

European Master's Degree
In Human Rights and Democratisation

Awarded Theses
of the Academic Year
2012/2013

"From Russia with Love: An Impact Assessment
of Resolution A/HRC/21/L2 on Sexual Minorities
in Africa"

Thesis *by* Roselyn Awuor Odoyo



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FOREWORD

The *European Master's Programme in Human Rights and Democratisation* (E.MA) is the first Master's course in human rights and democratisation launched and financed by the European Commission that later served as model for establishing other Regional Master's around the world. Since January 2013 these are all connected and managed by the *European Inter-University Centre for Human Rights and Democratisation* (EIUC) under the *Global Campus of Regional Master's Programme* (GC).

E.MA is a one-year master's course aimed at preparing professionals to respond to the requirements of daily work in international organisations, field operations, governmental and non-governmental bodies, and academia. The programme offers an action and policy-oriented approach to learning about human rights, democratisation and international relations from legal, political, historical, anthropological, and philosophical perspectives. This interdisciplinary nature and wide-ranging scope of E.MA reflect the benefits of true European inter-university cooperation in human rights education. It is an inter-disciplinary programme that reflects the indivisible links between human rights, democracy, peace and development.

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- HESSLING, Leonard, *Water and the Arab Uprisings – The Human Right to Water and Sanitation in Post-Transition Egypt*, Supervisor: Vincent Durac, University College Dublin (Ireland).
- ODOYO, Roselyn Awuor, *From Russia with Love: An Impact Assessment of Resolution A/HRC/21/L2 on Sexual Minorities in Africa*, Supervisor: Prof. Maria Teresa Beleza, New University Lisbon (Portugal).

This volume includes the thesis *From Russia with Love: An Impact Assessment of Resolution A/HRC/21/L2 on Sexual Minorities in Africa* by Odoyo, Roselyn Awuor, and supervised by Prof. Maria Teresa Beleza, New University Lisbon (Portugal).

BIOGRAPHY

Roselyn Awuor Odoyo is a human rights activist, panafricanist, feminist and Kenyan lawyer. Her focal advocacy areas are rights of

LGBTI persons, sex workers, persons with disabilities, women, rule of law and good governance. She aspires for a just and truly democratic society in which there is equality and non-discrimination for every individual.

ABSTRACT

This thesis elaborates the resolution on “Promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind” by examining the different transitions of the concept of “traditional values” in Africa and how the different transitions as well as the challenges that have emerged in documenting African sexualities through history to present day have affected sexual minorities on the African continent. It suggests that what is couched as “traditional values” is actually religious values translated into cultural relativism and judicial moralism to the detriment of Lesbian, Gay, Bisexual and Transgender individuals.

Like past editions, the selected theses amply demonstrate the richness and diversity of the E.MA programme and the outstanding quality of the work performed by its students.

On behalf of the Governing Bodies of EIUC and E.MA and of all participating universities, we congratulate the author.

PROF. FLORENCE BENOÎT-ROHMER
EIUC Secretary General

PROF. RIA WOLLESWINKEL
E.MA Chairperson

ROSELYN AWUOR ODOYO

FROM RUSSIA WITH LOVE:
AN IMPACT ASSESSMENT OF RESOLUTION A/HRC/21/L2
ON SEXUAL MINORITIES IN AFRICA

ACHPR	African Commission for Human and Peoples Rights
AIDS	Acquired Immuno-Deficiency Syndrome
AMShER	African Men for Sexual Health and Rights
AU	African Union
CAL	Coalition of African Lesbians
CEDAW	Convention on the Elimination of Discrimination Against Women
CRC	Convention on the Rights of the Child
FTM	Female to male transgender individual
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGLHRC	International Gay and Lesbian Human Rights Commission
ILGA	International Lesbian and Gay Association
LGBT	Lesbian, Gay, Bisexual and Transgender
MSM	Men that have sex with men
NAP	National AIDS Policy
NGO	Non-Governmental Organisation
OHCHR	Office of the High Commissioner for Human Rights
OUA	Organisation of African Unity
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCHR	United Nations High Commission for Human Rights

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1.

INTRODUCTION

We like ourselves just the way we are [...] we've got certain traditional values in our society that we would like to preserve.

(Sirleaf Johnson, "Nobel Peace Prize Winner Defends Law Criminalizing Homosexuality in Liberia", *The Guardian* [UK], 19 March 2012)

In the above and various other contexts the term "traditional values" is used interchangeably and translated as having a positive connotation. One of the continents in which the concepts of tradition and culture are particularly weighty in terms of relevance and application, is Africa.

At least three quarters of the countries in Africa criminalise same-sex relationships. Of these countries at least four make it punishable by death¹. These laws which are on the most part inherited from colonialism², are based largely on perceived morality criteria enshrined in various contemporary religions as values³. Decades later, same-sex relationships are categorised by most of these states not just as unreligious but also as "unAfrican." This has resulted in a blurring of the distinction between religion and culture and as such redefining the concept of "African culture/tradition" as regards non-heteronormative sexualities. As has been previously documented in various contexts, the argument that homosexuality is a western import and not a part of African culture⁴, has been used to justify various manifestations of state-sponsored homophobia and decades-long tradition of discrimination against sexual minorities in Africa. This has been exaggerated through

¹ International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA), 2011, p. 13.

² Hepple, 2012, p. 52.

³ Ibidem.

⁴ MacLean, 2012.

societal and cultural exclusion as well as legal moralism, contrary to established international human rights norms. Despite globalisation as well as the ratification of various relevant international human rights instruments by some of these countries, and despite the emergence of rights of sexual and gender identity minorities in international human rights discourse⁵, little if any progress has been made in most African states towards decriminalisation. On the contrary, some countries including countries that are in the global North, most notably Russia, defy established human rights norms particularly in reference to the inclusion of sexual minorities. Thus far, that defiance has been hinged on “cultural norms” and “traditional values.” This is evident not just in President Sirleaf Johnson’s statement above, but also more recently in a proposed resolution by Russia before the Human Rights Council that gives the implication that the understanding and incorporation of “traditional values” can be utilised to foster ongoing human rights discourse. Yet, the controversy surrounding the implication of this resolution refutes the presumption that in this context, traditional values has only positive connotations. Therefore, whereas generally speaking traditional values are understood to be a reflection of a given community’s values whose evolution can be historically traced, contemporary human rights discourse recognises that there are instances during which traditions have a negative impact. Particularly on minorities. One such instance is regarding the treatment of individuals whose identity is not confined to normative categories such as individuals that are Lesbian, Gay, Bisexual and Transgender (LGBT). Some countries, including the sponsor of the resolution, Russia, have further bolstered discriminatory legislation and practice against sexual and gender identity minorities⁶.

The preliminary study as well as the study by the Human Rights Council Advisory Committee on the impact of the United Nations (UN) resolution on “Promoting human rights and fundamental freedoms through a better understanding of traditional values of human kind” correctly note that “traditional values” is too broad a term that cannot

⁵ UNGA, Session 19, “Report of the United Nations High Commissioner for Human Rights on Discriminatory Laws and Practices and Acts of Violence against Individuals Based on Their Sexual Orientation and Gender Identity” (17 November 2011), UN Doc. A/HRC/19/41, p. 4.

⁶ An example is the Same Gender Marriage (Prohibition) Bill 2011 of Nigeria, available at http://www.boxturtlebulletin.com/btb/wp-content/uploads/2011/09/SB05_25th_july_2011.pdf (last accessed on 15 April 2013).

be specifically defined. There have been several explanations given through scholarship for the homophobia in contemporary Africa including within the context of colonisation as well as religion. As this thesis reiterates, there is a lot of scholarship on pre-colonial sexualities within African communities. This thesis considers how religious, socio-cultural as well as regulatory practices have and continue to influence “traditional values” under three definitive time periods in Africa. Namely pre-colonial, colonial and contemporary. In choosing these time frames, this thesis acknowledges the discrepancies that may arise in using “colonial continuities” to define Africa’s history yet finds that these broad categorisations of time are undeniable in measurement of Africa’s evolution on this matter. This thesis therefore aims to build upon the impact of the resolution as highlighted in the study of the Human Rights Council Advisory Committee⁷. Whereas the study underlined the positive as well as the negative impact of affirming this resolution on minorities in general, the focus of this thesis is on the impact such an affirmation could have on Africa’s sexual minorities who continue to face discrimination masquerading as “traditional values.”

In order to gain a deeper understanding of the resolution and the debates that have ensued, the first chapter entails a chronicle of the resolution process. In this chronicle the substantial and technical aspects of the resolution process as well as most of the controversial components of the resolution are highlighted, including what is subsequently the subject of this thesis, which is the subjectivity of the interpretation of “traditional values.” The consistency in the voting patterns reflects the subjectivity of the interpretation of “traditional values” in relation to human rights.

When discussing the concepts of tradition or even traditional values, a critical underlying theme is that of time. Time is relevant because of its central role in discussing the origin and conceptualisation of said traditions and values. This is because in as much as traditions are founded upon history, oft-times tradition and traditional values inform contemporary cultures and values. In the context of LGBT in Africa antagonists of the inclusion of sexual minorities in human rights discourse on the continent oft-times rely on the argument that

⁷ UNGA, Session 22, “Study of the Human Rights Council Advisory Committee on Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind” (6 December 2012), UN Doc. A/HRC/22/71.

homosexuality is “unAfrican” and a “western” import brought about by colonisation. It is for this reason that this thesis is themed on a tripartite categorisation of time periods that explore that argument. That is pre-colonisation, colonisation and post-colonisation. It is noteworthy that oft-times because of this categorisation, scholarship on sexualities within Africa easily become ensnared in the hegemony that fosters discourse on sexualities from perspectives that may not always be truly reflective of the plurality and diversity of Africans. Rather, for both antagonists and advocates alike, the lens through which this is examined seems to be perpetually influenced by the perceptions we have of the discourse in the global North. It is a trap which some scholarship including this thesis may set out to avoid but may not always be completely successful.

Secondly, it will explore the emerging and connected concepts of the resolution interfacing with sexual minorities in Africa. This has been done under the thematic subheadings of religion, socio-cultural and regulatory practices in order to identify the ways in which the three are linked to “traditional values” and the way in which they have influenced the evolution of the concept of “traditional values” over the years.

Thirdly it explores the cross-cutting issues that emerge in the process of discussing sexualities on the continent. This includes the aforementioned affinity to hegemonise the discourse.

Finally, it concludes with a summation of the problems posed particularly to sexual minorities in Africa, by entrenching an open ended concept such as “traditional values.”

As a result of the focus on sexual minorities in the context of the language of the resolution as well as the debates that have ensued in Africa over the decriminalisation of homosexuality, and whilst not negating the discrimination faced by intersex persons within and without Africa, the term sexual minorities in this thesis refers primarily to Lesbian, Gay, Bisexual, Transgender persons or any other individuals whose sexuality does not conform to constructed heterosexual norms, but may not necessarily fall within the aforementioned “labels” or have different references for their non-conforming identities including Queers, Dykes, Queens, Kuchus, Shogas, Tom bois, Lipsticks, Studs... the list is as endless as the individuals willing to claim them.

2.

CHRONICLE OF RESOLUTION A/HRC/21/L2
ON PROMOTING HUMAN RIGHTS AND FUNDAMENTAL
FREEDOMS THROUGH A BETTER UNDERSTANDING
OF TRADITIONAL VALUES OF HUMANKIND:
BEST PRACTICES

2.1. DRAFT RESOLUTION 12/21

The first attempt to legitimise contribution of traditional values in human rights discourse was in a draft resolution sponsored by Russia on 30 September 2009 at the Human Rights Council⁸. The resolution, which was part of a follow up on the implementation of the Vienna Declaration and Programme of Action of 1993⁹, introduces formal recognition of the role of traditional values in the contribution to and application of international human rights standards. The language used in the resolution echoes and affirms the indivisible, universal, interrelated and interdependent nature of human rights as used in international human rights mechanisms including that “significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind.” Whereas on face value the wording used in the resolution appears promotional of the observation of international human rights law regardless of historical, cultural and religious backgrounds, it goes further to reiterate the Vienna Declaration’s recognition that “[...] all cultures and civilizations in their traditions, customs, religions and beliefs share a common set of values [...]” without explicitly stating what these shared common sets of values are. At the same time, the resolution ambiguously alludes to set human rights standards as a culmination of the said values. The draft resolution

⁸ UNGA, Session 12, Agenda Item 8, 12/ “Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind” (30 September 2009), Res. A/HRC/12/L.13/Rev.1, available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/12/L.13/Rev.1 (last accessed on 6 April 2013).

⁹ UNGA, World Conference of Human Rights, “Vienna Declaration and Programme of Action” (12 July 1993), UN Doc. A/CONF.157/23.

called for the organisation by the United Nations High Commissioner for Human Rights (UNHCHR) of a stakeholder workshop,

for an exchange of views on how a better understanding of traditional values of humankind underpinning international human rights norms and standards can contribute to the promotion and protection of human rights and fundamental freedoms, with the participation of representatives from all interested state members of the United Nations, regional organizations, national human rights institutions and civil society, as well as experts selected with due consideration given to the appropriate representation of different civilisations and legal systems.

2.2. THE WORKSHOP

On 4 October 2010, a workshop was convened by the Office of the High Commissioner for Human Rights (OHCHR)¹⁰. The workshop was opened by the High Commissioner for Human Rights, Navanethem Pillay. In her opening statement¹¹, whilst emphasising the complexity of the concept of tradition, she stated that,

No society, regardless of its geographic location or level of economic development, can be said to be represented by a single and comprehensive set of shared values covering all social matters. Traditions and values change over time, and are viewed and interpreted differently by various actors in society. Nuances, and, in some cases, radical differences in such values are to be seen depending on the historical moment, societal sub-set, or, at any moment, between conservatives and progressives.

The workshop which was organised into five panels comprised of various experts had an agenda of framing the issues, understanding the relationship between traditional values and human rights as well as the various challenges and possibilities deriving from such relationship.

What emerged from the workshop can be broadly categorised into two frames of thought or application. The first being that the

¹⁰ UNGA, Session 16, “Report of the United Nations High Commissioner for Human Rights on Workshop on Traditional Values of Humankind” (13 December 2010), UN Doc. A/HRC/16/37, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-37.pdf> (last accessed on 6 April 2013).

¹¹ “Seminar on Traditional Values and Human Rights: Opening Statement by Navanethem Pillay High Commissioner for Human Rights”, available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10413&LangID=e> (last accessed on 6 April 2013).

only common traditional values that are globally shared are already contained in the various agreed international human rights instruments as such they should not be viewed as separate concepts. Further, there was an acknowledgement of the importance of tradition and culture and utility of their positive elements to further human rights discourse. However, the negative aspects of tradition and culture that contradict set human rights norms should not be condoned. This was emphasised by the High Commissioner, some of the panellists such as Eckhart Klein and Joseph Prabhu, the representatives of some of the states present such as The Netherlands, Ireland and the United States of America, and most of the NGOs present.

In contrast, the second emerging frame of thought was that of human rights as derived from religious values as such, said traditional and cultural values should be taken into account when considering a country's application and interpretation of human rights.

In the workshop, this frame of thought was particularly championed¹² by Natalia Narochnitskaya, President of the Paris Office of the Institute for Democracy and Cooperation who, during the panel session on framing the issues, validated a difference in perception of freedoms, human rights and equality in different countries and civilisations. She further noted that as much as the United Nations Charter provides for the protection and recognition of human rights it also provides for non-interference and sovereignty of a state in domestic affairs. Citing human rights standards as a reflection of traditional Christian values, she also advocated for the restoration of the link between human rights and traditional moral values. Philip Riabykh, representing the Moscow Patriarchate of the Russian Orthodox Church expressed an opinion that religious traditions should not be regarded as conflicting with human rights. He further stated that international authorities, while making human rights interpretations regarding specific countries, should make a thorough examination of the national context.

Although the objective of the conference was to gain a better understanding of how traditional values can be used to promote human rights, it was criticised by some Non-Governmental Organisations (NGOs) as largely unproductive, exclusive and the various panel

¹² UNGA, World Conference of Human Rights, "Vienna Declaration and Programme of Action" (12 July 1993), UN Doc. A/CONF.157/23, p. 5.

sessions as inadequately framing the various issues that arose from the draft resolution¹³.

2.3. RESOLUTION 16/3

Following the presentation of the workshop report, on 18 March 2011, Russia tabled a similar resolution¹⁴, which [resolution] was adopted on 24 March 2011. This resolution requested that the Human Rights Council Advisory Committee prepare a study on promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind and to present that study to the Council before its twenty-first session. Although similar in context to the resolution adopted in 2009, this resolution had a few notable changes in its text. One of such changes was the affirmation “that dignity, freedom and responsibility are traditional values, shared by the entire humanity and embodied in universal rights instruments.” The language used in reference to traditional values in this resolution is considerably narrower. Here, traditional values as stated in the resolution are named as the values of dignity, freedom and responsibility. Although lending more accuracy to what the sponsors and drafters of the resolution may have meant at the time when referring to traditional values, the resolution continued its ambiguity by not defining its perceived paradigms of dignity, freedom and responsibility. The arising questions in this regard are therefore: what does “dignity, freedom and responsibilities” entail? In this context do they mean anything other than as laid out or implied in existing international human rights instruments?

2.4. A/HRC/AC/8/4: PRELIMINARY STUDY

On 12 December 2011, the Advisory Committee submitted a preliminary study. The preliminary study breaks the concepts arising from the resolution into three broad categories, traditions, traditional

¹³ “Seminar on Traditional Values and Human Rights”, cit.

¹⁴ UNGA, Session 16, Agenda Item 3, 16/ “Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind” (18 March 2011), Res. A/HRC/16/L.6/Rev.

values and humankind. When discussing traditional values its focus is based on a direct interpretation of the values as laid out in Resolution 16/3 namely, dignity, freedom and responsibility.

The study began by affirming that there is no agreed definition of “traditional values of humankind.” Further in its approach, it created a distinction between tradition and values as two separate concepts.

The study stated tradition as being dualistic in nature. On one hand, “following tradition often implies stereotyped social and individual behaviour, and the dominance of stereotype over individual will, personal traits and aspirations” and as such, “incompatible with the universally recognized human rights norms.” Whilst on the other hand, it has the positive connotation of preservation of historical positive achievements of a state or society. The study argued that this dualistic nature of tradition implies that some traditions can indeed strengthen human rights whilst other traditions violate human rights. The study further argues that the concept of values has a positive connotation and human rights represent specific values.

Despite the categorisation into “traditions” and “values,” the study did not deviate from the categorisation of traditional values as a singular concept, as laid out and embodied in dignity, freedom and responsibility within Resolution 16/3. In its continued assessment the preliminary study defines dignity and freedom as both, “the most important traditional values of humankind” and as “principles that determine an individual’s position in society and the State.” As regards responsibility, the study states that as a traditional value, its interpretation transcends its linkage to obligation and is in this context, a “moral category” that “characterizes the relationship between the individual, the group and society in terms of the realization of the moral requirements imposed on them.” Generally speaking, although the study is broadly informative, it falls short in addressing the issue of how, if at all unspecified “traditional values” promote human rights practice and protection.

2.5. RESOLUTION A/HRC/21/L2

On 21 September 2012, despite the incompleteness of the study by the Advisory Committee, Russia proposed yet another resolution on promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind. The resolution,

much like its predecessors, contains language affirming the indivisible and universal nature of human rights and even stresses that, “traditions shall not be invoked to justify practices contrary to human dignity and violating international human rights law.” This in the wake of spreading declarations within Russia, prohibiting “homosexual propaganda” as well as criminalising “demonstrations of homosexuality” contrary to international human rights law¹⁵. However, like its predecessors, the resolution advocates for affirmation of the relevance of traditional values to human rights discourse without delving into any specific definitions as to the intended meaning behind traditional values. The resolution acknowledged that the study by the Advisory Committee was yet to be completed but nevertheless requested the collection of information from state members of the United Nations on best practices in the application of traditional values while promoting and protecting human rights. This request oversteps the objective of the commissioned study which was to understand how if at all, traditional values can be utilised in international human rights discourse. The garnering of best practices therefore would be on the presumption that “blanket” traditional values as a singular concept can enhance human rights. On 27 September 2012, the resolution was adopted.

2.6. A/HRC/22/71: STUDY OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE

The study which was initially due to be presented before the 21st session was finally completed and presented on 6 December 2012. It came after the adoption of yet another resolution on the promotion of human rights through traditional values on 27 September 2012 which resolution, among other things, accorded the Advisory Committee more time to complete its study.

The study begins by echoing the sentiments of High Commissioner Pillay at the 2010 workshop and correctly stating that there is no agreed definition of the term “traditional values of humankind.” The study adopts an approach that speaks instead to the various components of

¹⁵ For example, Article 1 of the Universal Declaration of Human Rights, Article 2 of the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.

what is understood as “tradition” and “values” as previously raised in the resolutions, workshop and preliminary study within the context of traditional values without further attempting to define what “traditional values” are. It reiterates the Preamble of Resolution 16/3 by qualifying the interpretation of common values shared by all of humankind as the values already embodied in international human rights law. Further it acknowledges the varied and complex nature of traditional values and that whereas some uphold universally accepted human rights law, others contradict said law. In highlighting the negative impact that traditional values can have on vulnerable groups, the study correctly notes that the maintenance of negative traditional values that derive from traditions, cultures and social norms whose evolution is not taken into account is contrary to a human rights-based approach which reflects this evolution in compliance with international human rights law.

3.

CHALLENGES ARISING FROM THE RESOLUTION

TRADITIONAL VALUES AS A COMMON, MUTUAL AND STATIC CONCEPT

[The resolution] reaffirms that a better understanding and appreciation of traditional values shared by all humanity and embodied in universal human rights instruments contribute to promoting and protecting human rights and fundamental freedoms worldwide¹⁶.

This paragraph of the resolution makes two assumptions. The first is that there are traditional values shared by all humanity. Even though the rest of the sentence can arguably be seen to qualify them as those “embodied in universal human rights instruments,” the various submissions derived from the resolution process further exacerbates the ambiguity surrounding the resolution because the understanding of what constitutes traditional values has evolved since the introduction of the first draft resolution in 2009.

The draft resolution in 2009 implies that traditional values are a common set of values that although derived from the traditions, customs, religions and beliefs of different civilisations and societies are somehow mutual. In contrast, although the resolution of March 2011 reiterates the position of the 2009 resolution, it also explicitly refers to the traditional values of dignity, freedom and responsibility. Aside from its reference to the preliminary study by the Advisory Committee, the resolution of 2012 seems to recant its position on specific reference to the traditional values of dignity, freedom and responsibility and re-adapts the ambiguity of the initial resolution shrouded in language

¹⁶ UNGA, Session 16, Agenda Item 3, 16/ “Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind” (18 March 2011), Res. A/HRC/16/L.6/Rev.

that implies the indivisible nature of human rights but simultaneously referring to traditional values as an ideal without acknowledging the negative aspects of said traditional values.

The reality is that the world is comprised of different societies that have different customs, traditions and religions all of which contribute to the values they hold, all of which have changed over certain periods of time. The resolution does not reflect the transitory nature of traditional values. Understanding the various differences as well as the commonalities between different societies and cultures in the context of human rights protection is indeed important practically and substantially as recognised in a vast number of human rights instruments¹⁷. That they vary from society to society is apparent.

This is particularly evident in the context of rights of sexual minorities which although incrementally recognised and protected in the global North with the exception of some countries like Russia that recently passed a “homosexual propaganda law” prohibiting the dissemination of information on “non-traditional sexual relations,” do not enjoy the same recognition and protection in the global South more so in Africa.

The second assumption it makes is that traditional values automatically make a positive contribution to the implementation and protection of human rights. This negates the reality that there are negative as well as positive elements of traditional values. Traditional values are informed in part by religious values which on the most part dictate the moral values of a given society. Africa by and large, is divided into two mainstream religions, Christianity and Islam whose religious values have in the past and present been translated in a manner that at the very least excludes sexual minorities and at worst advocates for their eradication¹⁸.

Therefore the issue is not what is said in the resolution but rather what is not. The ambiguity makes the resolution a two-edged sword because affirming it as it is could mean the relativisation of human rights particularly to the detriment of sexual and other minorities by countries whose current application of traditional values include non-recognition and a particular abhorrence to same-sex relationships.

¹⁷ UNGA, Session 22, “Study of the Human Rights Council Advisory Committee on Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind” (6 December 2012), UN Doc. A/HRC/22/71, p. 14.

¹⁸ See <http://www.thereligionofpeace.com/Quran/026-homosexuality.htm>.

4.

DEFINING TRADITIONAL VALUES

This thesis agrees with the finding of the Advisory Committee in its study¹⁹, traditional values as a concept cannot be singularly defined. However, this is not for want of trying. In an attempt to better understand the concept of “traditional values” one could delve deeper into understanding the two components of the term namely, “tradition” and “values.” These two components have separately and compoundly been theorised to varying degrees by different scholars. For the purpose of this thesis, the selected explanation is that given by George F. McLean. “Values” being a term that connotes something of worth to a given society and ranked in order of their perceived benefit or importance to said society. This ranking is applied in a certain “delineated pattern repeatedly reaffirmed through certain periods of time,” handed down from one generation to the next thereby creating a culture.

Culture provides both the individual and the community with the values and interests to be pursued in life, as well as the legitimate means for pursuing them. It stipulates the norms and values that contribute to people’s perception of their self-interest and goals and methods of individual and collective struggles for power within a society²⁰.

As tradition, these rankings are reflective of the given society historically, and although applied by its descendant society generations later, it may or may not be reflective of the applying society because of

¹⁹ UNGA, Session 22, “Study of the Human Rights Council Advisory Committee on Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind” (6 December 2012), UN Doc. A/HRC/22/71.

²⁰ Pechova & Stepankova, 2007, p. 9.

evolution. Different individuals or groups of persons and at different periods have varying sets of values.

Africa as a continent with 54 recognised states has a vast array of traditions and cultural beliefs and practices. Some positive and some negative because of their conflict with set human rights standards. As noted in the study by the Advisory Committee, the significance of tradition as relating to practices has indeed been mentioned in various human rights-related articles and special mechanisms.

On an international platform, whereas traditional values are indeed recognised as making a positive contribution to human rights discourse particularly on a regional level, the Universal Declaration on Human Rights is cited as a translation of various cultural values shared by humankind²¹. This concept is not new as it is one advocated by modernisation theorists that argue that the convergence of different countries with different historical backgrounds is a result of cultural globalisation in which humankind “share perspectives and construct a sense of global duty and solidarity thanks to a cultural citizenship²².”

The international scope has mostly focused on the elimination of harmful cultural practices and traditions that have historically been to the detriment of women, children and minorities generally.

Such as the Convention on the Elimination of Discrimination Against Women (CEDAW), Article 2 (f):

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: 2 (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

and Article 5 (a):

States Parties shall take all appropriate measures: To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

²¹ UNGA, Session 22, “Study of the Human Rights Council Advisory Committee on Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind” (6 December 2012), UN Doc. A/HRC/22/71, p. 4.

²² N. Stevenson, “Globalization, National Cultures and Cultural Citizenship”, in *Sociological Quarterly*, vol. 38, 1997, pp. 41-67, cited in Melstrom, 2012, p. 8.

Article 24 of the Convention on the Rights of the Child (CRC):

States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

Article 21 of the African Charter on the Rights and Welfare of the Child:

States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

(a) those customs and practices prejudicial to the health or life of the child; and

(b) those customs and practices discriminatory to the child on the grounds of sex or other status.

As well as Articles 2, 4 and 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) just to name a few.

Africa having experienced colonisation has a regional body and a charter that is hinged on the struggle for liberation, protection and promotion of human rights but also the preservation of its cultures. This is evident through the various instruments created in this regard such as: the 1976 African Cultural Charter, the 1999 Algiers Declaration that was “inspired by ancestral values²³,” the 2006 Charter for African Cultural Renaissance²⁴, the 14 December 2005 Nairobi Declaration as well as yet another Algiers Declaration of 2008 both adopted at the African Union (AU) Conference of Ministers of Culture²⁵. The African Charter on Human and Peoples Rights²⁶ takes into consideration “the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples’ rights [...]”

According to one scholar, “a person is an individual to the extent that he is a member of a family, a clan or community” and “having children and a large family is one of the foremost African values²⁷.” His

²³ Organisation of African Unity, 1999.

²⁴ Charter for African Cultural Renaissance, available at http://www.afrimap.org/english/images/treaty/Charter-African-Cultural-Renaissance_EN.pdf.

²⁵ Gawanas, 2009, p. 142.

²⁶ Organisation of African Unity, 1982.

²⁷ Okolo, 1991.

position is reiterated by Gawanas who states that “Africa’s languages, history and traditions remain fundamental to the coexistence of its people²⁸.” She further goes on to cite “supremacy of collectivism, sense of belonging to a community, humanism and Ubuntu²⁹” as core African values. Historically as well as in modern day Africa, these mentioned values are considered to exclude non-heteronormative sexuality by virtue of the fact that homosexuality is not formally acknowledged by African leadership, scholars and general population as being a part of African tradition and culture. Both writers imply that urbanisation and globalisation has a negative impact of the preservation of African values and culture but conversely agree that there are some traditions and cultural practices that are harmful and contradict internationally accepted human rights standards particularly as regards the treatment of women, children and minorities in general.

As such in order to analyse what traditional values are, this thesis is based on a broader definition of traditional values as the values derived from tradition. The working definition of tradition in this regard is “the transmission of customs or beliefs from generation to generation, or the fact of being passed on in this way³⁰.” This thesis focuses on three components within this definition, the religious, socio-cultural and regulation as relevant to Africa and its continental attitude towards sexual minorities.

²⁸ Gawanas, 2009.

²⁹ Ibidem.

³⁰ See <http://oxforddictionaries.com/definition/english/tradition>.

5.

TRADITIONAL VALUES AND SEXUAL MINORITIES
IN PRE-COLONIAL AFRICA

Pre-colonial Africa is defined as the period up until the 19th century when the scramble for Africa by European states began. Up until that period, the borders and boundaries that delineate the African states as we know them today (with the exception of Southern Sudan) did not exist. As such, shared traditions and cultures may have had a much wider geographical spread.

The construction of sexuality was not perceived then as it is in modern day. The term “homosexuality” itself emerged in 1869³¹. This however, is not to say that there was no same-sex attraction or sexual conduct in Africa until then³² rather, that in Africa any reference to it may have had a different name, in various tongues and even different conceptualisation and did not necessarily lead to linkages to “homosexual identities³³.” In the discourse on pre-colonial “African sexuality” there have emerged two key debates. On one hand there are academics and scholars (primarily non-African) that argue that homosexuality in Africa preceded the “coming of the white man.” On the other hand, there are those that argue that the concept of homosexuality was completely alien to pre-colonial Africans. The contents of the two arguments will be discussed in further detail under the sub categories of religious, socio-cultural and regulatory traditions below.

³¹ Anderson, 2007, p. 129.

³² Ibidem.

³³ Amory, 1997, pp. 5-10.

5.1. AFRICAN TRADITIONAL RELIGION AND HOMOSEXUALITY IN PRE-19TH-CENTURY AFRICA

African traditional religion is better understood as an integrated set of practices that seek to attend to the wellbeing of individuals and communities [...] in light of the transcendent realities of the divine and agents of the divine particularly in light of the natural world and the ancestors³⁴.

As with the broader theme of the existence of homosexuality in pre-colonial Africa, discourse on homosexuality in African traditional religion is divided. Some historians have cited African traditional religions as not just tolerant but also inclusive of same-sex sexual practices with the perception that it formed a connection between the existing world and the spiritual world. Such as the *Dagara* tribe of Burkina Faso whose religious practice included roles as gatekeepers that kept the channel between the two worlds open, given to individuals who would in today's terms be described as homosexual³⁵. The *Dogon* also of Burkina Faso were cited by historians as "great astrologers" characterised by homosexual tendencies and desire³⁶. Male to male intimacy was considered sacred and a gateway to prosperity by the *Fang* in Cameroon, Guinea and Gabon³⁷. It was also said that among the *Meru* of Kenya, some individuals that were given religious leadership roles that involved the wearing of women's clothes as well as exhibiting homosexual eroticism were referred to as *Mugawe*³⁸.

5.2. SOCIO-CULTURAL AND REGULATORY PRACTICE OF HOMOSEXUALITY IN AFRICA UP TO THE 19TH CENTURY

Historic descriptions of socio-cultural practices of same-sex relationships oscillates between suggestions of homosexual sexual conduct and perceived homosexual tendencies and mannerisms that may or may not have included sexual conduct.

Aside from the aforementioned religious roles, some practices were

³⁴ Siker, 2007, p. 50.

³⁵ Ibidem, p. 51.

³⁶ Murray, 2005, p. 14.

³⁷ Siker, 2007.

³⁸ Murray, 2005, p. 6.

deemed to fulfil a particularly functional objective such as among the *Pangwe* who believed that anal intercourse had medicinal benefits³⁹.

In other instances, same-sex sexual conduct, particularly between men and boys (up until the age of 20) may have been accepted in some societies for economic reasons as a source of income for the boys' families, who were paid by "patrons"⁴⁰. Among the *Korongo* and *Mesakin* of Sudan, marriage between two men was possible with the condition of bride price which was typically one goat⁴¹, or with spears like among the *Azande* of South-West Sudan and Congo⁴². According to Evans-Pritchard, the taking up of "male wives" was part and parcel of a polygamous set up in which the men, who were typically warriors, would take their boy wives with them to war, as women traditionally were left in the villages. Further, Evans-Pritchard argued that this practice was also a by-product of dissatisfactory heterosexual sexual relations⁴³. Premarital lesbian relationships were believed to enhance successful⁴⁴ heterosexual marriages among the *Buissi* of Congo⁴⁵.

Scholars have also noted that in some instances such as in Benin, homosexual sexual conduct was considered to be a phase that young men went through but eventually outgrew⁴⁶. Further cited examples include mutual masturbation and homosexual sexual conduct between young males among the *Duala* and *Bafia* of Cameroon, *Kru* of Liberia until they reached a suitable age to have sexual relations with women⁴⁷.

Given the construction of gender roles, men that displayed homosexual tendencies were likened to women and treated as such sexually and in their roles in the community. This implies a sort of acceptance on the basis of constructed gender roles and their presumed gender identity as feminine as opposed to masculine. Such as among the *Maale* of Ethiopia who referred to perceived effeminate men that dressed like women, cleaned their own house (which was at the time reserved as

³⁹ Ibidem, p. 9.

⁴⁰ Ibidem, p. 5.

⁴¹ Ibidem, p. 7.

⁴² Ibidem, p. 8.

⁴³ Ibidem.

⁴⁴ Given the gender roles in traditional African society, a successful marriage was considered to be one the husband was consistently pleased with his choice in wife as a result of her management of the homestead and fertility thus bearing many children, particularly sons, which were considered a sign of virility and wealth of the man.

⁴⁵ Siker, 2007, p. 52.

⁴⁶ Blessings-Miles, 2010.

⁴⁷ Murray, 2005, p. 25.

a role for women), performed other “female oriented tasks” and had sexual relations with men as *asbtime*⁴⁸.

There are some scholars that regard homosexuality in pre-colonial Africa as a “forced, accidental ‘phase’ rather than a cognitive choice⁴⁹” more so for “age graded homosexuality.” This may seem compelling if one considers some practices that are akin to modern day pederasty. Such as the *Sorones* who were “beautiful boys aged seven to fifteen” taken by chiefs among the *Mossi* of Burkina Faso, and were submitted to “tests” to ensure that they remained untainted by heterosexual sexual contact and given feminine roles until they reached mature age upon which they were given wives⁵⁰. This could also apply to the boy wives among the *Azande* as mentioned earlier on in this text. According to German ethnographer, Gunther Tessen that among the *Bene*, *Bulu*, *Fang*, *Jaunde*, *Mokuk*, *Mwele*, *Ntum*, *Pangwe* of modern day Gabon and Cameroon, men who were socially accepted as “having a heart for boys” would seduce young boys under the guise of “*biabo pfia’nga* (playing a game)⁵¹.” Historically, African traditional society was even considered as having a culture that viewed sexuality “not as an individual choice or orientation but in a sense belonged to the wider community⁵².”

On the flip side of this debate, the *Basangye* of Congo reportedly denied any homosexual behaviour even among the *Kitesha* which was the name given to males (and females) that did not fit into the conventional constructions of gender roles at the time⁵³.

Antagonists of the existence of homosexuality in pre-colonial Africa hinge their arguments on what they term as selective interpretation and application by “external” authorship⁵⁴ of existing historical records of homosexuality in Africa. They primarily counter said history with the argument that it is a misconstrued translation of African cultural practices that “blur potential distinctions between pre-colonial and post-contact African sexual practices and identities⁵⁵.” Further, they argue that current anthropology is a faulty attempt to correct the “othering of

⁴⁸ Ibidem, p. 4.

⁴⁹ Anderson, 2007, p. 124.

⁵⁰ Murray, 2005, p. 9.

⁵¹ Ibidem.

⁵² Epprecht, 2010, pp. 10-15.

⁵³ Murray, 2005, p. 25.

⁵⁴ See Amadiume, 1987, p. 2.

⁵⁵ Olorunfoba-Oju, 2011, p. 3.

African sexuality” in other historic records also by “western” authors that painted sexual practice in Africa as different, negatively so, from European practice⁵⁶.

Whereas scholars such as Epprecht, Amory, Pincheon have maintained that homosexuality did indeed exist albeit through practices and rituals of a homoerotic nature, other scholars have countered the notion of the existence of same-sex attraction and/or sexual conduct in Africa in that era with the argument that any theories or research that has so far said otherwise is yet another manifestation of the usurping of what they perceive as “Africa’s lived realities” that cannot relate to what they argue is a “furtherance of western cultural hegemonic interests⁵⁷.”

In any case the anthropology of “African homosexuality” is unique in the challenges it faces particularly because of the question of legitimacy and accuracy of the sources.

5.3. CHALLENGES FACED IN ANTHROPOLOGY OF PRE-COLONIAL SAME-SEX RELATIONSHIPS

The primary challenge in discussing same-sex relationships in pre-colonial Africa is the accuracy of sources used in existing records. There is a gaping absence of documentation on the topic in African literature which is probably attributable to the attitude to sexuality in Africa first by the colonialists who considered themselves superior and therefore any form of records kept by Africans may have been relegated to irrelevant and thereafter the continental attitude has been such that sexual minorities have been rendered almost invisible. Most of the discourse in this regard has originated from non-African scholars and anthropologists⁵⁸. Therefore, the sources of existing literature are viewed with suspicion particularly given that any legitimate information derived from Africans in that era would have been transmitted orally and not documented.

This has led to a debate on the sources of information regarding sexuality in Africa during this period as emanating from a context

⁵⁶ Ibidem, p. 2.

⁵⁷ Murray, 2005, p. 2.

⁵⁸ See http://www.glbtq.com/social-sciences/africa_pre,2.html.

perceived through “outsider” eyes⁵⁹. This presents the second challenge of interpretation or, as argued by some, misinterpretation. It has been argued that the ethnographic application of “homosexuality” which subsequently ignores “the complex constructions of sexuality as informed by race, class, gender and nation” is characterised by a failure to ask the important question about whether these cultural practices include sexual relationships⁶⁰. Therefore, whereas some cultural practices may have been carried out absent of sexual motive, the translation by historic and current researchers on the topic has given them sexual connotations⁶¹. Another cited example is that of the *nganga* (healers) of South Cameroon who were typically cross dressers but did not necessarily indulge in gay practices⁶². Furthermore some scholars have gone further to note that this ethnography makes it all too easy to misconstrue the context within which sexual references may have been made, overlooking for instance the possibility of it being part of a “sex-gender” construct⁶³.

⁵⁹ Oloruntoba-Oju, 2011.

⁶⁰ Amory, 1997, p. 5.

⁶¹ Anderson, 2007.

⁶² Geschiere, 2010, p. 128.

⁶³ Anderson, 2007.

6.

COLONIAL AFRICA:
CIVILISATION THROUGH REPRESSION

For purposes of this thesis, focus is placed on the French and British colonies as the two states that colonised a collective majority of African states.

In 1885, European states met in Belgium to divide the African continent into territories that would come under their power. Colonialism was not just about geographical domination, but also an overhauling of their colonies cultures and religions in an imperialistic bid to have them emulate those of the colonising European states. Previous expeditions recorded accounts of African culture and people as primitive, backward and uncivilised⁶⁴. Racism compounded by the Christianity-created linkages between “blackness” and evil or sin, helped to further promote the “othering” of African bodies as well as the (mis)perception of Africans as degenerate and culturally and morally inferior⁶⁵. This in turn fostered the justification of colonisation of Africa by the European states as a “moral duty,” a mission to civilise their colonial territories. Africans were characterised as “hyper-sexual,” “savage” or “dangerous” to justify racial domination⁶⁶.

6.1. RELIGION AND COLONISATION

Both Christianity’s and Islam’s debuts in Africa were long before colonialism. Islam was considerably more successful compared to Christianity pre-colonialism resulting in the practice of both traditional

⁶⁴ Khapoya, 2012, p. 106.

⁶⁵ Lewis, 2011, p. 200.

⁶⁶ Fabeni & Fried, 2008, p. 91.

religions as well as Islam in Africa. This changed with the abolition of slave trade and the beginning of Europe's colonisation of Africa which saw the incremental spread of Christianity particularly in sub-Saharan Africa and British colonies whereas most of the colonies that were under French rule remained predominantly Muslim⁶⁷.

Christianity and Islam alike included the doctrine of spreading the gospel and winning converts particularly on a continent in which its inhabitants followed their own traditional religious beliefs⁶⁸. Having undergone a Judeo-Christian revolution in Europe, the European states subsequently applied their values which were predominantly Judeo-Christian values to their colonial territories. Long before colonialism, between the 8th and 9th centuries, Islam had begun to spread throughout Africa albeit in a more segmented non-systematic approach as compared to that of the spread of Christianity⁶⁹. The spread of Islam was influenced largely by trade routes which were particularly heavy in Zanzibar and Sudan in the Eastern Africa region and Mali, Ghana and Nigeria to the North-West⁷⁰. Both religions owe their spread in Africa to a combination of military campaigns⁷¹ and through social work such as the setting up of clinics, schools, teaching the indigenous people European languages in the case of Christianity and Arabic in the case of Islam⁷². Although Islam preceded Christianity in Africa, during colonialism the two religions had a kind of symbiosis. For example in Nigeria and Ghana there existed a North-South divide between Islam and Christianity. In both countries Islam dominated the North and Christianity dominated the South owing to the origins of the European and Islam entries into the respective countries.

The two religions utilised religious text as a template for a way of life particularly the tenets of morality and to a degree, justice. It is worth noting that, "in medieval Europe [...]" the spiritual egalitarianism

⁶⁷ Gellar, 2006.

⁶⁸ International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA), 2011, p. 99.

⁶⁹ See "Trade and the Spread of Islam in Africa", available at http://www.metmuseum.org/toah/hd/tsis/hd_tsis.htm.

⁷⁰ BBC World Service, "The Story of Africa, Islam", available at <http://www.bbc.co.uk/worldservice/africa/features/storyofafrica/7chapter6.shtml>.

⁷¹ Islam spread from Northern Nigeria to modern day Guinea and Senegal through a series of "Jihads," see *ibidem*.

⁷² International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA), 2011.

and universality of Christianity expressed itself deeply in egalitarian politics, the idea of equal legal and political rights for all human beings, had it been seriously contemplated, would have been seen as a moral abomination, a horrid transgression against God's order⁷³." It was in this spirit that Christianity and perhaps less so for Islam, was applied to colonial Africa, i.e. from the perceived "superior" to the perceived "inferior." As some scholarship works put it, they "came to save souls alongside of armies that came to steal the land and everything on it⁷⁴." Traditional African religions were perceived as primitive, backward and as promoting or fostering idolatry.

For Islam, this "template" manifests itself in two ways: through Shariah and through the interpretations of the Quran. For this segment of the thesis, focus will be placed on interpretations of the Quran as well as Hadith, which are the teachings of Prophet Muhammad whilst Shariah will be discussed later in this chapter under regulatory practices.

In both religions, attitudes towards non-heteronormative behaviours and identities was hinged on the interpretations of the story of Sodom and Gomorrah and on other scriptural text interpreted as making direct reference to homosexuality. In order to understand the reason for the impact of scripture on non-heteronormative behaviour one needs only to look at the implications derived from the terminology used within scripture whose interpretation was applied to African society as was typical at that time, rigidly, selectively and as a manipulative tool considering the oxymoron that was the colonial environment of which the missionaries and clerics were beneficiaries⁷⁵.

The Christian Bible and the Quran somewhat mirror each other in terminology and inference as regards the interpretation of the relationship between Godliness and homosexuality. In total there are twelve references in the Christian Bible⁷⁶ whose strict interpretation informed the teachings of Christianity regarding homosexual behaviour.

In the Bible, Genesis 19:1-13 refers to a city called Sodom in which the men violently sought to have sex with other men in this particular instance, guests of Lot. The city was subsequently destroyed by God

⁷³ Donnelly, 2007, p. 286.

⁷⁴ Patron, 1995.

⁷⁵ Epprecht, 2010, p. 13.

⁷⁶ "What Does the Bible Say about Homosexuality?", available at http://www.christianbiblereference.org/faq_homosexuality.htm.

for its “wickedness.” The Quran⁷⁷ verse that mirrors this story of the demise of Sodom, and indeed is said to have been “borrowed” is Sura 7:80-84 “[...] For ye practice your lusts on men in preference to women: ye are indeed a people transgressing beyond bounds [...]. And we rained down on them a shower (of brimstone)” the same story is repeated in Suras 27 and 29⁷⁸.

Other Biblical verses that were perceived to link the wrath of God to homosexual acts which were subsequently referred to as sodomy and separated from the geographical link to the city of Sodom include: Deuteronomy 23:17: “There shall be no whore of the daughters of Israel, nor a sodomite of the sons of Israel;” 1 Kings 14:24: “And there were also sodomites in the land: and they did according to all the abominations of the nations which the Lord cast out before the children of Israel;” 1 Kings 15:12: “And he took away the sodomites out of the land, and removed all the idols that his fathers had made;” 1 Kings 22:46: “And the remnant of the sodomites, which remained in the days of his father Asa, he took out of the land;” 2 Kings 23:7: “And he broke down the houses of the sodomites that were by the house of the Lord, where the women wove hangings for the grove.”

Other scripture that reinforced the religious teachings regarding homosexual acts as unacceptable, unnatural, ungodly and with the implication of penalties for this behaviour include: Judges 19:22: “Now as they were making their hearts merry, behold, the men of the city, certain sons of Belial, beset the house round about, and beat at the door, and spoke to the master of the house, the old man, saying, Bring forth the man that came into thine house, that we may know him;” Romans 1:26-27: “For this cause God gave them up unto vile affections: for even their women did change the natural use into that which is against nature. And likewise also the men, leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly, and receiving in themselves that recompense of their error which was meet.”

In both Leviticus 18:22: “Thou shalt not lie with mankind, as with womankind: it is abomination,” and Leviticus 20:13: “If a man also lie with mankind, as he lieth with a woman, both of them have committed

⁷⁷ There are three translations of the Quran, Yusuf Ali, Pickthal and Shakir. These extracts are from the Yusuf Ali translation.

⁷⁸ See <http://www.thereligionofpeace.com/Quran/026-homosexuality.htm>.

an abomination: they shall surely be put to death; their blood shall be upon them.” The terminology “lie with” was interpreted as having sexual or intimate relations and the “term abomination is a translation of the Hebrew word *tow’ ebal* which means something morally disgusting, but it also has a strong implication of idolatry⁷⁹.”

The Quran equivalent of this is found in Sura 7:81: “Will ye commit abomination such as no creature ever did before you?” This has been interpreted as establishing homosexuality as the worst sexual sin⁸⁰. The construction of heterosexuality as the natural path and homosexuality as an “abomination” is found in Sura 26:165-166: “Of all the creatures in the world, will ye approach males, (166) and leave those whom Allah has created for you to be your mates? Nay, ye are a people transgressing.”

The Bible goes further to say in 1 Corinthians 6:9: “Know ye not that the unrighteous shall not inherit the kingdom of God? Be not deceived: neither fornicators, nor idolaters, nor adulterers, nor effeminate, nor abusers of themselves with mankind.” And, in 1 Timothy 1:9-10: “Knowing this, that the law is not made for a righteous man, but for the lawless and disobedient, for the ungodly and for sinners, for unholy and profane, for murderers of fathers and murderers of mothers, for manslayers, (10) For whoremongers, for them that defile themselves with mankind, for men stealers, for liars, for perjured persons, and if there be any other thing that is contrary to sound doctrine.” This was interpreted as establishing homosexuality as “unrighteous” and as such making it subject to law and by proxy, punishment. It is on this basis that missionaries “used their influence with the state to introduce laws and taxation policies designed to insinuate Western middle class standards of morality and modesty⁸¹.”

The Quran equivalent of this is in Sura 4:16: “If two men among you are guilty of lewdness, punish them both. If they repent and amend, leave them alone.” This translation varies from the original Arabic text that did not specify “two men” but rather, referred to “two from among you⁸².”

On the reverse side of the discussion on the spread of religion in

⁷⁹ Patron, 1995.

⁸⁰ “What Does the Bible Say about Homosexuality?”, available at http://www.christianbiblereference.org/faq_homosexuality.htm.

⁸¹ Donnelly, 2007.

⁸² “What Does the Bible Say about Homosexuality?”, available at http://www.christianbiblereference.org/faq_homosexuality.htm.

Africa, it is suggested by antagonists of the existence of homosexuality in Africa, that the missionaries and clerics whilst preaching against homosexual conduct amongst other religious “vices” on one hand, hypocritically engaged in homosexual conduct, more notably pederasty, on the sly taking advantage of the on-going colonial oppression and exploitation and as such introduced homosexual conduct to African society⁸³.

Under colonial rule, traditional African religious and political orders which were historically linked were shattered. As such traditional religions and cultural practices declined sharply whilst conversely, the number of Christians and Muslims in Africa consistently multiplied⁸⁴. At this point the question arising is why, despite the hostile environment under which Christianity and to some degree Islam took root in Africa, did these two religions hold such appeal to the point that they all but replaced African traditional religious beliefs? There exists a scholarly theory that may explain why these new religions enjoyed continuity through the decades and why the traditional religions eventually fell away⁸⁵. In theory there may have been various reasons that seem plausible or at the very least worth consideration for why these religions were quickly embraced in Africa.

As regards the two religions in general, the first reason that springs into mind is that, the invasive act of colonialism aside, there were several tenets of these religions that seduced the indigenous people into acceptance and embrace of the “foreign religions” manifested through the perceived benefit of membership. To begin with, even though several elements of the imported religions contradicted indigenous African culture, a large part of the values of the imported religions such as gender roles and reproduction subscribed to values highly regarded by indigenous African communities⁸⁶. Furthermore, for Islam and Christianity alike a huge part of spreading the gospel was through the promotion of the ideal of a better life. This incorporated emphasised aspects like education and health. The missionaries and Arab traders taught the locals how to read and write. One of the main instruments

⁸³ International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA), *State-Sponsored Homophobia: A World Survey of Laws Criminalising Same-Sex Sexual Acts between Consenting Adults*, Brussels, May 2011.

⁸⁴ Gellar, 2006, p. 6.

⁸⁵ Yuntunwi, unpublished thesis.

⁸⁶ Donnelly, 2007.

used to facilitate this was the Bible or the Quran which were also translated into local dialect. This presented opportunities previously not encountered in Africa and seemed to be more effective than previous cultural practices such as education through oral stories and healing rituals which did not always work. This fostered the notion that the introduced religions were superior to religions previously resorted to by indigenous Africans.

The second reason may have been as a result of the elitism created by the concept of civilisation introduced by colonisers as an ideal to be aspired and that fact that Christianity seemed at the very centre. Christianity presented itself as a tool for articulation and communication through “shared values” between the colonisers and the colonised particularly because it came with levels of education which were constructed as central to the concept of being civilised. This was compounded by the fact that colonisers, through “divide and rule” created a sort of reward system in which those indigenous African that best emulated European values and culture got bracketed under elite and were rewarded with administrative positions and openly seen to hold favour with the colonisers. For Islam, inculturation of Islam was deemed a cohesive tool to benefit trade relations between the Arab traders and the indigenous Africans.

Thirdly, and more specific to societal attitudes towards non-heteronormative conduct, even through various anthropologists recorded the existence, acceptance or indifference to non-heteronormative practices within some traditional African communities, it is arguable that these religions may also have acted as a conduit and presented an opportunity for those within said communities that dissented with the acceptance of such practice or identity. The magnitude of the inculturation of the two religions would therefore suggest that contrary to some historical records, more members of traditional African communities disapproved homosexual and “gender-bending” behaviour than they did accept it. Which argument would suit purveyors of cultural relativism in human rights discourse regarding sexual orientation and gender identity today.

6.2. SOCIO-CULTURAL PRACTICES IN COLONIAL AFRICA

Anthropology regarding colonial Africa during colonisation and for years following decolonisation was conducted primarily and almost exclusively by Europeans. Historical accounts appear to be divided into two factions. The first asserting that there was no evidence of the existence of homosexual practices amongst indigenous Africans before or during colonialism⁸⁷ and the second faction argued that homosexual conduct was indeed present among the native Africans. There are two important factors to be considered in the aforementioned anthropology. The first is an understanding of the norms and cultures of the “observer’s” country of origin and what influence that could have had on their interpretations at the time. Secondly, the degree of permeability of the European culture into African society outside of the central hub of European activity in whichever colonised state i.e. in deep rural locations.

Aside from the construction of schools, clinics and religious places of worship, influence on socio-cultural life in Africa could be seen to manifest in various ways. This thesis proposes three of these ways that it deems more prominent namely inculturation of European language, reinvention of the concept and construction of family and commercialisation of sexuality.

Whereas Islam includes polygamy, a practice that was already part and parcel of traditional African society, Christian missionaries advocated the practice of monogamy citing it as “God’s will⁸⁸” despite scriptural references to polygamous marriage like in the case of Abraham and therefore seemingly had more to do with emulating European society marital practice than “God’s will.” Whereas many indigenous African struggled with this concept, what Christianity and traditional African practice complimented each other on was the emphasis placed on marriage and procreation. Christian missionaries denounced homosexuality and portrayed it as a threat to this cherished traditional African value.

As mentioned earlier, historical accounts of traditional African society cite sexuality as something that was not regarded in the context

⁸⁷ M. Gelfand, “The Infrequency of Homosexuality in Traditional Shona Society”, p. 201 in *The Central African Journal for Medicine*, vol. 25, no. 9, 1979, cited in Murray, 2005.

⁸⁸ Gellar, 2006, p. 7.

of the concepts of “individual choice” or “orientation” but rather as belonging to the community.

The oppressive and exploitative environment that was colonialism enabled the development of a homosexual sex industry through the exploitation of the widespread poverty of a considerable portion of African communities⁸⁹. This further added to the attitudes towards homosexual conduct by both the colonisers and the colonised. For the colonisers it signified a “corruption” of their morals, a vice that they blamed on the “hyper-sexual,” “immoral” indigenous community. For the “colonised,” it represented a different form of oppression because not only was behaviour that was traditionally found in some African communities deemed detestable and immoral, but the same Europeans that deemed it so, used the oppressive environment to exploit an element of African culture that was forcibly suppressed in order to appease and to emulate the perceived morality of the colonisers.

6.3. REGULATORY PRACTICES IN COLONIAL AFRICA

Whatever the case, whether homosexuality existed or not, the institutionalisation of anti-homosexuality was certainly introduced through colonialism. Despite the existence of customary law in African society prior to colonisation, colonising European states introduced their own laws as a means of administrative and social control without consulting with the indigenous communities on cultural (in)consistencies and with the penultimate aim of “inculcating European morality into resistant masses⁹⁰.” Under British Imperial administration, the civil and criminal cases to which natives were parties were to be “guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any Order in Council or Ordinance⁹¹.” As a result of the racially-defined categorisation of Africans as “hyper-sexual” the imported legislation included regulation of sexual conduct. Whereas the colonisers dismissed customary laws and practices as regards “moral issues” they allowed the application of customary laws albeit as secondary to the

⁸⁹ Anderson, 2007, p. 123.

⁹⁰ Human Rights Watch, 2008, p. 5.

⁹¹ Anderson, 1960, p. 435.

European “secular law” on matters between the indigenous people as a means of control and to repress any uprisings.

At first glance, it would seem that the colonising states in introducing, implementing and enshrining their laws on their colonies were in an attempt to mirror the legal environment in their home states. Whereas this may have been true at the time for British colonies, the same cannot be said about the French colonies seeing as following the French Revolution, France decriminalised homosexuality in 1791⁹² but in the initial stages of colonisation, applied sodomy laws to its colonies. France repealed sodomy laws during colonisation⁹³.

As the term suggests, these laws were based on Christian scriptural references to the story of Sodom and Gomorrah. In the context of British society, scripture had been historically utilised as authoritative guidance in the construction of legislation ascribed to the religiosity of the British rulers who over centuries, translated the said text into canonical and common law and later codified it⁹⁴. Under the reign of Henry VIII, sodomy laws that had previously manifested in common and cannon law were codified in the 16th century⁹⁵. This law was repealed under Queen Mary and later re-enacted under the reign of Queen Elizabeth in the Buggery Act of 1563⁹⁶. As a result of the presented scriptural linkages between homosexual acts and “God’s wrath” it was deemed unfathomable that “true followers of the faith” should not possibly consent to subjecting themselves to this “abomination” that would distance them from God. As such, the sodomy laws did not consider consent or age as relevant factors and therefore drew no distinction between homosexual acts, rape, bestiality and incest⁹⁷. Although various terminology with scriptural undertones were progressively included as reference such as “debauchery” and “buggery,” which was originally derived from the French word *Bougre*⁹⁸, the underlying theme remained “unnatural acts against the order of nature” and much like the references

⁹² Human Rights Watch, 2008, p. 6.

⁹³ Hepple, 2012, p. 54.

⁹⁴ Ibidem, p. 53.

⁹⁵ Ibidem.

⁹⁶ Ibidem.

⁹⁷ Ibidem.

⁹⁸ E. Coke, *The Institutes of the Laws of England*. London: E. and R. Brooke, 1797, part 3, 58: cap. X: “Of Buggery, or Sodomy”, cited in Donnelly, 2007. See also D.S. Bailey, *Homosexuality and the Western Christian Tradition*. London: Longmans, 1955, pp. 147-149 cited in Yuntunwi, unpublished thesis, p. 14.

in scripture were punishable by death until the 19th century when the death penalty was replaced with prison term⁹⁹.

In the British colonies, these laws were translated to reflect the objective of the British Imperial administrators to “correct” and “Christianise” native customs¹⁰⁰. It was deemed a “preventive” measure against the “widespread homosexuality” within the colonies¹⁰¹ which previously either accepted homosexual practices or was indifferent to it. Unlike their home territories the colonies gave little objection or resistance and therefore presented an opportunity to adjust the sodomy laws particularly expounding on the element of consent to include consensual and non-consensual “acts against the order of nature¹⁰².” Implementation of this modified law began in India with the drafting of section 377 of the Indian criminal code which was later replicated and spread to the rest of Britain’s colonies¹⁰³. It was enshrined in the various penal codes and enforced by courts.

As mentioned earlier, the introduction of colonial law created a kind of legal plurality in Africa because of “allowances” made for the practice and application of customary law as part of a strategic objective to create a perception of self-governance. For Muslim communities in Africa such as in Northern Nigeria, Shariah law was practiced as customary law¹⁰⁴.

Shariah law is understood by Muslims as “God’s perfect law” and attempts to understand, define and apply Shariah law for practical use as based on the Quran and the Hadith is known as *fiqh*¹⁰⁵. Prophet Muhammad who was deemed the messenger of Allah had various teachings based on interpretations of the Quran which teachings are referred to as Hadith. It is primarily from these teachings that the penalties upon individuals found to be engaging in homosexual conduct are derived. Generally speaking, Islam admonishes all (displayed) sexual conduct outside of marriage and because marriage between two men is not recognised, this includes both heterosexual and homosexual conduct as well as gender bending behaviour such as effeminate men.

⁹⁹ Donnelly, 2007.

¹⁰⁰ Ibidem.

¹⁰¹ Human Rights Watch, 2008, p. 16.

¹⁰² Ibidem, p. 18.

¹⁰³ Ibidem.

¹⁰⁴ Anderson, 1960, p. 437.

¹⁰⁵ Leatham et. al., 2013.

This is translated through Hadith which makes reference to execution of such individuals for example in Abu Dawud (4462): “Whoever you find doing the action of the people of Lot, execute the one who does it and the one to whom it is done¹⁰⁶.” Other examples cite the specific penalty of stoning such individuals such as in Abu Dawud (4448): “If a man who is not married is seized committing sodomy, he will be stoned to death¹⁰⁷.” Reference to gender bending by both men and women is referred to in Bukhari (72:774): “The Prophet cursed effeminate men (those men who are in the similitude (assume the manners of women) and those women who assume the manners of men, and he said, ‘Turn them out of your houses.’ The Prophet turned out such-and-such man, and ‘Umar turned out such-and-such woman¹⁰⁸.’” Some Hadith disregards whether or not the sexual conduct was consensual by criminalising both parties regardless. For example in al-Tirmidhi, Sunan 1:152: “[Muhammad said] Whoever is found conducting himself in the manner of the people of Lot, kill the doer and the receiver¹⁰⁹.” That said historic records of instances in which Shariah law was applied in the context of homosexual conduct within indigenous African communities during colonialism are sparse or non-existent.

Shariah was described by Lord Cromer, an Englishman as a Quran inspired crystallization of “religion and law into one inseparable and immutable whole with the result that all elasticity is taken away from the social system¹¹⁰.” Like with Christianity and British introduced common law, through Shariah law homosexual conduct was regarded beyond the realms of “sinful” to criminal. Like with customary law, under colonial rule, Shariah law was deemed as secondary to European law and whereas previously Islamic law and/or Shariah law had governed all tenets including the public and criminal, the extent of Shariah law was limited under colonial rule. The colonial state “designed and implemented criminal law¹¹¹” and the extent of Shariah law was limited to family and succession laws for example the Marriage of Mohammedans Ordinance of 1905 and 1906 applied in some parts of Ghana, Sierra Leone and

¹⁰⁶ See <http://www.thereligionofpeace.com/Quran/026-homosexuality.htm>.

¹⁰⁷ Ibidem.

¹⁰⁸ Ibidem.

¹⁰⁹ Ibidem.

¹¹⁰ Moosa, 2009, p. 164.

¹¹¹ Ibidem, p. 165.

Uganda¹¹². There were exceptions to this particularly where Islamic law was regarded as synonymous with customary law and it could be applied to criminal cases under the codified criminal code or under Islamic law such as in Northern Nigeria¹¹³. This was however not absolute because cases could be “transferred” to the British courts at the discretion of the British Imperial administrators, particularly in cases that involved the death penalty. For person convicted of “acts against the order of nature” this was not particularly consoling except for the fact that under British sodomy laws, the penalty was imprisonment as compared to certain interpretations of Shariah law in which if found guilty the subject would have been sentenced to death by stoning.

Incidentally, back on British soil a report had been written by Lord Wolfenden in 1957 proposing the decriminalisation of consensual homosexual acts which proposal was put into effect in 1967 through the Sexual Offences Act¹¹⁴. This legislative change could not be applied to the imported legislations in what were now “sovereign” African countries even though the laws were inherited and in use as a template for the newly acquired status of “self-governing.”

This period is therefore particularly interesting because it was the era in which the relationship between the main stream religions and the state was forged in Africa. Therefore there is a movement from indigenous culture in pre-colonial times to inculturation of new values and new beliefs which despite the oppression through which they took root, they were adapted and eventually amalgamated as part and parcel of aspirational African culture. Indigenous African tradition and practices were projected as regressive and primitive and therefore overshadowed by aspirations for civilisation and the European way of life which was projected as progressive and ideal. Any documentation about traditional African way of life and beliefs was dismissed as irrelevant and replaced by documentation from European anthropologists and researchers whose observations were taken as fact. This documentation painted indigenous African community in two ways. Either as hyper sexual, primitive and as close to nature and therefore heterosexual. Otherwise, as hyper sexual, primitive and therefore immoral and deviant. Either which way, a new culture was introduced, that of regulation of people’s bodies by the state.

¹¹² Anderson, 1960, p. 437.

¹¹³ Ibidem, p. 440.

¹¹⁴ Human Rights Watch, 2008, p. 7.

7.

POST-COLONIAL AFRICA

[...] They may be matters for the church but not for the head of state [...]. The Almighty may judge but not the State¹¹⁵.

Following the end of World War II in 1945, there was a globalised spirit of self-determination and humanity catalysing and catalysed by an emerging discourse on human rights compounded by the creation of the United Nations. Shortly after, there was a wave of decolonisation which saw the exiting of colonial powers from their colonies and the facilitation and promotion of self-governance.

The continent was left to local political elite most of whom had by that point “benefitted” from western education and therefore deemed “pioneers of civilisation” in Africa. This perceived civilisation was constructed to distance itself from the colonial de facto characterisation of “African sexuality” by grounding all sexual desires and actions within the constantly policed nuclear family that was modelled to European standards and presented as “natural¹¹⁶.” The colonisers left a legacy that manifests itself to date primarily in three ways, religion, a re-invented socio-culture that aspires to distance itself from previous characterisation as “primitive” and aspires to be “civilised,” and a political regime to oversee social order through regulation.

¹¹⁵ Prof. Ali Mazrui, *The Monitor Uganda*, 6 October 1999, cited in Mazrui, Alamin & Mutunga, 2004.

¹¹⁶ M.J. Alexander, “Not Just (Any)body Can Be a Citizen: The Politics of Law, Sexuality and Postcoloniality in Trinidad and Tobago and the Bahamas”, in *Feminist Review*, no. 4, Autumn 1994, pp. 5-23, cited in Eckhardt, 2012, p. 2.

7.1. POST-COLONIAL AFRICA AND RELIGION

The two dominant religions after colonisation remained Christianity and Islam. Much like during colonialism, religion continues to permeate every aspect of African society including political structures, as the moral compass that guides society's actions¹¹⁷. As like the colonial period, religion has been used as a tool of social control couched as a unifying factor. So much so, that the levels of religious fundamentalism in Africa have superseded even that of the lands from whence these religions originated¹¹⁸. Ironically, as the "western" community increasingly broadens its interpretations of religious texts, particularly when it comes to perceived constructions of moral and immoral, African followers of the same religions have adhered to the rigid interpretation and application¹¹⁹.

Despite their foreign origins, Christianity and Islam have thus become infused by African religious leaders as part and parcel of African culture. The churches position summed up in the words of Archbishop Nicholas Okoh: "It is the same thing, the church of independent countries – no longer the British Empire – must make some changes¹²⁰." Therefore whereas the religion was introduced to Africa by white Christian missionaries, hailed for their "enlightenment," in an ironic twist of events the broad interpretation of the same scripture that embraces sexual minorities is deemed a corruption of scripture and hinged essentially on the argument of race i.e. "western" and adjudged as not reflective of African Christian and Muslim values. As Epprecht so aptly put it, "In the context of the long history of racism in Christian practice in Africa, any debate that appears to polarise largely along

¹¹⁷ In 2010 the President of Malawi whilst referring to two gay men that were pardoned said, "These boys committed a crime against our culture, our religion and our laws." B. Bearak, "Malawi President Pardons Gay Couple", in *The New York Times*, 29 May 2010, cited in VanKlinken & Gunda, 2012.

¹¹⁸ "The present trend in certain quarters to cast the bible aside and foist on the world a religion that does not have God and the bible at the centre [...]," Preamble of the position paper by the Church of Nigeria (Anglican Communion) on the bill for an act to prohibit marriage between person of the same gender solemnisation of same and for other matters related therein. Available at <http://www.guardian.co.uk/commentisfree/andrewbrown/2009/mar/13/religion-anglicanism-akinola-nigeria>.

¹¹⁹ Position paper by the Church of Nigeria (Anglican Communion) on the bill for an act to prohibit marriage between person of the same gender solemnisation of same and for other matters related therein. Available at <http://www.guardian.co.uk/commentisfree/andrewbrown/2009/mar/13/religion-anglicanism-akinola-nigeria>.

¹²⁰ Bingham 2013.

racial lines has a disproportionate power to distract attention from the big debates¹²¹.” So much so that the disparities are causing a rift seemingly along racial lines with Anglican church leaders from Africa leading the call to be separated from the central Anglican church¹²². This is one of the indicators of a society still healing from the horror of colonialism, that also struggles with the conditioning that colonialism inflicted and adopted negative aspects of colonialism as its own rewritten traditional culture. Any leaders within the religion that say otherwise are immediately cast as “western puppets” and not real believers, real Christians and certainly not real Africans. Religious leaders such as Desmond Tutu and Archbishop of Cape Town Njongonkulu Ndungane have differed in this view advocating instead for the inclusion of all peoples including homosexuals¹²³.

Therefore what is happening now is an amalgamation of one of Africa’s traditional values that has consensus, “family” and religious values that were traditionally un-African. The term “inculturation theology¹²⁴” was coined to explain this. Put together, the argument formulated by some religious theologists and leaders is that, homosexuality is against God’s will because it is a threat to reproduction which is the basis of religious interpretation of the existence of mankind and therefore, an abomination. Incidentally, whereas Christianity and Islam have historically seldom agreed on any mutuality between the manifestations of their different religions, in Africa, there appears to be consensus on the issue of same-sex relationships¹²⁵.

This is further exacerbated by the fact that most political leaders in Africa affiliate themselves with particular religions. Such as Yoweri Museveni, President of Uganda identified as a “born again” Christian as did former Nigerian President Olusegun Obasanjo. Immediate former President of Nigeria Y’ardua identified as a Muslim, President Mugabe of Zimbabwe is a professed catholic and former President Moi of Kenya also professed the Christian faith¹²⁶.

¹²¹ Epprecht, 2010, p. 10.

¹²² Bingham, 2013.

¹²³ “Obasanjo Backs Bishops Over Gays”, 2004.

¹²⁴ Inculturation theology is defined as “a very prominent strand of African theology. That seeks to develop a Christianity with an African face, that is, a type of Christianity that (re)values African cultural and religious traditions positively (though critically) and seeks to incorporate them in expressions of the Christian faith that are authentically African.” Magesa, 2004, p. 4.

¹²⁵ For example see Tamba, 2013.

¹²⁶ Epprecht, 2010.

Therefore the argument by religious political leaders and theologists on the continent is embodied in the position paper of the Church of Nigeria (Anglican Communion) in support of the Bill (which at the time of writing this thesis, is awaiting presidential assent) for “an act to prohibit marriage between person of the same gender, solemnization of same and for other matters related therein” is summarised as follows:

1. Scriptural condemnation. The argument that homosexuality is a sin and acceptance of it will bring the wrath of God. This is based on rigid interpretation of scriptures; particularly popular is the reference to Sodom and Gomorrah in the Bible, and of the Quran. Arguably the same scriptures contain more texts about acceptance and equality than they do about difference.

2. The second basis is that of the “creation theory.” That God made man and woman with the intention that coupling is a reserve of heterosexuality. “God made Adam and Eve not Adam and Steve¹²⁷.” Particularly because the perceived objective of said coupling is procreation and “filling the earth¹²⁸” which same-sex couples cannot “naturally” do and as such cannot possibly be a part of God’s plan.

3. Other reasons cited for why the religious following in Africa is so vocally against homosexuality and non-heteronormative relationships outside of Africa include: a general mystification on sexuality in Africa, stereotyping of homosexuals as promiscuous, flamboyant, paedophiles, and abusers of alcohol and drugs. Some negative historical encounters such as the torture and murder of young Christian boys and men in the 19th century by King Kabaka of Buganda when they refused his demands for sex, the historical construction of African society as “closest to nature” and thus predominantly heterosexual and the subjective and individualistic nature of homosexuality is perceived as a contradiction to the traditional value of community in which the individual is secondary¹²⁹.

Whereas some religious leaders have argued that sexual orientation

¹²⁷ “If he wants sexual relationship between man and man, and between woman and woman, God will not have created them male and female.” Former Nigerian President Olusegun Obasanjo quoted in *The Guardian*, 25 May 2010, available at <http://www.guardian.co.uk/world/2010/may/25/gay-rights-africa-malawi>.

¹²⁸ See Position paper by the Church of Nigeria (Anglican Communion) on the bill for an act to prohibit marriage between person of the same gender solemnisation of same and for other matters related therein, p. 3, para. (d). Available at <http://www.guardian.co.uk/commentisfree/andrewbrown/2009/mar/13/religion-anglicanism-akinola-nigeria>

¹²⁹ *Ibidem*, p. 3, para. (f).

is a moral issue and not a human rights issue thus not to be included as a ground for discrimination, some scholars have argued that in so far as the human rights versus religion debate there are three strands of African theology, two of which are particularly relevant in this regard. The first is the reconstructionist faction in which African (Christian) theologians are concerned with socio-economic and political issues such as poverty. The second faction is that of the inculturalist theologians who are more concerned with “questions of religious and cultural identity¹³⁰.”

The application of religion to the discrimination of homosexuality in Africa has been criticised by scholars as “contextualized, selective, literal appropriations of the Bible¹³¹.” That said, its influence on social attitude towards non-heteronormative identities cannot be ignored.

7.2. SOCIO-CULTURAL PRACTICES IN POST-COLONIAL AFRICA

In one of his papers¹³², Epprecht highlights various explanations for the influence behind the current negative social attitude towards homosexuality in Africa. This section of the thesis will focus on two of the cited reasons. Namely, the traditional African value of family and secondly the economic disparity evident in a large part of African population.

As regards the value placed upon family in Africa, Epprecht correctly notes that as with traditional Africa, in modern day Africa the society still places a lot of emphasis on marriage and reproduction¹³³. This is particularly in respect of lineage and inheritance. Therefore homosexuality is largely perceived as a threat to lineage within the family as well as to the continuation of society¹³⁴.

The second influence is the economic disparity in Africa. Epprecht correctly argues that since the 1980s Africa has undergone excessive economic strain. The gap between the rich and the poor grows exponentially larger by the day and the various policies and social services by the various governments only serve to further widen the gap.

¹³⁰ VanKlinken & Gunda, 2012.

¹³¹ Gunda, 2010, p. 35.

¹³² Epprecht, 2010.

¹³³ Ibidem, p. 12.

¹³⁴ VanKlinken & Gunda, 2012.

As such, many women, men and children turn to prostitution. Although this does not in and of itself signify increase in individuals identifying as homosexuals, it could however explain the negative societal attitude derived from the perceived linkages between prostitution and homosexual conduct. Additionally, some scholars have argued that the concept of family is particularly important in poorer societies because it is central to economic and physical stability and as such lower levels of tolerance towards homosexuality which is perceived as a threat¹³⁵.

Subsequently, the social attitude towards homosexuals in Africa has increasingly been one lacking in empathy, influenced largely by the disposition of the religious leaders and the political leaders. This disposition has been the catalyst of two notable reactions in Africa. The first is the emergence of a more visible LGBT population in Africa driven mostly by activists and locals as well as international human rights organisations. The second is a fortification of the “homosexuality as un-African” discourse among African populations. This is made evident through a string of out rightly criminal actions against LGBT individuals with blackmail and extortion on one end of the spectrum and escalating to physical and sexual violence and in the extreme, lethal violence¹³⁶.

Regardless of the debate on the existence of homosexuality in traditional Africa, the emergence and impact of Acquired Immuno-Deficiency Syndrome (AIDS) definitely highlighted the existence of homosexuals and homosexuality in modern day Africa. Initially, most antagonists of the existence of homosexuality in Africa used the high statistics of Human Immunodeficiency Virus (HIV) prevalence between perceived heterosexuals in Africa as a basis for their denial. Although this is the position still held in most states¹³⁷, some states eventually began recognising men that have sex with men (MSMs) as vulnerable groups in this discourse. This has had both a positive and a negative impact on the human rights discourse as regards sexual minorities in Africa. On the positive side it has been seen as a gate way for national and regional acknowledgement of the existence of same-sex sexual conduct. This is made evident by the inclusion of some countries such as South Africa and Kenya of MSMs in their National AIDS Policies

¹³⁵ Melstrom, 2012, p. 10.

¹³⁶ “South Africa: CGE Condemns the Killings of Gays and Lesbians”, 2013.

¹³⁷ Eckhart, 2012, p. 5.

(NAPs)¹³⁸. However on the flip side it has been used by some political and religious leaders as a scapegoat for the stigmatisation of homosexuals and continues to render the LGBT community as invisible. Such as in 2006 when a spokesperson for the Uganda AIDS Commission stated that the exclusion of LGBT in the national strategic framework was due to the illegality of homosexuality¹³⁹.

Despite the social stigma, it is more and more evident that whatever the historical facts, homosexuals do in fact exist in modern day Africa. There has been a notable increase of social spaces that are under the radar because of the hostile environments in which LGBT individuals meet. For example, the arrest of the eleven men in Cameroon happened in the raid of what was termed as a “gay bar.” There have been reports of “daring” actions, such as secret gay weddings and/or ceremonies around the continent seen to defy the criminalising laws and leading to the arrest and detention of involved individuals such as in 2008 in Dakar, 2011 in Mombasa on Kenya’s coast, in fact two Kenyan men reportedly formalised their relationship albeit in the United Kingdom in 2010 and in Morocco in early 2008 pictures of a gay wedding were published in the media¹⁴⁰. The global discourse on the human rights of sexual minorities caused the sprouting of LGBT organisations all over Africa.

As much as the visibility of LGBT individuals has increased, so too has the backlash from society, tenfold. This backlash has been manifested in blackmail and extortion, lethal as well as non-lethal violence as documented in several human rights organisations, reports as well as some UN reports. Non-lethal violence has manifested itself on the most part through sexual violence such as rape and physical violence.

According to a report¹⁴¹ by International Gay and Lesbian Human Rights Commission (IGLHRC) a recent survey of men who have sex with men (MSM) in Malawi, Namibia and Botswana found that blackmail was one of the most prevalent human rights abuses they faced. This is not an unusual situation faced by LGBT around the continent.

¹³⁸ See Kenya National Aids Strategic Plan 2009/10-2012/13, available at http://www.nacc.or.ke/nacc%20downloads/knasp_iii.pdf and Zimbabwe National HIV and AIDS Strategic Plan (ZNASP) 2006-2010 available at http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_125613.pdf.

¹³⁹ Human Rights Watch, 2008, p. 3.

¹⁴⁰ Geschiere, 2010, p. 129.

¹⁴¹ Thoreson & Cook, 2011.

7.3. REGULATION OF BODIES IN POST-COLONIAL AFRICA

Most African states inherited their legislative frameworks from their former colonisers. This included the legislation regulating sexual conduct and perceived morality as perceived during colonial times. These laws were and still are contained in the penal codes of these African states as punishable crimes.

With the exception of Benin, Burkina Faso, Cape Verde, Central African Republic, Congo, Chad, Côte d'Ivoire, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Gabon, Guinea-Bissau, Madagascar, Mali, Nigeria, Rwanda and South Africa¹⁴², the other countries in Africa either criminalise homosexuality or do not say anything about homosexuality in their legislation per se but may or may not reinforce stigma through state agencies. Sudan, Northern Nigeria and Mauritania have maintained the death penalty in their sodomy laws. Whilst Egypt does not criminalise homosexuality per se, in 2001 sixty men were arrested, detained and convicted on grounds of “habitual debauchery” and subsequently faced torture and ill treatment whilst in detention¹⁴³.

The 2013 report by the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) documents existing sodomy laws in 38 African states. It goes further to highlight how “more than 50% of African governments have taken action and steps to formally criminalise same-sex unions.” Looking at most of these laws, it is evident that despite opportunities to revise them as reflective of modern day society, most states have retained almost carbon copy sections of the colonial sodomy laws in their penal codes.

Angola and Mozambique formerly colonised by the Portuguese both have as their basic criminal law, the Portuguese Penal Code of 16 September 1886 and in both penal codes the criminalisation of acts “against the order of nature” are contained in Articles 70 and 71. This despite decriminalisation of homosexuality in Portugal in 1982.

The terminology used in the sodomy laws captured in the penal codes of most African states has underlying scripture reference and is reflective of and informs the social and political attitudes towards same-

¹⁴² Itaborahy & Zhu, 2013.

¹⁴³ Simmons, 2011, p. 161.

sex relationships i.e. “against the order of nature,” “gross indecency” and “unnatural offence or acts¹⁴⁴.”

Consent is deemed a globally applicable criterion for the evaluation of sexual-related crimes. With the exception of Egypt, African countries that criminalise homosexuality also disregard the criteria of consent making reference in these laws to people who “habitually practice [...],” “permit any other person to [...],” “voluntary sodomy¹⁴⁵.”

Nor do these laws have any respect for privacy as the majority of them provide that, “Any person whether in public or private [...].”

Any revisions that have been made have on the most part bolstered the penalties for homosexuality. In Uganda in 1990, the law was bolstered to include life imprisonment as a maximum sentence¹⁴⁶. 2009 saw the introduction of the infamous Bahati Bill¹⁴⁷ which initially proposed the death penalty and although this was later revised, it criminalises not just homosexual conduct but also unreported knowledge of homosexual conduct. These laws have as a matter of fact been applied against sexual minorities to facilitate arbitrary arrests and detention, deprivation of life as well as other forms of state-sponsored homophobia such as public statements by leaders that instigate violence and human rights violations of LGBT individuals by state actors and the general population.

In 2011, eight men in Sierra Leone were arrested at a party in Freetown after the neighbours notified the police as to their sexual orientation. They were charged with “disorderly conduct” which charge was later dropped. In July 2005 Victor Juliet Mukasa and Yvonne Oyo, two female to male (FTM) transgender individuals in Uganda were arbitrarily arrested then detained subjected to humiliating experiences, sexual and physical violence and degrading treatment at the hands of the police. They successfully filed suit¹⁴⁸ against the state in 2008 for unlawful interference with privacy, unlawful search of premises, unlawful arrest and detention, cruel inhuman and degrading treatment and violation of the right to property¹⁴⁹. On 20 May 2010 Tiwonge Chimbalanga and Steven Monjenga, a Malawian gay couple, were convicted on charges of

¹⁴⁴ The New King James Version Bible, Romans 1:26-28.

¹⁴⁵ Penal Code of Liberia.

¹⁴⁶ Human Rights Watch, 2008, p. 3.

¹⁴⁷ See <http://nationalpress.typepad.com/files/bill-no-18-anti-homosexuality-bill-2009.pdf>.

¹⁴⁸ *Victor Juliet Mukasa and Yvonne Oyo v Attorney General* [2008], Misc. Cause No. 24/06 (UgHC).

¹⁴⁹ *Ibidem*.

sodomy and sentenced to a fourteen year jail term. It took intervention by the UN Secretary-General, Ban Ki-moon for a presidential pardon on 20 May 2010¹⁵⁰. Other situations in Africa have had a less “positive” outcome. In Botswana in 1995, two men were arrested and convicted on sodomy. In 2006 in Cameroon, eleven men had spent more than one year in prison before seven of them were convicted on sodomy. One of the four that were released died shortly after as a result of the conditions of detention. In February 2008 in Senegal, nine men and one woman were arrested after photographs taken at a private gay wedding were published in a magazine. In May 2013, two men, Phil Mubiana and James Mwansa were arrested, subjected to anal examinations, poor detention conditions, forced to make confessions and charged with committing homosexual acts, punishable by up to fourteen years in jail¹⁵¹.

Political leaders in Africa have relied upon the existence of these laws as well as their religious disposition as an excuse for inflammatory, discriminatory and inciting remarks against LGBT individuals in their and other countries. In East Africa, former President Moi of Kenya referred to homosexuality as a scourge that is against African tradition and biblical teachings¹⁵². William Ruto, Kenya’s current Vice-President equated homosexuals to dogs in February 2013¹⁵³. Current President of Uganda Yoweri Museveni has more recently expressed that “our society has few homosexuals who are generally regarded as deviants” and went further to deny any discrimination, killings or marginalisation of homosexuals¹⁵⁴. He had in 1999 described homosexuality as abominable and stated that all homosexuals should be arrested¹⁵⁵. In West Africa Nigerian political leaders particularly former President Obasanjo have not been short of ways to express homophobic remarks echoing those of the former Kenyan President qualifying homosexuality as not

¹⁵⁰ “Malawi Frees Jailed Gay Couple”, in *The Guardian*, 29 May 2010, available at <http://www.guardian.co.uk/world/2010/may/29/malawi-frees-jailed-gay-couple>.

¹⁵¹ See <http://www.amnesty.org/en/news/zambia-urged-release-two-men-charged-same-sex-sexual-conduct-2013-05-08>.

¹⁵² “Moi Condemns Gays”, in *BBC News*, 30 September 1999, available at <http://news.bbc.co.uk/2/hi/africa/461626.stm>.

¹⁵³ “A Letter from the Gay and Lesbian Community to Uhuru Kenyatta and William Ruto”, available at <http://www.africanseer.com/news/african-news/kenya-news/252138-a-letter-from-the-gay-and-lesbian-community-to-uhuru-kenyatta-and-william-ruto.html>.

¹⁵⁴ “Museveni Speaks Out on Homosexuality”, in *New Vision*, 16 May 2013, available at <http://www.newvision.co.ug/news/640814-museveni-speaks-out-on-homosexuality.html>.

¹⁵⁵ Epprecht, 2010.

just ungodly but unAfrican¹⁵⁶. The late President John Atta Mills of Africa said, “I, as President, will never initiate or support any attempt to legalise homosexuality in Ghana¹⁵⁷.” In the South, President Robert Mugabe of Zimbabwe infamously described homosexuals as “worse than pigs and dogs.” In Gambia President Yahya Jammeh gave gays twenty four hours to leave the country, stating that homosexuality is sinful and immoral and would not be tolerated. In pardoning the two men arrested and convicted in Malawi, the then President Bingu wa Mutharika stated that homosexuality is a “crime against our culture, our religion and our laws [...]”¹⁵⁸.

Meanwhile in the global discourse on human rights, recognition of same-sex relationships has been gaining ground. In 1994 member states of the United Nations agreed, albeit not unanimously, that the Universal Declaration of Human Rights is inclusive of sexual orientation. This was quickly followed by reference to other international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In 2006, a group of experts from all over the world including Africa put together the Yogyakarta Principles which were conceptualised as a guide to the application of international human rights law to the issues of sexual orientation and gender identity. In July 2011, the Human Rights Council adopted a resolution proposed by South Africa on human rights, sexual orientation and gender identity, the first of its kind, requesting the commissioning of a study by the United Nations Commissioner for Human Rights “documenting discriminatory laws, practices and acts of violence” and other human rights violations against LGBT individuals around the world as well as how international human rights law can be utilised to end it. The voting pattern for the resolution was reflective of the positions held by states that do not recognise sexual minorities. Of the 45 states that voted, no African state voted for the resolution. However more than half of the recorded votes against the resolution were African states namely, Angola, Djibouti, Uganda, Nigeria, Gabon, Ghana, Mauritania

¹⁵⁶ Ibidem.

¹⁵⁷ “Ghana Refuses to Grant Gays’ Rights Despite Aid Threat”, in *BBC News*, 2 November 2011, available at <http://www.bbc.co.uk/news/world-africa-15558769>.

¹⁵⁸ B. Bearak, “Malawi President Pardons Gay Couple”, in *The New York Times*, 29 May 2010, cited in VanKlinken & Gunda, 2012.

and Senegal. Of the three that abstained, Burkina Faso and Zambia were among them. Therefore even though countries like Gabon do not criminalise homosexuality in their legislation, their voting against the resolution is arguably reflective of their position on the matter as a state. The report by the OHCHR documented the types of violations LGBT individuals around the world are subjected to. It made several crucial recommendations such as accountability for the killings and the human rights violations based on sexual orientation and gender identity, sensitisation of law enforcement agencies and decriminalisation of adult consensual same-sex relations. It further recommended that the Human Rights Council (HRC) kept regularly informed about the violations and victimisation of LGBT individuals based on their sexual orientation as well as the creation of special procedures to continue to investigate and report the human rights violations. This was followed by a resolution on extra judicial execution¹⁵⁹ in November 2012 that, for the first time, made specific reference to sexual orientation and gender identity¹⁶⁰. The United Arab Emirates proposed an amendment to the resolution¹⁶¹ to have the reference to sexual orientation and gender identity removed. The proposed amendment was rejected. Most African countries abstained from voting¹⁶² whilst at least ten African countries voted for the amendment and at least ten did not vote at all. Noteworthy however, is that Rwanda and Malawi were among the countries that voted against the amendment. During the General Assembly discussions, Rwanda's state representative went so far as to state:

Mr President, whether the concept of "sexual orientation" is defined or not, whether or not we support the claims of people with a different sexual orientation, whether or not we approve of their sexual practices, we must deal with the urgency of these matters and recognise that these women and men, these human beings, continue to be the target of murder in many of our societies and are even more at risk than many of the other groups listed. [...]

¹⁵⁹ UNGA, Session 67, Third Committee, Agenda Item 69 (b), "Extrajudicial, Summary or Arbitrary Executions" (9 November 2012), UN Doc. A/C.3/67/L.36, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/C.3/67/L.36.

¹⁶⁰ *Ibidem*, para. 6 (b).

¹⁶¹ UNGA, Session 67, Third Committee, Agenda Item 69 (b), "Extrajudicial, Summary or Arbitrary Executions", amendment to Draft Resolution A/C.3/67/L.36 (16 November 2012), UN Doc. A/C.3/67/L.68, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/C.3/67/L.68.

¹⁶² Vote on removal of SOGI (Amendment L.68), available at http://www.ighrc.org/sites/default/files/vote_sogi.pdf.

Believe me, Sir that a human group does not need to be legally defined to be the victim of execution or massacre, since those who target their members have previously defined them¹⁶³.

Whilst refraining from reading too much into this one incident, it could be a reason for the optimistic presumption that Malawi could follow Rwanda's lead on the decriminalisation of homosexuality.

The passing of the resolution on extra judicial killings was followed by regional conferences that culminated in an international conference hosted by South Africa and Norway and held in Oslo on 15 and 16 April on human rights, sexual orientation and gender identity¹⁶⁴. During the conference the commissioned report by the OHCHR as well as the outcomes from the regional meetings leading up to the Oslo Conference were presented. The report from the Africa region highlighted some positive elements as regards the discourse on human rights and sexual minorities in various African countries. Aside from Rwanda's withdrawal of legislation to criminalise homosexuality, other cited examples include the progressive employment acts of Botswana, Zimbabwe, Mozambique and South Africa which set standards for non-discrimination on the basis of sexual orientation, impartial judiciary of Uganda and the listing of sexual orientation as a ground for the protection of the right to privacy in Zimbabwe¹⁶⁵. The report also made several crucial recommendations to African states such as to comply with international human rights law as regards sexual orientation and gender identities. It also made a few recommendations to the Human Rights Council such as the implementation and address of the OHCHR report¹⁶⁶.

Regionally, in 1963 the Organisation of African Unity was established as a pan-African initiative to mend the continent following the horrors of colonisation and to tackle problems that plagued Africa thereafter¹⁶⁷. It was concerned more with "socio-economic development, territorial integrity and state sovereignty than it was with human rights protection and as such placed great emphasis, which emphasis still applies, on the

¹⁶³ "UN SOGI Panel-backgrounder", available at <http://arc-international.net/global-advocacy/human-rights-council/hrc19/sogi-panel-backgrounder>.

¹⁶⁴ Co-chairs' Summary of Conclusions, International Conference on Human Rights, Sexual Orientation and Gender Identity, Oslo, 15-16 April 2013, available at <http://www.hrsogi.org/>.

¹⁶⁵ AMSHeR, 2013.

¹⁶⁶ Ibidem.

¹⁶⁷ Adejo, 2001, pp. 119-141.

principle of non-interference with states' internal affairs. The African Charter on Human and Peoples' Rights was adopted on 28 June 1981 by the OAU (now the African Union, AU) and came into force on 21 October 1986¹⁶⁸. The Charter was envisaged as a regional human rights instrument for the recognition of individual rights, peoples' rights¹⁶⁹ and their social, cultural, economic as well as civil political rights. The Charter mimics the provisions in existing international human rights instruments particularly the UDHR, ICCPR and ICESCR but it is unique in its recognition of peoples' rights, its imposition of duties on both states and individuals and of particular relevance to this thesis, its reference to tradition, culture and traditional values.

The Preamble of the Charter states that the African member states in agreeing to the Charter, "take into consideration the virtues of their historical tradition and the values of African civilisation which should inspire and characterise their reflection on the concept of human and peoples' rights [...]". Article 17 (3) provides that "the promotion and protection of morals and traditional values recognised by the community shall be the duty of the state." As regards the duties of the individual, Article 27 (2) provides that "individual rights and freedoms are to be exercised with due regard to the rights of others, common interest, collective security and morality." Article 29 (7) goes further to provide that "individuals have the duty to preserve and strengthen positive African cultural values [...] in the spirit of tolerance [...] and to contribute to the promotion of the moral wellbeing of society." Whereas there is no express mention of sexual orientation as protected grounds, it is presumed to be included in the open ended provisions of Article 2 which provides that "there shall be no distinction in the enjoyment of rights and freedoms by individuals on grounds such as sex, race, gender or other status."

The Charter established the African Commission on Human and Peoples' Rights (ACHPR) as a supervisory mechanism to oversee the promotion, protection and interpretation of the rights enshrined in the Charter¹⁷⁰. The African Commission is housed in Gambia, a state that criminalises homosexuality under Article 144 of its criminal code

¹⁶⁸ Ineichen & Starrenburg, 2012, p. 32.

¹⁶⁹ This stemmed from the recognition of the impact of colonisation on the African people as made evident in the Preamble of the Charter and Articles 19 to 21 of the same.

¹⁷⁰ Ineichen & Starrenburg, 2012, p. 7.

making it punishable by imprisonment of up to 14 years. Until May 2006, there has been a distinct absence of formal interaction at the Commission on issues affecting LGBT individuals in Africa, however this could change given the increased NGO presence, which have persistently sought increased involvement by the Commission¹⁷¹.

Aside from those mentioned in the (African) Oslo Conference report, there have been gains on the continent such as the unprecedented inclusion of express provisions against discrimination based on sexual orientation in the South African Constitution: the first of its kind on the continent. Followed by the landmark South African case of *National Coalition for Gay and Lesbian Equality v. Minister of Justice*¹⁷² of 9 October 1998 in which the Constitutional Court of South Africa upheld the ruling of the High Court that the sodomy laws were unconstitutional and invalid. This was a landmark case in African jurisprudence because it directly challenged the inequality and stripping of human dignity that is the result of sodomy laws. Whereas the *National Coalition for Gay and Lesbian Equality v. Minister of Justice* South African case examined the restriction of rights presented by sodomy laws guided by three criteria also embodied in the Siracusa Principles. Weighing the issue of regulating morality, the dissenting judge in the case observed that “[...] in a democratic society it is not reasonably justifiable to make an activity criminal because a segment, or even a majority, of the citizenry consider it to be unacceptable.” However, this case is the exception rather than the rule.

The socio-political as well as the religious attitude towards same-sex relation has on the most part led to the application of legal moralism. Legal moralism is defined as “the immorality of an act of type A is a sufficient reason for the criminalization of A, even if A does not cause someone to be harmed.” In this regard A represents same-sex relations. In contrast to the aforementioned South African case, the Botswana Court of Appeal in *Kanane v. State*¹⁷³ in 2003 upheld the High Court’s ruling that sodomy laws do not violate the Botswana Constitution. The Court went further to state that,

while courts can perhaps not be dictated to by public opinion, the courts would

¹⁷¹ Ndashe, 2011.

¹⁷² [1998] 6 BCLR 726 (SACC).

¹⁷³ [2003] 2 BLR 64 (CA).

be loath to fly in the face of public opinion, especially if expressed through legislation passed by those elected by the public to represent them in the legislature [...]. The public interest must therefore always be a factor in the court's consideration of legislation particularly where such legislation reflects a public concern.

The Zimbabwean case of *Banana v. State*¹⁷⁴ of 2000, the Supreme Court upheld the ruling of the High Court, and maintained that the common law crime of sodomy was not unconstitutional. They further noted that, "this court, lacking the democratic credentials of a properly elected parliament, should strain to place a sexually liberal interpretation on the Constitution of a country whose social norms and values in such matters tend to be conservative."

In passing the sentence, Magistrate Nyakwawa Usiwa, the presiding judge in the 2010 Malawian case of Steven Monjeza and Tiwonge Chimbalanga (who were later given a presidential pardon) stated: "I will give you a [...] sentence so that the public [will] be protected from people like you, so that we are not tempted to emulate this horrendous example¹⁷⁵."

Therefore judging from the discourse in Africa today, individuals identities as LGBT are still largely viewed as products of western import. As such, despite the existence of homosexuals within the continent, ironically, most African states have set up their political and social structures in a manner that excludes homosexuals from the status of citizenry and bracketed as an alien other, recognition of whom, is seemingly believed to echo the imperialism and cultural genocide of colonialism and therefore perceived as a threat to "African traditional values." What is continuously evident is the created linkages between cultural relativism and legal moralism to the detriment of individuals that do not subscribe to normative paradigms. The irony is presented through the fact that this "colonial inspired scripts have been recrafted by Africans ostensibly concerned with independent self-definition or ennobling views of Africa¹⁷⁶."

¹⁷⁴ [2000] 4 LRC 621 (ZSC).

¹⁷⁵ *The Guardian*, 9 May 2010, available at <http://www.guardian.co.uk/world/2010/may/29/malawi-frees-jailed-gay-couple>.

¹⁷⁶ Lewis, 2011.

8.

EMERGING CROSS-CUTTING ISSUES

In evaluating the different eras from whence the concept of Africa's traditional values particularly in regard to sexuality and sexual orientation are articulated, there seem to be several emerging issues four of which will have a history of re-emergence through the three periods referred to in this thesis.

The first emerging issue is the hegemony applied to discussions on sexuality in Africa. In this context hegemony has been evident in two ways. The first is through the perceived heterosexism of the continent. The second is through the way in which the discourse on homosexuality in historic as well as in contemporary Africa has been constructed in a manner that mirrors the discourse in the global North.

Modern day scholarship and anthropology, this thesis included, discuss sexuality in Africa within the paradigms of Africa's colonial past which has evolved into a benchmark for comparisons between "then" and "now" as well as between "here" and "there." "[...] occidental, colonial, western centric, imperial and neo colonial paradigms are so entrenched in knowledge, production and popular culture that they influence the most seemingly progressive, compelling or disinterested accounts¹⁷⁷." The discourse on homosexuality in Africa has evolved over time from a negative projection based heavily on race and the perceived ethnographic differences to one that creates a symbiosis between homosexuality as an identity within and without Africa¹⁷⁸. Some scholars have argued that this is compounded by the fact that historical as well as modern day accounts of sexuality in Africa,

¹⁷⁷ Ibidem.

¹⁷⁸ Oloruntoba-Oju, 2011, p. 2.

particularly non-heteronormative sexuality, emanate largely from “outsider narratives¹⁷⁹.” Although contemporary scholarship has even gone so far as to highlight and correct the various misperceptions perpetuated through colonialism and presented as truth, the way in which this discourse is evolving continues to emulate the discourse in the “west.” Therefore the advances made in western discourse have become goals that the LGBT communities in Africa strive for and yearn to have replicated on the continent constituting what Dennis Altman refers to as “the internationalization of gay identities¹⁸⁰.”

Historically, sex and sexuality were not widely discussed within African communities as they were considered to be deeply private and as such not typically held as open discussions. Modern day Africa reflects a continuum of this attitude as regards discourse on sex and sexuality within the continent. As a topic, it has been subject to notable evasiveness be it in the education institutions, within African scholarship or as brought up by African leadership. Particularly in contexts that are not restricted to heterosexual normative sexuality. Oft-times existing discourse emanating from Africa scholars, media and leadership has taken on a one dimensional approach when conceptualising sexuality, that outrightly dismisses the plurality embedded therein, therefore constructing it within singular normative parameters and perpetuating the notion of an “African sexuality” which by and large is portrayed as heterosexual¹⁸¹. The discourse that appears to be inclusive of non-heteronormative sexualities has so far been typically fleeting and confined to the paradigms of health in particular, the prevalence of Artificial Immuno-Deficiency Syndrome (AIDS) within the continent. This is largely attributable to initial “scientific conclusions” that AIDS and the Human Immunodeficiency Virus (HIV) were a “gay disease¹⁸².” In Africa, even within this construct there is an apparent oversimplification as regards non-heteronormative sexualities. Therefore although there may be an acknowledgement of men that have sex with men (MSM), this demography has been constructed as more of a “situational” occurrence i.e. among prison inmates. As such, ignoring

¹⁷⁹ Ibidem, p. 3.

¹⁸⁰ Altman, 2001, p. 20.

¹⁸¹ Desai, 2001, p. 141.

¹⁸² University of Pennsylvania – African Studies Centre, “AIDS in Africa”, available at http://www.africa.upenn.edu/Articles_Gen/aids_afr.html.

the demography that identifies not just as MSM but rather more definitively as homosexual. In the instances that individuals who identify as homosexual are acknowledged in this discourse, they are identified as “the problem” and cited as the reason for the high prevalence of HIV whilst simultaneously negating the role the hostile environment plays¹⁸³. This approach is reminiscent of the attitude in pre-colonial Africa towards sexuality in which the concept of “sexual identities” was non-existent at the time which could perhaps explain the seeming community indifference at worst and in the instances in which there was a recorded inclusion of seeming homosexual conduct, it was seen to be as a phase or as part of an objective (such as a community’s religious beliefs) which ultimately built up to a more normative end.

Secondly, as mentioned in earlier chapters of this thesis, recorded history and research on (homo)sexuality in Africa being largely “outsider narratives,” antagonists continue to argue that there is a very real possibility of certain elements being lost in translation or otherwise misinterpreted. Oloruntoba-Oju¹⁸⁴ insistently refers to existing scholarship that proposes the existence of homosexuality in pre-colonial Africa, as “outsider narratives” that “bear little resemblance to the realities as perceived and expressed by those living close to the narrated situations” summed up as “colonial continuities” whose contents are “fictive representations by Africans long after colonial contact that are frequently interpreted as furtive pointers to a pre-colonial sexuality condition amongst Africans¹⁸⁵.” There is a strong likelihood that Africans in contemporary Africa may empathise with this argument and in fact hail it as a truer reflection of the continental recollection. Whereas this thesis substantially disagrees with Oloruntoba-Oju’s position, he raises a few valiant points regarding the questions that arise when considering the legitimacy of the content of research into African sexualities which research continues to evolve but still relies heavily on records and anthropology conducted by Europeans in an era of exploitation and oppression¹⁸⁶. Therefore on one hand it could be that the term and practice of *Yan daudu* in Nigeria were misinterpreted by non-African

¹⁸³ DeCapua, 2011.

¹⁸⁴ Oloruntoba-Oju, 2011.

¹⁸⁵ Ibidem, p. 4.

¹⁸⁶ Tamale, 2011, p. 14.

scholars as alleged by Oloruntoba-Oju¹⁸⁷? Or could it be that he as well as other African scholars such as Ifi Amadiume are correctly criticised for assuming no sexual correlation to cultural same-sex marriage and other non-heteronormative practices?¹⁸⁸ That is not to say however that just because the narratives emanate from non-African standpoints, they are absolutely incorrect because on the contrary these narratives can and have proved to be relevant and useful to African contexts¹⁸⁹. Rather, that there being no absolutes, due consideration should be given to the possibility of some of the historically recorded observations as partially influenced by the then “observers” own cultural backgrounds because the scale will always be tipped for lack of time machines and or any indigenous Africans present during the research period that might refute the anthropology.

This brings us to the third emerging concept of the mythical “unAfrican homosexual.” The myth advocated by some African scholarship, religious as well as political leaders alike, is that homosexuality is a “scourge” of the global North imported to Africa through colonisation. This concept appears to have transcended the realms of myth to become a widely categorised as “fact.” This has been widely discussed from different angles with most scholarship agreeing that the conceptualisation or at least terminology of the identity of “homosexual” may indeed be an import having originated in Germany. The difference between the proponents and antagonists is the debate about whether or not the substance of homosexual identity and the interpretation of seeming non-heteronormative conduct suffice as indicators that preceded colonialism in Africa¹⁹⁰. Whereas it may be notable that most documentation of pre-colonial homosexual conduct in Africa indeed emanated from “outsider narratives,” so did the legislated and religious-linked homophobia. Yet incidentally, the attitude on the continent reflects an ownership of the latter over the former. Whether or not the historical records of the existence, indifference to and in some instances inclusion of homosexual conduct in pre-colonial Africa are accurate, it begs the question of whether the negative social attitude and the regulatory attention given to the discourse in contemporary Africa can

¹⁸⁷ Oloruntoba-Oju, 2011, p. 16.

¹⁸⁸ Desai, 2001, p. 145.

¹⁸⁹ Tamale, 2011, pp. 25-26.

¹⁹⁰ Supra 36.

be said to be intrinsic to “African culture.” There are a lot of theories and speculation about why the concept of homosexuality as “unAfrican” has persisted to modern day. Why is it that Africans on the continent so readily relate to the indoctrinated concept of African as natural and therefore homosexual being “unnatural” as unAfrican? Perhaps the answer lies with the same reason of why modern day religions have taken firm root in Africa whilst African traditional religions continue to become extinct. People typically relate to their earliest memory whether their own or passed down, to inform their knowledge of their histories. In Africa’s case, foreign religion, and legislation enjoyed an advantage over African tradition because the former was not documented up until the mid-18th century and existing documentation emanated from “non-African” accounts. Therefore the only accounts available as regards Africa’s history are “outsider narratives” of which depictions of the “African sexuality” and religious practices as immoral and hypersexual but ultimately heterosexual, long preceded any positive depictions of the same¹⁹¹. Kapano Ratele explains this as “reductive cultural discourse” which are “[...] those practices associated with culture which are exclusionary and averse to complexity and well served by patriarchal and tribalistic ideologies” on the presumption of culture as “static or fixed” with the objective of “preserving group identity¹⁹².” Indeed the notion of “group identity” has been used as a tool for politics in Africa in which “familial scripts and the invention of nations as biological families” play a central role and therefore the sense of belonging is derived from the “sexual roles” assigned to citizenry and which if said roles are not adhered to the non-abiding citizenry becomes “unnatural, westernised and traitorous¹⁹³.”

The fourth emerging issue is that of linkages in discourse between sexual orientation and constructions of gender and gender roles. In discussing sexualities in Africa, oft-times these are perceived and portrayed as two separate discourses when they are very much interlinked. To begin with, the “familial script” that has been ingrained by antagonists to the plurality of sexualities in Africa is centred not only on perceptions of the “natural family” derived from reproduction,

¹⁹¹ Lewis, 2011, p. 208.

¹⁹² K. Ratele, “Native Chief and White Headmen: A Critical African Gender Analysis of Culture”, in *Agenda*, no. 72, 2007, pp. 65-76, cited in Lewis, 2011, p. 210.

¹⁹³ Lewis, 2011, p. 211.

but also from the roles based on gender that come with it. “People do not ‘belong’ to a gender. They live in a gender relations system which associates imbalances of power with natural sex differences. The Law has been a major actor, together with religion, custom, science in the building of a hierarchy, an imbalanced difference, between men and women¹⁹⁴.” These roles are normatively constructed such that the “man” is perceived as the head of the family (religion/community, etc.) and the more authoritative and dominating than and over the woman whose role is that of a caregiver and subsequently the “fairer, weaker” sex. So much so that even in most contemporary religious practices and beliefs particularly Christianity and Islam, the highest spiritual entity is referred to is the masculine. Historically and in contemporary Africa, this “gender relations system” has translated into “masculinist citizenship” and “masculinised ethnicity” which are effected through post-colonial mechanisms such as sodomy laws for instituting control and regulation both men and women’s bodies¹⁹⁵. These gender paradigms are so entrenched that most positions of power within the continent are occupied by men. Therefore if Frantz Fanon’s sentiments were to be applied in Africa, “homosexuality is associated with both racism and oppression on one hand and effeminacy on the other” making a particularly powerful tool used in a wider political agenda¹⁹⁶. Homosexuality is therefore perceived as a threat to these power structures which threat is neutralised through legislation and state-sponsored homophobia.

¹⁹⁴ Pizarro, 2012, p. 3.

¹⁹⁵ Lewis, 2011, p. 212.

¹⁹⁶ F. Fanon, *Black Skin, White Masks*. New York: Grove Press, 1967, cited in Desai, 2001, p. 147.

9.

CONCLUSION

No one can deny the persisting continuities of long traditions, sustained habitations, national languages, and cultural geographies, but there seems no reason except fear and prejudice to keep insisting on their separation and distinctiveness as if that was all human life was about.

(Edward Said, *Culture and Imperialism*¹⁹⁷)

Whilst nobody is negating the importance of tradition, culture and the values derived from them, modern day human rights discourse has revealed that not all traditional values have a positive impact. Some traditional practices have been shown to even be in conflict with internationally accepted human rights norms. The resolution proposes to draw a distinction between traditional values and traditional/cultural practice. To a degree, it is right in doing so to the extent that not all elements of tradition derive from cultural practice, however cultural practice plays a central role in defining a society's traditions which culture is oft-times also informed by among other things, the practiced religion of the given society. Tradition is a non-static concept defined by time periods and ranges beyond just traditional practices to religious values that manifest through legislative and judicial practice and social attitudes. When left open to interpretation, "tradition" has proven to be a dangerous tool that is used for the abuse of what essentially are human values as contained in human rights instruments and those are the values of dignity, freedom and of respect for humanity. "Traditional values could refer to almost anything so long as it is traditional"¹⁹⁸. What are commonly referred to as traditional values especially as

¹⁹⁷ Quoted in Altman, 2001.

¹⁹⁸ Jernow, 2012.

regards “perceived morality and the regulation of social conduct” are values rooted in and deeply influenced by religion introduced before and during the colonial period and maintained thereafter through inculturation.

As Chapter 6 and 7 have shown, these values have historically as well as currently been shown to work against non-heteronormative identities and gender constructions. Therefore the unanswered questions still remain “whose traditional values?” and “what traditional period would be applicable to the resolution proposed by Russia?” Is the interpreted intention of the resolution to bolster religious values or traditional values which if objectively applied would include practices and cultures that are recorded as being inclusive of non-heteronormative identities before the mainstream religions took root in societies such as Africa? In any case who decides which one applies?

Currently, Russia which is the sponsor of the resolution, has a legislation that prohibits “homosexual propaganda” which provides for administrative or criminal sanctions to ban the dissemination of any information that could make homosexuality seem attractive or promote the “distorted perception that traditional and non-traditional sexual relations are equal or force them to become interested in such relations¹⁹⁹.”

The motive behind the resolution can only be deemed questionable and as intentionally targeted towards the discrimination and exclusion of LGBT persons. The resolution appears to appeal mostly to countries that apply the “cultural relativism” argument as justification for the violation of the human rights of LGBT persons. This is evident not just in Russia’s national treatment of LGBT, which echoes those of its Africa counterparts, but also in the voting patterns regarding SOGI issues within the United Nations system. The resolution echoes the words of the Preamble of the African Charter, an instrument that was created post-colonisation with references to “African civilisation” which was historically conditioned through colonialism to emulate that of Europe in that time period.

It is a curious thing that despite the “unfriendly” and “exploitative” conditions under which these two religions were mainstreamed in Africa the level and magnitude of their rigid interpretation is still

¹⁹⁹ “Putin Signs ‘Blasphemy and Gay Propaganda Bills’”, 2013.

very evident in Africa today. It has been argued that religion is the comfort of the poor therefore by proxy because Africa has the highest number of populations living under the poverty line, all the religious values particularly the seemingly rigid ones are so tightly embraced. This however does not seem a satisfactory justification because the same could have been said of a country such as India which like Africa came under colonial rule and also like Africa has astonishingly high levels of poverty in its population. Yet, unlike Africa not only has India maintained its traditional religions on the most part, but they also recently decriminalised homosexuality in their penal code that much like most African states today, was a colonial inheritance for decades. This would imply that the difference lays in religion. This thesis did not include research on traditional religions in India and as such cannot authoritatively speak to the extent to which they may have been inclusive of non-heteronormative identities or practices but what has been recorded about Africa and its traditional religious practices, has to a considerable degree inferred inclusion of non-heteronormative behaviour. Another curious factor is that unlike the industrial hubs and metropolis, it could be argued that most of the deep rural areas of African states may have historically had little or no direct contact with “western people” or culture. Something that may still be true even in present day. Yet it is in this particular demography that religion seems most deeply rooted and the attitudes towards non-conforming identities with it. It is this demography that in modern day somehow epitomises the concept of “traditional.” That said, this argument could justifiably be countered with the fact that the adopted religions were spread by indigenous converts just like certain elements of “western culture” like dress. Also, what can be said about the non-conforming identities in that same demography who just like the rest of his/her community has had little or no contact with “western culture” through media or other means and will still intrinsically identify as non-conforming, which identity is silenced by the individual’s awareness or sense of the stigma they are likely to face should it be discovered that they are “different”?

The proposed resolution was right in noting “the important role of family, community, society and educational institutions in upholding and transmitting these values, which contributes to promoting respect for human rights and increasing their acceptance at the grass roots

[...] ²⁰⁰.” However in considering traditional values, due regard should be given to the questions, whose tradition? whose values?, and the way in which the concept of tradition has been shaped over different periods. When discussing Africa and its traditional values, the answer to these questions is intrinsically linked to its historical progression. The portrayed values of Africa pre-colonialism undoubtedly changed during its colonisation which is true also for post-colonial Africa. This process varied from country to country and whereas not negating the errors applied in ethnography that have oft-times regarded Africa as a singular rather than a collective, the concept of tradition as experienced in most African countries echoes similarities that may warrant or at least make a strong case for a degree of categorisation as “African.” The very understanding of the concepts of family, community, society and even education were altered and adapted in the process. This has subsequently shaped modern day Africa’s perception of its traditional values projected with immense clarity yet sometimes indistinguishable from the points at which the lines became blurred.

The impact the resolution will have on Africa’s LGBT individuals can therefore be presumed not just from the existing attitudes on the continent shrouded in cultural relativity but also drawn from the examples set by the sponsor of the resolution, Russia²⁰¹. The language of the resolution couches traditional values as a sensitivity to elements of culture and tradition. Without explaining or at the very least defining what those values are, the trend of discrimination and victimisation of individuals based on their sexual orientation is bound to continue. In a world experiencing globalisation and striving for equality and respect for human dignity, including their traditions and beliefs, in so far as they do not contradict globally accepted human rights standards. When future generations look back in time, especially for a continent such as Africa that experienced a mass negation of its sovereign continental identity through colonisation, it should be reflective of traditions that uphold human rights not just as an ideal but as a lived reality of the values its continental citizenry hold. The African generations of the

²⁰⁰ UNGA, Session 16, Agenda Item 3, 16/ “Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind” (18 March 2011), Res. A/HRC/16/L.6/Rev.

²⁰¹ Article 19, “Traditional Values? Attempts to Censor Sexuality. Homosexual Propaganda Bans, Freedom of Expression and Equality”, 2013.

future should be able to look back upon traditional values that promote understanding, inclusivity and respect for other human beings in a culture whose ultimate traditional value is that of humanity. Therefore instead of talking about “traditional values,” the focus in the context of human rights discourse should instead be on human values. Not to negate tradition and culture but rather to prioritise the collective individuals that comprise the societies in which the different traditions and cultures are relevant. This thesis agrees with Allison Jernow’s conclusion in her article, “Morality Tales in Comparative Jurisprudence: What the Law Says about Sex” in which she says that “the rights to privacy trumps the community right not to be offended by the idea of what people might be doing behind closed doors²⁰².” Likewise in the context of this resolution, human rights trump tradition and/or culture and traditional values that contradict established human rights standards.

As Africans, we all have infinite potential. We stand for an African revolution which encompasses the demand for a re-imagination of our lives outside neo colonial categories of identities and power. We are specifically committed to the transformation of the politics of sexuality in our contexts. As long as African LGBT people are oppressed, the whole of Africa is oppressed²⁰³.

* At the time of publishing, Nigeria’s Same-Sex Marriage Prohibition Bill had been signed into law on 7 January 2014²⁰⁴ to become the Same-Sex Marriage Prohibition Act. Uganda’s Anti Homosexuality Bill was signed into law on 24 February 2014²⁰⁵ to become the Anti Homosexuality Act.

²⁰² Jernow, 2011, p. 25.

²⁰³ African LGBTI Declaration, Nairobi, Kenya, 18 April 2010, in Tamale, 2011, p. 182.

²⁰⁴ “Nigeria: Jonathan Secretly Signs Anti-Gay Bill into Law”, 2014.

²⁰⁵ “Uganda’s President Museveni Signs Controversial Anti Gay Bill into Law’, 2014.

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