as having unsafe homosexual as well as heterosexual sex.⁷

⁵ The Vienna Declaration and Programme of Action resulting from the world conference on human rights of 1993 notes: 'All human rights are universal, indivisible and interdependent and interrelated ... While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.' Available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en) (accessed on 10 October 2010)

⁶ For example two women arrested in Kisumu for being lesbians were charged with stealing, which they argued was blackmail because of their sexuality. See Simangeli Mzizi, 'Two arrested for bogus lesbianism charge', Behind the Mask, 5 November 2009

⁷ The 2007 Kenya Aids Indicator Survey shows that 65% of gay men are also involved in heterosexual sex. A study by the Kenya Medical Research Institute entitled 'Evaluation of HIV Type 1 Strains in Men Having Sex with Men and

This paper describes key factors which have discouraged Kenya's human rights sector from being the bulwark for enabling LGBTI persons in this country to exercise their human rights. It assesses available conceptual and practical options and suggests ways via which LGBTI persons in Kenya may be enabled to exercise their rights on an equal basis with other persons. It foresees constitutional, legislative, judicial, social and pragmatic opportunities which advocates, activists and rights-based organisations can leverage to ensure the eventual effective protection of the rights of LGBTI persons. It concludes that the scope for general human rights violations is wedged on a slope so steep and slippery that failure to protect some groups today is a sure recipe for other groups to be violated tomorrow.

Section II of the paper introduces the study's conceptual framework. Section III assesses the challenges which have undermined effective interventions in protection of the rights of LGBTI persons. Section IV outlines strategies which may better enable human rights actors and institutions in their endeavours to protect the rights of LGBTI persons. Section V concludes the study by outlining some key lessons.

Section II: Conceptual Underpinnings

Definitional

For a study such as this one which is far more likely to draw stereotypical as much as considered responses, it is essential at the very outset to clarify key basic terms.

Sexual orientation refers to 'each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or

in Female Sex Workers in Mombasa, Kenya', shows that the strain of HIV among gays in Kenya is 100% similar to the HIV strain found in heterosexuals in the country; this is unlike the clearly defined strains of HIV found in homosexuals and heterosexuals in other countries. A gay rights activist notes: 'All gays in Kenya are stigmatised. And to avoid this, most of them end up marrying women to guise (sic) as being 'straight'. Or even worse, because they do not want permanent heterosexual relationships, they end up hiring female sex workers for their friends to think that they are straight.'

the same gender or more than one gender’.⁸ A person’s sexual orientation is usually either homosexual (same-gender attraction), heterosexual (opposite gender attraction), or bisexual (both opposite and same-sex attraction). The term ‘men who have sex with men’ is used to focus on same-sex behaviour without making claims to a sexual identity;⁹ and the term ‘women who have sex with women’ is used in a similar vein. In other words, these terms describe same-sex behaviour which suggests an absence of lesbian or gay identity and an absence of community, networks and relationships in which same-gender pairings mean more than such intimacy.¹⁰ The terms ‘gay’ or ‘lesbian’ refer to individuals who have adopted a conscious social identity reflecting a desire to enter into predominantly or exclusively same-sex relationships.

Gender identity refers to ‘each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms’.¹¹ A transgender person is someone whose deeply held sense of gender is different from their physical characteristics at the time of birth: a person born with a female body may have a gender identity which is predominantly male while a person born with a male body may have a predominantly female gender identity¹² A transsexual person is one who has undergone

⁸ Preamble to the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, available at <http://www.yogyakartaprinciples.org/> (accessed on 10 October 2010)

⁹ Sexual Orientation, Gender Identity and International Human Rights Law, ICJ Practitioners Guide No. 4, Available at http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=22929 (accessed on 10 October 2010)

¹⁰ Rebecca M. Young, and Ilan H. Meyer, ‘Critical Concepts for Reaching Populations at Risk’, American Journal of Public Health, July 2005, Vol 95, No. 7

¹¹ Supra note 4

¹² Supra note 5

physical or hormonal alterations by surgery or therapy, in order to assume new physical gender characteristics.¹³

An intersex person is one whose physical sexual differentiation at birth is not typically either one or the other sex and is physically intermediate between the two sexes and often involves ambiguous genitalia, but may be limited to atypical chromosomal patterns.¹⁴

The term 'LGBTI' persons groups lesbian, gay and bisexual persons with transgender and intersex persons. Finally, the term 'sexual minorities' includes all individuals who have traditionally been distinguished by societies because of their sexual orientation, inclination, behavior, or nonconformity with gender roles or identity.¹⁵ For ease of understanding, this study consciously uses the terms 'sexual minorities' and 'LGBTI' persons interchangeably.

A final important note which should be made here is that on account of its brevity, this study does not purport to provide full considerations on the specific rights of each grouping falling under the rubric of LGBTI persons. More considered studies, for example, focussing specifically on intersex persons or on transgender persons will be needed.

Human rights framing

The principles of equality and non-discrimination are key to the effective exercise of human rights by individuals and groups. International human rights norms though do not make explicit acknowledgement that these principles apply to sexual minorities too. Article 1 of the Universal Declaration of Human Rights ('UDHR') provides that: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one

¹³ Ibid. Also see Audrey Mbugua, 'Social injustice and trans-sexual people in Kenya', available at <http://www.pambazuka.org/en/category/comment/5418> (accessed on 6 October 2010)

¹⁴ See Human Rights Law and the LGBTI Community in Kenya: My Way, Your Way, or the Right Way? Implementing the Yogyakarta Principles in Kenya, G-Kenya Trust

¹⁵ James D. Wilets, 'Conceptualizing private violence against sexual minorities as gendered violence: an international and comparative law perspective', 60 Albany Law Review 989.

another in a spirit of brotherhood.¹⁶ Article 2 then provides that: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'¹⁷

The global as well as regional core human rights conventions have followed the UDHR precedent of not naming the grounds of sexual orientation and gender identity in their equality and non-discrimination clauses. For example, Article 2 of the African charter on Human and Peoples' Rights ('ACHPR') replicates anti-discrimination injunctions in other Human Rights Conventions when it provides that: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.'¹⁸ It is the treaty body committees which over the years have developed jurisprudence clarifying that human rights conventions protect sexual minorities too.¹⁹

The Committee on Economic, Social and Cultural Rights has interpreted the phrase 'other status' in Article 2 paragraph 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) to include the ground of sexual orientation:²⁰ for example in General Comment No. 18

¹⁶ Available at <http://www.un.org/en/documents/udhr/index.shtml> (accessed on 8 October 2010)

¹⁷ Ibid

¹⁸ Available at <http://www1.umn.edu/humanrts/instree/z1afchar.htm> (accessed on 8 October 2010)

¹⁹ For the approach of the African Commission on Human and Peoples' Rights on sexual orientation and gender identity, see Rachel Murray and Frans 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', available at [https://www.up.ac.za/dspace/bitstream/2263/4092/1/Murray_Towards\(2007\).pdf](https://www.up.ac.za/dspace/bitstream/2263/4092/1/Murray_Towards(2007).pdf) (accessed on 25 December 2008).

²⁰ Michael O'Flaherty and John Fisher: *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, Oxford University Press, 2008.

of 2005 (on the right to work),²¹ General Comment No. 15 of 2002 (on the right to water)²² and General Comment No. 14 of 2000 (on the right to the highest attainable standard of health).²³ On its part, the Human Rights Committee has interpreted the word 'sex' in Article 2 paragraph 1 of the International Covenant on Civil and Political Rights (ICCPR),²⁴ in *Toonen v. Australia*,²⁵ as: 'to be taken as including sexual orientation'.

The Declaration of Principles on Equality of 2008,²⁶ which constitutes the most current initiative by international civil society to clarify the concepts of equality and non-discrimination, affirms that the right to equality for every person is constituted by equality in dignity, treatment with respect and consideration, and equal participation in all areas of civil life (Article 1). It reaffirms the criteria to be used in determining the grounds which should be prohibited as basis of discrimination, that is:

... Where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds ... (Article 5).

It lists these prohibited grounds as:

²¹ Available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.GC.18.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.GC.18.En?OpenDocument) (accessed on 8 October 2010).

²² Available at <http://www.unhchr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94?Opendocument> (accessed on 8 October 2010). Paragraph 13 notes: 'The obligation of States parties to guarantee that the right to water is enjoyed without discrimination ... pervades all of the Covenant obligations. The Covenant thus proscribes any discrimination on the grounds of race, colour, sex, ... health status ... sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to water ... even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes.'

²³ Available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En) (accessed on 8 October 2010). See paragraph 18.

²⁴ Available at <http://www2.ohchr.org/english/law/ccpr.htm> (accessed on 8 October 2010)

²⁵ Available at <http://www1.umn.edu/humanrts/undocs/html/vws488.htm> (accessed on 8 October 2010)

²⁶ Available at www1.umn.edu/humanrts/instree/declar_principles_equality.pdf (accessed on 8 October 2010)

race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or career status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness or a combination of any of these grounds, or on the basis of characteristics associated with any of these grounds. (Article 5)

Article 5 of the Declaration also reaffirms several other issues of great relevance to this study. First, associating a person with persons to who a prohibited ground applies may itself engender discrimination and should be prohibited. Second, discrimination is either direct or indirect. Direct discrimination arises when a person or group on account of a reason related to a prohibited ground is treated less favourably than another person or group in a similar situation or when on account of such reason a person or group is subjected to detriment. Indirect discrimination relates to policies, legislation, administrative rules or practices whose effect is to disadvantage a person having a status or characteristic of a prohibited ground compared to others ‘...unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.’ (Article 5) Third, ‘harassment constitutes discrimination when unwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment.’ (Article 5) Finally, an act of discrimination may be committed intentionally or unintentionally.

Equal protection of the law for sexual minorities covers the whole gamut of human rights, ranging from the right to life, the right to protection against torture, cruel, inhuman or degrading treatment or punishment, and the right to privacy²⁷ As a signatory to the core human rights treaties, Kenya has the duties to Respect the rights in question by not violating them for example by restricting adults’ rights to undertake consensual sex; to protect those rights by taking actions against third parties who violate them for example by killing or blackmailing LGBTI persons; and to fulfil/facilitate those rights by putting in place via policy, legislative and administrative means, the environment appropriate to enable individuals to have the effective

²⁷ See L. Muthoni Wanyeki, ‘Do we need the State in our bedrooms?’ Available at <http://www.pambazuka.org/en/category/features/64748> (accessed on 6 October 2010)

benefit of human rights. This study affirms that it is incumbent on human rights advocates and activists to cause the state to perform these duties.

The rest of this paper discusses the extent to which and the reasons why human rights actors and institutions in Kenya have not been effective in enabling the realisation of these human rights goals; as well as proposing counter-measures.

Section III: Note on Kenyan Practice: Challenges and Smokescreens

The challenge of human rights as universal or relative norm

Kenyan human rights actors and rights institutions necessarily are influenced by global discourses which either back or undermine human rights principles. Justifications which focus on national or regional particularities are common in circles which over the years have sought to undermine human rights protections ranging across all human rights, and not just the rights of LGBTI persons. The universalist versus relativist debate on human rights has pervaded global human rights discourse for at least fifty years. This debate has been driven at least in part by political as distinct from human rights considerations, and was epitomised by the difference between northern/developed country emphasis of civil and political rights versus southern/developing countries' stress on economic, social and cultural rights. The contention was that the interpretation of human rights as universal was inapplicable to non-Western regions of the world on account of ideological and cultural differences: that the Western conception of rights was dominant not particularly because of its moral or other genuine value but because of the West's position as the dominant power-player and therefore principal paradigm setter.²⁸

Advancing the rights of sexual minorities became the latest victim of universalist versus relativist jockeying in December 2008 at the United Nations General Assembly in New York when a Statement on Human Rights, Sexual Orientation and Gender Identity,²⁹ with the initial backing of 66 states, was read at the General Assembly. The Statement drew its message exclusively from human rights normative frameworks such as the International Bill of Rights and interpretive statements from Treaty Body Committees. Among other things, it: reaffirmed 'the principle of the universality of human rights, '... that everyone is entitled to the enjoyment of

²⁸ See Adamantia Pollis and Peter Schwab, *Human Rights: Cultural and Ideological Perspectives*, Praeger Publishers, New York, 1979, p.8.

²⁹ Available at www.ilga.org/news_results.asp?LanguageID=1&FileID=1211&FileCategory=44&ZoneID=7 (accessed on 24 December 2008).

human rights without distinction of any kind ... (and) the principle of non-discrimination which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity'; raised concerns about: 'violations of human rights and fundamental freedoms based on sexual orientation or gender identity ... (and) that violence, harassment, discrimination, exclusion, stigmatisation and prejudice are directed against persons in all countries in the world because of sexual orientation or gender identity, and that these practices undermine the integrity and dignity of those subjected to these abuses'; condemned 'human rights violations based on sexual orientation or gender identity wherever they occur ...'; and urged 'states to take all the necessary measures ... to ensure that sexual orientation or gender identity may under no circumstances be the basis for criminal penalties, in particular executions, arrests or detention ..., to ensure that human rights violations based on sexual orientation or gender identity are investigated and perpetrators held accountable and brought to justice ... (and) to ensure adequate protection of human rights defenders, and remove obstacles which prevent them from carrying out their work on issues of human rights and sexual orientation and gender identity.'³⁰

Even though six African States (Cape Verde, Central African Republic, Gabon, Guinea-Bissau, Mauritius, and Sao Tome and Principe) backed this Statement, Kenya and most other African States supported the reading of a counter-statement supported by 60 States arguing against the Statement on Human Rights, Sexual Orientation and Gender Identity. The counter-statement, among other things, stated that: protection of sexual orientation could lead to the social normalisation and possibly the legalisation of deplorable acts such as paedophilia and incest. It charged that the Statement was an attempt to create 'new rights' or 'new standards' by misinterpreting the UDHR and International Treaties to include such notions that were never articulated nor agreed by the general membership.³¹

³⁰ Ibid

³¹ Available at www.hurriyet.com.tr/english/domestic/10617078.asp?gid=24 (accessed on 24 December 2008).

The Kenyan State, human rights advocates as well as rights-based institutions have unfortunately also been caught up in this human rights double-speak of the universal and the relative. Individuals and institutions with otherwise accomplished records of fighting against human rights violations and social injustice have fallen silent when the rights of LGBTI individuals or groups in Kenya have been violated or threatened. Some have even proceeded to justify or excuse such violations or threats.

The challenge of faith and African morality as sure ace for heart and fervour if not mind

Persons who back sodomy legislation in Kenya contend that homosexuality is ‘un-African’ and ‘unholy’. Reactions against LGBTI persons are articulated by the public generally,³² Christian³³ and Muslim religious leaders as well as politicians. The inherent paradox in this contention is the reality that it is colonial Britain which legislated sodomy legislation into her colonies.³⁴ Britain has long-since moved to expunge sodomy legislation from her statute books (through processes such as the 1956 Wolfenden Committee in the United Kingdom).³⁵ Even scientific positions which profiled homosexuality as an illness or disease are no longer plausible.³⁶

³² ‘Though Africa as a whole is under pressure from the Western world to recognise the rights of homosexuals, our culture and morals should not be eroded. Homosexuality is an unnatural behaviour. Kenya has got its own societal values. There is nothing Kenyan about homosexuality. It does not fit within how humans should reproduce.’ Letter to Editor by Japhet Kirimi, Daily Nation, 4 October 2010.

³³ Bishop David Oginde of the Christ is the Answer Ministries terms lesbianism and homosexuality as ‘an unnatural tendency’ that is both socially and religiously unacceptable. ‘I am not aware of any religion in the world that has accepted homosexuality as a lifestyle,’ and asks transgender and transsexual persons to seek medical attention ‘to correct’ their conditions.’ See ‘Treat us with decorum, pleads gay community’, available at <http://www.nation.co.ke/magazines/Treat%20us%20with%20decorum%20pleads%20gay%20community%20/-/1190/999610/-/item/1/-/4di1g/-/index.html> (accessed on 6 October 2010)

³⁴ For an erudite discussion on the manner in which colonial Britain forced its sodomy laws on its colonies and the consequences of that, see: *This Alien Legacy: The Origins of (Sodomy) Laws in British Colonialism*, Human Rights Watch, 2008, available at <http://www.hrw.org/en/reports/2008/12/17/alien-legacy-0> (accessed on 27 December 2008).

³⁵ This Committee concluded that homosexual behaviour between consenting adults in private was part of the ‘realm of private morality which is not the law’s business’ and should no longer be criminal”. For relevant analysis, see Philip Dayle with Alok Gubta: “Beyond the Polemics: The Continuing ‘Gay’ Rights Project and the Post-Colonial

In the meantime studies show that heteronormativity was not a given in Africa and many instances can be cited where African societies practised homosexuality or lesbianism. Woman-to-woman 'marriages' happened in much of traditional Africa including among the Nandi and Kisii communities, and records from the 18th century showed the Khoisan to be 'normatively fluid, i.e. non-normative regarding sexualities'.³⁷

The truth of the matter really is that African politicians have exploited anti-gay sentiment within their countries to distract the public from discussing issues more pertinent to their governance: from Gambia,³⁸ Sudan, Zimbabwe, Uganda,³⁹ Malawi, etc.⁴⁰

The challenge of law as a disabler of rights

One rather obvious reason which individuals and organisations have used against taking action to protect LGBTI persons is the fact that Kenyan law criminalises same-sex relations. Section 162 provides:

Any person who – (a) has carnal knowledge of any person against the order of nature; or ... (c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for 14 years, provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for 21 years if (i) the offence was committed without the consent of the person who was

South", paper presented at the Experts' Meeting on Sexual Orientation, Gender Identity and Human Rights, Yogyakarta, 6-9 November 2006.

³⁶ The World Health Organisation removed homosexuality from the International Classification of Diseases and Related Health Problems in 1992. ICJ's Practitioner's Guide cites the conclusion of the Colombian Constitutional Court thus: 'homosexuality is not a disease, nor a harmful conduct, it represents a variation of human sexual orientation. Therefore, the traditional visions of homosexuality as a disease or an abnormality that must be cured medically are not acceptable in contemporary pluralistic societies.' Supra note 5

³⁷ Bernedette Muthien, 'Heteronormativity in the African Women's movement', available at <http://www.engender.org.za/publications/heteronormativity.html> (accessed on 6 October 2010)

³⁸ See President Yahya Jammeh's approach at http://www.africanews.com/site/list_message/23850#m23850 (accessed on 6 October 2010)

³⁹ See President Yoweri Museveni's views in Emmanuel Gyezaho, 'Museveni warns against homosexuality', The Monitor, 17 November 2009

⁴⁰ See Hama Tuma, 'Homophobia? It is really 'demophobia'!' available at <http://www.pambazuka.org/en/category/comment/64232> (accessed on 6 October 2010)

carnally known; or (ii) the offence was committed with that person's consent but the consent was obtained by means of force or threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act.

Section 163 then provides that: 'Any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for seven years.'

These Penal Code provisions have been the bane of LGBTI individuals in Kenya whose possibilities of undertaking consensual same-sex conduct has been criminalised. The effect of this has been to undermine such persons' exercise of their rights including to privacy. This situation was most recently exacerbated with the entrenchment in the Constitution of Kenya of a provision in Article 45(2) that: 'Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties'.⁴¹

⁴¹ Constitution of Kenya 2010, available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php (accessed on 9 October 2010)

Section IV: The Tools and the Tooler – engineering Change

The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity⁴² interpret human rights norms enunciated in international human rights instruments showing how those norms apply to LGBTI persons. Principle 2 establishes the tools which Kenya's human rights activists and advocates must employ to ensure equality and non-discrimination for sexual minorities. It lists the following six actions which the State should undertake to ensure every person's entitlement to enjoy human rights without discrimination on the basis of sexual orientation or gender identity:

(a) Embody the principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their national constitutions or other appropriate legislation ... including by means of amendment and interpretation, and ensure the effective realisation of these principles; (b) Repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent ... (c) Adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity; (d) Take appropriate measures to secure adequate advancement of persons of diverse sexual orientations and gender identities as may be necessary to ensure such groups or individuals equal enjoyment or exercise of human rights ... (e) In all their responses to discrimination on the basis of sexual orientation or gender identity, take account of the manner in which such discrimination may intersect with other forms of discrimination; (f) Take all appropriate action, including programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression.⁴³

Human rights actors as key

Kenya's human rights community is extremely vibrant. Yet thus far it has not undertaken adequate interventions towards the protection of the rights of LGBTI individuals. Some training,

⁴² Supra note 4

⁴³ Ibid

awareness-raising, research, judicial, health and public policy interventions have happened;⁴⁴ a coalition of organisations is even attempting to propose equality legislation which proceeds from an intersectional approach; and as I shall show there are recent successes engaging with international human rights mechanisms: but these have been minimal.

Professor Makau Mutua has borrowed from the principle of anti-subordination to argue that it is futile and hypocritical for a human rights advocate to fight against one form of oppression while at the same time supporting another.⁴⁵ Human rights activists, he notes, should stand against all forms of oppression: that one may not fight sexism while supporting homophobia or racism. Human rights advocates and activists in Kenya need to be guided by this approach to protecting human rights. Human rights actors may also borrow from an instrumentalist approach by recognising that it is in their interests to protect against all human rights violations because the moment one oppressed group is vanquished the oppressor will seek out the next group, ‘... and this could be you’.⁴⁶

This very scenario was witnessed in Uganda when the Anti-Homosexuality Bill of 2009 was introduced as a private member’s bill into Parliament. Its object was:

to establish a comprehensive legislation to protect the traditional family by prohibiting (i) any form of sexual relations between people of the same sex; and (ii) the promotion or recognition of such sexual relations in public institutions as healthy, normal or an acceptable lifestyle, including in the public schools, through or with the support of any government entity in Uganda or any non- governmental organization inside or outside the country.⁴⁷

⁴⁴ For example the 2010 International Day Against Homophobia was celebrated at a forum where mainstream human rights advocates mixed with gay rights activists (see Barasa and Wanja, ‘Kenyan gay demand recognition’, Daily Nation, 18 May 2010).

⁴⁵ Drawn from summary of lectures by Professor Makau Mutua on 16 February 2010 at the Palacina Conference Centre and the Alliance Francaise.

⁴⁶ Ibid

⁴⁷ Bill No. 18 of 2009, The Anti-Homosexuality Bill. The Bill’s specific objectives were to : ‘(a) Provide for marriage in Uganda as that contracted only between a man and a woman; (b) Prohibit and penalize homosexual behaviour and related practices in Uganda as they constitute a threat to the traditional family; (c) Prohibit ratification of any

A coalition of human rights organisations was formed to resist the Bill because of the realisation that the Bill was not so much an anti-homosexuality bill as an anti-human rights bill seeking to undermine various articles in the Constitution of Uganda, including the inherence of human rights, right to life, right to privacy, equality and freedom from discrimination.⁴⁸

The Constitution

LGBTI individuals and groups as well as human rights advocates saw and welcomed Kenya's constitutional review process as an opportunity to ensure equality and non-discrimination on the basis of sexual orientation and gender identity. Individuals and groups who had never before advocated publicly began to do so in the face of great adversity⁴⁹ during the ill-fated 2003-2004 constitutional talks at Bomas of Kenya. The overall effect of engaging alongside the rest of the country in constitution-making though is mixed.

One view posits that Kenya has remained as homophobic as ever and that indeed the new Constitution entrenches discrimination of LGBTI persons by stating that marriage may happen only between persons of opposite sexes. The more positive interpretation of the impact of engagement by sexual minorities in the review process though points to foundational principles in the Constitution which both explicitly and by implication provide the basis upon which surely the rights of sexual minorities in Kenya will be guaranteed in the medium term. A key pointer in this regard is the realisation that human rights should apply to sexual minorities as much as they apply to all other individuals, and no differentiation or distinction in enjoyment of rights should be had simply on account of one's sexuality. Thus the High Court of Uganda was easily able to

international treaties, conventions, protocols, agreements and declarations which are contrary or inconsistent with the provisions of this Act; and (d) Prohibit the licensing of organizations which promote homosexuality.'

⁴⁸ See Sylvia Tamale, 'A Human Rights Impact Assessment of the Anti-Homosexuality Bill', Public Dialogue, November 18 2009, Makerere University; also see Mongezi Mhlango, "Ugandan NGOs set to respond to Anti-Homosexuality Bill", Behind the Mask, 23 October 2009

⁴⁹ See 'Treat us with decorum, pleads gay community', available at <http://www.nation.co.ke/magazines/Treat%20us%20with%20decorum%20pleads%20gay%20community%20/-/1190/999610/-/item/1/-/4di1g/-/index.html> (accessed on 6 October 2010)

provide remedies in a matter where two female applicants sought redress against human rights violations in respect of torture, human dignity, and the right to property.⁵⁰

It is now incumbent on human rights actors and rights-based organisations to strategise on how the Constitution may be used to ensure protection of the rights of LGBTI persons. First, the Constitution contains modern equality and non-discrimination provisions. Article 27(1) reaffirms that every person is equal before the law and has the right to equal protection and equal benefit of the law. Sub-articles (4) and (5) provide that the state and a person, respectively, ‘... shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.’⁵¹ It is significant that ‘dress’ is a specifically protected ground. The other significant note is the fact that this provision will in due course be the basis for quashing Sections 162 and 163 of the Penal Code as unconstitutional.

Second, the Constitution makes fairly specific provisions covering the rights of minority and marginalised groups. Article 55 requires the State to put in place affirmative action programmes designed to ensure that such groups:

(a) Participate and are represented in governance and other spheres of life; (b) are provided special opportunities in educational and economic fields; (c) are provided special opportunities for access to employment; (d) develop their cultural values, languages and practices; and (e) have reasonable access to water, health services and infrastructure.⁵²

Clearly, including sexual minorities in the ambit of Article 56 will be a hard sell for many Kenyans, but it has to be done. Article 260’s definition of ‘marginalised community’ is: ‘(a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole; (b) ...’ It then defines a ‘marginalised group’ as: ‘a group of people who, because of laws or practices

⁵⁰ See Victor Juleit Mukasa and Vivian Oyoo v. Attorney General, Misc. Cause No. 247/06 [2008]

⁵¹ Supra note 37

⁵² ibid

before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4)‘.

Other provisions in the Constitution of significance to enabling the exercise of rights by sexual minorities include: Article 10(2)(b) whose list of national values and principles of governance are: ‘human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized’; Article 28 providing that every person has inherent dignity and the right to have that dignity respected and protected; and indeed Article 26 protecting everyone’s right to life. The final note to be made in a study of this brevity relates to the right to privacy. Article 31 provides for everyone’s right to privacy, and it lists four protected rights: the rights not to have their home or property searched, their possessions seized, or the privacy of their communications infringed. The phrasing of the final right raises concerns in relation to protecting sexual minorities: the right not to have ‘information relating to their family or private affairs unnecessarily required or revealed.’ This provision may have been couched in a way that allows the State to protect against crimes such as pedophilia, but it could also be used to enforce Section 162 of the Penal Code.

Human rights mechanisms

From a position where one decade ago it was a near pariah for its failure to report to treaty body committees in terms of its international human rights obligations, Kenya has become far more compliant by lodging reports with most of the core human rights treaty body committees. These committees though by and large have not made specific recommendations seeking protection of the rights of LGBTI persons and groups. The LGBTI community and human rights advocates were, therefore, extremely heartened and have taken full advantage of the Universal Periodic Review (UPR) mechanism. The UPR is an innovation introduced by the United Nations in 2006 under which the Human Rights Council (‘HRC’) examines the situation of human rights in each state after every four years. The HRC was mandated by UN General Assembly Res. 60/251 of 15 March 2006 to:

Undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each state of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all states.’⁵³

A grouping of sexual minorities was one of nine clusters which as members of the Kenya Stakeholders Coalition for the UPR (KSC-UPR), under the facilitation of the Kenya National Commission on Human Rights (KNCHR), prepared the Stakeholders Coalition Universal Periodic Report for Kenya. This report established a watershed for the protection of human rights in two ways. First, Kenyan human rights organisations for the first time practised the principle of intersectionality of rights: groups under the banner of KSC-UPR acknowledged that reporting on Kenya’s human rights situation would be best done under one broad umbrella of all groups which suffered discrimination. Other clusters which were part of the KSC-UPR were civil and political rights; economic, social and cultural rights; children; youth; women; persons with disabilities; older persons; and indigenous groups. Second, the specific concerns of sexual minorities were not only included in the Stakeholders’ Report, they actually received audience at an international forum (the HRC plenary) and elicited responses from the State. Even the fact that the State declined to accept recommendations covering protection of the rights of LGBTI persons did not undermine the significance of the moment when a member of the Gay and Lesbian Coalition of Kenya spoke eloquently at the HRC articulating the imperativeness of protecting the rights of Kenya’s sexual minorities.⁵⁴

It is useful here to outline the recommendations and responses by various actors on the subject of sexual minorities during the UPR process for Kenya. The KSC-UPR recommended that:

⁵³ Available at <http://www.undemocracy.com/A-RES-60-251> (accessed on 9 October 2010)

⁵⁴ LGBTI Rights Statement at Kenya UPR [Denis Nzioka](http://www.gaykenya.com/news/3790.html) 23/09/2010, available at <http://www.gaykenya.com/news/3790.html> (accessed on 9 October 2010)

The State should decriminalize homo sexual acts. It should pass a comprehensive Anti-Discrimination Law affording protection to all individuals irrespective of their sexual orientation or gender identity. It should develop and adopt positive policies for the management of trans-sexualism and intersexuality.⁵⁵

The KNCHR sought legislation that all Kenyans are equal before the law despite their sexual orientation or gender identity, and the outlawing of discrimination on that basis; and repeal sections in the Penal Code which criminalise homosexual sex. Recommendations of the HRC's Working Group on the UPR included that: concrete steps should be taken to provide for the protection and equal treatment of LGBTI persons (Netherlands); decriminalize same-sex activity between consenting adults (Czech Republic); repeal all legislative provisions which criminalize sexual activity between consenting adults (United States of America); and decriminalize homosexuality by abrogating the legal provisions currently punishing sexual relations between consenting individuals of the same sex, and subscribe to the December 2008 General Assembly Declaration on sexual orientation and human rights (France).⁵⁶ Despite these concerted efforts, Kenya declined to accept recommendations covering sexual minorities, stating that same-sex unions were culturally unacceptable in Kenya.⁵⁷ It may be instructive that the State's response focused on same-sex unions when in fact the recommendations were far more wide ranging and if anything the LGBTI constituency in Kenya stresses issues of equality and non-discrimination as well as health concerns rather than marriage or civil unions.

Kenya's next review under the UPR will be in 2014. Between now and then various actors must keep working to ensure that the profile given to these issues is sustained.

⁵⁵ Kenya Stakeholders Coalition For The Universal Periodic Review, available at http://www.khrc.or.ke/images/2010-02/kenyas_upr_stakeholders_coalition_report_2-11-09.pdf (accessed on 9 October 2010)

⁵⁶ Report of the Working Group on the Universal Periodic Review Kenya, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/144/88/PDF/G1014488.pdf?OpenElement> (accessed on 9 October 2010)

⁵⁷ Report of the Working Group on the Universal Periodic Review Kenya, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/144/88/PDF/G1014488.pdf?OpenElement> (accessed on 9 October 2010)

Decriminalisation in the face of legislative fervour and judicial reason

Kenya's contention at its UPR assessment that same-sex unions were culturally unacceptable in the country illustrates the very real challenge which policy makers have to contend with: how they should weight the popular will when set against the rights of minorities. The much vaunted cliché – that the minority have their say and the majority have their way⁵⁸ – does not even really apply to sexual minorities on account of societal intolerance. Of greater significance though is the fact that the majority's view can never be used to justify repressing the minority. Article 27 of the ICCPR is explicit in this regard when it provides that:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Even with this injunction, Kenya's Legislature may not decriminalise gay sex in a very long time. Kenya's Ninth Parliament (2003-2007) was exceedingly jittery about passing legislation which might be interpreted to introduce LGBTI issues into the country; and some of the opposition to passage of the Sexual Offences Act of 2006⁵⁹ wrongly revolved around this. This too was the case with the Reproductive Health Bill which the Federation of Women Lawyers proposed and then withdrew. Furthermore, it is not to be expected in the foreseeable future that the Executive would introduce legislation of this nature into Parliament. Most recently when a cabinet minister urged Kenyans not to stigmatise people on account of their sexual orientation,⁶⁰ she was condemned roundly by religious leaders who called for her immediate dismissal from the Government.

⁵⁸ During Kenya's constitutional review, a member of the Committee of Experts said that the Committee would not include in the Draft Constitution recognition and protection of the rights of homosexual persons because a majority of Kenyans would then reject the Draft at the referendum. See Emeka-Mayaka Gekara, 'Gays say Draft Ignored them', Daily Nation, 20 November 2009.

⁵⁹ Available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php (accessed on 9 October 2010)

⁶⁰ Galgalo Bocha, 'Murugi urges Kenyans to accept gays', Daily Nation, 1 October 2010

Kenya's human rights community as yet does not seem ready to mount a decriminalisation campaign whether on account of strategic reasons or excuses. Even then, legislation albeit indirectly and tenuously of potential benefit to causes of sexual minorities will continue to be passed by Parliament while it undertakes its general legislative work; and it is necessary that advocates and activists continue to press for innovative interpretations of such laws. A case in point is the National Cohesion and Integration Act No. 12 of 2008⁶¹ whose protection against hate speech in Section 13 unfortunately only covers groups of persons defined by their colour, race, nationality or ethnic or national origins.

So, what of judicial reason? Kenya's Judiciary has enforced the law including by determining criminal cases brought against alleged acts in violation of Sections 162 and 163 of the Penal Code. Yet any assumption that the courts would obviously be homophobic in their decision-making would be incorrect. In fact, the High Court has on various occasions quashed criminal convictions on sodomy charges for being unsafe.⁶² A grouping of human rights organisations are presently prosecuting a case on behalf of an intersex person seeking a declaration that there should be a third gender.⁶³

Looking forwards, advocates and activists will surely welcome the revitalisation of Kenya's Judiciary because of the opportunities which this will offer protection of their rights. The Constitution now provides every person the right to institute court proceedings claiming that a right or fundamental freedom has been denied, violated or infringed (Article 22(1)). Where a victim cannot do so on their own behalf, a claim can be lodged on their behalf by a representative of that person or of a group, a person acting in the public interest, or an

⁶¹ Available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php (accessed on 9 October 2010)

⁶² This was so in *David Njoroge Mugo v. Republic* (2006) EKLK, where the High Court acquitted the appellant on commission of an unnatural act contrary to Section 162 (a) of the Penal Code because the case was not proved beyond reasonable doubt, that allegations against the appellant were false and actuated by malice. Similarly, in *Greek Mwanjasi Munyaka v. Republic* Criminal Appeal No. 328 of 2001, the High Court determined that the trial in which the appellant had been charged with offenses under Section 162 (a) had been riddled with so many mistakes that it could not stand.

⁶³ Jillo Kadida, 'Inter-sex convict tells of suffering' *Daily Nation*, July 14th 2010 at page 6

association acting on behalf of a member(s) (sub-article 2). Filing fees for this are waived. The reliefs which courts may grant include a declaration of rights, an injunction, a declaration of invalidity of any law that denies, violates, infringes or threatens a right or freedom, an order for compensation, and an order of judicial review (article 23). Advocates and activists can also look forward to the establishment of the Supreme Court which under Article 163(3) (b) may exercise its appellate jurisdiction in relation to decisions by lower courts on the Bill of Rights.

Prospectively, it may be foreseen that the High Court or Supreme Court will in due course quash sections 162(a) and (c) as well as Section 163 of the Penal Code as violative of Article 27 of the Constitution. The quashing will clarify that while same-sex civil unions are unconstitutional on account of Article 45 of the Constitution, criminalising consensual same-sex acts between adults amounts to discrimination in terms of Article 27. The Court will cite with approval *Naz Foundation versus Government of NCT of Delhi*⁶⁴ which declared that Section 377 of the Indian Penal Code insofar as it criminalised consensual sexual acts of adults in private violates Articles 21, 14 and 15 of the Constitution of India.

Human Rights Institutions

Human Rights Institutions are established as independent agencies to facilitate protection and promotion of human rights. The KNCHR is established under the Kenya National Commission on Human Rights Act No. 9 of 2002.

One study⁶⁵ shows that most National Human Rights Institutions in Africa have either remained silent or displayed a negative attitude towards including the theme of sexual minorities in their protection work.⁶⁶ The study though notes that practice within the South African Human Rights

⁶⁴ *Naz Foundation versus Government of NCT of Delhi* WP(C) No. 7455/2001 (accessed at http://www.nazindia.org/judgement_377.pdf)

⁶⁵ Frans Viljoen, 'Protection of Sexual Minorities in Sub-Sahara Africa', study commissioned for the Office of the High Commission for Human Rights, 2008

⁶⁶ The study quotes the Deputy of the Ghanaian Commission on Human Rights and Administrative Justice stating: 'In the first place, I do not know if I want to promote homosexuality in Ghana. As a human rights organisation, if

Commission and the KNCHR is far more proactive in seeking protection for sexual minorities. It cites a KNCHR statement advising against intolerance of sexual minorities.⁶⁷ The study though then proceeds in these terms: ‘However, an interview with the current leadership suggests that the commitment to the protection of sexual minority rights is more equivocal, and that the strong stance of Commissioner Mute risks becoming an individual voice not endorsed by the collective.’ While this conclusion may not be dismissed totally out of hand, since that study, the Commission has also made strong defences for LGBTI individuals, for example, by making recommendations during Kenya’s UPR process.

The role of Kenya’s National Human Rights Institution under the new Constitution is even more definitive. Article 59 establishes the Kenya National Human Rights and Equality Commission and its functions include multiple possibilities for the better protection and promotion of the rights of LGBTI persons. These include: promotion of respect for human rights; promotion of protection and observance of human rights in public and private spheres; investigation of complaints against human rights violations; and being the State’s principal agent in ensuring compliance with its international human rights obligations. Stakeholders will spend the next few months preparing enabling legislation for the KNHREC and those concerned with the rights of sexual minorities should engage with this process to ensure that it speaks to their concerns.

someone comes forward and says their rights are violated, it is my duty to protect them. As a Ghanaian, I don't think I can openly go out and promote it in the country.’ Ibid

⁶⁷ Commissioner Lawrence Mute noted: ‘The Kenya National Commission on Human Rights is always deeply concerned when those in positions of authority and responsibility make comments that might be understood as some in the community to be a call to violence against another community or group of people - in his case homosexual people. Whilst the law in Kenya criminalizes homosexual acts between men, the law does not criminalize a community or an individual because of his or her sexual or gender identity. KNCHR calls upon the government to ensure that this situation does not become a witch hunt of people whose rights are protected like any other Kenyan citizen. Whilst the KNCHR recognizes and respects the rights of religious institutions and individuals to hold their opinions; these opinions must not be allowed to victimize or place at risk any other community or individual.’ Ibid

Administrative pragmatism

Pragmatic considerations have influenced the State's actions in relation to LGBTI individuals and groups. Remedying the HIV/AIDS pandemic has made the State to realise the futility of ignoring the health needs of sexual minorities such as men who have sex with men. Recently the Government has indicated it would conduct a census of the LGBT community to get a better idea of numbers so as to combat the spread of HIV and AIDS more effectively. Statements by various Government officials are telling in this matter:

'The information is only for public health use, which is in line with the Government's MDG plan to provide better health services for all.' (The Government's head of the National AIDS/STI Control Programme)⁶⁸

Noting the Government had to focus on the gay community too, 'they are part of the society ... The Government is willing to listen.' (Minister for Planning, National Development and 2030 Vision)⁶⁹

Another Minister asked Kenyans to accept homosexuality and learn to live with it. The Government had no option but to address the community's concerns. They should not be stigmatised because of their orientation.⁷⁰

At the same time, while Kenya's law enforcement agencies have not always been a boon for protecting the rights of LGBTIs, the Police have on occasion taken actions to protect the lives of gay individuals. This was the case when two ostensibly gay persons were rescued by police from a lynching mob.⁷¹ The CIBER Crime Unit in the Criminal Investigations Department has also been

⁶⁸ Gilbert ONGachi, 'Africa: Gay Rights: The Ninth MDG?' Available at <http://www.pambazuka.org/en/category/lgbti/67169>

⁶⁹ Ibid

⁷⁰ 'Stirring the hornet's nest' Daily Nation, 2 October 2010

⁷¹ In February 2010, Kilifi Police rescued two men from a mob in Mtwapa set on lynching them because they reportedly were going to get married. See "Mob attacks gay party", available at <http://www.nation.co.ke/News/-/1056/860810/-/item/1/-/hw1wsjz/-/index.html> (accessed on 4 October 2010)

exercised to deal with websites which during the last few months have been encouraging perpetration of hate crime or hate speech on sexual minorities.⁷² The clear message then is that advocates of sexual minorities therefore must not make assumptions about the recalcitrance and uncooperativeness of the Executive or even the Police: they must seek engagement.

The media

The media is extremely influential as a tool for the vulnerable and the powerful, the victim and the oppressor, to articulate their competing stories. Africa's media has by and large tended to be extremely homophobic. Significantly though, more positive reporting has been noted, for example in Cameroon respecting the need to decriminalise consensual sex between gay adults where journalists were less biased in their coverage and more professional.⁷³

The reporting and editorial approaches of Kenya's print and electronic media have also undermined protection and promotion of the rights of sexual minorities. Sections of the mainstream media have in the past been fairly prejudiced when reporting on issues of sexual minorities. Not only have they used unflattering language, they have on occasion also sensationalised stories to the prejudice of the safety of LGBTI individuals. But possibly the country may be experiencing a shift, and the media has in recent times sought to be more studied and considered in the opinions it articulates, and commentaries have tackled positive⁷⁴ and negative⁷⁵ aspects relating to sexual minorities. News-stories though by and large remain unnuanced and likely to encourage hate crime or misinformation: this indeed was the case with the Kikambala story stating that a gay couple were getting married. The media then made little

⁷² Minutes in my possession.

⁷³ 'Media catching the drift on homosexuality issues', available at <http://www.mask.org.za/cameroonian-media-catching-the-drift-on-homosexuality-issues/> (accessed on 25 September 2010)

⁷⁴ See Alfred Mugambi, 'Bashing gays simply not on; wishing them away is an exercise in futility', available at <http://www.nation.co.ke/oped/Opinion/-/440808/1026632/-/nx94b6z/-/index.html> (accessed on 6 October 2010); also see Cabral Pinto, 'Debate on gay rights shows progressive change in country', Daily Nation, 19 February 2010; Wachira and Kariuki, 'Give me an ID; I am neither a man or a woman', Saturday Nation, 5 June 2010.

⁷⁵ See Dorothy Kweyu, 'Homosexuality an abomination in the sight of God and man', Daily Nation, 25 May 2010; also see Dominic Waweru, 'Nothing's African about gays', Sunday Nation, 7 March 2010

endeavour to report the importance of the work which KEMRI scientists were doing at the institution under attack. Blogging on the inadequacies which media coverage portends, a gay writer notes:

... news agencies are most of the time called upon to speak for the voiceless in society, to highlight the plight of those who feel infringed upon, to be the messengers of truth and objectivity ... If news agencies really want to highlight the plight of gay people in Kenya, I suggest that they highlight what is really happening on the ground, that most gay people are normal people living normal lives and have hopes and dreams for an inclusive society and a government that does its best to protect the interests of minorities. News agencies should know that what they report, what they write ultimately influences the opinion of the masses. I am in no way urging news agencies to write falsehoods about gay people, I am simply urging for an objective approach to handling of the gay issue, just like every other piece of news is handled.⁷⁶

Kenya's media needs to become more proactive yet prudent in their interaction with news on sexual orientation and gender identity. The media should frame discussions in terms of consensual sex for adults.

Section V: Conclusion: Lessons Galore

The significance of the last one decade for the rights of LGBTI persons should not be understated. Ten years ago, President Moi was still making decidedly homophobic statements. Today, lgbt persons have voice and even while individuals still remain in mortal danger of life and limb on account of their sexuality, many have had the courage to claim their rights in the spaces that matter: within political, legal, economic and social fields where the whole society plays.

Several lessons may be drawn as conclusions to this study.

First, LGBTI persons themselves must continue claiming their rights as equal citizens or residents of this country. Unclaimed rights remain mere claims which do not bother anybody. People have no choice but to listen when claims on rights are made.

Second, the Yogyakarta Principles offer the best opportunity yet as a package restating that the human rights which apply to all individuals and groups are the same human rights which sexual minorities claim. These Principles will gradually become the rallying point for technical

⁷⁶ Available at <http://www.gaykenya.com/author/admin123/> (accessed on 4 October 2010)

responses as well as awareness-raising by human rights organizations as well as LGBTI persons. Kenyans should take advantage of them.

Third, practical considerations by human rights actors for advancing the rights of LGBTI persons should be informed by Kenya's Constitution. In the medium term, the Judiciary offers a reasonable opportunity for engendering legislative reform particularly around decriminalization of same-sex acts. The Legislature and the Executive will plod along with interventions which while not specifically targeting the rights of LGBTI persons will still be meaningful to exercise of their rights.

Fourth, it is a given that homophobia will not be stamped out of the country: this has not happened in many far more liberal societies. The key matter is that there is no excuse for Kenya not to have a core of committed individuals and organizations which ensure adequate responses against human rights violations wherever they occur regardless of the victim's sexuality. Recent initiatives which use intersectional approaches to respond to violations are welcome and to be encouraged.