Sexual Orientation as a right: The Namibian Constitution in Perspective with specific emphasis on the interpretation of Article 10

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DECLARATION

“I the undersigned, hereby declare that the work contained in this dissertation for the purpose of obtaining my LLB is my own original work and I have not used any other sources than those listed in my bibliography and quoted in the references.”

Signature:…………………………

Date:…………………………….
SUPERVISOR’S CERTIFICATE

I Professor N. Horn, hereby certify that the research and writing of this dissertation was carried out under my supervision.

Signature…………………………

Date……………………………..
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This piece of work would not at all have been possible were it not for the encouragement of my supervisor who was always there with a joke about the difficulties of life. Last but not least a big thanks must go to my family for taking on all my chores whether or not I was working and for bearing me through the long nights where I loudly typed away at our very noisy Keyboard. I am truly grateful for all the participation and non participation of all the above mentioned parties.
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Statutes

The Constitution of the Republic of Namibia Act 1 of 1990

The Universal Declaration of Human Rights

Cases

Coalition for Gay and Lesbian Equality v Minister of Justice 1998 (12) BCLR 1517 (CC); 1999 (1) SA 6 (CC)
Djama v Government of the Republic of Namibia 1993 (1) SA 387 (Nm)

Frank v Chairperson of the Immigration Selection Board 1999 NR 257 (HC)

Kauesa v Minister of Home Affairs (Case No A125/94) Unreported

Minister of Defence, Namibia v Mwandinghi 1992(2) SA

Muller v President of the Republic of Namibia 2000 (6) BCLR 655 (NmS)

Mwellie v Minister of Works, Transport and Communication 1995(9) BCLR 1118 (NmH)

National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC); 2000 BCLR 39 (CC)

S v Vries 1996(2) SACR 638 (Nm)
1.1 What is sexual orientation?

Sexual orientation is an enduring emotional, romantic, sexual or affectional attraction to another person. It can be distinguished from other aspects of sexuality including biological sex, gender identity (the psychological sense of being male or female) and the social gender role (adherence to cultural norms for feminine and masculine behavior). Sexual orientation exists along a continuum that ranges from exclusive homosexuality to exclusive heterosexuality and includes various forms of bisexuality. Bisexual persons can experience sexual, emotional and affectional attraction to both their own sex and the opposite sex. Persons with a homosexual orientation are sometimes referred to as gay (both men and women) or as lesbian (women only). It is thus in essence an array of things.

Sexual orientation is different from sexual behavior because it refers to feelings and self-concept. Persons may or may not express their sexual orientation in their behaviors. Sexual orientation is a relatively recent notion in human rights law and practice and one of the controversial ones in politics. Prejudices, negative stereotypes and discrimination are deeply imbedded in our value system and patterns of behavior. For many public officials and opinion-makers the expression of homophobic prejudice remains both legitimate and respectable - in a manner that would be unacceptable for any other minority.

The main principles guiding the rights approach on sexual orientation relate to equality and non-discrimination. Human rights advocates, lawyers and other activists seek to ensure social justice and guarantee the dignity of lesbians, gays and bisexuals.[1]

Heinze[2] points out that It does not cost anything to let give consenting adults the freedom to choose whom they are intimate with or how they wish to protect themselves and not it also does not cost a lot to ensure that these people are protected from discrimination on that basis. This is especially easy because the cases can be brought much in the same way, as one would choose to bring a cause of action for a denial of liberty.[3] It is easy to imagine that the right in fact came into existence when the phenomenon of homosexuality comes into existence. This is because it does not take away from the fact that these people although they may be different are still human and thus deserve to be treated accordingly.
What is the Human Right to Freedom of Sexual Orientation?

The human rights related to non-discrimination are explicitly set out in the Universal Declaration of Human Rights, the International Covenants, the Convention on the Rights of the Child and other widely adhered to international human rights treaties and Declarations. While these documents do not contain direct references to discrimination based on sexual orientation, they do prohibit discrimination on grounds of sex. In 1993 the UN Commission on Human Rights declared that the prohibition against sex discrimination in the International Covenant on Civil and Political Rights included discrimination on the basis of sexual preference.

The right can also be identified broadly in the Universal Declaration of Human Rights that enumerate the entitlements of human beings and one of them being the development of ones personality. The right is ascribed here to human dignity, identity and personhood. Sexual Orientation is described to be vital to the human experience. This does not mean that the right is absolute, it is curbed as any other rights if it causes harm to others. However people should be free to choose how they express themselves and whom they are intimate with, the law cannot dictate the right way in which a person has to act in this regard without infringing upon the said freedoms. It is not a disease to foster a different sexual orientation; sexual minorities pose no specific threat to society or to members themselves. Heinze states that scientific research has proven that the stigmatization of social minorities creates isolation and suffering as well as encourages psychological aggression. Social minorities are turned into social scapegoats that are blamed for all the bad things that happen.

A Brief History of the Rights of sexual orientation

Rights of sexual orientantion though they may be viewed as new rights are classified by Heinze to fall under the umbrella of previously existing first generation rights. Rights pertaining to sexual orientation like first generation rights are easy to implement they too are justiciable and they have similar judicial for a. Heinze further argues that just because the right recently came to the fore does not mean that it is not a first generation right or that it does not belong to that group of rights. The
rights from which it emanates already existed and that the said right itself could simply not exist in a
time when human rights were not so widely accepted.[6]

The Human Rights at Issue

One of the question that came to the fore in this research was if indeed right pertaining to sexual
orientantion could be seen as human rights or to be said to fall under human rights and thus be worth of
the protection that comes with these rights.

· The human right of all persons to freedom from discrimination in all areas and levels of education,
healthcare, housing, and work.
· The human right to the highest attainable standard of health.
· The human right to live in a safe and healthy environment.
· The human right to freely determine one's political status.
· The human right to protection from torture, cruel, inhumane, or degrading treatment.
· The human right to protection against arbitrary or unlawful interference with one's privacy, family, or
home.
· The human right to freedom of thought, conscience, and religion.
· The human right to freedom of opinion and expression.
· The human right to freedom of association.
· The human right to participate in shaping decisions and policies affecting one's community, on the
local, national and international level.[7]

There is not one human right that is stated above that does not directly have a bearing on sexual
orientantion. It is a part and parcel of a persons existence and a reason that why a person may be
discriminated against.
Oscar Wilde pointed out that one cannot make men moral by law, that all that one can do is criminalize their preferences.[8]

The law is used as a tool for social control and also that there are limits to what the law can achieve in this regard. This dissertation aims to deal with the right not to be discriminated against on the ground of sexual orientation. Whether this right is afforded by the Constitution; specifically Article 10[9] that deals with Equality before the law[10] for all persons and prohibits non-discrimination based on the enumerated grounds[11].

1.2 The question considered

Should the rights of sexual orientation be read into the Namibian Constitution under Article 10. Both subsections of the Article are included because of the nature of the right. The right can be subsumed by the general Equality provision under article 10(1) and or be considered under the enumerated ground of sex.

Sodomy as it stands is illegal in Namibia. It is a common law offence that was introduced under South African rule in the Criminal Procedure Act in which homosexual acts are described as "unnatural sex crimes". This only relates to sex between two males. Sex between two women is not included. In fact there was a time when many homophobic statements were made by ministers, ruling party (Swapo) leaders and the president discouraging homosexuality.[12] There can be no doubt that such treatment of a group of people in society amounts to discrimination based on sex. This is still the case even if one uses the plain meaning of the word or better stated when referring to biological sex. There is a clear differentiation made between men and women.

This in itself puts Namibia in a different light. It would seem then that because of the above fact the Namibian Constitution would not lend itself to incorporate anything other than biological sex under the said enumerated ground.

The paper aims to understand why sexual orientation cannot be regarded as a right and as well as to show why it should or should not be regarded as a right and therefore also be read into the
interpretation of Article 10 of the Namibian Constitution.

CHAPTER 2

2.1 General Constitutional Interpretation

In the absence of any specific discretion in the Constitution the Namibian judiciary has to interpret the Constitution in light of its aims, objectives, spirit and values. Naldi[13] states that the Constitution reflects the 1982 Constitutional principles that were inspired by the democratic values and concerns for
fundamental rights that were derived from international standards and that they provide the a context in which the Constitution should be interpreted and applied. The Constitution is not seen as just a general statute that describes the structures of government and governs the relationship between the government and the people that it seeks to govern. It has to identify the said ideals and principles and values that bond the Namibian people and discipline its government.

Naldi makes several statements with regard to the Constitution and its interpretation. He further states that the Constitution is an organic instrument. A sui generis document whose spirit and tenor must preside and permeate the processes of judicial interpretation and judicial discretion. He stresses that it cannot be interpreted in a narrow, mechanistic, rigid or artificial manner but must be interpreted in a broad, liberal and purposive way to enable it to continue to play a creative and dynamic role in the expression and achievement of the ideals and aspirations of the nation. He points out that even the courts have taken this into account and consider the Constitution to be a living instrument that must be interpreted in light of contemporary conditions.[14] The courts appear to have adopted the purposive approach doctrine.[15]

Purposes of the constitution are to constrain governmental power sand to protect the individual. He cites the reasons for such an interpretation of the Constitution also be the fact that sometimes the statement of the declaration of rights can somewhat be vague at times or to be determined by subsequent Acts of Parliament. However the Namibian Courts apply the presumption of constitutionality.[16] Only where it is plain that an enactment is oppressive and repugnant to the Constitution will the courts interfere.[17]

Canons of Interpretation in Roman Dutch law mean that a strict interpretation is placed on statutory provisions that interfere with fundamental rights, and where a statute is reasonably capable of more than one meaning the court will choose the meaning which least interferes with the freedom of the individual.[18] However the burden of proof lies on the applicant. The applicant has to persuade the Court that a fundamental right has been infringed or threatened. Provided that the person has locus standi under Article 25(2) of the Constitution which is designed to secure enforcement of such rights and freedoms.[19]
2.1.1 The purposive approach of interpretation

This type of interpretation looks at the context of the text as well as the relationship between different parts of the text. The interpretation and application of the legislation in concrete situations depends largely on the creativity of the courts.

Christo Botha states that because the legislative function is a purposive activity intention has to be a part of the functional framework of the purpose of the legislation. Intention must be determined objectively. The purpose of legislation is the prevailing factor in interpretation. The context of the legislation as well as social and political policy directions are taken into account to establish the purpose of legislation. The Court may modify the initial meaning of the text to harmonize it with the purpose of the legislation. Contextualists hold the view that the judiciary has an inherent law making discretion during statutory interpretation. The discretion is qualified by the logical pre-requisite that the modification of the meaning of the text is possible only if and when the scope and purpose of the legislation is absolutely clear and also supports such a modification.

The mischief rule is the forerunner of the contextualist approach to interpretation. The mischief rule includes the application of external aids: the law prior to the problem in question, defects in the law, mischief not provided for, new remedies and the reasons for the remedies. The purpose of the legislation requires an objective, purpose oriented approach, which is supported by the principles of Roman Dutch Law.\[20\]

It is clear from the above statements with relation to the interpretation that the message that is sent by the criminalization of Sodomy as well as the outburst of leaders of the country discouraging homosexuality may play a role in the determination of the intention and purpose and ultimately the interpretation of Article 10.

2.1.2 The interpretation of Article 10 through the cases
The main premise of the paper is Article 10 of the Namibian Constitution. The Article deals with Equality and freedom from discrimination:

10 (1) All person shall be equal before the law
10 (2) No person may be discriminated against on the grounds of sex, race, colour, ethnic origin, creed or social or economic status.

The two provisions represent the general prohibition and its specific categorizations. All persons are equal before the law translates into equal treatment for all people in general. In accordance with the interpretation that should be given to the Constitution therefore the list of the categorization is not exhaustive. The list was catered for and made on the basis of the history of the country and the people that were previously discriminated based on the enumerated grounds. The rights that are entailed under article 10 are collectively known as the rights of equality and non-discrimination. Article 10 is a part of the non-amendable bill of Rights that are stated under Chapter 3 of the Constitution.

Cassidy in considering the application of Article 10 states that the Namibian courts have followed the South African approach in the area of interpretation. The South African Constitutional Court interpreted equivalent sections in the cases that case before it.

In the case of the Namibian Constitution Cassidy outlines the analytical structure of answering article 10 questions that is already set in the following two cases: Mwellie v Minister of Works, Transport, and Communication and Muller v President of the Republic of Namibia.

According to the two cases. Article 10 (2) specifically only caters for what is known as unfair discrimination. So where any of the listed grounds are mentioned it first has to be determined whether or not the discrimination that is being perpetrated is fair or unfair before the article itself can take effect. What is unfair discrimination is determined by considering the effect of the discrimination on the victim or victims.

Article 10 (1) on the other hand is violated if a differentiation based on the article is unreasonable and
is not rationally connected to a legitimate object and may not even have been fully explained yet and also violates article 8 that deals with the right to dignity.

The Namibian courts had only begun to interpret the Constitution in this regard as such and the cases that were dealt with so far revealed a commitment to the concept of substantive rather than formal equality. Formal equality requires equal treatment of all persons according to some neutral norm or standard, regardless of the actual circumstances of the people; substantive equality requires equal outcomes taking actual circumstances into account.

2.1.2.1 The Mwellie case

The Mwellie case encompasses the rational connection test. In this case a former public employee alleging wrongful termination of his employment challenged the constitutionality of a section of the Public Service Act that set a twelve-month statute of limitation for claims arising under the Act. He argued that the section violated article 10(1) by providing that the limitation period was only applicable to certain persons and not other people. It is here in this case where the court stated that the application of article 10(1) was not absolute and that classifications that were reasonable and rationally connected to a legitimate object were permissible. [26]

The court found that it was reasonable for the law to treat public employees differently from non-public employees in terms of the time within which they may bring a lawsuit. The reasons being that the public sector was significantly larger involving many ministries and departments. This would then of course translate into the high number of the staff and that the state would need more time in order to investigate all the allegations on time.[27]

Cassidy states that the courts in interpreting the section followed a common interpretation of the section from many countries with similar equality provisions e.g. The United states and India. In all the countries that were referred to in this regard the right to equality was not absolute and that reasonable classifications could be made as long as the classifications were rationally connected to a legitimate purpose.[28]
2.1.2.2 The Müller case

The Müller case entails the unfair discrimination test. In this case a Mr. Muller wanted to change his surname to that of his wife. In order for this to occur he needed to comply with certain formalities under the Aliens Act. There is an exception under the same Act that precludes women who are assuming their husbands surname from complying with the formalities. Mr. Müller argues that the fact that he as a man was required to follow those formalities whereas his wife would not have to was a violation of article 10(2), specifically the enumerated ground of sex.[29]

The court in this case set forth a four-step analysis in order to determine whether there has been a violation of article 10(2). First the question must be posed whether the differentiation is made between people or categories of people. This is a question that is just not clear to me at all. The second question is if the differentiation based on one of the enumerated grounds in the sub article. Thirdly it must be determined whether the differentiation amounts to discrimination against such people or categories of people. Finally does the differentiation amount to discrimination, if so then it is unconstitutional unless it is covered by article 23 of the constitution that permits discrimination in relation to affirmative action.

In applying the above approach the Court came to the conclusion that the answer to the first two questions could be answered in the affirmative. The only thing to consider was that whether the differentiation amounted to discrimination. The court found that the differentiation in the Aliens Act between men and women wanting to change their surname upon marriage did not unfairly discriminate against Mr. Muller. The court looked at whether or not the differentiation affected the dignity of the appellant and they came to the conclusion that it did not. The appellant who happens to have been a white male could also not claim to have been a part of a previously disadvantaged group. Furthermore it would transpire that the purpose of the section was not to impair the dignity of males individually or as a group stating that the surname fulfills a lot of important social and legal functions to ascertain a person identity for the purpose various purposes e.g. social security, insurance, license, marriage, inheritance, elections and voting, passports, tax e.t.c.
The fact that the wives get to assume their husbands surnames is a long-standing tradition. One that has been incorporated in the laws. Also mentioned was the fact that there seemed to be no other males that wanted this change. More importantly Mr. Muller was not without a remedy. There are provisions in the Act that allowed him to change his name specifically stated under Section 9 of the Act.

Therefore the only real difference is the inconvenience that he has to suffer as opposed to the ease to which his wife would be able to perform the same task.[30]

It must be stated that just because legislation has a certain purpose it does not mean that it cannot ascribe to another purpose. Therefore there can be discrimination even where it was not the purpose of the Act.

Cassidy also points out a problem with relation to the fact that Mr. Muller was not a part of a previously disadvantaged group. Consideration of the victims status is important but that the reliance on the factor should not be conclusive in the sense that discrimination still has to be proven in the present also just generally status of the groups can change over time.[31] Cassidy also warns against the danger of the statement that women adopting their husbands surname was part of a long-standing tradition. Citing as an example that corporal punishment was also a part of a long-standing tradition and yet the Supreme Court found that it violated the Constitution. Although in support of the judgment of the case itself the reference to the practice of women adopting their husbands surname can be seen to be in conjunction with the social and legal function of the surname.[32] Also addressed by Cassidy is the issue of the fact that Mr. Müller had a remedy, stating that the fact that men have to go though the extra inconvenience might in itself however still mean that this is unfairly discriminatory to men. This was not the only consideration; the court had also refused to deviate from the rule that the loser pays costs because of Mr. Muller’s failure to follow the procedure that was followed by the Act. In essence Mr. Muller was penalized for not complying with a law that he believed was unconstitutional before challenging its constitutionality.[33]

The reasoning for the discrimination framework is not as clear as the rational connection test. What is unfair is not so clearly visible from the courts judgment.
The right to Equality is one that fits squarely into the question of discrimination. The right itself seems to be an umbrella rights that covers all forms of discrimination that descend from the right to be human. The other argument that is suggested by Heinze is that sexual orientation as a right can be subsumed under the prohibitions against sexual discrimination. He states that the word “sex” should not only denote gender but should also include any kind of discrimination arising from sexuality, sexual behavior or sexual norms. The question is whether this is the interpretation that the Namibian Constitution can lend itself to.

Heinze states on the matter that;

There are then two kinds of equality under human rights law. There is a general ideal equality according to which people, merely as people, are entitled to enjoy all the fundamental rights equally. There is, however, also a specific equality, which recognizes the historical failure of that ideal with respect to particular categories of persons, and which attaches to those categories in order to achieve general equality. The purpose of enumerating these is not to create special privileges, but simply to emphasize the historical failure with regard to those categories and to link the abstract ideal of equality to historical reality.[34]

It cannot be argued against that this reflects the Namibian situation. The Constitution is very clear when it comes to rights to equality and non-discrimination from its preamble and the Bill of Rights enshrined in Chapter 3.[35]

2.3 Interpreting Fundamental Rights: Further International Aspects

Namibia is a part of the International Community by virtue of being a member of the United Nations. It has also ratified international agreements in pursuance of the preservation of human rights[36].

The Universal Declaration of Human Rights thus applies to Namibia. Hence the interpretation offered by Heinze[37] and the explanations that for the most part are international in nature can also be
applicable to Namibia in as far as international law forms part of Namibian law.[38]

Heinze views the right in accordance with the right to develop ones personality, he also refers specifically to the problem that occurs under the Namibian Constitution where the right is not specifically worded or enumerated and that this in fact does not mean that it is present in that particular provision or rather that it does not preclude it from being read into the relevant provision.[39]

Specifically worded rights are clear in the instances in which the apply but may fail to cover all the ranges of situations to which particular rights may apply. The approach with regard to sexual orientation is that the more abstract rights should be looked at first then work progressively from there taking into account all the factors and problems that may arise.

2.3 International Law applied to Article 10

Constitutional interpretation helps provide for an answer for the determination of what may be read into the Constitution in general but such purposive interpretation also has to be amenable in its application. In Namibia the interpretation of constitutional statues can be found in case law and this serves as authority on the matter. There are already two cases that are cited above that deal with the interpretation of Article 10. However what needs to be addressed here is what the right in essence aims to protect.

Equal treatment for all people is guaranteed under Article 10 (1). This implies that no matter what a person’s sexual orientation is they have to be afforded the same treatment as everybody else. The issue of sodomy comes into play here. Sodomy is still considered a crime in Namibia and it is in pursuance of this that condoms are not provided for in prisons. An activity that could help save many lives by ensuring at least for those that choose to use them safer sex. This ties in to the stigma of homosexuality that existed in Namibia even after independence.

It is a fact that there are gay and lesbian people that live in Namibia and are a part of Namibian society.
It is however something that is not easy to deal with and so looking towards the international community could help further an understanding of the right itself as long as ways of dealing with it.

Another issue that comes to the fore in relation to these rights is that the rights themselves are couched in a general way. They do not cater to just a narrow range of things and they in a sense transcend time in the fashion that the further they are looked into the more we discover about them. For us it takes experience thus things need to be brought up so that we can then see how far these rights go in relation to the issues that they were meant to cover. This is the argument that Heinze too presents in favour of unremunerated rights such as sexual orientation citing an argument put forth by Richard discussing the U.S. Constitutional Law;

> It is paradoxical indeed to truncate the scope of unremunerated rights like the rights of intimate association precisely at the point where the right would protect the moral independence of traditionally despised and powerless minority. Such juridical treatment realizes the worst of the Founders fears about the abuse of textually enumerated rights as an argument against unremunerated rights.[40]

It is understandable of course to look the founders of the rights so as to better interpret them. This cannot be the case when it comes to fundamental rights. They are inalienable and have always been there along with any other concepts of being human. It would therefore seem absurd to limit the rights themselves to what men at certain point in time thought they ought to entail. That rights themselves evolve with the times cannot be stressed. They are dynamic and versatile to the point where the founders of the rights if they can be properly so called did not or could not even imagine the many concepts that would come to be embraced by those rights.

Heinze evidences this by the use of the example of slavery. Stating that there was a time where it was acceptable for one man to own another man as his property. Today slavery is not only abolished but there is no credible normative theory that can be used to justify it. This is of course not to say that it is still not practiced but that in today’s day and age there is nothing that can justify its existence. Although there was a time where it was indeed the order of the day. He also makes a reference to the crime of sodomy stating that the world in which its was originally punished is not today’s world and he attributes this to the fact that today there is a better understanding when it comes to non normative
heterosexual practices. [41]

The fact that the rights of sexual orientation were not generally included within original conceptions of human rights has no bearing upon whether they in principle, or for the purposes of contemporary human rights law, properly belong or derive from those rights. [42]

**Fundamental rights of sexual orientation**

Heinze identifies with not just the one right of sexual orientation but sees that right to in fact encompass many rights that can specifically fall into the category of the right to organize social events at places and more broadly as the right to develop one's personality. So here he states that there are generally worded rights and specifically worded rights. Generally worded rights require more studied interpretation while the specifically worded rights may fail to cover all the possible ranges of rights and so in looking at the rights it is suggested that one should rather begin with the generally worded rights and then try and solve the problems that arise from there by looking at the specifically worded rights. [43]

“Rights of personhood evoke the existential foundations of the interests involved. Rights of privacy cast these interests within a particularly crucial setting. Rights of liberty define the legitimate extent to which fundamental rights of sexual orientation can be exercised. Rights of equality establish sexual orientation as a category equal in status to race, ethnicity, sex, religion, language, nationality, political conviction and other specifically recognized categories that are recognized by the non discrimination provisions.

**Personhood**

As stated earlier in the text the reason why this is of relevance in relation to Namibia is because the Constitution is for the most part a western Constitution. It is a member of the United Nations and thus must adhere to the Universal Declaration. The Universal Declaration states that every person as a member of society is entitled to the realization of economic, social and cultural rights that are
indispensable for his dignity and the free development of his personality.[44]

Heinze rightly identifies that many of the rights that relate to sexuality and sexual orientation go to the core of human dignity and identity. Sexual orientation is a part of human identity. He expressly states that because this is an indivisible part of a person it is fundamental to an individual’s existence. It is sexuality that links human being to other people, to events and even to culture and tradition.

There are of course limitations as there are to any rights such as the fact that such rights should harm others. However suppressing the category of the right altogether so that it negates a person’s sexual life and autonomy constitutes as Heinze puts it an arbitrary obstruction of being and identity.[45]

It is because sexuality is a way in which a person chooses to define themselves that makes it important. Sexual orientation defines who we choose to be intimate with and in fact to have relationships with. It is exceptionally personal and therefore it makes sense that the choice in who we choose to have relationships and the manner in which we choose to conduct to have these relationships should be left to the individuals themselves.[46]

Whatever the origin of sexual orientation the scientific community is in agreement that sexual minorities do not suffer from a disease or disorder and that they don't pose a threat to themselves or to society. The cultivate strong family bonds and interpersonal relationships and are willing and able to work and participate in society and to respect the law. The same research also states that social and political stigmatization of sexual minorities only leads to suffering and isolation and encourages physical and psychological aggression against them and in general divided families and friends whilst promoting ignorance about sexual social and psychological issues and was wasting the talents and potential contributions of citizens. Sexual minorities are used as scapegoats for things that go wrong in a society and this can then lead to tragedies such as suicide or concentration camps.[47]

Privacy
The right of privacy can also be found in the Universal Declaration[48]:

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

Privacy cannot exist without the freedom to make the choices that govern our personal relationships with others. The right itself can be seen to be encompassing the right to establish and develop relationships with others. This definitely hinges on who we choose as sexual partners and this in itself is a choice that is based in ones own identity.[49] Another aspect of the right of privacy which is more common is that of the spatial aspect. A person has the right to conduct his own intimate relations in his own home without anyone breaking in the door to arrest a person for a crime that he has not committed. This of course relates to private, consensual sexual acts.[50]

**Liberty**

Two interests are identified. The first one has already been alluded to above namely the liberty to exercise ones rights only to the degree that the rights of others are not harmed. The second aspect is the right to exercise ones own liberty without the burden of illegitimate claims of harm that come from third parties. Here the principle that clearly stands out is that of palpable harm. It is clear that there must be clarity on what constitutes harm and what can fall under the category of an illegitimate claim. The two aspects can conflict.[51]

The harm that is looked for in any case is palpable harm. The harm that is caused by someone else in the exercise of a fundamental freedom must be real and significant. It should not be imaginary, speculative or trivial. This is because these are fundamental rights and as such they need to be protected and should not be easy to dismiss in favor of the fact that to some people they may be sinful immoral or distasteful.[52] The interesting question that arises in Heinze’s discussion of this sphere of the right is the question of legislating morality. He states that it is true that all laws are in a sense legislations of morality because they represent normative choices. He states in fact then that the real question is
whether a moral sentiment alone can provide adequate basis for curtailing rights.\[53\]

This goes directly to the heart of the matter. People may have many reasons why they frown upon non-heterosexuals people. This is because most of the time the behavior and lifestyle of these sexual minorities does not bode well with their own moral codes. These could stem from religion or culture and this conviction can indeed be held by a predominant part of a society. The state has a duty at least in a democracy to adequately represent the wants and needs of the society that it governs. In a democracy the majority rules. However when it comes to human rights it is no longer a matter of preference. Whether or not the rights are accepted, they exist.

Heinze responds to the question as thus (and I quote only the relevant answer here); when a moral justifies a law absent palpable harm, that norm can be called the specific morality that is underlying the law. Specific morality alone absent palpable harm does not suffice to deny a fundamental-inviolable and inalienable right.\[54\]

\textbf{Equality}

“All human being are born free and equal in dignity and in rights.”\[55\] This is meant to apply without distinction of any kind\[56\]. Hence the mere fact that one is a human being guarantees that he is entitled to all the rights that fall under the concept of equality such as equality in the law; before the law and equal protection of the law. The right also encompasses non-discrimination and the concept of affirmative action. \[57\]

The way that the Universal declaration states this right is worthy of mention here because unlike Article 10 of the Constitution the Universal declaration not only generally states the right and then specifically enumerates the grounds that because of the history of the U.N have to emphasized but it also then states...”and any other.” ground. This clearly means that the list of enumerated grounds is not exhaustive and it lends it better to the interpretation given of the nature of fundamental rights. The added part is what is known as a "such as clause."\[58\]
Heinze states that if it is then in fact possible that equality on the basis of sexual orientation already falls under or may be implied in provisions that prohibit discrimination on the ground of sex then there would be in fact no need to consider the question at hand at all. However this would only be possible if the meaning of the word sex was then widened not only to refer to gender but also any kind of discrimination that arises from sexuality, sexual behavior or sexual norms.[59]

Considering that the Namibian Constitution ought to be interpreted broadly and purposively then clearly it should be able to lend itself to looking at the word sex in a broader context as mentioned above.

There are as stated above two types of Equality. There is general equality that affords people merely by virtue of being human the right to equality. Then there is specific equality that is evidenced by the enumerated grounds and these are supposed to represent the recognition of the historical failure of that ideal with respect to particular categories of persons and which then attaches to those persons to achieve general equality. It must be emphasized and it is also in fact stated by Heinze that this is not to create special privileges and it also helps to link the abstract ideal of equality to a historical reality.[60] Sexual minorities have also faced persecution much like that faced by the groups that fit into the enumerated grounds.[61] Heinze poses the question. When does a category become a category? Basically the treatment must be unequal, invidious and it must be systemic.[62] It logically follows that sexual orientation at least in countries where the issue has come up and has had to be addressed then it in fact fits all the criteria.

It is important to state though that this is not as yet the case in Namibia. Little progress has been made with regard to the right. Sodomy is still considered as a crime. It is in fact something that only recently came to the fore because of the consideration of human rights as a whole.
CHAPTER 3

3.1 The Frank Case Evaluated

The only case that has dealt with or at least attempted to deal with the issue of the rights of sexual orientation is the Frank case[63]. It is important to look at the way the case was handled by the Supreme Court as to glean the stance that is taken by Namibia and also the difficulties and issues that arise with regard to this issue.

3.1.2 The High Court decision

In Frank v Chairperson of the Immigration Selection Board[64] two women in a long-term relationship challenged the denial of a permanent residence permit to one of the women who was a German citizen. The woman alleged that the denial was motivated by the fact that the two were in a lesbian relationship.
This was denied by the immigration board and they even stated that the relationship of the two women was a private matter and had no bearing on the application of the permit. The Board in explaining the denial of the permit states that the women long-term relationship was not one recognized in a court of law and therefore the board was not able to assist in the application.

The High Court came to the conclusion that the relationship fell under the concept of universal partnership and therefore the respondents were entitled to the same treatment that would be afforded to a man and a woman in the same relationship. The court in this case noted the existence of the concept of universal partnership where parties agree to put in common all their property and this type of relationship can be entered into expressly or verbally in writing or tacitly e.g. where a man a woman and a woman live together as husband and wife but they have not been married by a marriage officer. The Court stated that if a man and a woman can tacitly conclude such a partnership then the same can also happen for two people of the same sex that have such a relationship to fall under the same concept pursuant to the equality provision in the Constitution and the provision against discrimination on the grounds of sex.

Therefore the Court disagreed with the board finding that not only is the relationship recognized but also that the board should have taken it into consideration when looking at the application for a residence permit. The High Court decision was appealed by the government. These are the facts as restated in the appeal to the Supreme Court;

3.1.2 The Supreme Court decision

First Respondent started working in Namibia in 1990 on a temporary work permit that she renewed continuously. In 1995 she applied for permanent residence and the Ministry of Home Affairs denied this. She re applied in June 1997 and attached a letter to this appeal that was sent by her legal representatives. In the letter she requested to appear before the immigration board and answer any questions that have deal with information which may adversely affect the application or supplement further information if required by the Board. Also attached were various communications that supplemented her application including the fact of the relationship that she had with the second
respondent. Again her application was refused.

She had pointed out in the letter that she was lesbian and was in a relationship with Elizabeth Khaxas since 1990. She also stated that if it were possible to marry she and second respondent would have done so. The relationship between the first respondent and the second respondent’s son was also mentioned.

First respondent stated that it was the mention of her lesbian relationship that was the main reason for the denial of her application for permanent residence. Had she been heterosexual she would have married and would have been able to reside in Namibia and qualify to apply for citizenship under Article 4(3) (a). She stated that the fact that this fact was not taken into account by the board meant that they violated her right to equality and freedom from discrimination that is guaranteed under Article 10 as well as her right to privacy[65] and the protection of the family[66].

The issue of the respondent’s sexual orientation was stated to not have played a role in the decision of the Board to not grant the second respondent permanent residence. There were other reason cited such as her job experience and the fact that she was in essence replaceable and it would be in the interest of the Namibian society seeing as she was a foreigner because then the job could be given to a Namibian who had the same experience and skills. It was apparent that there were not so many skilled and experienced people that could replace her in her job and so this reason s redundant.

The board stated further that her sexual orientation was a private matter and had no bearing at all on her application for permanent residence. It would appear then that the board did not have any other reasons that were adequate to deny her permanent residence and as is stated by the court a quo her sexual orientation should have played a role as it is directly related to the reason why she seeks permanent residence.

Attention may be drawn here to the Labor Act of 1992 that specifically prohibited discrimination in the labor market when it comes to sexual orientation. The labor Act 6 of 1992 includes sexual orientation as a category of persons against whom employers may not discriminate. In the new labour Act of 2007
sexual orientation is no longer referred to but instead refers to the word sex without defining it.[67]

O'Linn in his judgment states that the court a quo in stating that the relationship should have taken into consideration the lesbian relationship misdirected itself. Indicating that this would in fact lead the board to go outside it parameters of application. O'Linn goes further to state that there are several other remedies that the respondent could have pursued and did not and the fact that these exist militates to some extent the against an argument that the respondent board has a duty to consider such factor in favor of the Applicant Frank[68].

Many other issues arise and are considered in this case but I would like to give special attention to the issue of the respondent’s lesbian relationship and the alleged breach of their fundamental rights as dealt with by the Honorable Judge O’Linn.

He deals with them matter by first stating that in the first application the board was not made aware of the relationship and that evidence of it was only provided for on the second application. He states that in that application what the respondent was looking for was not that the board had infringed their fundamental rights as individuals but rather that it had failed to deal with them on a basis equal to other unmarried heterosexual individuals.[69]

I cannot fathom how this distinction is of any relevance when it comes to the consideration of human rights that is based on Equality and non-discrimination. It goes to the heart of the matter. It basically shows differential treatment based on sexual orientation. The fact that lesbians are not in any case allowed to marry cannot be allowed to come into play when considering an issue that if decided upon might change the law as it stands. The would elevate the fact that lesbians are not allowed to marry to that of a solid law when it is simply not stated and catered for under the Constitution.

As to the meaning, content and ambit of a fundamental right or freedom. The honorable judge is of the opinion that this must be sought by giving the words their plain meaning quoting a work on the
Constitutional law of India by Seervai that an analysis of a decision must depend upon the word. Stating further that even where two constitutions may be exactly worded it does not mean that they can be applied without qualification to one another for they may still bear different meanings. [70]

This is a qualified statement indeed but it can be stated that this is not at all the case when in comes to South Africa because of the History that is shared between the two countries. Also because of the universal nature of fundamental rights they lend themselves easily to the same interpretation all across and the globe.

The judge states that he is mindful of the dictum of the court in the Namunjepo decision where the learned chief justice Strydom said that

“A court interpreting a constitution will give such words, especially the words expressing fundamental rights and freedoms, the widest possible meaning so as to protect the greatest number of rights...”

The judge is mindful of the many decisions where the basic approach in interpreting a constitution had been expressed in what he calls poetic and stirring language leading put to the statement that the Constitution does not amount to anything that we wish it to amount to. [71] This statement in itself leads itself to the interpretation that the reading into the constitution the rights of sexual orientation is a wild flight of fancy. Alluding to the fact there is no basis upon which such rights may be established.

The Honorable judge sums up by stating that what has to be looked at are the language of the provisions, the legal history and the traditions usages and norms, values and ideals of the Namibian people. It goes without question that is only sound to consider these. However seeing as how the Constitution and the Bill of rights per se were adopted as it were from international law then their history would also be relevant with regard to the present issue. In light of their universality comparative jurisprudence on the matter could also be considered.

Homosexuality is not something that is devoid from Namibian society and this is the only ground that is recognizable upon which the rejection of any sexual orientation of rights may be based. Stressing
that the Namibia’s past traditions and norm and values should be looked at without any reference to the above-mentioned means that the people that do have a different sexual orientation are relegated to a disadvantaged minority. The values and norms and traditions alone cannot dictate in the sphere of fundamental rights.

The judge in his defense counters this argument with reference to the interpretation of article 8 and the value judgment that is inherent in the interpretation of that provision. However it is important to state that it is on the basis of the interpretation of this article where value judgments is based on the current values of the Namibian people and parliament is of course seen as the voice of the people and so what they say on the topic should theoretically speaking then amount to the values of the people. The contention although theoretically sound is not accurate in practice. Therefore too much reliance should not be placed on it. As it is stated in the case of S v Vries[72] that is should not be the subjective view of individual justices but that judgment should be objective and informed by objective factors.

The infringement of the fundamental rights to equality and non-discrimination is also specifically looked at.[73] After stating that there is a difference between the way South African courts interpret the law and the way Namibian Courts are allowed to by stating that they are not vested with the same powers and nor is does the Namibian constitutions lend themselves to an interpretation of the South African Courts because the Namibian provisions are not as strongly worded and are more ambiguous and the Constitutions does not confer upon them the same powers of interpretation. The judge states that respondent’s council leaned heavily on South African decisions.

This might be because in essence up until the Frank case itself there interpretation of Article 10 to include sexual orientation was never considered. Seeing as how the two jurisdictions are similar and in essence in many matters the interpretation of the South African courts are followed it would seem logical that South African cases can be persuasive where there is no Namibian law on the matter.[74]

O’Linn finally states on the matter that the Constitution does not expressly prohibit discrimination the grounds of sexual orientation citing in support of this the expressions of the former president as well as the Minister of Home Affairs in public discouraging homosexual relationships. This was of course
because these relationships were against the traditions and values of the Namibian people. A fact that he took judicial notice of because the issue was also raised in parliament and nothing was said to the contrary.

Not mentioning the fact that politics should not at all be something that the courts should take judicial notice of. This statement implies that the reason that no one spoke against the statement is because they were in agreement. This may not even have been the case. Party politics may be considered as well as the fact that no own would like to speak against the President. To suggest however that the silence meant agreement does not make it a sufficient ground to stand upon when considering whether or not to take judicial notice of the issue. This does not mean that they could not have been in agreement. It could be the case that there were no homosexuals present and if so would rather that it was not known considering the nature of the statement. It is ludicrous to expect such a minority’s rights to be served when they cannot adequately represent themselves politically.

The learned judge believes that parliament has the right to decide, in accordance with the letter and the spirit of the Namibian Constitution, on the legislation required for the admission of aliens to citizenship or residence and or employment in Namibia[75].

He further states that it is their responsibility to provide for categories that may be given special treatment and which categories may not. Although it would seem more justifiable here to refer to the fact all these laws that are made have to be in conformity with the constitution and it is the duty of the courts to make sure that this happens.

The decision of the Immigration Control Board was set aside nonetheless but for it to be reconsidered after complying with the audi alterem partem rule. Although the Learned judge states that nothing in his judgment justifies discrimination against homosexuals as individuals or deprive them of protection of other provisions of the Constitution it would seem that the judgment makes possible to discriminate against homosexuals as a group of people and seeks justification for this on the basis of the fact that it what the Namibian society demands.[76]

3.2 A comparative Analysis: The closely related position of the Republic of South Africa
The are two cases in South Africa too that have dealt with the issue at hand, The National Coalition for Gay and Lesbian Equality v Minister of Home Affairs[77] in this case the Constitutional Court addressed the question of the consideration of the long term sexual relationships in immigration matters. South African Immigration Laws facilitated the grant of immigration permits to spouses but not to same sex life partners. The court held that the provision at issue violated the closely related rights of equality and dignity of homosexuals in a permanent relationship. The court ordered that this be remedied by stating that the words “partner in a permanent same sex life partnership” should be read into the provision to provide for the same preferential immigration treatment.

The reasoning of the court was that gay and lesbians were a vulnerable minority and had been subjected to previous disadvantage and discrimination and that they had been denied their equal dignity and worth.[78]

The second case that South Africa dealt with was the case of Coalition for Gay and Lesbian Equality v Minister of Justice[79] that addressed the criminalisation of sodomy. Similarly in this case the court found that criminalisation of sodomy violated the rights to equality and dignity of homosexual men. With reference to equality the court noted that the prohibitions at issue outlawed sodomy between men only and not between women or a man and a woman and thus differentiated on the ground of sexual orientation. These laws only helped to foster prejudices against gay men and increased the negative effects of these prejudices on their lives such a violence against them and peripheral discrimination such as refusal of facilities, accommodation and opportunities.[80] The case reiterated the vulnerable position that gay men are put into because of such laws and the court stated that they are a political minority and are thus further not able to use political power to secure favourable legislation for themselves and thus are reliant on the bill of rights for their protection. The only purpose that the laws against homosexual men serve is to criminalize conduct which fails to conform with the moral or religious views of a certain section of society.[81] This clearly in the eyes of the Court meant that it fell into the realm of unfair discrimination.

Criminalizing sexual conduct that is widely known to be practiced by homosexual men in society is tantamount to stating that all gay men are criminals. Pursuant to this as a result of the criminal offence
of sodomy gay men are at risk of being arrested, prosecuted and convicted simply because they seek to engage in sexual conduct that is part of their experience as human beings. There can be no doubt that the existence of a law that punishes a form of social expression for gay men degrades and devalues them in broader society and as such can be seen as a palpable invasion of their dignity and in breach of Article 10 of the Constitution.[82]

Cassidy in a consideration of the issue at hand states that it may be argued that the Constituent Assembly’s failure to include sexual orientation in article 10(2) as an enumerated ground reveals that Namibian society has a different view as to the importance of outlawing the discrimination against homosexuals than South Africa does. She refers to the matter p public comments that were made by the president and the Minister of Home Affairs of the subject basically rejecting homosexuality outright and that this may be argued to reflect the views of the nation on the subject.[83]

However is important to note here about the nature of fundamental rights. They are not subject to the whims of the people or those in power. As long as it can be stated that sexual orientation can be seen to be a fundamental right then not even such statements whether backed by popular demand or not should influence the government in the formulation of policies that will then coincide with their views because in essence this would mean that they violate the enshrined Bill of rights that is in the Constitution. It need not be mentioned that the supreme law on the matter is the supreme Constitution.

3.3 Concluding Remarks

It would appear looking at the issue from a comparative jurisprudential point of view that the universality of the said rights of equality and non discrimination lend themselves to the interpretation that sexual orientation should be read into article 10 of the Namibian Constitution. On the other hand what would be the point of imposing a rule in society that will simply not be adhered to because of the lack of fidelity by the citizens. This is an important consideration. It cannot be simply stated that it is wrong to have the opinion or the belief that homosexuality should not be encouraged. It goes to the issue of legislating morality and that this is the case in Namibia today that homosexual people are discriminated against based on a commonly and strongly held belief by the majority or adversely those
It is not possible to not protect against an individual against discrimination while you discriminate against the group to which that individual belongs. The bottom line being that sexual orientation can be read into article 10 of the Namibian constitution and that in essence it should in fact be read into the article. However the arguments that are hailed against it in the case law cannot simply be ignored and to this perhaps it is relevant to state that these must be the reasons that such an interpretation should be afforded to foster tolerance and acceptance and not encourage isolation and discrimination against any Namibian solely based on the fact that he or she is not heterosexual.

CHAPTER 4

Rights of sexual orientation in the world today and the way forward for Namibia

There are four models that Heinze identifies when it comes to countries that have formally recognized legal rights of sexual orientation. Of these models I shall discuss only two that would equally be able to fit into the Namibian situation.

The Expansive recognition model is also known as the northern European model as it is mostly northern European nations that adhere to it. According to this model equality is formally recognized
though non-discrimination provisions but also including the fostering of social integration of sexual minorities and by combating prejudice.

The model starts by decriminalizing the behavior in this case more specifically sodomy. The second rung of the process is that of general non discrimination which comprises of legal provisions that forbid public discrimination as well as some private discrimination on the basis of sexual orientation in areas such as employment, education and housing as well as accommodation. The third and final rung is that of Affirmative assimilation which involves the counties taking active steps to prevent violence and intolerance through education of their society through school and the media as well as encouraging psychological counseling and youth guidance also lending financial support to lesbian and gay organizations. These countries have even taken steps to ensure equality for same sex couples by recognizing various forms of legal partnerships e.g. equal inheritance rights, taxation and social benefits.[84] There is no evidence at all that the changes that the countries have made have any adverse effects on the countries and their law enforcement, rights of others or public order or values in general. In fact this has made the citizens of the country more sympathetic to sexual minorities.[85]

The other model is the minimum recognition model. This model only includes the first rung of the expansive model. Decriminalization takes place. Although no laws specifically prohibiting discrimination on the basis of sexual orientation have been adopted. This is the least that can be done or a country cannot be said to respect the rights of sexual minorities at all.[86]

It follows fro the discussion in this paper that the rights of sexual orientantion can indeed be read into Article 10 of the Constitution and that in order to safeguards the rights of these sexual minorities. So that they can be respected as human beings on par with the rest of the world around them. They are a part of our society and there is no reason that is justifiable to treat them as though they counted for any less than any other meber of the society. This is the view that is internationally endorsed and very capable of itting into the Namibian situation as well.
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[33] P.178
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[35] Act 1 of 1990
[38] Article 144 of the Constitution
[39] Article 10(2) of the Constitution only mentions sex as one of its enumerated grounds and sexual orientation is not specifically stated. The Constitution of the Republic of Namibia Act 1 of 1990
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[42] Ibid P.88
[43] P.155
[44] Universal Declaration Article 22
[45] Heinze P.158-159
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[52] P.189
[53] P.191
[54] P.192
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[70] P.52
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