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LEGISLATING AGAINST SAME-SEX MARRIAGE IN AFRICA: CULTURAL AND RELIGIOUS VALUES TRUMPING HUMAN RIGHTS; BUT FOR HOW LONG?

By

Prof. Nlerum S. Okogbule*
Cleverline T. Brown, PhD**
John K. Chinda***

Abstract
The paper examines the spate of legislative and other measures taken by African countries against same-sex marriages. It demonstrates that this opposition is predicated on those African cultural values and religious beliefs which regard marriage as a union between a man and a woman. It is shown that the insistence on such values and beliefs is not in consonance with the increasing recognition of gay rights in other parts of the world, especially the developed Western countries. It is argued that the legislative measures taken by African States violate the human rights of homosexuals, and that since marriage is a dynamic institution, African States should consider balancing the needs for the protection of the rights of homosexuals with the society at large.

Keywords *Same-sex marriage, cultural and religious values, human rights, Africa*

1.0 Introduction

Marriage is one of the most treasured institutions in traditional African societies.[1] The special reverence for the institution is underscored by the various rites and ceremonies that attend the celebration of marriages in the communities. From the introductory stage, through payment of the bride price,[2] to the leading of the female spouse to the bridegroom's house, all of these stages have some form of ceremony and solemnity attached to them.[3]This extends to the procedures for the dissolution of marriages which are so structured as to give room for the intervention of relatives from both sides during periods of conflict among the spouses. The traditional African conception of marriage is a relationship between a male and a female. This traditional conception is also in tandem with the religious doctrines of Christianity and Islam both of which equally regard marriage as a union between a man and a woman. These two religions, originating from Western and Arabic societies, are widely practiced in Africa, in addition to the traditional religion of most communities. The Christian conception of marriage was

* *LL.B (Ife), LL.M (Ife), BL. (Lagos), PhD (Glasgow), Professor of International Law, Department of Jurisprudence and International Law; Rivers State University, Port Harcourt, Nigeria:*
** *LL.B (RSU), LL.M (RSU), BL. (Lagos), PhD (UWE Bristol), Research Fellow, Centre for Advanced Law Research, Rivers State University, Port Harcourt, Nigeria*
*** *LL.B (RSU), LL.M (Dundee), BL. (Abuja), PhD Researcher, University of Dundee, United Kingdom.*
[1] K Gyekye, *African Cultural Values: An Introduction* (Sankofa Publishing Company 2003) 76.
[2] The bride price (wealth) is the amount of money or materials required to be provided by the man for the family of the woman he seeks to marry. The amount and requirements vary from society to society. On the human rights and constitutional implications of this practice in Uganda, see JD Mujuzi, 'Bride Wealth (Price) and Women's Marriage-Related Rights in Uganda: A Historical Constitutional Perspective and Current Developments' *International Journal of Law, Policy and the Family* (2010) 24 (3) 414, 415 – 426.
[3] T Nhlapo, 'The African Customary Law of Marriage and the Rights Conundrum' in M Mamdani, (ed), *Beyond Rights Talk and Culture Talk; Comparative Essays on the Politics of Rights and Culture* (David Philip Publishers 2000) 136 – 148 at 142.

given legal validity in the English case of *Hyde v Hyde*[4] where Lord Penzance defined marriage as 'the voluntary union for life of one man and one woman to the exclusion of all others'.

However, this long-standing traditional African system which is also supported by the foreign-derived religious conception of marriage has recently received enormous challenges from several angles, notably, the values of individual autonomy and liberalism expressed as part of human rights.[5] A major part of the challenge springs from the growing recognition that in the exercise of the right as to whom and how to marry, individuals should be allowed to marry even people of the same sex. This agitation, which was initially opposed even in Western societies,[6] has, in general now been accommodated in Western liberal thought under the banner of human rights.[7]In contrast, African States are still largely steeped in the traditional and religious-based beliefs concerning marriage as a union between a man and a woman. It is from this context that one must situate the increasing discontent in African countries about the possible 'importation' of the assumed Western-inspired values on marriage and sexual relationship to their States.

Some African countries have, in reaction, either enacted new, reviewed old legislations against same-sex marriages and relationships in their countries, or introduced into their Parliaments bills on the subject matter. Not a few political leaders have also issued open threats and made demeaning comments against homosexuals without adequate consideration of the human rights implications of such measures or actions.[8] In doing this they have anchored their actions on the traditional African conception of marriage and vowed to ensure that it is not 'polluted' by the foreign values on same. This perception of a Western-inspired imposition is not helped by the recent unnecessarily hostile and dictatorial posture of Western political leaders on the matter, especially in publicly declaring their intention to tie further aid to African countries to the reversal by such countries of their stance against homosexuality.[9] These developments have cumulatively engendered the current debate in Africa on same-sex relationships and their intersection with the promotion and protection of human rights.

[4] (1866) L R I P and D 130 at 133.
[5] On the role of individual autonomy and Western liberalism in human rights, see J Donnelly, 'Human Rights in Western liberalism' in AA An-Naim and FM Deng (eds), *Human Rights in Africa: Cross-Cultural Perspectives* (The Brookings Institution 1990) 31-55.
[6] Notice the furor generated earlier on in England on homosexuality leading to the Report of the Wolfenden Committee on Homosexual Offences and Prostitution in 1957, which recommended that homosexual practices in private between consenting adults should no longer be a crime in England. For an analysis of this transition from criminalization of homosexuality to state recognition, see SM Cretney, *Same-sex Relationships: From "Odious Crime" to "Gay Marriage"*, (Oxford University Press 2006) 1 – 8; On the role of law in the enforcement of morals and social values, see P Devlin, *The Enforcement of Morals*, (Oxford University Press1968) 1 – 25; HLA Hart, *Law, Liberty and Morality,* (Oxford University Press 1963) 13 – 24; B Mitchell, *Law, Morality, and Religion in a Secular Society* (Oxford University Press 1970) 16 – 35.
[7] For an analysis of the legal processes that led to this acceptance in the United States and Denmark, see, MD Dupuis, 'The Impact of Culture, Society, and History on the Legal Process: An analysis of the Legal Status of Same-sex Relationships in the United States and Denmark' *International Journal of Law and the Family* (1995) 9 86, 108 – 111.
[8] For instance, on 15 May 2008, the then Gambian President Yahya Jammeh while addressing a political rally threatened to 'cut off the head' of any gay person found in the Gambia. According to him, 'The Gambia is a country of believers … sinful immoral practices (such) as homosexuality will not be tolerated in this country'. Available at www.news.bbc.co.uk/1/hi/world/africa/7416536.stm accessed 19 January 2012.
[9] See the comment by the former British Prime Minister David Cameron on this matter soon after the 2011 Commonwealth Conference. Available at: www.guardian.co.uk/politics/2011/oct/30/ban-homosexuality-lose-aid-cameron accessed 15 September 2017.

Against this background, this paper seeks to examine the viability of the legislative measures being embarked upon by African states against same-sex marriages in view of the pervasive impact of cultural globalization world-wide and the increasing salience and resilience of human rights. To carry out this assignment, the paper is divided into four parts. The first part following this introduction examines the issue of universalism and relativism of human rights in relation to cultural values on marriage in Africa. The crucial issue addressed is the implication, for the on-going debate on same-sex marriages in Africa, of accepting human rights norms as either universal or relative. The second part of the paper focuses on the approach adopted by some selected African countries: namely, Malawi, Uganda, and Nigeria and contrasts them with the position taken by South Africa in legalizing such marriages.[10] The third part outlines how the deep-seated homophobia in the continent can be combated through the deployment of the human rights corpus. It argues for the recognition of the human condition, which induces people to prefer particular forms of sexual orientation, a preference that ought to be respected and given legal protection. The paper concludes by arguing that while the current legislative measures by African States against same-sex marriages represent cultural and religious values trumping human rights on the matter, this is but a temporary situation, which will inevitably be reversed and such marriages eventually permitted. This is because Africa cannot be immune to the wind of change affecting the institution of marriage worldwide as represented in the growing number of States recognizing and legalizing same-sex marriages. Accordingly, African States are urged to recognize the rights of gays in line with their national and international human rights obligations.

2.0 Relationship Between Cultural and Religious Values and Human Rights

One of the most problematic issues in human rights jurisprudence is the tension between culture and human rights.[11] The contestation has always centered on the extent to which human rights norms reflect or are expected to reflect and embody the cultural norms and values of societies. Underpinning this issue is the argument whether human rights are universal and ought to trump cultural values and norms inconsistent with its dictates, or relative to each cultural environment. This issue, which is at the heart of the controversy between universalism and relativism, has engaged the attention of jurists and anthropologists over the decades.[12]Although the resolution of the controversy is not in sight, it must be acknowledged that, *in general*, human rights essentially reflect the cultural norms and values of particular societies at any given point in time. Informed by this understanding, it has been argued that the existing human rights paradigm is not universal as it has large marks of the norms and values of Western societies.[13] This assertion is predicated on two main arguments, namely, the process and substance arguments.

The *process* argument contends that the procedure that led to the adoption of the Universal Declaration of Human Rights is not universal as it did not encompass all regions of the world. It draws its strength from the fact that at the time of adoption of the Declaration in 1948, several African and Asian countries

[10] Apart from the fact that the countries selected in this paper represent four of the six regional groupings of the continent, namely, East, West, Central, and Southern Africa, the issue of homosexual marriages have been a topical one in these countries in very recent times. They can thus be taken as representative of the trend in the entire continent.
[11] MW Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2013) 264.
[12]Y Ghai, 'Universalism and Relativism: Human Rights as a Framework for Negotiating Inter-ethnic Claims' *Cardozo Law Review* (2000) 21 1095, 1096 – 1102.
[13] C Brown, 'Universal Human Rights: A Critique' in T Dunne and NJ Wheeler (eds), *Human Rights in Global Politics*, (Cambridge University Press 1999) 103, 127.

were still under one form of colonial rule or the other and so did not participate in the adoption of the Declaration.[14] Moreover, the composition of the drafters of the Declaration did not adequately represent the interests of all regions of the world with the result that the Western influence and dominance is prominent.[15]

Drawing from this procedural exclusion, the *substance* argument contends that an examination of the content of the current human rights corpus shows that it embodies norms and values derived from, and applicable, in Western societies, and it would, therefore, be inappropriate to impose such values on the rest of the world.[16] In particular, reference is often made to the concept of liberalism and individualism which are central features of the human rights corpus, as distinct from the communitarian principle that largely defines social relations in Africa and Asian societies.[17]It would seem that the legitimacy crisis arising from these disputations can best be resolved through cross-cultural dialogue to generate a more universally acceptable architecture of human rights.[18] This is predicated on the understanding that no culture is complete and both Western and other cultural enunciations of human rights have a lot to benefit from such a cross-cultural approach.[19]

Relating these disputations to the subject of the present discourse, it may be asked whether homosexuality is part of the cultural norms and values of Western societies being sought to be globalized as some African political leaders have suggested, or a long-standing secret practice world-wide only being given visibility lately? In the first place, it must be recognized that homosexuality has existed amongst humanity from time immemorial both in Africa, Western and other societies.[20] In the case of Africa therefore, it is not the so-called influence of Western societies that introduced the practice into the continent as homosexuality had existed in Africa before European colonization of the continent. Rather, what European countries introduced into the continent was the legalized homophobia as evident in the various criminal laws enacted in several African territories during colonial rule.[21] Against this background, it may be said that what the West and human rights activists are essentially saying is that this minority group that exists in African countries, as in Western countries, should be accorded recognition and their human rights acknowledged and respected. That African political leaders do not

[14] Most African and Asian countries attained independence and began to function as sovereign states in international relations after 1960s. The impact of these 'new' states on the inherited rules of international law and their attempts to create new binding rules are examined in A Anghie, *Imperialism, Sovereignty and the Making of International Law*, (Cambridge University Press 2007) 356, 244.
[15] VA Leary, 'The Effect of Western Perspectives on International Human Rights' in AA An-Naim and FM Deng, *Human Rights in Africa Cross-Cultural Perspectives* (The Brookings Institution Press 1990) 15 – 30 at 20.
[16] Brown, (n 13) 105.
[17] J Silk, 'Traditional Culture and the Prospect for Human Rights in Africa', AA An-Naim and FM Deng (eds), *Human Rights in Africa Cross-Cultural Perspectives (*The Brookings Institution Press 1990) 399, 303 – 315; M Chanock, "Culture" and Human Rights: Orientalising, Occidentalizing and Authenticity' in M Mamdani, (ed), *Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Rights and Culture* (David Philip Publishers 2000) 15, 22.
[18] B de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (2nd ed, Cambridge University Press 2002) 565, 280; M Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2013) 264.
[19] ibid.
[20] S Tamale, 'A Human Rights Impact Assessment of the Anti-Homosexuality Bill' *East African Journal of Peace and Human Rights* (2009) 15 (2) 509, 513.
[21] ibid 513.

approach the matter from this perspective is evident in the recent legislative measures adopted by African states to 'deal' with the increasing agitation for recognition of same-sex marriages.

3.0 Constitutional and Legislative Measures by African States on Same-Sex Marriages

Operating under the existing normative heterosexual paradigm, African States have taken a number of constitutional and legislative measures to criminalize and punish same-sex relationships in their countries. One significant feature of these new measures is that they not only duplicate existing statutory Criminal Code provisions on same-sex relationships but specify enhanced punishments and increased scope of coverage. It is ironical, and an indication of the changing societal norms and values that the Criminal Code prohibitions against same-sex relationships in African countries were enacted by West European countries as part of the colonial project.[22] Today, these same Western countries are now in the forefront advocating for the recognition of homosexual rights, while African countries through their political leaders are opposed to such moves. The nature, extent and measures taken in opposition to same-sex marriages will become obvious after a consideration of the approach adopted by a number of selected African countries, namely, Malawi, Uganda, Nigeria and South Africa.

3.1 Malawi

The issue of whether to allow gay marriages in Malawi or what the country's approach to such matters should be took a centre-stage in late 2009. This followed the marriage engagement of a gay couple, Steven Monjeza and Tiwonge Chimbalanga. The pair, aged 26 and 20 respectively, had been arrested in December 2009 after celebrating their engagement. Their arrest and arraignment were based on the fact that homosexual acts are proscribed under the Malawian Penal Code of 1930, drafted when Malawi was under British colonial rule, a provision that was retained after independence in 1965.[23] In particular, Section 153 prohibits 'unnatural offences' while Section 156 concerning 'public decency' is used to punish homosexual acts as in this particular case.

In sentencing the couple to 14 years in prison with hard labour upon conviction for gross indecency and engagement in unnatural sexual acts, the Magistrate, Nyakwawa Usiwa had told them:

> I will give you a scaring sentence so that the public be protected from people like you so that we are not tempted to emulate this horrendous example. The Malawi society is not ready to see its sons marrying other sons, nor daughters marrying daughters.[24]

However, following the avalanche of international condemnation of the decision, interlaced with a threat to discontinue aid to countries that do not respect gay rights, the then President of Malawi Bingu wa Mutharika in May 2010 pardoned the gay couple and they were consequently released from prison. Significantly, and symptomatic of the influence of traditional norms and values in the country, a week after their release from prison on the orders of the President, the couple split. The statement by Steven

[22] SF Joireman, 'Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy' *Journal of Modern African Studies* (2001) 39 (4) 571, 596.
[23] No specific written laws against homosexuality were in place before British rule, and homosexuality remains largely a taboo in the country.
[24] Available at: www.africafiles.org/article.asp?II -23828 accessed 13 September 2017.

Monjeza indicating this split is instructive. According to him, 'I regret the whole episode, I want to live a normal life… not a life where I would be watched by everyone, booed and teased'.[25]

The decision, in this case, has however been criticized as a violation of the human rights of the 'couple' involved. Indeed, some human rights activists in the country have argued that the laws under which they were convicted contravene the country's constitution and international conventions that guarantee equality and non-discrimination regardless of sexual orientation. In this connection, reference has been made to Section 20 of the Malawian Constitution which provides that discrimination against persons in any form is prohibited and that all persons are guaranteed equal and effective protection against discrimination on the basis of race, colour, sex, language, religion, political or other opinions, nationality, ethnic or social origin, disability, property, birth or *other status'*.[26] For instance, Crispin Sibande, a human rights lawyer with the Malawi Human Rights Commission contended that the phrase 'other status'[27] in the section includes sexual orientation. He also describes the Penal Code as inconsistent with the Constitution which deplores any form of discrimination.[28]

Perhaps drawing from the Monjeza and Chimbalanga episode, and in order to broaden the scope of coverage of the criminal law, the Malawian Parliament in December 2010 passed a bill amending the country's Penal Code and the bill was promptly assented to by the President in January 2011. The new Section 137A prohibits indecent practices between females.

3.2 Uganda

Uganda imposes draconian prison sentences on people who engage in homosexual conduct. Same-sex relations are criminalized in the country under a Penal Code enacted during British colonial rule. Indeed, prior to 2000, only male homosexuality was criminalized, but by the virtue of the Penal Code Amendment (Gender References) Act 2000, all references to "any male" was changed to "any person" so that lesbianism was also criminalized as well. Although as is the case in many African countries, the Ugandan culture regards homosexual relations as taboo, such cultural prohibitions were generally unwritten. Indeed, written laws prohibiting homosexual activity were first enacted in the territory during the British colonial rule in the 19th century, and like the Malawian case, such laws were retained after independence and enshrined in the Penal Code Act of 1950. Thus S. 145 of the Code provides: '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'.

Similarly, S. 148 stipulates 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

[25] Available at: www.salon.com/2010/06/09/malawi_gay_couple/ accessed 15 September 2017. The 'couple' was booed, teased and jeered at by the crowd during the trial of the case.
[26] It does seem that in countries where there is no express constitutional provision on this subject matter, a provision such as this phrase could be the fulcrum around which activism for the recognition of gay rights can be built.
[27] Emphasis added. The fact that the Constitution recognizes the possibility of discrimination based on 'other status' suggests that the scope of the constitutional provision need not be closed or frozen.
[28] Available at: www.voanews.com/english/news/africa/southern/Malawians-Debate-Issue-of-Legalizing-Gay-Marriage-84777977.html accessed 10 February 2018.

herself or with another person, whether in public or in private, commits an offence and is liable to imprisonment for seven years'. As if these statutory provisions were not enough, on 29 September 2005, President Yoweri Museveni signed into law a constitutional amendment specifically prohibiting same-sex marriage.[29] In this connection, S. 31 (1) of the Constitution provides that 'men and women of the age of eighteen years and above have a right to marry and to form a family', while Clause 2a of the same section expressly declares that 'marriage between persons of the same sex is prohibited'. The result of this constitutional provision is that in addition to the Penal Code provision which criminalizes sexual relations between persons of the same sex under the euphemism of 'sexual relations against the order of nature', marriage between such persons is also prohibited.[30]

Notwithstanding these draconian statutory and constitutional provisions, human rights activists have continued to press for the recognition and protection of the rights of Lesbians, Gay, Bisexual and Transgender (LGBT) persons. Thus on 12 September 2008, in a case against the Attorney General of Uganda, brought by LGBT activists Yvonne Oyoo and Victor Juliet Mukasa, Justice Stella Arach of the Kampala High Court set a precedent by declaring affirmatively that at least articles 23, 24 and 27 and articles 20 to 45 of the Uganda Constitution of 1995 which offers broad-based protection against discrimination apply to the LGBT community.[31] Victor Juliet Mukasa brought this case against the Attorney General of Uganda after government officials illegally raided Mukasa's home without a search warrant, seizing documents related to Mukasa's work as a Human Rights Defender for people who are transgender, lesbian, gay and bisexual. The officials illegally arrested a guest at Mukasa's home, Yvonne Oyoo, and treated both in an inhuman and degrading manner amounting to sexual harassment and indecent assault. In a judgment delivered on 22 December 2008, the judge ruled that the rights of Victor Juliet Mukasa and Yvonne Oyoo' had been violated and ordered the government to pay damages to them for the violations, torture, and seizure of their documents.

To be sure, such acts of intimidation and violence against LGBT activists are not isolated in the country. Thus on 26 January 2011 one David Kato, a prominent LGBT activist working for Sexual Minorities Uganda (SMUG) an NGO was murdered in his home in Kampala. This was after a tabloid Rolling Stone' had published the name and picture of David Kato and that of other LGBT activists in its front page with the caption 'Hang them'.[32]

Even during the debates at the Constituent Assembly that led to the adoption of the new constitution for the country, it was obvious that majority of the members were clearly opposed to the issue of allowing same-sex marriages in the country. The Uganda President recently signed the Anti-Homosexuality Act of 2023 into law. The law proscribed the rights of gays and homosexuals, including penalizing advocates of it.

[29] JD Mujuzi, 'The Absolute Prohibition of Same-sex Marriages in Uganda' *International Journal of Law, Policy and the Family* (2009) 23 (3) 277, 278.
[30] ibid at 284.
[31] In particular, S 21 of the Constitution on Equality and Freedom from discrimination provides as follows: (1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law. (2) Without prejudice to clause (1) of t
his article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.
[32] 'African Activist' www.africanactivists.org/2011/01/ugandan-activist-david-kato-murdered.html accessed 27 January 2012.

3.3 Nigeria

The issue of same-sex marriage has also engaged the attention of the Nigerian legislature recently. Although the initial attempts to legislate against same-sex marriage in the country started in 2006, that effort fell through, as the enactment could not be completed before the expiration of the tenure of that National Assembly.[33] The process was therefore restarted in 2011 culminating in the passage of the Same Gender Marriage (Prohibition) Bill by the country's Senate on 26 November 2011, and the House of Representatives on 17 December 2013. The President of the Federal Republic of Nigeria assented to the Bill on 7th January 2014.[34] The Act contains far-reaching provisions on the criminalization of same-sex relationships. It prescribes 14 years imprisonment for same-sex couples who marry,[35] while any person who witnesses or helps such couples to get married could be sentenced to 10 years in jail.[36] The Act also makes it illegal to register gay clubs or organizations, while any 'public show of same-sex amorous relationships directly or indirectly attracts a 10-year jail term for the persons involved.[37]

Expectedly, the contents of the bill and its approval by the National Assembly have drawn the attention and disapproval of major Western countries and the condemnation of human rights activists. In particular, the British government threatened to cut its aid to African countries that do not respect the rights of gay people.[38] The American government also said as much and President Barack Obama promptly directed the implementation of the policy stating that the American position on the matter would be communicated to African countries. In reacting to these positions and threats, the then Senate President, David Mark made the following declaration upon the passage of the bill:

> Anybody can write to us, but our values are our values. If there is any country that does not want to give us aid or assistance, just because we hold on very firmly to our values, that country can keep their assistance. No country has a right to interfere in the way we make our own laws.[39]

Although Nigeria may, arguably, be able to withstand the impact of any withdrawal of aid and assistance because of its enormous oil resources, bedeviled with corruption,[40] the same cannot be said of other heavy aid-dependent African countries, some of whom are now seeking to adopt a middle course by keeping silent on the issue. The stand taken by the Nigerian Senate evidently ignores the fact that no country is an island and, as will be shown later in this paper, the globalization of cultural norms and values are not restricted to any defined borders.

Moreover, this approach fails to take cognizance of the dynamic nature of culture and customary law in Nigeria and Africa as a whole. It is trite that under the customary law system operating in certain

[33] The last National Assembly was inaugurated in June 2007 and their four-year tenure ended in May 2011. The last National Assembly was inaugurated in June 2015, and it was in session until 29 May 2019.
[34] This bill was eventually passed by the House of Representatives, the second arm of the country's National Assembly.
[35] S 5 (1) Same Sex Marriage (Prohibition) Act 2013.
[36] S 5 (3) Same Sex Marriage (Prohibition) Act 2013.
[37] S 5 (2) Same Sex Marriage (Prohibition) Act 2013.
[38] BBC, 'Cameron Threatens to Dock Some UK aids to Anti-Gay Nations' (2011) <https://www.bbc.co.uk/news/uk-15511081> accessed 12 August 2019.
[39] Available at www.news.yahoo.com/nigeria-senate-approves-anti-gay-marriage-bill-112709602.html last accessed 7 February, 2012.
[40] PA Donwa, CO Mgbame and OM Julius, 'Corruption in the Nigerian Oil and Gas Industry and its Implications for Economic Growth' *International Journal of African and Asian Studies* (2015) 14 29, 41.

parts of the country, the practice of 'woman to woman' marriage is not only practiced, but accepted under certain circumstances. For instance, it is a long-standing tradition in the Eastern and Midwestern parts of Nigeria that where a woman has been married for several years without a child, she is permitted to choose a young fertile bride, pay her bride price and 'marry' her with the full compliments of a formal traditional wedding. Under this arrangement, the young lady is regarded as the wife of the older woman, although for purposes of procreation, she will be required to have sexual relations with the husband of the older woman.[41]

Another form of this kind of marriage occurs when a couple has only female children and at advanced ages, the wife is permitted to 'marry' another woman so that a male child could be had who will perpetuate the man's family lineage. In this situation, the young wife may start bearing children by other close relations of the family and not necessarily the aged husband. The Nigerian Supreme Court avoided deciding on the legality of this custom when it distinguished the facts presented in the case of *Eugene Meribe v Joshua Egwu*[42] from the practice of 'woman to woman' marriage. Its dictum, however, suggests that it would have set aside such a custom as being repugnant to natural justice, equity and good conscience in reliance on the provisions of the Evident Act in the country deriving from the colonial era.[43] This is clear from the Court's dogmatic declaration:

> In every system of jurisprudence known to us, one of the essential requirements for a valid marriage is that it must be the union of a man and a woman thereby creating the status of husband and wife. Indeed, the law governing any decent society should abhor and express its indignation of a 'woman to woman' marriage; and where there is proof that a custom permits such an association, the custom must be regarded as repugnant by virtue of the proviso to section 14(3)[44] of the Evidence Act and ought not to be upheld by the court. We, however, do not think that on a close examination of the facts of this case, there was a 'woman to woman' marriage between Nwanyiakoli and Nwanyiocha.[45]

While this form of marriage is admittedly dissimilar to the current agitation for same-sex marriages, the point remains that it is the recognition that under peculiar circumstances, native law and custom permits deviation from established customary rules in relation to marriage. The existence of such practices disproves the contention that marriage between persons of the same gender is alien to African culture and tradition. Taking a cue from such permissive customary rules on marriage, African States should,

[41] J Igbanoi, 'Nigeria: Same Sex Marriages – As old as time? *This Day* 5 December 2011 https://allafrica.com/stories/201112060576.html accessed 12 August 2019; RA Dimka and SL Dein, 'The Work of a Woman is to Give Birth to Children: Cultural Constructions of Infertility in Nigeria' *African Journal of Reproductive Health* (2013) 17 (2) 102.
[42] (1976) LPELR – SC 48/75.
[43] This provision has received scathing criticism as it is doubtful whether the good conscience required is that of the Nigerian people or those of the colonial masters.
[44] S 14 (3) Evidence Act Cap 112 Laws of the Federation of Nigeria 1990.
[45] Per Mandarikan, JSC (Emphasis added).

therefore, make the necessary social, cultural and legal adjustments in response to the changing circumstances and accommodate same-sex marriages.[46]

One other issue relevant to the passage of the Same Sex Marriage (Prohibition) Act in Nigeria must be mentioned here. It is the incongruity arising from the existence of the Act given that statutory provision already exists in the country's Penal Codes criminalizing homosexual activities. It is pertinent to mention that both the Criminal and Penal Codes prohibit same-sex relationships under the banner of 'unnatural sexual acts'.[47] The language of the statutory provisions is similar to those of the other African countries discussed because they were inserted into all of these Penal Codes by colonial Britain. This raises the question; how long will African States allow this tapestry of colonial rule shield them from recognizing the dynamics of change when such conducts have since been decriminalized in the metropolitan countries?[48] At least one African country, South Africa, has successfully broken this tapestry by invalidating such colonially-imposed laws and recognizing same-sex marriages. To that country, we now turn.

3.4 South Africa

In contrast to the position in the above mentioned African countries, South Africa took a historic, and arguably progressive step to legalize same-sex marriages when on 14 November 2006, the country's Parliament passed the Civil Union Bill.[49] South Africa thus became the fifth country in the world, and the first in Africa, to allow marriages between same-sex couples.[50]This step was taken consequent upon the decision of the country's Constitutional Court in the case of *Minister of Home Affairs and Another v. Fourie and Another, Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others.*[51] In this case, Marie Fourie and Cecilia Bonthuys, both females, had applied to be allowed to marry. Upon the refusal of their application by the High Court, they appealed to the Constitutional Court, which held that the existing legal definition of marriage was in conflict with the country's Constitution because it denied gays, and lesbians the rights granted to heterosexuals. It may be mentioned that S.9(3) of South Africa's Constitution expressly prohibits unfair discrimination on the grounds of sexual orientation, among others. It provides as follows:

> 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

[46] Igbanoi (n 41).
[47] Thus, in section – of the Criminal Code it is provided as follows; while S. – of the Penal Code which is applicable in the northern states of the country is similarly worded.
[48] Homosexual conducts between consenting adults were de-criminalized in Britain in 1967 following the Report of the Wolfenden Committee on Homosexual Acts and Prostitution.
[49] The bill was assented to by the Acting President of the country Phumzile Mlamblo – Ngeuka on 29 November 2006 and it took effect on 30 November 2006.
[50] The other countries are Netherlands, Belgium, Spain and Argentina. Several other countries, mostly Western and South American countries have since followed suit.
[51] 2006 (1) SA 524 (CC).

> orientation, age, disability, religion, conscience, belief, culture, language and birth.[52]

In a judgment delivered on 1 December 2005, the Constitutional Court gave Parliament one year to remedy the situation by either amending the Marriage Act 25 of 1961 or enacting new legislation to allow gays and lesbians to enter into legal marriages. It was in order to comply with this judgment that the Parliament passed the Civil Union Act 17 of 2006.[53] In supporting the Bill in Parliament, the then Minister of Defence, Mosiuoa Lekota had stated *inter alia:*

> Today, as we reap the fruits of democracy, it is only right that they (gays and lesbians) must be afforded similar space in the sunshine of our democracy… This country cannot afford to continue to be a prisoner of the backward, timeworn prejudices that have no basis.[54]

South Africa was able to take this bold, evidently radical position from the African point of view, based on two mutually reinforcing factors. First, the constitutional provision on equality for all, and the prohibition against discrimination on several grounds, including sexual orientation, made it easier for the Constitutional Court to arrive at the decision it did. Flowing from the constitutional provisions, the main task for the Court was to examine the consistency and compatibility of the Marriage Act with the equality and non-discrimination provisions of the Constitution.

Second, the diverse nature of the South African society facilitated the acceptance and subsequent insertion of 'sexual orientation' as a status symbol in the country's Constitution. The South African society consists of an admixture of people from different races such as Blacks, Asians, Europeans and Black Indians. The heterogeneous nature of the South African society was underlined by the Constitutional Court in the earlier case of *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*[55] when it referred to the fact that the country is 'fissured by differences of language, religion, race, cultural habit, historical experience and self-definition" which in consequence, 'reflects widely varying expectations about marriage, family life and the position of women in society'.[56] In particular, the sizeable Dutch population in the country had a major influence in this regard. Since the Netherlands was the first country to legalize same-sex marriages,[57] it was only natural that the descendants of that country in South Africa should call for the legalization of such marriages in South Africa as well. It is also noteworthy that the South African Constitutional Court had

[52] In relation to individuals, S. 9(4) of the Constitution provides that no person may unfairly discriminate against anyone on one or more grounds in terms of subsection (3) of the Constitution. This equal protection clause in the constitution is one of the first in the world to guarantee gay rights.
[53] It was passed by a vote of 230 against 41. For an analysis of this Act and its implications for the marriage law in South Africa, see, BS Smith and JA Robinson, 'The South African Civil Union Act 2006: Progressive Legislation with Regressive Implications?' *International Journal of Law, Policy and the Family* (2008) 22 (3) 356, 392.
[54] Available at www.southafrica.info/services/rights/same-sex-marriage.html accessed 10 January 2012.
[55] (2000) 2 SA I at 47.
[56] ibid.
[57] Netherlands passed the law legalizing same-sex marriage in 2001.

in a number of other cases held that discriminatory statutory provisions on different subject matters against same-sex couples were unconstitutional and thus invalid.[58]

It is our contention that this pace-setting position adopted by South Africa should be followed by other African countries. The fact that gays and lesbians enjoy this constitutional right in South Africa has not led to the collapse of corporate morality in the country, nor has it prevented a majority of the people from continuing with the exercise of their heterosexual marriage rights.

4.0 Eradicating Homophobia in Africa Through the Human Rights Framework

Homophobia can be described as a range of negative feelings and prejudices against homosexuality, which sometimes take the form of apathy, contempt, disdain, irrational fear and aversion, usually manifested in discrimination, violence or even murder.[59] These feelings are generally accentuated by cultural and religious doctrines and beliefs.

Largely, the aversion against same-sex relationships had been a historically generalized phenomenon.[60] This general aversion derives from the fact that the dominant social construct privileged and projected heterosexual relations as the natural and socially acceptable one. The dominant view is also recognized and reflected in the domestic laws of states. Accordingly, homosexuals continue to face all forms of discrimination, physical and mental torture and abuse in various parts of the world. As the United Nations Human Rights Council acknowledged in a recent Resolution:

> In all regions, people experience violence and discrimination because of their sexual orientation or gender identity. In many cases, even the perception of homosexuality or transgender identity puts people at risk. Violations include – but are not limited to – killings, rape and physical attacks, torture, arbitrary detention, the denial of rights to assembly, expression and information and discrimination in employment, health and education. United Nations mechanisms, including human rights treaty bodies and the special procedures of the Human Rights Council, have documented such violations for close to two decades.[61]

While the universal nature of homophobia is acknowledged, the African situation is in several respects, more egregious.[62] Indeed, it can be said that, although now being contested and challenged, homophobia

[58] See for example the following cases, *Satchwell v President of the Republic of South Africa and Another*, 2002 (6) SA I (CC)*; Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC), and *J & Another v Director – General, Department of Home Affairs and Others* (2003) (5) SA 621 (CC).
[59] Mutua (n 11) 462.
[60] M Foucalt, *The History of Sexuality Vol. 1: An Introduction*, (Knopf Double day Publishing Group 2012).
[61] Paragraph 1 of Resolution – adopted on Friday 15 December 2011. See, A/HRC/19/41. The resolution for the first time, endorsed the rights of gay, lesbian and transgender people. The resolution was hailed as historic by the United States and other backers but decried by some African and Muslim countries. According to the then United States Secretary of State, Hilary Clinton, 'the resolution … represents a historic moment to highlight the human rights abuses and violations that lesbian, gay, bisexual and transgender people face around the world based solely on who they are and whom they love' Available at https://www.cbsnews.com/news/un-backs-gay-rights-for-first-time-ever/ accessed 22 June 2019.
[62]This is because in the context of Africa, gay, lesbian and transgender people are often killed, assaulted or humiliated for their courage in standing up and speaking out about themselves, while activists for the rights of such people face similar fates. For

is deeply embedded in the social fabric of Africa. The thought of homosexuals having any rights at all or respect for their persons is seen as repulsive to the claimed African culture and religion. It is on this score that the then Zimbabwean President, Robert Mugabe equated the clamour for such rights with a possible claim of rights by drug addicts. According to him:

> If we accept homosexuality as a right, as is being argued by the association of sodomists and sexual perverts, what moral fibre shall our society ever have to deny organized drug addicts…the rights they might claim and allege they possess under the rubric of individual freedom and human rights, including the freedom of the press.[63]

However, the kind of homophobia that pervades the African continent today is not necessarily traceable to the African traditional values because much of the revulsion of homosexuality can be traced to Christianity and Islam, the two religious traditions that express homophobia in their doctrinal teachings.[64] Indeed, homophobia has long been a hallmark of these two religions. In respect of Christianity, for instance, the Bible expressly declares homosexuality to be a sin.[65] Thus it is stated in Leviticus Chapter 18 verse 22 that 'thou shall not lie with mankind, as with womankind: it is abomination.' Moreover, Chapter 20 verse 13 of the same Leviticus states: 'If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them'.[66] It is ironical, however, that African political leaders are using these two foreign religions in addition to traditional values as justification for their intense opposition to homosexuality which is claimed to be a foreign cultural imposition. In this connection, they attack homosexuality as alien to Africa while embracing the two foreign faiths.[67]

The forces against homosexuality claim to defend either African culture and traditional values or religion, or both. In pursuit of this goal, homosexuality is painted as incompatible with fundamental African societal values and even with humanity itself, while advocates for gay and lesbian rights are demonized as 'carriers of cultural perversion'.[68] This creates a scenario where considerations of cultural and religious values are used to oppose human rights.[69] Since the homophobia in Africa is deeply embedded in cultural and religious understandings of marriage and its place in society, eradicating the phenomenon requires cultural and religious transformations which are often resisted by powerful local groups and interests. It is our contention that the human rights framework provides a realistic and enduring platform for challenging the high level of homophobia in Africa manifested in the spate of

instance, on the night of September 29, 2004, Fanny Ann Eddy, founder of the Sierra Leone Lesbian and Gay Organization was brutally murdered in the group's offices in Freetown for her visibility as a lesbian and an activist.

[63] S Long, A Widney Brown and Gail Cooper, *More Than a Name: State-Sponsored Homophobia and Its Consequences in Southern Africa* (Human Rights Watch 2003) 298, 14.

[64] Mutua (n 11) 462; It can thus be said that religious groups have played a significant role in the backlash against homosexuality in Africa.

[65] King James Holy Bible.

[66] M Hendricks, 'Islamic Texts: A Source for Acceptance of Queer Individuals into Mainstream Muslim Society' *The Equal Rights Review* (2010) 5 31, 38. Similarly, the Holy Quran also frowns at Homosexuality.

[67] Mutua (n 11) 460.

[68] Long (n 63) 71.

[69] M Mamdani, *Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Rights and Culture,* (Palgrave 2000) 158.

legislation against same-sex marriages across the continent. This assertion is informed by four main considerations.

First, the human rights corpus has proven to be a useful instrument for challenging power relations that marginalize and oppress minority groups in society. In this way, human rights sit at the intersection of power and powerlessness and serve as a check against the arbitrary and capricious use of power and the domination of the weak by the strong, the oppression of the minority by the majority and the subordination of the unpopular by the popular.[70] As Makau Mutua points out:

> The rights language now pervades the struggle against human powerlessness in areas where it was unthinkable only several decades ago. For example, economic, social and cultural rights seem to have entered the mainstream of rights discourse in the last decade. Claims which were at the margins only recently are now moving albeit slowly to the centre. This process of demarginalisation of certain rights claims speaks to the growing acceptance of the complexity of the human condition.[71]

Framing and deepening the struggle for the acceptance of homosexuality in human rights terms will thus enhance its recognition and eventual legal protection.

Second, the increased activism by human rights Non-Governmental Organizations (NGOs) the world over has led to the recognition of particular human rights by domestic and international institutions. It is a testament to the doggedness of some human rights NGOs over the years that the rights of women, children, indigenous peoples and other minorities are now recognized and legally protected in several countries and regions of the world.[72] In particular, the recent acceleration and intensification of international struggles by Lesbian, Gay, Bisexual and Transgender (LGBT) movements have resulted in sexual orientation and gender identity receiving attention in international human rights and policy agendas.[73] In this respect, the human rights corpus has been used as a central vehicle and framing device for actualizing LGBT political claims, particularly in international contexts.[74] The modest success recorded by these movements strengthens our optimism that the struggles of LGBT activists in Africa will eventually lead to the recognition of homosexual rights in the continent. This is underlined by the fact that rights are fought for, negotiated and socially constructed. Very often, they spring from and concretize in fierce political contestation in a manner not dissimilar to the on-going agitation. They start as claims and struggles by marginalized and oppressed groups before being eventually accepted as

[70] Mutua (n 11) 456.
[71] Mutua (n 11) 452.
[72] In this connection and within the African context, reference may be made to the role of human rights NGOs that led to the landmark decisions of the African Commission on Human and Peoples' Rights on the rights of minorities in the continent, namely *Social and Economic Rights Case and the Endorois Case*.
[73] K Kollman and M Waites, 'The Global Politics of Lesbian, Gay, Bisexual and Transgender Human Rights: An Introduction, *Contemporary Politics* (2009) 15 (1) 1, 2.
[74] As Kollman and Waites put it: 'The engagement with a human rights frame has proven successful in opening the doors of powerful international organizations such as the European Union (EU)… and more recently shows signs of becoming a vehicle for access to the UN'. These international developments have reverberated in domestic political settings as illustrated by the adoption of same-sex union policies by a majority of Western democracies over the past two decades. Kollman and Waites (n 73) 2.

rights by society.[75] In this respect, the visibility and recognition of LGBT movements in South Africa and their legal successes in seeking equal rights for gays and lesbians will doubtless serve as a veritable catalyst in this direction.[76]

Third, the tremendous impact of globalization on cultural norms and values and the attendant socialization and acculturation promoted by these processes has meant that there are no longer water-light cultural compartments.[77] This means that the human rights values regarding the right of people to decide who to marry are not and cannot be restricted to Western societies and ought to be embraced by the world over especially when they do not impinge on the rights of those in heterosexual marriages. The globalization of the ideas of same-sex marriages and the fact that these values are now supported by a host of countries, especially Western countries, means that such ideas will continue to spread, rather than diminish in the years ahead. Indeed, it can be said that the trend for the recognition of gay rights which was set in motion in the last few decades appears unstoppable as more and more states are now acknowledging gay rights.[78]

Fourth, it is now increasingly realized that there is much oppression and marginalization of particular groups in the name of culture in many African countries. Examples of such oppressive cultural practices include the denial of equal rights to women, adherence to traditional practices that lead to violence against women such as female genital circumcision, wife battering, and denial of inheritance rights, among others.[79] Rather than deal with the basic existential challenges of gross inequality, unemployment and impoverishment of the masses in Africa, the ruling elite seek to maintain these inequalities and injustices by essentializing culture and contending that their cultures are under threat from foreign values.[80] They use this as a political cum nationalistic rhetoric to maintain their stranglehold on political power, even against the wishes of their subjects.

Additionally, since identities such as race, gender, religion, political opinion, nationality, marital status and disability have been recognized and protected in human rights instruments and national constitutions, it will be recognition of the complexity of the human condition if sexual orientation, which includes homosexuality is also recognized and protected in such legal instruments in Africa. Furthermore, the on-going legislative actions and measures being taken by African States against homosexuals have seriously undermined the two fundamental principles underpinning the human rights corpus, namely, equality and non-discrimination.[81] In the name of preserving cultural values and religious doctrines, homosexuals have been made to suffer from discrimination and are not treated equally as heterosexuals. Considering that, there are three main categories of sexual orientation, namely, heterosexual, homosexual and bisexual; none of these sexual orientations is normal or abnormal because

[75] N Stammers, *Human Rights and Social Movements* (Pluto Press 2009) 286.
[76] In making this assertion, the fact that the increased activism for these rights in South Africa was boosted by the constitutional provisions on sexual orientation and equal rights is not overlooked. There is nothing preventing African states from inserting the rights to sexual orientation in their constitutional instruments.
[77] In the words of Chanock, '… in the current period of high–velocity cultural globalization … there are no longer (if ever there were) single cultures in any country/polity/legal system, but many. ML Chanock, *Culture'and Human Rights Orientalising, Occidentalizing and Authenticity* (Cape Town David Philip 2000) 18.
[78] Mutua (n 11) 458.
[79] NS Okogbule, Localizing Human Rights in a Globalizing World: The Challenge for Africa, 45th Inaugural Lecture of the Rivers State University, Port Harcourt, Nigeria delivered on 26 April 2017.
[80] Mutua (n11) 458.
[81] ibid 455.

each of them is an existential condition.[82] Accordingly, there should be no socially preferred sexual orientation because the preference is individual.[83]

The crucial question then is: should religion and the preservation of alleged traditional values be the main policy considerations by African States in legislating against same-sex marriages especially when such legislations are targeted against a significant minority? It is contended that a rational forward-looking legislative measure should not be aimed at penalizing people for being who and what they are; as such measures are disrespectful of the human personality and violate the fundamental principle of equality. The protection of the family and the institution of marriage by society and the state can better be achieved by recognizing the diversities in ways of life and seeking to accommodate these within a more rational holistic legal framework. This is crucially important when it is realized that over the years there have been significant changes in the customary rules and practices relating to marriage and family relations in various parts of Africa. On this score, it is important to mention three fundamental changes that have taken place in the nature and context of family relations in Africa.

First, the customary requirements concerning the nature and scope of marriage as a relationship between two families, and not just one between two individuals, has seen a dramatic change and increasingly the nuclear family is taking root in several African countries.[84] This development has been precipitated by contemporary economic challenges and, in some cases, by the adoption of Christianity with greater emphasis on the man, his wife and children as constituting a family.

Second, the customary practice whereby childless couples were regarded as 'cursed' in Africa is gradually giving way to the realization that such situation could be due to medical conditions and consequently child adoption is increasingly being resorted to and accepted in Africa in dealing with such challenges. Third, the practice of regarding a wife as a chattel 'purchased' or acquired by the man with no rights except to satisfy the sexual and emotional needs of the man and act as a partner in the procreation process has also changed; and women's rights are now recognized even in international human rights instruments in Africa.[85] Consistent with these developments, it is contended that the institution of marriage must adjust and align with the changes in societal norms and values including the acceptance of same-sex marriages in the continent.

5.0 Conclusion

The need for the formulation of a more inclusive legal regime governing marriages in Africa can hardly be over-emphasized. This imperative is underlined not only by the fact that marriage and its legal consequences occupy a central position in the ordering of human affairs but also by the changing nature of the concept of the family in contemporary society. Such an inclusive approach should recognize same-sex marriages and de-criminalize homosexual relationships as contained in existing penal statute. While the current angst against homosexual practices in Africa may be based on, the entrenched traditional norms and values as well as religious beliefs and prejudices it must be realized that homosexuality cannot be wished away nor can it be eradicated by the enactment of draconian legislation

[82] ibid 457.
[83] ibid 457.
[84] RA Dimka and SL Dein, 'The Work of a Woman is to Give Birth to Children: Cultural Constructions of Infertility in Nigeria' *African Journal of Reproductive Health* (2013) 17(2) 102.
[85] NK Hevener, *International Law and the Status of Women* (Routledge 2019) 250.

against such practices as most African countries are doing now. The criminalization of homosexuality essentially affects both men and women who do not conform to the dominant ideology of heterosexuality.[86] Yet, one of the hallmarks of civilization is the recognition of the immense benefits derivable from diversity in beliefs and ideologies. As the South African Constitutional Court emphasized in the *Fourie case*,[87] 'the hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner'.[88]

Since culture is not static but dynamic and reflects changes in social and economic circumstances, the current approach by African States to deal with homosexual conducts will only last for some period of time as the growing interaction between Africans and people from other parts of the world will eventually lead to the reversal of such positions and the repeal of the relevant laws. This prediction is predicated upon the understanding that in this era of globalization, developments in one part of the globe are contemporaneously captured in other parts as the events are taking place. It, therefore, behooves African countries to critically examine the emerging trend of global recognition of homosexuality and devise ways of guaranteeing the rights of this admittedly minority group to the expression of their identities and rights as members of the society. Gays and lesbians are human beings and their rights as to how to express their identities and preferences should equally be respected and protected by law in African countries. This is the only way African States can reasonably be seen to be respecting the human rights provisions against discrimination in their national constitutions and international human rights instruments endorsed by them.

By failing to engage meaningfully with the call for legal recognition of same-sex relationships, African States are losing the opportunity of open discussion on how such relationships should be categorized whether as full marriages or civil partnerships. This is because in some countries a distinction has been made between civil partnerships and marriage such that same-sex relationships can legally be recognized as civil partnerships without attaching all of the incidents and privileges of marriage to it. In other words, some countries have adopted what has been described as the expansive recognition model; while others adopt either the intermediate recognition model or the minimum recognition model.[89] For example, in 2004 the United Kingdom Parliament enacted the Civil Partnership Act which provides a mechanism for those in same-sex relationships to achieve a status functionally equivalent to marriage by giving recognition to their partnership.[90] This approach while not designating the consequence 'marriage' has largely the same effect as marriage.[91] Although the approach is susceptible to the justifiable criticism that it does not ensure equality of rights between same-sex couples and those

[86] S Tamale (n 20) 3.
[87] *Minister of Home Affairs and Another v Fourie and Another* [2006] (3) BCLR 355 (CC).
[88] ibid at 561.
[89] E Heinze, *Sexual Orientation: A human right: An Essay on International Human Rights Law* (Martinus Nijhoff Publishers 1995) 106, 115.
[90] See Ss 1 and 3 of the Act. For an evaluation of the House of Lord's interpretation of this enactment and its implications for same-sex relationships. B Hale, 'Same-sex Relationships and the House of Lords: One Step Forward and Two Steps Back? *The Juridical Review* (2007) 247 – 261.
[91] N Lowe and G Douglas, *Bromley's Family Law* (10th ed, Oxford University Press 2004) 42. According to the authors, 'the model of creating a broadly equivalent but separate legal status, rather than extending marriage to same-sex couples originated in Denmark and … it enables governments to avoid the charge that they are "weakening" the institution of marriage and allows them to present the measure as an anti-discrimination device and even as a "pro-family policy".

in heterosexual marriages, it could if adopted by African States be a useful starting point from which full equality can eventually be achieved.

On the other hand, the expansive model represented by Netherlands, South Africa, Belgium, Spain and Argentina accords such relationships the full rights, benefits and entitlements that those in heterosexual marriages enjoy.[92] Decisions as to which model to adopt can only be taken when there is an acknowledgement of the need for according such relationships legal recognition and protection. It is only when open discussions and engagement on how to respond to the agitation of this minority group is encouraged that African States can effectively ensure that the rights of homosexuals are recognized and protected. In particular, it is necessary to draw attention to the African Charter on Human and Peoples' Rights which in Article 2 prohibits discrimination. Although there has been no direct communication to the Commission on this subject matter, this step will most likely become inevitable in light of the draconian approaches adopted by a number of African States to deal with the increasing agitation by the minority group against the marginalization of their rights by their countries. The African Court of Justice and Human Rights can take a standard-setting approach in its interpretation of the Charter such that the rights of homosexuals can be respected and protected and erase the toga of marginalization of this minority group in the continent.

It must be borne in mind that majoritarian opinions can often be harsh to minorities that exist outside of the mainstream and it is the function of law to enunciate provisions and rules that counteract, rather than reinforce, such unfair discrimination against minority groups. The fact that the dominant view which privileges heterosexuality is a form of oppression of the minority gay population makes it obligatory for all those who believe in human rights and human dignity to fight for the recognition and protection of their rights. This minority group should not continue to be denied the right to express themselves and their identities because of reliance on religious and cultural norms relating to marriage that no longer accord with changing views and circumstances of a changing world society.

[92] ibid 42.