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The hard life of LGBTI people in Africa. The cases of Uganda and South Africa in context

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1. Introduction[1]

LGBTI[2] people are highly vulnerable and easy targets in Africa. They are exposed to prejudice, discrimination, criminalization and violence. According to recent data, solid majorities across age groups, gender, class and ethnic groups share the opinion that homosexuality should not be accepted by society (98% in Nigeria, 96% in Senegal, Ghana, and Uganda, 90% in Kenya). Even in South Africa, where discrimination based on sexual orientation is unconstitutional, homosexual conduct and same-sex marriages are fully legal, and homosexual couples have access

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1 The analysis inevitably takes on the ambiguities, and possibly the fallacies of Western assumptions on the relationships between sexual conducts and relations and social identities, gender identification, and roles and positions in society. Ambiguities that cannot be fully disclosed and are sometimes implicitly inherent to the discourse, due to both the author's education and cultural, political, social and academic background and embedding, and to the need to mostly draw upon secondary sources for the present research. Secondary sources, despite all efforts, remain mainly Euro-american.

2 The use of LGBTI is preferred to include intersex people, but the acronym LGBT is maintained in quotations.

to adoption (with all the same rights and duties as heterosexual couples), 61% of people assert that homosexuality should be rejected by society[3].

"Africa has over time been perceived as the continent that is almost entirely against rights for lesbian, gay, bisexual, transgender and intersex people. The reasons for this have often been cited as religion, culture and the general '*unAfricanness*' of homosexuality. A large section of the African society considers homosexuality as a western import" [4]. Building on the overview of discriminatory and criminalizing legislation that is present in the large majority of African countries, the article discusses, on the one hand, the success and the shadows of the only African country that has a progressive legislation and relatively strong LGBTI movements: South Africa. On the other hand, it discusses the impact of the recourse to courts where homophobic discourse is used by decision-makers as a powerful instrument to gain cheap political consensus, as is the case of Uganda. The question of the pertinence of legislation and case-law as means for social change lies at the core of the article.

2. Anti-sodomy laws and discrimination

"Law has been significant in bringing the *species* of the homosexual into being and in creating the categories and concepts of the *homosexual* and the heterosexual"[5]. The debate on the relevance of law in the social, political and cultural construction of these categories and concepts, as well as its intersection with medical, psychological, political and economic discourses is very complex and it greatly exceeds the space of this article. And yet, underestimating the importance of law as a social source for stigmatization, criminalization, and/or de-stigmatisation would be a misconception.

National laws reflect, but also foster and justify customs and practices of discrimination, criminalization and violence against LGBTI people, groups and associations. Instead of representing a shelter from threat, harassment and violence, legislation in the majority of African countries provides for further thereat, harassment and violence. LGBTI people are not just weakened by the lack of an effective legal protection from discrimination on the grounds of sexual orientation and gender identity, but their fundamental rights and freedoms are jeopardized by anti-homosexuality laws. Laws matter in the hard life of LGBTI people and groups, and due to their fragility, they are more exposed to the effects of the laws. Indeed, "symbolism and stigma

3 A. KOHUT, *The Global Divide on Homosexuality,* Washington, 2014.
4 L. PAOLI ITABORAHY - J. ZHU, *State-Sponsored Homophobia,* Geneva, 2014, p. 78.
5 P. DE VOS, *On the Legal Construction of Gay and Lesbian Identity and South Africa's Transitional Constitution*, in *South African Journal on Human Rights*, n. 12, 1996, p. 270.

play a role in every major piece of legislation"[6], and this proves to be even more true *vis-à-vis* legislation dealing with sexuality (and especially non-heterosexuality), as it is a terrain extremely dense with symbolism. Legislation can consolidate stigma, providing prejudice and discrimination a legal basis, or contrast it. For LGBT people in Africa, unfortunately, the first is the case.

We may discuss the aptness of law as an effective mechanism for social change, and we can even conclude that law simply mirrors existing social, economic and cultural patterns. It is unquestionable, however, that in democratic States law is the primary tool to intervene in society[7]. Too often, indeed, analyses focus primarily, if not exclusively, on the "dark side" of the law, i.e. its repressive character. But, as Foucault argues, one of the most salient aspects of modern power is its capacity of producing : producing "domains of objects and rituals of truth" and producing reality[8]. Similarly, R. Pound indicates the law as a tool for social engineering, and suggests that legal innovation can induce social change[9]. This capacity of crafting and shaping reality is absolutely crucial if the discourse is focused on the inquiry into social change.

Out of the 54 African countries, 36[10] have anti-homosexuality laws. This means that in these countries there are laws explicitly criminalizing same-sex conduct between consenting adults. From Algeria, where sec. 338 of the Criminal Code of 1966 punishes "homosexual acts" with a term of imprisonment between two months and two years, plus a fine, to the Lusophone Angola and Mozambique, where those who "habitually practice vices against nature" are liable to be imprisoned in criminal psychiatric hospitals, interned in a workhouse or an agricultural colony, put on a probation, condemned to a bond of good conduct, or banned from the exercise of his/her profession; from Lesotho, where sodomy is punished as a common-law offense and it is listed as one of the offenses for which arrests may be made without a warrant, to Sudan where s.148 of the Criminal code of 1991 punishes sodomy with "flogging one hundred lashes and five

6 E. POSNER, *Law and Social Norm*, Harvard, 2000, p.2.

7 There is a wide and fascinating literature on the complex relationship between law and society. Since Selznick's claim that there is no longer any need "to argue the general interdependence of law and society" (P. SELZNICK, *The sociology of Law*, in T.K. MERTON - L.S. COTTRELL (a cura di), *Sociology Today*, New York,1959, p.115), much has been written on the topic (inter alia R. POUND, *Contemporary Juristic Theory*, in D. LLOYD, *Introduction to Jurisprudence,* London, 1965; S.F. MOORE, *Law and Social Change*, in *Law and Society Review*, vol. 7, n.1, 1972).

8 M. FOUCAULT, *Discipline and Punish: The Birth of the Prison, London,* 1977, p. 1994.

9 R. POUND, *op. cit.,* p. 247-52.

10 Algeria, Angola, Botswana, Burundi, Cameroon, Comoros, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Libya, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Nigeria, Sao Tomé, Senegal, Seychelles, Sierra Leon, Somalia, South Sudan, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, Zimbabwe. In Benin, even though homosexuality is not illegal, the age of consent is higher for same-sex relations than for heterosexual relations, whereas in Malawi since 2012 existing anti-sodomy laws have been suspended.

years imprisonment", but the penalty is hardened in case of reiteration of the act, up to death penalty; from Senegal and Sierra Leon, where respectively sec. 319 (Penal Code of 1965) punishes improper or unnatural acts with a person of the same sex by imprisonment from one to five years, and sec. 61 (Offences against the Persons Act, 1861) criminalizes "buggery and bestiality" with a minimum of ten years up to life imprisonment, to Kenya, whose recently amended Criminal code maintains the criminalization of "carnal knowledge of any person against the order of nature" (sec. 162), the criminalization of same-sex relations is common and widespread in all African regions: Northern, Southern, East and West, the Horn and the islands.

As we will discuss in the following paragraphs, homosexual, transsexual and bisexual relations were not unknown in pre-colonial Africa, whereas the legal criminalization of these relations was typically imposed under both direct and indirect rule through the application of the British penal code and common law[11]on the one hand, and the imposition of specific anti-sodomy laws in the countries under the French empire. Dating back to the British colonial penal code, sodomy laws are in force in 16 of the 18 African Commonwealth nations. From specific anti-sodomy laws, these pieces of legislation have been reshaped by case-law and custom to include any aspect of same sex conduct, especially encompassing lesbian relations and transsexualism. Interestingly, in the UK the offences of buggery (England and Wales) and sodomy (Scotland) were usually interpreted as being perpetrated by males, and the notion of "gross indecency", when first introduced in the colonies, maintained the gender definition of an offence perpetrated by a male. In fact "sexual agency between women was in any case usually unimaginable, hidden, or possible for men to socially control in a patriarchal context without turning to law"[12]. But it soon evolved into more general legal formulation, leaving the gender of the perpetrator unspecified, to include women, transgender and intersex people.

Quite curiously, the 1810 Napoleonic code had indeed retained the decriminalization of sodomy from the 1791 Penal code so that "for homosexuals in France and in a host of other nations the threat of executions of late imprisonment was obsolete" [13], but anti-sodomy laws were nonetheless imposed on some French African colonies as means of social control, as was the

11 Noticeably, colonial anti-sodomy laws in Africa originated with the 1860 Indian Penal Code, whose section 377 was "the first colonial anti-sodomy law integrated into a penal code" (HUMAN RIGHTS WATCH, *This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism,* 2008).

12 C. LENNOX – M. WAITES, *Human rights, sexual orientation and gender identity in the Commonwealth*, in C. LENNOX - M. WAITES (a cura di), *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalization and Change,* London, 2013, p.16.

13 L. CROMPTON, *Homosexuality and Civilization,* Harvard, 2003, p.582.

case for Senegal, Benin, Cameroon[14]. Moreover, the majority of francophone African countries introduced such legislation after independence in the post-colonial era if it was not included in the colonial criminal codes.

Mauritania, Sudan, and some regions of Nigeria and Somalia punish homosexual acts with the death penalty. Nigeria and Uganda have laws that outlaw homosexual propaganda, punishing different kinds of "apology" of same sex relations. In Nigeria, for example, Section 5(2) of the newly enforced Same Sex Marriage Prohibition Acts (Dec. 2013), states that "a person who […] makes directly or indirectly public show of same sex amorous relationship in Nigeria commits an offense and is liable on conviction to a term of 10 years imprisonment"[15]. Similar laws are under discussion in Tanzania as well. Several countries (Bahrain, Benin, Chad, Congo, Ivory Coast, Gabon, Madagascar, Niger and Rwanda) have fixed an unequal age of consent for heterosexual and homosexual acts, so that, for example, according to the Rwandan Criminal code the age of consent is 16 for heterosexual sex (sec. 358), but 18 for same-sex sex (sec. 362)[16].

In 2004, the new Namibian Labour Act repealed the 1992 Labour Act, in which section 107 prohibited any employment discrimination on the basis of sexual orientation. In the new sec. 5, dealing with "Prohibition of discrimination and sexual harassment in employment," the listed grounds no longer encompass "sexual orientation".

In recent years there has been a recrudescence in social and political hostility against homosexuality, transsexualism and bisexuality throughout Africa, which has taken the form of explicit anti-LGBTI movements, stigma, the tightening of existing legislation and the enforcement of new, even harsher laws, characterized by an increase in radical penalties and the growth of sanctioned conduct.

Take the case of law n. 1/05 of 22 April 2009 reviewing sec. 567 of the Criminal Code in Burundi that criminalized same-sex relations for the first time in the country. Unlike the other countries of the Great Lakes region, such as Kenya, Uganda and Tanzania, where anti-sodomy laws were largely remnants of the colonial British rule, in Burundi the Belgians had not imposed such laws, and until 2009 no law existed against homosexual behaviors. Despite the strong opposition of the Senate, the law was enforced with the support of the President of the Republic, and branded a populist response to the social opposition to non-heterosexual conducts.

14 HUMAN RIGHTS WATCH, *op. cit,* p. 7.
15 http://www.refworld.org/docid/52f4d9cc4.html accessed on 29 July 2014.
16 http://www.wipo.int/wipolex/en/text.jsp?file_id=221101 accessed on 29 July 2014.

In Ethiopia, the Preface of the recent Criminal Code, which was adopted in 2004 to replace the 1946 Penal code, explicitly connects the enforcement of the new code to the necessity of complying with international agreements and the "democratic rights of citizens and residents", as well as the need to acknowledge the "grave injuries and suffering caused to women and children by reason of harmful traditional practices." The Preface recognizes that "legislation should, by adopting progressive legislation at times, educate and guide the public to dissociate itself from harmful traditional practices"[17]. And yet, art. 629 of Section II (Title IV, Chapter I), dealing with "sexual deviations", punishes "whoever performs with another person of the same sex a homosexual act, or any other indecent act," with simple imprisonment. LGBTI people's rights are not to be understood as "democratic rights" and the progressive legislation does not include LGBTI people, as if they were not included in the Ethiopian citizenry.

In The Gambia, Act 3 of 2005 amended sections 1444 and 147 of the Criminal code specifically extends the criminalization of same-sex relations to lesbian conduct[18]. This is an interesting aspect of the criminalization of homosexual conduct: quite often legislation refers exclusively to sodomy, as if same-sex relations were occurring just among males, or as if just male gay conduct had to be punished. Obviously, neither of the two corresponds to reality. Anthropologists have demonstrated that lesbianism has a strong tradition in several pre-colonial African societies, even if, as is the case of Basotho women, "what women do together is not defined as «sexual»" (Kendall, 1998:241), and lesbian conducts are severely punished [19] and stigmatized, as demonstrated by the case of "corrective rape", a way to turn lesbians "into real African women"[20].

Even in countries where same-sex relations are not criminalized, LGBTI people are often persecuted and harassed through a wide interpretation of anti-prostitution and promiscuity or public order laws, as it happens in Egypt, where despite the absence of a specific anti-sodomy

17 http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/70993/75092/F1429731028/ETH70993.pdf accessed on 6 August 2014.

18 http://www.ilo.ch/dyn/natlex/docs/SERIAL/75299/78264/F1686462058/GMB75299.pdf accessed on 6 August 2014.

19 Noticeably, "female same-sex patterns are poorly documented and frequently misunderstood" (S.O. MURRAY - W. ROSCOE (a cura di), *Boy-Wives and Female Husbands. Studies in African Homosexualities*, New York, 1998, p. xx), and the literature remains inadequate.

20 J.A. NELL - M. JUDGE, *Exploring homophobic victimisation in Gauteng, South Africa: Issues, impacts and responses*, in *Acta Criminologica* 21 (3), 2008.

law, law 10/1961 on combating prostitution has been interpreted to criminalize same-sex relations[21].

The two most notorious cases of recent anti-homosexuality laws are the Ugandan, which will be discussed later on, and the Nigerian cases.

On 7 January 2014, the Nigerian President Goodluck Jonathan signed the "Same-sex Marriage (Prohibition) Act" through which same-sex marriages were explicitly prohibited, and punishments for homosexual conduct were hardened. Indeed, as just mentioned, similarly to the majority of African Commonwealth countries, Nigeria's Criminal code, building on British colonial anti-sodomy laws, already punished "the carnal knowledge of any person against the order of nature" with 14 years imprisonment, as well as 7 years imprisonment for "acts of gross indecency" committed by any male persons. Moreover, in several Northern Nigerian states that have adopted Islamic Sharia law, specific anti-homosexual laws have been enforced and some of them, as already highlighted, have introduced the death penalty by stoning (just for gays). Most Islamic States' laws also prohibit sexual relations among women[22]. Since 2006, two other Nigerian federal bills criminalizing same-sex relationships have been introduced in Parliament, but have failed to be approved. Annalists argue that President Jonathan is expected to seek re-election in 2015, and, given the defection of several regional governors to the opposition in the past months, his endorsement of the anti-homosexual legislation is a strategic move to strengthen popular consensus[23]. "The effects of the act will go far beyond the prohibition of same-sex marriage (which is discriminatory itself) and will result in widespread human rights violations, censorship, […] fear and repression"[24]. And in fact, as widely reported by the media, the law has triggered a wave of anti-LGBTI activity in Nigeria, as it is considered a sort of "license to violence"[25].

21 For further details on the "Queen Boat" trial and the Egyptian case, see: HUMAN RIGHT WATCH, *In a time of torture. The assault on justice in Egypt's crackdown on homosexual conduct*, 2004, available at: http://www.hrw.org/reports/2004/egypt0304/egypt0304.pdf accessed on 5 August 2014.

22 L. PAOLI ITABORAHY – J. ZHU, *op. cit. p.* 42.

23 http://worldnews.nbcnews.com/_news/2014/01/13/22291129-nigerian-president-signs-anti-gay-bill-into-law?lite; http://www.washingtonpost.com/opinions/nigerias-anti-gay-law-demands-a-response-from-the-west/2014/02/10/23b19570-9276-11e3-b227-12a45d109e03_story.html, accessed on 7 August 2014.

24 Y. ILESANMI, *Freedom to Love All*, Marston Gate, 2013, p. 126.

25 http://mg.co.za/article/2014-01-15-un-activists-challenge-nigerias-anti-gay-law/ accessed on 7 August 2014.

3. Are LGBTI un-African?

"Homosexuality is against African norms and traditions. [...] Kenya has no room for homosexuals and lesbians," maintained former Kenyan President Daniel Arap Moi[26]; "Gays are less than human, worse than dogs and pigs" is a common slogan used by Zimbabwe President Robert Mugabe who repeatedly uses homosexuality to justify why "we as chiefs in Zimbabwe should fight against such Western practices and respect our culture"[27]. In 2006 Jacob Zuma, the President of South Africa since 2009, said "when I was growing up an *ungqingili* (a gay) would not have stood in front of me. I would knock him out" and he added that same-sex marriages were "a disgrace to the nation and to God"[28]; Ugandan President Y. Museveni, asserted that homosexuality is "a decadent culture, being passed by the Western nations" and it is "a danger not only to the [Christian] believers, but to the whole Africa."[29]

In August 2014, in Kenya, the Republican Liberty Party introduced a bill before the National Assembly proposing aggravated punishment for foreign homosexuals. The draft bill recommends that a foreigner who commits a homosexual act shall be stoned in public, while Kenyan nationals found guilty shall be jailed for life. The petition presenting the draft bill argues for the need of a "comprehensive and enhanced legislation to protect the cherished culture of the people of Kenya, legal, religious and traditional family values against the attempts of sexual rights activists seeking to impose their values of sexual promiscuity on the people of Kenya."[30] So, a double mystification: the idea that homosexuality is against traditional Kenyan culture and the idea that foreigners attempt to force Kenyan moral and sexual integrity, and that is why they should he punished with a death sentence.

Very interestingly, in 2013 on the occasion of a meeting with USA President Barack Obama, Senegalese President Macky Sall defended his refusal to decriminalize homosexuality, comparing the African position on homosexuality to other countries' positions on polygamy, which is widely practiced in Senegal. "We don't ask the Europeans to be polygamists," Sall reportedly maintained.

26 C.E. FINERTY, *Being Gay in Kenya: the Implications of Kenya's New Constitution for Anti-Sodomy Laws*, in *Cornell International Law Journal,* vol.45, 2012, p. 436.
27 Y. ILESANMI, *op. cit.*, p. 32.
28 http://www.iol.co.za/news/politics/zuma-provokes-ire-of-homosexuals-1.295239#.U-ntPmNsXIU, accessed on 12 August 2014.
29 Quoted by HUMAN RIGHTS WATCH, *op. cit. p.7-8*.
30 http://allafrica.com/stories/201408120968.html?aa_source=mf-hdlns accessed on 18 August 2014.

"We like polygamy in our country, but we can't impose it in yours. Because the people won't understand it, they won't accept it. It's the same thing."[31]

In the Senegalese President's comparison with polygamy we find the best example of a professed reason underlying homophobia in African countries: cultural authenticity. The discourse is not on the level of rights and liberties, but on the level of cultural specificity, tradition and customs, so that the anti-homophobia claims can be dismissed as western cultural intrusion, or even imperialism. Defending the Ugandan "Anti-Homosexuality Act" President Museveni suggested that Western support of gay rights as human rights was a form of "social imperialism"[32]. As underlined by M. Epprecht, "while Africa is not alone in this apparent trend [recent homophobic turn], the vehemence of some of the homophobia, and the way it is being linked to pan-African struggles against Western imperialism, is striking"[33].

Scholars may agree that "few Africans south of the Sahara even today would identify as homosexuals, bisexuals, lesbians, gay, queer or any of the other terms coined in the West to signify a more or less innate sexual orientation. We know, however, that many people who do not so identify nonetheless sometimes, and sometimes even predominantly, have sex with the people of the same sex"[34]. The reluctance of such identification points to several questions, whose analyses largely exceed the scope of this article. Suffice here just to list a few of these questions: linguistic/definition questions[35]; the changing meaning of sexuality and sexual identities[36]; urban/rural socio-cultural background[37]; taboos and violence[38]; legal identity[39]. But, notwithstanding the difficulties in identification and self-definition, same-sex relations do exist in Africa, and they have always existed.

31 http://www.cbsnews.com/news/senegalese-president-defends-anti-gay-law/, accessed on 12 August 2012

32 http://www.independent.co.uk/voices/comment/the-wests-outcry-over-ugandas-hateful-antigay-law-may-do-more-harm-than-good-9151625.html, accessed on 12 August 2014.

33 M. EPPRECHT, *Is Africa the most Homophobic Continent?*, CNN report, published on 28 February 2014, available at : http://edition.cnn.com/2014/02/28/opinion/uganda-anti-gay-law-marc-epprecht/

34 M. EPPRECHT, *Heterosexual Africa, the History of an Idea from the Age of Exploration to the Age of AIDS*, Athens (USA), 2008, p. 4.

35 G. REID, *How to Become a "Real Gay": Identity and Terminology in Ermelo, Mpumalanga*, in *Agenda*, vol. 20, n.67, 2006.

36 S. ARNFRED, *African sexuality/Sexuality in Africa*, in S. ARNFRED (ed.) *Re-thinking sexualities in Africa,* Uppsala, 2004; R. LORWAY, *Dispelling Heterosexual African AIDS in Namibia. Same-sex sexuality in the township of Katutura*, in *Culture, Health and Sexuality*, vol. 8, n.5, 2006.

37 G. REID, *op. cit.*

38 B. DLAMINI, *Homosexuality in the African context*, in *Agenda*, vol. 20, n. 67, 2006.

39 P. DE VOS, *op. cit.*

The stereotype of a strongly heterosexual pre-colonial Africa, despite its deep social consensus systematically strengthened by media and opinion-makers, has no historical foundation. "Among the many myths Europeans have created about Africa, the myth that homosexuality is absent or incidental in African societies is one of the oldest and most enduring"[40], whereas research has demonstrated without any reasonable doubt that, as elsewhere in the world, same-sex relations and transgenderism are indigenous phenomena.

So the question is not whether Africa has always been heterosexual, but rather how homosexuality has become un-African.

Colonial societies were built on the rhetoric of a primitive African sexuality, characterized by super-virile men, whose myth alimented the idea of the "black peril"[41], and lascivious women, whose sexual appetite was the justification for interracial sexual intercourse in bigoted and puritan colonial societies[42]. From the first travel accounts into the African continent that reported that "the negro race is mostly unattained by sodomy"[43], to the claims that homosexuality was introduced to the continent by non-Africans (both Arabs and Europeans), the idea of homosexuality being un-African was even reinforced by ethnographic and anthropology works that either denied the presence of or misinterpreted non-heterosexual relations. So that, for example, homosexual relations were justified by the lack of women, a situational adolescent phase, the performance of rites of passage, the absence of men, or sex-for-money reasons. In this way any "homoerotic desire [was] effectively denied"[44].

In the past three decades much research has been conducted to redress this stereotype, and scholars have demonstrated the presence of homosexuality and homosexual conducts in the large majority of African society not as an "imported" (by Arabs, Europeans or other ethnic groups) phenomenon, but as typically indigenous patterns of sentimental and sexual relations[45]. And even though it may appear excessive to maintain that "there are no examples of traditional African belief systems that singled out same-sex relations as sinful or linked them to concepts of disease

40 S. O. MURRAY – W. ROSCOE,*op. cit. p.* XI

41 J. McCULLOCH, *Black Peril, White Virtue: Sexual Crime in Southern Rhodesia 1902-1935*, Bloomington, 2000.

42 T. KEEGAN, *Gender, Degeneration and Sexual Danger: Imagining Race and Class in South Africa*, in *Journal of Southern African Studies*, vol, 27, n. 3, 2001.

43 R. BURTON, *The book of the thousand ight and a night*, London, 1885, p. 246.

44 S.O. MURRAY – W. ROSCOE, *op. cit.* p. XIII.

45 E. CAMERON - M. GEVISSER (a cura di) *Defiant Desire. Gay and Lesbian Lives in South Africa*, New York, 1995; M. EPPRECHT, *Sexuality and Social Justice in Africa*, London, 2013; M. EPPRECHT, *op. cit.*, 2008; S.O. MURRAY – W. ROSCOE, *op. cit.;* D. J. WEST - R. GREEN (a cura di), *Socio-legal control of Homosexuality: a Multi-national Comparison*, New York, 1997

or mental health"[46], it has been demonstrated that homosexuality was "widely accepted, albeit reluctantly, for ages" in its multiple forms[47]. Additionally, research has documented how homophobia and discrimination are a product of the colonial era[48]. It is a quite convincing hypothesis that before the introduction by colonial legislators and jurists of anti-sodomy laws in order to "inculcate European morality" into indigenous cultures, there was the European assumption that those native cultures "did not punish perverse sex enough"[49]. This would imply that African pre-colonial legal systems did not strongly criminalize and stigmatize same-sex relations.

Thus, sodomy laws are the product of colonial legal systems, and the social stigma against LGBTI conducts is a direct output of the criminalization of same sex relations, of religious backlash against homosexuality, and of the political use of homophobia as catalyst for gaining consensus[50]. Homophobia has since become pervasive in Africa, it has permeated the political rhetoric of almost every country, and it has perpetrated the vicious circle of criminalization and social discrimination.

4. Criminalization through law, decriminalization through courts: the case of Uganda

In Uganda, after a long incubation period[51], the Parliament passed the "Anti-Homosexuality Bill" on December 20, 2013, and President Yoweri Museveni signed it on February 24, 2014. When first introduced in Parliament to protect the "traditional heterosexual family from internal and external threats,"[52] the bill sought to punish homosexuality with life imprisonment and "aggravated homosexuality" (i.e. an "offense" against minors and disabled persons, and "serial offenders") with the death penalty. According to scholars, "the Bill was popular among voters in Uganda, and had near-unanimous support in Parliament", as "homophobic attitudes are such a part of the political culture in Uganda that Ugandan politicians have come to see that taking anti-

46 S.O. MURRAY – W. ROSCOE, *op. cit.,* p. 270.
47 D. ENGLANDER, *Protecting the Human Rights of LGBT People in Uganda in The Wake of Uganda's "ANTI Homosexuality Bill, 2009"*, in *Emory International Law Review,* vol. 25, 2010, p. 1269.
48 C. LENNOX – M. WAITS, *op. cit.*
49 HUMAN RIGHTS WATCH, *op.cit.,* p. 5.
50 A. CURRIER, *Out in Africa. LGBT Organizing in Namibia and South Africa,* London, 2012; R. HODES, *Populist Hatred: Homophobia and Political Elites in Africa*, in e-*ir.info* June 2012; B. ROEHR, *Homophobia adind Africa's HIV Epidemic,* in *British Medical Journal,* 2010.
51 The Bill was first introduced in Parliament in 2009.
52 http://nationalpress.typepad.com/files/bill-no-18-anti-homosexuality-bill-2009.pdf accessed on 7 August 2014.

gay stances is politically beneficial, and perhaps expected. Indeed, members of Uganda's Parliament view opposing the Anti-homosexuality Bill as political suicide"[53].

The Constitution of the Republic of Uganda explicitly prohibits same sex marriages. Before 2005, article 31(1) provided that "men and women of the age of eighteen years and above have the right to marry and to found a family", but the article was amended in 2005 by inserting a clause to the effect that "marriage between persons of the same sex is prohibited." It is very interesting, for the purpose of our discussion, to notice that this amendment was "sneaked in during the 2005 amendment of the Constitution which saw an omnibus amendment bill,"[54] with several provisions introduced at once, and with the removal of term limits for the presidential office being the most important one, attracting the attention of both Parliament and public opinion[55].

The Ugandan Constitution dates back 1955, and it can be considered contemporary to the South African one, but their stand on LGBTI rights could hardly be more different. In the South African constitution-making process LGBTI organizations have been able to draw attention to important non-discrimination principles, as we will discuss in the next paragraph, whereas in Uganda "during the Constituent Assembly […] no mention of non-discrimination on the ground of sexual orientation was made"[56], and the Constituent Assembly Proceedings show that no delegate raised the issue of introducing sexual orientation on discrimination grounds, as was the case for disability and birth, both of which had been added to the draft constitution during the constituent debates.[57]

Once the specific theme of marriage was examined, the draft provision stating that"marriage shall be entered into with free consent of the intending parts" was changed and the words "intending parts" were replaced by "man and woman intending to marry" to explicitly avoid giving "freedom for men to marry each other and women to do the same"[58]. The delegates were extremely clear already in 1994 that in Uganda there was no room for the recognition of same-sex couples. Nevertheless, the Constitutional Review Commission, appointed in 2002 by the

53 D. ENGLANDER, *op. cit.* p. 1264 and 1270.

54 A. JJUUKO, *The incremental approach: Uganda's struggle for the decriminalization of homosexuality*, in C. LENNOX - M. WAITES (a cura di), *op. cit.*

55 And moreover, "it was widely acknowledged that 70% of parliamentarians were openly bribed to give President Yoweri Museveni the two-thirds voted needed to alter the constitution to allow him a third term" (A.M. TRIPP, *The politics of constitution-making in Uganda*, in L.E. MILLER (a cura di), *Framing the State in Times of Transition: Case Studies in Constitution Making,* Washington, 2005, p. 158), so that art. 31 amendment was included in the bribed vote and approved without any specific discussion.

56 J. DDAMULIRA MUJUZI, *The absolute prohibition of same-sex marriage in Uganda,* in, *International Journal of Law, Policy and the Family,* vol. 23, n.3, 2009, p. 278.

57 See: *Proceedings of the Constituent Assembly, Official Report,* September 1994.

58 Statement by Mr H. SEBI, *Proceedings of the Constituent Assembly, Official Report*, September 1994.

government to seek Ugandans' view on the need for constitutional amendments, accepted the government proposal of amending article 31 adding the prohibition of same-sex marriage without mentioning in its report any feedback from public opinion. The amendment was then included in the White Paper, approved by the Legal and Parliamentary Affairs Committee of the Parliament of Uganda, and consequently in 2005 article 31 was amended without further debate. Uganda is the only African country that has constitutionalized the prohibition of same-sex marriages.

Ugandan Penal code, dating back 1950, already criminalized "unnatural offences": sections 145 and 146 provide for imprisonment for life in the case of "carnal knowledge of any person against the order of nature; carnal knowledge of an animal; or permits a male person to have carnal knowledge of him or her against the order of nature," and imprisonment for seven years in case of attempts to commit those offences.

The purpose of the 2013 Anti-Homosexuality legislation has been to broaden the offences liable to punishment, to include inchoate crimes of homosexuality as well as the promotion of homosexuality, and to intensify the penalties. But clearly one of the most important objectives of the Anti-Homosexuality Act is to build and strengthen popular consensus on widespread homophobia. Despite the high dependency on foreign and international aid and the international mobilization against the enforcement of the bill, which indeed prevented the President to sign the act immediately after its approval in Parliament, the political gains of its enactment have been considered higher than the sanctions and critics from the international community and of foreign donors. In Uganda, fostering homophobia is considered paying back in political terms.

Very interestingly, however, on Friday, August 1, 2014 the Ugandan Constitutional Court struck down the Anti-Homosexuality Act on a legal technicality: that the Parliament Speaker had not checked the quorum when Parliament passed the law in December 2013[59].

Just after the Anti-Homosexuality Act took effect a number of LGBTI organizations lodged a petition in the Constitutional Court on eleven grounds, alleging that the Anti-Homosexuality Act was enacted without a quorum in the house and was therefore in breach of the Constitution and of the Parliamentary Rules of Procedures; that sections 1, 2 and 4 of the Anti-Homosexuality Act, in defining the criminalizing consensual same sex/gender sexual activity among adults in private are in contravention with the right to equality and the right to privacy (art. 2, 21 and 27 of the Ugandan Constitution); that section 2 of the Anti-Homosexuality Act, in criminalizing

59 For further details :http://mg.co.za/article/2014-08-01-ugandas-highest-court-overturns-anti-gay-law/ accessed on 5 August 2014.

touching by persons of the same sex, creates an offence that is overly broad and in contravention of the principle of legality; that sections 2 and 3 of the Anti-Homosexuality Act, in imposing a maximum life sentence for homosexuality and aggravated homosexuality, provide for a disproportionate punishment; that section 31 of the Anti-Homosexuality Act, in criminalizing consensual same sex/gender sexual activity among adults in which one is a person living with HIV/AIDS or disability, is in contravention of the freedom from discrimination (art. 2 of the Ugandan Constitution); that section 3 of the Anti-Homosexuality Act, in subjecting persons charged with aggravated homosexuality to a compulsory HIV test, is in contravention of the freedom from discrimination and privacy and freedom from cruel, inhuman and degrading treatment and the right to the presumption of innocence; that section 7 of the Anti-Homosexuality Act, in criminalizing aiding, abetting, counseling, procuring and promotion of homosexuality, creates offences that are overly broad and penalize debate, professional counseling, HIV services, and access to health services in contravention to basic principles of the Ugandan Constitution; that section 11, in classifying houses or rooms as brothels merely on the basis of occupation by homosexuals creates an offence that is in contravention of the rights of property and privacy; and finally that the spirit of the Anti-Homosexuality Act, by promoting and encouraging homophobia, amounts to institutionalized promotion of a culture of hatred and stigmatization in contravention to the right to dignity. Moreover, the petitioners argued that the Anti-Homosexuality Act was in breach of the rights guaranteed under international human rights accords ratified or acceded by Uganda.

The list of issues raised in front of the Constitutional Court was long and dense, and could have opened an extremely interesting and politically taut debate, however both petitioners and respondents agreed to discuss the procedural ground first. And, as already mentioned, the Court found that "there was no Coram in Parliament when the Act was passed, that the Speaker acted illegally in neglecting to address the issue of lack of Coram. […] and that the act of the 9th Parliament in enacting the Anti-Homosexuality Act 2014 on 20 December 2013 without quorum in the House is inconsistent with and in contravention of Articles 2(1) and (2) and 88 of the Constitution of the Republic of Uganda and Rule 23 of the Parliamentary Rules of Procedures, and thus null and void. […] Having found in the affirmative on issue 1, we find that that has the effect of resolving the entire Petition" (Constitutional Court of Uganda, Petition n.8 of 2014, 1 August 2014, p. 21-22).

Indeed, it would have been much more interesting, for the purpose of legal debate on the one hand, and for further legal development on the other, to have the Court discuss all other issues raised by the petitioners, but this was not the case.

This means that the Anti-Homosexuality act is null and void, but sections 145 and 146 of the Penal Code remain in force and are currently applicable, which is to say that same-sex relationships among consenting adults remain a crime.

The Constitutional Court's technical judgment implies that the Court abstained from considering the content of the Act, so that a new bill can be introduced again in Parliament and passed with the requested quorum. And indeed a new bill, named Prohibition of Promotion of Unnatural Sexual Practices Bill was under discussion among Members of Parliament in late October 2014, but not introduced in Parliament as of the end of 2014. According to Nicholas Opiyo, one of the lawyers for the legal team that successfully challenged the Anti-Homosexuality Act, maintained that the bill appears even more draconian than previous legislation[60]. The bill is allegedly more severe than the 2014 law as it criminalizes both providing funding for purposes of promoting unnatural sexual practices, with the clear aim of jeopardizing pro-LGBTI organizations, and making an example "by whatever means of a person engaged in real or fictitious unnatural sexual practices"[61].

Nevertheless, despite the fact that the Court decision was not been based on "substantial" grounds as, for example, the respect for human dignity, equality, privacy, and all fundamental rights and freedoms relevant to the case, which have grounded the legal reasoning of the South African Constitutional Court in its equality and anti-discrimination judgments[62], the Ugandan judgment has had a very important impact in two ways.

First, from a legal perspective, it emphasizes that the rule of law takes precedent, even when very popular legislation is under constitutional scrutiny, and striking it down means to go against public opinion. And the court did so even in a country where the respect for the rule of law is less consolidated than elsewhere. Second, from a socio-political standpoint, as will be discussed further on, the judgment represents a symbolic terrain for mobilization, and the Court a physical terrain where to fight for identity, while litigating over rights.

60 http://www.buzzfeed.com/lesterfeder/new-anti-lgbt-legislation-drafted-in-uganda#.tj1VQzYLV, accessed on 19th December 2014.

61 http://www.bbc.com/news/world-africa-29994678, accessed on 19th December 2014

62 E. CAMERON, *Dignity and Disgrace – Moral Citizenship and Constitutional Protection*, in H. CORDER, V. FEDERICO, R. ORRÙ (a cura di), *The Quest for Constitutionalism. South Africa since 1994,* Farnham, 2014.

According to some analyses, the Constitutional court ruling would allow President Museveni to blame another institution for the striking down of a law that had received strong support in the most conservative social classes of Ugandan society, while partially placating the protests of Western donors that advocate for the respect of fundamental rights and liberties in the country[63]. President Museveni has, in fact, expressed his opposition to the new Prohibition of Promotion of Unnatural Sexual Practices Bill, that will not be introduced in Parliament not because it violates human dignity and fundamental rights, but because of economic considerations, and the negative implications that anti-homosexuality legislation had on Uganda's trade and export[64]. But the scale could tip to the homophobic side again quite easily.

Already in 2010 courts have been used to enforce the right of LGBTI people. In October 2010 the Ugandan weekly magazine Rolling Stone (not to be confused with the most popular American music magazine!) published names, photos and addresses of 100 Ugandan gays inciting readers to "hang them"[65] and selling an incredibly high number of copies[66]. LGBTI activists filed a petition with the High Court against the tabloid. In the case *Kasha Jacqueline, David Kato and Onziema Patience v Rollingstone Publications Limited and Giles Mushame*, n. 163/2010, the High Court found that "the motion is not about homosexuality per se, but … it is about fundamental rights and freedoms" and "the call to hang gays in dozens tends to tremendously threaten their right to human dignity" as "homosexuals are entitled to their right to privacy as any other citizens". Finally the Court found that section 145 of the Penal code cannot be used to broadly punish homosexuals, but "one has to commit an act prohibited under section 145 to be regarded as a criminal." The reasoning led the High Court to issue a permanent injunction preventing the tabloid and its editor from "any further publications of the identities of the persons and homes of applicants and homosexuals in general." A compensation was awarded to the applicants. This ruling has been pointed to by scholars as "a great step in the move towards decriminalization, as the Court affirmed that homosexuals are entitled to the same rights like everyone else and that their sexuality cannot be a basis for discrimination against them"[67].

63 http://www.theguardian.com/world/2014/aug/01/uganda-anti-gay-law-null-and-void accessed on 5th August 2014.

64 *Uganda's Leader, Museveni Rethinks the Anti-Gay Law*, THE NEWS [Nigeria], http://thenewsnigeria.com.ng/2014/10/03/ugandas-leader-museveni-rethinks-the-anti-gay-law/, accessed on 19th December 2014.

65The same had already happened in Cameroon in 2005, when several newspapers published the lists of "prominent homosexuals", see: http://mg.co.za/article/2006-02-06-fifty-public-figures-named-in-cameroons-gay-witchhunt

66 http://mg.co.za/article/2010-10-29-gay-ugandans-targeted-after-outing, accessed on 25 August

67 A. JJUUKO, *op. cit.*, p.395.

This judgment did not protect, however, David Kato, the advocacy officer for Sexual Minorities Uganda and another petitioner, from being brutally murdered a few weeks after the case.

5. Out of Africa: the South African ambiguous successes

Against the African background, in South Africa sexual orientation is a constitutionally listed ground for unfair discrimination in any field of both public and private life, and since 2000 the incitement of hatred based on sexual orientation is punished (Promotion of Equality and Prevention of Unfair Discrimination Act n.4, 2000). Since 2006, the country provides for same sex marriages (Civil Union Act n.17, 2006). In 2002, the South African Constitutional court recognized adoption rights for same-sex couples (*Du Toit and Another v Minister of Welfare and Population Development and Others* (CCT40/01) [2002] ZACC 20; 2002 (10) BCLR1006; 2003 (2) SA 198 (CC)).

And yet, despite very progressive legislation, the country experiences an extremely high level of anti-LGBTI violence. "Corrective rape", mainly against lesbians and transsexuals, but even against gays, is sadly a common practice, especially in townships[68]. The gap between the societal goals sketched by the Constitution and legislation, and the real social fabric of the country seems hard to bridge.

"South African law has never treated gay and lesbians kindly"[69]. Both British rule and the Roman Dutch law, the two pillars of the country's white legal system, criminalized and punished homosexuality. According to the principles of the Roman Dutch law, sodomy and unnatural immoralities had to be punished by hanging and immediate burning of the body, and this perfectly fit the typical British colonial anti-sodomy law. Indeed, deeply imbued with the most conservative principles of Calvinism, Roman Dutch law criminalized a number of sexual acts not directed towards procreation, both heterosexual and same-sex.

The South African judges enjoyed a good margin of interpretation while applying the anti-sodomy laws in the twentieth century, and generally this ended up in broad interpretations of what constituted an "unnatural practice". The progressive de-criminalization of heterosexual practices between willing adults was not accompanied by a parallel decriminalization of the very

68 Y. OYIEKE, *Investigating "corrective" rape and the right to be free from all forms of sexual violence in (South) Africa,* paper presented at the IX World Congress of IACL, Oslo, 16-20 June 2014, available at: http://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/workshop7.html

69 E. CAMERON, *Unapprehended Felons: gays and lesbians in the laws of South Africa*, in E. CAMERON – M. GEVISSER, *op. cit.,* p. 91.

same conducts between same-sex adults : heterosexual *metsha*, that is penetration between thighs, became «natural and accepted;» "by 1931 heterosexual fellatio was no longer regarded as a criminal offense (*R v. K&F,* 1932); … in 1962 heterosexual sodomy no longer constituted a criminal offense." So that by the middle of the twenty century, "the only acts regarded by South African law as *unnatural* were between men[70]"[71]. As underlined by De Vos, "a perusal of the various decisions regarding same-sex conduct and desire reveals a widespread and emphatic disapproval and even repulsion displayed by South African judges against gay men and lesbians"[72].

The criminalization of same sex conducts was a fertile terrain for apartheid ideology, which was "based on keeping the white nation not only racially pure, but morally pure as well"[73]. Since 1950, in fact, the Population Registration Act and the Group Areas Act had classified the population into four racial groups (White, Coloured, Black, and Indian), and assigned these groups to different residential and business zones. Civil, political, socio-economic rights and educational, cultural, occupational and social opportunities as well as economic status were determined for each individual by virtue of the group to which they were deemed to belong. Urban segregation, different education policies, and the principle of separation were applied to every aspect of social, cultural, economic and even private life. The *Prohibition of Mixed Marriages Act* of 1949 and the *Immorality Amendment Act* of 1950 strengthened the prohibition of inter-racial marriages and intercourse[74]. Moreover, the *Immorality Act* n. 23 of 1957, renamed in 1988 as the *Sexual Offences Act*, punished prostitution, cruising, and "immoral or indecent acts" committed by a man older than nineteen with a man younger than nineteen. In 1988 this prohibition was extended to women.

The State intrusion into South African private life was very pervasive and was an instrument for social control and repression of the opposition. The Sexual Offences Act banned the private

70 Quite curiously but not surprisingly, in a pragmatic way, the practice of same-sex *metsha* was indeed tolerated in the mines (K. BOTHA - E. CAMERON, *South Africa*, in D. J. WEST, R. GREEN (eds), *Socio-legal control of Homosexuality: a Multi-national Comparison*, New York, 1997, p. 9). For further discussion on the tolerance by the apartheid regime of homosexual conducts in the name of social stability and profit, see further down.

71 K. BOTHA - E. CAMERON, *op. cit.* p. 9.

72 P. DE VOS, *op. cit.,* p. 276-277.

73 K. CAGE, *Gayle: The Language of Kinks and Queens: A History* and *Dictionary of Gay Language in South Africa*, Johannesburg, 2003, p. 14.

74 Indeed, already in 1903 the Transvaal Immorality Ordinance n.46 criminalized heterosexual sex relations between "white and black persons".

gathering of two or more gay men[75], which meant, on the one hand, that "gay clubs and restaurants were theoretically operating illegally"[76], and, on the other hand, that the apartheid regime could use anti-sodomy legislation as an additional tool for political oppression, effectuating invasive controls on private gatherings in the name of morality[77]. Of course, this reinforced the idea of homosexuality as crime[78].

As noted by scholars, "repression of non-conformist sexuality was seen by the State to be necessary in order to keep the white nation morally pure"[79]. Moreover, homosexuality was used to stigmatize political opponents and anti-sodomy laws were used to further oppress African people. Very interestingly, through a comparison of South African prosecutions and convictions for sodomy from 1920 to 1994, Botha and Cameron demonstrate how black men were three to four times more likely to be convicted that white ones, but between 1970s and 1990s, in the time of the harshest apartheid repression, black men were ten times more likely to be prosecuted for sodomy than white men[80]. Noticeably, however, the moral rectitude could be alleviated for the sake of profit in the mine compounds, as already underlined[81]. Mine managers tended to tolerate same-sex relations as these might ease and favor mine operations and social stability in the hostels[82.]

"On the cusp of the democratic transition away from apartheid in the late 1980s and early 1990s, lesbian and gay activists took advantage of national liberation movement frames of equality to encourage ANC leaders to endorse lesbian and gay rights in the reimagined, inclusive South Africa"[83].

Despite the fact that homosexual activism has been present in South Africa since 1966, the democratic transition opened new political opportunities for LGBTI movements. The complex

75 Section 20A of the Act stated: "(1) a male person who commits with another male person at a party an act which is calculated to stimulate sexual passion or to give sexual gratification shall be guilty of an offence; (2) For the purpose of subsection (1) "a party" means any occasion when more than two persons are present".
76 V. REDDY, *Negotiating Gay Masculinity*, in *Agenda*, n. 37, 1998, p. 69.
77 G. RETIEF, *Keeping Sodom out of the Laager*, in E. CAMERON - M. GEVISSER, *op. cit.*
78 G.G. DA COSTA SANTOS, *Decrinimalizing homosexuality in Africa: lessons from the South African experience*, in C. LENNOX - M. WAITES *op. cit.*
79 G. RETIEF, *op. cit.*
80 K. BOTHA – E. CAMERON, *op. cit.,* p. 16-19.
81 The tight intertwining of the apartheid regime and the capitalistic economic ideology is largely explored by the literature. For more insights, see: D. POSEL, *The Making of Apartheid 1948-1961*, Oxford, 1991.
82Ther hostel were (and still are) same sex, collective low-cost accommodation for migrant mine workers. For an insight on same-sex relations in the mine compounds, see: T. MOODIE, *Migrancy and Male Sexuality in the South African Gold Mines*, in *Journal of Southern African Studies*, vol. 14, n.2, 1988.
83 A. CURRIER, *op. cit.,* p. 15.

and multifaceted evolution of LGBTI organizations in South Africa is the focus of an interesting body of literature[84] that we can not discuss in this work. It is sufficient to recall that "the gay movement was never a cohesive phenomenon with a strong, collective voice", as "the particular fragmented forms that sexual politics have taken in the last 50 years of South African history reflect the complex interplay of sexual identity with the politics of race, class and gender"[85]. LGBTI organizations were neither necessarily anti-apartheid nor multiracial, so that in 1987, at the International Lesbian and Gay Alliance (ILGA) Ninth Annual conference in Cologne, Germany, Alfred Siphiwe Machela, a black South African gay, described the gay community of the country as divided into two parts: "a white camp interested in gay social activities only, and a black camp which puts its weight behind all movements that are truly committed to the liberation of all South Africans"[86].

In the context of the democratic transition, however, LGBTI organizations proliferated, and were able to gain visibility and to have their voice heard in the constitution-making process.

"I'm fighting for the abolition of apartheid, and I fight for the right of freedom of sexual orientation. These are inextricably linked with each other. I cannot be free as a black man if I am not free as a gay man" declared Simon Nkoli, one of the most prominent South African LGBTI activists, at the first public gay pride parade in 1990[87]. Nevertheless, it was just in 1992 that the ANC included LGBTI rights in its political agenda, encompassing the idea of discrimination on the ground of sexual orientation in the *Bill of Rights for a New South Africa* prepared by the ANC Constitutional Committee[88]. The Democratic Party and the Inkatha Freedom Party did the same,

84 A. CURRIER, *op. cit*; J. NICOL, *If We Can't Dance to It, It's not Our Revolution*, in N. HOAD, K. MARTIN, G. REID, *Sex and Politics in South Africa*, Cape Town, 2005; M. GEVISSER, *A Different Fight for Freedom: A History of South African Lesbian and Gay Organisation from 1950s to the 1990s,* in E. CAMERON – M. GEVISSER*, op. cit.*

85 J. COCK, *Engendering Gay and Lesbian Rights: the Equality Clause in the South African Constitution*, in *Women's Studies International Forum*, Vol. 26, n.1, 2005, p. 33.

86 S. CROUCHER, *South Africa's Democratisation and the Politics of Gay Liberation*, in *Journal of Southern African Studies*, vol. 28, n. 2, 2002, p. 319.

87 http://www.dailymaverick.co.za/article/2012-10-09-joburg-pride-a-tale-of-two-cities/#.U_tG5mOfnIU

88 So that section 8 on gender rights provided that:
"(1) Discrimination on the grounds of gender, single parenthood, legitimacy of birth or sexual orientation shall be unlawful.
(2) Legislation shall provide remedies for oppression, abuse, harassment or discrimination based on gender or sexual orientation.
(3) Educational institutions, the media, advertising and other social institutions shall be under a duty to discourage sexual and other types of stereotyping". For the full text of the ANC Bill of rights : http://www.anc.org.za/show.php?id=231 accessed on 21 August 2014. For further details, see. S. CROUCHER, *op. cit.*

as most of the opposition parties and groups did, to distance themselves from the LGBTI discriminatory policies of the Government of Pretoria. Moreover, by the early 1990s, the issue of the recognition of LGBTI people's rights became a topic of academic and scientific debate, so that in the scientific literature on the future of South African legal system, sexual orientation was often mentioned[89].

The South African Constitutions (both the 1993 interim and the 1996 final one) explicitly include sexual orientation as listed in the equality clause, and s1 of the final Constitution states that "The Republic of South Africa is one, sovereign democratic state founded on the founding values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms, (b) Non-racialism and non-sexism, [...]".

In the participatory process, which was part of the two-step constitution-making process, out of the over two millions submissions, 7,032 ware from gays, lesbians and sympathetic persons, and about 13,000 were the signatures on petitions for the inclusion in the final Constitution of LGBTI rights, whereas there were only 564 submissions opposing the inclusion of the protection against discrimination on the ground of sexual orientation[90].

As a cascade effect of the constitutional protection of LGBTI persons against discriminations[91], the Labour Relations Act of 1995 defines and sanctions the discrimination on the basis of sexual orientation as an unfair labor practice and the Employment Equity Act 55 of 1988 defines "family responsibility" as to include gay and lesbian relationships. Meanwhile, since the landmark decision of 1998, *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others,* when the Constitutional Court declared all sodomy laws inconsistent with the constitution, "one by one the Court has struck down legislation which restricted the legal entitlements of people in same-sex relationships, including immigration privileges (*National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000), spousal benefits (*Satchwell v President of the Republic of South Africa & Another* 2002), adoption (*Du Toit & Another v Minister of Welfare and Population Development &* Others, 2002), and parental rights (*J & Another v Director General, Department of Home Affairs and Others*, 2003)"[92].

89 E. CAMERON, *Sexual Orientation and the Constitution: A Test Case for Human Rights*, in *SALJ* n.110, 1993; A. SACHS, *Advancing Human Rights in South Africa*, Cape Town, 1992.
90 K. BOTHA, *Profile*, in *Equality*, n.3, 1996.
91 It is important to recall that the Constitution provides for both vertical and horizontal application of its provisions, so that the anti-discrimination clause has to be enforced not only in the relations between the State and the individual, but also in private-private transactions and relationships.
92 M.Y. LEE, *Equality, Dignity and Same Sex Marriage*, Leiden, 2010, p. 35.

The Court's case-law strongly contributed to the end of the criminalization of homosexual acts in South Africa[93], and in 2005 it held that the common law definition of marriage that excluded same-sex couples from enjoying the same rights as heterosexual ones was discriminatory[94], and thus inconsistent with the Constitution (*Minister of Home Affairs and Another v Fourie & Another*, 2006). The Court decided to suspend its judgment for twelve months to allow Parliament to amend existing marriage law. On December 1, 2006, the Civil Union Act n. 17, "Noticing that the family law dispensation as it existed after the commencement of the Constitution did not provide for same-sex couples to enjoy the status and the benefits coupled with the responsibilities that marriage accords to opposite sex couples" entered into force, "to provide for the solemnisation of civil unions, by ways of either a marriage or a civil union" (Preamble, Civil Union Act n. 17, 2006).

In late 2014, the country remains the only African country to have legalized same-sex marriages. Nonetheless, this progressive legislation has had a strong impact on society yet[95].

The most recent statistics, that date back December 2012, report that from 2007 to 2011 3,327 marriages and civil union have been celebrated in South Africa[96], which is a really small number, even if weighted against the generalized South African low marriage rate.

It is difficult to evaluate the importance of the Act simply and solely by the number of marriages and civil unions celebrated, and yet, this datum is a significant one. The lack of impact on societal attitudes can also be measured by the high number of "corrective rape" to convert lesbians to heterosexuality, in an attempt to "cure" them from loving a woman, and sexual related crimes

93 For a more detailed discussion, see J. BERGER, *Getting the Constitutional Court on time: a litigation history of same-sex marriage*, in M. JUDGE et alii, *To Have and To Hold: The Making of Same-sex Marriage in South Africa,* Johannesburg, 2008, E. CAMERON, *op. cit.* 2014, J. COCK, *op. cit.*, G.G. DA COSTA SANTOS, *op. cit.*.; P. DE VOS, *A Judicial revolution? The court-led achievement of same sex marriages in South Africa,* in *Utrecht Law Review*, n.6, vol. 4, 2008.

94 Marriage Act 25 of 1961.

95 The scientific literature on the same-sex marriage in South Africa and on a global scale is extremely wide. Just to mention some of the Italian works, for a review on same sex marriages in a gobal perspective see T. GROPPI, N. VIZIOLI (a cura di), *Il matrimonio tra persone dello stesso sesso nei giudizi di legittimità costituzionale: una prospettiva comparata*, in *Ianus,* n.4, 2011; whereas on the South African case, see M. MONTALTI, *Il felice epilogo del same sex marriage in Sudafrica*, in *Quaderni Costituzionali*, vol. 2, 2006. It is very interesting to frame the analysis in the broader picture of international law. For an in depth discussion, see M.C.VITUCCI, *La tutela internazionale dell'orientamento sessuale*, Napoli, 2012.

96 Noticeably, statistics do not make any difference between heterosexual and same-sex couples. Heterosexual couples can choose whether to bet married under the Civil Union Act or under the 1961 Marriage Act. The number of celebrated marriages and civil unions is low, even considering that South Africa has one of the lowest marriage rates in the world. Reasons for this are complex, and scholars argue it is mainly due to poverty and education. For further details : http://www.statssa.gov.za/publications/P0307/P03072011.pdf

and harassments. South Africa is one of the most violent countries in the world, and the rate of rapes is especially high[97]. Police crime statistics for 2010-2011 declare that 64,514 sexual offenses were reported in the country, but civil society organizations estimate that about 90% of sexual offenses are unreported[98]. Although statistics for corrective rape have not been compiled nationally, in 2009 a support group reported to ActionAid that it deals with 10 new cases every week in Cape Town[99].

Does law matter, then? It matters in terms of rights and liberties, in terms of political opportunities and in terms of social, political and cultural identification and self-identification. As scholars maintain, "the legal discourses surrounding sexual orientation allows all the players to participate in the construction of their own sexual-orientation identities, and to make themselves available for interpretation along this register by others"[100]. But social change may take longer than legal change, and some even argue that "social norms are unlikely to change as a result of simple, discrete, low-cost interventions by the governments, […] the only self-conscious way of changing them in a direction they seek, is to violate them. Not just to violate them, but to violate them in a public and decisive way"[101].

The whole strategy of "incremental" demand for equality and rights, from lobbying the ANC leadership in the early 1990s to include LGBTI rights into its Bill of Rights to the mobilization of same-sex groups, shows how LGBTI organizations have been able, on the one hand, to avoid backlash and, on the other, to constantly re-negotiate identities in both political and socio-cultural terms. Research demonstrates, in fact, how the movement managed to "get to the Constitutional Court on time", persuading a lesbian couple not to sue for the right to marry in the late 1990s as it was perceived as "very risky litigation" at the time[102]. On the other hand, once

97 Very interestingly, a study carried out by The Triangle Project and the UNISA Centre for Applied Psychology showed that, in the Western Cape, the fear of sexual assault is a reality for 44% of white lesbian women and 86% of black lesbian women, meaning that the socio-economic and cultural context heavily matters. In fact, homophobic hate crimes, even if characterized by very specific factors, remain violent crimes. Research carried out on the issue demonstrate that "the social dynamics that support violence are widespread poverty, unemployment, and income inequality; patriarchal notions of masculinity that value toughness, risk-taking, and defense of honor; exposure to abuse in childhood and weak parenting; access to firearms; widespread alcohol misuse; and weaknesses in the mechanisms of law enforcement" (M. SEEDAT, et al. *Violence and injuries in South Africa: prioritising an agenda for prevention,* in *The Lancet* 374.9694, 2009).

98 http://rapecrisis.org.za/rape-in-south-africa/, accessed on 25 August 2014.

99 http://www.independent.co.uk/news/world/africa/crisis-in-south-africa-the-shocking-practice-of-corrective-rape--aimed-at-curing-lesbians-9033224.html

100 P. DE VOS, 1996, *op. cit.* p. 272.

101 E. POSNER, *op. cit.,* p. 8.

102 J. BERGER, *op. cit.* p. 24.

the time arrived, the white lesbian couple who raised the case in front of the High Court to grant their right to marry have been supported by a campaign of black lesbians[103] in a well designed strategy aimed at cutting across the racial divide, with the purpose of contributing to the creation of a new multi-racial identity of the organization.

A vibrant debate exists on the effective positive implications of the Civil Union Act, with part of the LGBTI movements and some scholars arguing on the one hand the irrelevance of the Act in a context of poverty, deprivation and victimization, and, on the other, that by not repealing the Marriage Act of 1961 non-heterosexuals continue to enjoy the possibility of choosing under which piece of legislation they can get married; and finally arguing that the Civil Union Act is founded on Western models and it ignores African culture, specifically the structure of the family.

The point here, however, is that the legalization of gay marriage, together with the entire legislation granting equal rights and legal protection to LGBTI persons, seems not to have engendered any significant step ahead in terms of social inclusion and tolerance. If there has ever been the hope that the legalization of same-sex marriages would foster a culture of acceptance, this has proved not to be the case. LGBTI hate crimes remain the hard reality for the majority of the LGBTI communities, especially in the poorest and most deprived areas of the country. The awful practice of "corrective rape" still claims too many victims, and even part of the progressive political leadership of the country plays the populist card of the homophobic discourse when they need to obtain low-cost and easy political and social consensus.

Since the transition, the most conservative Christian Parties have been campaigning against the inclusion of LGBTI rights[104] and tried to oppose to the Civil Union Act. But homophobia has a much larger social and political basis.

In 2012, the traditional leader Chief Patekile Holomisa, at the time a member of Parliament for the ANC and chairman of the joint Constitutional Review Committee and Chairman of the Congress of Traditional Leaders of South Africa, explicitly maintained that "the ANC knows that the great majority of South Africans do not want to promote or protect the rights of gays and lesbians," because homosexuality "is not part of our culture, the African culture."[105] Despite harsh criticism by members of the public and by members of his own party, this statement did

103A. CURRIER, *op. cit.,* p. 93-94.

104 As, for example, the African Christian Democratic Party. Fort a broader discussion, see: J. COCK, *op. cit.*

105 http://mg.co.za/article/2012-05-22-call-for-anc-to-address-homophobic-tendencies, accessed on 25 August.

not prevented Holomisa from becoming deputy Minister of Labour in the new cabinet following the 2014 elections. And even the President of the Republic, Jacob Zuma did not hesitate to use homophobic discourses, as already mentioned.

And yet, despite harsh critics in both academia and the LGBTI movement against the Civil Union Act, "the legalization of same-sex marriage in South Africa elevated LGBT visibility throughout Africa, generating new constraints on and possibilities for African LGBT movement visibility strategies" [106].

6. When mobilizing is difficult

The ambiguous victories of the South African LGBTI movements assume an even darker perspective if considered against the horizon of the majority of the other African countries, characterized by very hostiles environments, where anti-sodomy laws make it even easier for violence to occur, given socio-political and cultural backgrounds deeply imbued with homophobia.

The de-criminalization of same sex practices and relations and the development of laws addressing the inequalities of colonial and post-colonial regimes do not necessarily lead to social acceptance of same-sex lifestyles. On the contrary, and paradoxically, "the higher visibility of LGBTI people often generates more violence against them"[107].

In a recent interview a South African activist argues that "a lot of people are outraged that gay people have equal rights, and are becoming more angry as gay people become more visible"[108].

Social movements literature explains that visibility is crucial for mobilization, and it is usually associated with vibrancy and relevance of the movements themselves[109], and in the case of movements in the South of the world visibility is also directly connected with receiving funding from donors in the North, which is crucial for the very survival of movements and organizations. Nonetheless, as the case study of Namibia illustrated by A. Currier clearly demonstrates, in violent homophobic environments, where homosexuality is criminalized, visibility may endanger organizations and activists, exposing them to psychological and physical harassment[110].

106 A. CURRIER, *op. cit., p. 104*.
107 R. SCHAFER – E. RANGE, *Ther Political Use of Homophobia,* Berlin, 2014, p. 1.
108 http://www.independent.co.uk/news/world/africa/crisis-in-south-africa-the-shocking-practice-of-corrective-rape--aimed-at-curing-lesbians-9033224.html accessed on 26 August 2014.
109 R. KOOPMANS, *Movements and media: Selection processes and Evolutionary Dynamiucs in the Public Sphere*, in *Theory and Society*, n.33, 2004; C. TILLY, *Social Movements 1768-2004*, Boulder Colorado, 2004.
110 A. CURRIER, *op. cit.*

"We are an illegal organization," Frank Mugisha, one of the Uganda petitioners that brought the case against the Anti-Homosexuality Act in front of the Constitutional Court declared. "We are underground. We are essentially operating guerrilla warfare and could be raided by the police at any minute"[111]. In Uganda the danger of being labeled as LGBTI is manifest[112]as the case of David Kato, the advocacy officer for Sexual Minorities Uganda, who was bludgeoned to death in January 2011, clearly shows[113].

Visibility may be very dangerous, but LGBTI movements are not the type of movements and organizations that can efficiently work underground, as anti-apartheid movements did, for example. Being characterized by a tight knit of identity and political claims, for LGBTI organizations visibility and the capacity of self-identification in the movement is even more crucial[114]. That is the dilemma.

A deeper analysis of the variables influencing the homophobic wind blowing over Africa is thus necessary in order to have a better understanding of the situation LGBTI movements are operating in. Far from the presumption of providing a comprehensive analysis of the phenomenon, that should be the goal of more research and deserves wider academic attention. We have simply pointed at a few interesting factors that seem to play an important role in shaping the general background LGBTI movements and organizations have to face.

The study of the Ugandan case brings into the analysis the importance of religious fundamentalism which is spreading all over Africa, either under the flag of Islam or under the flag of the different Christian fundamentalist churches. In both cases what is at stake, in addition to religious values, social and cultural traditions and the easy political mobilization of religion as an identity-building instrument, is the capacity of fundamentalist organizations to play the role of donors in a context of extreme poverty and deprivation, with the traditional international and foreign donors pulling out due to the world economic crisis.

In Uganda, the anti-homosexuality movement has been sponsored by the country's Pentecostal churches, backed from the United States[115], as well as Evangelical and Charismatic churches. In the past decade, fundamentalist Pentecostal churches from the Southern states of the USA have

111 http://www.theguardian.com/world/2014/jul/31/uganda-anti-gay-laws-lgbt-activists, accessed on 25 August.
112 For further details of the Rolling Stone case, see: R. SCHAFER – E. RANGE, *op. cit.*
113 http://www.theguardian.com/world/2011/jan/27/ugandan-gay-rights-activist-murdered accessed on 25 August.
114 A. CURRIER, *op. cit.*
115 http://mg.co.za/article/2014-08-08-ugandan-mps-lonely-anti-gay-law-battle accessed on 12 August 2014.

launched strong missionary campaigns to fight against anti-Christian values and practices, and they have fueled much of the religious fervor in Ugandan politics, while also launching impressive pro-poor campaigns and HIV/AIDS programs[116]. One of the most influential of these churches, the Fellowship, "has a particularly strong and long-lasting influence on Ugandan social policy development, beginning well before its current role helping to eradicate homosexuality from Uganda"[117], and it has strongly backed the Member of Parliament who has introduced the Anti-Homosexuality Bill in Parliament.

Mutatis mutandis, the same paradigm applies to the Northern states of Nigeria with fundamentalist Islamic brotherhoods and congregations[118].

The second, more interesting purpose of our discussion is essential in the analysis of the vulnerability of LGBTI movements: the political use of homophobia as a very successful consensus-gaining mechanism. As well illustrated by the cases of Zimbabwe, Uganda, and Nigeria, "homophobia is deliberately fomented by political actors as soon as they get into a legitimacy crisis. In particular in economic crises, in which public criticism of abuses of power, excessive corruption, patronage and clientism by a small ruling elite begins to increase, heads of state and high-ranking politicians reach for the cudgel of homophobia and use it to attack people of different sexual orientation and/or gender identity vociferously in the regime-friendly media"[119].

In Cameroon in 2005-2006, the research of Awondo, Geschiere, and Reid highlights how the homophobic discourse has been used as a tool for political critique, using a similar, albeit opposite, political logic and mechanism. The tabloids *L'Anecdote* and *La Meteo* launched a "campaign to out gays in Cameroon" publishing long lists of prominent persons "accused" of being gay: government ministers, MPs, news readers, popular singers and sports stars. In this case, "homosexuality became a convenient outlet for venting the considerable popular disaffection with the regime"[120].

The clear impression is that homophobic movements are more popular that pro-LGBTI ones. Deeply imbued with the values of African traditions, culture, authenticity, they offer opinion-makers and political leaders easy claims and arguments. In a way, homophobia is a cross-ethnic,

116 R. SCHAFER – E. RANGE, *op. cit*. p. 4-6.
117 D. ENGLANDER, *op. cit.,* p. 1270.
118 Y. ILESANMI, *op. cit.*
119 R. SCHAFER – E. RANGE, *op. cit*. p.1.
120 P. AWONDO - P. GESCHIERE - G. REID, *Homophobic Africa? Toward a more nuanced view*, in *African Studies Review*, vol. 55, n. 3, 2012, p. 151.

cross-class, cross-gender, cross-age argument that strikes the deepest chords of the wide majority of poor, largely uneducated, and marginalized populations.

Mobilizing in such context is anything but simple, and the difficulties that Kenyan, Ugandan, Namibian, and Nigerian movements and organizations experience is evident in their scarce visibility and in their limited impact on the public sphere.

Oppressed by repressive legislation, LGBTI people and movements struggle to survive in several African countries. What is at stake is not just the mobilization to obtain the equalization of ages of consent for homosexual and heterosexual acts; the prohibition of discrimination based on sexual orientation in employment; hate crimes based on sexual orientation considered an aggravating circumstance; the criminalization of incitement to hatred based on sexual orientation; marriage and partnership rights for same-sex couples and joint adoption by same-sex couples. What is at stake is the very right to life for LGBTI persons, and the very basic claims for the access to active citizenship.

And yet, even in the harshest environments, there are interesting signs of positive progress. The Ugandan mobilization that led to the ruling of the Constitutional Court declaring unconstitutional the widely condemned Anti-Homosexuality Act has two positive implications: first, despite the intimidating context, LGBTI activists, backed by international support, have managed to challenge the constitutionality of the law; media reports showed a very crowded sitting of the Court [121], and despite the fact that the previous anti-gay laws remain valid and homosexuality remains a crime punishable by a jail sentence, the first Ugandan gay pride was held only a few days after the Court's decision, with the police granting the permission for it [122]. Second, Ugandan LGBTI movements, up until the last few years, mainly focused on providing healthcare services and organizing community meetings, but have recently proved to be extremely skillful in setting up support networks, mobilizing the international actors and drawing the attention of international human rights organizations, foreign LGBTI movements, as well as Western governments [123] and donors to the conditions of Ugandan LGBTI persons and

121 For media reports, see: http://www.bbc.com/news/world-africa-28605400 http://www.theguardian.com/world/2014/aug/01/uganda-anti-gay-law-null-and-void; accessed on 25 August 2014.

122 http://www.theguardian.com/world/2014/aug/09/uganda-first-gay-pride-rally-law-overturned, accessed on 25 August 2014.

123 Noticeably, the South African position has been very ambivalent. In March 2014, in a public address at the Human Rights Day Policy Dialogue event of the Southern African Liaison Office, the Deputy Minister of Justice and Constitutional Development maintained that "There is no denying that South Africa is a world leader on this issue, with us being the very first country in the world to prohibit discrimination based on sexual orientation. […] South Africa is at the forefront of the dialogue on the

organizations. This seems to suggest that, despite their vulnerability, LGBTI movements remain lively and vibrant.

Moreover, a few days after the Ugandan Constitutional Court judgment, in the enthusiasm for the success, the leader of an important Kenyan LGBTI rights corporation announced that they would file a suit with the Constitutional Court against Kenyan law criminalizing homosexuality[124]. This would represent a radical change in Kenyan LGBTI movements' strategy, which has been very reluctant to undertake court litigation as tool to promote rights and liberties. The domino effect of the Ugandan success has to be measured in time, but its cultural and political impact should not be underestimated.

And, finally, it is relevant for the purpose of our discussion to note that the most interesting mobilizations in such hostile environment are catalyzed by events in the legal systems: the proposal, debate, approval of new legislation; the Constitutional court ruling. When social stigma, violent homophobia, criminalization of homosexuality make it particularly hard to voice LGBTI claims, the legal paradigm provides a "safe" place to raise issues, and it offers a pertinent terrain for the advocacy of rights and freedoms, as well as the advocacy for identity, dignity and citizenship.

7. Concluding remarks

Homosexuality, transsexualism, inter-sexuality, as well as heterosexuality, have rich and varied forms across Africa. Any serious discussion on LGBTI rights, identities, social movements and organizations in Africa should take into account African diversity. Avoiding easy generalizations, every case study offers an insight into one of the multiple faces of African reality.

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issue of sexual orientation at a regional and international level" (http://www.gov.za/speeches/view.php?sid=44711 accessed on 25 August 2014). But during both the Mbeki and Zuma administrations the country twice refused to support resolutions in the UN Security Council (one in 2008 and one in the UN Human Rights Council in 2010) that called for the protection of gay people against violence because South Africa did not want to offend other African governments even though, in 2011 South Africa sponsored a similar resolution that was successfully adopted by the UN Human Rights Council. The government adopted the tactic of "quiet diplomacy" *vis-à-vis* the recrudescence of anti-gay legislation in Uganda and Nigeria, two important economic and geopolitical partners (http://www.issafrica.org/iss-today/just-how-serious-is-south-africa-about-gay-rights, accessed on 25 August 2014). The tactic of "quiet diplomacy" found many critics, including P. DE VOS who demonstrates how the "quiet approach is deeply hurtful and potentially devastating to many gay men and lesbians in South Africa and elsewhere on our continent" (http://constitutionallyspeaking.co.za/uganda-why-quiet-diplomacy-is-a-devastating-betrayal-of-gay-men-and-lesbians-on-the-continent/, accessed on 25 August 2014).

124 http://www.dailynews724.com/entertainment/leading-kenyan-activist-announces-planned-suit-against-countryx27s-sodomy-law-h204560.html accessed on 19 December 2014.

And the same applies to homophobia as well. "Homophobia in Africa has not a single story. We must question the idea that homophobia in Africa is unique and understand it within a broader global context. […] African conceptions of homosexuality [and homophobia] are shaped by factors including nationalism, globalisation, migration, ethnicity, and religion. They are shaped by labour practices and national politics, by participation in sports and watching movies."[125] Any shortcut that reduces the African variety to a single voice is to be avoided.

Nevertheless, out of this brief discussion on contemporary trends in LGBTI policies, legislation and mobilization, we could be tempted to push Africa (as a whole and/or in its pluralism and variety) back to the pre-modern era, somewhere before the time of universal rights and the "discovery" of political and social tolerance. But as Comaroff and Comaroff maintain, "African modernity has always had its own trajectories, giving moral and material shape to everyday life"[126], so that the trajectories of African LGBTI organizations and movements are part of our own modernity, and we can not dismiss them as phenomena that do not share the same patterns of other LGBTI movements elsewhere. As a consequence, "while Euro-America and the South are currently caught up in the same all-embracing world-historical processes, it is in the latter that the effects of those processes tend most graphically to manifest themselves. Old margins are becoming new frontiers"[127], where the most extreme question is the very notion of human dignity and peaceful coexistence and seeing how long societies can go in denying social, political and cultural identities to sexual minorities. Indeed, "homosexuality is a powerful symbolic terrain in Africa, as elsewhere"[128] so it is exactly on this terrain that the harshest battles for identity, rights, freedom, citizenship and legitimate membership in the social, cultural and political communities, will be fought.

125 http://www.theguardian.com/commentisfree/2010/may/26/homophobia-africa-not-single-story, accessed on 26 August 2014.
126 J COMAROFF, J.L. COMAROFF, *Theory from the South,* London, 2012, p. 8.
127 J COMAROFF, J.L. COMAROFF, *op. cit.,* p. 13.
128 P. AWONDO - P. GESCHIERE - G. REID, *op. cit.,* p. 154.