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Church and the forbidden: An analysis of how homosexuality is perceived in an African context with the influence of the church in relation to anti-homosexuality laws

This dissertation is submitted in fulfilment of the requirements for the degree of Master of Laws

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I, Samukelisiwe Mbuthuma (214558646), declare that:

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> Courage doesn't always roar. Sometimes courage is the quiet voice at the end of the day saying, "I will try again tomorrow."' – Mary Anne Radmacher, American author and artist

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> 'No one who achieves success does so without acknowledging the help of others. The wise and confident acknowledge this help with gratitude.' – Alfred North Whitehead

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ABSTRACT

In many African countries, homosexuality is still illegal. Not only is homosexuality unacceptable in the legal sense, but it is also socially unaccepted. The rejection of homosexuality and same-sex marriages is based on the notion that homosexuality is an un-African concept and does not fit within the morals and values of the quintessential African family. The trail of the prohibition of homosexuality and same-sex sexual relations can be traced from the Christian Bible, where some scriptures record the destruction of Sodom and Gomorrah because of homosexuality (Genesis 19).

More scriptures in the New Testament of the Bible prohibit homosexuality (Romans 1:26–7, 1 Corinthians 6:9 and 1 Timothy 1:10). This thesis argues that the religious prohibition of homosexuality influenced the social and political perception of morality and the making of laws which respond to the needs of the general public. As Christianity became the main religion in Rome, it influenced the making of laws in general and criminal laws, especially. These laws included the criminalisation of sodomy. The same could be said about the English laws, where at some stage some offences such as sodomy and bestiality, fell under the jurisdiction of the Church Courts.

The prohibition of homosexuality gave birth to statutes such as the Buggery Act 1533 in England. This law made sodomy a capital offence punishable in English law. It was subsequently exported to many British colonies during the British colony in Africa, where some of the worst anti-gay laws still exist to date. These laws have proven to be very difficult to deconstruct as they have become part and parcel of the culture and social construct of the people, and have partly informed the society's manner in which they perceive specific social issues such as homosexuality.

The list of some British colonies in Africa that inherited versions of this law include Kenya and Uganda, which are the focus of this research. Although countries such as these two have yet to consider decriminalising homosexual acts and same-sex marriage, Botswana is among the most recent countries in Africa to decriminalise homosexual acts, joining South Africa in offering equality to the Lesbian, Gay, Bisexual, Transgender, Queer, Intersexual, Asexual (LGBTQIA) community.

The court in the case of *LM v Attorney General* was the landmark case which decriminalised homosexual acts in Botswana. On the other hand, Kenya recently upheld similar provisions in the case of *EG v Attorney General.* Parliament is accountable to the public, and it is the public and its opinion that influence laws that become effective in the country. What then influences public opinion? This thesis explores the influence of Christianity that was imported into Africa through missionaries in the colonial era. Furthermore, it offers that Christianity has been the main contributor to the societal, and therefore legal rejection of the LGBTQIA community and their fundamental human rights.

Keywords: Africa; Anti-homosexuality Laws; Anti-sodomy laws; Christianity; Homosexuality; Lesbian, Gay, Bisexual, Transgender, Queer, Intersexual, Asexual (LGBTQIA); Sodomy; Un-African.

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CHAPTER 1

INTRODUCTION

I BACKGROUND

In many African countries, homosexuality is still illegal. Not only is homosexuality unacceptable in the legal sense but it is also socially unacceptable. The unacceptability of homosexuality and same-sex marriage is based on the notion of homosexuality being an un-African concept and not fitting in within the morals and values of the quintessential African family.[1]

During the British colony in Africa, many British cultures and laws were introduced and imposed on Asian and African countries.[2] As a result, many African countries adopted the British language (English) and most adopted colonial laws. Part of these laws that were adopted by these countries are still part of some African countries' laws and have proven very difficult to deconstruct as they have become part and parcel of the culture and social construct of the people, and have partly informed the people's manner in which they perceive certain societal issues, such as homosexuality.[3]

In Britain, in the year 1533, King Henry VIII passed the 'The Buggery Act 1533' (which became permanent law in 1541) which made sodomy a capital offence punishable for the first time in English law.[4] For the punishment of this offence, 25 Henry VIII, Chapter 6 (1533–1534) was enacted, although there was yet a sufficient punishment for the offence of buggery committed with man or an animal, the offence of buggery would, however, be

[1] Marc Eprrecht *Hungochani: The History of a Dissident Sexuality in Southern Africa* (2004) 5.
[2] Enze Han & Joseph O'Mahoney 'How Britain's colonial legacy still affects LGBT politics around the world' 15 May 2018, available at *https://theconversation.com/how-britains-colonial-legacy-still-affects-lgbt-politics-around-the-world-95799*, accessed on 25 June 2019.
[3] Edward P Antonio 'Homosexuality and African culture' in Paul Germond & Steve de Gruchy (eds) *Aliens in the Household of God: Homosexuality and Christian Faith in South Africa* (1997) 295.
[4] Michael Kirby 'The sodomy offence: England's least lovely criminal law export?' in Corinne Lennox & Matthew Waites (eds) *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth* (2013) 62–3.

deemed as a felony and the punishment thereof is death and losses and penalty of their material possessions.[5]

Thus, sodomy remained a punishable offence in Britain until the year 1861 (in which year the punishment of the death penalty of sodomy was abolished, however, the act of sodomy itself continued being a crime but punishable by imprisonment through the Offences against the Person Act of 1861).[6] This law was subsequently exported to all of the British colonies, where some of the worst anti-gay laws still exist today. The list of some British colonies in Africa that inherited versions of this law includes: Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Nigeria, Seychelles, Sierra Leone, Somalia, Swaziland, Sudan, Tanzania, Uganda, Zambia and Zimbabwe.[7]

The British anti-sodomy laws also made their way to India where it introduced section 377 of the Indian Penal Code (IPC) in 1861.[8] Enze Han and Joseph O'Mahoney[9] explain that IPC, along with the Queensland criminal code of 1899, was used as a 'model' for the legal systems in other British colonies around the world. They state that through its colonial administration, the British managed to impose and institutionalise a set of laws (that are now known as Penal Codes in many African countries) in its colonies that criminalised homosexual conduct.[10] Additionally, Colonial Model Office Code of 1930 which essentially was a colonial attempt to set standards of behaviour, both to reform the colonised and to protect the colonisers against moral lapses was also imposed. It was also the first colonial

[5] An Act for the Punishment of the Vice of Buggery. The Act provided that 'Forasmuch as there is not yet sufficient and condign punishment appointed and limited by the due course of the laws of this realm for the detestable and abominable vice of buggery committed with mankind or beast, it may therefore please the King's Highness, with the assent of his lords spiritual and temporal, and the commons of this present Parliament assembled, that it may be enacted by authority of the same: that the same offence be from henceforth adjudged felony, and such order and form of process therein to be used against the offenders, as in cases of felony at the common law. And that the offenders being hereof convict by verdict, confession, or outlawry, shall suffer such pains of death and losses, and penalties of their goods, chattels, debts, lands, tenements, and hereditaments as felons been accustomed to do, according to the order of the common laws of this realm. And that no person offending in any such offence shall be admitted to his clergy. And those justices of peace shall have power and authority within the limits of their commissions and jurisdictions to hear and determine the said offence as they use to do in cases of other felonies. This act is to endure till the last day of the next Parliament.'

[6] Michael Levy 'Gay rights movement' 20 June 2019, available at *https://www.britannica.com/topic/gay-rights-movement*, accessed on 25 June 2019.

[7] Carl Collision 'Kenya high court will not repeal anti-LGBT law' 24 May 2019, available at *https://mg.co.za/article/2019-05-24-kenya-high-court-will-not-repeal-anti-lgbt-law*, accessed on 24 June 2019.

[8] Maria Thomas & Isabella Steger 'In over 40 countries, laws against homosexuality are a lasting legacy of a British rule' 7 September 2018, available at *https://qz.com/india/1380947/section-377-the-former-british-colonies-with-laws-against-gay-people/*, accessed on 25 June 2019.

[9] Han & O'Mahoney op cit note 2.

[10] Ibid.

'sodomy law' integrated into African laws. Its influence widely spread across Asia, the Pacific Islands and Africa - almost everywhere the British imperial flag flew. Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Nigeria, Seychelles, Sierra Leone, Somalia, Swaziland, Sudan, Tanzania, Uganda, Zambia and Zimbabwe[11] are all examples of the British former colonies whose laws remain at the helm of the Buggery Act, despite their independence.

II PROBLEM STATEMENT

In 2011 BBC posited that Africa is the most homophobic continent on earth.[12] African countries have come a long way to achieve independence. However, they still have a long way to rid themselves of the stains that were left during colonisation. Examples of the current struggles include total economic independence and legal independence. The legal systems of many African countries resemble that of the English legal system. That is particularly true of countries such as, but not limited to: South Africa, Kenya, Ghana and Nigeria.[13] Laurence Gower believes that although African countries have changed their civil servants from black to white, the structure of their administration remains unchanged. Gower argues that this is most common in English-speaking Africa where the English law was applied without considering whether they were suitable for the local conditions.[14]

This is problematic since some African societies are living in countries that still implement colonial laws that do not suit their current needs or changing circumstances and climates of their communities. Thus, one of the problems focussed on in this study include the unchanged anti-homosexuality laws that infringe on the human rights of the Lesbian, Gay, Bisexual, Transgender, Queer, Intersexual, Asexual (LGBTQIA) community. This thesis will focus on Kenya and Uganda as examples of countries that still implement the colonial law. It is important to focus on these countries because Kenya's Supreme Court has recently made a ruling that the anti-homosexuality laws in Kenya are not unconstitutional, which means that homosexuality in Kenya remains illegal. Furthermore, Uganda has the

[11] Thomas & Steger op cit note 8.
[12] David Smith 'Why Africa Is the Most Homophobic Continent' *The Guardian online* 23 February 2014, available at *https://www.theguardian.com/world/2014/feb/23/africa-homophobia-uganda-anti-gay-law*, accessed on 24 November 2019.
[13] Sandra F Joireman 'Inherited legal systems and effective rule of law: Africa and the colonial legacy' (2001) 39(4) *The Journal of Modern African Studies* at 577.
[14] Laurence C B Gower *Independent Africa* (1967) 29.

harshest punishments for the offence of sodomy in Africa in terms of its Penal Code provisions. Uganda was also declared by BBC in 2011 as the worst place to be gay.[15] As an example of such laws, the anti-homosexuality provisions on the Penal Codes, case laws and current stance on homosexuality of Kenya and Uganda, follow:

(a) Kenya

In Kenya homosexuality is a crime punishable by law. According to sections 162, 163, and 165 of the Penal Code Act 81 of 1948, any person who has carnal knowledge with any other person or animal or allows anyone to have carnal knowledge of him is deemed guilty of a felony which is punishable imprisonment for a period of 14 years. Furthermore, the commission or procurement of, attempt to commit or to procure any act gross indecency by a man with another man in private or in public is deemed as a felony punishable by five years' imprisonment. The attempt to have the anti-homosexuality provisions struck down did not succeed as the court in the case of *EG &others v Attorney General*; *DKM & and others (Interested Parties)*; *Katiba Institute & another (Amicus Curiae)*.[16]

The court in this case examined the petitioners' contentions carefully and found that the intentions of the legislature and opinions of the public were well represented in the Constitution and the court did not find any reason to change that.[17] The court also found that the provisions in question (sections 162, 163, and 165) were not vague or unclear.[18] Furthermore the court found that the petitioners' failed to prove that their fundamental rights were violated or threatened by these provisions.[19] Therefore, the court found that it could not strike down the provisions as it found them to be constitutional.[20]

(b) Uganda

Uganda is one of the countries that bare the harshest punishments for sodomy. It also has a very high public disapproval rate for same-sex relations.[21] Section 145 of the 1950 Ugandan Penal Code is almost identical to section 162 of the Kenyan Penal Code as it also prohibits

[15] Smith op cit note 12.
[16] *EG & 7 others v Attorney General*; *DKM & 9 others (Interested Parties)*; *Katiba Institute & another (Amicus Curiae)* Petition No. 150 Of 2016 Consolidated with Petition No. 234 of 2016.
[17] Ibid paras 388–92, 395.
[18] Ibid para 278.
[19] Ibid paras 405–6.
[20] Ibid.
[21] Kapya Kaoma 'An African or un-African sexual identity? Religion, globalisation and sexual politics in sub-Saharan Africa' in Adriaan van Klinken & Ezra Chitando (eds) *Public Religion and the Politics of Homosexuality in Africa* (2016) 118.

and punishes commission of carnal knowledge or allowance of same with another person or animal. The difference is that the punishment in Uganda is imprisonment for life.[22] The attempt to have carnal knowledge of another (human being or animal) is punishment by imprisonment for seven years.[23] Section 148 of the Penal Code of Uganda is also almost identical to that of section 165 of the Penal Code of Kenya as it also deems it a felony for a male person to commit or procure or attempt to procure gross indecency, whether in public or private, with another male.[24] This felony is punishable by seven years imprisonment.[25]

In the high court case of *Frank Mugisha & others v Uganda Registration Services Bureau*[26] one of the main issues was whether the Uganda Registration Services Bureau (URSB) prejudiced the fundamental human rights of the applicants according to article 43[27] of the Constitution of Uganda. The URSB had refused to register Sexual Minorities Uganda (SMUG) under section 18 of the Companies Act of 2012 because it was found to be undesirable and un-registrable.[28] This was so because its Memorandum of Association indicated that because SMUG was to be formed to advocate for the rights and well-being of persons belonging to the LGBTQIA community, which persons are engaged in activities labelled criminal acts under the Penal Code Act.[29]

In its decision the court agreed that URSB had acted in the public interest by not allowing the registration of SMUG because indeed SMUG was formed with the intention of advancing, protecting, advocating for, and promoting the behaviours of a group that engages in homosexual practices that are against the Penal Code of Uganda.[30] The court further held

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[22] S 145 of the Penal Code provides that:
'Any person who—
(a) has carnal knowledge of any person against the order of nature;
(b) has carnal knowledge of an animal; or
(c) permits a male person to have carnal knowledge of him or her
against the order of nature, commits an offence and is liable to imprisonment for life.'

[23] S 146 of the 1950 Penal Code Act provides that: 'Any person who attempts to commit any of the offences specified in s 145 commits a felony and is liable to imprisonment for seven years.'

[24] S 148 provides that: 'Any person who, whether in public or in private, commits any act of gross indecency with another person or procures another person to commit any act of gross indecency with him or her or attempts to procure the commission of any such act by any person with himself or herself or with another person, whether in public or in private, commits an offence and is liable to imprisonment for seven years.'

[25] Ibid.

[26] *Frank Mugisha & others v Uganda Registration Services Bureau* Miscellaneous Cause No. 96 of 2016.

[27] Art 43(1) of the Constitution provides that whilst enjoying fundamental rights and freedoms, one must not prejudice the fundamental rights and freedoms of others or the public interest.

[28] *Frank Mugisha* supra note 26 para 5.

[29] Ibid para 12.

[30] Ibid para 32.

that its objective is to conform to the laws, values, norms and aspirations of the people of Uganda.[31] Homosexuality remains illegal in Uganda and punishable by the full extent of the law.

The Penal Codes of Kenya and Uganda are relevant in this research project because they are both very similar to the anti-sodomy laws that were promulgated in England as the offence of buggery as mentioned earlier in this chapter. These Penal Codes are as a result of colonialism that saw many British laws imported into British African colonies.[32]

Anti-homosexuality laws mean that being part of the LGBTQIA community is a crime punishable by law.[33] They further mean that the LGBTQIA community is prohibited from engaging in same-sex, same-sex relationships and marriages.[34] It is submitted that it also means that members of the LGBTQIA community cannot express their sexuality and sexual desire the way they want to without this being an offence. It is further submitted that this means that they do not have the freedom to be who they truly are in their own countries.

Furthermore, it is also submitted that they are compelled to hide their true identities for fear that they will be imprisoned or socially ostracised, abused or mistreated. Ultimately, this means that they cannot enjoy the freedom of human rights like heterosexual people can. The LGBTQIA community often argues that there are rights that do not apply to them, but apply to all others who are heterosexual.[35] These rights include the freedom to dignity, privacy, liberty, the right not to be discriminated against on the ground of sexual orientation, the right to access healthcare, the right to freedom and security of the person, rights to freedom of conscience, religion, belief and opinion, and the right not to be subjected to inhuman and degrading treatment or other such treatment.[36]

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[31] Ibid para 41.
[32] Han & O'Mahoney op cit note 2.
[33] This is seen by the anti-homosexuality laws which are scribed in the Penal Codes of the countries that still criminalise same-sex sex.
[34] Ibid.
[35] In the Botswana case of *LM v Attorney General* [2019] MAHGB-000591-16 para 6 and the Kenya case of *EG & 7 others v Attorney General*; *DKM & 9 others (Interested Parties)*; *Katiba Institute & another (Amicus Curiae)* supra note 16 para 242 the applicants/petitioners in these cases contended that their rights to freedom to dignity, privacy, liberty, the right not to be discriminated against on the ground of sexual orientation, the right to access healthcare, the right to freedom and security of the person, rights to freedom of conscience, religion, belief and opinion, and the right not to be subjected to inhuman and degrading treatment or other such treatment, were being violated.
[36] Ibid.

It is submitted that the denial of these fundamental human rights to the LGBTQIA community places them on an unequal footing to the rest of the members of society. These laws give an impression to the general society that it is acceptable to mistreat, rape, and abuse members of the LGBTQIA community because they are not equal to heterosexual people nor do they have the same rights as heterosexual citizens. It has been documented (as shown above in the issues faced in Kenya and Uganda and further in this research project) that the LGBTQIA community suffer mistreatment, abuse and corrective rape from society because those who are against homosexuality believe that they must be corrected in their way of life by any means necessary.

It is submitted that these laws are not the only influence on the social exclusion of the LGBTQIA community. In fact, the laws are also a by-product of a founding reason, which is the prohibition of sodomy by Christianity. It is argued that since Christianity played a part in influencing the punishment of laws such as sodomy in England, which informed the anti-homosexuality laws that eventually spread across British colonies, these laws became part and parcel of the culture and social construct of the people, and have partly informed the society's manner in which they perceive certain societal issues such as homosexuality.

(c) Biblical scriptures against homosexuality

The shunning and disassociation of members of the LGBTQIA community stems from the principle teachings of the Christian Bible that homosexuality is an abominable and punishable sin; that in fact, God destroyed cities because of that sin. The Christian attitude to homosexual practices inevitably begins with the story of the destruction of Sodom and Gomorrah referred to in the book of Genesis 19.[37] In Genesis 18:20 it can be read that the LORD told Abraham his plans to destroy Sodom and Gomorrah because of the accusations levelled against the cities. In Genesis 19 (with its heading being 'The Sinfulness of Sodom') the Bible makes mention of angels that were sent to destroy Sodom and Gomorrah because of the sin in that city which included homosexual activity.

The Bible continues that a resident of Sodom and Gomorrah took these angels into his house as guests for the night to protect them from the men of the city who wanted to have sex with them.[38]

[37] Derrick S Bailey *Homosexuality and the Western Christian Tradition* (1955) 1.
[38] Genesis 19:4–5 *The Good News Bible* Translation.

Leviticus 18:22 prescribes that it is an abomination for a male to have sexual relations with another male as he would with a woman. Leviticus 20:13 also prescribes that if a male lays with another as he would, a woman both would have committed an abomination. It further prescribes the punishment of death for the commission of this act.

In the New Testament Romans 1:26–7,[39] 1 Corinthians 6:9[40] and 1 Timothy 1:10,[41] also make mention of homosexuality as a sin. Romans 1:26–7 provides that evildoers dishonoured their bodies by disobeying God's truth by having same-sex intercourse with each other and by practicing idolatry. 1 Corinthians 6:9 lists those who partake in homosexual practices among those who are condemned and will not inherit the kingdom of God because of their sinful actions. 1 Timothy 1:10 also condemns sodomites and characterises those who practice homosexuality as being disobedient and sinful against the law of God. These scriptures give the background for the basis in which Christians believe that homosexuality is a sin.

It is submitted that because of the influence and rule of the church in medieval times, the views and opinions on morality of the church at the time also became the views and opinions of the general society. They also became the political views of the government which then eventually became part of the law. It is also submitted that the laws that were once known as anti-sodomy laws are now known as anti-homosexuality laws. These were the laws that were ultimately imported into Africa from the West through colonisation.

The Human Rights Watch in its article *This alien legacy: The origins of 'sodomy' laws in British colonialism socially, homosexuality* [42] documented the history of anti-homosexuality laws. It stated that these anti-sodomy laws were exported to British colonies

[39] 'For this reason God gave them up to dishonourable passions. Their women exchanged natural relations for unnatural, and the men in the same way gave up natural relations with women and were consumed with passion for one another, men committing shameless acts with men and receiving in their own bodies the due recompense for their error.'

[40] 'Do you know that wrongdoers will not inherit the kingdom of God? Do not be deceived! Fornicators, idolaters, adulterers, male prostitutes, sodomites, thieves, the greedy, drunkards, revilers, robbers – none of these will inherit the kingdom of God'

[41] 'Now we know that the law is good, if one uses it legitimately. This means understanding that the law is laid down not for the innocent but for the lawless and disobedient, for the godless and sinful, for the unholy and profane, for those who kill their father and mother, for murderers, fornicators, sodomites, slave traders, liars, perjurers, and whatever else is contrary to the sound teaching that conforms to the glorious gospel of the blessed God, which he entrusted to me.' Preceding and subsequent verses included to show context.

[42] Alok Gupta 'This alien legacy: The origins of "sodomy" laws in British colonialism socially, homosexuality' (2008), available at *https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism*, accessed on 08 October 2019 at 36.

and reinterpreted by their respective courts.[43] Socially, homosexuality is unacceptable because many believe that it is unnatural and sinful. Furthermore, as it is in the case of South Africa, although its laws are progressive and offer rights and protection to all people equally, the social response towards those laws has been underwhelming.[44]

South Africa still faces issues of corrective rape, victimisation and stigmatisation of the LGBTQIA community because regardless of the laws, people still believe that homosexuality is unnatural and is a sin.[45] There are a plethora of reasons why people are homophobic, but religion is a major part of homophobia.[46] With Christianity being the majority religion in the whole of Africa,[47] it can be argued that as far as the influence of religion is concerned, it is the leading religion with influence and thus it is the main cause for this kind of view and understanding about homosexuality.

Robert Kuloba argues that the Christian Bible and its teachings are responsible for enriching Africa's patriarchal ideology which defines gender roles and states what a traditional African family looks like, which does not include a gay couple and places homosexuality out of the African concept.[48] It notions that homosexuality is sinful and unchristian thus rejected and unacceptable in the African community.[49] Kuloba further argues that since Christianity forbids homosexual acts, post-colonial Africa also does not accept it because of the adoption of Christian ways of doing and thinking by post-colonial Africa.[50]

(d) The protection of human rights

Despite African countries such as those mentioned above i.e. Kenya and Uganda, the international arena has made its intentions clear about protecting human rights and ensuring the promotion of the protection of human rights worldwide. The United Nations is passionate about the protection of human rights for every individual in the world. In 1948 the United

[43] Ibid.
[44] Cameron Modisane 'Social inclusion for homosexuals' (2014) 73 *The Journal of the Helen Suzman Foundation* at 49.
[45] Ibid.
[46] Modisane op cit note 44 at 50.
[47] Frank Jacobs 'This is the best (and simplest) world map of religions' *Big Think* (2019) available at *https://bigthink.com/strange-maps/world-map-of-religions*, accessed on 28 November 2019. According to a survey by the 'Big Think' Christianity is the most popular/followed religion in Africa, followed by Islam.
[48] Robert W Kuloba, ''Homosexuality is unAfrican and unbiblical': Examining the ideological motivations to homophobia in sub-Saharan Africa – the case study of Uganda' (2016) 154 *Journal of Theology for Southern Africa* at 12.
[49] Ibid at 10.
[50] Ibid.

Nations published the Universal Declaration of Human Rights (UDHR).[51] The UDHR is not legally binding however, the protection of the rights and freedoms set out in the Declaration have been adopted into many national constitutions and domestic legal frameworks.[52] The aim of this document was to set out fundamental human rights to be universally protected.[53] articles 1,[54] 2,[55] 7,[56] 9,[57] and 12[58] of the UDHR provide for the decriminalisation of homosexuality. They emphasise that all people are entitled to equal protection of the law and are entitled to protection against discrimination and violation of their fundamental human rights. The UDHR further provides for the protection of the right to respect freedom of expression, association and peaceful assembly in articles 19[59] and 20(1).[60]

In 1976, the International Covenant on Civil and Political Rights (ICCPR) was enforced. This treaty's aim is to further compel national governments and legislatures to protect human rights. Unlike the UDHR the ICCPR is a legally binding treaty and is legally binding to all countries that choose to ratify it.[61] Articles 2(1),[62] 6(2),[63] 9,[64] 17,[65] and 26[66] of

[51] United Nations, available at *https://www.un.org/en/universal-declaration-human-rights/*, accessed on 20 November 2019.
[52] Catalina Vasquez 'Universal Declaration of Human Rights', available at *https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/*, accessed on 20 November 2019.
[53] Ibid.
[54] 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'
[55] 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.'
[56] 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.'
[57] 'No one shall be subjected to arbitrary arrest, detention or exile.'
[58] 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.'
[59] 'Everyone has the right to freedom of thought and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas.'
[60] 'Everyone has the right to freedom of peaceful assembly and association.'
[61] Elizabeth Willmott-Harrop 'Human rights mechanisms and international law' (2001), available *https://libertyandhumanity.com/themes/international-human-rights-law/human-rights-mechanisms-and-international-law/*, accessed on 20 November 2019.
[62] 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'
[63] 'In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.'
[64] 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'

the ICCPR also provide for equal treatment and protection of all people in those states that are parties to the Covenant. It also provides that the death penalty (in those countries where it has not been abolished) may only be imposed in those crimes that are deemed to be most serious. It further provides that all people are entitled to the right to liberty and security and are entitled not to be subjected to unlawful invasion of privacy.

In addition to these is the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966. This treaty is also legally binding to its state parties.[67] Article 2[68] of the ICESCR provides that the state parties to the Covenant shall guarantee that the rights guaranteed in the Covenant will be exercised without discrimination on any ground.

It is submitted that human rights are universal and are inherent to each person who exists in the world. Therefore, they should not apply differently based on the country or continent an individual is in. Neither should they apply differently because of the lifestyle choices, beliefs, views, opinions, and background of the individual. There is no justification not to afford anyone their inherent human rights. Thus this thesis follows the human rights theory which is based on the notion that all human beings are entitled to basic rights and freedoms.[69] It proposes that those basic rights are morally inherent of every human being[70] and are needed for a life of dignity and for a life worthy of a human being.[71] The theory consists of five separate theories,[72] namely: the theory of natural rights,[73] the theory of social rights,[74] the theory of legal rights,[75] the theory of historical rights,[76] and the theory of

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[65] 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.'

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

[67] 'Section 5: Background information on the ICESCR', available *https://www.escr-net.org/resources/section-5-background-information-icescr*, accessed on 20 November 2019.

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

[69] Jack Donnelly *Universal Human Rights in Theory and Practice* (1989) 17.

[70] Douglas Husak 'The motivation for human rights' (1985) 11 *Social Theory and Practice* at 249–55.

[71] Donnelly op cit note 69 at 17.

[72] P Sadish 'Theories of human rights', available at *https://www.academia.edu/6894687/theories_of_human_rights*, accessed on 13 February 2020.

[73] The theory of natural rights states that when an individual enters society they enter with certain basic rights. No government can deny anyone these rights as they are inherent (Ibid at 2).

[74] The theory of social rights states that rights are a condition of society and are laws, traditions and customs that are socially useful and desirable by society (Ibid at 3).

economic rights.[77] For the purposes of this thesis, only the theories of natural rights (i.e. rights to equality, dignity and privacy) will be discussed.

This thesis seeks to make relative comparisons to the laws from other former British colonies to the progressive laws in South Africa and Botswana for the purposes of illustrating that it is indeed possible for former colonies to be independent even in their laws to represent and encompass all their people. Although South Africa has made considerable progress in its laws, the struggle still remains in the non-reciprocity from society towards these progressive laws that seek to protect, liberate and provide equality to the LGBTQIA community.[78] However there is a powerful lesson that needs to be grasped from South Africa and Botswana as they are two of the few countries in Africa who have decriminalised same-sex relationships. The courts in both countries have managed to place the interests of the LGBTQIA community and their equality above public opinion that is against the inclusion of gay rights and equality.

III JUSTIFICATIONS OF THE RESEARCH

As many African countries are yet to decriminalise homosexuality, the negative impact and criminalisation of members of the LGBTQIA community are still looming. The violations of their natural rights (their rights to equality, dignity and privacy) are significantly present even though the world is more progressive today than it was centuries ago and issues such as homosexuality are no longer foreign concepts to most of the world's population. Other researchers have previously researched the un-Africanness of homosexuality extensively however, the Christian ideology behind this idea has not been explored sufficiently. Therefore, it is noteworthy that this thesis' legal research is undergirded by theological and sociological studies which will be discussed to provide context for the thesis' point of departure.

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[75] The theory of legal rights states that these rights are created and maintained by the State. These rights are not natural to man. Outside of the State (the source of these rights) the individual cannot claim these rights against it (Ibid at 4).
[76] The theory of historical rights states that these rights are the product of history and originate in its customs, which is passed down to generations who habitually follow them (Ibid).
[77] Ibid at 5. The theory of economic rights maintains that the way the economic power is distributed at any given time and place will shape the character of legal duties which are imposed on that time and place.
[78] Modisane op cit note 44 at 49.

The significance of this study stems from the poignant withholding of equal rights to the LGBTQIA community. The chief of these rights being the liberty to be in an intimate relationship with whomever they choose without the fear of being chastised or imprisoned. What the LGBTQIA community and its proponents see today is problematic jurisprudence that fails to protect their rights and makes it a punishable crime to enter into relationships best suited for their sexuality. However, in order to deal with the fruits of an issue it is also important not to ignore its roots. Before there were anti-sodomy laws such as the Buggery Act of 1533 that has set a staple precedent in the forming of anti-homosexuality laws that still reign in many African countries, what was the conversation that led to the decision that homosexuality must be made a crime? This thesis then seeks to uncover the roots before the fruits.

Upon much study, it became clear that religion has had significant role to play in influencing the law in European countries such as Rome and England. Moral acts such as sodomy fell within the jurisdiction of the Christian Church courts. The reason for this being that the Christian church had already determined, through biblical references, that homosexuality was a sin that God punished through burning the cities of those that committed this act. Research has also shown that in Rome and England, Christianity was the major religion. This is why acts such as homosexuality were declared a crime that fell under the jurisdiction of the Church courts. It is for this reason that the Christian church and the biblical scriptures that prohibit homosexuality have become one of the focuses of this study.

Furthermore, the significance of choosing Kenya and Uganda as the two countries that still criminalise homosexuality is because Kenya is the African country with most recent case that has upheld the country's anti-homosexuality laws. Uganda is significant because out of all the African countries that still criminalise homosexuality, Uganda has the harshest punishment to the offence in terms of its Penal Code provisions. It is also important to highlight that the importance of choosing South Africa and Botswana out of the countries that no longer criminalise homosexuality as examples of legislative progressiveness is because Botswana is the most recent country in Africa to hand down a landmark judgment that had decriminalised homosexuality in a detailed and informative judgement. South Africa is important because it has one of the most progressive gay rights in Africa and in the world.

The significance of the study is to also show the relationship between the influence the Christianity has had in shaping the anti-homosexuality laws that still exist today and the perception that homosexuality is un-African. This is shown through how courts have interpreted anti-homosexuality legislation in these countries and the nuances that exist in the decisions held by these courts upon constructing this legislation.

Ultimately, beyond showing how homosexuality because a criminal offence and how it became un-African as it is known today, this thesis aspires to provide evidence of how deeply the anti-homosexuality laws affect the LGBTQIA community in terms of the limitations of their rights to equality, dignity and privacy. The idea behind this research is also to be of persuasive value to the law makers in considering decriminalising homosexuality. It also intends to expose the drawback of legislation that is promulgated under the influence of and for the benefit of one group based on its moral beliefs and subscriptions and consequently marginalising another. The research also hopes to transcend the making of the law and further influence the courts, implementors and enforcers of the law to do so in a manner that aligns with international laws of human rights and in a manner that benefits all members of society and eschew from implementing and enforcing the law based on the moral convictions and beliefs of others, lest it continues to perpetuate marginalisation of the LGBTQIA in a now largely pluralistic society.

IV THE RESEARCH QUESTION

This thesis seeks to analyse whether the entry of Christianity into Africa bears significance to how homosexuality is perceived as un-African in the present day. It also seeks to analyse the long-term impact and validity of the Buggery Act 1533 on the interpretation of homosexual rights in British colonies in the present day.

The thesis will explore two ends of the spectrum; the first instance will discuss the progress made by two British colonies that have successfully legislatively decriminalised homosexuality i.e. South Africa and Botswana. The second instance will discuss two British colonies that continue to affirm the criminalisation of homosexuality i.e. Kenya and Uganda. The thesis will then provide comparative analysis between the two opposing standpoints by assessing the manner in which the respective courts have interpreted their statutes. Thereafter, the thesis will discuss the extent of dissent and provide suggestions and recommendations.

Considering the nature of the research question, the thesis will rely on academic works that extend beyond the legal framework due to the strong sociological and theological nuances that layer/surround the thesis.

The hypothesis of this study is that the church is the fundamental reason for anti-homosexuality laws and homosexuality in general being viewed as un-African. It proposes that it is because of the teachings and influence of the church imparted into African sociology, politics and culture of Africa that homosexuality is now regarded as un-African.

More particularly, the purpose of this thesis is to:

(a) Investigate the background of anti-homosexuality laws of former British colonies.

(b) Explore the 'un-African' narrative i.e. the nature of homosexuality that deems it 'un-African'.

(c) Provide comparative analysis on the laws of progressive British colonies i.e. South Africa and Botswana, to those of Uganda and Kenya who maintain a different position.

(d) Illustrate how other African countries can use South Africa and Botswana (in terms of its progressive laws) as examples.

V METHODOLOGY

This thesis will use a qualitative approach to collect research information. It will involve a desktop review, critical analysis and exploration of primary and secondary legal authorities. The purpose of which is to provide for the trace and proof of historical legal trends, and to unearth any contradictions and inconsistencies between some theoretical and practical observations of applications of some legal principles in different jurisdictions and also provide suggestions and recommendations of a more human rights based way forward. Since the research makes biblical and sociological references, it will also explore theological and sociological sources of framework.

VI THE STRUCTURE OF THE STUDY

(a) Chapter One: Introduction

This chapter gives a summary of the background of anti-homosexuality laws in former British colonies. It also discusses the problem statement of the research. The research question and the research methodology are set out and discussed in this chapter. In addition, the structure of the thesis is also set out in this chapter.

(b) Chapter Two: Homosexuality is un-African: Anti-homosexuality laws

The background on the anti-homosexuality laws in Kenya and Uganda are discussed extensively. The case law that confirms the anti-homosexuality laws in both Kenya and Uganda are also discussed and analysed.

(c) Chapter Three: Why is homosexuality un-African?

Chapter three deals with the question of why homosexuality is un-African. The connection and influence of the church with regard to the denial of homosexuality in Africa and the un-Africanness of homosexuality will be drawn. The chapter will also include arguments from researchers who have shown that homosexuality is not foreign to Africa but in fact, has existed since ancient times. It will also include the analysis of the arguments of those who submit that homosexuality is a western import.

(d) Chapter Four: South Africa and Botswana as positive examples

Chapter four makes a relative comparison to South Africa and Botswana who are among few countries in Africa that have decriminalised homosexuality. It illustrates how other African countries can use South Africa and Botswana as an example as far as its progressive laws are concerned.

(e) Chapter Five: Critical analysis, conclusion and recommendations

The arguments made by the church are analysed. The way other African courts and South African courts have explained the importance or non-importance of human rights as they pertain to the LGBTQIA community will also be analysed and discussed. Several concluding points, recommendations and remarks are also provided.

VII THE LIMITATIONS OF THE STUDY

The study will only be limited to the study of African countries. Moreover, the study will only cover religion only as it relates to Christianity. Although African tradition and Islam may be included, they will only be mentioned in so far as they relate to the context being discussed. The study will also be limited to the human rights theory in connection to the rights of the LGBTQIA community.

CHAPTER 2

HOMOSEXUALITY IS UN-AFRICAN: ANTI-HOMOSEXUALITY LAWS

I INTRODUCTION

As iterated in chapter one, homosexuality remains illegal in most African countries. Beyond this illegal nature, homosexuality is also socially unaccepted and deemed an un-African concept which has no room in the morals and traditional values of the African society. This chapter will first look at the origin of anti-sodomy laws and anti-homosexuality laws. It looks at the history of the offence of sodomy as originating from Roman Law and English Law. It then looks at how these laws were implemented in now former British colonies. Although there are more former African British colonies, this chapter will only look at two, which are Kenya and Uganda whose laws regarding homosexuality are more stringent and controversial. These two countries still strongly implement the anti-homosexuality laws and have recently had case law that confirmed the continuation of the implementation of these laws.

II THE ORIGIN OF ANTI-HOMOSEXUALITY LAWS

(a) Roman law and Homosexuality

In Roman law there was limited legislation that proscribed homosexuality.[1] The Roman law, through the codifications of Theodosius and Justinian, had substantially strong influence upon both the western European systems of civil and criminal law as well as ecclesiastical canon law.[2] Originally, it seems that if homosexual practices were punished, it was either by private actions taken against the offender or by public process initiated by the aediles.[3] One case of homosexual practice, which was circa in the year 226 BC, was dealt with by accusation before the Senate.[4] It arose from proposals which had been made to the son of the

[1] Derrick S Bailey *Homosexuality and the Western Christian Tradition* (1955) 64.
[2] Ibid.
[3] Ibid. 'In Roman history an aedile was either of two (later four) Roman magistrates responsible for public buildings and originally also for the public games and the supply of corn to the city.'
[4] John Boswell *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century* (1980) 65.

famous M Claudius Marcellus by C Scantinius Capitolinus, whom Valerius Maximus describes as tribune of the plebs, and Plutarch as co-aedile with Marcellus.[5] Capitolinus was convicted, and a heavy fine was imposed which Marcellus applied to the purchase of sacred vessels for the temples.[6] This supposedly resulted in the Lex Scantinia being passed in which male homosexual practices were penalised.[7]

In the beginning of the third century AD, when Emperor Severus Alexander came to power it seems that male homosexual prostitution flourished, regardless of the Scantinian or any other law.[8] According to John Boswell an early third century writer, Sextus Empiricus, states that among the Romans homosexual practices are forbidden by law.[9] Derrick Bailey argues that this might have meant that the Lex Scantinia lay dormant but unrepealed, and capable of being invoked at any time.[10] He also may have meant certain opinions and decisions of great jurists of his day, which appear to extend by interpretation the force of the well-known Lex Julia de adulteriis coercendis so as to make it apply to homosexual offences[11] committed between adults as well as with boys.[12] Roman legal theory permitted an extension of the scope of law.[13]

In republican times the opinions of learned lawyers – their interpretations and applications of statute law, and particularly the Twelve Tables – played an important part in the development of Roman jurisprudence; usage gave force to many of these decisions, and they collected together for reference.[14] Bailey suggests that this development explains the statement made by Tribonian and his collaborators in the institutes which they compiled at the emperor's bidding, and which was given legal force on 30 December 533[15]. The statute

[5] Ibid at 65–6.
[6] Christopher Clinton Conway *Homosexuality and Roman Law* (unpublished BA thesis, University of Illinois, 1993) 10. See also Bailey op cit note 1 at 64.
[7] Bailey op cit note 1 at 64.
[8] Ibid at 66.
[9] Boswell op cit note 4 at 66. Boswell argues that Sextus is an unreliable source in this area because his expertise lay in him being a physician and not an expert on Roman Law.
[10] Bailey op cit note 1 at 67.
[11] Ibid.
[12] Ibid at 69.
[13] Ibid.
[14] James Bernard Murphy 'The lawyer and the layman: Two perspectives on the rule of law' (2006) 68(1) *The Review of Politics* at 126.
[15] Bailey op cit note 1 at 69.

provided that public prosecutions of criminal cases take place under a number of statutes. The statutes punish with death crimes that include adultery and sodomy. [16]

All homosexual acts are regarded as coming within the scope of Julian law, therefore meaning that according to this law, all homosexual acts are illegal and punishable by law.[17] Bailey argued that the Scantinian Law had lain dormant for ages and the subject of homosexual practices never attracted the attention of pagan legislators.[18] However, when Christianity became the religion of the Roman Empire[19], a crusade was opened against it which the Christian emperors are alleged to have launched. On 16 December 342, Constantius and Constans promulgated a law which provided (in a recent translation) that[20] when a man marries another man, they shall be guilty of a crime and punished by the law.[21]

Bailey also argues that this law appears to have been directed against passive sodomists.[22] Nearly 50 years after the enactment of this law, another law was put forth by Valentinian II, Theodosius and Arcadius, on 6 August 390.[23] This law prescribes the penalty of burning, which was the most common form of criminal punishment imposed upon sodomists during the middle ages, and persisted in some countries until recent times.[24] The law states that a man who has sex with another man commits sodomy and must be burnt in public.[25]

There are many laws that were imposed in the Middle Ages and in the Roman Empire era that resemble these ones.[26] Furthermore, since the Christian religion was dominant in Rome, the teaching of homosexuality being forbidden (specifically that homosexual acts are against the nature and the teachings of God – they are unnatural – and they incite the wrath of

[16] Boswell op cit note 4 at 271.
[17] Bailey op cit note 1 at 69.
[18] Ibid.
[19] Boisi Center for Religion and American Public Life 'An introduction to Christian theology' (2007) 1 *Boisi Center Papers on Religion in the United States* at 3.
[20] Jessica E Dixon *The Language of Roman Adultery* (unpublished PhD thesis, University of Manchester, 2012) 86–7. See also Bailey op cit note 1 at 69.
[21] Clyde Pharr *The Theodosian Code and Novels and the Sirmondian Constitutions : A Translation with Commentary, Glossary, and Bibliography* (1952) 231–32. See also Bailey op cit note 1 at 70.
[22] Bailey op cit note 1 at 71.
[23] Edward Westermarck *Christianity and Morals* (1939) 372.
[24] Pharr op cit note 21 at 231–2.
[25] Ibid.
[26] Bailey op cit note 1 at 72–120.

God that is to come to man just as Sodom and Gomorrah[27]) were prevalent and a way of life in Rome and eventually in many other European countries that were influenced by such laws.[28]

(b) English law and Homosexuality

As already discussed in chapter one, in England the Buggery Act of 1533 was enacted to punish sodomy. However, the Buggery Act was not the first law that was enacted in England proscribing homosexual activity. One of the earliest accounts of the English is to be found in the treatise entitled 'Fleta', which according to Bailey, was probably composed about the year 1290 by a jurist at the court of Edward I.[29] It provides that anyone who has dealings with Jews or Jewesses or commits the act of bestiality or is a sodomist shall be buried alive after it has been legally proven that they have committed the act and a public conviction has taken place.[30] Not long after the composition of Fleta another law was passed which is supposed to have emanated from Edward I himself.[31] This compilation was known as Britton. It laid down the customary penalty for sodomy which is to be publicly convicted and burned.[32]

The church courts in England were normally responsible for the trial of sodomists, thereafter the secular tribunal's function was to impose the penalty of the law upon those who were convicted by the ecclesiastical authority.[33]

After the enactment of the Buggery Act, cases of sodomy were removed entirely from the jurisdiction of the church courts and were committed to the civil magistrates for trial.[34] Moreover, such offenders were now included with murderers and robbers below the rank of

[27]Samson O Olanisebe & Adewale J Adelakun 'Re-interpreting "Sodom and Gomorrah" passages in the context of homosexuality controversy: A Nigerian perspective' (2013) 3(2) *Ilorin Journal of Religious Studies* at 198. Justinian published two novellae denouncing unnatural lusts threatening obdurate sodomists with the fullest rigors of the law. The first was issued in 538, the NOV. 77. (Bailey op cit note 1 at 73).

[28] Bailey op cit note 1 at 100.

[29] Ibid at 145. See also N Denholm-Young 'Who wrote 'Fleta'?' (1934) 58 (229) *The English Historical Review* at 2.

[30] Alok Gupta 'This alien legacy: The origins of "sodomy" laws in British colonialism socially, homosexuality' (2008) available at *https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism*, accessed on 08 October 2019 at 13.

[31] Ibid.

[32] Ibid.

[33] Bailey op cit note 1 at 146. See also Michael Kirby 'The sodomy offence: England's least lovely criminal law export?' in Corinne Lennox & Matthew Waites (eds) *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth* (2013) 62.

[34] Kirby op cit note 33 at 62.

sub-deacon, in the category of those who might not claim Benefit of Clergy.[35] Finally, the death penalty was imposed – which was presumably carried out by hanging.[36] The 1533 Buggery Act was re-enacted in 1541.[37] In 1547 the first Parliament of Edward IV passed a comprehensive statute of repeal by which all new felonies created in the last reign were abolished, including that of buggery established by the 1533 Act.[38]

In 1548, however, the provisions of this Act were again given force by a new statute.[39] Mary's rise to power was marked by another comprehensive statute of repeal by which the 1548 Act was rescinded.[40] Mary did not take any steps during her reign to introduce any further legislation against those who were guilty of sodomy or bestiality. It was presumed that this was because it was intended that with the restoration of the old religion such offences should again fall under the jurisdiction of the church courts.[41]

In 1563, Elizabeth's second Parliament passed an Act[42] which declares that since the act that prohibits the offence of buggery had been repealed, more people (whom the act refers to as evil) committed the offence of buggery, which is a horrible and detestable act not pleasing to the Almighty God.[43] Consequently, the 1533 statute was revived and made to be in full force.[44] This Act remained in force for the next 275 years.[45] In 1823 assault with intent to commit an unnatural offence was made punishable by hard labour and imprisonment in addition to, or in lieu of, a fine or imprisonment.[46] In 1826 sodomy was included among the infamous crimes, accusation by which rendered the sender thereof guilty of felony.[47] In 1828

[35] The Benefit of the Clergy was an exemption granted in the middle ages. It exempted the English clergy and nuns from the jurisdiction of the ordinary civil courts. It was abolished in 1827.
[36] Bailey op cit note 1 at 148.
[37] Ibid at 149.
[38] I Edward VI ch 12 (A repeal of the statute of 28 Henry VIII ch 17). John Raithby (ed) *The Statutes at Large of England and of Great Britain: From Magna Carta to the Union of the Kingdoms of Great Britain and Ireland* vol 3 (1917) 491.
[39] Bailey op cit note 1 at 149. The 1548 (2, 3 Edward VI ch 92) statute made the following amendments: the penalty on conviction was to be death, but without loss of goods or land; the rights of the offender's wife and children, and of all lawful claimants upon his estate, were safeguarded; indictments had to be made within six months of commission of the act in question; and no person due to benefit in the event of the death of the accused might be admitted to give evidence against him.
[40] Ibid.
[41] Ibid.
[42] 5 Elizabeth I ch 17.
[43] Ibid.
[44] Montgomery Hyde *The Love That Dared Not Speak Its Name: A Candid History of Homosexuality in Britain* (1970) 142.
[45] Bailey op cit note 1 at 150.
[46] Ibid.
[47] Ibid.

the 1563 statute was repealed by a consolidating Act which dealt with a large number of offences against the person.[48] It stated that every person who is convicted of the crime of buggery with another person or animal is deemed a felon and shall be sentenced to death.[49]

In 1861 the penalty of death was removed with the passing of the Offences against the Person Act, which provided that any person convicted of the crime of buggery shall be imprisoned for life or for a period not less than ten years. [50] Furthermore, it provided that any person who attempts the crime of buggery or be found guilty of assault with the intent to commit buggery or indecent assault with the attempt to commit same shall be guilty of a misdemeanour and punished with imprisonment for a term not exceeding ten years and not exceeding two years with or without hard labour.[51]

The last major piece of legislation against homosexual offences was passed in 1885.[52] The Bill was introduced in Parliament to further provide for protection of women and girls, the repression of brothels and other purposes.[53] The Bill was also amended to increase the maximum penalty for such practices from one to two years.[54] The clause thus became part of the Criminal Law Amendment Act of 1885, which provided that any male person who, whether in public or private, commits, partakes, obtains or attempts to obtain sexual intercourse ('gross indecency') with another male shall be liable for imprisonment for a period no more than two years, with or without hard labour.[55]

III CURRENT LAWS ON HOMOSEXUALITY OF FORMER BRITISH COLONIES

For the following countries, these have been the resultant laws expounding from the British anti-sodomy law:

[48] 9 George IV ch 31 s 1.
[49] 9 George IV ch 31 s 15.
[50] 24 & 25 Victoria ch 100 s 61.
[51] 24 & 25 Victoria ch 100 s 62.
[52] Bailey op cit note 1 at 151.
[53] Ibid.
[54] Ibid at 151–2.
[55] 48 & 49 Victoria ch 69 s II.

(a) Kenya

(i) The anti-homosexuality laws of Kenya

The Kenyan President, Daniel Arap Moi, joined other leaders in labelling homosexuality as a scourge that contradicts the teachings of Christianity and African traditions.[56] Speaking at an agricultural show in Nairobi (in 30 September 1999), Moi warned Kenyans to be careful against homosexuality which he flagged as a dangerous practice as it is against *African tradition and Biblical teachings*.[57]

This warning given by the President was in the year 1999, however a decade later, this is still the case in Kenya; homosexuality is still illegal and socially unacceptable. One public poll indicated that over 90 per cent of Kenyans deem homosexuality as an unacceptable practice.[58]

As it stands homosexuality in Kenya is illegal. It is prohibited under the Kenyan Penal Code 81 of 1948.[59] Section 162 of the Penal Code, very similar to the 1861 Offences against the Person Act and the Criminal Law Amendment Act of 1885 of England, provides that whosoever has 'carnal knowledge' of any person or animal or allows another person to have carnal knowledge of him, 'against the order or nature' will be found guilty of a felony and imprisoned for a period of 14 years. [60]

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[56] Vasu Reddy 'Homophobia, human rights and gay and lesbian equality in Africa' (2001) 50 *Agenda: Empowering Women for Gender Equity* at 85.

[57] Ibid. Moi stated that: 'It is not right that a man should go with another man or a woman with another woman. It is against African tradition and Biblical teachings; I will not shy away from warning Kenyans against the dangers of the scourge'.

[58] Pew Research Centre 'Global views on morality' 15 April 2014, available at *https://www.pewglobal.org/2014/04/15/global-morality/country/kenya*, accessed on 19 June 2019.

[59] Chapter 63, Laws of Kenya.

[60] S 162 of the Penal Code provides:

'Any person who—

(a) has carnal knowledge of any person against the order of nature; or

(b) has carnal knowledge of an animal; or

(c) permits a male person to have carnal knowledge of him or her against the order of nature,

is guilty of a felony and is liable to imprisonment for fourteen years:

Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if—

(i) the offence was committed without the consent of the person who was carnally known; or

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

Furthermore, section 163 of the Penal Code provides for the attempt of the commission of this act specified in section 162 of the Code.[61] Such person who attempts is liable for imprisonment for seven years.[62] Section 165 of the Code is also very similar to the 1861 Offences against the Person Act and the Criminal Law Amendment Act of 1885 of England, provides for the commission, procurement or attempt to procure the commission of any act of 'gross indecency', whether in public or private by any male person with another male person. Such persons are deemed guilty of a felony and are liable for five years imprisonment.[63]

This law is widely acknowledged and highly enforceable in Kenya as it has seen 595 people prosecuted under this law between the years 2010 and 2014.[64] This was demonstrated in the case of *COL & another v Resident Magistrate Kwale Court & others*.[65] In this case two men were apprehended by the police near Mombasa, Kenya as it was suspected that they had engaged in homosexual acts. The men were then taken to a police station and subsequently charged with the following: committing an 'unnatural offence' contrary to section 162(a) as read with section 162(c) of the Penal Code; committing an 'indecent act' with an adult contrary to section 11A of the Sexual Offences Act 3 of 2006; and trafficking in obscene literature (publications) contrary to section 181(1)[66] of the Penal Code.[67] The police

[61] S 163 provides that: 'Any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for seven years.'
[62] Ibid.
[63] S 165 provides that: 'Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.'
[64] Ari Shaw 'From disgust to dignity: Criminalisation of same-sex conduct as a dignity taking and the human rights pathways to achieve dignity restoration' (2018) 18(2) *African Human Rights Law Journal* at 685–6.
[65] *COL & another v Resident Magistrate Kwale Court and others* eKLR Petition 51 of 2015.
[66] This section provides:

'(1) Any person who -

(a) for the purpose of or by way of trade or for the purpose of distribution or public exhibition, makes, produces or has in his possession any one or more obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other obscene objects, or any other object tending to corrupt morals; or

(b) for any of the purposes above mentioned imports, conveys or exports, or causes to be imported, conveyed or exported, any such matters or things, or in any manner whatsoever puts any of them in circulation; or

(c) carries on or takes part in any business, whether public or private concerned with any such matters or things, or deals in any such matters or things in any manner whatsoever, or distributes any of them, or exhibits any of them publicly, or makes a business of lending any of them; or

(d) advertises or makes known by any means whatsoever, with a view to assisting the circulation of or traffic in any such matters or things, that a person is engaged in any of the acts referred to in this section, or advertises or makes known how, or from whom, any such matters or things can be procured either directly or indirectly; or

proceeded to take the men to a local hospital where they were forced to an anal examination and blood tests for the purposes of HIV and hepatitis B testing.

In the hospital the men were told to undress, to lie on the table and spread their legs whilst the physician performed an anal exam to check for signs of penetration. The men were not given any privacy during this examination as it was all performed in the presence of medical personnel and the police officers. The men garnered support from the National Gay and Lesbian Human Rights Commission (NGLHRC), a Kenyan advocacy group, and together they challenged the legality of forced medical examinations and testing in court. They argued that the examinations amounted to cruel and degrading treatment and violated the Kenyan Constitution and international law statutes on human rights.[68]

The applicants contended that the forced examination violated among other things, their right to privacy under article 22(1) of the Constitution and also amounted to degrading treatment. They contended that these violations were in conflict with the Kenya's obligations as a state party to the 'Convention against Torture and other Cruel, Inhuman or Degrading Treatment'. In June 2016, however, the Kenyan high court at Mombasa dismissed the applicant's case and upheld the government's argument that the examinations were both reasonable and were allowed in law. The court further ruled that such procedures were not ultra vires.[69]

There seemed to be a glimmer of hope for the LGBTQIA community and activism in Kenya when on 24 April 2015, in the case of *Gitari v Non-Governmental Organisations Co-ordination Board*[70] the high court of Kenya ruled that the State had violated article 36 (freedom of association) of the Constitution of Kenya, by refusing to register the NGO, the National Gay & Lesbian Human Rights Commission (NGLHRC).[71] The court found that LGBTQIA people are a constituent part of the 'every person' clause provided for in article

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(e) publicly exhibits any indecent show or performance or any show or performance tending to corrupt morals,

is guilty of a misdemeanour and is liable to imprisonment for two years or to a fine of seven thousand shillings.'

[67] Shaw op cit note 64 at 685. Shaw argues that: 'the arrest and charges stemmed from a colonial era law in place prior to Kenya's independence in 1963. As with many former British colonies, Kenya inherited and retained the Colonial Office Model Code of 1930 as its own national Penal Code.'

[68] Ibid.

[69] This ruling was later overturned in an appeal in the case *COL & another v Chief Magistrate Ukundla Law Courts & 4 others* [2018] eKLR, Civil Appeal 56 of 2016 where it was held that forced anal examinations are unconstitutional.

[70] *Gitari v Non-Governmental Organisations Co-ordination Board* [2015] eKLR, Petition No 440 of 2013.

[71] Ibid para 107.

36.[72] Furthermore, the court held that the criminalising legislation only includes same-sex sexual acts and not the sexual orientation of an individual per se.[73] The court stated that the Board had acted in a manner that was unlawful and in contradiction with the Constitution, which is an abuse of power.[74] The court also said that the board relied on its own moral convictions when making its decision and used it as a basis for rejecting the application. In doing this, the court held, the board acted outside of its mandate and nullifies its constitutional obligations.[75] The court stated that moral convictions cannot be used to deny others of their constitutional rights.[76]

However, this hope for the LGBTQIA was destroyed when in May 2019, Kenya's high court upheld a ban on homosexuality, ensuring that homosexuality remains illegal and that there is no chance of same-sex marriage becoming legal in this predominantly Christian country.[77]

(ii) Recent case law on the anti-homosexuality laws of Kenya

In the case of *EG & others v Attorney General*; *DKM & others (Interested Parties)*; *Katiba Institute & another (Amicus Curiae)*[78], similar to the Botswana *LM v Attorney General* case, the issues that the court had to determine were: 'whether sections 162 (a) and (c) as well as section 165 of the Penal Code are unconstitutional on grounds of vagueness and uncertainty'; and 'whether the impugned provisions are unconstitutional for violating articles 27, 28, 29, 31, 32, and 43 of the Constitution.'[79]

The court gave a lengthy explanation and determination of the interpretation of legislation. The court stated that in interpreting the Constitution, article 259(1) of the Constitution of Kenya obliges that it must be interpreted in a manner that promotes the spirit, purposes, values and principles of the Constitution. Furthermore, it must also advance the rule of law, and the fundamental human rights and freedoms guaranteed in the Bill of Rights.

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[72] Freedom of Association – S 36(1) provides:
'(1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.'
[73] Quoting *Jackueline Kasha Nabagesra & others v Rolling Stone Ltd & another* HC MC 163 of 2010.
[74] *Gitari* supra note 70 para 136.
[75] Ibid para 127.
[76] Ibid.
[77] John Ndiso 'Kenya's High Court unanimously upholds ban on sex' *Reuters* 24 May 2019, available at *https://af.reuters.com/article/topNews/idAFKCN1SU1M7-OZATP*, accessed on 19 June 2019.
[78] *EG & 7 others v Attorney General*; *DKM & 9 others (Interested Parties)*; *Katiba Institute & another (Amicus Curiae)* Petition No. 150 Of 2016 Consolidated with Petition No. 234 of 2016.
[79] Ibid para 242.

It must also be interpreted in a manner that gives allowance to the development of the law and a manner that contributes to good governance.[80]

The court further stated that Constitutional provisions must be interpreted purposively and within context.[81] In construing the Constitution, where necessary, attention must be given to the social and historical background of the legislation.[82] The court expressed that it regards the 'plain meaning rule' the most important rule in interpreting a statute, which provides that the starting point of interpreting a statute is the language of the statute.[83] The court provided that in the absence of the intention of the legislation that states otherwise, the language must be taken as conclusive.[84] The court held that it has no legislative powers and for that reason it cannot enlarge the scope of the legislation nor rewrite or reframe the legislation, especially where there is no ambiguity in the language of the legislation.[85] The court's duty is to simply carry out the obvious intention of the legislature.[86]

On the issue of vagueness and uncertainty, the court agreed that the Penal Code does not define the words 'unnatural offences' and 'against the order of nature', however the question the court posed was whether the lack of definition of these words rendered the impugned sections vague and uncertain. In answering that question, the court looked at the Black's Law dictionary[87] which defines 'carnal knowledge' as the act of a male person having sexual bodily contact with a female. From this definition the court held that carnal knowledge and sexual intercourse have an equivalent meaning.[88] The court quoted the cases of *Noble v State*[89] and the case of *Gaolete v State*[90] to confirm this definition.[91] The court in the *Gaolete* case defined 'against the order of nature' as the penetration through the anus.[92] It held, in the *Gaolete* case, that it is therefore penetration per anum that makes 'carnal knowledge' (i.e. sexual intercourse) against the order of nature.[93]

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[80] Ibid para 249.
[81] Ibid para 248.
[82] Ibid para 249.
[83] Ibid para 253.
[84] Ibid.
[85] Ibid para 254.
[86] Ibid.
[87] Henry Campbell Black *Black's Law Dictionary* 4 ed (1968) 268.
[88] *EG & 7 others*; *DKM & 9 others*; *Katiba Institute* supra note 78 para 270.
[89] *Noble v State* 22 Ohio St 541.
[90] *Gaolete v State* [1991] BLR 325 (HC).
[91] *EG & 7 others*; *DKM & 9 others*; *Katiba Institute* supra note 78 paras 270–1.
[92] Ibid para 271.
[93] Ibid.

The court continues in quoting the Law dictionary in defining 'unnatural offence' which is defined in the dictionary as a crime that is against nature and gives sodomy and buggery as examples of such acts or crimes.[94] It also quoted section 2 of the Sexual Offences Act 3 of 2006 which defines the phrase 'indecent act' any unlawful act which involves the physical contact of the genitals, breasts or buttocks two people. It is also the display of material that contains pornography to another person without his or her consent but does not include penetration.[95]

The court thereafter held that it had been established that the impugned provisions have been clearly defined in law dictionaries and in other judicial pronouncements. It was the view of the court that the lack of definitions of these phrases in the Penal Code does not render the impugned provisions vague or uncertain.[96] The court therefore declined to declare section 164 (a) and (c) and 165 as unconstitutional on the grounds of vagueness, uncertainty, ambiguity and over broadness.[97] In its decision, the court gave a succinct rationale. It held that the phrases used in the impugned sections were clear and disclosed offences that are already known in law. It further held that any person who is accused under the impugned provisions would be notified and made clear of the particulars of the offence. It also held that by reading the provisions, which the petitioners argue are overboard, it would risk making the provisions vague. [98]

On the issue of impugned provisions violating the right to equality and freedom from discrimination (article 27 of the Constitution) the court stated that in a case of this nature, the court must first establish 'whether the law differentiates between different persons.'[99] It had to also establish 'whether the differentiation amounts to discrimination' [100] and lastly, 'whether the discrimination is unfair.'[101] The court quoted the case of *Willis v The United*

[94] Ibid para 272.
[95] Ibid para 273.
[96] Ibid para 278.
[97] Ibid. The court held 'Our above conclusion is fortified by several reasons: - *First,* the phrases used in the sections under challenge are clear as defined above. *Second*, the provisions disclose offences known in law. *Third*, a person accused under the said provisions would be informed of the nature, particulars and facts of the offence. *Fourth,* even though we are not persuaded by the Petitioners' contention that the provisions under challenge are overbroad, it is our considered view that there is a real danger that in reading down an overbroad statute, we will simply substitute the vice broadness with the equally fatal infirmity of vagueness.'
[98] *EG & 7 others*; *DKM & 9 others*; *Katiba Institute* supra note 78 para 279.
[99] Ibid para 287.
[100] Ibid.
[101] Ibid.

Kingdom[102] which observed that discrimination means treating persons in similar situations differently without any objective and reasonable justification of doing so.[103] From this the court concluded that the discrimination prohibited by the Constitution is unfair discrimination and in the court's view, unfair discrimination is differential treatment that is degrading.[104] The court stated unfair discrimination occurs when a law or conduct arbitrarily and without just cause, groups and treats some as unequal to or undeserving of respect than others. It also happens when the law or conduct eternises or does nothing to rectify existing mistreatment and marginalisation.[105]

The court further observed that the principle of equality tries to ensure that no individual is made to feel that they are not deserving of equal treatment and they are not made to feel that the law or conduct that they are complaining of will be used against them more harshly than others who are not part of the marginalised group.[106] The court quoted the South African case of *Harksen v Lane*[107] which lays out the test for establishing whether a claim based on unfair discrimination should succeed. In casu, the court essentially stated that it only amounts to unfair discrimination if the differentiation or protection by the law is arbitrary and is without a legitimate reason.[108] However, where there is a legitimate reason for the differentiation or protection by the law, it cannot be deemed as discrimination.[109] It is therefore clear that not every differentiation or unequal treatment amounts to discrimination.[110]

The petitioners' averment regarding this particular issue is that the impugned provisions target the LGBTQIA community only, which the court took to mean that the petitioners contend that the impugned provisions do not apply to heterosexuals.[111] The court disagreed with this contention. The court opined that in its reading of the language of section 162 it

[102] *Willis v The United Kingdom* No. 36042/97, ECHR 2002-IV.
[103] *EG & 7 others*; *DKM & 9 others*; *Katiba Institute* supra note 78 para 287.
[104] Ibid para 288.
[105] Ibid.
[106] Ibid para 289.
[107] *Harksen v Lane* [1997] ZACC 12, 1998 (1) SA 300 (CC) para 48.
[108] Ibid.
[109] *EG & 7 others*; *DKM & 9 others*; *Katiba Institute* supra note 78 para 291.
[110] Ibid para 293.
[111] Ibid para 295.

found it to be clear as the section uses the words 'any person'.[112] From this interpretation, the court concluded that section 162 does not target any particular group of persons.[113]

The court applied the same interpretation of section 165 which includes the words 'any male person' of which the court construed it to apply to all male persons and does not target a particular group with a particular sexual orientation.[114] The petitioners further argued that because of the enforcement of the impugned provisions they have been subjected to various discriminatory acts and attacks, including rape, on the basis of their sexual orientation.[115] In response to this contention the court expressed that save for the affidavits and allegations made in the petition, the petitioners did not submit any tangible evidence to support the allegations, as required by law.[116] The court therefore concluded that it found no reason to uphold the petitioners' allegations.[117] Furthermore, the petitioners failed to prove that the impugned provisions are discriminatory.[118]

Tending to the issues of articles 43,[119] 50,[120] 29,[121] and 32[122], the court essentially held that the petitioners failed to produce evidence to prove these allegations. On the issue of healthcare, the petitioners had argued that they are vulnerable and susceptible to HIV/AIDS infections; however, they fear seeking treatment because of the stigma attached to their sexual orientation and the prosecution thereof, and that the health care professions mistreat them. They linked this to the impugned provisions that it is because of such provisions that they experience such.[123]

The respondent argued that no evidence was brought forward to demonstrate that anyone had been denied access to health care due to their sexual orientation. Regarding HIV/AIDS, the respondent contended that stigma is not exclusive to LGBTQIA.[124] The court

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[112] Ibid para 296.
[113] Ibid.
[114] Ibid para 297.
[115] Ibid para 298.
[116] Ibid para 299.
[117] Ibid.
[118] Ibid.
[119] 'Whether the impugned provisions infringe the Petitioners' right to the highest attainable standards of health.'
[120] 'Whether the impugned provisions violate the Petitioners' right to a fair hearing under.'
[121] 'Whether the Petitioners' right to freedom and security of the person has been violated.'
[122] 'Whether the Petitioners rights to freedom of conscience, religion, belief and opinion under Article 32 has been violated.'
[123] *EG & 7 others*; *DKM & 9 others*; *Katiba Institute* supra note 78 para 300.
[124] Ibid para 301.

agreed with the respondent and held that although the allegations made by the Petitioners (to whom the burden of proof rested) that their right to health had been violated, no evidence was produced to support these allegations. The Petitioners did not bring forward any evidence to prove that they were denied medical attention in any one of the country's medical facilities or that they were mistreated whilst seeking medical attention. They merely made generalisations without producing any evidence.[125]

On the issue of the right to a fair hearing the petitioners quoted article 10(2)*(a)*[126] and the preamble of the Constitution.[127] The petitioners then argued that taking into account that the impugned provisions are vague and uncertain and that the evidence to support the offence is collected in a degrading manner, their right to a fair trial is not guaranteed.[128] The court did not address the issue of vagueness and uncertainty of the impugned provisions again because it had already addressed the issue.[129] The court agreed that evidence obtained in a manner that is inconsistent with article 50 or that violates any right in the Bill of Rights must be excluded if its admission would render the trial unfair or otherwise detrimental to the administration of justice.[130] However, the court found that no evidence was tendered to show that any of the petitioners was ever subjected to any such examination.[131] The court further held that none of the petitioners tendered evidence to suggest that evidence was illegally

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[125] Ibid para 308.

[126] This section provides:

> '10 (2) The national values and principles of governance include—
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> (*a*) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people… .'

[127] The preamble provides the following:

> 'We, the people of Kenya—
>
> ACKNOWLEDGING the supremacy of the Almighty God of all creation:
>
> HONOURING those who heroically struggled to bring freedom and justice to our land:
>
> PROUD of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation:
>
> RESPECTFUL of the environment, which is our heritage, and determined to sustain it for the benefit of future generations:
>
> COMMITTED to nurturing and protecting the well-being of the individual, the family, communities and the nation:
>
> RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law:
>
> EXERCISING our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution:
>
> ADOPT, ENACT and give this Constitution to ourselves and to our future generations.
>
> GOD BLESS KENYA'

[128] *EG & 7 others*; *DKM & 9 others*; *Katiba Institute* supra note 78 para 309.

[129] Ibid para 310.

[130] Ibid para 311.

[131] Ibid.

obtained from them and it was used against them to violate their constitutionally guaranteed rights.[132]

In addressing the issue of article 29, the court held that it is common knowledge that a party alleging that his fundamental rights were violated must plead such violation and show that the violation did happen, and the respondent was the violator. Furthermore, it held that this constitutional claim that a fundamental constitutional right or freedom was violated must not be made in general terms. The petitioner must give specific facts and prove the allegation which the court must then inquire into. [133]

The court ruled against the petitioners on this issue and stated that the impugned provisions do not apply exclusively to the petitioners.[134] On the issue pertaining to article 32 that the impugned provisions violate the petitioners' right to freedom of conscience, religion, thought, belief and opinion the court dismissed the arguments and allegations and held that no evidence was led or submission made in support of this allegation.[135]

The court dealt with the issue of the whether the petitioners' rights to human dignity (article 28) and privacy (article 31) have been violated in depth. The petitioners submitted that criminalisation of private homosexual acts constitutes an unjustified interference with the right to privacy.[136] This interference they argued, entailed denying them the right to express themselves in the manner they know best or which is natural to them.[137] They argued that the right to privacy protects adult consensual sexual activity between persons of the same sex in private.[138] They further argued that any act that vitiates human dignity is a deprivation of the right to life.

According to the petitioners dignity entails self-respect and self-worth and that dignity is violated when individuals or groups are marginalised, harmed or devalued. [139] The petitioners also contended that the provisions in question violated their right not to have any information regarding their individual's private affairs revealed.[140]

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[132] Ibid.
[133] Ibid para 320.
[134] Ibid para 321.
[135] Ibid para 322.
[136] Ibid para 326.
[137] Ibid para 327.
[138] Ibid para 326.
[139] Ibid.
[140] Ibid para 327.

The respondent argued that these rights are not absolute and they do not legitimise criminal conduct.[141] The respondent further argued that the impugned provisions only criminalise carnal knowledge per anum.[142] Furthermore, the respondent argued that it would be an error for the court to strike down the impugned sections on the basis of the right to privacy, because the provisions protect public interest and promote African culture which abhors homosexuality.[143]

The court started off by detailing the importance of human dignity. In doing so, it quoted articles 1[144], 5[145] and 12[146] of the Universal Declaration of Human Rights which essentially provide for the entitlement to the right to human dignity to all people and prohibits torture, cruel on inhuman treatment or punishment enforced on anyone. It also provides for the right to privacy and discourages interference of such privacy.[147] The court also quoted the South African Constitutional Court (CC) case of *S v Makwanyane*[148] whereupon in casu, the court observed that human dignity is an essential and substantial part of a person's life.[149] The court in this case, further emphasised that the right to human dignity is the foundation of many other rights; that it also holds constitutional value in interpreting other rights such as the right to equality, the right to life and the right not to be punished in a cruel, inhuman or degrading way.[150] The court acknowledged that these rights, the right to human dignity and the right to privacy, are guaranteed in the Constitution of Kenya.[151]

In attacking the provisions in question, the petitioners relied on local and foreign jurisprudence.[152] The court also referred to foreign decisions to determine whether they held any persuasive value in this matter. However, the court observed that in doing so, it will exercise some caution as previous local decisions have warned that courts must exercise

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[141] Ibid para 328.
[142] Ibid.
[143] Ibid para 329.
[144] This section provides: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'
[145] It provides: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'
[146] This provides: 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.'
[147] *EG & 7 others*; *DKM & 9 others*; *Katiba Institute* supra note 78 para 332.
[148] *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC) para 328.
[149] *EG & 7 others*; *DKM & 9 others*; *Katiba Institute* supra note 78 para 337.
[150] Ibid para 338.
[151] Ibid paras 339–40.
[152] Ibid para 354.

caution when considering foreign decisions.[153] The court quoted decisions from India, whereupon the landmark case of *Navtej Singh Johar & others v Union of India through Secretary, Ministry of Law and Justice*[154] decriminalised all consensual sex among adults in private, including homosexual sex, and the case of *Naz Foundation v Govt. of NCT of Delhi*[155] which held that the treatment of consensual homosexual sex between adults as a crime amounts a violation of fundamental rights protected by the Constitution of India.[156]

The court went on to look at the decisions held in the United Kingdom (UK), where in the case of *Dudgeon v UK*[157] the court held that laws prohibiting certain homosexual acts between consenting adult males constituted an unjustified interference with Dudgeon's (and all homosexual persons thereto) right to respect for his private life.[158] The court further held that there was no pressing social need for homosexual acts to be made criminal offences.[159] The court also looked at Australia, Belize, the USA and South Africa which all held that discrimination on the basis of and criminalisation of homosexuality and homosexual acts violated the fundamental human rights to privacy, dignity, and equality. These countries decriminalised homosexual acts.[160]

The court also referenced the Zimbabwean case of *Banana v State*[161] which declared that the law criminalising sodomy was not unconstitutional.[162] The court also quoted Botswana jurisprudence whence at the time of this judgment, the decision of *Kanane*[163] still prevailed and the court still upheld similar provisions as to those that are in question in this current matter.[164] The court also considered the decisions of the European court of Human Rights, which, in the case of *Chapin and Charpentier v France*,[165] unanimously declared that the European Convention on Human Rights does not include the right to marriage for

[153] Ibid paras 355–7.
[154] *Navtej Singh Johar & others v Union of India through Secretary, Ministry of Law and Justice* writ petition (criminal) No. 76 of 2016.
[155] *Naz Foundation v Govt. of NCT of Delhi* 160 Dehli Law Times 277.
[156] *EG & 7 others*; *DKM & 9 others*; *Katiba Institute* supra note 78 para 360.
[157] *Dudgeon v UK* 7525/76 [1981] ECHR 5.
[158] *EG & 7 others*; *DKM & 9 others*; *Katiba Institute* supra note 78 para 361.
[159] Ibid.
[160] Ibid paras 363–5.
[161] *Banana v State* [2000] 4 LRC 621 (ZSC).
[162] *EG & 7 others*; *DKM & 9 others*; *Katiba Institute* supra note 78 para 368.
[163] *Kanane v The State* 2003 (2) BLR 64 (CA).
[164] *EG & 7 others*; *DKM & 9 others*; *Katiba Institute* supra note 78 para 369.
[165] *Chapin and Charpentier v France* Application No 40183/07.

homosexual couples. Furthermore, it held that issues pertaining to the question of same-sex marriage must be left to national laws of the contracting states to the Convention.[166]

The court could not cite any local jurisprudence as there had never been a matter challenging this issue in particular.[167] In determining whether the impugned provisions violate the petitioners' rights to dignity and privacy, the court expressed that the best way to answer that question is by juxtaposing the impugned provisions against the articles of the Constitution and determine whether they can be read in a manner that is constitutionally compliant.[168] The court inquired that if it were to agree with the motion made by the petitioners, which is to strike down the impugned provisions, how would that relate to the values, principles and purposes of the Constitution.[169] The court held that the preamble to the Constitution, articles 10, 159 and 259 reveal a wide context of the jurisprudence of Kenya which is founded on the indigenous culture and societal background of the country.[170]

The court further held that article 4(2) of the Constitution provides that Kenya is a multi-party part and is therefore established in the values and principles of governance expressed in article 10. That being said, the implementation and infusion of these values into the Kenyan society has allowed it to progress into a nation that is able to recognise and realise the cherished desires of its people. One of those aspirations – which form the foundation of the nation – being culture, as expressed in article 11 of the Constitution. Moreover, article 19 recognises the Bill of Rights which is part and parcel of the democratic nation and is also the underlying structure of social and economic policies. The interpretation of the petitioners' rights must also include other values which are impressed in the Constitution.[171]

The court expressed that having read the Constitution, the final Constitution of Kenya Review Commission (CKRC) and the Committee of Experts (CoE) reports, it has no doubt

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[166] *EG & 7 others*; *DKM & 9 others*; *Katiba Institute* supra note 78 para 370.
[167] Ibid para 371.
[168] Ibid para 383.
[169] Ibid para 385.
[170] Ibid paras 386–7. The court held that: 'The values and principles articulated in the Preamble to the Constitution, Article 10, 159 and 259 reflect the historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. The Constitution is the point of reference in any determination. The Preamble to the Constitution acknowledges ethnic, cultural and religious diversity, the nurturing and protecting the wellbeing of the individual, the family, communities and the nation, a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.'
[171] Ibid paras 388–9.

that the Constitution of Kenya reflects the values and principles which informed the process of making the Constitution which was eventually endorsed by the Kenyan people in the referendum.[172] The court also quoted article 45(2)[173] of the Constitution which makes clear that the right to marriage between two consenting adults is to be enjoyed by people of the opposite sex.[174] It[175] also provides that the family that will enjoy the recognition and protection from the state is one that is 'natural and fundamental unit of society' and which is 'the necessary social order'.[176] The court further highlighted that it must interpret the Constitution in a manner that takes into account political and constitutional history leading up to the enactment of a particular provision and the historical context of the constitution making progress and the fact that the marriage union was reserved for adults of the opposite sex.[177]

Having considered all this and taken consideration of sections 162 and 165 of the Penal Code, in conjunction with article 28 and 31 the Constitution as well as the whole context of the Constitution, the court held that it disagreed with the petitioners that the impugned provisions violate their rights to dignity and privacy. Furthermore, the court could not find that the petitioners' argument, that their rights were violated and threatened on the grounds of sexual orientation, sufficed and the argument could not be justified within the scope and intention of article 45(2) of the Constitution.[178]

The court continued and found that decriminalising consensual same-sex sex would contradict article 45(2) of the Constitution, which only recognises marriage between adults of the opposite sex. The court found it immaterial that the petitioners were not seeking to be

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[172] Ibid para 390.

[173] This section provides:

> (1) The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.
> (2) Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.
> (3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.
> (4) Parliament shall enact legislation that recognises—
>> (a) marriages concluded under any tradition, or system of religious, personal or family law; and
>> (b) any system of personal and family law under any tradition, or adhered to by persons professing a particular religion,
>> to the extent that any such marriages or systems of law are consistent with this Constitution.

[174] *EG & 7 others*; *DKM & 9 others*; *Katiba Institute* supra note 78 para 391.

[175] Art 45(1).

[176] Ibid.

[177] *EG & 7 others*; *DKM & 9 others*; *Katiba Institute* supra note 78 para 392.

[178] Ibid para 395.

allowed to marry. The court reasoned that by allowing same-sex sex, will eventually lead to homosexual couples living together, which contradicts the intention and spirit of the Constitution. [179]

The court also held that decriminalising the impugned provisions would indirectly open a door for same-sex unions, which would be directly contradictory to article 45(2).[180] The court observed that the issue before this court was alive at the time of the construction of the Constitution therefore, if the people of Kenya desired for the right to same sex relationships to be recognised and protected, nothing would have prevented them from making hat declaration without offending the spirit of article 45.[181] The court further expressed that the views, desires and will of the public are embodied in the Constitution and it thus reflects societal views. Therefore, the court found that it could not ignore the provisions of article 45(2) because it reflects the views, opinions and values of the public, which must be factored in when considering constitutional validity of a legislation that was enacted for the purposes of conduct regulation. [182]

The court found that the impugned provisions do not offend the right to privacy and dignity provided for in articles 28 and 31 of the Constitution.[183] Thus, the court held that section 162 and 165 of the Penal Code are not unconstitutional. The court therefore dismissed the petitions. [184] This ruling was received by applause by many who are against homosexuality. [185] Leaders in Kenya have also made it clear that they do not accept homosexuality and they support the ruling made by the high court. [186] The President of Kenya, Uhuru Kenyatta, was recorded saying 'gay rights is really a non-issue', the Deputy President, William Ruto, saying Kenya has 'no room' for gays. Kenyan legislator Aden Duale once told Parliament that homosexuality was 'as serious as terrorism'.[187]

The lack of legal protection on homosexuals in Kenya leaves room for sexual minorities to be routinely abused, assaulted by mobs, raped by vigilantes or enslaved by

[179] Ibid para 396.
[180] Ibid para 397.
[181] Ibid para 399.
[182] Ibid paras 402–3.
[183] Ibid para 405.
[184] Ibid paras 405–6.
[185] Human Dignity Trust 'Kenya', available at *https://www.humandignitytrust.org/country-profile/kenya/*, accessed 19 June 2019.
[186] Ibid.
[187] Ndiso op cit note 77.

criminals.[188] The Penal Code does however, provide some protection to the LGBTQIA community in cases of rape. The Code provides that a person who forcefully has carnal sex with a person of the same sex or attempts to do so will be punished with up to 21 years of imprisonment.[189] The National Gay and Lesbian Human Rights Commission, who were one of the petitioners against the anti-homosexuality laws, has recorded more than 1 500 such attacks against lesbian, gay, bisexual and transgender (LGBTQIA) Kenyans since 2014.[190]

With the above discussion about Kenya it would be trite to discuss Uganda which has similar laws. Discussing Uganda will also show the similarity in the Penal Codes and the anti-homosexuality laws which are all off springs of the former British anti-sodomy laws.

(b) Uganda

(i) The anti-homosexuality laws of Uganda

Uganda is one of the countries that offer harsh sentences on prosecutions of people found to have been participating in homosexual activities. In 2016, Kaoma recorded that the disapproval rate for same-sex relations in Uganda was 96 per cent.[191] In Uganda, homosexuality and same-sex activities are illegal and socially forbidden. This is further legislatively supported by section 145 (Unnatural Offences') of the 1950 Penal Code Chapter 120, Laws of Uganda, which provides that 'carnal knowledge' of any person or animal or allows another person to have carnal knowledge of him, 'against the order or nature' will be found guilty of an offence and will be *imprisoned for life* [emphasis added].

It must be noted that although this Ugandan anti-gay law is similar to the anti-gay laws of the previous former British colonies provided for in this chapter, the punishment of violating this law in Uganda, in particular, is life imprisonment, which is much harsher than

[188] Ibid.

[189] S 162 of the Penal Code provides:

'…Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if –

(i) the offence was committed without the consent of the person who was carnally known; or

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

[190] Ibid.

[191] Kapya Kaoma 'An African or un-African sexual identity? Religion, globalisation and sexual politics in sub-Saharan Africa' in Adriaan van Klinken & Ezra Chitando (eds*) Public Religion and the Politics of Homosexuality in Africa* (2016) 118.

the other sub-Saharan African countries that punish this crime.[192] Section 146 of the Penal Code stipulates that a person who attempts to commit the offence prohibited in section 145 commits a felony shall be imprisoned for a period of seven years.[193] Furthermore, section 148 of the Penal Code provides for the commission, procurement or attempt to procure the commission of any act of 'gross indecency', whether in public or private, by any male person with another male person. Such persons are deemed guilty of an offence and are liable for seven years imprisonment.[194]

In 2009, Adrian Jjuuko brought a petition before the CC of Uganda in *Adrian Jjuuko v Attorney General*.[195] The premise of the petition was that section 15(6)*(d)* of the Equal Opportunities Act[196] was inconsistent with the Constitution of the Republic of Uganda in as far as it provided that social minorities [which would include the LGBTQIA community] may be discriminated against, which was contrary to article 20(1) of the Constitution which guarantees that the fundamental human rights and freedoms are inherent and not granted by state.[197] It also enjoins all agents of the government to respect, uphold and promote the fundamental human rights and freedoms of the individual.[198]

It was the petitioner's contention that section 15(6)*(d)* of the Equal Opportunities Act was also inconsistent with article 21(1) of the Constitution which guarantees equality of all persons before and under the law in all spheres of political, social and cultural life[199]; article 21(2) of the Constitution which prohibits discrimination that negates equal protection of the law[200]; article 28(1) of the Constitution which guarantees the right to a fair hearing before an

[192] The Law Library of Congress, Global Legal Research Center 'Criminal laws on homosexuality in African nations' (2014), available at *https://www.loc.gov/law/help/criminal-laws-on-homosexuality/homosexuality-laws-in-african-nations.pdf*, accessed on 27 June 2019. In 2014 the staff of the Global Legal Research Directorate Law Library of Congress conducted research on the criminal laws on homosexuality in Africa. The information was compiled in a chart that gives succinct summaries of the laws. Of all the African countries who punish homosexuality, it was found that Uganda has the harshest punishment, which is life imprisonment.
[193] The Act provides that: 'Any person who attempts to commit any of the offences specified in section 145 commits a felony and is liable to imprisonment for seven years.'
[194] The Act provides: 'Any person who, whether in public or in private, commits any act of gross indecency with another person or procures another person to commit any act of gross indecency with him or her or attempts to procure the commission of any such act by any person with himself or herself or with another person, whether in public or in private, commits an offence and is liable to imprisonment for seven years.'
[195] *Adrian Jjuuko v Attorney General* Constitutional Petition No. 001 of 2009.
[196] Equal Opportunities Commission Act, 2007.
[197] *Adrian Jjuuko v Attorney General* supra note 195 para 20.
[198] Ibid para 30.
[199] Ibid para 35.
[200] Ibid para 40.

impartial tribunal[201], and; article 36 of the Constitution which guarantees protection to minorities.[202] The court found that the arguments made by the Petitioner were correct and declared that section 15(6*)(d)* of the Equal Opportunities Commission Act was inconsistent with article 2(2) of the Constitution of the Republic of Uganda and was thus void.[203]

On 20 December 2013, Parliament adopted the Anti-Homosexuality Act,[204] which prohibited same-sex marriage and 'homosexual propaganda'. The Act also punished homosexual practices with life imprisonment. However on 1 August 2014, the Act was declared as invalid by the CC on the basis that Parliament lacked the required quorum[205] when the law was approved. This meant that the previous 1950 Penal Code was retained.[206] On 29 October 2014, members of Uganda's ruling party proposed a draft of a new bill entitled, 'The Prohibition of Promotion of Unnatural Sexual Practices Bill'. This bill was intended to replace the annulled 2013 Anti-Homosexuality Act by placing same-sex acts in the same category as bestiality, paedophilia, and other heinous acts.[207]

In February 2015, the Human Rights Awareness and Promotion Forum initiated proceedings to have the East African court of Justice rule that laws such as the Ugandan Anti-homosexuality Act are unacceptable and are a violation of human rights.[208] That court found in casu, that the case was moot since the law was not enacted. However, under a public interest exception the court found that the evidence presented by government was insufficient to establish enough public importance to the homosexuality in Uganda. [209]

The legislature enacted the Non-Governmental Organisations Act, 2015 ('NGO Act') which came into force in March 2016. Section 30(1)*(a)* of the NGO Act which prohibits the registration, under the Act, of any organisation whose objectives contravene the provisions of

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[201] Ibid.
[202] Ibid para 45.
[203] Ibid para 385.
[204] Which became the Anti-Homosexuality Act of 2014.
[205] As required by Arts 2(1) and (2), 88 and Rule 94(1) of the Constitution of the Republic of Uganda and Rule 23 of the Parliamentary Rule of Procedure.
[206] *Oloka-Onyango & others v Attorney General*, Constitutional Petition number 08 of 2014.
[207] International Lesbian, Gay, Bisexual, Trans and Intersex Association: Aengus Carroll & Lucas R Mendos 'State Sponsored Homophobia 2017: A world survey of sexual orientation laws: criminalisation, protection and recognition' (Geneva; ILGA, May 2017), available at *https://ilga.org/ilga-state-sponsored-homophobia-report-2017*, accessed on 19 June 2019 at 104.
[208] *Human Rights Awareness and Promotion Forum (HRAPF) v Attorney General of Uganda* Reference No. 6 of 2014; *Uhai Eashri & another v Human Rights Awareness & Promotion Forum (HRAPF) & another* Applications No: 20 & 21 of 2014.
[209] Ibid para 60.

the Constitution. The laws of Uganda include the laws prohibiting any same-sex relations and same-sex marriages.[210] Therefore, this prohibits registration of any NGO that seeks to support same-sex relations or people that belong to the LGBTQIA community. Further sections lay out detailed corporate governance requirements for NGO registration.[211]

(ii) Case law

In 2016 Frank Mugisha and others initiated a case against Uganda Registration Services Bureau (hereinafter referred to as 'URSB') in the high court under articles 20(1) and (2), 21(1), (2), 29(1)*(b)*, *(d)*, and *(e)*, 32(1) and (2), 36, 38, 42, and 50(1) of the Constitution of the Republic of Uganda[212] and Order 52 rule 1 of the Civil Procedure Rules (CPR), in *Frank Mugisha & others v Uganda Registration Services Bureau.*[213] In casu the applicants had endeavoured to register Sexual Minorities Uganda (SMUG) with the URSB under the provisions of section 18 of the Companies Act, 2012 for the reservation of the name 'SMUG'.[214] URSB rejected their application on the ground that the name was 'undesirable' and 'un-registrable' because SMUG was to be formed to advocate for the rights and well-being of persons belonging to the LGBTQIA community, which persons are engaged in activities labelled criminal acts under the Penal Code Act.[215] URSB also cited section 36 of the Companies Act.[216]

The objectives of SMUG were contained in its Memorandum of Association. [217] The issues brought before the court by the applicants were 'whether the refusal by URSB to reserve the name of SMUG and consequently to register SMUG contravened the Constitution

[210] See the Uganda Penal Code of 1950.
[211] Part VIII of the NGO Act.
[212] The stated Articles of the Constitution provide for the fundamental rights and freedoms of individuals and groups. These include: the right to equality and freedom from discrimination, the right to protection of conscience, expression, assembly and association, State affirmative action in favour of marginalised groups, protection of rights of minorities, civic rights and activities and the right of any person to just and fair treatment in administrative decisions.
[213] *Frank Mugisha Others v Uganda Registration Services Bureau* Miscellaneous Cause No. 96 of 2016.
[214] Ibid para 5.
[215] Ibid para 12.
[216] Ibid para 6.
[217] Ibid. The objectives included:

> '(a) research and documentation of violations of fundamental human rights of LGBTI people in Uganda; (b) promote protection, wellbeing and dignity of LGBTI persons and combat discrimination in policy, law and practice;
> (c) providing security response and safe space to the members in case of crisis and;
> (d) providing health care services for the LGBTI people in Uganda.'

of Uganda [particularly article 43(1) of the Constitution]?' and 'whether [the applicants] are entitled to the remedies sought?'[218]

In adjudicating the case, the court first made it clear that all fundamental rights of an individual are inherent and not granted by the state.[219] However, the court also made it clear that not all fundamental human rights and freedoms are absolute.[220] The court then drew a distinction between 'non-derogable and derogable fundamental rights and freedoms'.[221] The court found that 'non-derogable' fundamental rights and freedoms, as prescribed in article 44 of the Constitution, include rights and freedoms related to the treatment of individuals. [222] It stated that the focus of its ruling remained in article 43(1) of the Constitution, which provides that whilst enjoying fundamental rights and freedoms, one must not prejudice the fundamental rights and freedoms of others or the public interest. [223]

The court also quoted article 27(2) of the African Charter on Human and People's Rights (ACHPR), which stipulates that a person must exercise their rights and freedoms in a manner that gives regard to the rights of others and the common interest, morality and security. [224]

The applicants argued that the limitation under article 43(1) does not apply in this case and that the rejection of the registration of SMUG by the respondent (URSB) was unconstitutional whilst on the other hand, the respondent (URSB) argued that the limitation does in fact apply to the case as rejecting the registration of SMUG was in the public interest,[225] and that the objectives of SMUG were to promote behaviour not in line with the laws of Uganda, particularly section 145 of the Penal Code Act.[226]

The court held that the test to determine whether the rejection by the respondent falls within the ambit of article 43 is that the respondent's ground for rejecting the registration of

[218] *Frank Mugisha* supra note 213 para 10.
[219] Ibid para 16.
[220] Ibid para 17.
[221] Ibid.
[222] Ibid. The rights and freedoms include:
'(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
(b) freedom from slavery or servitude;
(c) the right to a fair hearing;
(d) the right to an order of habeas corpus.'
[223] *Frank Mugisha* supra note 213 para 20.
[224] Ibid para 21.
[225] Ibid para 24.
[226] Ibid para 28.

SMUG must demonstrate[227] that SMUG would either prejudice the fundamental or other human rights and freedoms of others or of the public interest.[228] The court explained that the public has a stake and a common interest in the ideals or actions of an individual or group of persons to the extent that they may affect the morality of others.[229] The respondent also argued that the promotion of morals is a feature of public interest which can be a legitimate justification for restrictions of certain rights. The respondent further argued that the nature of criminal law is considerate of public interest and concerned about safeguarding it. [230]

On the other hand, the applicants relied on the decision made in the case of *Jackueline Kasha Nabagesra & others v Rolling Stone Ltd & another*[231] where it was held that in order to be convicted under section 145 of the Penal Act one must have committed an act prohibited that is regarded as a crime under this provision.[232] The court also said that section 145 of the Penal Code is more tapered than 'gayism'.[233] 'The applicants further argued that the decision made by the high court in *Jackueline Kasha Nabagesra & others v Attorney General and Rev Fr Lokodo*[234] was wrong. In casu, Musota J held that in addition to the offence provided for under section 145 of the Penal Code Act, it is also an offence to, directly or indirectly, assist or encourage the commission of an offence or to conspire to do so whether the offence was actually committed or not. It is also an offence to promote the commission of an offence. [235]

The court in that case further held that the Minster acted lawfully by shutting down a workshop on the ground that was used for the purposes of promoting and encouraging homosexual practices. [236] The court however, disagreed with the position of the *Rolling Stone*[237] case but agreed with the holding of Musota J in the *Lokodo* case.[238] The court also agreed with the arguments made by the respondent that the objectives of SMUG were to promote behaviours that contravene not only section 145 of the Penal Code Act, but also

[227] The burden of proof had shifted to the respondent.
[228] The court used the Black's law dictionary (9 ed at 1350) to define public interest as 'the general welfare of the public that the warrant recognition and protection, something in which the public as a whole has a stake.'
[229] *Frank Mugisha* supra note 213 para 27.
[230] Ibid para 28.
[231] *Jackueline Kasha Nabagesra & others v Rolling Stone Ltd & another* HC MC 163 of 2010.
[232] *Frank Mugisha* supra note 213 para 15.
[233] Ibid.
[234] *Jackueline Kasha Nabagesra & others v Attorney General and Rev Fr Lokodo* HC MC. No. 033 of 2012.
[235] Ibid para 33.
[236] Ibid.
[237] *Jackueline Kasha Nabagesra* supra note 231.
[238] *Frank Mugisha* supra note 213 para 35.

article of 31(2)*(a)*[239] of the Constitution as amended by section 10 of the Constitution (Amendment) Act, 2005. The court further held that SMUG would be an organisation that is formed with the purpose of promoting and allowing the association of persons and the LGBTQIA community whose practices and ideals contradict the laws of Uganda. [240]

The court further held that courts of law in Uganda are required to exercise judicial power in conformity with the law, the values, norms and aspirations of the people of Uganda.[241] The court then agreed that the objectives of SMUG go against the values and norms of the people of Uganda and are prejudicial to the public interest.[242] Furthermore, the court quoted and agreed with the position held in the case of *The King v Registrar of Joint Stock Companies*[243] wherein similar to this case, the registrar refused to register the company on the ground that its object was illegal.

In the appeal of the judgment, the court of appeal affirmed the decision of the court a quo and held that a company whose Constitution proposes to engage in activities which are an offence against the law cannot be formed.[244] The court concluded in holding that URSB was successful in justifying its rejection of registering SMUG and that the rejection by URSB was taken in the public interest and was well within the ambit of article 43 of the Constitution.[245]

The above cases discussed are indicative of the way Uganda views homosexuality. They demonstrate the notions and beliefs that not only the public has but also that the courts affirm, about the LGBTQIA community. They also show the extent to which the LGBTQIA community can be excluded. The *Frank Mugisha & others v Uganda Registration Services Bureau* case exemplifies how deeply the LGBTQIA community is rejected in Uganda, that even organisations that are intended to assist and offer support to the LGBTQIA community are forbidden. The prospects of this changing in the near future in Uganda currently look slim.

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[239] This section provides that: 'Marriage between persons of the same sex is prohibited.'
[240] *Frank Mugisha* supra note 213 para 32.
[241] Art 126(1) of the Constitution; ibid para 41.
[242] *Frank Mugisha* supra note 213 para 41.
[243] *The King v Registrar of Joint Stock Companies* [1931] 2 KB at 197–203.
[244] *Frank Mugisha* supra note 213 para 42.
[245] Ibid para 44.

IV CONCLUSION

It is obvious that from the above statutes and case law that the British laws have had a long-standing effect on some of its former African colonies and the progress for some is ostensibly slow. This chapter has shown how buggery became a crime from Roman Law to English Law and now in Africa through colonisation. It is evident that the laws reigning in these former colonies are similar to each sentence of imprisonment and the extremes of punishment. It is also evident that homosexuality in these countries is seen as not only taboo, but as a foreign concept and thus un-African and therefore illegal. The next chapter will explore the reasons behind the beliefs of the un-Africanism of homosexuality and the history that has influenced this belief. Furthermore, the next chapter will explore whether homosexuality is really a western import.

CHAPTER 3

HOMOSEXUALITY AS AN UN-AFRICAN CONCEPT: LOOKING AT THE INFLUENCE OF THE CHURCH

I INTRODUCTION

Homosexuality is often said to be an un-African concept for those who are not accepting of the LGBTQIA community. In 2013, the 'Big Debate' on SABC hosted a debate under the topic 'Is Homosexuality un-African?' [1] The debate hosted a number of speakers from different African countries, including a Member of Parliament of Uganda, David Bahati (who was strictly against homosexuality and adamantly advocating for the passing of the anti-homosexuality bill in Uganda), and the former President of Botswana, Festus Mogae [2]. Inference can be drawn from the comments made in the debate that many people are of the belief that homosexuality is of western culture that was never part of Africa. Some were of the belief that homosexuality came into Africa through the British colonisation of African countries.

This chapter looks at exploring and analysing these notions and also investigates why homosexuality is said to be un-African and a western import to Africa. There are several reasons why homosexuality is said to be un-African and why it is rejected in many African countries which include biblical/scriptural prohibition and Africanist/traditionalist unacceptance of homosexuality. These aspects will be discussed in this chapter.

[1] The Big Debate 'Is Homosexuality un-African?' 3 March 2013, available at *https://youtu.be/CUBEq1c4sjc*, accessed on 26 April 2019.
[2] Presidential term: 1 April 1998 – 1 April 2008.

II IS HOMOSEXUALITY A WESTERN CONCEPT?

(a) The early western existence of homosexuality and denial of early existence of homosexuality in Africa

Homosexuality in human beings[3], has existed for centuries all around the world, although the misconception by some is that homosexuality is merely a millennial 'fashion trend'.[4] Homosexuality has only become more apparent and prevalent recently because there has been a rise in awareness on the rights of gay and lesbian people, and the rise on awareness of plurality of sexualities and gender identities that exist in the world, whereas previously speaking on such matters in the past was regarded as taboo.[5] The first reference of homosexuality in the Christian religion is found in the Bible in Genesis 19:1–11[6] which is estimated to have been in 1897 BC.[7] The Bible records[8] the first reference of homosexual activity to have been in the twin cities of Sodom and Gomorrah, which are believed to have been situated along the Jordan Valley in Israel.[9]

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[3] It has been shown that some animals also exhibit homosexual behaviour. (James Owen 'Homosexual activity among animals stirs debate: Birds do it, bees do it, even educated fleas do it. So go the lyrics penned by US songwriter Cole Porter' 23 July 2004, available at *https://www.nationalgeographic.com/science/2004/07/homosexual-animals-debate/*, accessed on 20 August 2019.

[4] David Brennan 'Politician says being gay is a "fashion trend": 'In my whole life up to 50, I had never seen or heard of a homosexual person' *NewsWeek* 23 January 2019, available at *https://www.newsweek.com/bob-katter-gay-marriage-lgbt-same-sex-homosexuality-australia-1301299*, accessed on 22 July 2019.

[5] Stephen O Murray & Will Roscoe (eds) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (1998) XVI.

[6] Old Testament. The scripture provides: 'The two angels arrived at Sodom in the evening, and Lot was sitting in the gateway of the city. When he saw them, he got up to meet them and bowed down with his face to the ground. "My lords," he said, "please turn aside to your servant's house. You can wash your feet and spend the night and then go on your way early in the morning." "No," they answered, "we will spend the night in the square." But he insisted so strongly that they did go with him and entered his house. He prepared a meal for them, baking bread without yeast, and they ate. Before they had gone to bed, all the men from every part of the city of Sodom—both young and old—surrounded the house. They called to Lot, "Where are the men who came to you tonight? Bring them out to us so that we can have sex with them." Lot went outside to meet them and shut the door behind him and said, "No, my friends. Don't do this wicked thing. Look, I have two daughters who have never slept with a man. Let me bring them out to you, and you can do what you like with them. But don't do anything to these men, for they have come under the protection of my roof." "Get out of our way," they replied. "This fellow came here as a foreigner, and now he wants to play the judge! We'll treat you worse than them." They kept bringing pressure on Lot and moved forward to break down the door. But the men inside reached out and pulled Lot back into the house and shut the door. Then they struck the men who were at the door of the house, young and old, with blindness so that they could not find the door.'

[7] James Ussher *The Annals of The World* (1658) 22.

[8] Genesis 19. The Old Testament.

[9] James A Loader *A Tale of Two Cities: Sodom and Gomorrah in the Old Testament, Early Jewish and Early Christian Traditions* (1990) 49.

It has also been shown that homosexual activity and inclinations also existed among European colonials, explorers, settlers and military as early as 1400s.[10] Explorers, colonials and the military were predominantly men who often married late or not at all and spent long periods of solitude away from women and often only among themselves.[11] They shared many spaces and experiences together, including barracks, dressing and bathing.[12] When they were not working, they would enjoy their rest and recreational drinking and searching for sex wherever it may be found, and because there were no women among them, they would enjoy sex among themselves.[13] Since European imperialism spread across the world in continents including Africa, Asia and Australia, so did the homosexual lifestyle. Hence, the belief of many Africans that 'white' (or European) people introduced homosexuality into the continent during colonialism, abusing their power and wealth to corrupt the traditional African way of life.[14]

However, there seems to be some differences between the school of thought that colonialism brought homosexuality into Africa and the ideology that homosexuality being un-African was an idea influenced by white settlers, and that in actual fact, homosexuality existed in pre-colonial Africa. Marc Eprrecht in his book *Hungochani: The History of a Dissident Sexuality in Southern Africa*[15] argues that in the colonial era, racialism was predicted on the belief that Africans were essentially different and inferior to the 'so-called civilised' branches of humanity; they possessed no history, or they were uniformly 'childlike' and incapable of sophisticated thoughts and emotions.[16]

Africanist research since the 1940s has been able to demonstrate the falseness of this belief and to rally evidence that shows how African history, culture, and humanity are complex and diverse as other regions of the world. The very idea of Africa as a single entity is Eurocentric.[17] Epprecht continues to argue that it is disturbing that some African leaders and Africanist intellectuals now seek to confine African people (in terms of sexuality), once

[10] Robert Aldrich *Colonialism and Homosexuality* (2003) 24.
[11] Ibid at 23.
[12] Ibid.
[13] Ibid at 79.
[14] Marc Epprecht *Unspoken Facts: A History of Homosexualities in Africa* (2008) 24.
[15] Marc Eprrecht *Hungochani: The History of a Dissident Sexuality in Southern Africa* (2004) 5.
[16] Ibid.
[17] Ibid.

again like the Europeans did, to a narrow and fundamentally dehumanising stereotype (i.e. heteronormativity).[18]

Some African leaders and non-supporters of the LGBTQIA community who stand against the prejudice of African black people brought on by western colonisers have also, seemingly contradictorily borrowed ideas of the same western colonisers concerning homosexuality in Africa – which are that homosexuality has never existed in Africa and that homosexuality is not biblical; it is a public health hazard; and is against the traditional African family values.[19] Epprecht argues that these arguments seem to be borrowed from social conservatives in the west, while the inhibitory laws (such as the Buggery Act 1533 that gave birth to anti-homosexuality laws in British colonies) are a direct legacy of colonialism.[20] Even the claim that homosexuality or same-sex behaviour is un-African appears to have originated in the west rather than Africa itself. [21]

(b) Arguments against and denial of the early existence of homosexuality in Africa

Many scholars have made arguments against the early existence of homosexuality, arguments that are consistent with western inclinations to believe that homosexuality was never part of Africa's history.[22] From as early as the eighteenth century, European men of a certain class, such as Sir Edward Gibbon wanted to believe that Africans were exempt from this 'moral pestilence' of sodomy.[23] For Europeans, black Africans were the epitome of the primitive man. The primitive man had to be heterosexual since he was supposedly close to nature, ruled by instinct, and culturally unsophisticated. Furthermore, his sexual energies and outlets were said to be devoted exclusively to their natural purpose, which is biological reproduction.[24]

Some recent scholars also dispel the indigenous existence of homosexuality in Africa. John C Caldwell, Pat Caldwell and Pat Quiggin presented an overview of the anthropology up to the 1980s and concluded that there is a distinct African sexuality confirming the assumptions and beliefs of Europeans about confining Africa to just a single entity as

[18] Ibid.
[19] Eprrecht op cit note 15 at 7.
[20] Ibid.
[21] Ibid.
[22] Edward P Antonio 'Homosexuality and African culture' in Paul Germond & Steve de Gruchy (eds) *Aliens in the Household of God: Homosexuality and Christian Faith in South Africa* (1997) 295.
[23] Edward Gibbon *The Decline and Fall of the Roman Empire* (1925) 506.
[24] Murray & Roscoe (eds) op cit note 5 at XI.

opposed to the diverse continent with diverse cultures that it actually is.[25] Epprecht however argues that this conclusion is unfounded because of the lack of investigation or direct research on the topic of same-sex activities or even masturbation.[26] Murray and Roscoe have also said that anthropologists have reinforced the myth of African sexual exceptionalism by failing to thoroughly investigate same-sex trends and therefore failing to accurately report what they do observe.[27]

Furthermore, others like Michael Davidson have contributed to the stereotype of a homo-free Africa.[28] In his book, *Some Boys*, Davidson accounts for a time when he was living among the Zulu in the 1920s and claims that he never saw any sign of any kind of homosexual behaviour or understanding of homosexual practices.[29] It is argued that this is a controversial claim, as it will be discussed later in this chapter, because there has been evidence to show some homosexual activities among the Zulu tribe, especially among the men who fought alongside King Shaka Zulu.

Another anthropologist of the Shona (Zimbabwe) people, Michael Gelfand made a conclusion consistent with the European belief of a homo-free Africa, after he did an enquiry on the case of Zimbabwe.[30] Gelfand concluded that the traditional Shona people did not have problems associated to homosexuality.[31] Gelfand attributed that to the children being brought up using a valuable method especially with regard to normal sex relations, thus avoiding issues related to homosexuality which Gelfand argues is prevalent in the western society.[32] To this assertion by Gelfand, Epprecht responded by arguing that such assertions of the non-existence of homosexuality in African society laid a foundation for the belief that the practice of homosexuality in non-traditional settings is primarily influenced by external factors.[33]

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[25] John C Caldwell, Pat Caldwell & Pat Quiggin 'The social context of AIDS in sub-Saharan Africa' (1989) 15(2) *Population and Development Review* at 187.
[26] Epprecht op cit note 14 at 8. On the issue of masturbation, Epprecht questions why masturbation was not an option for men who had been separated from their wives or women for long periods of time and had a need for orgasm but instead were 'forced' to engage in sex with other men and sometimes with animals to satisfy the need for orgasm.
[27] Murray & Roscoe (eds) op cit note 5 at XII.
[28] Michael Davidson *Some Boys* (1988) 187.
[29] Ibid.
[30] Michael Gelfand 'Apparent absence of homosexuality and lesbianism in traditional Zimbabweans' (1985) 31(7) *Central African Journal of Medicine* at 138.
[31] Ibid.
[32] Ibid.
[33] Epprecht op cit note 14 at 8.

In dispelling the existence of homosexuality in Africa or when acknowledging its existence, some anthropologists and writers, have often diminished it to merely a passing phase in an adolescent, and have minimised and discounted its meaning and cultural significance. Melville J Herskovits in the 1930s claimed that homosexuality among the Dahomey youths was merely situational and opportunistic.[34] Herskovits claimed that when boys and girls stop interacting by playing games with each other, the opportunity for boys to have companionship with girls in the same group ceases.[35] At this time, the boy might take another boy 'as a woman'. This is called gaglgo, which is homosexuality.[36] Herskovits continues to claim that sometimes, this kind of homosexual affair continues for the entire life of the couple.[37]

In response to Herskovits's claim, Murray and Roscoe argued that by making a claim that homosexual practices are due to the lack of women or part of a passing adolescent phase, it denies the possibility that an individual may find pleasure in another person of the same sex.[38] Murray and Roscoe maintain that anthropologists always depended on the material subsistence and assent of – previously the colonial and now the western and African states and political authorities – in their research.[39] This gave basis for why some anthropologists denied or dismissed the existence of homosexuality even when they witnessed it.[40]

(c) The early existence of homosexuality in Africa

Despite the denial or dismissal of the early existence of homosexuality in Africa, and arguments that homosexuality is only consistent with western culture and is a western import[41] there has been evidence to show that homosexuality has existed in Africa even prior to the colonisation of Africa. Most of what is known about what traditional African settings were like was through the writings of individuals who were part of the colonial system that significantly disrupted those cultures.[42] Because of the lack of native writing systems before

[34] Melville J Herskovits *Dahomey*: *An Ancient West African Kingdom* (1938) 289.
[35] Ibid.
[36] Ibid.
[37] Ibid
[38] Murray & Roscoe (eds) op cit note 5 at XIII.
[39] Ibid at XIV.
[40] Ibid.
[41] For example, the late former President Robert Mugabe of Zimbabwe said at the Global Coalition for Africa meeting held in Maastricht in November 1995 that the African culture and tradition does not allow homosexuality. The Citizen (28 November 1995) reproduced in Antonius J G M Sanders 'Homosexuality and the law: A gay revolution in South Africa?' (1997) 41(1) *Journal of African Law* at 100–1.
[42] Murray & Roscoe (eds) op cit note 5 at 9.

the late nineteenth century, there are only a few sources of evidence and accounts of original African societies and cultures before European contact.[43] These sources of evidence show that homosexuality existed throughout the whole continent of Africa.

In the Horn of Africa[44] reports of open male-male sexual relationships – which were age-based relationships (where an older male would have sexual relations with younger boys who usually played the passive role in the sexual relationship) – existed in Eritrea at the beginning of the twentieth century.[45] These relationships were tolerated by the boys' fathers since it was a source of income.[46] After puberty the boys usually went on to have sexual relationships with females.[47] However, some boys would still continue to have male-male sexual relations until twenty years old. Not all these homosexual relationships were for money, as there is an unusual case of a 25-year-old married chief who continued to have receptive sex with men but not for payment.[48]

In eastern Ethiopia it was recorded that sodomy was not foreign to the Harari.[49] Unlike Eritrea, male-male relations were not organised in terms of age or gender status, however, they occurred often between adult men and between men and youth.[50] On the southern edge of Ethiopia in the mid-1960s it was found that men referred to as 'sagoda' – a word used by the Konso people for an effeminate man – were known to be able to seduce other men to have sex with them.[51] However, it was believed that men did not only practice sodomy with sagoda but also among themselves.[52] Among the Maale people of southern Ethiopia it was observed that there were men (called 'ashtime') who were transvestites, who performed

[43] Ibid. It is believed that there are Arabic sources that date back as early as the ninth century that give accounts of sexual practices as Islamic traders descended the coasts of Africa, however, they are yet to be scrutinised.
[44] A region of eastern Africa that is a home to Djibouti, Eritrea, Ethiopia, and Somalia.
[45] Paolo Ambrogetti *La Vita Sessuale nell'Eritrea* (1900) 16. Translation by Rudi C Bleys *The Geography of Perversion: Male-To-Male Sexual Behavior Outside the West and the Ethnographic Imagination, 1750–1918* (1995) 169–70. See also Murray & Roscoe (eds) op cit note 5 at 21.
[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] The Harari being the Islamic ethnic group traditionally inhibiting the walled city of Harar in the Harari region of eastern Ethiopia; see Atlas of Humanity 'Ethopia, Harari people', available at *https://www.atlasofhumanity.com/harari*, accessed on 23 June 2019.
[50] Murray & Roscoe (eds) op cit note 5 at 21.
[51] Marc Epprecht *Heterosexual Africa? The History of an Idea from the Age of Exploration to the Age of AIDS* (2008) 57.
[52] Murray & Roscoe (eds) op cit note 5 at 22.

female tasks, cared for their own houses (which was regarded as the duty of women to do so), and apparently had sexual relations with men.[53]

The Maale people have testified that more of the ashtime had existed in the nineteenth century, however they were considered abnormal.[54] It was traditionally known that the Maale king was the male principle incarnate and for that reason, no mature woman (of child-bearing age) could enter the king's compound.[55] Consequently, domestic labour meant to be generally done by females was performed by the ashtime, who would be gathered and protected by the king.[56] On nights before royal rituals, the king was prohibited from engaging in sexual relations with females.[57] However, it was not prohibited for him to engage in sexual relations with the ashtime. This, therefore, constituted part of general maleness in Maale.[58]

In Sudan there were reports of the existence of non-masculine males who were called 'londo' by the Nuban (Korongo) men and 'tubele' by the Mesakin.[59] These males could marry other men and a 'bride price' of one goat was required for such marriages.[60] It was reported that these marriages generally did not last long.[61] The husband is typically a young man who would be expected to outgrow his homosexual practices, or who would be incentivised to play that part in order to gain an easy life.[62] He would then retire his 'unnatural' life and abandon his male 'wife'.[63] These young husbands would not be disqualified from marrying women at a later stage; at times they would have male and female wives concurrently.[64]

According to John Faupel[65], the Ugandan King Mwanga II's reasoning behind his persecution of Christian pages in 1886 was prompted by their refusal to welcome his sexual

[53] Sophia Thubauville 'Another topic please! Disquiet about transgender in Ethiopia' in Felix Girke, Sophia Thubauville & Wolbert Smidt (eds) *Anthropology as Homage: Festschrift for Ivo Strecker* vol 41 (2018) 6.
[54] Donald L Donham *History, Power, Ideology: Central Issues in Marxism and Anthropology* (1990) 106.
[55] Ibid at 112. See also Thubauville op cit note 53 at 6.
[56] Donham op cit note 54 at 112.
[57] Ibid at 112–13.
[58] Ibid.
[59] Siegfried Nadel *The Nuba: An Anthropological Study of the Hill Tribes in Kordofan* (1947) 285.
[60] Ibid.
[61] Ibid.
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] John F Faupel *African Holocaust: The Story of the Uganda Martyrs* (1962) 82.

advances towards them.[66] It apparently became increasingly difficult for him to staff his harem of pages and supposedly was particularly infuriated when his favourite page, Mwafu, no longer submitted to anal penetration by him.[67] Similarly in South Africa, it was suggested that King Shaka Zulu, who is known as a great warrior who established a kingdom in southern Africa prior to European invasions, was homosexual.[68] He had no wives, no children, and preferred the company of uFasimba, a regiment of the youngest bachelors.[69] He declared that his soldiers must not be drained of energy by marriage and family ties, until they have gotten older and are unfit to be a soldier. It is then that they can marry.[70] The KwaZulu-Natal theme park Shakaland, where the television series *Shaka Zulu* was filmed, is now being marketed as a tourist destination and attraction for African American gays.[71]

Some scholars such as Dan Wylie, however, dismiss such claims about Shaka Zulu's sexuality as 'speculative rubbish'.[72] However Wylie is criticised for his rejection of the homosexuality thesis on the basis that he did not give any justification for this rejection, neither did he seemingly not consider the factors that contributed to the longevity and wide distribution of the homosexuality theory. He just simply dismissed it.[73]

Still in South Africa, in the 1890s, during the time of violent dislocation of black South Africans, a refugee named 'Nongoloza' Mathebula became a leader of a rebel group, called the Ninevites, operating south of Johannesburg.[74] He ordered his troops to abstain from physical contact with females.[75] Instead, older men of marriageable status within the regimen were to take younger male initiates and keep them as 'izinkotshane', boy wives.[76] Nongoloza testified[77] that homosexuality among warriors had always existed. He explained that even when they were not at work and were free, some of them had women and some had young

[66] Ibid. See also Antonius J G M Sanders 'Homosexuality and the law: A gay revolution in South Africa?' (1997) 41 *Journal of African Law* at 103; J A Rowe 'The purge of Christians at Mwanga's court: A reassessment of this episode in Buganda history' (1964) 5(1) *The Journal of African History* at 55.
[67] Murray & Roscoe (eds) op cit note 5 at 24.
[68] Ibid at 177.
[69] Ibid.
[70] Epprecht op cit note 51 at 94.
[71] Ibid at 92.
[72] Dan Wylie *Savage Delight: White Myths of Shaka* (2000) 325.
[73] Epprecht op cit note 51 at 92.
[74] Epprect op cit note 15 at 60. See also Murray & Roscoe (eds) op cit note 5 at 177.
[75] Murray & Roscoe (eds) op cit note 5 at 177.
[76] Ibid.
[77] In his testimonial to the Director of Prisons Report in 1912.

men for sexual purposes.[78] It appears that Nongoloza's justification for sexual relations among men had no referral to fear of venereal disease or tradition but he justified it in terms of sexual desire – that men actually desired to have sex with boys or other men.[79] The Ninevites that Nongoloza led became infamous in the late 1890s for both their criminality and the active and predatory preference for sex with males.[80] Nongoloza testified that male-male sex was not strictly a mine compound or prison phenomenon but that it had always existed.[81]

Homosexuality in historical Africa was not exclusive to male-male sex but women-women sex existed in countries such as south-western Sudan, Central African Republic, and north-eastern Congo among the Zande people before and during the 1430s when this was documented[82], in Mombasa in the nineteenth century[83], lesbianism in Kenya[84], Lesotho and South Africa where it has been documented Tswana women in South Africa formed homosexual relationships while their husbands were away working in mines.[85] According to Isaac Schapera lesbianism was common among girls without it being regarded as reprehensible behaviour.[86]

In Lesotho, Judith Gay made a documented account of institutionalised friendships – which Gay argues developed since the 1950s – among women who remained in their villages while men resettled in South Africa for work.[87] According to Gay, relationships known as 'mummy-baby' formed between young girls in the modern schools and slightly older girls as they developed close relationships which were sexual in nature.[88] Gay further notes that 'Mummy-baby' relationships not only provided emotional support for married and unmarried women who find themselves in new towns or schools, but they also either replaced or accompanied heterosexual bonds.[89]

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[78] Epprect op cit note 15 at 60. See also Murray & Roscoe (eds) op cit note 5 at 177.
[79] Murray & Roscoe (eds) op cit note 5 at 177.
[80] Epprecht op cit note 15 at 60.
[81] Ibid.
[82] Murray & Roscoe (eds) op cit note 5 at 28–9.
[83] Ibid at 32.
[84] Documented in an African novel by Rebeka Njau called *Ripples in the Pool* first published in 1975; Murray & Roscoe (eds) op cit note 5 at 39.
[85] Murray & Roscoe (eds) op cit note 5 at 183.
[86] Isaac Schapera *A Handbook of Tswana Law and Custom* (1938) 278.
[87] Judith Gay '"Mummies and babies" and friends and lovers in Lesotho' (1985) 11(3-4) *Journal of Homosexuality* at 97.
[88] Ibid.
[89] Ibid.

Gay relates that these relationships would be voluntarily initiated by one girl who takes a liking to another and felt attracted to her by her looks, her clothes, or her actions and simply asks her to be her 'mummy' or 'baby' depending on her relative age.[90] It is submitted that the arguments made by scholars that homosexuality was inconspicuous in pre-colonial Africa are no longer convincing. It is also submitted that there is enough evidence to show that homosexual practices did indeed exist prior to the colonisation of Africa. It is submitted that it had to be an idea or certain teaching that was infused into the mind of the African society that led to the rejection and prohibition of homosexual practices.

III CHRISTIANITY AND THE WEST: HOW HOMOSEXUALITY BECAME 'UN-AFRICAN'

What is the link between Colonialism and Christianity into Africa? It has been long argued by writers such as Steve Biko in his autobiography *I Write What I Like*[91] – who refers to Christianity as 'the white man's religion'[92] – that prior to colonisation, Africans never knew of the Christian God or the Christian way of living. Africans were only privy to a way of life that was in line with African culture and rarely subscribed to religion and when they did, it was not the Christian God.[93] In the chapter 'Homosexuality among the negroes of Cameroon and a Pangwe tale'[94] Günther Tessmann investigated the Bantu (the Bafia) speaking tribe in Cameroon between 1904 and 1917 and discovered that they did not recognise a God.

Therefore, they did not believe in afterlife after death. This meant that because they believed there is no God there is also no moral evil. There is therefore no punishment after death. [95] He continues to make the conclusion that from the fact that there was total freedom of sexual activity it can be deduced that homosexual desires are firmly found in human nature.[96] It is submitted that this juxtaposed with the Christian view (which will be discussed in detail hereinafter) significantly contradicts the moral Christian view related by the Christian enforcers.

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[90] Ibid at 102.
[91] Stephen Biko *I Write what I Like* (1987).
[92] Ibid at 31.
[93] Ibid.
[94] Günther Tessmann 'Homosexuality among the negroes of Cameroon and a Pangwe tale' in Murray & Roscoe (eds) op cit note 5 above at 150–1.
[95] Ibid at 151.
[96] Ibid.

(a) Christianity and Homosexuality

The Christian attitude toward homosexual practices originates from the biblical tale of the destruction of Sodom and Gomorrah referred to in the book of Genesis 19.[97] The story has exercised a powerful influence, directly and indirectly, upon the civil and ecclesiastical attitudes to sexuality and the issues surrounding the topic of homosexuality since the general assumption about the sin of Sodom and Gomorra was the practice of homosexuality.[98]

In Genesis 18:20 it can be read that the LORD told Abraham his plans to destroy Sodom and Gomorrah because there were grave accusations against the cities. In Genesis 19 (with its heading being 'the sinfulness of Sodom') the Bible makes mention of angels that were sent to destroy Sodom and Gomorrah and a man named Lot who would be spared from death because he was innocent. The Bible continues that Lot took these angels into his house as guests for the night. As they went to bed, all the men of Sodom came to the house and demanded that the guests be brought to them so that they may have sex with them.[99] For decades to the present, scholars debate the real reasons why Sodom and Gomorrah was destroyed with others denying that it was because of homosexuality as many traditional Christians believe it to be. Paul Germond[100] argues that there seems to be four possible inferences one can draw from the destruction of Sodom and Gomorrah:

(a) 'the Sodomites were destroyed for the general wickedness which had prompted Yahweh [the LORD] to send his angels to investigate the city in the first place;

(b) the city was destroyed because the men of Sodom had wanted to rape the angels;

(c) the city was destroyed because the men of Sodom had wanted to engage in homosexual intercourse with the angels;

(d) the city was destroyed for the inhospitable treatment of the visitors sent from the Lord.'

Greg Bahnsen, a scholar, argues for the third possibility, which is the traditional Christian view. He gives contemporary expression to this tradition and argues that the obvious conclusion that God's destruction of Sodom and Gomorrah was due to homosexual

[97] Derrick S Bailey *Homosexuality and the Western Christian Tradition* (1955) 1.
[98] Ibid.
[99] Ibid.
[100] Paul Germond 'Heterosexism, homosexuality and the Bible' in Paul Germond & Steve de Gruchy (eds) *Aliens in the Household of God: Homosexuality and Christian Faith in South Africa* (1997) 213.

practices cannot be avoided.[101] Sherwin Bailey argued for the fourth possibility: that the sin of the citizens of Sodom was that they broke the rules of hospitality.[102] He argued that aggressive behaviour of the Sodomites (the men who wanted to have sex with the angels) towards Lot and his guests violated the rules of hospitality.[103] According to Bailey, the city was destroyed because of the sin of inhospitality to guests and not for sexual immorality.[104]

Walter Eichrodt[105] argues that Jeremiah 23:14[106] and Ezekiel 16:49–50[107] possibly give a broader list of sins in mind and gives a different story of Sodom than what it has been concluded to be (one of divine judgment because of homosexuality). Jeremiah 23:14 suggests that Sodom and Gomorrah's sins included adultery, lies, assisting those who did evil and no one repenting from their ways of wickedness. On the other hand, Ezekiel 16:49–50 suggests that their sins included pride, gluttony and failure to help the poor and needy.

Germond also dismisses the traditional Christian view of homosexuality being the sin of Sodom and maintains that attempted homosexual assault is but one component in the total biblical picture of Sodom's transgressions.[108] Germond further argues that the story of Sodom and Gomorrah is a remote starting point for getting a biblical understanding on sexual ethics. Germond insists that Genesis 19 is inappropriate for guidance in matters pertaining to contemporary sexual ethics. Germond argues that only a vitriolic heterosexist would insist that Sodom and Gomorrah had anything to do with homosexuality and ignore evidence proving otherwise.[109]

It is argued that this argument by Germond does not necessarily mean that the Bible does not make reference to homosexuality as a sin because it certainly does. Leviticus 18:22 and 20:13 are part of what is known as the 'Holiness Code',[110] which called Israel to become

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[101] Greg L Bahnsen *Homosexuality: A Biblical View* (1978) 34.
[102] Bailey op cit note 97 at 2–8.
[103] Ibid.
[104] Ibid.
[105] Walter Eichrodt *Ezekiel* (1970) 215.
[106] 'I have seen also in the prophets of Jerusalem a horrible thing: they commit adultery, and walk in lies: they strengthen also the hands of evildoers, that none doth return from wickedness: they are all of them unto me as Sodom, and the inhabitants thereof as Gomorrah.'
[107] 'Behold, this was the iniquity of thy sister Sodom, pride, fullness of bread, and abundance of idleness was in her and in her daughters, neither did she strengthen the hand of the poor and needy. And they were haughty and committed abomination before me: therefore I took them away as I saw good.'
[108] Germond op cit note 100 at 216.
[109] Ibid.
[110] Bailey op cit note 97 at 29.

a kingdom of priests and a holy nation.[111] Leviticus 18:22 prescribes that it is an abominable act for a man to have sexual relations with another man as he would with a woman. Leviticus 20:13 also prescribes that if a male lays with another as he would with a woman both would have committed an abomination. It further prescribes the punishment of death for the commission of this act. These two prescriptions are commonly read as condemning homosexuality in every form.[112] In this instance Germond argues that these scriptures cannot be applied to contemporary forms of lesbian and gay life.[113] Germond argues that none of the three Old Testament texts (Genesis 19, Leviticus 18:22 and 20:13) are useful for interpreting a normative ethic for contemporary homosexuality.[114]

Germond further argues that the Genesis chapter has more to do with sexual violence and rape than about homosexuality.[115] It is submitted that this stance is contrary to the traditional Christian perspective which suggests that the Genesis chapter is about the sin of homosexuality. Furthermore, Germond argues that although the Levitical prescriptions, which are part of the Holiness Code, are concerned with male prostitution in foreign cults, they are no longer binding on Christians.[116]

In the New Testament, Romans 1:26–7, 1 Corinthians 6:9 and 1 Timothy 1:10, also make mention of homosexuality as a sin. Romans 1:26–7 provides that evildoers dishonoured their bodies by disobeying God's truth by having same-sex intercourse with each other and by practicing idolatry. 1 Corinthians 6:9 lists those who partake in homosexual practices among those who are condemned and will not inherit the kingdom of God because of their sinful actions. 1 Timothy 1:10 also condemns sodomites and characterises those who practice homosexuality as being disobedient and sinful against the law of God.

These scriptures give the background for the basis in which Christians insist that homosexuality is a sin. Interpretation of these scriptures will always be a subject of debate for many, such as Germond who maintains that such scriptures are out of place and do not necessarily apply to the modern day or contemporary lesbian and gay life.[117] His

[111] Exodus 19:6. The Old Testament.
[112] Germond op cit note 100 at 218.
[113] Ibid at 220.
[114] Ibid.
[115] Ibid.
[116] Ibid.
[117] Ibid at 218.

interpretation of these scriptures destroys the idea that these scriptures single out homosexuality as a disreputable act.[118]

Forster[119] also shares the same sentiments as Germond so far as the interpretation of scriptures in relation to contemporary Christianity is concerned. Forster establishes that the hermeneutic differences concerning what the Bible intends and contemporary issues cannot be caved-in together.[120] Forster argues that the passage in Romans 1:26–7, which biblical literalists often interpret as prohibiting homosexuality may not even be dealing with same-sex relationships at all.[121] Forster cautions that this interpretation is dangerous and irresponsible.[122] Forster follows a contextual approach to biblical interpretation as he offers that this prescription must only be interpreted in the context of the time and place in which Paul (the author of the book) had written it.[123] Forster, much like Germond, argues that this prescription is irrelevant in contemporary society.[124] Arguments from Christian supporters of these scriptures will be discussed hereinafter.

IV PROHIBITION OF HOMOSEXUALITY IN AFRICA: THE CHRISTIAN ARGUMENT

The general Christian doctrine is the dogmatic message that is preached across all Christian denominations, with some nuances with some sub-doctrines. However, the main doctrine is instilled throughout all denominations and to all followers of the faith.[125]

Concerning the general Christian doctrine, Millard Erickson in his book *Introducing Christian Doctrine*, says that the Christian doctrine contains statements that detail all the fundamental beliefs taught by Christianity.[126] Erickson further states that these statements contain teachings about the identity and ultimate destiny of a Christian and the fundamental teachings about God, nature and life.[127]

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[118] Ibid at 211–28.
[119] D Forster 'Reading the same Bible and reaching different ethical conclusions: The Bible and Christian ethics' in L Kretzschmar *What is a Good life? An Introduction to Christian Ethics in 21st Century Africa* (2009) 143.
[120] Ibid.
[121] Ibid.
[122] Ibid.
[123] Ibid.
[124] Ibid.
[125] Millard J Erickson *Introducing Christian Doctrine* 3 ed (2015) 4.
[126] Ibid.
[127] Ibid.

Christian doctrine then primarily stems from Scriptures[128] – the Word of God – which means each word written in the Bible is regarded as doctrine and therefore taught to the followers of Christianity. It is submitted that although there are different books in the Bible written by various authors (some who were apostles, prophets, teachers, evangelists, preachers, kings, psalmists, etc. who were given the authority by God to account on events and instructions of God by way of writing them down), 2 Timothy 3:16 of the Bible says that 'all scripture is *inspired by God* and is useful for teaching, for reproof, for correction, and for training in righteousness…' [emphasis added].

Erickson says that the Bible is held to be the defining document or the Constitution of the Christian faith.[129] It specifies what is to be believed and done.[130] Erickson says it is the followed guideline since it possesses the right of defining correct belief and Christian practice.[131] Followers of Christianity are those who continue in the teachings of Jesus Christ (found in the Bible) and thus cannot deny or modify what was taught and practiced by Jesus Christ or by those whom He authorised,[132] despite social evolution and freedom afforded by democracy and the Constitution. The amendment of a secular Constitution may be possible, however, the authority and originator of the Christian constitution is God Himself which makes God the only one eligible to alter or modify the standards of belief and practice of the Christian faith.[133]

According to the WorldAtlas, out of the 54 African states 31 of them have a Christian population that comprises of over 50 per cent of the national population of the country. [134] Such countries include Angola, Botswana Kenya, Malawi, Nigeria, South Africa, Uganda, Swaziland, Zambia, and Zimbabwe, wherein also homosexuality was once a crime or is still a crime.

Different denominations of the Christian faith have expressed the same but nuanced views about the issue of sexuality at large and homosexuality especially. The Methodist

[128] Boisi Center for Religion and American Public Life 'An introduction to Christian theology' (2007) 1 *Boisi Center Papers on Religion in the United States* at 8. Erickson says that other sources of Christian doctrine are: Natural Theology, Tradition, and Experience. (Ibid at 6).
[129] Erickson op cit note 125 at 6.
[130] Boisi Center for Religion and American Public Life op cit note 128 at 10.
[131] Erickson op cit note 125 at 6–7. See also Boisi Center for Religion and American Public Life op cit note 128 at 10.
[132] Boisi Center for Religion and American Public Life op cit note 128 at 8.
[133] Ibid.
[134] 'African countries where Christianity is the largest religion', available at *https://www.worldatlas.com/articles/african-countries-with-christianity-as-the-religion-of-the-majority.html*, accessed on 19 September 2019.

Church of Southern Africa (MCSA) amongst others[135] and is just one example of a church who are debating this issue (MSCA will be used in this thesis as one such example). The MCSA is used as an example in this thesis because of the extensive level that it has discussed and debated the issue of homosexuality compared to other denominations. The issue of rejection or acceptance of homosexuality within the MCSA has been a matter of debate through conferences for years. Since the year 1980 the church has debated the issue of sexuality in general and sexuality as it applies to the Christian faith.[136]

Finally, the 2007 MCSA conference took a position in resolving the differing views about this issue.[137] The two key resolutions were, first that it affirmed that same-sex resolutions that were taken in the conferences of 2001 and 2005 which agreed that the church welcomed diversity and unity in the church. Secondly, that the church recognised that scripture is authoritative in the church, however, there was no one way of interpreting it and there might be diversions within the church on the subject of homosexuality. However, there must be respect for one another despite the differences. It was decided that whilst the church awaited the outcome of the decision of the 2005 conference on the issue of homosexuality in the church, the Methodist ministers were expected to give pastoral care to homosexual individuals as they would do all others.[138]

Paragraphs 1.20 and 1.9.5 of the doctrine of the MCSA (Laws and Discipline) state that the MCSA believes that God calls one into the office of the Christian Ministry, and by virtue

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[135] Other churches have also debated the issue of homosexual practice and same-sex marriage. The Lutherans, the Moravians, the Church of Jesus Christ of Latter-day Saints, the Baptist Church, the Catholic Bishops, the Seventh-day Adventists, the Uniting Presbyterian Church in Southern Africa all stand by what the Bible states and they discourage members of the church and church servants from engaging in homosexual practices. They all affirm the biblical pattern of marriage being between a man and woman and sexual intimacy only reserved for this type of relation. They also do not allow the solemnisation of same-sex marriages in their churches. The Saints of Christ in Pinetown, the Deo Gracious Church in Durban and the Living Waters Church in Greenfield Gauteng are churches that were initiated after churches showed scepticism about homosexuals. These churches believe that homosexual people are human being like all other people and they also come from God. They also believe that since hormonal set-ups are determined at birth, it means that homosexual people also come from God. Furthermore, they believe that marriage is not only for the purposes of procreation but also for joy and companionship, which are factors that transcend gender and sexuality. They believe that homosexual people should be allowed in church. In 2015 the Dutch Reformed Church in South Africa voted to ordain gay ministers and solemnise same-sex marriages. The United Congregational Church of Southern Africa is still engaged in an on-going debate on this issue. See also 'Homosexuality in South Africa' (2015) available at *https://www.kzncc.org.za/homosexuality-in-south-africa/*, accessed on 05 April 2019.

[136] Inclusive and Affirming Ministries 'The storyline of the Methodist Church of Southern Africa (MCSA) and the issue of homosexuality and same-sex relationships' 2019, available at *https://iam.org.za/methodist/*, accessed on 05 April 2019.

[137] Ndikho Mtshiselwa 'How the Methodist Church of Southern Africa read Leviticus 18:22 and 20:13 in view of homosexuality' (2010) 23(3) *Old Testament Essays* at 770.

[138] Ibid.

of being called, is thus dependent on the gifts of the Spirit that God bestows.[139] Ndikho Mtshiselwa in his article *How the Methodist Church of Southern Africa read Leviticus 18:22 and 20:13 in view of homosexuality*, argues that this comes off as contradictory because according to the conference statements made, the MCSA rejects the ministry of the homosexual.[140] With regard to the general membership the MCSA stipulations state that all people are welcome as members of the MCSA.[141] However, in order to be members, they must be prepared to be saved from their sins through faith in Jesus Christ and to show their acceptance of salvation in the manner they conduct themselves in their daily lives. The highlight here is that in the MCSA homosexuals are accepted as general members of the church but they cannot take up leadership positions.[142]

Furthermore, the MCSA ostensibly tolerates same-sex relationships but rejects same-sex marriages. The Doctrine, Ethics and Worship Committee of the Methodist Church of South Africa (DEWCOM)[143] recorded and summed up the stance taken by United Methodist Church's Social Principles on human sexuality which emphasised that homosexual and heterosexual people are of equal worth and should be perceived as such. It stated that every person who has any form of struggle for human fulfilment needs the guidance of the church. It also emphasised that it does not condone the practice of homosexuality and does agree that such practice is against the teachings of Christianity. However, it believes that the grace of God is available to all people. It implored that the church should not condemn or reject the LGBTQIA community and as a ministry itself, it welcomes all people. [144]

It is argued that in the MCSA's quest to be accepting of all people and protesting any form of rejection of people who seek to accept the love and grace of God, their stance has become somewhat confusing, irrational and hypocritical in the sense that the church will

[139] Methodist Church of Southern Africa *Laws & Disciplines* 11 ed (2008) 15.
[140] Mtshiselwa op cit note 137 at 771.
[141] MCSA Laws and Discipline op cit note 139 at 25.
[142] Mtshiselwa op cit note 137 at 772.
[143] According to the Seth Mokitimi Methodist Seminary NPC, available at *https://www.smms.ac.za/dewcom/*, accessed on 09 March 2020, the Doctrine, Ethics and Worship Committee (DEWCOM) of the MCSA is a committee of Conference. DEWCOM is mandated by Conference to answer to questions that face the church on doctrinal and ethical matters, as well as to assist with the development of appropriate conduct and service for the life of the church. It states that the DEWCOM is not responsible for making policy, but provides information to Conference, which then instructs the applicable assemblies of the church to review their recommendations.
[144] Doctrine, Ethics and Worship Committee *Methodist discussion document on Same–Sex relationship and Christianity* (2003) at 16.

tolerate ministers of church who engage in same-sex relationships but reject same-sex marriages.[145]

The rejection of same-sex marriages stems from the church's doctrine which highlights its belief that marriage can only be recognised if it is between a man and a woman.[146] The belief is derived from the interpretation of Scripture of which the DEWCOM points out is read and interpreted literally.[147] On this, Mtshiselwa argues that the literal approach fails to recognise and to be aware of the historical and cultural distance between the twenty first century and the time of the production of these texts.

The texts being spoken of are: Leviticus 18:22 which prescribes that it is an abominable act for a man to have sexual relations with another man as he would with a woman;[148] Leviticus 20:13 also prescribes that if a male lays with another male as he would with a woman both of them would have committed an abomination. It further prescribes the punishment of death for the commission of this act;[149] and Romans 1:26–7 which provides that evildoers dishonoured their bodies by disobeying God's truth by having same-sex intercourse with each other and by practicing idolatry.[150]

The literal approach, according to Mtshiselwa, centres on and recognises as absolute what is considered as explicitly declared in the Scripture about homosexuality.[151]

The beliefs about homosexuality and same-sex marriage are not unique to the Methodist Church as they are similar among other denominations and the Christian faith at large, nuanced only by the extent to which homosexuality is either accepted or rejected.[152]

The DEWCOM records that modern church denominations have differing views on homosexuality. These views range from the complete rejection of homosexuality, using

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[145] In the *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being* [2015] ZACC 35, 2016 (2) SA 1 (CC) para 41, De Lange argued that the church allowed her to continue to practice as a minister of the church whilst being in a homosexual relationship and allowed her to stay in the Church's manse with her partner, but drew the line at recognising her same-sex marriage.

[146] Ibid.

[147] DEWCOM *Methodist discussion document* op cit note 144 at 3.

[148] 'You are not to have sexual relations with a male as you would a woman. It's detestable.'

[149] 'If a man has sexual relations with another male as he would with a woman, both have committed a repulsive act. They are certainly to be put to death.'

[150] 'For this reason, God delivered them to degrading passions as their females exchanged their natural sexual function for one that is unnatural. In the same way, their males also abandoned their natural sexual function toward females and burned with lust toward one another. Males committed indecent acts with males, and received within themselves the appropriate penalty for their perversion.'

[151] Mtshiselwa op cit note 137 at 772.

[152] Inclusive and Affirming Ministries op cit note 136.

Scripture has absolute ground for this rejection; to an acceptance of homosexual people on condition that they do not partake in homosexual acts; to a further conditional acceptance on account that they do not undertake leadership positions (which is the stance taken by the MCSA); to a full acceptance of homosexuality as part of the diversity of God's creation, which encompasses the blessing of same-sex unions and the ordination of homosexual individuals into priesthood.[153] The Methodist Church globally, is not objecting to homosexuality.[154] However, the, MCSA detours from the global stance and chooses to accept homosexual people but reject their ministry and marriage. Therefore, it can be conclusively said that the MCSA does not affirm homosexuality as the global Methodist Church does.[155]

In the broader East and West Africa, the Anglican Church has explicitly expressed its rejection and non-acceptance of homosexuality and has expressed its unwillingness to compromise on the biblical doctrine that teaches that homosexuality is against the nature of God and is thus sinful and forbidden.[156] In July 2012, the Bishop of Anglican Diocese of Mombasa, Julius Kalu, purportedly deemed gay people as enemies of the church of a worse nature than terrorists.[157] Kapya Kaoma attended the dialogue on human sexuality where 35 members of the LGBTQIA community and over 35 religious leaders from various African Christian traditions and regions gathered.[158] One Anglican bishop from the Congo mentioned to Kaoma that he will never be coerced into accepting homosexuality as it is evil and an abomination.[159] Kaoma reports that others made incessant jaundiced comments about transgender individuals whilst some referred to the LGBTQIA community as demons.[160]

The 1998, global Anglican and Episcopal bishops gathered for the Lambeth Conference to engage in the Christian debates on the issue of human sexuality. It is reported that amid the conference a Nigerian Bishop, Emmanuel Chukuma, proceeded to perform an exorcism on an English gay rights activist in an attempt to cast out 'demons of homosexuality' from him.[161] Ensuing from the conference, Anglican bishops from Burundi, Kenya, Nigeria, Rwanda, and

[153] DEWCOM *Methodist discussion document* op cit note 144 at 15.
[154] Ibid at 20.
[155] Mtshiselwa op cit note 137 at 774.
[156] Kapya Kaoma *Christianity, Globalization, and Protective Homophobia* (2018) 47.
[157] Ibid.
[158] Ibid at 48.
[159] Ibid.
[160] Ibid.
[161] Thabo Msibi 'The lies we are told. On (homo) sexuality in Africa' (2011) 58(1) *Africa Today* at 59.

Uganda with associations with the United States (US) Christian Right have explicitly challenged homosexuality.[162]

Anglican Archbishop Eliud Wabukala objected to the court ruling[163] handed down on 24 April 2015, in which the court found in favour of allowing formal registrations of gay rights advocacy groups in Kenya. He contended that the judgment was contrary to the teachings and traditions of both Christianity and Islam. Wabukala further asserted that the Kenyan society is built on traditional family units and does not support sexual minorities' rights.[164] Archbishop Peter Akinola of Nigeria delineated gay individuals as 'lower than dogs'. Nicholas Okoh, successor to Akinola, contended that God made woman for man. He argued that if God wanted people of the same sex to marry, he would have very well created a man and a man or a woman and a woman. Instead, he continued to argue, God created persons of the opposite sex because the purpose of marriage is procreation and the path of same-sex marriage leads to a dead end.[165]

In Southern Africa, however, anti-homosexuality arguments are opposed by a small number of Anglican priests and bishops. Archbishop Desmond Tutu, Archbishop Thabo Makgoba, and Rev MacDonoald Sembereka are among the ecclesiastical authorities who have supported and advocated for LGBTQIA rights.[166]

Antonio argues that the denial that there was any homosexuality in traditional societies takes place in the face of the continuing experience of social and religious conversion to which Africa has been subject to since the arrival of agents of modernity.[167] One of these has been a whole new way of thinking about the morality of sexual activity which missionary Christianity introduced into Africa.[168] Christianity facilitated the establishment of western

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[162] Kaoma op cit note 156 at 56.
[163] *Gitari v Non-Governmental Organisations Co-ordination Board* [2015], Petition 440 of 2013, The High Court of Kenya at Nairobi.
[164] Fredrick Nzwili 'LGBT Kenyans gain the right to organize, and churches promise to fight *The Washington Post* 29 April 2015, available at *https://www.washingtonpost.com/national/religion/lgbt-kenyans-gain-the-right-to-organize-and-churches-promiseto-fight/2015/04/29/e8d24000-ee9d-11e4-8050839e9234b303_story.html?utm_term=.2a4b4354c12f*, accessed on 04 December 2019.
[165] Kanayo Umeh 'Okoh warns Nigeria against legalising same-sex marriage *The Guardian* 29 June 2015, available at *https://guardian.ng/news/okoh-warns-nigeria-against-legalising-same-sex-marriage/*, accessed on 04 December 2019.
[166] George Conger 'Cape Town Archbishop responds to Tutu gay wedding news' 6 January 2016, available at *http://anglican.ink/2016/01/06/cape-town-archbishop-responds-to-tutu-gay-wedding-news/*, accessed on 04 December 2019.
[167] Antonio op cit note 22 at 295.
[168] John C Hatch *The History of Britain in Africa: From the Fifteenth Century to the Present* (1969) 145.

modes of thought and behaviour which meant that religious understanding of morality was established into the traditional settings and social, cultural and political way of thinking in Africa which were otherwise unknown in Africa.[169] This can be seen in the ways in which the effects of western culture have become inscribed in different aspects of African reality; politics, economics, language, culture, religion and morality.[170]

V THE INFLUENCE OF CHRISTIANITY ON SOCIETAL MORALITY AND SOCIAL OPINIONS ON HOMOSEXUALITY

Israel Katoke[171] argues that western Christian missionaries came into Africa with the agenda to rid Africa of its own ways of doing, thinking and acting and to Christianise Africans.[172] This entailed changing the language spoken in that area, the dress code and names they were given.[173] All this had to be European in order meet the standards the western Christian missionaries were setting for Africa.[174] Katoke recounts that this led to the abandonment of African social customs, dress fashion, traditional dances and African culture.[175] Katoke further argues that the conversion of many Africans to Christianity meant that coverts had to abandon their families and fully immerse themselves in the way of living of Christians.[176]

Furthermore, western Christianity had a major influence on social aspects such as marriage concepts and customs, family life and community constructs.[177] Antonio's argument supplements this argument by Katoke. Antonio argues that the denial of homosexuality that is happening in African traditional societies is due to the social and religious conversion that has taken place since the intrusion of the western Christian missionaries into Africa.[178] Antonio argues further that the perspective and thinking concerning the morality of sexual activity was introduced into Africa by Christian missionaries and opened up Africa to

[169] Antonio op cit note 22 at 296.
[170] Ibid.
[171] Israel Katoke 'Christianity and culture: An African experience' (1984) 1(4) *Transformation* 7–10.
[172] Ibid at 7.
[173] Kapya Kaoma 'An African or un-African sexual identity? Religion, globalisation and sexual politics in sub-Saharan Africa' in Adriaan van Klinken & Ezra Chitando (eds*) Public Religion and the Politics of Homosexuality in Africa* (2016) 121. See also George W Reid 'Missionaries and West African nationalism' (1960) 39(3) *Phylon* at 226.
[174] Reid op cit note 173 at 229.
[175] Katoke op cit note 171 at 7.
[176] Ibid.
[177] Ibid.
[178] Antonio op cit note 22 at 295–6. See also Kaoma op cit note 173 at 122.

religious understanding of morality and to western modes of behaviour and social and cultural practices that were previously unknown to Africa.[179]

It is submitted that South Africa is one of few countries in Africa that has decriminalised homosexuality and has legalised same-sex marriage. However, even in this legally progressive country, there are still major concerns and struggles of social non-acceptance and discrimination and it is argued that this is due to the influence of Christianity on the society's moral views on subjects like homosexuality. It is further submitted that the democratic transition of 1994 was a very important and foundational step in creating an open political society in South Africa where conversations about and measures of eradicating discrimination of all forms could be implemented. Furthermore, the 1996 Constitution opened a platform for every citizen to live openly and freely, whilst enjoying the same legal rights as everyone else. It is submitted, however, that for the LGBTQIA community, that might have been true in the legal sense but socially, inclusion and acceptance by not only the religious community but also the general society is still a struggle, notwithstanding the democratic and 'legally free' society that we now live in.

Cameron Modisane argues that the LGBTQIA community still suffers the same tragic challenges that they faced in the hands of the apartheid government, and this is particularly true for black South Africans.[180] Modisane argues that part of the problem is that openness to the rights of the LGBTQIA community is a new idea to most.[181] He further asserts that most people still struggle with the idea that people of the same sex are allowed to live together let alone the fact that they can legally get married.[182] This makes it difficult for many people to understand and recognise and also be sensitive to the struggles that the LGBTQIA community still faces today.[183]

Modisane also argues that one of the challenges still faced by the LGBTQIA community is the failure by the South African government and the justice system to help the victims of corrective rape by setting low bail and taking long periods of time to bring the

[179] Ibid. See also Hatch op cit note 168 at 145.
[180] Cameron Modisane 'Social inclusion for homosexuals' (2014) 73 *The Journal of the Helen Suzman Foundation* at 49.
[181] Ibid.
[182] Ibid.
[183] Ibid. See also R Koraan & A Geduld '"Corrective rape" of lesbians in the era of transformative constitutionalism in South Africa' (2015) 18(5) *PER/PELJ* at 1936–7.

reported cases to conclusion.[184] Other challenges the LGBTQIA community faces, Modisane argues, is the constant unfair discrimination by religious institutions who regularly point out homosexual people as 'sinners, deviant, ill' and 'a threat to society'.[185]

The disapproval of homosexuality by religious institutions cannot be ignored because of the influence the religious community has on society.[186] In the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*[187] the CC also recognised and affirmed the power of social influence and the influence of the religious community when it comes to matters such as homosexuality and same-sex marriages.[188] Although the court maintains that these views cannot influence what the Constitution provides about the grounds of sexual orientation[189], it is argued that it cannot be denied that that very same influence does create an environment that is a hotbed for unfair discrimination and which makes it difficult for the LGBTQIA to be comfortable about expressing their sexuality without the fear of threat against their lives from people who are homophobic. However, blame cannot be placed wholly on the influence from the views of the religious community because as Modisane has argued, there can be various reasons that can cause a person to be homophobic, although religious influence ranks at the top of the list of those reasons.[190]

Markd Massoud[191] submitted that laws do not automatically reflect the attitudes and opinions of society. This sentiment was further affirmed by Duarte[192] when she said that legal injustices alongside mindsets and cultures must be done away with. Duarte expressed that having one's rights and equality guaranteed in law is not necessarily the same as possessing them in one's everyday life in public spaces as those rights and freedoms may not be guaranteed in those public spaces.

In 1995, the University of the Witwatersrand conducted a survey to determine people's attitudes which revealed that only 38 per cent of South Africans thought that the Constitution

[184] Modisane op cit note 180 at 49.
[185] Ibid. See also Vhahangwele Nemakonde 'Somizi storms out of Grace Bible Church over homosexuality remarks' *The Citizen* 22 January 2017, available at *https://citizen.co.za/lifestyle/1404845/somizi-storms-out-of-grace-bible-church-over-homosexuality-remarks/*, accessed on 15 March 2018. A Christian pastor caused outrage when he pointed out that homosexuality is unnatural and sinful. The pastor further claimed that homosexuality is such a repulsive act that even animals do not practice it.
[186] This was once reiterated in the case of *S v Lawrence* [1997] ZACC 11, 1997 (4) SA 1176 (CC).
[187] *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15, 1999 (1) SA 6 (CC).
[188] Ibid para 38.
[189] Ibid.
[190] Modisane op cit note 180 at 50.
[191] Markd F Massoud 'The evolution of gay rights in South Africa' (2003) 15(3) *Peace Review* at 302.
[192] Jessie Duarte 'South African gay and lesbian film festival' May 1994.

should guarantee equal rights to homosexual people.[193] Mwanawina Ilyayambwa[194] in his article in which he analyses the case of *Le Roux v Dey*[195] argues that the judgment raises a key question which presents as a litmus test to the acceptance of homosexuality in the South African society.[196] Ilyayambwa poses the question of whether society, despite the unfair discrimination on the basis of sexual orientation being prohibited by the Constitution, has accepted homosexuality.[197] Ilyayambwa argues that if society had accepted homosexuality and if homosexuality was a concept that was carved into the law as normal behaviour then it would not need special protection from the law.[198]

Ilyayambwa further submits that in ideal circumstances [in a society where homosexuality was accepted], to be called homosexual should not invoke defamatory sentiments, and instead it should be received with affirmation and pride.[199] Further to the non-acceptance of homosexuality, regardless of laws that protect the LGBTQIA community, there is the non-acceptance by the religious community. The non-acceptance of homosexuality by the religious community is not a new phenomenon as history will show that the Christian church more especially, has been using biblical doctrine to justify their discrimination against homosexuality.[200]

During the framing of the Constitution the African Christian Democratic Party (ACDP) objected to putting laws together that prohibited discrimination against homosexual people.[201] The party was interested in articulating Christian morals that were not competently addressed in the post-apartheid political domain.[202] The National Coalition for Gay and Lesbian Equality (NCGLE) acknowledged that if the issue of including prohibiting

[193] Massoud op cit note 191 at 304.
[194] Mwanawina Ilyayambwa 'Homosexual rights and the law: A South African constitutional metamorphosis' (2012) 2(4) *International Journal of Humanities and Social Science* at 53.
[195] *Le Roux v Dey* [2011] ZACC 4, 2011 (3) SA 274 (CC). The facts of this case are as follows: A school learner (applicant in the CC appeal case) had found a photo on the internet where two male bodybuilders were sitting next to each other in a position that suggested sexual activity or stimulation. The learner manipulated the photo by pasting a photo of his school principal's face on the face of one bodybuilder and the photo of the defendant on the face of the other bodybuilder. This manipulated photograph was then spread around the school. Although the matter dealt with defamation in its core, issues relating to homosexuality and discrimination based on sexual orientation were subliminal.
[196] Ilyayambwa op cit note 194 at 56.
[197] Ibid.
[198] Ibid.
[199] Ibid.
[200] Msibi op cit note 161 at 68–9.
[201] Natalie Oswin 'The end of queer (as we knew it): Globalization and the making of a gay-friendly South Africa' (2007) 14(1) *Gender, Place and Culture A Journal of Feminist Geography* at 98.
[202] Ibid.

discrimination based on sexual orientation had been put to a referendum, most South Africans would have likely supported the sentiments of the ACDP.[203] As the NCGLE predicted, although the ACDP only won two seats in Parliament in the 1994 elections, its position about homosexuality garnered the ACDP a lot of publicity and media attention.[204]

The ACDP put the question of sexual orientation up for public debate and some of the opinions produced, which favoured the ACDP's position included a comment by Pastor Kenneth Meshoe, the leader of the ACDP in the Constitutional Assembly in 1995, in which he said that building a nation is not possible if the family values and morals of the society are legally destroyed by the clauses in the Constitution that promote the gay lifestyle that is an embarrassment to the ancestors.[205]

VI THE 'AFRICANIST' ARGUMENT AGAINST HOMOSEXUALITY

The Africanist argument against homosexuality suggests that homosexuality did not exist in pre-colonial Africa and therefore is against the traditions and culture of Africa.[206] Antonio argues that what is culturally recognised is used to ideologically deny any other activity which, whether it actually occurs or not, is deemed perverse by virtue of standing outside the circle of the culturally acceptable.[207] Antonio further argues that the problem with the Africanist argument is that something is not necessarily immoral because it is culturally unacceptable nor can the existence or non-existence of an activity in a certain culture simply be predicated upon what is considered publicly legitimate.[208] The Africanist argument

[203] Ibid.
[204] Eric C Christiansen 'Substantive equality and sexual orientation: Twenty years of gay and lesbian rights adjudication under the South African Constitution' (2016) 49 *Cornell International Law Journal* at 581. See also David Bilchitz 'Constitutional change and participation of LGBTI groups: A case study of South Africa' 2015 *International Institute for Democracy and Electoral Assistance*, available at *http://constitutionnet.org/sites/default/files/constitutional-change-and-participation-of-lgbti-groups-a-case-study-of-south-africa-pdf.pdf*, accessed on 11 August 2020 at 15.
[205] Oswin op cit note 201 at 98. Meshoe said: 'Nation-building cannot be possible while we try to legally destroy family values and the moral fibre of our society with clauses in the Constitution that promote a lifestyle that is an embarrassment even to our ancestors.'
[206] The Citizen (28 November 1995) reproduced in Antonius J G M Sanders 'Homosexuality and the law: A gay revolution in South Africa?' (1997) 41(1) *Journal of African Law* at 100–1. The late former President Robert Mugabe of Zimbabwe said at the Global Coalition for Africa meeting held in Maastricht in November 1995 that the African culture and tradition does not allow homosexuality. Referring to homosexuality, he said '[l]et it be known that our tradition and culture in Africa does not allow that.'
[207] Antonio op cit note 22 at 297.
[208] Ibid.

assumes that because Africanness did not know the existence of homosexuality, the latter is therefore morally problematic.[209]

Antonio further argues that another problem with the Africanist argument is that it reduces the morality of heterosexuality to the sexual act and abhors what it imagines to be the form of the sexual act between two people of the same sex – anal sex.[210] Antonio suggests that what justifies heterosexism is the false belief that two people of the opposite sex can only have vaginal sex and totally eliminates the idea that it is possible for couples of the opposite sex to have anal sex.[211] It is therefore the anal sex which is the cause of the offence.[212] It is argued that the issue is not that there is anal penetration because anal penetration of a woman by a man is not under scrutiny, criticism nor regarded as criminal. However, the rub lies where the anal penetration is from a man to another man. It is argued, therefore, that the issue is not of gender but of sexual orientation that is deviant from the accepted social norms. Antonio argues that it is this preoccupation with imagining the sexual act between two persons which has led to a male-centred definition of homosexuality, a definition which has almost completely overlooked the existence of lesbians.[213] The end result of the Africanist argument is that the social and political problems inherent in certain forms of the African heterosexuality already spoken of are covered up since what matters is not the wider relationship between a couple and the social context in which it unfolds but the physical manner in which they express their desire.[214]

This was illustrated in one of the most notable judicial decisions on same-sex relationships in Zimbabwe (where homosexuality is still illegal today).[215] In the case of

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[209] Kaoma op cit note 173 at 118.
[210] Antonio op cit note 22 at 299.
[211] Ibid.
[212] Edward E Evans-Pritchard 'Sexual inversion among the Azande' (1970) 72 *American Anthropologist* at 1430. Pritchard reported that the Azande people were accustomed to male-male sexual relationships as men would often take young men to be their boy-wives or simply to have sexual relations with them. Pritchard reports that the sexual relations would be in the form of non-penetrative sex. The male dominant in the relationship would receive pleasure by rubbing his penis between the thighs of his male partner. Pritchard further reports that male-male relationships were normal in this society. However, anal penetration was the cause for the disgust and offence to the Azande people.
[213] Antonio op cit note 22 at 299.
[214] Ibid.
[215] S 73 of the Criminal Law (Codification and Reform) Act Chapter 9:23, proscribes sodomy. It provides:

> '(1) Any male person who, with the consent of another male person, knowingly performs with that other person anal sexual intercourse, or any act involving physical contact other than anal sexual intercourse that would be regarded by a reasonable person to be an indecent act, shall be guilty of sodomy and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding one year or both.

Banana v The State[216] the court had to decide whether inter alia, the common-law crime of sodomy was in conformity with section 23 of the Zimbabwean Constitution, which guaranteed protection against discrimination on the ground of gender. The majority court found that section 23 of the Constitution did not include an express prohibition against discrimination on the ground of sexual orientation.[217] The provision prohibited discrimination between men and women, not between heterosexual men and homosexual men.[218] The latter discrimination was prohibited only by a Constitution which proscribed discrimination on the grounds of sexual orientation.[219] The real complaint by homosexual men in the majority's view, was that they were not allowed to give expression to their sexual desires, whereas heterosexual men were.[220] In so far as that was discrimination, the majority thought it was not the sort of discrimination which was prohibited by section 23 of the Constitution.[221]

The court further expressed the opinion that the argument that the discrimination arose from the fact that men who performed that act with women were not penalised, although technically correct, lacked common sense and real substance.[222] It added that the law had properly decided that it was unrealistic to try to penalise such conduct between a man and a woman.[223] This did not lead to a conclusion that the law was discriminating when such conduct took place between men. The real discrimination was against homosexual men in

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(2) Subject to subsection (3), both parties to the performance of an act referred to in subsection (1) may be charged with and convicted of sodomy.

(3) For the avoidance of doubt it is declared that the competent charge against a male person who performs anal sexual intercourse with or commits an indecent act upon a young male person—

(a) who is below the age of twelve years, shall be aggravated indecent assault or indecent assault, as the case may be; or

(b) who is of or above the age of twelve years but below the age of sixteen years and without the consent of such young male person, shall be aggravated indecent assault or indecent assault, as the case may be; or

(c) who is of or above the age of twelve years but below the age of sixteen years and with the consent of such young male person, shall be performing an indecent act with a young person.'

[216] *Banana v The State* (2000) 4 LRC 621 (ZSC). The appellant was a former non-executive president of Zimbabwe. In 1997, his aide-decamp, D, was convicted of having murdered a police constable. The court held it could not reject the allegations that D been traumatised as a result of being the victim of repeated homosexual abuse by the appellant. Subsequently, after police investigation into the allegations of the common-law crime of sodomy, unlawful intentional sexual relations between two males, the appellant was charged for trial by the high court. He was convicted, inter alia, on two counts of sodomy. He appealed against the conviction to the Supreme Court.

[217] Ibid at 621.

[218] Ibid at 622.

[219] Ibid.

[220] Ibid.

[221] Ibid.

[222] Ibid.

[223] Ibid.

favour of heterosexual men, which was not discrimination on grounds of gender.[224] Consequently, the court concluded that the criminalisation of consensual sodomy was not discrimination under the Constitution and even if that was the case, the law in question would pass the constitutional test of whether it was reasonably justifiable in a democratic society.[225]

The court further held that it was not its function to seek to contemporise the social mores of the country or of the society.[226] The court stated that the social norms and values of Zimbabwe did not require the decriminalisation of consensual sodomy. It emphasised that Zimbabwe was a conservative society on issues such as sexual morality. It cautioned that the court must not be put in the position of having to interpret the Constitution in a manner that was not suited for Zimbabwe to be a liberal democracy on matters concerning sexuality. [227]

The appellant's conviction was therefore upheld. The dictum from McNally JA's majority judgment encapsulates the reasoning behind the majority's decision.[228] McNally JA opined that Zimbabwe was a conservative society in matters of consensual sodomy and that must be taken into consideration when interpreting the provisions of the Constitution as it relates to such matters. [229]

In a dissenting judgment Gubbay CJ held that even if the majority of the citizenry who subscribe to heterosexual relationships find homosexuality unacceptable, it does not give justifiable cause for it to be deemed a crime based on moral values alone more especially in the current pluralistic society.[230] He further posed the question of whose moral values the court is guided by.[231] Gubbay CJ opined that he is not convinced that it is reasonably justifiable for an activity to be declared as criminal simply because a portion of society regard it as morally unacceptable.[232] Furthermore, Gubbay CJ stated that the courts should not be commanded by public opinion and public opinion should not replace the court's duty to

[224] Ibid.
[225] Ibid.
[226] Ibid.
[227] Ibid.
[228] Ibid at 671 (Majority judgment by McNally JA).
[229] Ibid.
[230] Ibid at 645 (Dissenting judgment by Gubbay CJ).
[231] Ibid.
[232] Ibid at 646.

interpret the Constitution.[233] He further observed that the groups that need protection from the Constitution the most are the social activist and the marginalised members of society.[234]

VII CONCLUSION

It is evident that the debate of whether homosexuality existed in pre-colonial Africa is still ongoing, with many denying its existence to fulfil their own agenda. Some refuse to admit that black Africa has never been a one-dimensional continent. They insist that Africa has always been one dimensional and has only ever known and practiced heterosexualism. One thing that remains ostensibly obvious though, is that the influence of Christianity has played a mammoth role in the homophobia that exists today.

The statements shown in this chapter from various religious leaders regarding the issue of acceptance/non-acceptance of homosexuality are not representative of attitudes of every religious leader and the congregations they lead, such as Archbishop Desmond Tutu and the Southern African Anglican Communion who have shown support for the LGBTQIA community, however, they reflect the attitudes a majority of Christian leaders and followers of the religion. It is argued that the influence of Christianity went beyond just influencing the laws of sodomy and how the offence was punished as it was shown in the previous chapter. These laws were imported into Africa through colonialism.

It is submitted that the influence of Christianity through Christian missions during colonialism also changed the way that African people saw and thought about morality and moral issues such as homosexuality. The teachings of Christianity informed the African people that homosexuality is a sin. That teaching in combination with the European colonists who imposed on African people that homosexuality in is un-African. The continuation of the thinking that homosexuality is un-African has been perpetuated by the Christian teaching that insists that homosexuality is a sinful and unnatural practice. It is submitted that according to this teaching, this meaning that homosexuality is a practice should not be in existence in Africa and is therefore not an African concept.

[233] Ibid.
[234] Ibid.

CHAPTER 4

A COMPARISON: SOUTH AFRICA AND BOTSWANA AS POSITIVE EXAMPLES

I INTRODUCTION

South Africa and recently, Botswana have one of the most progressive laws in the world regarding anti-discrimination on the basis of sexual orientation and gender identity as well as protecting the rights of the LGBTQIA community. South Africa has been the leading country in Africa to change its laws to protect and liberate the LGBTQIA community. Botswana is one of the most recent countries to have developed its laws and decriminalised homosexuality.

This chapter will look at the history of the constitutional democracy of both countries as it pertains to the rights and freedoms of the LGBTQIA community. It will also look at landmark judgments that led to the transformation of the laws and how the courts looked at levelling the playing fields in terms of equality. Lastly it will discuss how other African countries can use South Africa and Botswana as examples for the progression for their laws using the rationale the courts have given for the inclusion of anti-discrimination laws and the importance of the protection of the LGBTQIA community.

II SOUTH AFRICA

(a) History

Before delving into an in-depth discussion on the cases and legislation that has resulted in the progressive laws on equality, it is important to first reflect on the history of the LGBTQIA legislation and how far it has come, and the progress made to date, in order to appreciate the emphasis made upon its protection, as well as the need for current legislation.

The idea of heteronormativity dates back to the 1700s, where during colonisation of South Africa, German missionaries began instilling Christian education into schools, which

ended in 1953 when the Bantu education system was put in place.[1] Part of that education was to teach on Christian doctrine, which included teaching that homosexuality is a sin, based on Leviticus 18:22 which prescribes that it is detestable for a male to have sexual relations with another male as he would with a woman.[2] At that time, the British missionaries were able to continue spreading the Christian message of sexual purity and also dictate to their followers what should be considered moral, which included heterosexuality as the norm and anything contrary was considered immoral.[3]

In the 1900s, during the Afrikaner nationalist movement, Dutch Reform Calvinism became a big foundation for the apartheid and Afrikaner nationalist movement ideology and this ideology was majorly based on Christian religion.[4] This ideology taught that homosexuality was unnatural and immoral.[5] With this belief and ideology and will to influence sexual morality, it would make sense to say that it influenced policy. In 1927, the Immorality Act 5 of 1927 was passed where section 1 and section 2 of the Act made an act punishable by law for a European male to have 'carnal intercourse' (intercourse not between husband and wife) with a native female (female of African descent), and vice versa.[6]

Furthermore, in order to ensure that the law is able to control and police sexual morality, in 1957, the second Immorality Act 23 of 1957 was passed. This Act made it illegal for people of different races to have intercourse, particularly, it prohibited white people from having intercourse with coloured people (as it was called then), and vice versa.[7] Jeffery

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[1] Leonard Thompson *A History of South Africa* 3 ed (2000) 46. See also Dixson Pushparagavan 'The history of LGBT legislation' (2017), available at *www.sahistory.org.za/article/history-lgbt-legislation*, accessed on 1 January 2019.
[2] The International Standard Version (ISV), Old Testament.
[3] Antonius J G M Sanders 'Homosexuality and the law: A gay revolution in South Africa?' (1997) 41 *Journal of African Law* at 101. See also Pushparagavan op cit note 1.
[4] Pushparagavan op cit note 1.
[5] Ibid.
[6] The Act provides:

1. ' Any European male who has illicit carnal intercourse men in case with a native female, and any native male who has illicit of illicit intercourse carnal intercourse with a European female, in circumstances between which do not amount to rape, an attempt to commit rape, Europeans indecent assault, or a contravention of section two or four and natives, of the Girls' and Mentally Defective Women's Protection Act, 1916 (Act No. 3 of 1916) shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding five years.
2. Any native female who permits any European male women in to have illicit carnal intercourse with her and any European case of illicit female who permits any native male to have illicit carnal intercourse between intercourse with her shall be guilty of an offence and liable Europeans on conviction to imprisonment for a period not exceeding and natives, four years.'

[7] S 16 (1) of the Act provides:
'(1) (a) Any white female person who –
(i) has or attempts to have unlawful carnal intercourse with a coloured male person;

Weeks[8] argues that the prohibition of 'unnatural/immoral sexual acts' by statutes like the 1957 Immorality Act was merely a euphemism for sexual acts associated with homosexuality.[9] This Act outlawed homosexuality only if it occurred in public spaces.[10] There were however, loopholes to these Immorality Acts, where people could only be arrested if they conducted these offenses in public.[11] Thus in 1968 the then Minister of Justice, Petrus C Pelser, proposed an amendment to the 1957 Act which would make homosexuality illegal.[12]

In the making and passing of these Acts, the LGBTQIA community was fighting back and attacking the charter through the formation of movements such as the Law Reform Movement.[13] The Law Reform Movement of 1968 was led by a group of professionals which consisted of mainly middle-class white men.[14] However, it did have success in bringing together homosexuals from different classes of society.[15] Its goal was to ensure that their way of life is maintained and is not interfered with or hindered.[16] The Reform, along with the Gay Association of South Africa (GASA) distanced themselves from the anti-apartheid movement and took on an apolitical stance in order to gain independence and respect from Parliament, which meant that even among the gay community, black people were also marginalised.[17]

(ii) commits or attempts to commit with a coloured male person any immoral or indecent act; or
(iii) entices, solicits, or importunes any coloured male person to have unlawful carnal intercourse with her; or
(iv) entices, solicits or importunes any coloured male person to the commission of any immoral or indecent act; and

(b) any coloured female person who –
(i) has or attempts to have unlawful carnal intercourse with a white male person; or
(ii) commits or attempts to commit with a white male person any immoral or indecent act; or
(iii) entices, solicits, or importunes any white male person to have unlawful carnal intercourse with her; or
(iv) entices, solicits, or importunes any white male person to the commission of any immoral or indecent act, shall be guilty of an offence.'

[8] Jeffery Weeks *Sex, Politics and Society: The Regulation of Sexuality Since 1800* 3 ed (2012) 281, 314.
[9] Ibid.
[10] Mark Gevisser 'A different fight for freedom: A history of South African lesbian and gay organisation from 1950s to 1990s' in Mark Gevisser & Edwin Cameron (eds) *Defiant Desire: Gay and Lesbian Lives in South Africa* (1995) 31.
[11] Ibid.
[12] Ibid.
[13] Pushparagavan op cit note 1.
[14] Gevisser op cit note 10 at 32. See also Brett Kennedy 'Homosexuals in the periphery: Gay and lesbian rights in developing Africa' (2006) 21 *Nebraska Anthropologist* at 61.
[15] Pushparagavan op cit note 1.
[16] Ibid.
[17] Amy L Kovac 'Africa's rainbow nation' (2002) 28(2) *Journal of Southern African Studies* at 91. See also Gevisser op cit note 10 at 51.

The proposal made by the Minister to make homosexuality illegal did not pass however, some amendments were made to the 1957 Act – which gave birth to the Immorality Amendment Act 2 of 1988, but ultimately the Act and its amendments were made to keep homosexuality away from the public – to keep the influence of homosexuality away from the general public – and keep it indoors.[18] The Reform considered that as a victory, no matter how minor it was, and thus were content with being able to continue living their lifestyle without being hindered.[19] The movement died down over time.[20]

In 1986 the first gay and lesbian activism organisation was formed in Cape Town.[21] This Lesbians and Gays against Oppression (LAGO) organisation was explicitly liked to anti-apartheid groups.[22] In 1988 two other major homosexual rights groups were formed, namely; the Gay and Lesbians of the Witwatersrand (GLOW) and Organisation of Lesbian and Gay Activists (OLGA).[23] OLGA eventually replaced LAGO.[24] OLGA's membership was mostly the white middle-class.[25] Unlike the Law Reform Movement, movements such as GLOW and OLGA incorporated the LGBTQIA struggle into the wider anti-apartheid struggle.[26] GLOW gave the marginalised (coloured, Indian and black) members of the LGBTQIA group the platform to voice out their concerns and struggles and as well as be united in combating homophobia as well as apartheid.[27] GLOW was particularly popular because it provided black LGBTQIA people, especially in the townships advocacy and support which had a huge impact in the black homosexual life.[28] GLOW also formulated and adopted a policy of non-discrimination above welcoming all people from all ethnicities.[29] GLOW was involved in the formation of the National Coalition for Gay and Lesbian Equality (NCGLE), which is now

[18] Gevisser op cit note 10 at 37.
[19] Pushparagavan op cit note 1.
[20] Pierre de Vos 'The 'inevitability' of same-sex marriage in South Africa's post-apartheid state' (2007) 23(3) *South African Journal of Human Rights* at 435. See also Jacklyn Cock 'Engendering gay and lesbian rights: The equality clause in the South African Constitution' (2002) 26(1) *Woman's Studies International Forum* at 37.
[21] EC Christiansen 'Ending the apartheid from the closet: Sexual orientation in the South African constitutional process' (1997) 32(4) *International Law and Politics* at 1023. See also H de Ru 'A historical perspective on the recognition of same-sex unions in South Africa' (2013) 19(2) *Fundamina (Pretoria)* at 227.
[22] Ibid.
[23] Kennedy op cit note 14 at 63.
[24] De Ru op cit note 21 at 228.
[25] Christiansen op cit note 21 at 1024.
[26] Pushparagavan op cit note 1.
[27] Ibid.
[28] Donald L Donham 'Freeing South Africa: The "modernization" of male-male sexuality in Soweto' (1998) 13(1) *Cultural Anthropology* at 11.
[29] Pushparagavan op cit note 1.

known as the Lesbian and Gay Equality Project (LGEP).[30] With the formation of these organisations and movements, the 1980s became particularly transformative years for the homosexual movements.[31]

Although the LGBTQIA group was seeing some movement in its fight to equality, it was reported that homosexual men and women were still being ill-treated within the South African Army.[32] It was reported that they would be beaten and subjected to electric [shock] aversion therapy as well as imprisonment.[33] The reasoning behind the punishment was the same as the Nationalist belief of religious purity (more specifically that homosexuality is a sin).[34] They used this belief to justify their attack on homosexuals.[35] It is submitted that this justification is parallel to the justification churches use today to discriminate against homosexual people. Though, not using any violence, the impact is just as deep.

After the release of Nelson Mandela and the process of the negotiation of the new Constitution between the African National Congress (ANC) and the United Democratic Front (UDF), movements such as GLOW and OLGA participated in these political discussions.[36] They ensured that sexual freedom was included in the new Constitution as a fundamental human right.[37] This was a success because the 1996 Constitution, which is the ultimate law of the land, made it illegal to discriminate based on sexual orientation.[38] Subsection 3 and 4 of Section 9 – the 'Equality clause' – explicitly states that no one may be discriminated against

[30] Mxolisi Simanga 'Celebrating Bev Ditsie for her role in making LGBTI rights a reality' *The Citizen Online* 25 August 2017, available at *https://www.citizen.co.za/news/south-africa/1627201/celebrating-bev-ditsie-for-her-role-in-making-lgbti-rights-in-sa-a-reality/amp/*, accessed on 24 February 2019.
[31] Pushparagavan op cit note 1.
[32] Mikki van Zyl, Jeanelle de Gruchy & Sheila Lapinsky et al *The aVersion Project: Human Rights Abuses of Gays and Lesbians in the South African Defence Force by Health Workers During the Apartheid Era* (1999) 40.
[33] Ibid.
[34] Ibid at 68.
[35] Ibid.
[36] Kennedy op cit note 14 at 63.
[37] Ibid.
[38] Ibid. See also s 9 of the Constitution.

based on sexual orientation (among other listed grounds of discrimination).[39] This meant that South Africa became one of the most progressive countries in terms of personal freedoms.[40]

(b) Constitutional democracy and the right to equality

Moreover, in 1996 the South African Schools Act 84 of 1996 was enacted. Section 5(1) of this Act ensures that learners are admitted to public schools without being unfairly discriminated in any way, also making schools to be more inclusive.[41] In 1998, the Employment Equity Act 55 of 1998 was enacted. This Employment Equity Act ensures and places emphasis on the equality clause of the Constitution even in the place of employment and ensures that employers and employees cannot discriminate, directly or indirectly, based on sexual orientation (among other grounds of discrimination listed in section 9(3) of the Constitution). Further, statutes such as the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) 4 of 2000 seek to give emphasis and effect to section 9 of the Constitution in its quest to eliminate unfair discrimination and ensure a South Africa that is all-inclusive.[42]

In 1998, the applicants in the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*[43] requested the CC to confirm the judgment made by Heher J in the Witwatersrand High Court (in the same matter)[44] that the offence of sodomy, as well as the insertion of sodomy in schedules of certain Acts of Parliament[45], and section 20A of the Sexual Offences Act 23 of 1957[46] which proscribes sexual conduct between men in certain

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[39] The Act provides:

> '(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.'

[40] Pushparagavan op cit note 1.

[41] Ibid.

[42] According to the Act, the purpose of PEPUDA is: 'To give effect to section 9 read with item 23(1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996 so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to promote for matters connected therewith.'

[43] *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15, 1999 (1) SA 6 (CC).

[44] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (6) BCLR 726 (W), 1998 (2) SACR 102 (W).

[45] The inclusion of sodomy as an item in Schedule 1 of the Criminal Procedure Act of 1977, and the inclusion of sodomy as an item in the schedule to the Security Officers Act, 1987.

[46] S 20A(1) and (2) provides:

circumstances were unconstitutional and invalid.[47] In the court a quo, the court did not only look at the constitutionality of the inclusion of sodomy in the schedules and also on the Sexual Offences Act, but it further considered the constitutionality of sodomy as a common-law offence.[48] The court took O'Regan J's (concurring judgment in the case of *Brink v Kitshoff*) historical view in terms of her juxtaposition of equality and disadvantage based on the apartheid regime.[49] The CC held that because of the oppression of gays and lesbians by the apartheid regime, it made them a disadvantaged group, and thus their rights must be protected.[50]

Ackermann J in the majority judgment held that these offences were aimed at prohibiting sexual intimacy between gay men, and thus violated their right to equality in that they unfairly discriminated against them based on the ground of sexual orientation, which the Constitution expressly includes as a prohibited ground of discrimination.[51] The court also held that the criminalisation of sodomy interferes with their most intimate relationships and private conduct that does not affect anyone else.[52] This devalues and degrades them and is also an intrusion to their private lives which then means it is a violation of their fundamental and constitutional rights to dignity[53] and privacy.[54]

The court succinctly held that the criminalisation of sodomy severely limits a gay man's right to equality as it relates to sexual orientation.[55] It curtails one of the ways in which a man can express his sexuality as a gay man.[56] It also limits his rights to liberty, freedom and dignity.[57] It further depresses his self-identity and fulfilment.[58] The laws criminalising sodomy inform society's ideas and perspectives on homosexuality and further inform and

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'(1) A male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or to give sexual gratification, shall be guilty of an offence.
(2) For the purposes of subsection (1) "a party" means any occasion where more than two persons are present.'

[47] *National Coalition for Gay and Lesbian Equality* supra note 43 para 4.
[48] *National Coalition for Gay and Lesbian Equality* supra note 44 at 730.
[49] See *Brink v Kitshoff* [1996] ZACC 9, 1996 (4) SA 197 (CC) para 42 (Concurring judgment by O'Regan J).
[50] *National Coalition for Gay and Lesbian Equality* supra note 43 paras 26–8.
[51] Ibid para 28.
[52] Ibid para 26.
[53] Ibid para 28.
[54] Ibid para 32.
[55] Ibid para 36.
[56] Ibid.
[57] Ibid.
[58] Ibid.

validate the discriminations that exist against gay people.[59] The court further explained that these discriminations prevent gay people from receiving fair treatment and access to opportunities and goods and services within society. [60] This CC decision changed the landscape of South African law.[61]

In 1999, the *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*[62] brought section 25(5) of the Aliens Control Act 96 of 1991 under scrutiny and questioned its constitutionality. This section omitted to give persons, who are partners in permanent same-sex life partnerships, the benefits it extended to 'spouses' (who, according to the common-law definition of marriage, only meant partners in a heterosexual marriage).[63] The court unanimously, as per Ackermann J, held that section 25(5) reinforced the stereotypes about homosexual people.[64] This section affirmed the negative stance that the discriminatory society already had taken, that gays and lesbians did not possess any inherent humanity to deserve their families and family lives within same-sex relationships to be respected and protected, which thus amounted to an invasion of their dignity.[65]

The court further held that section 25(5) unfairly discriminated against homosexual people on the grounds of sexual orientation and marital status and seriously limited their rights to equality and dignity.[66] It did so in a manner which was not 'reasonable and justifiable in an open and democratic society' given its emphasis on human dignity, equality and freedom.[67] The court held that the omission of partners in permanent same-sex life partnerships from section 25(5) was inconsistent with the Constitution.[68] The rationale given by the court in its judgment included that protecting the traditional institution of marriage should not be done in a manner that limits the rights of persons in permanent same-sex relationships.[69] The court further stated that no plausible reason existed which warrants the

[59] Ibid.
[60] Ibid.
[61] Mwanawina Ilyayambwa 'Homosexual rights and the law: A South African constitutional metamorphosis' (2012) 4(2) *International Journal of Humanities and Social Science* at 53.
[62] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17, 2000 (2) SA 1 (CC).
[63] Ilyayambwa op cit note 61 at 52.
[64] *National Coalition for Gay and Lesbian Equality* supra note 62 para 49.
[65] Ibid para 54.
[66] Ibid para 97.
[67] Ibid.
[68] Ibid.
[69] Ibid para 55.

exclusion of same-sex life partners from benefiting under section 25(5) of the Constitution.[70] Although the government's interest is in pursuance of protecting traditional families and heterosexual spouses, the court found that same-sex life partners benefiting under section 25(5) of the Constitution would not negatively affect this protection. [71] The court held that it would not appropriate to declare the entire section 25(5) invalid.[72] The court instead ordered that the words 'or partner, in a permanent same-sex life partnership' be read in after the word 'spouse' in section 25(5) of the Aliens Control Act.[73]

On July 2002, the CC delivered a victory judgment for the LGBTQIA community in the case of *Satchwell v President of the Republic of South Africa*.[74] The applicant in this case challenged, inter alia, the constitutional validity of sections 8[75] and 9[76] of the Judges' Remuneration and Conditions of Employment Act 88 of 1989 in that the provisions failed to

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[70] Ibid para 56.
[71] Ibid.
[72] Ibid para 97.
[73] Ibid.
[74] *Satchwell v President of the Republic of South Africa* [2002] ZACC 18, 2002 (6) SA 1 (CC). The applicant was a judge in a permanent same-sex life partnership with Ms Carnelley. The two were unmarried because at the time, same-sex marriages had not yet been made legal in the country. She brought the application to challenge, inter alia, s 8 and s 9 of the Judges Remuneration and Conditions of Employment Act 88 of 1989 because she could benefit from the provisions since the word 'spouse' in the provisions did not include permanent same-sex life partners.
[75] Section 8 provides:

> '(1) Subject to the provisions of subsection (2) the surviving spouse of a judge who on or after the fixed date was or is discharged from active service in terms of section 3 or 4 or who died or dies while performing active service, shall be paid with effect from the first day of the month immediately succeeding the month in which he dies an amount
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> (a) in the case of a surviving spouse of a judge who was so discharged from active service, equal to two thirds of the salary which was in terms of section 5 payable to that judge;
>
> (b) in the case of a surviving spouse of a judge who died while performing active service as a judge, equal to two thirds of the amount to which that judge would have been entitled if he or she was discharged from active service in terms of section 3(1)(a) on the date of his or her death.
>
> (2) For the purposes of subsection (1) the amount payable to a surviving spouse shall be adjusted whenever the salary applicable to the office held by the judge concerned on his discharge or at his death, is increased.
>
> (3) The amount payable to the surviving spouse of a judge in terms of sub-section (1) shall be payable with effect from the first day of the month immediately succeeding the day on which he died, and shall be payable until the death of such spouse.'

[76] Section 9 provides:

> 'If a gratuity referred to in section 6 would have been payable to a judge who died or dies on or after the fixed date had he not died but, on the date of his death, was discharged from active service in terms of section 3 or 4, there shall
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> (a) if such judge is survived by a surviving spouse, be payable to such surviving spouse, in addition to any amount payable to that spouse in terms of section 8; or
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> (b) if such judge is not survived by a spouse, be payable to the estate of such judge, a gratuity which shall be equal to the amount of the gratuity which would have been so payable to such judge had he not died but was, on the date of his death, discharged from active service as aforesaid.'

include the words 'or partner, in a permanent same-sex life partnership' after the word 'spouse'.[77] The applicant contended that the provisions therefore unfairly discriminated against her and infringed her constitutional right to equality because she and her partner could not benefit under the provisions since they only make allowance for married judges and their spouses, which does not include permanent same-sex life partners.[78]

The court in this case unanimously ruled, as per Madala J, that the exclusion of judges' permanent same-sex life partners from benefitting from the impugned provisions, on the basis of sexual orientation, amounts to unfair discrimination.[79] The court further held that excluding permanent same-sex life partnerships from the provisions whilst extending benefits to married spouses, even though permanent same-sex life partnerships serve the same purpose and have the same social value as heterosexual marriages, amounts to unfair discrimination.[80] The respondents in the matter conceded that the provisions did indeed unjustifiably and unfairly discriminate.[81] To remedy the defect the court ordered, inter alia, that the words 'or partner, in a permanent same-sex life partnership' be read in after the word 'spouse' in the provisions.[82]

On September 2002, the CC announced another victory for the LGBTQIA community in the case of *Du Toit v Minister for Welfare and Population Development*[83] where it unanimously decided, as per the judgment of Skweyiya AJ, that the provisions of the Child Care Act 74 of 1983 (sections 17(a), 17(c) and 20(1)) and of the Guardianship Act 192 of 1993 (section 1(2)), which reserved the possibility of adopting children to married couples and single persons only, violated the Constitution and mostly the equality clause as this was discriminatory against same-sex couples [based on sexual orientation and marital status].[84] This decision therefore made co-parent adoptions by a same-sex partner possible.[85]

In 2003, the CC handed down yet another judgment on a subsequent action arising from the 2002 *Satchwell* case. In the case of *Satchwell v President of the Republic of South*

[77] *Satchwell* supra note 74 para 14.
[78] Ibid.
[79] Ibid para 21.
[80] Ibid para 23.
[81] Ibid para 26.
[82] Ibid para 37.
[83] *Du Toit v Minister for Welfare and Population Development* [2002] ZACC 20, 2003 (2) SA 198 (CC).
[84] Ibid para 44.
[85] Ilyayambwa op cit note 61 at 53.

Africa[86] it had come to the attention of the applicant that the Judges' Remuneration and Conditions of Employment Act 88 of 1989 (the old Act) had been replaced with the Judges' Remuneration and Conditions of Employment Act 47 of 2001 (the new Act).[87] The new Act was much the same as the old Act with the only difference being that the former extended the benefits to include CC judges and other judges.[88] The new Act, however, did not remedy the defect of only offering the benefits to married spouses and excluding permanent same-sex life partners.[89] This meant that the applicant did not gain the relief that she had sought for and achieved from the CC in the earlier action.[90] Therefore the applicant sought the court again for the same relief as it applied to the new Act.[91] The court, as per O'Regan J, accordingly gave the same order as the earlier action as it applied to the new Act that wherever the word 'spouse' appeared in the provisions, the words 'or partner, in a permanent same-sex life partnership' were to be read in.[92]

On March 2003, the CC added another victory in favour of the LGBTQIA community in the case of *J v Director-General, Department of Home Affairs*.[93] In casu, the applicants had conceived twins through artificial insemination as they were a same-sex couple.[94] The couple wished to be both registered as the parents of the children.[95] The registration was not a problem for the birth mother of the children to be registered as their mother in terms of section 32 of the Births and Deaths Registration Act 51 of 1992.[96] However, the regulations and forms which were annexed to section 32 only gave provision for the registration of one male and one female as parents of a child.[97] This then posed a problem for the first applicant in that the provisions did not allow her to be registered as the children's parent.

In the high court, the applicants also sought for, inter alia, section 5[98] of the Children's Status Act 82 of 1987 (the Status Act) to be declared constitutionally invalid as it

[86] *Satchwell v President of the Republic of South Africa* [2003] ZACC 2, 2003 (4) SA 266 (CC).
[87] Ibid para 2.
[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Ibid para 3.
[92] Ibid para 14.
[93] *J v Director-General, Department of Home Affairs* [2003] ZACC 3 (CC), 2003 (5) SA 621 (CC).
[94] Ibid para 2.
[95] Ibid.
[96] Ibid para 3.
[97] Ibid.
[98] Section 5 provides:

discriminated against the applicants on the ground of marital status and sexual orientation.[99] The court did so.[100] With respect to subsections (1)*(a)* and *(b)* of section 5, Magid J, struck the word 'married' wherever it appeared.[101] The judge further read in the words 'or permanent same-sex life partner' after the word 'husband' where it appeared in subsections (1)*(a)* and *(b)* and (2)*(b)* of section 5.[102]

In the CC, as per Goldstone J, the court unanimously confirmed that section 5 of the Status Act unfairly discriminated against the applicants in that it differentiated between married persons and persons in permanent same-sex life partnerships and therefore prevented the first applicant from being registered as the parent of the twins.[103] The court also confirmed that the section was inconsistent with section 9(3) of the Constitution in that it unfairly discriminated on the ground of sexual orientation.[104] Moreover, the court found it appropriate to severe the concluding words in subsection (1)*(a)* which read '… as if the gamete or gametes of that woman or her husband were used for such artificial insemination.'[105] The court reasoned that if it were to read in the words 'or permanent same-sex life partner' after the word 'husband' in those concluding words, it would be

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'(1) (a) Whenever the gamete or gametes of any person other than a married woman or her husband have been used with the consent of both that woman and her husband for the artificial insemination of that woman, any child born of that woman as a result of such artificial insemination shall for all purposes be deemed to be the legitimate child of that woman and her husband as if the gamete or gametes of that woman or her husband were used for such artificial insemination.

(b) For the purposes of paragraph (a) it shall be presumed, until the contrary is proved, that both the married woman and her husband have granted the relevant consent.

(2) No right, duty or obligation shall arise between any child born as a result of the artificial insemination of a woman and any person whose gamete or gametes have been used for such artificial insemination and the blood relations of that person, except where –

(a) that person is the woman who gave birth to that child; or

(b) that person is the husband of such a woman at the time of such artificial insemination.

(3) For the purposes of this section – 'artificial insemination', in relation to a woman –

(a) means the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of that woman; or

(b) means the placing of the product of a union of a male and a female gamete or gametes which have been brought together outside the human body in the womb of that woman, for the purpose of human reproduction; 'gamete' means either of the two generative cells essential for human reproduction.'

[99] *J* supra note 93 para 5.
[100] Ibid para 9.
[101] Ibid para 10.
[102] Ibid.
[103] Ibid para 13.
[104] Ibid.
[105] Ibid para 18.

inappropriate and it would incorrectly assume that a child of same-sex partners is legitimate in common law.[106]

Goldstone J made a pungent point in stating that the gay and lesbian community deserves more than piecemeal relief granted by the courts when elements of their relationships are prejudiced by legislation that is inconsistent with the principles of the Constitution.[107] Therefore it is necessary that there be legislation which comprehensively regulates same-sex relationships.[108] The court then upheld the ruling of the high court as far as striking the word 'married' wherever it appeared in section 5 of the Status Act and reading in the words 'or permanent same-sex life partner' after the word 'husband' wherever it appeared in the section.[109]

In 2005, the case of *Minister of Home Affairs v Fourie*[110] was heard in the CC. These were two separate cases which were previously heard in the lower courts but held the same issues, which were thus granted leave to appeal to the CC and be heard simultaneously.[111] In both cases, the issue brought forward to the court was whether the fact that there was no provision for same-sex couples to marry under the Marriage Act amounted to unfair discrimination.[112]

In casu, the argument was that the common-law definition of marriage and the formula prescribed for marriage in the Marriage Act 25 of 1961 was not inclusive of same-sex couples and amounted to unfair discrimination and violated the constitutional rights to equality, dignity, and privacy of homosexual people.[113]

Sachs J, in the majority judgment, stated that South Africa has many forms of family formations and it is inappropriate to only acknowledge one form as the only socially and legally accepted form given the societal developments of this country.[114] Furthermore, Sachs J held that there was an important constitutional necessity to recognise the long history of South Africa along the lines of the marginalisation and persecution of homosexual people and

[106] Ibid.
[107] Ibid para 23.
[108] Ibid.
[109] Ibid para 28.
[110] *Minister of Home Affairs v Fourie* [2005] ZACC 19, 2006 (1) SA 524 (CC).
[111] Ibid para 44.
[112] Ibid para 45.
[113] Ibid para 34.
[114] Ibid para 59.

that although there were breakthroughs made in this area, there were legal regulations for homosexual family law rights, and this needed to change.[115]

The CC came to the conclusion that indeed the common-law definition of marriage and the provisions of section 30(1)[116] of the Marriage Act were inconsistent with the Constitution and its guarantee of the rights to equality and dignity, and it indeed made no inclusion for same-sex couples to enjoy the same benefits, status, responsibilities, and entitlements as heterosexual couples[117], in that it omitted to include the words 'or spouse' immediately after the words 'or husband' as they appeared in the prescribed marriage formula.[118]

The remedy given by the CC was that Parliament was given a period of twelve months from the date of the judgment to come up with a suitable legal way to correct the defects, i.e. the discrimination of same-sex couples by the common-law definition of marriage and section 30(1) of the Marriage Act.[119] The court further ordered that should the legislature fail to correct the defect within the twelve months, the court will read in the words 'or spouses' immediately after the words 'or husband' in the prescribed marriage formula.[120]

It is submitted that with the correction of the defect and same-sex couples having the same entitlements, benefits, responsibilities and status as heterosexual couples, that meant that same-sex couples could also adopt children, which was previously a privilege left for married couples – which in that case meant only heterosexual couples. It allows them to make decisions on behalf of each other as spouses, receive spousal maintenance and also celebrate their union publicly with a ceremony of their choice.

As the order of the court, Parliament passed the 2006 Civil Union Bill which was enacted the Civil Union Act 17 of 2006. This Act legalised same-sex marriage and gave same-sex couples the same status, benefits, entitlements and responsibilities as heterosexual

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[115] Ibid.

[116] This section provides: 'In solemnizing any marriage the marriage officer, if he is a minister of religion or a person holding a responsible position in a religious denomination or organization, may follow the rites usually observed by his religious denomination or organization, but if he is any other marriage officer he shall put the following questions to each of the parties separately, each of whom shall reply thereto in the affirmative:
'Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)?''

[117] *Fourie* supra note 110 para 114.

[118] Ibid.

[119] Ibid para 162.

[120] Ibid para 161.

couples.[121] This placed homosexual couples on the same level playing field as heterosexual couples in all respects legally, however, the victory is not as big socially, as same-sex couples are still not yet as accepted by society, with the prevalence of violent attacks on homosexuals and corrective rape of lesbian women still a big issue even today.[122]

In 2006, the CC decided the case of *Gory v Kolver*.[123] In this case, the court dealt with the constitutional validity of section 1(1) of the Intestate Succession Act 81 of 1987 (the Act).[124] This section only conferred rights of intestate succession to heterosexual spouses but not to partners in permanent same-sex relationships.[125] In the court a quo, the court declared section 1(1) inconsistent with the Constitution as far as it did not include the words 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support' after the word 'spouse' wherever it appeared in the section.[126] The court a quo then ordered that these words be read in accordingly.[127]

In a unanimous decision, Van Heerden J held that section 1(1) was indeed inconsistent with the Constitution and the exclusion of permanent same-sex partners from the section amounted to unfair discrimination on the ground of sexual orientation.[128] The court further held that not only did section 1(1) unjustifiably violate the applicant's right to equality (section 9 of the Constitution) but it also violated his right to dignity (section 10 of the Constitution).[129] The court then ordered the reading in of the words 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support' after the word 'spouse' wherever it appeared in the section.[130] The court also ordered that this order apply retrospectively.[131] It is submitted that the effect of this decision meant that partners in a permanent same-sex relationships where, it could be shown that there

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[121] Section 4 of the Act provides:

'(1) A marriage officer may solemnise a civil union in accordance with the provisions of this Act.
(2) Subject to this Act. a marriage officer has all the powers, responsibilities and duties, as conferred upon him or her under the Marriage Act, to solemnise a civil union.'

[122] Pumza Fihlani 'South Africa's lesbians fear "corrective rape"' (2011) *BBC Online*, available at *https://www.bbc.co,uk/news/world-africa-13908662*, accessed on 1 January 2019.
[123] *Gory v Kolver* [2006] ZACC 20, 2007 (4) SA 97 (CC).
[124] Ibid para 1.
[125] Ibid.
[126] Ibid para 4.
[127] Ibid.
[128] Ibid para 19.
[129] Ibid.
[130] Ibid paras 43, 66.
[131] Ibid.

was a reciprocal duty of support, could also have rights of intestate succession in the estate of their deceased partners.

In 2008, the CC in the case of *Geldenhuys v National Director of Public Prosecutions* [132] confirmed an order made by the SCA [133] declaring that subsections 14(1)*(b)*[134] and 14(3)*(b)*[135] of the Sexual Offences Act 23 of 1957 were unconstitutional.[136] These subsections made a differentiation between immoral and indecent activities by setting the legal age of consent at 16 years and 19 years, respectively. The differentiation was made where the age of consent for heterosexual activities was 16 years however it was set at 19 years for homosexual activities.[137] Although the impugned provisions had already been repealed at the time of the CC handing down its judgment, the court was still required to deal with the matter because albeit the abrogation and replacement of the provisions, the applicant was not relieved from his conviction.[138] The court therefore held that the applicant was within his rights to approach the courts to challenge the provisions on the basis that they discriminated against him at the time, and ask that they be declared unconstitutional and for a retrospective order nullifying the provisions on the basis of which he was convicted.[139]

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[132] *Geldenhuys v National Director of Public Prosecutions* [2008] ZACC 21, 2009 (2) SA 310 (CC). The applicant, a dentist, was convicted on four counts of indecency involving children, in violation of the subsection 14(1)*(b)* of the Sexual Offences Act 23 of 1957. At the time of his conviction the age of consent on sexual activities of parties of the same sex, according to subsection 14(1)*(b)*, was 19 years, as opposed to the 16 years that was set for sexual activities between parties of the opposite sex by subsection 14(1)*(a)* of the Act. He was sentenced to 11 years' imprisonment. The applicant had appealed his conviction at the Transvaal High Court. His conviction was confirmed by the court, but his sentence was reduced. He then appealed his conviction but not his sentence to the Supreme Court of Appeal (SCA). In the SCA Van Heerden JA declared that subsections 14(1)*(b)* and 14(3)*(b)* are unconstitutional and ordered that the 19 years set as the age of consent as per these subsections be replaced with 16 years. The court, however, dismissed his appeal of his conviction.

[133] *S v Geldenhuys* [2008] ZASCA 47, 2009 (1) SACR 1 (SCA).

[134] The Act provides:

'(1) Any male person who –

(a) has or attempts to have unlawful carnal intercourse with a girl under the age of 16 years; or

(b) commits or attempts to commit with such a girl or with a boy under the age of 19 years an immoral or indecent act; or

(c) solicits or entices such a girl or boy to the commission of an immoral or indecent act,

shall be guilty of an offence.'

[135] The Act provides:

'(3) Any female who-

(a) has or attempts to have unlawful carnal intercourse with a boy under the age of 16 years; or

(b) commits or attempts to commit with such a boy or with a girl under the age of 19 years an immoral or indecent act; or

(c) solicits or entices such a boy or girl to the commission of an immoral or indecent act,

shall be guilty of an offence.'

[136] *Geldenhuys* supra note 132 para 1. These provisions have since been repealed by Parliament.

[137] Ibid para 22.

[138] Ibid para 27.

[139] Ibid.

In a unanimous judgment the court, as per Mokgoro J, held that if a provision differentiates between persons, especially under the grounds listed in section 9(3) of the Constitution, there must be a rational justification to a 'legitimate government purpose' for the differentiation.[140] If the differentiation is otherwise arbitrary it is assumed to be in violation of section 9(1) of the Constitution.[141] Ultimately the court found that there was no rational or ascertainable justification for the differentiation in the age of consent set for homosexual activities and heterosexual activities.[142] The court therefore found that the differentiation set in subsections 14(1)*(b)* and 14(3)*(b)* was in inconsistent with the Constitution and amounted to unfair discrimination on the basis of sexual orientation.[143]

In 2018, the Parliament passed a bill that will make it impermissible for marriage officers working for the State to refuse officiating same-sex couple marriages.[144] The enactment is pending a 24-month transitional period for the Department of Home Affairs to enable officers to be trained.[145] This is Parliament's way of continually working on correcting injustice as it was revealed in an argument for the passing of the Bill, that 88 per cent of marriage officers within the Department of Home Affairs were exempted from officiating same-sex couples.[146] The Civil Union Amendment Bill will repeal section 6 of the Civil Union Act which allows marriage officers (other than ministers of religion) an option not to officiate same-sex marriages on reasons of conscience, religion, and belief.[147] The rationale behind this bill is that no civil servant should be able to pick and choose which South Africans to serve and despite their religious subscription or beliefs, civil officers must serve all South Africans equally.[148] The Bill is now awaiting assent by the President of the country.

The laws are comprehensively inclusive of the LGBTQIA rights. Not only are the members of the LGBTQIA community able to marry according to the Civil Union Act (as

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[140] Ibid para 29.
[141] Ibid.
[142] Ibid para 38.
[143] Ibid.
[144] Chantall Presence 'Parliament passes bill changing same-sex marriage law' *IOL Online* 6 December 2018, available at *https://www.iol.co.za/news/politics/parliament-passes-bill-changing-samesex-marriage-law/*, accessed on 23 February 2019.
[145] Ibid.
[146] Ibid.
[147] S 6 of the Act provides: 'A marriage officer, other than a marriage officer referred to in section 5, may in writing inform the Minister that he or she objects on the ground of conscience, religion and belief to solemnising a civil union between persons of the same sex, whereupon that marriage officer shall not be compelled to solemnise such civil union.'
[148] Presence op cit note 144.

already shown above), but they are also able adopt children, as confirmed in the case of *Minister of Home Affairs v Fourie.*[149] This shows that the progression in South Africa regarding homosexuality, and the laws thereto, is promising.

III BOTSWANA

(a) Anti-homosexuality legislation of Botswana

In Botswana criminalisation of same-sex behaviour was not unconstitutional.[150] According to section 164(a) and (c) of the Penal Code Chapter 08:01,[151] any person who had or allowed another person to have carnal knowledge (i.e. sexual intercourse or interaction of a sexual nature) of him or her against *natural order* was guilty of committing an offence and was liable or imprisoned for up to seven years.[152] Section 167 of the Penal Code[153] provided for the commission, procurement or attempt to procure the commission of any act of 'gross indecency', whether in public or private, by any male person with another male person. Such persons were deemed guilty of an offence.

In 2003, the court of appeal decided on the case of *Kanane v The State.*[154] The facts of this case are as follows: In 1995, two men were charged with the first count of engaging in unnatural acts (as envisaged in section 164 of the Kenya Penal Code) and the second count of committing indecent practices (as envisaged by section 167 of the Penal Code as read with section 33[155] of the Penal Code).[156] One of these men, being Graham Norrie, pleaded guilty to both charges, to which he was fined P1000.[157] The appellant pleaded not guilty to both charges and argued that the sections of the Penal Code with which he was charged were ultra

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[149] *Fourie* supra note 110.
[150] Emmanuel K Quansah 'Same-sex relationships in Botswana: Current perspectives and future prospects' (2004) 4(2) *African Human Rights Law Journal* at 11.
[151] This Code is prior to its amendment.
[152] S 164 of the Penal Code –
'Any person who
(a) has carnal knowledge of any person against the order of nature;
(b) has carnal knowledge of an animal; or
(c) permits any other person to have carnal knowledge of him or her against the order of nature, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.'
[153] Take note that the Penal Code was amended resulting in the Penal Code (Amendment) Act 4 of 1998. S 164 was amended by replacing the words 'any other' with the word 'male' contained therein. S 167 was amended by removing the word 'male' wherever it appeared.
[154] *Kanane v The State* 2003 (2) BLR 64 (CA).
[155] S 33 of the Penal Code provides: 'When in this Code no punishment is specially provided for any offence, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both.'
[156] *Kanane* supra note 154 at 69.
[157] Ibid.

vires section 3[158] of the Constitution of Botswana.[159] Since the issue brought up by the appellant was constitutional in nature, it was agreed that it had to be brought before the high court (based on the criminal charges brought against the appellant) before the trial proceeded, in terms of section 18(3)[160] of the Constitution of Botswana.[161]

The appellant filed a notice of motion accompanied by an affidavit in support of the motion – as permitted by Order 70 rule 4(2) of the Rules of the High Court[162] – setting out the reasons for contending that the charges were in violation of the Constitution.[163] His contentions included first that sections (164 and 167) are discriminatory against male individuals on the ground of gender and impinge on their freedom of privacy[164], of conscience,[165] of expression,[166] of assembly and association[167] as stipulated in section 3 of the Constitution.[168] Furthermore, in his contentions the sections impede male persons from enjoying their right to freely assemble and associate with others as guaranteed in sections 13[169] and 15[170] of the Constitution by discriminating against males on the ground of gender.[171]

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[158] S 3 provides: 'Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his or her race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely-

(a) life, liberty, security of the person and the protection of the law;
(b) freedom of conscience, of expression and of assembly and association; and
(c) protection for the privacy of his or her home and other property and from deprivation of property without compensation, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.'

[159] *Kanane* supra note 154 at 69.
[160] This section provides: 'If in any proceedings in the subordinate court any question arises as to the contravention of any of the provisions of sections 3 – 16 (inclusive) of this Constitution, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the high court, unless, in his opinion, the raising of the question is merely frivolous or vexatious.'
[161] *Kanane* supra note 154 at 69.
[162] Order 70 rule 4(2) of the Rules of the High Court Chapter 04:02.
[163] *Kanane* supra note 154 at 69.
[164] S 9 of the Constitution of Botswana.
[165] S 11 of the Constitution of Botswana.
[166] S 12 of the Constitution of Botswana.
[167] S 13 of the Constitution of Botswana.
[168] *Kanane* supra note 154 at 69.
[169] The section provides for the protection of freedom of assembly and association.
[170] The section provides for, inter alia, protection from discrimination on the grounds of race, tribe, place of origin, political opinions, colour or creed.
[171] *Kanane* supra note 154 at 69.

It was further contended that the offences the appellant was accused of were carried out in private between two consenting male adults.[172] It was also submitted on behalf of the appellant that the traditional legal attitudes to sex have their foundation in the belief that marriage and sexual intercourse were for the purposes of procreation.[173] Therefore, this approach insists that all non-procreative sex was deemed unnatural and aberrant.[174] Thus, making the compass of the 'unnatural offences' lacking in lucidity, therefore making it impossible for any charge under section 164(c) of the Penal Code to fulfil the requirements of section 10(2)*(b)*[175] of the Botswana Constitution.[176]

In the court a quo,[177] Mwaikasu J held that in relation to section 164(c), the normal form of sexual intercourse is the penetration of the male genital organ into the genital organ of the female.[178] Any other form or manner of sexual intercourse is against the order of nature.[179] Mwaikasu J continued by holding that the section was not discriminatory as it targeted both males and females.[180] The justice was of the view that public morality or the cherished mores, and influence of the present-day culture of a society, are at the core of criminal law.[181] These moral values modulate the conduct of individual members of society for the benefit of society and furnish a favourable environment for the employment and enjoyment of the individual rights and freedoms of members of such society.[182]

In his judgment, Mwaikasu J observed that the conduct of any person who has been deemed to have contravened the moral fibre of any society is prohibited under national criminal law.[183] In this regard, the existence of any such moral values or mores as being important to the well-being of the society and for the advancement of the individual rights and freedoms is what preserves the society concerned.[184] Mwaikasu J expressed that the court

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[172] *Kanane* supra note 154 at 69.
[173] Quansah op cit note 150 at 204.
[174] Ibid.
[175] This section provides: '(2) Every person who is charged with a criminal offence –
(b) shall be informed as soon as reasonably practicable, in a language that he or she understands and in detail, of the nature of the offence charged… .'
[176] Quansah op cit note 150 at 204.
[177] *Kanane v State* 1995 BLR 94 (High Court).
[178] Kealeboga N Bojosi 'An opportunity missed for gay rights in Botswana: *Utjiwa Kanane v The State*' (2004) 20(3) *South African Journal on Human Rights* at 468.
[179] Ibid.
[180] Ibid.
[181] Quansah op cit note 150 at 204.
[182] Ibid.
[183] Ibid.
[184] Ibid.

must take caution in interpreting the Penal Codes whilst dealing with the charges that stand against the applicant so as to not find itself unconsciously importing foreign notions of moral values or norms into the country.[185] The court also relied on the Wolfenden Report[186] and Lord Devlin's response to it in a series of lectures.[187]

Mwaikasu J approved the latter's view that the primary existence of the law is to protect society.[188] Devlin's view further stated that the law protects the individual from injury, indignation, corruption and exploitation. However by so doing, it does not discharge its primary function of protecting society.[189] Moreover, the law must also protect institutions as well as political and moral ideas which make up the co-existence of people.[190] Devlin also stated that society must take heed of both the morality and loyalty of the individual, as one cannot flourish without the other. [191] The justice further pointed out that sodomy, bestiality and offences regarded as unnatural – which are offences now found in many African Penal Codes which were imported during colonisation – are not generally common among indigenous African societies.[192] Mwaikasu J stated that these offences originated from the West and are more common among white societies.[193] Mwaikasu J made reference to South Africa and Zimbabwe as countries where these offences are more common because of the influences of the Western colonisers in these countries. [194]

Furthermore, the justice held that the rights to privacy, association and freedom of expression could be infringed or limited by legislation to uphold and protect public

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[185] Ibid.
[186] A report by a committee set up in England, Committee on Homosexual Offences and Prostitution, in 1957, chaired by Sir John Wolfenden. The report asserted that '[i]t is not the duty of the law to concern itself with morality as such...[I]t should confine itself to those activities which offend against the public order and decency or expose the ordinary citizen to what is offensive or injurious.'
[187] P Devlin *The Enforcement of Morals* (1965). These are print of lectures delivered by him between 1959 and 1964. Lord Devlin was a leading figure in Britain during the years 1948–1964 and a proponent of the legalistic view of enforcement of morals. It was his view that 'the whole basis of criminal law is that there are certain standards of behaviour or moral principles which society requires to be observed and a breach of them is an offence against society as a whole'. He added that conduct that arouses 'intolerance, indignation and disgust' in society needs to be suppressed by legal order.
[188] Ibid at 22.
[189] Ibid.
[190] Ibid.
[191] Ibid.
[192] *Kanane* supra note 154 at 78.
[193] Ibid.
[194] Ibid. In saying this Mwaikasu J relied heavily on a publication by B Malinowski *The Sexual Life of Savages in North - Western Melanesia* published (1932) which posited that '[t]he white man's influence and his morality stupidly misapplied where there is no place for it, creates a setting favourable to homosexuality. The natives are perfectly aware that venereal disease and homosexuality are among the benefits bestowed on them by Western culture.'

morality.[195] Mwaikasu J concluded in taking from a book by Dr Dobson[196] by holding that the impugned sections were necessary to prevent likely harm to both the individual and the society as a whole.[197] In the court of appeal the appellant made the same contentions he made in the court a quo.[198]

Tebbutt JP, who handed down the judgment in the court of appeal, distanced himself from the assertion that the offences in issue are uncommon among indigenous African societies as no authority was referenced in support of it.[199] The court commenced by considering the meaning of the phrase 'carnal knowledge against the order of nature'.[200] It concluded that the phrase meant sexual intercourse per anum,[201] deviating from the definition gave by Mwaikasu J in the court a quo, which was that 'carnal knowledge against the order of nature' does not only entail sexual intercourse per anum but also includes oral sex.[202] The court relied on decisions from South Africa[203] and concluded that taking into account the physiological characteristics of males and females, it was only males who would be able to achieve penetration of the anus of either a male or female.[204]

On the question of whether sections 164 and 167 contravened the Constitution, Tebbutt JP aired that Mwaikasu J erred in that the justice dealt with the appellant as though the appellant had been charged under the amended form of the provisions, whereas he was charged with violating the provisions as they were prior to their 1998 amendment.[205] Furthermore, Tebbutt JP suggested that the court should follow the precedent set by the case of *Attorney General v Dow* where the majority court adopted a broad and open-handed approach in interpreting the Constitution.[206] The facts of this case were as follows: the respondent was a female citizen of Botswana married to an American citizen.[207] The couple had three minor children. In terms of the then section 21 of the Constitution of Botswana, every person born in Botswana on or after 30 September 1966 was entitled to Botswana

[195] *Kanane* supra note 154 at 68.
[196] James Dobson *When God Doesn't Make Sense* (1993).
[197] *Kanane* supra note 154 at 78.
[198] *Kanane* supra note 154; *Kanane* supra note 177.
[199] Ibid at 78.
[200] Ibid at 71.
[201] Ibid.
[202] Ibid.
[203] Judgements such as *R v Gough and Narrowing* 1936 CPD 163; *R v H* 1962 (1) SA 279 (SR).
[204] *Kanane* supra note 154 at 71.
[205] *Kanane* supra note 154 at 78.
[206] *Attorney General v Dow* [1992] BLR 119.
[207] Ibid at 121.

citizenship.[208] The couple's first child who was born in 1979, was therefore a citizen of Botswana by virtue of section 21 of the Constitution.[209] In 1984, section 21 was repealed and a new Citizenship (Amendment) Act 17 of 1984 was enacted, section 4(1) of which provided in part that a person is a citizen of Botswana if they are born in the country or if at the time of birth, their mother (if born out of wedlock) or father was a citizen of Botswana.[210] By virtue of this Act, the last two children born in 1985 and 1987 were regarded as non-citizens of Botswana for reason that their father was not a citizen of Botswana.[211]

The respondent applied for an order declaring, inter alia, that section 4(1) of the Citizenship Act violated her fundamental right to equality.[212] The respondent contended that the section discriminated against her in that contrary to male citizens of Botswana married to foreigners she could not pass her citizenship to her children.[213] On the other hand the appellant contended that section 15 of the Constitution dealt with discrimination and that, whereas section 3 granted rights and freedoms regardless of sex, the word 'sex' is not expressly listed in the definition of 'discriminatory' treatment in section 15(3).[214] The appellant further submitted that the omission of the word 'sex' was intentional and made so as to sanction the enactment of legislation which is discriminatory on grounds of sex.[215] In addition, the appellant argued that discrimination on the grounds of sex was permitted in Botswana since according to common law and customary law, Botswana society is patrilineal and therefore male oriented.[216]

The court a quo found in favour of the respondent. The attorney general then appealed to the court of appeal. In dismissing the appeal, the court (main judgment as per Amissah JP) observed that the rights guaranteed in section 3 diminished by section 15 simply because the word 'sex' was not explicitly included in the definition of 'discriminatory' in the section.[217] The court further held that a right guaranteed by the Constitution cannot be derogated by a definition in another section to suit the purpose of that particular section.[218] Tebbutt JP held

[208] Ibid.
[209] Ibid.
[210] Ibid.
[211] Ibid.
[212] Ibid at 136.
[213] Ibid.
[214] Ibid.
[215] Ibid.
[216] Ibid.
[217] Ibid at 122.
[218] Ibid.

that if the finding of the court in *Dow* is applied to the impugned provisions with which the appellant was charged, prior to the amendment of section 167 of the Penal Code, they would have been discriminatory on the basis of gender.[219]

Turning to section 164(c) prior to the amendment, the court noted that persons who commit the offence may either be male or female and therefore there appeared to be no discrimination on the grounds of gender in so far as the perpetrator of the offence is concerned.[220] Counsel for the appellant contended that the offender in committing the offence only had sexual intercourse (carnal knowledge) with a male person and not a female.[221] This therefore made the section discriminatory.[222] He further contended that the entire section in its pre-and-post-amendment form was discriminatory against one class of persons.[223] According to the court, the class of persons that counsel referred to is gays and lesbians.[224] In other words, the appellant's contention was that section 164(c) was discriminatory on the basis of sexual orientation.[225]

The court noted that discrimination on the basis of sexual orientation is not among the forms of discrimination set out in section 15(3) of the Constitution of Botswana.[226] The court therefore posed the question 'whether in Botswana at the present time the circumstances demand the decriminalisation of homosexual practices as between consenting adult males or put it somewhat differently, is there a class or group of gay men who require protection under section 3 of the Constitution?'[227]

Thus, the court then shifted the burden on the appellant to prove that public opinion in Botswana had changed and developed such that the society in Botswana demanded decriminalisation.[228] The appellant failed to adduce such evidence and this proved fatal to his cause.[229] The court held that when construing the Constitution, consideration must be given to public opinion, especially if expressed through legislation.[230] The court continued to hold

[219] *Kanane* supra note 154 at 73.
[220] Ibid.
[221] Ibid.
[222] Ibid.
[223] Ibid.
[224] Ibid.
[225] Ibid at 77.
[226] Ibid.
[227] Ibid at 77–8.
[228] Ibid at 78.
[229] Ibid.
[230] Ibid at 79.

that in passing of the 1998 Amendment Act, the legislature clearly considered the provisions in question.[231] It concluded therefore that there is a hardening of attitude when it comes to the attempt to moving towards the liberation of sexual conduct by accepting homosexual practices. [232]

Tebbutt JP observed that it was not necessary for the court to express an opinion on whether the social values and norms of Botswana in relation to the issue of homosexuality are conservative or liberal.[233] Tebbutt JP continued to state that there are some indications that show the court that it was not yet the time to decriminalise homosexual practices between consenting adult males in private.[234] Furthermore, the court held that gay men and lesbian women do not fall under the category of people who have been shown, at the point in time, to require protection from the Constitution.[235]

Quansah in his article titled *Same-sex relationships in Botswana: Current perspectives and future prospects*, argued that section 167 of the Penal Code with which the appellant was charged was clearly discriminatory on the basis of gender, either in itself or in its effect.[236] Quansah further argued that the section was only directed at male persons who committed acts of gross indecency with one another, be it in public or in private.[237] However, taking into consideration the 1998 amendment of the section, the court could not strike the section down. [238] Furthermore, it was the court's view that section 164(c) prior to the 1998 amendment, did not discriminate on the grounds of gender.[239] The court reasoned that since the person who commits the proscribed offence may be either male or female, the averment that it is discriminative in nature could not be sustained.[240] The court found that only section 167 prior to the amendment, contravened the Constitution.[241] However, it did not find the same with section 164 therefore the appeal only succeeded in part.[242]

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[231] Ibid at 80.
[232] Ibid.
[233] Ibid at 80.
[234] Ibid at 80–1.
[235] Ibid at 81.
[236] Quansah op cit note 150 at 206.
[237] Ibid.
[238] *Kanane* supra note 154 at 73.
[239] Ibid at 76.
[240] Ibid.
[241] Ibid at 81.
[242] Ibid.

Thus, until most recently, despite cases such as the *Kanane*[243] case in which the applicants vigorously challenge discrimination based on gender and sexual orientation and question the criminalisation of homosexual associations, no changes had been made by the Botswana legislature to remedy this. Furthermore, homosexual copulation and association remained a crime in Botswana punishable by imprisonment up to seven years or by a fine. However, after numerous debates on the decriminalisation of homosexual copulation and homosexual association largely led by organisations such as the Lesbians, Gays and Bisexuals of Botswana (LEGABIBO), Southern African Litigation Centre (SALC), and a range of other stakeholders,[244] activism calling for the decriminalisation of homosexuality in the country claimed a victory in the most recent landmark Botswana high court judgment that finally ruled to decriminalise homosexuality.[245]

(b) Changes to the anti-homosexual laws of Botswana

In this case of *LM v Attorney General*[246] the applicant sought inter alia to have the court declare that section 164(a), (c), and section 165 of the Penal Code rehashed above are ultra vires. The applicant also sought that section 86 of the Constitution as far as the sections are not made for the good order and governance of the Republic of Botswana be declared ultra vires. Furthermore, the applicant sought that the impugned sections be declared void for vagueness.

The applicant further sought that the impugned sections be declared ultra vires sections 3 and/or 15 of the Constitution to the extent that the sections discriminate against homosexuals, as well as section 5 of the Constitution to the extent that the sections interfere with the applicant's fundamental right to liberty. Lastly, the applicant sought that the impugned sections be declared to be in contravention of section 7 of the Constitution to the extent that the sections impinge on the applicant's fundamental right not to be subjected to inhuman and degrading treatment or other such treatment.[247]

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[243] *Kanane* supra note 154.
[244] Kellyn Botha 'Angola's new LGBT protections: A good start to 2019?' *IRANTI* 16 January 2019, available at *https://www.iranti.org.za/index.php/news/angolas-new-lgbt-protections-a-good-start-to-2019/*, accessed on 17 April 2019.
[245] Alan Yuhas 'A win for gay rights in Botswana is a "step against the current" in Africa' *New York Times Online* 11 June 2019, available at *https://www.nytimes.com/2019/06/11/world/africa/a-win-for-gay-rights-in-Botswana-is-a-step-against-the-current-in-africa.html*, accessed on 19 June 2019.
[246] *LM v Attorney General* [2019] MAHGB-000591-16.
[247] Ibid para 6.

In dealing with the issues, the court first recounted the historical evolution of the offence of sodomy or sexual intercourse against the order of nature. The court mentioned the Biblical reference to the prohibition and punishment of the act of sodomy in the story of Sodom and Gomorrah and also in the New Testament.[248] The court made a historical account of the offence of buggery which emanated from the English common law, which was then penned into statute, for the purposes of protecting the Christian principles upon which the UK was founded.[249]

The court continued that with the advent of colonialism the offence of sodomy was henceforth imported into the British colonies during the seventieth and twentieth centuries.[250]

Having recounted the history of the offence, setting the tone for the discourse regarding the issues at hand, the court went on to discuss constitutional interpretation where the court determined that the Interpretation Act (Chapter 01: 04), Laws of Botswana is relevant in the interpretation of the Constitution. The court purported to interpret the Constitution as a 'living and dynamic charter of progressive human rights.'[251] It also purported to look at the entire setting and context in which the words are used and the purpose for which the words are intended and not merely look at the literal meaning of the words.[252]

On the issue of 'void for vagueness' particularly with respect to the meaning of 'carnal knowledge' 'against the order of nature', which the Penal Code do not define, the court quoted the case of *Gaolete v State.*[253] In this case the court defined 'carnal knowledge' as 'sexual intercourse' and 'against the order of nature' was defined as 'anal sexual penetration'. This definition was later embraced by the highest court of the land in *Kanane*.[254] The court therefore held that having regard to the definition accorded thereto, it was also bound by such definitions and thus concluded that the impugned provisions were not vague.[255]

The court moved on to the issue of the right to privacy which is entrenched in section 3(c) and section 9 of the Botswana Constitution. On this point, the court first looked at the

[248] Ibid paras 42–50.
[249] Ibid para 51.
[250] Ibid para 52.
[251] Ibid para 76.
[252] Ibid para 78.
[253] *Gaolete v State* [1991] BLR 325 (HC).
[254] *LM v Attorney General* supra note 246 para 96.
[255] Ibid para 97.

historical context of privacy, also pointing at the dictionary meaning of privacy.[256] The court further went on to lay out the importance of privacy and the rights thereto, stating that privacy as an essential component of a human being, allows one to freely be themselves without judgment and to think freely without any impediments. It gives people personal autonomy and control over themselves.[257]

In explicating the paramountcy of privacy and the right thereto, the court quoted foreign case law including, inter alia, the South African CC case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*[258] where the court held that privacy allows us the space to have and cultivate intimate relationships without outside interference. The CC further held that the expression of one's sexuality lies at the core of private intimacy and if the sexual intimacy is practiced with consent from both parties and without harm to each other, interference of that sexuality is an invasion of privacy.[259]

The court also quoted the US case of *Lawrence v Texas*[260] where the US Supreme Court struck down the criminal proscription of sodomy as it was held to be a violation of the right to privacy. Furthermore, the court also referred to the Universal Declaration of Human Rights quoting article 12 of same which states that no one shall be subjected to the arbitrary invasion of their privacy or attacks to their reputation. It further states that everyone has a right to be protected by the law against such invasion or attacks.[261] To this the court added that the impugned provisions supress the applicant in that it limits his right to freely express his sexuality in private and with a consenting adult partner.[262] Moreover, the applicant has a right to express his sexual desire and intimacy, which so far has not been shown to be harmful to any person, in his own private space.[263]

On the issue of liberty, which is guaranteed under section 3 of the Constitution of Botswana, the court used foreign case law to substantiate its assertions about the importance

[256] Ibid paras 108–12.
[257] Ibid para 113.
[258] *National Coalition for Gay and Lesbian Equality* supra note 43.
[259] Ibid para 124.
[260] *Lawrence v Texas* 539 US 558.
[261] *LM v Attorney General* supra note 246 para 120.
[262] Ibid para 127.
[263] Ibid.

of the right to liberty.[264] Leburu J emphasised that contrary to the common misconception, sexual orientation is not a fashion statement or pose, but is in actual fact an intrinsic part of one's identity. Thus, one must be able to freely make decisions about their personal life and whom they want as a partner. Therefore, the right to liberty makes those decisions possible and it also embraces the right to sexual autonomy. The right to liberty further protects the inherent and private choices which are free from influence and interference by others. [265]

The court emphasised that the premise of the right to liberty was not merely about the physical freedom from restraint but the complete freedom and autonomy to choose for oneself with whom they want to be in a sexual relationship and how they choose to express their sexual desires and not have the state dictate how they are to express their sexual desire. The court held that section 164(a), (c) and 165 of the Penal Code circumvent the applicant's only mode of sexual expression which is sexual intercourse per anum.[266]

Tending to the issue of dignity, the Leburu J held that sexual intercourse goes beyond the scope of procreation. It extends to the expression of love and intimacy and the impugned sections deny the applicant the only mode available to him to express this love and intimacy. Furthermore, the court held that the denial and criminalisation of such acts negatively affect the applicant's self-worth and human dignity which is an equal right that belongs to all people. Thus the court held that the applicant's dignity must be respected unless it is legitimately restricted.[267]

The court dealt intensely with the issue of discrimination. The substance of the amicus curiae case was that ex facie the provisions under scrutiny appear to be gender neutral and applying to all equally. However, the amicus averred that the provisions are discriminatory in their substance by denying the applicant sexual expressions and gratification in the only way natural and available to him, which is penetration per anum.[268] It was also submitted that the word 'sex' in section 3 be interpreted to also include 'sexual orientation'.[269] The court did not find a problem with determining that the word 'sex' in section 3 was wide enough to also

[264] The court referred to the US case of *Planned Parenthood of South Eastern PA v Casey* 505 US 833 (1992) and the landmark case that decriminalised sodomy in India, *Navtej Singh Johar & others v Union of India, Ministry of Law and Justice* (Writ Petition No. 76 of 2016, Supreme Court).
[265] *LM v Attorney General* supra note 246 paras 142–3.
[266] Ibid para 144.
[267] Ibid paras 150–1, 153.
[268] Ibid para 156
[269] Ibid.

include 'sexual orientation'.[270] The court substantiated this determination by quoting the Canadian case of *Vriend v Alberta*[271] which also expanded the word 'sex' to include 'sexual orientation'.[272]

Having quoted other foreign case law on the issue, the court agreed with the averments of the amicus curiae in that the impugned provisions appear to be neutral and applicable to all, however, the court held that the impact of the provisions on the applicant as a homosexual who only engages in anal sexual penetration is greater than it is on heterosexual men and women.[273] The court authoritatively held that denying the applicant the only way available to him to express sexual desire is discrimination, especially when this is not denied to heterosexuals. The court ruled that it is indirect discrimination on the ground of sexual orientation and the impugned sections render the applicant a criminal. [274]

In conclusion on the issues at hand, the court held that section 164 and 165 were discriminatory in effect. The court held that the impugned provisions impair the applicant's right to dignity, privacy, liberty and are discriminatory in effect. The court further held that when the state endeavours to apply constitutional limitations on one of the fundamental rights of an individual the state bears an onus of proving that such limitation satisfies the constitutional limitation.[275] In this case, the court held that the respondent failed in providing evidence that the limitation it impressed on the fundamental rights of the applicant satisfied the constitutional limitation.[276] The court stated that the respondent's justification was battened with speculative assertions and/or speculations that sexual penetration per anum is contrary to public morality or public interest.[277]

The court found it necessary to also address the issue of public interest/morality. The court confirmed that public opinion is relevant in matters of constitutional adjudication, but it is not final and determinative. The court opined that public opinion is rendered inconsequential when juxtaposed with the indispensable 'triangle of constitutionalism', which

[270] Ibid para 157.
[271] *Vriend v Alberta* [1998] 1 SCR 493.
[272] *LM v Attorney General* supra note 246 para 159.
[273] Ibid para 169.
[274] Ibid.
[275] Ibid para 175.
[276] Ibid paras 180, 192.
[277] Ibid.

are the fundamental human rights.[278] In making this assertion, the court quoted the landmark South African Constitutional Case of *S v Makwanyane*[279] that held that public opinion may have some relevance, however, it is not meant to usurp the duty of the court to interpret the Constitution and uphold its provisions.[280]

The court also held that the sodomy provisions are of the Victorian era and are influenced by Judeo-Christianity teachings, teachings that recognised procreation as the sole purpose of sexual intercourse. Leburu J further held that such proposition is no longer valid and sustainable.[281]

Finally, the court held that it is not the realm of the law to regulate the private consensual sexual encounters between two consenting males.[282] It must also not insert itself in the determination of what is regarded as private morality or immorality and private decency or indecency.[283] The court ruled that it must only intervene where there may be indecency done with a minor or with an adult without consent of the said adult, but done in private, in which case there are penal provisions that can be asserted to deal with that infraction.[284] The court ordered that the word 'private' indecency ought to be removed from section 167 through the doctrine of severability[285] so that it only covers public indecency.[286] The court unanimously declared section 164(a), (c), and 165 unconstitutional.[287]

For the LGBTQIA community in Botswana this judgment means that the manner in which they choose to express their sexual desires is no longer the business of the law. It also means that it is no longer a criminal offence to express themselves sexually (per anum) and to openly express who they naturally are, without the fear or threat of being imprisoned or fined for it. Consequently, homosexuality is no longer a crime in Botswana.

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[278] Ibid para 185.
[279] *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC) paras 77–88.
[280] *LM v Attorney General* supra note 246 para 186.
[281] Ibid para 208.
[282] Ibid para 224.
[283] Ibid.
[284] Ibid.
[285] *LM v Attorney General* supra note 246 paras 218–19. The doctrine of severability posits that a portion of a statutory legislation or contract can be severed or excised and deemed void from the portion that is deemed valid and legally enforceable. This is only allowed where, after the excision of the void portion, the rest of the statute or contract still makes legal sense and does not affect the validity of the remaining provision or portion of the legal document.
[286] Ibid para 223.
[287] Ibid para 228.

IV LESSONS TO BE LEARNT FROM SOUTH AFRICA AND BOTSWANA

It is submitted that it is trite that countries on the path of overcoming past colonialism and oppression will face many challenges whilst converting themselves to liberal democracy. Such challenges include mostly matters related to equality of all. It is submitted that this is due to the differences in opinions and views on matters rooted on personal morality, such as sexuality. Furthermore, it is submitted that it is also trite that not all people agree that a person can be anything other than heterosexual. Both Botswana and South Africa have faced such challenges and push-back in trying to evolve in the way that all people are treated and offered equality. However, both countries have overcome these challenges in a manner that has ensured that the fundamental human rights of all people are recognised and respected.

In both countries, the courts have taken into consideration that public opinion is important in constitutional litigation. In the case of *S v Makwanyane*[288] the court made reference to the relevance of public opinion in the adjudication of the Constitution.[289] In the Botswana case of *Ramantele v Mmusi & others*[290] the court also pointed out that prevailing public opinion is relevant in the making of laws. However, in mentioning that public opinion is relevant, both courts made a point of also mentioning that public opinion is not decisive. This is the approach that both the South African and Botswana courts have applied in their landmark judgments that decriminalised homosexuality in these countries.

When the University of the Witwatersrand conducted a survey in 1995 to determine people's attitudes, it found that only 38 per cent of South Africans thought that the Constitution should bestow equal rights to homosexual people.[291] This means that the prevailing public opinion was against the inclusion of gay rights in the Constitution. However, the court overlooked this and placed the importance of equality and inclusion above the opinions on the public. In the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*[292] the court ruled that the decriminalisation of sodomy was unconstitutional. This meant that the LGBTQIA community could claim their constitutional right to equality.

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[288] *S v Makwanyane* supra note 279 paras 77–88.
[289] Ibid.
[290] *Ramantele v Mmusi & others* CACGB-104-12 [2013] BWCA 1 para 20.
[291] Markd F Massoud 'The evolution of gay rights in South Africa' (2003) 15(3) *Peace Review* at 304.
[292] *National Coalition for Gay and Lesbian Equality* supra note 43.

In Botswana, the court in the case of *Kanane v The State*[293] the court had placed public opinion above the rights of the LGBTQIA community. The court held that the appellant had failed in showing that public opinion had shifted and demanded decriminalisation of sodomy. It is submitted that the court in this case missed an opportunity to develop gay rights in Botswana. The court in *LM v Attorney General*[294] changed the narrative of gay rights by deciding to place the fundamental rights of the LGBTQIA community above public opinion that might have still been against the decriminalisation of sodomy.

It is submitted that this is a very important lesson that other countries must grasp, which is that public opinion is relevant but is not decisive. It is submitted that one of the main reasons that other African countries have held out in decriminalisation of homosexuality is because of public opinion that is against this decriminalisation. It is submitted that this public opinion is fuelled by many different teachings, feelings, theories and personal convictions that may or may not be justifiable. It is submitted that in order for the other African countries to attain true democracy and the equality of all people is to follow the example of South Africa and Botswana, along with other African countries that have decriminalised sodomy.

Finally, it is submitted that by following the example set by the courts in South Africa and Botswana they could also be on their way to decriminalising anti-homosexuality laws and complying with international laws and standards on human rights for all people. They could do this by looking past colonial laws and ensuring that although public opinion is important, it is not decisive and therefore should not be decisive in matters where the fundamental human rights of others are involved.

V CONCLUSION

Botswana and South Africa have made considerate progress toward liberal democracy and equality for all. Looking at the rationale for striking down anti-homosexuality laws, the courts in these counties considered the dignity, rights and freedoms of the LGBTQIA community and placed equality above public opinion that was against the inclusion of the LGBTQIA community in the equality discourse and the inclusion of LGBTQIA rights in the Constitution. It is submitted that in many other African countries (those that have not

[293] *Kanane* supra note 154.
[294] *LM v Attorney General* supra note 246.

decriminalised homosexuality), public opinion is still held at higher importance than the rights of the LGBTQIA community.

It is submitted that those countries should follow the positive examples of Botswana and South Africa. It is submitted that public opinion has a place in society and is especially important for the making of law, however, the current circumstances of society must also be considered. The laws must respond to the current needs of society and not only the needs of the majority either. It is submitted that the law must consider the current needs and circumstances of all people in order to achieve true equality and meet the standards of the Universal Declaration of Human Rights.

CHAPTER 5

CRITICAL ANALYSIS, CONCLUSION AND RECOMMENDATIONS

I INTRODUCTION

The argument made by Africans who believe that homosexuality is un-African is that homosexuality was never part of the African history and that homosexuality was imported into Africa by Europeans through colonisation. However, it has been shown in the above chapters that homosexuality did in fact exist in pre-colonial Africa. There are two hypotheses that this chapter makes and will analyse: first, that homosexuality became un-African because the Christians came and declared it so in its mission to instil Christian morality into black Africans; secondly and in agreement with the argument made by Marc Epprecht,[1] that Europeans had tried to confine black Africa into a single entity and found it incomprehensible that Africa could be diverse, multifaceted, multi-cultured and have diversities of sexuality.[2]

Other than these hypotheses, societies against homosexuality have also expressed that it is a health hazard and contributes significantly to the epidemic of HIV/AIDS, and it also disturbs and conflicts with the normal, heteronormative African family construct, which this chapter will also explore. Finally, concluding remarks and recommendations will be made.

II ANALYSIS OF THE ANTI-HOMOSEXUALITY LEGISLATION AND THE CASE LAW

It is submitted that the anti-homosexuality laws in countries such as Kenya and Uganda are consistent with the Eurocentric beliefs of the early western anthropologists that compressed Africa into a single entity, incapable of being diverse and multifaceted.[3] The Penal Codes of Kenya and Uganda and many other African former British colonies are very similar, if not identical to one another. This not only confirms that they come from one source, but they also exhibit that they are consistent with one idea.

[1] Marc Eprrecht *Hungochani: The History of a Dissident Sexuality in Southern Africa* (2004) 5.
[2] Ibid.
[3] Ibid.

In the case of *Kanane v The State*[4] the court correctly observed that criminal law has its basis on public morality or moral values or norms as cherished by members of the society concerned, and is influenced by the culture of the moment of such society.[5] The court emphasised the importance of protecting the opinions and views of society and held that the Penal Codes prohibiting certain acts such as sodomy were necessary to prevent likely harm to both the individual and the society as a whole, thus, the rights to privacy, association and freedom of expression could be infringed or limited by legislation to uphold and protect public morality.

The court further expressed that whilst interpreting the Constitution, regard must always be had to public opinion, especially if expressed through legislation. It is argued that this is the same rationale applied by the court in the Kenyan case of *EG v the Attorney General*[6] where the court emphasised that in interpreting the Constitution, the intention of legislature must be held in high regard. The court emphasised that the Constitution is the expression of the values and principles of the public, of which the court accepted that the meaning of 'value' is principles or standards of behaviour.[7]

In the case of *Frank Mugisha & others v Uganda Registration Services Bureau*[8] the court explained that the public has a stake and a common interest in the ideals or actions of an individual or group of persons to the extent that they may affect the morality of others.[9] The court further held that its objective is to conform to the laws, values, norms and aspirations of the people of Uganda.[10] It is submitted that the manner in which the court dealt with this case is that it placed the public interest and morality of the public above the needs of the LGBTQIA community at the time, which were the registration of the company SMUG which was meant to assist and advocate for the marginalised LGBTQIA community.[11]

[4] *Kanane v The State* 2003 (2) BLR 64 (CA).
[5] Kealeboga N Bojosi 'An opportunity missed for gay rights in Botswana: *Utjiwa Kanane v The State*' (2004) 20(3) *South African Journal on Human Rights* at 468.
[6] *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* Petition No. 150 Of 2016 Consolidated with Petition No. 234 of 2016.
[7] Ibid para 389.
[8] *Frank Mugisha and Others v Uganda Registration Services Bureau* Miscellaneous Cause No. 96 of 2016.
[9] Ibid para 27.
[10] Ibid para 41.
[11] Ibid para 7.

III ANALYSIS OF THE NOTION THAT HOMOSEXUALITY IS UN-AFRICAN

The arguments supporting the notion that homosexuality is un-African can be summed up in three statements:

(a) Homosexuality has never existed in Africa. Its introduction was a western import through colonisation;

(b) Homosexuality is contrary to the traditional African family setup and African morals; and

(c) Homosexuality is a health hazard.

(a) Homosexuality has never existed in Africa. Its introduction was a western import through colonisation

As shown in chapter three, the Christian Bible records homosexual activity in a non-western country, Israel, which is tracked back before colonialism.[12] It is submitted then that if the Bible records homosexual activities to have existed in ancient times and existing in countries such as Israel, it is arguable that plurality of sexualities were not exclusive to Western countries like some anthropologists have suggested but have been in existence in other continents, such as Africa, for centuries. This is further confirmed by the numerous accounts of early existence of homosexuality and homosexuals in African countries.

Many of these countries have been able to give homosexuals and homosexual activities names in their native language, further proving that homosexuality was not something foreign to them but rather something that they were used to seeing and experiencing. It is further argued that this is also indicative of an early existence of homosexuality, otherwise it is submitted that there is doubt that Africans would have been able to name something, in their vernacular language, that they did not know about or have not seen. Therefore, the arguments of this thesis support the side of the anthropologists who have shown that homosexuality has existed in pre-colonial Africa. It is submitted that it is unlikely that homosexuality was exclusive only to western countries.

It is submitted that the argument that homosexuality is un-African on the basis that it was never original in Africa and was a western import, as argued by the court in *Kanane* is

[12] James A Loader *A Tale of Two Cities: Sodom and Gomorrah in the Old Testament, Early Jewish and Early Christian Traditions* (1990) 49.

flawed and therefore, likely untrue. It is submitted that one is found to be pressed to criticise the court in this case which observed that the types of offences, such as sodomy and bestiality, have had their origin and are predominant practices among white societies in the West and migratory white communities from the West.[13] It is submitted that this assertion incorrectly assumes that homosexuality never existed in pre-colonial Africa. It presumes that Africa was polluted by the West in terms of homosexuality. It is agreed that the court is correct in as far as it says that there are ideologies that were not part of Africa prior to colonialism. However, this thesis fails to agree that homosexuality is one of those ideologies that were imparted into Africa.

Anthropologists like Michael Gelfand minimise homosexuality as a phenomenon that can simply be avoided in the way that children are brought up, especially as it relates to what he calls 'normal sex relations', as he asserts that Zimbabwean families did not experience homosexuality because of the manner in which children where brought up.[14] It is argued that this conclusion disposes of any possibility that homosexuality might be part of an identity of a person rather than it being just a recreational activity, behaviour or passing phase. It is further argued that if the writer suggests that the problem of homosexuality does not exist because of how children are nurtured and taught about sexual relations, he makes a peril assumption that homosexuality is a behaviour that can simply be taught away rather than it being possibly part of a person's identity and sexual preference. This is suggestive of an idea that homosexuality (or heterosexuality) is an occurrence that falls within a continuum of behaviours and feelings that are determined by a wide range of influences. These include genetic predisposition, culture, family socialisation, geographic space, physical proximity, gender imbalance, life cycle, age, consumption of alcohol or other disinhibiting drugs and innumerable idiosyncratic factors.[15] This is very likely, a flawed assumption.

Melville J Herskovits's argument asserts that homosexuality is situational on the basis that boys have sexual interactions with each other because girls and boys no longer socialise and play games with each other, a phase which passes as the boy grows up. Stephen Murray

[13] *Kanane* supra note 4 at 78. Mwaikasu J asserted that homosexuality is a phenomenon most found in South Africa and Zimbabwe where White settlers have imported their influence in placing such practices.
[14] Michael Gelfand 'Apparent absence of homosexuality and lesbianism in traditional Zimbabweans' (1985) 31(7) *Central African Journal of Medicine* at 138.
[15] Epprecht op cit note 1 at 11.

and Will Roscoe[16] correctly disagree with this assertion and criticise this argument as denying the possibility that homosexuality can exist simply because of the attraction to the same sex and not because situational disposition of lacking interaction with the opposite sex. It is submitted that this criticism made by Murray and Roscoe is corrected. It is argued that these assertions are questionable in that they suggest that homosexuality can only exist within and among boys and that girls are somehow exempt from having the same desires of companionship with the same sex as boys would have. It suggests that homosexuality is only a behaviour practiced by boys who miss the presence of girls, which again diminishes homosexuality as merely a forbidden behaviour rather than a sexual preference towards people of the same gender that any person of any gender may have, which is like the others, a false contention. It is submitted that it is these kinds of assertions that contribute to the denial of the existence of homosexuality in Africa, which further contributes to the idea that homosexuality is a foreign and un-African concept.

It is evident and should no longer be a point of contention that homosexuality has existed in Africa for centuries and even prior to the invasion into Africa by European colonials and it was an accepted norm and practice for men to have sex with boys and women having sexual relationships with each other. Not only were there males who had sex with males (MSMs) for certain benefits and as a way of keeping tradition and women who had sex with other women for the sake of companionship whilst their men were away, there were also cases where some were homosexual because that was their sexual preference and it had no ulterior motives, as it has already been shown. Furthermore, transvestites and intersexual individuals also existed.

Therefore, it can be concluded that this is not a new phenomenon and it was not a western import into Africa. If this is the case, it must mean that there is something else responsible for imposing this un-Africaness of homosexuality into Africa and is the reason why homosexuality became an alien concept in Africa and was thus dubbed 'un-African.' It is the submission and hypothesis of this thesis that this ideology emanates from the Christian school of thought that homosexuality is a sin and against morality and should not be part of society. It is this idea that has informed society's masses, who adamantly reject homosexuals,

[16] Stephen O Murray & Will Roscoe (eds) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (1998) XII.

which in turn informed the anti-sodomy laws and anti-homosexuality laws that today still infringe and limit the human rights of the LGBTQIA community.

(b) Homosexuality is contrary to the traditional African family setup and African morals

In the excerpt[17] quoting the views of the African Christian Democratic Party (ACDP), homosexuality is understood to be threatening to traditional family values – which is heteronormativity and procreation – and to the possibility of building the nation. It is observed that the ACDP and its supporters viewed homosexuality as so abnormal that if the law promoted and protected the lifestyle, the future of the country would be doomed. Today, the opinions of the religious community – although it cannot be said that all religious institutions support this view – are not far removed from the sentiments shared by the ACDP in 1994 and 1995, as it was also seen in the opinions shared by some church leaders of the African Anglican and Methodist Churches on this subject.[18]

Robert W Kuloba[19] puts it excellently when he notes that:

> 'The fruitlessness of same-sex relationships in terms of child production leaves homosexuality a problematic concept in terms of what Africans call natural and godly. Homosexuality is conceived as an unworthy practice in relation to childbirth, and reduces men to feminine sexual status, without empowering women to perform men's sexual duties of fathering children. This is deemed dangerous to the nation, as it does not guarantee continuity of the human beings and also feminises the citizenry.'

It is argued that the argument that suggests that homosexuality is a threat to the traditional African family set up and also threatens child production is flawed. This argument reduces the purpose of marriage, relationships, and family to merely a tool for reproduction. It dismisses any other reasoning why two people would want to come together and form a family. It also excludes those who experience barrenness and fertility issues (in heterosexual relationships) because it suggests that if they cannot bear children, then there is no point in getting married. It also reduces the meaning of family to just being a married heterosexual couple with children. It closes the door for all others who have a different definition of

[17] 'Nation-building cannot be possible while we try to legally destroy family values and the moral fibre of our society with clauses in the Constitution that promote a lifestyle that is an embarrassment even to our ancestors.'
[18] Kapya Kaoma *Christianity, Globalization, and Protective Homophobia* (2018) 47.
[19] Robert W Kuloba, '"Homosexuality is unAfrican and unbiblical": Examining the ideological motivations to homophobia in sub-Saharan Africa – the case study of Uganda' (2016) 26 *Journal of Theology for Southern Africa* 154.

family, even in the African context. It further places a blanket assumption that for every African person, a family consists of a mother, a father and children. It restricts the freedom for anyone who wishes to create a family in a manner that does not consist of this heterosexual set up. It is also argued that it is unlikely that individuals choosing to marry or have sexual relations with others of the same sex would threaten the continuity of human beings. To suggest that, is to suggest that every person in the world will eventually become gay or lesbian and stop procreating, which is an unlikely phenomenon to occur.

(c) Homosexuality is a health hazard

Homosexuality has also been prohibited because it is said to be a health hazard as men who have sex with other men (MSM) are at a higher risk of contracting HIV.[20] This truth has been used to further discriminate against the LGBTQIA community. In the cases of *EG v Attorney General* and *LM v Attorney General*, the petitioners in each case argued that they experience difficulties in receiving proper health care because of the stigmatisation based on their sexual orientation.[21] It is argued that discrimination on the basis of sexual orientation is in actual fact, the health hazard because preventing any person from accessing health care services because of their sexual orientation, means that they cannot get proper education on how to protect themselves from contracting the virus or from infecting their partners. Anti-homosexuality laws also open a wide door towards the spreading of other sexually transmitted diseases among the LGBTQIA community because of the minimisation and/or lack of access to healthcare due to stigmatisation and abuse.

IV HOW THE CHURCH HAS INFLUENCED THE LAWS

It has already been shown how Christianity became the major religion in Rome, which then influenced how crimes were punished and which laws were promulgated. The same was done in England where at one stage, the church courts were responsible for the prosecution of persons accused of committing crimes such as buggery and sodomy.[22] It is argued that from this background information it can be seen that the Holy Church in England played a huge role in influencing what was to be considered sin, and therefore crime punishable by law.

[20] *EG v Attorney General* supra note 6 paras 34–8.
[21] Ibid paras 155, 173; *LM v Attorney General* [2019] MAHGB-000591-16 para 31.
[22] Derrick S Bailey *Homosexuality and the Western Christian Tradition* (1955) 149.

The church had influence in the law and how a certain sin, and therefore crime, was to be punished (usually the call for punishment was akin to the traditional view of punishment of sodomy as was taught about Sodom and Gomorrah). Furthermore, the church had the power to try and punish cases of sodomy. This obviously emanating from the doctrinal teachings of the church from the Bible as to what is to be considered sin, and therefore, crime. [23] From the English laws and through colonisation, these Christianity-influenced laws were then imported into African British colonies. This is also evident by the distinct similarity in the provisions of the Penal Codes, particularly the provisions that prohibit sodomy, same-sex sex, activities and same-sex marriages.

Statistics have already shown that Christianity is the majority religion in Africa, which means that it is the religion that has the most influence on the societal thoughts, perceptions, views and opinions.

Both the courts in the *Kanane* (judgment by Mwaikasu J) and the *LM v Attorney General*[24] cases expressed the same view and hypothesis echoed in this thesis, that the societal and political views on morality imported into Africa through colonialism resulted in the widespread African Penal Codes that seek to protect the institutions and the community of ideas, political and moral views.

Courts in cases such as *LM v Attorney General*, *EG v Attorney General*, *Ramantele v Mmusi & others*[25] and *S v Makwanyane*[26] have emphasised the paramountcy of public opinion and public interest in the making of legislation and constitutional adjudication. The court in *Ramantele* expressed succinctly that the court also pointed out that prevailing public opinion is relevant in the making of laws. However, in mentioning that public opinion is relevant, the court made a point of also mentioning that public opinion is not decisive.[27]

In *S v Makwanyane* the court also observed the same about public opinion as it held that although public opinion has relevance, it does not substitute the duty of the court to interpret the Constitution. It further held that there would be no need for constitutional adjudication if public opinion were decisive. The court also highlighted that Parliament

[23] Ibid at 148.
[24] *LM v Attorney General* supra note 21.
[25] *Ramantele v Mmusi & others* CACGB-104-12 [2013] BWCA 1.
[26] *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC).
[27] *Ramantele v Mmusi & others* supra note 25 para 20. The court 'Prevailing public opinion, *as reflected in legislation*, international treaties, the reports of public commissions, and contemporary practice, is a relevant factor in determining the constitutionality of a law or practice but it is not a decisive one.' [Emphasis added].

receives its mandate from the public and is accountable to the public about its mandate. It is submitted however that this does not apply to courts.[28]

It is agreed that indeed, public opinion holds significant power in the making of legislation. Legislation is made to protect the people for whom it has been designed and is made as a response to the public's needs. Therefore, it must reflect the opinions of the people it is protecting. This means that legislation must always express and reflect changing views and opinions of the public and reflect the current circumstances of the public. In *Kanane* the court posed the question 'whether in Botswana at the present time the circumstances demand the decriminalisation of homosexual practices as between consenting adult males or put it somewhat differently, is there a class or group of gay men who require protection under section 3 of the Constitution?'[29] This question verifies that the legislature and court (although in cases of the court, public opinion is not decisive) takes into account public opinion and the current circumstances of the country in making decisions affecting the law.

The question must be asked though, if public opinion influences laws, what influences public opinion? This thesis offers that inter alia religion, particularly Christianity which is recognised as it being the major religion in Africa,[30] as already shown in chapter three (which is also the focus of this research), is one of the major influences on public opinion. It shapes the public's views on issues such as marriage, procreation, family and sexuality. This thesis also adds that within the white societies in the West, even prior to the colonisation of Africa, it was the Christian views on morality that influenced the moral views on homosexuality in the white societies as well as the laws that eventually were imported into African countries (this is the premise of this research). This is shown through the influence of the kind of crimes that were regarded as buggery and it was the church in England and Rome that was given jurisdiction in prosecuting crimes that were related to sodomy and bestiality.[31]

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[28] *S v Makwanyane* supra note 26 paras 77–88. The court held that 'Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, *which has a mandate from the public, and is answerable to the public for the way its mandate is exercised*, but this would be a return to parliamentary sovereignty, and a retreat from a new legal order established by the 1993 Constitution.' [Emphasis added].

[29] *Kanane* supra note 4 at 77–8.

[30] 'African countries where Christianity is the largest religion', available at *https://www.worldatlas.com/articles/african-countries-with-christianity-as-the-religion-of-the-majority.html*, accessed on 19 September 2019.

[31] Bailey op cit note 22 at 146.

It is submitted that the church had jurisdiction in prosecuting these specific crimes because it was the church teachings that declared and taught that sodomy was sin and had to be punished as it was done in the Bible. It is further submitted that it is further proof that the church had an influence on the views on morality as it pertains to homosexuality and had an influence on the making of the laws as it pertains to making certain crimes and punishing them, because the way in which the Bible suggests the sin of homosexuality was punished (by burning the cities that were accused of this sin), is the same way it was punished according to Roman Law[32] and English Law[33], which is to burn the convict in public.

The influence of Christianity on the views on morality as it pertains to homosexuality also applies to Africa. This was confirmed in the *LM* case where the court explored the history and origins of the Penal Codes and the anti-sodomy laws and where the court also confirmed that the prohibition of sodomy and homosexual acts originate from the biblical tale of the destruction of Sodom and Gomorrah supposedly because of their homosexual sin.[34] Furthermore, Israel Katoke[35] also makes mention that in his research he has found that the Christian missionaries came into Africa and got rid of the traditional and cultural understanding of the African way of doing things. This included the perspective on morality.[36]

It is submitted that the Christian missionaries also influenced Africans into changing the way in which they thought about sexual morality and specifically, morality on homosexuality. This view supported by that Edward P Antonio[37] who was correct in submitting that a whole new way of thinking about the morality of sexual activity was introduced into Africa by missionary Christianity[38] during colonisation. It is argued that because of the introduction of new ways of thinking, which Antonio has correctly submitted that the denial that there was any homosexuality in traditional societies takes place in the face of the continuing experience of social and religious conversion to which Africa has been

[32] Ibid at 71.
[33] Ibid at 146.
[34] *LM v Attorney General* at supra note 21 paras 42–60.
[35] Israel Katoke 'Christianity and culture: An African experience' (1984) 1(4) *Transformation* 7–10.
[36] Ibid at 7.
[37] Edward P Antonio 'Homosexuality and African culture' in Paul Germond & Steve de Gruchy (eds) *Aliens in the Household of God: Homosexuality and Christian Faith in South Africa* (1997) 295.
[38] Ibid at 295–6.

subject since the arrival of agents of modernity (missionary Christianity)[39], African people were made to believe and accept a homo-free Africa.

Christianity facilitated the establishment of Western modes of thought and behaviour which meant that religious understanding of morality was established into the traditional settings and social, cultural and political ways of thinking in Africa which were otherwise unknown in Africa. What was once foreign to Africa, has been infused into what is now known as African culture and tradition. This means that the idea of a traditional African family is not an original African idea but rather a religious idea, which seeks to promote patriarchy and heterosexuality as what is 'normal', moral, and acceptable. It is further submitted that what is known as 'African morals' are not an African original idea of morality, but are what Christian religion has instructed the African people morality is; the very morality that has informed public opinion that is now reflected in the legal system through legislation and discriminatory laws.

As already stated above and shown in previous chapters, the prohibition of homosexuality begins with a biblical teaching of the destruction of Sodom and Gomorrah because of their supposed homosexual activities that are forbidden in the Christian religion. It is submitted that central to this belief is that homosexuality is an unnatural and thus forbidden act by God and those who commit such an act are worthy of divine judgment, just as it happened in Sodom and Gomorrah. Many scholars have debated the question of whether homosexuality was the sin that caused the declaration that the cities must be destroyed. Paul Germond gave four possible inferences one can draw from the destruction of Sodom and Gomorrah.[40] Derrick S Bailey concluded that the cities were destroyed because of the violation of the rules of hospitality.[41]

It is opined that Bailey might have made an unbalanced and incorrect conclusion on this matter as it seems 'violating the rules of hospitality' is not grave a sin to warrant a destruction of an entire city. This is a relative comparison to other times that cities of people were destroyed in the Bible. In certain instances when people were to be judged and punished

[39] Ibid.
[40] Paul Germond 'Heterosexism, homosexuality and the Bible' in Paul Germond & Steve de Gruchy (eds) *Aliens in the household of God: Homosexuality and Christian Faith in South Africa* (1997) 213.
[41] Bailey op cit note 22 at 2–8.

because of their sins, the Bible would make reference to Sodom and Gomorrah and 'similar sins' that they were destroyed for.[42]

It is respectfully submitted that the first possibility: that the Sodomites were destroyed for the general wickedness which had prompted Yahweh [the LORD] to send his angels to investigate the city in the first place, seems to be more correct in this matter. On the basis that first, this passage of scripture never explicitly mentions homosexuality as the sin the cities were to be destroyed for (rather, it seems homosexuality was *one* of the sins the cities were destroyed for) because the passage only ever refers to a 'great sin' but never specifies; secondly, it seems less possible that Sodom would be destroyed because the men wanted to rape the angels because the declaration that Sodom would be destroyed was determined *before* the angels went to Sodom and for all intents and purposes the angels went to Sodom to execute the declaration that was already given by the LORD to destroy Sodom. By logical correlative, the above argument applies to the third and fourth possibilities offered by Germond.[43]

Although the focus of this research is not to establish the real reason for the destruction of Sodom and Gomorrah, it is submitted that it is necessary to express disagreement as to the traditional belief for the destruction of Sodom and Gomorrah (homosexuality) because it is this foundational teaching that has led to the promulgation of unjustified anti-homosexuality laws that violate human rights.

V THE AFRICANIST ARGUMENT AGAINST HOMOSEXUALITY

It is argued that the Africanist argument against homosexuality is based on a self-righteous concept of what is culturally acceptable because of what the patriarchal society has decided is normal and thus moral, whilst disregarding the problematic heterosexuality in the forms of polygamy[44], pledging young girls to be married to older men and the practice of inheriting

[42] These references include Isaiah 1:9, 3:9, Jeremiah 23:14, Lamentations 4:6, Amos 4:11, and Zephaniah 2:9.
[43] Germond op cit note 40 at 213.
[44] Edward E Evans-Pritchard 'Sexual inversion among the Azande' (1970) 72 *American Anthropologist* at 1431–32. According to Evans-Pritchard in polygamous families, particularly large ones, women often had to endure long periods of sexual deprivation while the husband was busy satisfying himself with some of his other wives – a situation which led to the development of lesbian sex in Zande society.

the wife of a deceased sibling[45] because these traditions are found to be historically inherent in the African culture and therefore are acceptable and thus moral.

It is clear from the arguments made by Antonio that the Africanist argument is not necessarily concerned with homosexuality as a sexuality or sexual preference for persons of the same sex. This is simply because it has totally disregarded the essence of homosexuality (as a sexuality rather than just a sexual act) and with whom gay and lesbian people have chosen to express their sexual desires. It has directed its non-acceptance and discontent towards how the sexual desire is expressed, which is anal sex. The anal sex is problematic because it is not the vaginal sex that the patriarchal society has defined to be the only acceptable and moral way of having sex. According to the Africanist argument, anything outside of those acceptable perimeters is thus socially, culturally and morally deviant.

It is argued that Antonio's arguments show that Africans are confused about what they have chosen to not accept because from the above it is clear that what Africans truly abhor is sex per anum and the concept of having sex other than what they have deemed as normal, and not necessarily the preference for having companionship with someone of the same sex. This goes to show that this very idea of denial of homosexuality is not African in its origin but an impartation from elsewhere because if homosexuality never existed in Africa, Africans would not have any confusion about what it is that they find problematic and unacceptable.

VI SOUTH AFRICA AND BOTSWANA AS POSITIVE EXAMPLES

South Africa has is one of the most progressive countries in the world when it comes to laws pertaining to human rights in general, and equality rights in particular.[46] It is argued that the Constitution and the courts have been used positively to ensure that the justice system in South Africa is fair to all. It is submitted that despite the contention and contesting of the public against the inclusion of the LGBTQIA rights in the Constitution, the legislature and courts have not been swayed to disadvantage one group over the opinions of the other.

Courts in cases from South Africa, Botswana and Kenya have emphasised the importance of public opinion in the matters of constitutional adjudication. It is agreed that

[45] Antonio op cit note 37 at 299.
[46] Dixson Pushparagavan 'The history of LGBT legislation' (2017) available at *www.sahistory.org.za/article/history-lgbt-legislation*, accessed on 1 January 2019.

the courts in of *S v Makwanyane*[47] remarked that public opinion may have relevance in the enquiry led by the courts, however it is not the decisive factor.[48] It further remarked that there would not be a need for constitutional adjudication if public opinion were the determining factor. In *Ramantele*[49] this is affirmed and the court stated that although public opinion is reflected in legislation and international treaties, and is the major factor in determining constitutionality it is however, not decisive.[50]

It is argued that in South Africa, although the legislature may have taken heed of the prevailing public opinion, it was not decisive because although only 38 per cent of the public agreed with the inclusion of the LGBTQIA rights in the new Constitution, it still put the equality of all people above the majority public opinion.

Public opinion has also shown that it is prevalent as the court used it in the case of *Kanane*[51] in which the court decided that it would not decriminalise homosexuality because public opinion and the culture of Botswana had not indicated that it needed to do so. This, however, was overturned in the case of *LM v Attorney General*[52] where the court took into consideration prevailing public opinion but did not allow it to be the decisive factor in constitutional adjudication and ultimately the decriminalisation of homosexuality.[53]

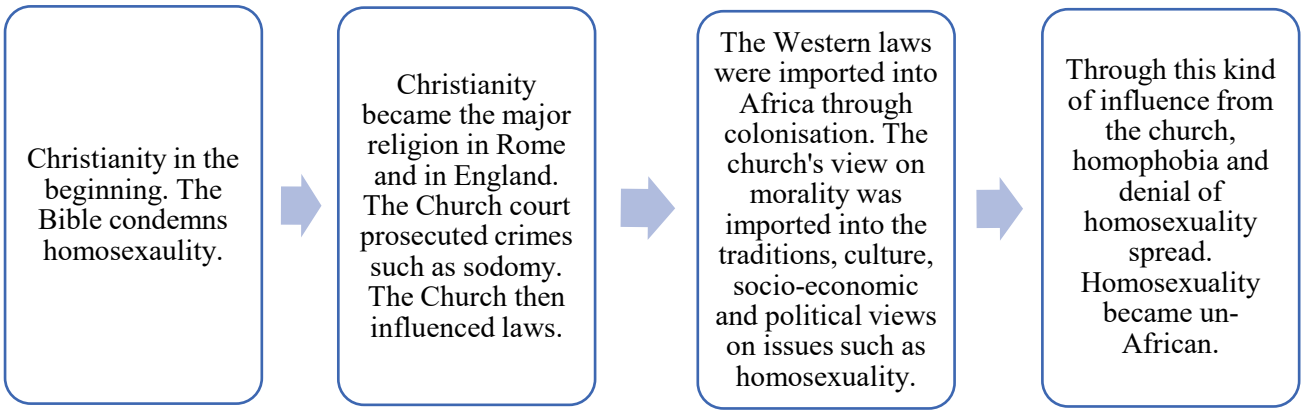
It is argued that in countries like Botswana (a former British colony), public opinion and the culture of the nation are not all in agreement with same sex relationships. This is evident through the prejudice towards and misconceptions about the LGBTQIA community that are still prevalent.[54] The court, just as seen in South Africa, placed the equality of all and the rights of the LGBTQIA above public opinion. Kenya opted to go through a different route than South Africa and Botswana and placed public opinion, which the court held is reflected in the Constitution, above the rights of the LGBTQIA community.[55] It is argued that the decision by the court is reflective of the position held

[47] *S v Makwanyane* supra note 26 paras 77–88.
[48] Ibid.
[49] *S v Ramantele* supra note 25 para 20.
[50] Ibid.
[51] Bojosi op cit note 5 at 468.
[52] *LM v Attorney General* supra note 21.
[53] Ibid.
[54] Cameron Modisane 'Social inclusion for homosexuals' (2014) 73 *The Journal of the Helen Suzman Foundation* at 49.
[55] Bojosi op cit note 5 at 468.

by the other African countries that have not found it necessary to decriminalise homosexuality.

It is submitted that countries which have not decriminalised homosexuality can take South Africa and Botswana as positive examples in developing their laws to ensure the equality and inclusion of all people. It is submitted that public opinion is very important because it describes the current needs of the society and laws are a response to the needs of the society. However, fundamental rights are inherent to everyone and the personal beliefs, agendas and convictions of one group should not be allowed to restrict the freedom, dignity, privacy and general enjoyment of life of others. It is further submitted that the courts in South Africa were able to perform a balancing act wherein they took into consideration the public as well as religious groups (which mostly inform the public prohibition and non-acceptance of homosexuality) but still regarded equality of all people as most important.

VII SUMMARY FLOWCHART



VIII CONCLUSION

Through colonisation, the laws that proscribe homosexuality were imported into African colonial countries, which therefore inherited same. Thus today, some of these countries have laws that resemble or are almost identical to these English laws criminalising ‘unnatural acts’. The correlation can now be deduced that the Christian doctrinal teachings of homosexuality were infused into Western law, which was in turn imported into African countries through

colonisation, which leans towards the premise of this thesis, which is to demonstrate the hypothesis that homosexuality is 'un-African' as a result of the influence of the doctrinal beliefs and influence of the Christian church (from the Western countries into African countries).

Africa still struggles with being the most homophobic continent in the world. It is argued that this is due to the anti-homosexuality laws that place homosexual people at a disadvantage in society because according to these laws they are unequal to heterosexual people and should be treated as so. Over and above the anti-homosexuality laws, society is still unaccepting of the LGBTQIA community even in countries were homosexuality has been decriminalised and same-sex marriage has been legalised.

Society's position inherently influences the making of laws that govern it, hence to that degree, the law can be considered as a response to the needs of the public. These needs are informed by views, perceptions, opinions, tradition, culture and religion. It is argued that Christian-Africa has had biblical views about homosexuality and sexuality in general, inform and influence the cultural, political and socio-economic stance and perception on homosexuality and has perpetuated homophobia. The prohibition of homosexuality has also been a denial of fundamental human rights to the LGBTQIA community. It has limited their humanity and contribution as stakeholders in society. Those who reject homosexuality have complained that it is unnatural; unbiblical/sinful; is a threat to the traditional African family and is a setup that does not allow procreation, which, according to them, is the point of relationship and marriage; and it is a health hazard.

IX CONCLUDING REMARKS AND RECOMMENDATIONS

The legislature and the judiciary have played significant roles in ensuring evolution of the laws that once were oppressive and symbolic of capture and oppression of the African people by Roman, English laws and the apartheid government. It is opined that other African countries would do well to follow the lead of South Africa and Botswana. South Africa and Botswana (among other African countries that have decriminalised sodomy) have set an example by divorcing their laws from those of their former coloniser. They did so even when it was not fashionable and when not many were in support of the inclusion of the prohibition of discrimination based on sexual orientation. South Africa and Botswana further adhered to

the international laws that clearly advocate for human rights and the prohibition of discrimination based on any difference, including difference in sexual orientation.

However, it is cautioned that the continued influence of religion poses a threat to this progression. This is observable in the other African nations that are resistant in changing their laws to accommodate and liberate the LGBTQIA community. This is due to the major role that religious influence plays in shaping the way certain issues, such as homosexuality, are viewed and accepted or not accepted. South Africa still suffers the same social illness because in as much a great deal of work has been done in drastically transforming the laws to become inclusive, the social response to these laws has not been consistent with the efforts of the legislature.

While the legislative developments have been progressive, this thesis recognises that beyond just the negative aspects of the Afri-Christian influence, and beyond the black and white letter of those very same progressive laws, allowance has to be made for state implementation strategies that will translate the written laws into a lived reality for the marginalised homosexual communities in South Africa and Botswana. It is agreed, however, that the church has its autonomy and must be given the freedom to practice and preach their true message. Though, the plight remains that the freedom and autonomy of one (the church) is costing the social freedom and safety of the other (the LGBTQIA community).

It is observed that the court in the case of *Gitari v Non-Governmental Organisations Co-ordination Board*[56] was correct in holding that moral convictions cannot be used to deny others their constitutional rights. It is respectfully submitted that crime and sin are not synonymous. The issue of homosexuality is strictly under the category of sin (morality and religious issue), thus decriminalisation of homosexuality is not equal to sanctification of homosexuality. The framers of the Constitution of the former British colonies and now independent African countries should not have included criminalising provisions in the first place; criminalising an act that has always existed in the African society. Hence, the current fear and paranoia (within the LGBTQIA community in countries that still criminalise homosexuality) about the decriminalisation of homosexuality on the basis of equality has opened a can of worms and has caused a quagmire in these countries' justice systems simply

[56] *Gitari v Non-Governmental Organisations Co-ordination Board* [2015] eKLR, Petition No 440 of 2013.

because indeed, no one is free until all are free, and no one is equal until everyone within society is equal and treated as so.

It is agreed that the sentiments expressed by the court in the *LM v Attorney General* case, that same-sex acts between two consenting adults practiced in private do not harm anyone,[57] are correct. Furthermore, it is argued that the dictum by Gubbay CJ in *Banana v State*[58] in his assertion that simply because a segment of even the majority of society finds homosexuality unacceptable based on their moral values does not give a reasonable justification to the criminalisation of homosexual activity.[59] It is submitted that criminalising an act should always be in the best interest of the public where that act causes harm to the society at large and infringes on the rights of others.

It is not enough to say that homosexuality infringes on the moral fibre of public morality because morality is not only relative, but it is also not a blanket reflection on the views shared by all people. It should not just be about what the majority prefers, especially in cases dealing with human rights, but it should also be about the consideration of the protection of every person's human rights, which is or should be the very fibre and core of each country's Constitution.

The Constitution does not make mention of a majority, nor does it only seek to protect the interests and human rights of the majority, instead it seeks to promote and protect the fundamental human rights of each and every individual who qualifies as a citizen of that particular country. It is argued that having bias towards one particular group within the country renders the entire Constitution precarious. It also renders it unable to guarantee fundamental human rights to *all* people, which are intrinsic to each individual anyway.

Anti-homosexuality laws do not belong in an equal society. They send an echoing message that the government is not in the business of serving its people equally and neutrally but only exists to drive its own personal beliefs and the agenda of the Western church that inaugurated the 'morality' that now forbids people to live their lives the way that is most natural to them. It is argued that a country that discriminates against its own people and has not made up its own laws based on the current social needs and changing circumstances of its people but depends on implementing laws that were made up by its capturers cannot say that

[57] *LM v Attorney General* supra note 21 para 127.
[58] *Banana v The State* (2000) 4 LRC 621 (ZSC).
[59] Ibid para 645.

it is truly independent. Furthermore, anti-homosexuality laws infringe on the right to freedom of association, dignity, right not to be discriminated against on the ground of social freedom, and privacy, which are essential human rights for every human being regardless of their lifestyle choices.

These anti-homosexuality laws loudly express that people should not be who they want to be or live their lives freely because it makes others uncomfortable. Instead they must be who they are told to be. Whether homosexuality is innate or a choice (this is not the focus of this study) natural or unnatural, if it causes no harm to others, it should not be a crime. With all this being said, it is respectfully submitted that governments should not legislate laws that prohibit people from freely expressing who they are or who they choose to be (where it poses no real harm or threat to others) and prohibit any sin/excess that has no empirical criminal implications. It is argued that crime is any act that infringes the civil rights of others, thus it is submitted that homosexuality does not fall within that ambit. It is submitted that the law is used as instrument to shape the norms of society. Therefore, agreeing with the dictum by Goldstone J in *J v Director-General, Home Affairs*[60] it is recommended that the African states that still criminalise homosexual acts should legislate and implement comprehensive laws that are consistent with international standards of human rights and LGBTQIA rights, which will regulate same-sex relationships because, indeed, the LGBTQIA community deserves more than piecemeal resolutions that are of a lesser standard than those of heterosexual people.

[60] *J v Director-General, Home Affairs* [2003] ZACC 3, 2003 (5) SA 621 (CC).

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