

**Religion and the politicisation of sexual and gender minority rights in  
contemporary Africa: *Who's oppressing whom?***

Submitted in partial fulfilment of the requirements of the master's degree

Human Rights and Democratisation in Africa

By

**Lakshita KANHIYA (23983142)**

prepared under the supervision of

**Dr Guillaume ATTLOU MOUMOUNI**

**&**

**Mr Landilani BANDA**

at the

**Chaire UNESCO des Droits de la Personne Humaine et de la Démocratie**

**l'Université d'Abomey-Calavi**

**23 October 2023**

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#### Personal details

Name of student: KANHIYA Lakshita

Student number: 23983142

Registered for the LLM: Human Rights and Democratisation in Africa

Student's e-mail address: lakshita.kanhiya@gmail.com / u23983142@tuks.co.za

Student's cell phone no.: +230 5821 5555

---

#### Details of mini-dissertation/dissertation/thesis

Title: Religion and the politicisation of sexual and gender minority rights in contemporary Africa: *Who's oppressing whom?*

Supervisor: Mr BANDA Landilani

Co-supervisor: Dr MOUMOUNI A Guillaume

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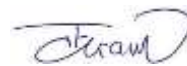
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*Saraswati namastubhyam varadé kāmārūpiṇi |  
vidyārambham kariṣhyāmi, siddhirbhavatu mé sadā ||*

As a human rights advocate, the path to justice is not linear. It is a winding, arduous journey filled with obstacles. In the name of love, in the name of justice, and in the name of human rights, I extend my heartfelt gratitude to Goddess Saraswati, the divine source of knowledge, art, speech, wisdom, and learning in Hinduism, for her blessings and protection throughout my academic journey at the Centre for Human Rights. I owe an immense debt of gratitude to my parents, whose unwavering support has been the cornerstone of my career growth. I am grateful to my thesis supervisors, whose mentorship have been instrumental in shaping this research. I also express my appreciation to all my well-wishers who have stood by me with their encouragement and positive vibes. Your support has been a constant source of motivation. This thesis is not just my accomplishment; it is a collective effort of all those who have played a role in my academic life.

Thank you for being a part of this rainbow journey.

## TABLE OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
African Charter	African Charter on Human and Peoples' Rights
AU	African Union
COVID-19	Corona Virus Disease 2019
ECOWAS	Economic Community of West African States
HIV	Human Immunodeficiency Virus
HRC	UN Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILGA	International Lesbian and Gay Association
LGBTQI+	lesbian, gay, bisexual, transgender, queer, or intersex (LGBTQI+), among other gender diverse identities.
MP	Member of Parliament
NGO	non-governmental organisation
SOGI	sexual orientation and gender identity
U.S	United States
UDHR	Universal Declaration of Human Rights
UN HRC	United Nations Human Rights Council
UN IE SOGI	United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity
UN	United Nations
UNSG	United Nations Secretary-General
WCF	World Congress of Families

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## DEDICATION

*In the heart of academic inquiry, a thesis unfolds, a tapestry woven with threads of religion and human rights, entitled 'Religion and the Politicisation of Sexual and gender minority rights in contemporary Africa: Who's Oppressing Whom?' Beneath the African sky, where religious beliefs and convictions converge, this study embarks on a profound odyssey, seeking answers to questions that echo through the ages.*

*Through the pages of this scholarly quest, we journey to a continent where beliefs are diverse as the sands of the paradise island of Mauritius in the Indian Ocean, and where identities bloom in the shadows, seeking solace in the embrace of religious beliefs. Here, religion and sexual and gender minorities dance a delicate waltz, a dance of contention, as religious extremists tenets find themselves entangled in the modern tapestry of human rights.*

*In this intricate mosaic, the research unfurls the narratives of those who find themselves at the crossroads of devotion and discrimination. It reveals how religious beliefs can, at times, cloak oppression in the shroud of victimhood, posing a paradoxical challenge to equality and non-discrimination. As the faithful ardently hold their religious beliefs, the fabric of human rights may appear tattered for those on the fringes of society. Their identities, once considered divine creations, become obscured beneath layers of prejudice and misunderstanding.*

*Yet, in the crucible of inquiry, there is hope. Through thoughtful analysis and nuanced understanding, we may find the light that illuminates the path towards inclusivity and tolerance, where religion and human rights can co-exist. With each page turned, it is an invitation to seek, to understand, and ultimately, to bridge the chasm that separates freedom of thought, belief and religion and the rights of sexual and gender minorities.*

*In humble respect to the LORD and in honour of the voices, silenced and unheard, I dedicate this research to those who have questioned, to those who have dared, to those who have lived, and to those who have cared.*

*This study is a tribute to the sexual rights advocates' resilience, striving for inclusivity in a continent where questions outnumber answers.*

## CHAPTER ONE

### INTRODUCTION

#### 1.1 Background

The rights of sexual and gender minority<sup>1</sup> remain one of the most contentious and highly politicised topics in Africa. The narrative that diverse sexualities and gender non-conforming identities are unAfrican are often made by political leaders with popular support from the public.<sup>2</sup> Often, the narrative is supported by religious sentiments that sexuality and gender are binary and that diverse sexual and gender identities are against religious mores. Religion in this study is defined as ‘a system of beliefs, practices, institutions, and relationships that provides the primary source of moral guidance for believers’.<sup>3</sup> The politicisation of sexuality, supported by religion in most African societies has adverse impact on the rights of sexual and gender minorities on the continent. Gloppen and Rakner define politicisation as ‘the process by which a social phenomenon [in this study sexuality] becomes the basis of mobilisation by societal and political actors, who turn it into an issue of major political significance, as a subject of heated public arguments, mobilisation and conflict’.<sup>4</sup> Tamale posits that political leaders in post-colonial Africa have politicised sexual and gender minority rights as a smokescreen to perpetuate despotic control of power and gain religious relevance for political convenience.<sup>5</sup>

Across the continent, there is interchangeable use of religion and culture in anti-queer<sup>6</sup> rhetoric.<sup>7</sup> The religious narratives within Christianity vary, but many African Christians adhere to conservative interpretations of biblical texts that condemn same-sex relationships. These interpretations typically

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<sup>1</sup> This study will be using the term ‘sexual and gender minorities’ which encompass individuals who identify as lesbian, gay, bisexual, transgender, queer, or intersex (LGBTQI+), among other gender diverse identities.

<sup>2</sup> For instance, President Museveni stated that Homosexuality is ‘danger to procreation of human race. <<https://www.theguardian.com/global-development/2023/apr/03/ugandan-president-calls-on-africa-to-save-the-world-from-homosexuality>> Accessed 04 August 2023.

<sup>3</sup> AA An-Na'im ‘The politics of religion and the morality of globalisation’ in M Juergensmeyer (ed) *Religion in global civil society* (2005) 24.

<sup>4</sup> S Gloppen & L Rakner ‘LGBT rights in Africa’ in C Ashford & A Maine (eds) *Research handbook on gender, sexuality and law* (2020) 198.

<sup>5</sup> S Tamale ‘Confronting the Politics of Nonconforming Sexualities in Africa’ (2013) 56(2) *African Studies Review* 31-45.

<sup>6</sup> This study will be using the term ‘anti-queer’, which refers to a stance, attitude, or belief system that opposes or discriminates against sexual and gender minorities.

<sup>7</sup> A Jjuuko and others *Queer lawfare in Africa: Legal strategies in contexts of LGBTQI+ criminalisation and politicisation* (2022) 9.

stem from passages in the Old and New Testament understood as prohibiting the act of sodomy.<sup>8</sup> Within Islam, same-sex acts are generally regarded as sinful. The story of Lot cited both by Christians and Muslims (or the ‘people of Sodom and Gomorrah’) is frequently cited as evidence of divine condemnation of same-sex relationships.<sup>9</sup> While sexual and gender minorities are protected under international human rights law, including the African Charter on Human and Peoples’ Rights (the Charter), the politicisation of their rights, as favoured by religion, has meant that they are unable to enjoy the rights enshrined in the Charter as equal citizens of the African soil.<sup>10</sup>

## 1.2 Problem statement

Africa, a continent known for its deeply ingrained religious traditions has held conservative views on sexual and gender minorities. Political leaders, religious figures, and conservative groups instrumentalise religious doctrines to rally public sentiment against sexual and gender minorities.<sup>11</sup> This is a result of the religious ideals of the coloniser, the surge of religious fundamentalism through a well-coordinated born-again evangelical movement often instigated and funded by American evangelical lobbies, as well as through conservative factions within different Islamic sects and Christian groups.<sup>12</sup> This politicisation has deteriorated the situation for sexual and gender minorities in many African countries both regarding rights and policies, and in terms of everyday ostracism and violence.<sup>13</sup> In this face of politicisation, backed by religion, sexual and gender minorities are not seen as human rights holders and their rights are violated with impunity. Understanding the depth and impact of politicisation of sexual and gender minority rights as backed by religion is therefore an important step towards addressing the human rights relativism that most African states practice with respect to sexuality and gender.

## 1.3 Research objectives

The objective of this study is to understand the role of religion in the politicisation of sexual and gender minority rights. The study explores the different actors within the sphere of religious-based

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<sup>8</sup> ‘Homosexuality, Marriage, and Sexual Identity’ (2014) *The General Council of the Assemblies of God* available at: <<https://ag.org/Beliefs/Position-Papers/Homosexuality-Marriage-and-Sexual-Identity>>.

<sup>9</sup> ‘Sodom and Gomorrah’ (*Encyclopedia Britannica*, 3 July 2023) < <https://www.britannica.com/place/Sodom-and-Gomorrah/Religious-views> > Accessed 18 August 2023.

<sup>10</sup> For further interpretation of the Charter on sexual and gender minority rights, see R Murray & F Viljoen ‘Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples’ Rights and the African Union’ (2007) 29 (1) *Human Rights Quarterly* 29.

<sup>11</sup> Jjuuko (n 7) 6-11.

<sup>12</sup> K Kaoma *Globalising the culture wars: US conservatives, African churches and homophobia* (2009).

<sup>13</sup> Jjuuko (n 7).

political mobilisation against sexual and gender minorities with the aim to exploit pathways to challenge the use of religion to counter right claims by sexual and gender minorities.

#### **1.4 Significance of study**

The politicisation of the rights of sexual and gender minorities, as backed by religion has become a significant impediment to the realisation of basic human rights in contemporary Africa. By investigating this interplay, this study uncovers the underlying factors contributing to the oppression faced by sexual and gender minorities. Further, this study address the question of *who's oppressing whom?* by its critical examination of state-religion power dynamics on sexual and gender minority rights. This understanding is crucial in advocating for the protection and promotion of human rights, ensuring equality, and challenging discriminatory practices and beliefs. Subsequently, this study provides a baseline analysis of the Christian and Islamic influence of the politics of sexuality in Africa, thereby contributing to the existing body of knowledge on the socio-legal factors that influences the marginalisation of sexual and gender minorities.

#### **1.5 Research questions**

The main research question is how the politicisation of sexual and gender minority rights, linked to governmentality, power, and influence backed by religion, contribute to the criminalisation and oppression of sexual and gender minority rights in Africa. To answer this question, the following sub-questions will be examined:

- I. How do religious narrative influence political discourse with respect to sexual and gender minority rights in Africa?
- II. How does the politicisation of sexual and gender minority rights, as backed by religion impact on the rights of sexual and gender minorities in Africa?
- III. What are the potential strategies and approaches for fostering inclusivity, tolerance, and human rights for sexual and gender minorities in Africa, considering the religious and political opportunity structure at play?

#### **1.6 Methodology**

This study adopts a doctrinal qualitative research approach involving extensive desktop research of primary and secondary sources of data. Primary sources include relevant international human rights instruments at the United Nations (UN), African Union (AU) and domestic levels, and policy papers. Secondary sources include academic publications, reports, newspaper articles and other documentations. The study is descriptive and analytical in the substantive chapter while the

concluding chapter is prescriptive as it provide recommendations. Comparative aspects in the study is use for illustration purposes and not meant to be the main basis of analysis.

## **1.7 Scope and limitations**

This study focuses specifically on the African continent, examining the religio-politicisation of sexual and gender minority rights within societies. The study considers both national laws and regional human rights standards, focusing on the compatibility and tensions between religious arguments and human rights law. It recognises Africa’s rich tapestry of religious practices and its primary religious traditions, namely African traditional religion, Christianity, and Islam, which collectively form the continent’s diverse religious heritage.<sup>14</sup> A meticulous analysis of the religious landscape of Africa unveils that the majority adhere to the imported monotheistic Abrahamic faiths of Islam and Christianity.<sup>15</sup> Accordingly, this study will focus on Christianity and Islam, but this does not mean that other religions do not condemn sexual and gender minorities. Importantly, conducting research on sensitive topics like religion and sexual and gender minority rights requires ethical considerations. Therefore, due to limited time and the processes involved in getting approval for conducting empirical research, this study does not involve interviews with sexual and gender minorities or organisations. This study acknowledges the diverse cultural, social, and historical contexts within Africa. However, due to the wide range of countries and beliefs across the continent, the research prioritises representative cases that enables a cautious drawing of generalisable trends. Finally, given the evolving nature of the political and religious landscape across the continent, this study is based on the knowledge available up to October 2023.

## **1.8 Theoretical framework**

### ***1.8.1 Theoretical base***

The study is guided by the critical legal theory, postcolonial theory, and liberation theology. By integrating these theories, this study unravels the underlying power dynamics, religious influences, and historical legacies that shape the ongoing struggles for sexual and gender minority rights on the continent. This framework considers the agency of sexual and gender minorities in navigating and challenging oppressive structures, as well as the potential for alliances between religious and secular groups advocating for inclusive rights.

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<sup>14</sup> IS Aderibigbe ‘Religious Traditions in Africa: An Overview of Origins, Basic Beliefs, and Practices’ in IS Aderibigbe & CMJ Medine (eds) *Contemporary Perspectives on Religions in Africa and the African Diaspora* (2015) 7.

<sup>15</sup> See Pew Forum on Religion and Public Life *Tolerance and tension: Islam and Christianity in sub-Saharan Africa* (2010) available at: <<https://www.pewresearch.org/religion/2010/04/15/executive-summary-islam-and-christianity-in-sub-saharan-africa/>>

### ***(a) Critical legal theory***

Critical legal theory is a multidisciplinary approach to law and jurisprudence that critiques existing legal systems and seeks to uncover hidden structures of power and privilege.<sup>16</sup> This perspective challenges traditional legal norms and advocates for a more inclusive and equitable legal framework for marginalised groups, including sexual and gender minorities.<sup>17</sup> In the context of this study, it is employed to analyse the legal landscape and the ways in which the legal system either perpetuates or challenges the oppression of sexual and gender minorities in Africa. This approach also investigates the role of the law in reinforcing or challenging religious influences on legal decisions and policies concerning sexual and gender minority rights.

### ***(b) Postcolonial theory***

Postcolonial theory enables an examination of how religious institutions, inherited from colonial times, have been instrumental in shaping the discourse surrounding sexual and gender minority rights in the postcolonial context.<sup>18</sup> In this study, it will provide a lens to examine the lingering impacts of colonialism, and how historical legacies continue to shape contemporary African societies. Postcolonial theory will also allow for an exploration of the dynamics of power, domination, resistance, and identity construction in African societies.

### ***(c) Liberation Theology***

Liberation Theology emerge as a response to social injustice and oppression, drawing inspiration from religious principles to advocate for the liberation of marginalised groups.<sup>19</sup> Likewise, it offers a lens to assess the role of religious leaders and institutions in influencing political discourse and public policy regarding sexual and gender minority rights. In this study, it will examine the diverse interpretations of religious teachings and mores that either promote inclusivity and tolerance or contribute to oppression against sexual and gender minorities.

#### ***1.8.2 Myths, beliefs and misconceptions on sexual and gender minorities***

In Africa, sexual and gender minorities face significant challenges due to widespread myths and misconceptions that persist within society. These misconceptions often stem from religious, and traditional beliefs, as well as a lack of accurate information and understanding. One prevailing myth is that identifying as a sexual and gender minority is a lifestyle choice or a foreign concept brought

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<sup>16</sup> R Wacks ‘‘Critical legal theory’, *Philosophy of Law: A Very Short Introduction* (2013) *Oxford Academic* 92.

<sup>17</sup> Wacks (n 16).

<sup>18</sup> V Mishra ‘Postcolonial Theory’ (2020) *Oxford Research Encyclopedia of Literature* 1-8.

<sup>19</sup> AB Bradley ‘Liberation Theology’ (2023) *African American Studies*.

to Africa by the West and does not form part of African history and culture.<sup>20</sup> This misconception ignores the long history of diverse sexual and gender expressions, where same-sex relationships and non-binary gender identities have existed for centuries, pre-dating colonialism.<sup>21</sup> For instance, the tombs of two men's bodies in ancient Egypt have been excavated showing them both embracing as lovers; many ancient Egyptian deities were often androgyne or of a third gender.<sup>22</sup> Similarly, some tribes in Nigeria and Ghana did not assign gender to babies at birth and waited until later life to assign genders.<sup>23</sup> Hence, these notions fail to recognise that sexual orientation<sup>24</sup> and gender identity<sup>25</sup> are deeply ingrained aspects of human diversity, shaped by a complex interplay of genetic, hormonal, and environmental factors.<sup>26</sup> Further, the power of Christianity and Islam under European colonial rule and modern African electoral politics have influenced the current and existing narratives around same-sex relations.<sup>27</sup> As a result, sexuality is not solely determined by biological factors. A substantial aspect of it is shaped by social constructs influenced by legal and religious influences driven by political motives.<sup>28</sup>

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<sup>20</sup> S Murray & W Roscoe *Boy wives and female husbands* (2001) 9.

<sup>21</sup> S Collins 'The Splendor of Gender Non-Conformity in Africa' (*Medium*, 10 October 2023) <[https://medium.com/@janelane\\_62637/the-splendor-of-gender-non-conformity-in-africa-f894ff5706e1](https://medium.com/@janelane_62637/the-splendor-of-gender-non-conformity-in-africa-f894ff5706e1)> Accessed 6 August 2023.

<sup>22</sup> L Buckle 'African sexuality and the legacy of imported homophobia' (*Stonewall*, 01 October 2020) <<https://www.stonewall.org.uk/about-us/news/african-sexuality-and-legacy-imported-homophobia>> Accessed 6 August 2023.

<sup>23</sup> Collins (n 21).

<sup>24</sup> Sexual orientation refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender. The Yogyakarta Principles (2006).

<sup>25</sup> Gender identity refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms. The Yogyakarta Principles (2006).

<sup>26</sup> T Morgenroth & MK Ryan 'The Effects of Gender Trouble: An Integrative Theoretical Framework of the Perpetuation and Disruption of the Gender/Sex Binary' (2021) 16(6) *Perspectives on Psychological Science* 1113-1142.

<sup>27</sup> 'One step forward two steps backward...LGBTQI Rights in Africa' (*Sonke Gender Justice*, 2 August 2023) <<https://genderjustice.org.za/article/one-step-forward-two-steps-backwardlgbtqi-rights-in-africa/>> Accessed 12 October 2023.

<sup>28</sup> A Dallery 'The politics of writing (the) body' in A Jagger & S Bordo *Gender, body, knowledge: Feminist reconstructions of being and knowing* (1989).

## **1.9 Structure**

After this introductory chapter, chapter Two interrogates how religious narratives influence political discourse with respect to sexual and gender minority rights. Chapter Three examines how politicisation of sexual and gender minority rights, as backed by religion impact on the rights of sexual and gender minorities in Africa. Chapter Four further examines the potential approaches that may be utilised to protect sexual and gender minority rights in Africa, considering the religious and political opportunity structure at play. Finally, chapter Five is the conclusion and recommendations of this study.



## CHAPTER TWO

### THE INFLUENCE OF RELIGION ON POLITICAL DISCOURSE REGARDING SEXUAL AND GENDER MINORITY RIGHTS

#### 2.1 Introduction

This chapter explores the influence of religion on political discourse vis-à-vis sexual and gender minority rights in Africa. It explores how religion has played and continues to exert a significant influence on the discussion surrounding the rights of sexual and gender minorities on the continent.<sup>29</sup> By the twelfth century, Islam had made inroads on the continent, whereas efforts to introduce Christianity in most parts of the continent did not occur until the eighteenth century.<sup>30</sup> Given that Africa boasts a diverse array of religious beliefs, including Christianity and Islam, religious leaders, possessing considerable political clout, often use their platforms to advocate for conservative perspectives on sexual and gender minority rights.<sup>31</sup> This discourse predominantly revolves around the criminalisation of consensual same-sex intimacy, frequently citing religious justifications.<sup>32</sup> Despite obligations set out in global and regional human rights instruments,<sup>33</sup> violations against sexual and gender minorities persist. In fact, many African countries have ratified these agreements but grapple with their enforcement and implementation due to political and religious resistance.

#### 2.2 Religious teaching and mores on sexual and gender minorities

Religious narratives, with their multifaceted nature, possess the power to influence perceptions, attitudes, and policymaking, either facilitating or obstructing progress of sexual and gender minority

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<sup>29</sup> S Tamale 'Exploring the contours of African sexualities: Religion, law and power' (2014) 14 *African Human Rights Law Journal* 150-177.

<sup>30</sup> J Trimingham *The influence of Islam upon Africa* (1968).

<sup>31</sup> KG Asiedu and others 'Across Africa, major churches strongly oppose LGBTQ rights' (*AP News*, 20 October 2021) <<https://apnews.com/article/lifestyle-africa-religion-relationships-united-states-3b1115a1a9ed40a1211dd508ae996141>> Accessed 12 September 2023.

<sup>32</sup> 'UN experts urge religious leaders to show respect and compassion for LGBT persons' (*OHCHR*, 14 May 2021) <<https://www.ohchr.org/en/press-releases/2021/05/un-experts-urge-religious-leaders-show-respect-and-compassion-lgbt-persons>> Accessed 12 September 2023.

<sup>33</sup> Most African states have ratified the African Charter on Human and Peoples' Rights and are state parties various UN treaties.

rights.<sup>34</sup> While some African nations have taken steps to protect sexual and gender minority rights,<sup>35</sup> the overall picture on the continent reveals significant challenges and disparities. A striking example of the diverse landscape concerning sexual and gender minority rights in Africa is that, as of now, only South Africa recognises same-sex marriage and expressly has a non-discrimination clause based on sexual orientation and gender identity in its constitution.<sup>36</sup> Likewise, the Supreme Court of Namibia in the case of *Digashu v. GRN, Seiler-Lilles v. GRN*<sup>37</sup> has recently recognised same-sex marriage conducted abroad. These progressive stances stand as an exception in a continent where general social acceptance of sexual and gender minorities remains distressingly low. Religion has historically not been confined to private matters but has consistently intertwined with politics and public life.<sup>38</sup> This study focus on the concept of ‘public religion’<sup>39</sup> to analyse on how religion intersects with politics and public life.

### ***2.2.1 Christianity teachings and mores on sexuality and gender***

The teachings and mores on sexuality and gender within Christianity vary widely, influenced by different interpretations of religious texts, theological beliefs, and individual viewpoints. While there is no single, all-encompassing Christian stance, this study acknowledges a range of opinions within Christianity, spanning from conservative and traditional viewpoints to acceptance and inclusivity. These teachings and mores often emphasise gender roles and heterosexual norms, and therefore, stigmatise various sexual activities, including sodomy.<sup>40</sup> Further, these teachings typically advocate for marriage as a sacred covenant between one man and one woman,<sup>41</sup> opposing the recognition of same-sex marriages and stressing the importance of traditional family structures. This perspective is grounded

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<sup>34</sup> A Adameczyk & BE Hayes ‘Religion and Sexual Behaviors: Understanding the Influence of Islamic Cultures and Religious Affiliation for Explaining Sex Outside of Marriage’ (2012) 77(5) *American Sociological Review* 723-746.

<sup>35</sup> G Reid ‘Progress and Setbacks on LGBT Rights in Africa — An Overview of the Last Year’ (*Human Rights Watch*, 22 June 2022) <<https://www.hrw.org/news/2022/06/22/progress-and-setbacks-lgbt-rights-africa-overview-last-year>> Accessed 12 September 2023.

<sup>36</sup> DV Pierre ‘The “right to be different”: the same-sex marriage judgment of South Africa’s Constitutional Court’ (2015) *Annuaire international de justice constitutionnelle* 15-20.

<sup>37</sup> *Digashu v. GRN, Seiler-Lilles v. GRN* (SA 7/2022 and SA 6/2022) [2023] NASC (16 May 2023) Supreme Court of Namibia.

<sup>38</sup> S Ellis & GT Haar ‘Religion and Politics: Taking African Epistemologies Seriously’ (2007) 45 *The Journal of Modern African Studies* 385–401.

<sup>39</sup> The notion of ‘public religion’ is seemingly defined as one that has, assumes, or tries to assume a public character, function, or role; derived from sociologist José Casanova in his book: J Casanova *Public Religions in the Modern World* (1994).

<sup>40</sup> RK Wabyanga ‘“Homosexuality is Unafrikan 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* 6–27.

<sup>41</sup> MR Gunda & J Naughton *On Sexuality and Scripture: Essays, Bible Studies, and Personal Reflections by the Chicago Consultation, the Ujamaa Centre, and Their Friends* (2017) 19–25.

in conservative interpretations through the reading of the biblical narratives of Sodom and Gomorrah, together with other religious texts, reinforcing heteronormativity as the natural and godly way.<sup>42</sup>

Even after the separation of church and state, the Christian influence on political discourse has remained strong. Among the most influential groups is the evangelical churches, which merging evangelical congregations have assumed a pivotal role in actively participating in political discourse. In certain instances, evangelical pastors take on roles as Members of Parliament (MP) and Government Ministers, thereby directly integrating moral renewal theology into the political arena.<sup>43</sup> Besides, African Anglican provinces, for example the Church of Nigeria, have taken conservative stances on issues related to the ordination of gay clergy and recognition of same-sex marriage,<sup>44</sup> distancing themselves from more liberal positions held by the Anglican Communion in England.<sup>45</sup>

While religion plays a significant role in the politicisation of sexual and gender minority rights in Africa, it is important to note that Christianity is not solely a source of contention but also embraced by sexual rights activists as a means of advancing their cause. Recent years have witnessed a reduction in discriminatory laws in Christian-majority African nations, through both court rulings and legislative actions in countries like Angola,<sup>46</sup> Botswana,<sup>47</sup> Seychelles,<sup>48</sup> and Mozambique.<sup>49</sup>

Liberal Christian perspectives on sexuality and gender acknowledge the progressive nature of societal norms and advocate for greater acceptance, theological reinterpretations, and evolving viewpoints. The

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<sup>42</sup> Wabyanga (n 40).

<sup>43</sup> Jjuuko (n 7) 10.

<sup>44</sup> S Kisika 'Church of England's blessings of same-sex couples sparks anger among Anglican churches in Uganda, Kenya' (*Washington Blade*, 17 February 2023) <<https://www.washingtonblade.com/2023/02/17/church-of-englands-blessings-of-same-sex-couples-sparks-anger-among-anglican-churches-in-uganda-kenya/>> Accessed 13 September 2023.

<sup>45</sup> H Ndukuba 'Church of England "quarreling with God" Nigeria says' (*Anglican Ink*, 12 February 2023) <<https://anglican.ink/2023/02/12/church-of-england-quarreling-with-god-nigeria-says/>> Accessed 13 September 2023.

<sup>46</sup> F Viljoen 'Abolition of Angola's anti-gay laws may pave the way for regional reform' (*The Conversation*, 14 February 2019) <<https://theconversation.com/abolition-of-angolas-anti-gay-laws-may-pave-the-way-for-regional-reform-111432>> Accessed 10 September 2023.

<sup>47</sup> R Salerno 'Botswana Court of Appeals unanimously upholds decriminalization of gay sex' (*76Crimes*, 29 November 2021) <<https://76crimes.com/2021/11/29/botswana-court-of-appeals-unanimously-upholds-decriminalization-of-gay-sex/>> Accessed 10 September 2023.

<sup>48</sup> S Uranie, P Athanase & R Vannier 'Seychelles parliament passes bill to decriminalize sodomy' (*Seychelles News Agency*, 18 May 2016) <<http://www.seychellesnewsagency.com/articles/5198/Seychelles+parliament+passes+bill+to+decriminalize+sodomy>> Accessed 10 September 2023.

<sup>49</sup> 'Mozambique scraps colonial-era homosexuality ban' (*Mail & Guardian*, 29 June 2015) <<https://mg.co.za/article/2015-06-29-mozambique-scraps-colonial-era-homosexuality-and-abortion-bans/>> Accessed 10 September 2023.

argument put forward is that ‘same-sex relationships are valid expressions of human love, emphasising the core teachings of Jesus Christ about love for all individuals and recognising the inherent worth and dignity of every person’.<sup>50</sup> This perspective promotes a non-judgmental approach and aims to create a more welcoming and affirming religious environment for sexual and gender minorities. As Pope Francis highlighted in an exclusive interview with the *Associated Press* in January 2023,<sup>51</sup>

Being homosexual is not a crime. We are all children of God, and God loves us as we are and for the strength, that each of us fights for our dignity.

Additionally, the Vatican has engaged in interfaith dialogues, including discussions with sexual and gender minorities activists, suggesting a willingness to address issues related to sexual diversity and human rights on a broader scale.<sup>52</sup> Bishop Tutu’s response to the acceptance of Uganda’s anti-homosexuality bill in 2014 further underscores a different liberal perspective that ‘there is no scientific basis or genetic rationale for love, there is only the grace of God’.<sup>53</sup> This statement rejects any form of discrimination or exclusion from a religious standpoint, highlighting love as a force beyond scientific measurement. Therefore, the teachings and mores on sexuality and gender within Christianity are not uniform, underscoring the evolving nature of Christianity’s perspectives on sexual rights and ongoing theological debates regarding sexual orientation, gender identity, and human dignity.

### ***2.2.2 Islamic teachings and mores on sexuality and gender***

Islamic teachings and mores on sexuality and gender in Africa, much like Christian viewpoints, display a wide spectrum of diversity. The Islamic faith draws from various sources including the Quran (the Book of Revelation), Fiqh (Jurisprudence), and Shari’a (the comprehensive code regulating all aspects of Muslim life). Some scholars argue that the Quran encourages diversity, viewing individuality and tolerance as integral to divine intent.<sup>54</sup> However, in many African Muslim-majority nations,<sup>55</sup> conservative interpretations of Islamic teachings regarding sexuality and gender tend to dominate, and none of these nations have recently repealed sodomy laws or promoted sexual and gender minority

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<sup>50</sup> ED Cook *The Moral Maze: Way Of Exploring Christian Ethics* (1983).

<sup>51</sup> R Sanders ‘Being homosexual is not a crime – Pope Francis’ (*The Voice*, 28 January 2023) <<https://www.thevoiceslu.com/2023/01/being-homosexual-is-not-a-crime-pope-francis/>> Accessed 11 September 2023.

<sup>52</sup> R Cascioli ‘The Vatican opens up to ‘LGBT families’’ (*Daily Compass*, 2 June 2022) <<https://newdailycompass.com/en/the-vatican-opens-up-to-lgbt-families>> Accessed 11 September 2023.

<sup>53</sup> M Kennedy ‘Desmond Tutu condemns Uganda’s proposed new anti-gay law’ (*The Guardian*, 23 February 2014) <<https://www.theguardian.com/world/2014/feb/23/desmond-tutu-condemns-uganda-proposed-anti-gay-law>> Accessed 15 September 2023.

<sup>54</sup> SSA Kugle *Homosexuality in Islam: Critical Reflection on Gay, Lesbian, and Transgender Muslims* (2010).

<sup>55</sup> ‘Nations with anti-LGBT laws: 52% Muslim, 42% Christian’ (76crimes, July 2023) <<https://76crimes.com/nations-with-anti-lgbt-laws-49-muslim-44-christian/>> Accessed 14 September 2023.

rights. In countries like Mauritania and Somalia that practice Shari'a law, lengthy prison terms and capital punishments are commonplace.<sup>56</sup>

The Quran sanctifies sexual activity by incorporating prayer for a righteous child before engaging in sex.<sup>57</sup> It also refers same-sex couples as Lot, invoking the same used by Christian.<sup>58</sup> The Quran further mentions Lot paralleling the narrative on recounting the destruction of the cities of Sodom and Gomorrah due to their inhabitants' involvement in same-sex acts.<sup>59</sup> These perspectives often arise from strict interpretations of Islamic jurisprudence. This story of Lot is central to the theological justification and at the core of the intersection between Islam and sexual diversity.<sup>60</sup> As long as a restrictive interpretation is attached to this story, Shari'a law is opposed against sexual and gender minorities, as discussed in section 2.3.2 of this study.

Islam in Africa is practiced alongside colonial penal codes founded on largely Christian mores that were enacted to curb local sexual practices. Of note, there is limited evidence of widespread same-sex practices in the first century and a half of Islamic history.<sup>61</sup> Traditional Islamic jurisprudence categorises sexual and gender minority activities as forbidden, making them subject to punishment and the types of penalties depended on the specific situation and school of thought.<sup>62</sup> In practice, sexual and gender minorities were generally tolerated in pre-modern Islamic societies, and historical records indicate that laws against same-sex conduct were seldom enforced, except in cases involving rape or other extreme violations of public morals as defined by Islamic law.<sup>63</sup> In addition to the religious rhetoric that hinders progress in sexual and gender minority reform, the documentary '*A Jihad for Love*'<sup>64</sup> illustrates the contemporary experiences of sexual and gender minority Muslims and their struggle with sexual and religious identity.

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<sup>56</sup> 'One step forward two steps backward...LGBTQI Rights in Africa' (Sonke Gender Justice, 2 August 2023) < <https://genderjustice.org.za/article/one-step-forward-two-steps-backwardlgbtqi-rights-in-africa/> > Accessed 12 October 2023.

<sup>57</sup> A Swidler Homosexuality and world religions (1993) 181-197.

<sup>58</sup> Swidler (n 57).

<sup>59</sup> EK Rowson 'Homosexuality' in JD McAuliffe Encyclopaedia of the Qur'ān (2006) 444-445.

<sup>60</sup> Kugle (n 54).

<sup>61</sup> EK Rowson 'Homosexuality in Islamic law' (2004) 4 Encyclopaedia Iranica 441-445.

<sup>62</sup> NA Ibrahim 'Homophobic Muslims: Emerging Trends in Multireligious Singapore' (2016) 58(4) Cambridge University Press 955-981.

<sup>63</sup> EK Rowson 'Homosexuality in Islamic law' (2004) 4 Encyclopaedia Iranica 441-445.

<sup>64</sup> '*A Jihad for Love*' Available at: [https://www.imdb.com/title/tt0780046/?ref=vp\\_vi\\_tt](https://www.imdb.com/title/tt0780046/?ref=vp_vi_tt)

Thus far, within the rich tapestry of Islamic teachings, while traditional views are prevalent, it is key to acknowledge the existence of liberal interpretations regarding sexuality in Africa, albeit with less prominence. As put forward by Imam Dr Mohamed Zahed,<sup>65</sup>

We do not need to invent a new Islam but from within Islam, we find plenty of arguments. After 20 years of studying Islam, I discovered that there are effeminate men, masculine transgender identities that are quoted in our cultural and religious texts.

In this liberal context, South Africa hosts the continent's inaugural mosque that promotes acceptance of sexual and gender minorities, presided over by Imam Hendricks, who openly identifies as gay and has undertaken a unique effort to reinterpret the Quran and Islamic heritage through a lens of inclusivity, which he has termed a 'queer Jihad'.<sup>66</sup> In the same vein, the community of *yan daudu* (men who act like women) in Northern Nigeria sheds light on how religious terminology and customs facilitate distinct experiences and perspectives among sexual and gender minorities.<sup>67</sup> Central to this is the notion that 'Allah made us'. Similarly, the literary contributions of the Moroccan author Taïa provide insights into the various forms of sexuality, gender, and intimacy deeply rooted in Islamic North African cultures.<sup>68</sup> Jama and Osman, in their writings, draw on similar experiences of Islamic Somali communities.<sup>69</sup>

These perspectives emphasise principles of compassion, respect, and individual agency. Therefore, as noted by Kugle, 'sexual and gender minorities are not clearly and positively prohibited in the history of Islam, and ancient jurists viewed such matters more in terms of acts rather than sexual orientation'.<sup>70</sup> Thus, the conceptions of sexual and gender minorities found in classical Islamic texts align more with the traditions of ancient Greece and Rome than with contemporary understandings of sexual diversity.<sup>71</sup> Clearly, this intricate situation appears to be shaped by the influence of the more recent global rise of fundamentalist interpretations of Islam that aim to restrict freedom of thought and action.<sup>72</sup>

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<sup>65</sup> 'Fearless Allies – conversation for LGBT inclusion' *Religious dialogue toolkit* < [https://gin-ssogie.org/wp-content/uploads/2023/06/GIN\\_Brochure\\_A4\\_final\\_web.pdf](https://gin-ssogie.org/wp-content/uploads/2023/06/GIN_Brochure_A4_final_web.pdf) >

<sup>66</sup> S Kugle 'Queer Jihad: A View from South Africa' (2005) 16(1) *ISIM Review* 14–15.

<sup>67</sup> PR Gaudio 'Allah Made Us: Sexual Outlaws in an Islamic African City' *Malden: Wiley-Blackwell* (2009).

<sup>68</sup> A Taïa 'Infidèles. Paris: Seuil. Infidels' (2016) *New York: Seven Stories Press*.

<sup>69</sup> A Jama *Being Queer and Somali*. Los Angeles: Oracle Releasing (2015).

<sup>70</sup> SSA Kugle 'Sexuality, Diversity and Ethics in the Agenda of Progressive Muslim' in O Safi *Progressive Muslims: on justice, gender and pluralism* (2003) 190-234.

<sup>71</sup> K Ali *Sexual Ethics and Islam: Feminist Reflections on Qur'an, Hadith, and Jurisprudence* (2016) 105.

<sup>72</sup> DM Siddiqi 'Exceptional Sexuality in a Time of Terror: "Muslim" Subjects and Dissenting/Unmournable Bodies' (2019) 20 *South Asia Multidisciplinary Academic Journal* 1–18.

## 2.3 Faith in politics: Religious leaders influence on the politicisation of sexual and gender minority rights

The power of religious institutions is central role in political discourse that vilify sexual and gender minorities as ‘deviant’ and ‘ungodly’.<sup>73</sup> Recently in Botswana, Namibia, and Malawi, the church has thrown the public into a moral panic with an oppressive agenda that weaponises sexual and gender minority rights, paddling the narrative as Western agenda, and procreation by focusing on what is themed ‘gender ideology’.<sup>74</sup> This has led to sexual and gender minorities being unfairly scapegoated for a wide spectrum of societal challenges, including natural disasters, governance shortcomings, economic stagnation, and even the COVID-19 pandemic.<sup>75</sup> This section delves into case studies from Zambia and Nigeria to illustrate how religious narratives influence the rhetoric and outcomes of sexual and gender minority rights.

### 2.3.1 Case study of Zambia

Zambia distinguishes itself by proudly declaring its status as a Christian nation, a designation incorporated in its Constitution since 1996.<sup>76</sup> It is one of the African nations that criminalise the act of sodomy through specific legal provisions in its Penal Code namely, sections 155, 156, and 158, categorised under ‘carnal knowledge of against the order of nature’ and ‘gross indecency’.<sup>77</sup> These laws were adopted during the British colonial period.<sup>78</sup> Despite these laws, no cases have been brought to court directly challenging its constitutional deficiency or advocating for the rights of sexual and gender minorities.<sup>79</sup> Religious leaders hold a decisive role in shaping policies concerning sexual and gender minorities in Zambia. This is a distinctive instance of the intricate interplay between religion and politics, a phenomenon widespread across Africa.<sup>80</sup> In this case, it manifested as a religiously driven

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<sup>73</sup> AV Klinken ‘Kenyan, Christian, Queer: Religion, LGBT Activism, and Arts of Resistance in Africa’ (2019) 3 *Penn State University Press*.

<sup>74</sup> ‘The arm of imperialism: The church’s anti-gender and anti-SOGIE rhetoric’ (*Washington Blade*, 23 August 2023) <<https://www.washingtonblade.com/2023/08/23/the-arm-of-imperialism-the-churchs-anti-gender-and-anti-sogie-rhetoric/>> Accessed 12 September 2023.

<sup>75</sup> Jjuuko (n 7).

<sup>76</sup> L Banda ‘LGBT lawfare in response to heterosexual nationalism and the retention of the antisodomy laws in Zambia’ in A Jjuuko and others *Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation and politicisation* (2022) 242.

<sup>77</sup> ‘Zambia country profile’ (*Human Dignity Trust*) <<https://www.humandignitytrust.org/country-profile/zambia/>> Accessed 14 September 2023.

<sup>78</sup> These laws were first established in the Code of Criminal Law, 1 November 1931.

<sup>79</sup> Banda (n 76) 240.

<sup>80</sup> S Ellis & GT Haar ‘Worlds of Power: Religious thought and political practice in Africa’ (2005) 105 *African Affairs* 145–146.

political mobilisation when in 1991, President Chiluba, a devout Pentecostal Christian, declared Zambia a Christian nation in its Constitution.<sup>81</sup> This declaration acknowledges ‘the supremacy of God Almighty’ while upholding ‘the right to freedom of conscience, belief, or religion’.<sup>82</sup>

Unlike in other countries where western far-right Christian movements often influence religious-based heterosexual nationalism, Zambia’s influence originates from local Pentecostal churches.<sup>83</sup> Consequently, sexual and gender minorities face oppression all in support of Zambia’s theo-political aspirations.<sup>84</sup> In the lens of heterosexual nationalism, sexual and gender minorities are seen as a threat to Zambia’s nationhood, excluding them from the construction of ‘nationality’ and denying them citizenship rights.<sup>85</sup> A vivid example of this sentiment can be seen in the reaction of Zambian political leadership to a statement by Ban Ki-moon, United Nations Secretary-General (UNSG) during his 2012 visit. Recalling the times of the anti-Apartheid struggle in South Africa and the fight against colonial rule in Zimbabwe, Ki-moon highlighted the nation’s historical commitment to democracy and freedom in the region, focusing on the significance of championing human rights and liberty.<sup>86</sup> Ki-moon also pointed to the ongoing constitutional review process as an opportunity for Zambia to lead once more by enshrining the highest standards of human rights and protections for all people by prohibiting discrimination based on various factors, including sexual orientation.<sup>87</sup> This statement re-opened the political Pandora box with a heated public debate influenced by religious leaders, resulting in the removal of the words ‘vulnerable and marginalised groups’ from the discrimination clause of the Constitution. This change aimed to prevent sexual and gender minority rights activists from using or misusing Article 60 to champion their cause.<sup>88</sup>

More recently, Chief Justice Mumba Malila came under attack by religious leaders during a public lecture at the University of Zambia, when he addressed a question regarding his stance on gay rights

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<sup>81</sup> IA Phiri ‘President Frederick J.T. Chiluba of Zambia: The Christian Nation and Democracy’ (2003) 33 *Journal of Religion in Africa* 401-428.

<sup>82</sup> Preamble of the Constitution of Zambia, Paragraph 1.

<sup>83</sup> Banda (n 76) 247.

<sup>84</sup> Banda (n 76) 246.

<sup>85</sup> AV Klinken ‘Sexual Citizenship in Postcolonial Zambia: From Zambian Humanism to Christian Nationalism’ in B Bompani & C Valois *Christian Citizens and the Moral Regeneration of the African State* (2017) 133-148.

<sup>86</sup> AV Klinken ‘Gay rights, the devil and the end times: public religion and the enchantment of the homosexuality debate in Zambia’ (2013) 43(4) *Religion* 519-540.

<sup>87</sup> ‘Secretary-General’s remarks to the National Assembly of the Republic of Zambia’ (UN, 24 February 2012) < <https://www.un.org/sg/en/content/sg/statement/2012-02-24/secretary-generals-remarks-national-assembly-republic-zambia> > Accessed 09 September 2023.

<sup>88</sup> Banda (n 76) 245.



amidst the ongoing national debate.<sup>89</sup> In his response, he expressed his unequivocal belief that discriminating against gay individuals is fundamentally unjust, emphasising that they should not be denied their rights based on their sexual orientation.<sup>90</sup> Supporters of retaining anti-sodomy laws in Zambia, primarily driven by the Evangelical Fellowship of Zambia (EFZ) issued an immediate press release arguing for the supremacy of the Constitution, contending that a democracy should reflect the will of the people as expressed in the Constitution.<sup>91</sup> Through media interventions, they further called for the Chief Justice resignation.<sup>92</sup> On the other side, the Ministry of Health has debarred the use of the words ‘Sexual and Reproductive Health Rights’ justifying that the term promotes sexual and gender minority rights.<sup>93</sup> This rhetoric of Christian nationalism makes ‘Zambia stand out as the sole African country where Pentecostal Christianity has significantly contributed to shaping a constitutionally embedded sense of national identity’.<sup>94</sup>

### 2.3.2 Case study of Nigeria

Nigeria criminalises same-sex relationships through a combination of federal and state laws, some of which inherited from the colonial era, while others enacted by domestic legislatures since its 1960 independence.<sup>95</sup> Primarily, Nigeria’s legal framework on sexual and gender minority rights can be traced back to the Criminal Code, enacted by the British colonial government in 1916. Section 284 of the Criminal Code Act (2004) contains provisions criminalising consensual same-sex sexual acts imposing a penalty of imprisonment for fourteen years. Its Constitution is modelled along international human rights law principles, with constitutional guarantee of the right to freedom of thought, conscience and religion.<sup>96</sup> Further, Nigeria’s Bill of Rights prohibits discrimination on an elaborate list of categories,<sup>97</sup> including specifically the ground of religion.<sup>98</sup> In fact, due to the diversity in culture and

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<sup>89</sup> ‘Centre for Human Rights stands in solidarity with Zambian Chief Justice Mumba Malila and human rights lawyers on rights of sexual minorities in Zambia’ (*Centre for Human Rights*, 04 October 2023) < <https://www.chr.up.ac.za/latest-news/3595-centre-for-human-rights-stands-in-solidarity-with-zambian-chief-justice-mumba-malila-and-human-rights-lawyers-on-rights-of-sexual-minorities-in-zambia> > Accessed 6 October 2023.

<sup>90</sup> (n 89).

<sup>91</sup> Press statement: ‘EFZ Appalled by media reports Quoting Chief Justice calling for respect of gay rights’ (*Evangelical Fellowship of Zambia*, Lusaka, 25 September 2023).

<sup>92</sup> ‘10 human rights lawyers back Chief Justice over gay rights in Zambia’ (*Lusaka Times*, 26 September 2023) < <https://www.lusakatimes.com/2023/09/26/10-human-rights-lawyers-back-chief-justice-over-gay-rights-in-zambia/> > Accessed 22 October 2023.

<sup>93</sup> (n 77).

<sup>94</sup> Klinken (n 86) 519.

<sup>95</sup> A Sogunro & D Fatunla *Compendium of laws discriminating against persons based on sexual orientation and gender identity expression in Nigeria* (2017).

<sup>96</sup> The Constitution of Nigeria 1999, section 38(1).

<sup>97</sup> The other grounds include place of origin, sex, status, ethnic or linguistic association or ties.

<sup>98</sup> The Constitution of Nigeria 1999, section 15(2), section 42(1).

religion across Nigeria, the British colonial administration implemented two distinct yet interconnected legal codes in colonial Nigeria: the Criminal Code for Southern Nigeria and the Penal Code for Northern Nigeria.

In 1999, political leaders in the Northern states began a serious conversation on introducing and enforcing Shari'a law as part of their state's legal framework,<sup>99</sup> despite the constitutional prohibition against officially designating a 'state religion'.<sup>100</sup> Ultimately, the northern politicians won the day, and Shari'a law was initially domesticated in the Penal Code of Zamfara State in 2000.<sup>101</sup> Over time, twelve northern regions adopted variations of Shari'a law, which prescribed death penalty for same-sex relations<sup>102</sup> and with several stoning sentences handed down by Shari'a courts.<sup>103</sup> Notable enough, Nigeria had an intriguing development in the form of a noteworthy alliance between Christianity and Islamic leaders in support of the same-sex marriage (Prohibition) Act 2014. This collaboration occurred within a country that had been grappling with escalating tensions between adherents of both faiths in recent years, as they publicly praised President Jonathan and embraced this new legislation as a significant milestone.<sup>104</sup>

Shari'a laws are designed to strengthen Islamic dominance and consolidate political authority.<sup>105</sup> For example, in 2015, the Hisbah<sup>106</sup> apprehended twelve men in the northern city of Kano on suspicion of planning a same-sex wedding.<sup>107</sup> The arrest of these individuals was based on their 'feminine' act and look.<sup>108</sup> In June 2022, a Shari'a court rendered a verdict sentencing three men to death by stoning for engaging in same-sex sexual activities in the state of Bauchi, which sets a dangerous precedent for even

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<sup>99</sup> Human Rights Watch "'Political Shari'a'?" Human Rights and Islamic Law in Northern Nigeria' (2004).

<sup>100</sup> The Constitution of Nigeria 1999, section 10.

<sup>101</sup> A Sogunro 'Against 'the order of nature': Towards the growth of queer lawfare in Nigeria' in A Jjuuko and others *Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation and politicisation* (2022) 213.

<sup>102</sup> Same-sex Marriage (Prohibition) Act, 2013 The Republic of Nigeria.

<sup>103</sup> 'Nigeria Islamic court tries gay suspects in Bauchi' (*BBC News*, 15 January 2014) <<https://www.bbc.com/news/world-africa-25749308>> Accessed 14 September 2023.

<sup>104</sup> For further reading see D Oguntola-Laguda & AV Klinken 'Uniting a divided nation? Nigerian muslim and christian responses to the Same-Sex Marriage (Prohibit Act)' in AV Klinken & E Chitando *Public Religion and the Politics of Homosexuality in Africa* 35-48.

<sup>105</sup> Sogunro (n 101) 206.

<sup>106</sup> An Islamic law enforcement agency.

<sup>107</sup> 'Sharia police arrest 12 in Nigeria over 'gay wedding'' (*Mail & Guardian*, 27 January 2015) <<https://mg.co.za/article/2015-01-27-sharia-police-arrest-12-in-nigeria-over-gay-wedding/>> Accessed 19 September 2023.

<sup>108</sup> S Roberts 'Nigeria: 12 arrested over 'gay wedding'' (*The Pink News*, 27 January 2015) <<https://www.thepinknews.com/2015/01/27/nigeria-12-arrested-over-gay-wedding/>> Accessed 19 September 2023.

harsher judgments against sexual and gender minorities.<sup>109</sup> Accordingly, the colonial legacy in Nigeria has left behind a bias against same-sex relationships reinforced by major religious institutions. In fact, matters concerning sexual and gender minorities rarely emerge as topics of public concern until political or religious figures use them as distractions from more substantial challenges.<sup>110</sup>

## 2.4 Overview of religious conversion practices on sexual and gender minorities

In many parts of Africa, discussions surrounding sexual and gender minorities and conversion practices are complex due to the interplay of religion, and social attitudes. As defined by the UN Independent Expert on protection against violence and discrimination based on Sexual Orientation and Gender Identity (UN IE SOGI),<sup>111</sup>

Conversion therapy is used as an umbrella term to describe interventions of a wide-ranging nature, all of which have in common the belief that a person's sexual orientation or gender identity can and should be changed. Depending on the context, the term is used for a multitude of practices and methods, some of which are clandestine and therefore poorly documented.

Religious conversion practices, also known as 'sexual orientation change efforts' or 'reparative therapy' refers to practices aim at changing an individual's sexual orientation based on religious beliefs.<sup>112</sup> While Africa is not a monolithic entity, there are some common trends and country specific examples to consider on the issue. Some of the most pernicious religiously justified violence includes bias motivated attacks and hate crimes by mobs, family members, and religious leaders who allege that their religious beliefs permit and even require violence against sexual and gender minorities.<sup>113</sup> Actions based on these religious beliefs involve subjecting sexual and gender minorities to the guidance of a spiritual counsellor and enrolment in programs to alter their perceived 'condition' through derogatory language, physical abuse, deprivation of essential needs, and in some cases, with exorcism rituals.<sup>114</sup> This approach hinges on the erroneous belief that identifying as sexual and gender minority is either a psychological ailment or a conscious decision, which can be cured via religious conversion practices.

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<sup>109</sup> P Salako 'LGBTQ+ Nigerians fear violence after sharia court death sentence' (*Context News*, 18 July 2022) <[https://www.context.news/money-power-people/lgbtq-nigerians-fear-violence-after-sharia-courtdeathsentence?utm\\_source=news-trust&utm\\_medium=redirect&utm\\_campaign=context&utm\\_content=article](https://www.context.news/money-power-people/lgbtq-nigerians-fear-violence-after-sharia-courtdeathsentence?utm_source=news-trust&utm_medium=redirect&utm_campaign=context&utm_content=article) > Accessed 19 September 2023.

<sup>110</sup> Sogunro (101) 228.

<sup>111</sup> UN 'A/HRC/44/53 Practices of so-called "conversion therapy"' (2020) <<https://www.ohchr.org/sites/default/files/Documents/Issues/SexualOrientation/ConversionTherapyReport.pdf> >

<sup>112</sup> Canadian Psychological Association 'Policy Statement on Conversion/ Reparative Therapy for Sexual Orientation' (2015).

<sup>113</sup> A/HRC/53/37 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' para 19.

<sup>114</sup> UN (n 111).

For instance, in Ghana, cases of so-called corrective rape of lesbian, bisexual and queer women facilitated by religious leaders and adherents have been reported.<sup>115</sup> In Nigeria there have been instances of religious leaders advocating for conversion practices towards sexual and gender minorities, many of whom are minors, to be subjected to ‘deliverance’ to ‘break the yoke’ of the demon causing same-sex attraction or desire to change gender identity.<sup>116</sup> In Ethiopia, religious leaders have formed an association to promote conversion practices on sexual and gender minorities.<sup>117</sup> In Kenya, conversion practices has been reported in one such conservative church, known as the Mountain of Fire and Miracles Ministry, which is secretly running a program to ‘cure’ sexual and gender minorities, using starvation and incessant prayer over three days as the main methods.<sup>118</sup>

Religious conversion practices are fundamentally degrading, demeaning, and oppressive in nature. There exists no scientific backing for religious conversion practices. Leading medical and psychological institutions have universally criticised conversion practices as lacking efficacy, being unethical, and posing potential harm.<sup>119</sup> Additionally, the UN Human Rights Committee (HRC) in its general comment on the right to life has highlighted that no manifestation of religion or belief ought to propagate war, or incite national, religious, or racial hatred, discrimination, or violence.<sup>120</sup> It further added that states must take special measures of protection towards persons, whose lives have been placed at particular risk because of pre-existing patterns of violence, including sexual and gender minorities.<sup>121</sup>

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<sup>115</sup> Human Rights Watch “‘No Choice but to Deny Who I Am’ Violence and Discrimination against LGBT people in Ghana” (2018).

<sup>116</sup> B Ezeamalu ‘Pastors, activists debate gay rights in Nigeria’ (*Premium Times*, 2 September 2018) <<https://www.premiumtimesng.com/entertainment/naija-fashion/282248-pastors-activists-debate-gay-rights-in-nigeria.html?tztc=1>> Accessed 25 August 2023.

<sup>117</sup> ‘Ethiopian church leaders push gay ‘conversion therapy’’ (*Monitor*, 6 September 2019) <<https://www.monitor.co.ug/uganda/news/world/ethiopian-church-leaders-push-gay-conversion-therapy--1846410> > Accessed 25 August 2023.

<sup>118</sup> J Onyango ‘Gay therapy church claims homosexuality can be cured through prayers and 3 days of starvation’ (*Tuko*, May 2018) <<https://www.tuko.co.ke/249487-gay-therapy-church-claims-homosexuality-cured-prayers-3daysstarvation.html#249487> > Accessed 25 August 2023.

<sup>119</sup> J Mayamba ‘African LGBTQ+ communities battling harms of dangerous conversion therapy’ (*Global Campus of Human Rights*, 5 October 2023) <[https://gchumanrights.org/gc-preparedness/preparedness-gender/article-detail/african-lgbtq-communitiesbattlingharmsdangerousconversiontherapy.html?fbclid=PA\\_AaZt5gwCp5v2qN6DtHjXzy2wZ1CoLIYH6kFZi pEjIU7tgeDA\\_IQgxBJwKU](https://gchumanrights.org/gc-preparedness/preparedness-gender/article-detail/african-lgbtq-communitiesbattlingharmsdangerousconversiontherapy.html?fbclid=PA_AaZt5gwCp5v2qN6DtHjXzy2wZ1CoLIYH6kFZi pEjIU7tgeDA_IQgxBJwKU) > Accessed 6 October 2023.

<sup>120</sup> CCPR/C/GC/36 General comment No. 36 (2018) on article 6 of the ICCPR, on the right to life, para. 23.

<sup>121</sup> (n 120).

## 2.5 Conclusion

Africa is witnessing the emergence of religiously sanctioned oppression against sexual and gender minorities as a new chapter in its religio-political evolution.<sup>122</sup> Advocates for sexual and gender minority rights emphasise the importance of separating religious beliefs from human rights, promoting equality and non-discrimination of all individuals, regardless of sexual orientation and gender identity. Contrariwise, opponents often cite religious freedom as a rationale to resist changes that they perceive as challenging their deeply held beliefs. Besides, actions contrary to sexual and gender minority rights are not inherently rooted in religion but rather in the deliberate manipulation of conservative religious narratives to justify oppression and discrimination. Therefore, the concept that religion can hinder rather than liberate has gained significant influence. In light of this situation, it is easy to perceive conservative religious leaders as contributors to what is described as the ‘queerphobia spectacle’ being witnessed across Africa today.

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<sup>122</sup> K Kaoma ‘Beyond Adam and Eve: Jesus, sexual minorities and sexual politics in the church in Africa’ (2015) 153 *Journal of Theology for Southern Africa* 7–28.

## CHAPTER THREE

# NAVIGATING THE INTERSECTION BETWEEN HUMAN RIGHTS AND RELIGIOUS-BASED POLITICISATION OF SEXUAL AND GENDER MINORITIES IN AFRICA

### 3.1 Introduction

Africa continues to witness a troubling surge in court cases, constitutional amendments, proposed and adopted legislation, and ‘rights talk’, weaponizing laws against sexual and gender minorities to advance political discourse.<sup>123</sup> This makes the legal and political landscape regarding equality of sexual and gender minorities as full-fledged citizens with sexual rights increasingly hostile. However, the private sphere of individuals is emerging as a crucial arena, where sexual preferences is regarded as inviolable human rights, applicable to all individuals regardless of their sexual orientation and gender identity. These demands stem from the aspiration of creating an inclusive society of respect and dignity. As this debate has become a focal point in political discourse, often hijacked by religious and anti-queer rhetoric, this chapter is a critical examination of the complex interplay between politics, religion, and human rights in Africa.

### 3.2 International human rights framework

At the core of the international human rights framework is the concept of universality, which asserts that human rights are not privileges but inherent entitlements, which states have an obligation to respect, protect and fulfil.<sup>124</sup> This principle is enshrined in various international instruments and first stated in Article 1 of the Universal Declaration of Human Rights (UDHR)<sup>125</sup> and Article 5 of the International Covenant on Civil and Political Rights (ICCPR).<sup>126</sup> While acknowledging the significance of cultural and religious backgrounds, the Vienna Declaration and Programme of Action underscores the duty of states to promote and protect all human rights and fundamental freedoms in the following terms:<sup>127</sup>

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<sup>123</sup> Jjuuko (n 7) 1.

<sup>124</sup> ‘Rule of Law and Human Rights’ available at < <https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/> >

<sup>125</sup> The UDHR, though not a binding human rights instrument, has attained the status of customary international law with respect to the principles of equality, non-discrimination and human dignity.

<sup>126</sup> Notably, most African states have ratified the ICCPR and its provisions are part of the inspiration the African Commission draws from in its promotion and protection mandate.

<sup>127</sup> Vienna Declaration and Programme of Action (1993) para 5.

All human rights are universal, indivisible, interdependent and interrelated. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

In accordance with Article 20(2) of the ICCPR, this commitment to universality requires vigilance to ensure that advocacy of hatred leading to discrimination, hostility, or violence is not tolerated. Besides, the international human rights landscape is constantly evolving, shaped by the political dynamics of inter-governmental organisations and the domestic legal realities of its member states.<sup>128</sup> This evolution is particularly evident in the realm of sexual and gender minority rights, which have seen gradual acceptance but also increased polarisation among member states. This transformation can be traced through key milestones, such as the United Nations Human Rights Council's (UN HRC) adoption of its first resolution on sexual orientation in June 2011.<sup>129</sup>

While there is no specific international treaty explicitly condemning discrimination based on sexual orientation and gender identity, international law and principles, including the Yogyakarta Principles<sup>130</sup> has laid the groundwork for the protection of sexual rights. For instance, in the landmark case of *Toonen v Australia*<sup>131</sup> the UN Human Rights Committee (UNHRC) stated that discrimination based on 'sex' in the ICCPR should be interpreted to include sexual orientation,<sup>132</sup> thereby widening the scope of prohibition of discrimination on grounds of 'sex' to include sexual orientation. Moreover, Articles 2(1) and 26 of the ICCPR enshrine the right to freedom from discrimination and equal protection under the law. Likewise, The UN Committee on Economic, Social and Cultural Rights also recognised that 'other status' in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) encompasses sexual orientation.<sup>133</sup>

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<sup>128</sup> F Viljoen 'Minority Sexual Orientation as a Challenge to the Harmonised Interpretation of International Human Rights Law' in C M Buckley, A Donald & P Leach *Towards Convergence in International Human Rights Law: approaches of regional and international systems* (2016) 158.

<sup>129</sup> A/HRC/RES/17/19 'Human Rights Council resolution - Human rights, sexual orientation and gender identity' (adopted 17 June 2011).

<sup>130</sup> 'Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity' available at <<https://icj2.wpenginepowered.com/wp-content/uploads/2012/08/Yogyakarta-Principles-publication-2007-eng.pdf>>

<sup>131</sup> *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) para 8.7.

<sup>132</sup> (n 131).

<sup>133</sup> General Comment No. 15 (2002) The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), para 13.

The right to privacy is another essential component, which plays a crucial role in decriminalising consensual same-sex acts and protecting individuals from invasive state interventions into their private sexual lives. Within the international human rights framework, Article 17(1) of the ICCPR stipulates that ‘no one shall be subjected to arbitrary or unlawful interference with his privacy’. This right safeguards sexual activity between consenting adults from unwarranted state interference<sup>134</sup> and reflected in Article 12 of the UDHR.

Moreover, freedom of expression, as articulated in Article 19 of the ICCPR, and freedom of peaceful assembly and association, as outlined in Article 21 of the ICCPR, are fundamental rights that sexual and gender minorities rely on to promote visibility, organise events, and advocate for legal and social change. The international human rights framework also provides advocates with tools for advocacy and accountability. For instance, advocates often engage with UN bodies such as the UN HRC and Special Procedures to raise awareness, report violations, and seek international backing on states that violate human rights.

In response to the rise of hate speech and discrimination, international initiatives like the Rabat Plan of Action 2012<sup>135</sup> and the UN Strategy and Plan of Action on Hate Speech<sup>136</sup> underscore the role of religious leaders and the need to protect human rights based on equality and non-discrimination of all individuals. These initiatives seek to strike a balance between freedom of speech and preventing hate speech from escalating into discrimination, hostility, and violence, which are prohibited under international law.

In view of the above, the international human rights framework is a dynamic and evolving system that plays a crucial role in advancing the rights of sexual and gender minorities. Through principles of universality, legal protections against discrimination, the right to privacy, freedom of expression and assembly, and international advocacy, it provides a normative basis for the recognition and protection of the rights of sexual and gender minorities in African states at global level. While challenges persist, the progress made within this framework reflects a growing commitment to upholding the principles of dignity, equality and non-discrimination for all, regardless of sexual orientation or gender identity.

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<sup>134</sup> See for instance *Ah Seek A.R.F. v The State of Mauritius* (2023) Supreme Court of Mauritius.

<sup>135</sup> ‘OHCHR and freedom of expression vs incitement to hatred: the Rabat Plan of Action’ Available at: <https://www.ohchr.org/en/freedom-of-expression> > Accessed 20 August 2023.

<sup>136</sup> ‘The UN Strategy and Plan of Action’ Available at: <https://www.un.org/en/hate-speech/un-strategy-and-plan-of-action-on-hate-speech> > Accessed 20 August 2023.



### 3.2.1 African human rights system

The African human rights system is primarily governed by the African Charter. The system as a whole incorporates various components such as the African Commission on Human and Peoples' Rights (African Commission), the African Court on Human and Peoples' Rights (The Court), the African Committee of Experts on the Rights and Welfare of the Child, and the African Charter on the Rights and Welfare of the Child. A distinguishing feature of the African Charter is its unique recognition of the rights of 'peoples' including the right to equality and the right to existence and self-determination.<sup>137</sup> Yet, many countries across the continent have poor reputations when it comes to sexual and gender minority rights.<sup>138</sup> More than 30 African countries still have anti-sodomy laws, within penalties including life imprisonment and death sentence.<sup>139</sup> Meanwhile, nineteen African nations never had anti-sodomy laws.<sup>140</sup>

Adopted in 1981, the African Charter does not contain any reference to sexual orientation. The African Charter instead underscores the principles of non-discrimination and equality before the law on various grounds. On its part, the African Commission has highlighted that articles 2 and 3, as well as articles 4 and 5, which guarantee respect for individuals' lives and the integrity of their persons while prohibiting torture and other forms of cruel, inhuman, or degrading treatment or punishment, protects sexual and gender minorities from violence.<sup>141</sup> Prior to this declaration, the African Commission had pointed out in *Zimbabwe Human Rights NGO Forum v. Zimbabwe* for the first time that the principle of non-discrimination under article 2 of the African Charter extends to 'sexual orientation'.<sup>142</sup>

Again, the African Commission in 2014 solidified its position with Resolution 275,<sup>143</sup> which called on states to create an enabling environment for human rights defenders, including those advocating for

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<sup>137</sup> F Viljoen 'Review of the African Commission on Human and Peoples' Rights' in C Heyns *Human Rights Law in Africa* (1997) 47.

<sup>138</sup> G Reid 'Progress and Setbacks on LGBT Rights in Africa — An Overview of the Last Year' (*Human Rights Watch*, 22 June 2022) <<https://www.hrw.org/news/2022/06/22/progress-and-setbacks-lgbt-rights-africa-overview-last-year> > Accessed 22 August 2023.

<sup>139</sup> International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) 'State-Sponsored Homophobia, A world survey of laws: Criminalisation, protection and recognition of same-sex love' (updated version - 2020) 23-31.

<sup>140</sup> International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) 'State-Sponsored Homophobia, A world survey of laws: Criminalisation, protection and recognition of same-sex love' (2015) 22.

<sup>141</sup> ACHPR/Res.275(LV)2014 'Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity' available at: <<https://achpr.au.int/en/adopted-resolutions/275-resolution-protection-against-violence-and-other-human-rights-violations> >

<sup>142</sup> Communication 245/02, *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) Para 169.

<sup>143</sup> (n 141).

sexual and gender minority rights, free from stigma, reprisals, or criminal prosecution. This resolution marked a historic recognition by the African Commission of the need to protect sexual and gender minorities from violence. In 2017, Resolution 376 adopted by the African Commission further explicitly recognised the added vulnerability of human rights defenders, emphasising the need for specific legislation to protect them.<sup>144</sup> More recently, the African Commission passed Resolution 552, titled ‘Resolution on the Advancement and Safeguarding of the Rights of Intersex Individuals in Africa’ reinforcing its responsibility to promote and safeguard human and peoples’ rights, with a particular focus on intersex people.<sup>145</sup>

Thus, the landscape of sexual and gender minority rights within the African human rights system is still teething. While challenges persist, significant legal developments within the human rights framework indicate a growing recognition of the importance of protecting sexual and gender minority rights from religious-based politicisation as discussed below.

### **3.3 The right to freedom of religion and beliefs and its interaction with the rights of sexual and gender minorities**

The concept of freedom of religion has a rich historical lineage.<sup>146</sup> In international law, this right finds expression in Article 18 of the UDHR, which proclaims that ‘everyone has the right to freedom of thought, conscience, and religion’. Further elaboration of this right and its limitations can be found in Article 18 of the ICCPR. Corresponding provisions are present in Article 8 of the African Charter. The common features across these human rights treaties include that individuals possess an absolute right to hold their personal religion, thoughts, and beliefs, which constitutes the internal dimension of religious freedom.<sup>147</sup> However, manifestation of these beliefs is not absolute and limitations on manifestations are permissible. The state cannot impose any religion upon individuals, and freedom of religion includes the right not to adhere to any religious belief.<sup>148</sup> Both the internal and external aspects of freedom of religion occasionally intersect with sexual and gender minority rights.

Highlighting this connection, the ICCPR, as a cornerstone of the international human rights framework stipulates that no manifestation of religion or belief should amount to ‘advocacy of national, racial or

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<sup>144</sup> Network of African National Human Rights Institutions (NANHRI) ‘A Guide for African National Human Rights Institutions for Implementing Resolution 275’ (2020).

<sup>145</sup> ACHPR/Res.552 (LXXIV) 2023 ‘Resolution on the Promotion and Protection of the Rights of Intersex Persons in Africa’ available at: <<https://achpr.au.int/en/adopted-resolutions/resolution-promotion-and-protection-rights-intersex-persons>>

<sup>146</sup> U Khaliq ‘Freedom of Religion and Belief in International Law: A Comparative Analysis’ in AM Emon, MS Ellis & B Glahn *Islamic Law and International Human Rights Law* (2012) 183-184.

<sup>147</sup> *Kokkinakis v. Greece*, application 14307/88, European Court of Human Right, judgment, 25 May 1993.

<sup>148</sup> (n 147).

religious hatred that constitutes incitement to discrimination, hostility or violence'.<sup>149</sup> This principle becomes evident when examining the concept of proportionality, as exemplified in the case of *Toonen v. Australia*,<sup>150</sup> and analogous national jurisprudence from South Africa and Kenya discussed below. Unrestricted manifestation of religious beliefs would entail the imposition of specific religious beliefs on others, infringing on their rights to belief (including the right not to believe), and the rights to privacy, equality, and dignity.<sup>151</sup> As articulated in Article 5 of the ICCPR, one person's rights cannot be employed to negate the rights of others. Also, as put forward by Ki-moon,<sup>152</sup>

'[I]et there be no confusion: where there is tension between cultural and religious attitudes and universal human rights, rights must carry the day.

While everyone possesses the right to freely express their religion, this right cannot be invoked to legitimise the use of laws against sexual and gender minorities as a weapon, as articulated in Principle 21 of the Yogyakarta Principles:<sup>153</sup>

Everyone has the right to freedom of thought, conscience and religion, regardless of sexual orientation or gender identity. These rights may not be invoked by the state to justify laws, policies or practices, which deny equal protection of the law, or discriminate, based on sexual orientation or identity.

Although the Yogyakarta Principles are not legally binding, they provide universal guidance and 'affirm binding international legal standards with which all states must comply'.<sup>154</sup> Until now, many nations have transgressed Principle 21 by using religion as a basis for their oppressive legislation against sexual and gender minorities, claiming that such restrictions are necessary 'to maintain public morals' contrary to international human rights law.<sup>155</sup>

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<sup>149</sup> CCPR General Comment No. 22: article 18 (Freedom of Thought, Conscience or Religion) (1993).

<sup>150</sup> (n 131).

<sup>151</sup> Human Dignity Trust 'Criminalising Homosexuality and International Human Rights Law' (2015).

<sup>152</sup> 'The United Nations speaks out' (*OHCHR*, 2011) <[https://www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/LGBT\\_discrimination.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/LGBT_discrimination.pdf)> Accessed 23 September 2023.

<sup>153</sup> (n 130) Principle 21.

<sup>154</sup> (n 130).

<sup>155</sup> 'UN experts urge religious leaders to show respect and compassion for LGBT persons' (*OHCHR*, 14 May 2021) <<https://www.ohchr.org/en/press-releases/2021/05/un-experts-urge-religious-leaders-show-respect-and-compassion-lgbt-persons>> Accessed 19 September 2023.

### ***3.3.1 Religion and proportionality in the context of sexual and gender minority rights***

Within the realm of international human rights law, the question of whether religious beliefs should influence a state's ability to employ legislation against sexual and gender minorities becomes evident. The response to this question is unequivocal: the right to freedom of religion must be upheld, but it should never be invoked to justify the criminalisation of same-sex relationships or the infliction of harm upon sexual and gender minorities. Yet, religion is still cited today as a rationale for retaining laws perpetuating discrimination based on sexual orientation and gender identity.<sup>156</sup> Court rulings and statements concerning the principles of proportionality can be categorised into two primary groups: first, those in which sexual and gender minorities have asserted their right to privacy and equality, and the state has attempted to justify the infringement of these rights on religious or moral grounds. Second, cases in which individuals have claimed that their rights to religious freedom were violated, some of which intersect with the rights of sexual and gender minorities, illuminate how human rights law defines the boundaries of religious freedom. These cases as illustrated in the next section reveal the extent to which religious beliefs influence the public sphere and shed light on the interplay between religious convictions and potentially competing rights.

### ***3.3.2 National jurisprudence of selected African countries***

This section delves into the realm of human rights law obligations assumed by states concerning the treatment of individuals within their borders, particularly focusing on the safeguarding of religious rights and sexual and gender minority rights.

First, in 1998, a landmark ruling emerged from the Constitutional Court of South Africa in the case of *National Coalition for Gay and Lesbian Equality v. Minister of Justice*. The Court found the criminalisation of sodomy laws to be inconsistent with the constitutional principles of equality, dignity, and privacy. In this landmark decision, the court made a critical distinction between an individual's right to hold religious beliefs and the state's authority to impose those beliefs upon society as a whole. The Court pointed out that<sup>157</sup>

Such [religious] views, however honestly and sincerely held, cannot influence what the Constitution dictates concerning discrimination on the grounds of sexual orientation. Yet, while the Constitution protects the right of people to continue with such beliefs, it does not allow the state to turn these beliefs even in moderate or gentle versions into dogma imposed on the whole of society. The constitutional

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<sup>156</sup> A/HRC/28/66 'Report of the Special Rapporteur on freedom of religion or belief' (2014).

<sup>157</sup> *National Coalition for Gay and Lesbian Equality v The Minister of Justice* 1998 para 38 (CC).

protection of dignity requires us to recognize the value and worth of all individuals as members of our society. Just as apartheid legislation put the lives of couples of different racial groups in constant jeopardy, the sodomy offence instils insecurity and vulnerability into the daily lives of gay men. There can be no doubt that a law punishing a form of sexual expression for gay men degrades and devalues them in our broader society.

In the same case, Justice Ackermann stated,<sup>158</sup>

The enforcement of the private moral views of a section of the community, largely based on nothing more than prejudice, cannot qualify as a legitimate purpose. Therefore, in the proportionality assessment, there is no counterbalance to the extent of the limitation and its harmful impact on gays. It appears that there is no justification for the limitation.

In 2008, the Equality Court of South Africa determined the case of *Strydom v. Nederduitse Gereformeerde Gemeente Moreleta Park*,<sup>159</sup> where a religious school contended that its constitutional right to freedom of religion took precedence over anti-discrimination laws, justifying the termination of a gay music teacher's employment. The Court distinguished between the right to hold religious views hostile to same-sex relationships, which the Constitution protected, and the right to apply these beliefs in employment practices, which it did not.<sup>160</sup> By drawing a distinction between 'external' and 'internal' freedom of religion, the Court ruled that the school had discriminated against the teacher based on sexual orientation on when it terminated the employment contract.

In 2015, the High Court of Kenya took a similar position when in *Gitari v NGO Board & 4 others* it ruled that the national Non-Governmental Organisation (NGO) board violated the rights to freedom of association when it denied the registration of an organisation working on the promotion of the rights of sexual and gender minorities in Kenya. Applying the proportionality test, the Court affirmed that religious beliefs could not serve as a valid justification for curtailing sexual and gender minority rights and that,<sup>161</sup>

The Board and the Attorney General rely on their moral convictions and what they postulate to be the moral convictions of most Kenyans. They also rely on verses from the Bible, the Quran and various studies which they submit have been undertaken regarding homosexuality. We must emphasise, however, that no matter how strongly held moral and religious beliefs may be, they cannot be a basis for

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<sup>158</sup> (n 157) para 37.

<sup>159</sup> *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2008 (EC).

<sup>160</sup> (n 159) 30 ILJ 868.

<sup>161</sup> *Gitari v NGO Board & 4 others* (2015) Petition 440 of 2013 High Court of Kenya.

limiting rights: they are not laws as contemplated by the Constitution. Thus, neither the Penal Code nor the religious tenets that the Board cites, meet the constitutional test for limitation of rights.

In highlighting this connection, this has been confirmed by the Supreme Court of Kenya in the case of *G P Kaluma v NGO & Others*<sup>162</sup> reaffirming Kenya's constitutional principles that guarantee freedom of association and freedom from discrimination.

### **3.4 Faith and politicisation: Unpacking the power of religion on sexual and gender minority rights**

In numerous African nations, the practice of scapegoating sexual and gender minorities has become a favoured strategy employed by ultra-conservative and nationalist politicians who masquerade as champions of religious values to consolidate their support base and maintain political power. As a result, the oppression against sexual and gender minorities movements in political discourse has steadily grown through well-organised, transnational, and well-funded entities, which include religious extremists and ultra-conservative political leaders. These have infiltrated parliamentary proceedings to support anti-queer legislation such as the Anti-Homosexuality Act (2023) in Uganda and introduction of the 'Proper Human Sexuality Bill' (2021) in Ghana as discuss in the sub-sections.

#### ***3.4.1: Evangelicalism and the Anti-Homosexuality Act of Uganda***

In the contemporary postcolonial milieu, history repeats itself through a recurring historical pattern. Modern imperialist forces and well-funded entities, exemplified by United States (U.S) evangelical entities like Family Watch International<sup>163</sup> employ comparable strategies through a global campaign framework. They strategically focus on sexual and gender minority issues to subvert equal rights and exert influence over political leaders. Among African nations, Uganda has prominently engaged in a two-decade long process of utilising lawfare as a means to either advance or obstruct sexual and gender minority rights.<sup>164</sup> It is paramount to recognise the substantial impact of U.S conservative evangelicals in this lawfare, characterised by the dissemination of misinformation, the utilisation of deceptive tactics, and the promotion of pseudo-scientific research on Africa's sexual politics.<sup>165</sup>

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<sup>162</sup> *GP Kaluma v NGO & Others* (2023) SC Application No. E011 of 2023 (Supreme Court of Kenya).

<sup>163</sup> 'Family Watch International' <<https://www.splcenter.org/fighting-hate/extremist-files/group/family-watch-international> > Accessed 20 August 2023.

<sup>164</sup> A Jjuuko & S Nyanzi 'Court focused lawfare over LGBT rights: The case of Uganda' in A Jjuuko and others *Queer lawfare in Africa: Legal strategies in contexts of LGBTQ+ criminalisation and politicisation* (2022) 145.

<sup>165</sup> C Okereke 'How U.S. Evangelicals Helped Homophobia Flourish in Africa' (*Foreign Policy*, 19 March 2023) <[https://foreignpolicy.com/2023/03/19/africa-uganda-evangelicals-homophobia-antigay-bill/#cookie\\_message\\_anchor](https://foreignpolicy.com/2023/03/19/africa-uganda-evangelicals-homophobia-antigay-bill/#cookie_message_anchor) > Accessed 22 August 2023.

Prior to moving to the Anti-Homosexuality Act (2023), it is important to note that the declaration of Uganda as a British Protectorate in 1894 marked the introduction of morality laws into Uganda's legal framework. These laws aimed to promote socially acceptable behaviour, including regulating sexual rights and establishing rules of social conduct. One prominent aspect of these morality laws can be found in Section 145 of the Ugandan Penal Code, as amended in 2000, which prescribes life imprisonment for anyone who 'has carnal knowledge of any person against the order of nature'.

In May 2023, Uganda enacted the Anti-Homosexuality Act (2023), which includes the death penalty for 'aggravated homosexuality'.<sup>166</sup> This category encompasses sexual acts involving individuals under 18 or those involving a human immunodeficiency virus (HIV)-positive person. Furthermore, the Act<sup>167</sup> imposes a 20-year prison sentence targeting activities such as persuasion, advertising, financing, providing spaces, or operating organisations that are perceived as 'promoting homosexuality'. One of the most significant aspects of this legislation<sup>168</sup> is section 14, which imposes a 'duty to report acts of homosexuality'. This duty obliges individuals to report any 'reasonable suspicion that a person has committed or intends to commit' acts of homosexuality or any other offenses defined by the law.

Dubbed the 'Pearl of Africa', Uganda has often been targeted by religious missionaries who sought to propagate their traditional family and moral values, often stoking hatred and violence against sexual and gender minorities.<sup>169</sup> In view of the adoption of this Act, it is argued that it is a result of the U.S evangelicals setbacks in their domestic pursuits, such as the 2015 U.S Supreme Court decision confirming constitutional protection of same-sex marriage and the ordination of female and queer bishops.<sup>170</sup> Hence, they shifted their attention to Africa, viewing it as a more conducive arena for their religious extremist influence.<sup>171</sup> Particularly, these religious missionaries redirected their efforts towards Uganda, perceiving it as fertile ground for their anti-queer ideology due to its predominantly conservative Christian population and youthful demographic. Prominent evangelical missionaries, such as Scott Lively, are known to 'whisper in the ears of Ugandan political leaders, and preach to the

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<sup>166</sup> 'The Anti-Homosexuality Act 2023', Republic of Uganda, available at: <https://www.parliament.go.ug/sites/default/files/The%20Anti-Homosexuality%20Act%2C%202023.pdf>

<sup>167</sup> (n 166).

<sup>168</sup> (n 166).

<sup>169</sup> KJ Kaoma 'The paradox and tension of moral claims: Evangelical Christianity, the politicization and globalization of sexual politics in sub-Saharan Africa' (2014) 2(3) *Critical Research on Religion* 227-232.

<sup>170</sup> E Sanderson 'The Unholy Relationship between Uganda's Anti-LGBTQ+ Law and US Evangelicalism' (*Global Affairs*, 8 June 2023) <<https://globalaffairs.org/commentary-and-analysis/blogs/unholy-relationship-between-ugandas-anti-lgbtq-law-and-us>> Accessed 22 August 2023.

<sup>171</sup> (n 170).

common people that U.S does not work because it allows sexual and gender minorities to live freely'.<sup>172</sup>  
As highlighted by Kaoma,<sup>173</sup>

Homosexuality remained illegal in Uganda under existing colonial laws, yet arrests and prosecutions based on these archaic laws were virtually non-existent. It was not a political issue until 2009 when a contingent of American evangelicals, led by Pastor Scott Lively, conducted a series of talks in Uganda.

From 2007 to 2020, American evangelical groups dedicated substantial financial resources to disseminate sentiments in Uganda and beyond to shape oppressive laws, policies, and public opinion against sexual and gender minorities.<sup>174</sup> Before the Anti-Homosexuality Act 2023, Uganda signed its first Anti-Homosexuality Act in 2014. However, less than a year later, the Constitutional Court in the case of *O Onyango & Ors v Attorney General*<sup>175</sup> invalidated the law on technical grounds. At that time, the director of *God Loves Uganda*<sup>176</sup> underscored that,<sup>177</sup>

The Anti-Homosexuality bill would never have come about without the involvement of American fundamentalist evangelicals; and further expounds in the documentary on how the post-Idi Amin era left Uganda as a 'green pasture' ripe of which American evangelical Christians took advantage of modern-day mass conversions to Christianity by American evangelical Christians.

Today, the Anti-Homosexuality Act 2023 poses a severe threat to the already marginalised sexual and gender minorities in the country.<sup>178</sup> The implementation of this law represents a significant infringement on fundamental human rights, including the rights to freedom of expression, association, privacy, equality, and non-discrimination.<sup>179</sup> It stands in direct contradiction to the Constitution of Uganda, as well as the regional and international human rights instruments to which Uganda is a signatory.<sup>180</sup> This

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<sup>172</sup> V Kalende 'Africa: homophobia is a legacy of colonialism' (*The Guardian*, 30 April 2014) <<https://www.theguardian.com/world/2014/apr/30/africa-homophobia-legacy-colonialism>> Accessed 19 September 2023.

<sup>173</sup> T Walker 'How Uganda was seduced by anti-gay conservative evangelicals' (*The Independent*, 14 March 2014) <<https://www.independent.co.uk/news/world/africa/how-uganda-was-seduced-by-antigay-conservative-evangelicals-9193593.html>> Accessed 19 September 2023.

<sup>174</sup> L Namubiru & KS Wepukhulu 'Exclusive: US Christian Right pours more than \$50m into Africa' (*Open Democracy*, 29 October 2020) <<https://www.opendemocracy.net/en/5050/africa-us-christian-right-50m/>> Accessed 22 August 2023.

<sup>175</sup> *O Onyango & Ors v Attorney General* (Constitutional Petition No 8 of 2014) Constitutional Court of Uganda.

<sup>176</sup> RR Williams 'God Loves Uganda' (*Independent Lens*, 19 May 2014) <<https://www.pbs.org/independentlens/documentaries/god-loves-uganda/>> Accessed 20 August 2023.

<sup>177</sup> Walker (n 173).

<sup>178</sup> A Budoo-Scholtz 'Uganda's President Signs Repressive Anti-LGBT Law' (*Human Rights Watch*, 30 May 2023) <<https://www.hrw.org/news/2023/05/30/ugandas-president-signs-repressive-anti-lgbt-law>> Accessed 22 August 2023.

<sup>179</sup> Budoo-Scholtz (n 178).

<sup>180</sup> Budoo-Scholtz (n 178).



legislation is the latest in a series of setbacks for basic human rights in Uganda and is closely linked to American evangelicals who have endeavoured to export their culture wars concerning sexual and gender minorities to various African nations, with Uganda serving as a focal point of their efforts.<sup>181</sup>

Nonetheless, this does not imply that leaders from different religious denominations remain uninvolved. It appeared that leaders of the Anglican Church of Uganda were initially cautious about supporting the Anti-Homosexuality Bill in 2009<sup>182</sup> but openly endorsed the 2023 Bill. Therefore, it can be observed that due to evangelicalism longstanding advocacy on issues related to sexual and gender minorities, leaders from other denominations have found it increasingly challenging not to align with the wave of religio-political discrimination. Highlighting this connection in the words of Jones,<sup>183</sup>

In colonial and post-colonial Uganda, organised religion has [always] played a critical role in national politics (...) [The only difference now is that] religious institutions appear more significantly in the present than in the past.

With ‘religious values’ serving as a substantial foundation for Anti-Homosexuality sentiments and legislation across the continent, it is evident that the discrimination of one group is being justified under the guise of safeguarding the religious beliefs of another. This not only contravenes Principle 21 of the Yogyakarta Principles but also Article 18(3) of the ICCPR, which permits limitations on the right to freedom of thought, conscience, and religion when necessary ‘to protect public safety, order, health, or morals or the fundamental rights and freedoms of others’.

### ***3.4.2 Religion and the Anti-Homosexuality Bill of Ghana***

In 2016, Ghana showed signs of tolerance when its ambassador to the UN affirmed at the UN HRC that ‘Ghana’s Constitution prohibits discrimination of all kinds’ and he did not oppose the appointment of the IE SOGI.<sup>184</sup> However, heightened tensions against sexual and gender minorities have been reported since 2019, when the World Congress of Families (WCF), a U.S based religious extremist group known

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<sup>181</sup> Sanderson (n 170).

<sup>182</sup> L Ford & E Pomfret ‘Ugandan church leader brands anti-gay bill ‘genocide’ (*The Guardian*, 4 December 2009) <<https://www.theguardian.com/katine/2009/dec/04/gideon-byamugisha-homosexuality-bill>> Accessed 3 October 2023.

<sup>183</sup> B Jones ‘The church in the village, the village in the church: Pentecostalism in Teso, Uganda’ (2005) 45(2) *Cahiers d’Études africaines* 497-517.

<sup>184</sup> K Adomako ‘Is it time for the Government of Ghana to invite the Independent Expert on Sexual Orientation and Gender Identity for an official ‘country visit’?’ (*Modern Ghana*, 31 July 2019) <<https://www.modernghana.com/news/948017/is-it-time-for-the-government-of-ghana-to-invite-the-indepen.html>> Accessed 19 September 2023.

for its anti-queer rhetoric stance, organised a conference in Accra.<sup>185</sup> This conference attracted influential Ghanaian political and religious leaders, including key proponents of the 2021 ‘Promotion of Proper Human Sexual Rights and Ghanaian Family Values’ Bill.<sup>186</sup> These individuals not only had close ties with the WCF but also with other religious fundamentalist groups like Citizen Go and the Forum of Christian Leaders.<sup>187</sup>

It is to be recalled that in February 2017, the then Speaker of Parliament, Mike Oquaye, declared that Ghana would not legalise same-sex relationships or same-sex marriage,<sup>188</sup> citing personal Christian beliefs as a matter of principle.<sup>189</sup> This statement also conflates the decriminalisation of same-sex conduct with the legalisation of same-sex marriage, despite the absence of any significant movement advocating for same-sex marriage equality in Ghana.<sup>190</sup> The situation further escalated during the COVID-19 pandemic when a newly established resource centre was set up to provide a safe space for sexual and gender minorities. Due to public and political pressure, law enforcement authorities forcibly closed this down.<sup>191</sup> Accordingly, a coalition of conservative religious leaders and anti-queer activists known as the ‘Coalition for Proper Human Sexual Rights and Family Values’, who had been advocating for such measures since 2018, renewed their efforts in March 2021.<sup>192</sup> Then in June 2021, eight MPs introduced the ‘Promotion of Proper Human Sexual Rights and Ghanaian Family Values’ Bill as a Private Members Bill.<sup>193</sup>

Of note, section 104(1)(a) of Ghana’s Penal Code (1960) criminalises ‘sexual intercourse with a person in an unnatural manner’ of sixteen years or over with his consent, and considered a misdemeanour and carries a maximum penalty of three years imprisonment. In addition, Section 278 criminalises acts of ‘gross Indecency’ in public. The ‘Promotion of Proper Human Sexual Rights and Ghanaian Family

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<sup>185</sup> R Samanga ‘The World Congress of Families is Expanding its Homophobic Agenda into West Africa’ (*Okay Africa*, 7 November 2019) <<https://www.okayafrica.com/world-congress-of-families-holds-antilgbt-conference-in-ghana> > Accessed 29 August 2023.

<sup>186</sup> OutRight Action International “‘We deserve protection’ Anti-LGBTIQ Legislation and Violence in Ghana’ (2022) 9-15.

<sup>187</sup> (n 186).

<sup>188</sup> (n 186).

<sup>189</sup> ‘Stop tempting African leaders to legalize homosexuality - Speaker of Parliament’ (*Ghana Web*) Available at: <https://content.jwplatform.com/previews/CdD9JzDB>.

<sup>190</sup> (n 186).

<sup>191</sup> “‘LGBTQI office in Ghana’ cause strong division among citizens’ (*BBC News*, 23 February 2021) <<https://www.bbc.com/pidgin/tori-56146389> > Accessed 19 September 2023.

<sup>192</sup> ‘Bill to criminalise homosexuality coming soon - Foh Amoaning’ (*Ghana Web*, 29 May 2018) <<https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Bill-to-criminalise-homosexuality-coming-soon-Foh-Amoaning-655883> > Accessed 19 September 2023.

<sup>193</sup> (n 186) 16-25.

Values' Bill attempts to build on these colonial era law which was inherited from British colonial administrators. Its core premise is that same-sex relationships are inconsistent with the religious beliefs of Ghanaians. Even though the Bill purports to regulate so-called sexual behaviour, it is an overkill of legislation, as it seeks to restrict free speech and academic freedom, legalise the illegal act of conversion therapy, turn family members against each other and create a police state.<sup>194</sup>

The Bill's sweeping provisions encompass all individuals, activities, and organisations related to "LGBTQIAAP+" activities, which includes Lesbian, Gay, Bisexual, Transgender, Transsexual, Queer, Questioning, Intersex, Ally, Asexual, Pansexual, and any other sociocultural concepts of sex and sexual relationships that deviate from the conventional notion of male and female assigned at birth.<sup>195</sup> Sam George, one of the eight MPs sponsoring the Bill, referred to it as a 'world-class piece of legislation', asserting that being a sexual and gender minority is a lifestyle choice rather than a human right.<sup>196</sup> He further added that '[m]ay we unite in this fight against the scourge and perversion that homosexuality presents. So help us God'.<sup>197</sup> The Speaker of Parliament, Alban Bagbin, went further to describe sexual and gender minority activities as more detrimental than COVID-19, emphasising that 'good will always triumph over evil'.<sup>198</sup> These statements demonstrates the way in which African postcolonial leaders, in the words of Mbembe, are 'riding the phallus'.<sup>199</sup>

Thus far, President Akufo-Addo is perceived by many, including members of his own political party as sympathetic to sexual and gender minorities.<sup>200</sup> This perception emerged following an interview with Al-Jazeera in October 2019, where he suggested that 'if there was sufficient public support, decriminalisation of same-sex practices in Ghana could be considered'.<sup>201</sup> However, the President faced significant backlash from political, religious, and traditional leaders who accused him of sympathising with sexual and gender minority rights. Consequently, he retreated from his previous statements, assuring Ghanaians that he did not intend to decriminalise same-sex acts.<sup>202</sup> Yet in 2023, during the

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<sup>194</sup> AFR 28/4677/2021 'Ghana: Anti-LGBTI bill stirs up hatred, persecution and discrimination' (*Amnesty International*, 6 September 2021) < <https://www.amnesty.org/en/documents/afr28/4677/2021/en/> > Accessed 19 October 2023.

<sup>195</sup> 'Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021' clauses 1&2 available at: <https://cdn.modernghana.com/files/722202192224-0h830n4ayt-lgbt-bill.pdf>

<sup>196</sup> (n 192).

<sup>197</sup> N Bhalla 'Ghana MPs plan law criminalising promotion of LGBT+ rights' (*Reuters*, 9 March 2021) < <https://www.reuters.com/article/us-ghana-lgbt-rights-idUSKBN2B1201> > Accessed 5 October 2023.

<sup>198</sup> (n 192).

<sup>199</sup> A Mbembe 'Out of the Dark Night' (2021) *Columbia University Press* 190.

<sup>200</sup> EY Ako & A Odoi 'LGBTIQ+ lawfare in response to the politicisation of homosexuality in Ghana' in A Jjuuko and others *Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation and politicisation* (2022) 283.

<sup>201</sup> Ako & Odoi (n 200).

<sup>202</sup> Ako & Odoi (n 200).

visit of U.S Vice President Harris who stated that supporting sexual and gender minority rights is a human rights issue, the President distanced himself from the Bill, saying it is ‘not an official legislation of the government’.<sup>203</sup>

It is clear from the above that conservative religious institutions have played a significant role in fuelling anti-queer sentiments during discussions of the Bill.<sup>204</sup> Evidently the political valence of religious notions of sexuality and gender which serves as a multifaceted strategy that encompasses political survival, religious alignment, and the exploitation of public sentiment for political gains continue to impede advances to the enjoyment of human rights by sexual and gender minorities.

### 3.5 Conclusion

Through an examination of the human rights legal frameworks, it has become evident that the right to manifest one’s religion, when correctly interpreted, does not encompass the dissemination of discriminatory views targeting sexual and gender minorities. The case studies in this chapter illustrate how freedom of religion has often been utilised to counter the state’s responsibility to protect individual sexual sovereignty and personal self-determination. Even so, states, bears a positive obligation to intervene when purported religious expressions lead to the oppression of sexual and gender minorities. In search of potential strategies to address this complex interplay, the next chapter explores how decolonial and constitutional approaches may be utilised to protect sexual and gender minorities from religio-politicisation influence.

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<sup>203</sup> MR Kakumba ‘AD639: Uganda a continental extreme in rejection of people in same-sex relationships’ (*Afro barometer*, 11 May 2023) <<https://www.afrobarometer.org/publication/ad639-uganda-a-continental-extreme-in-rejection-of-people-in-same-sex-relationships/>> Accessed 29 August 2023.

<sup>204</sup> WF Mohammed ‘An anti-LGBTQI bill in Ghana is the outcome of institutionalized homophobia’ (*The Washington Post*, 8 September 2021) <<https://www.washingtonpost.com/outlook/2021/09/08/an-anti-lgbtq-bill-ghana-is-outcome-institutionalized-homophobia/>> Accessed 29 August 2023.

## CHAPTER FOUR

### DECOLONIAL AND CONSTITUTIONAL APPROACHES IN A COMPLEX RELIGIO-POLITICAL LANDSCAPE

#### 4.1 Introduction

The perception of sexual and gender diversity as ‘deviant’ necessitating state and religious intervention hinge on the belief that all things deemed ‘natural’ hold intrinsic superiority, while the ‘unnatural’ is relegated to an inferior status. Through the decolonial and constitutional approach, this chapter delves into the complex interplay between religion and sexual and gender minorities, highlighting how it predominantly mirrors a historical legacy rooted in conservatism and colonialism and hence the potential strategies that states should adopt for a more inclusive, tolerant, and equal society.

#### 4.2 Decoding the state-religion relationship

Africa’s rich history of the interaction between state and religion has given rise to four primary models of engagement: the religious state, the state with an established religion, the anti-religious state, and the secular state.<sup>205</sup> When it comes to handling state-religion relations, African nations have often looked to these models for guidance.<sup>206</sup> In the first model, a religious state bases its laws, policies, and programs on the theological doctrines of a particular denomination.<sup>207</sup> Zambia stands as a rare example of a Christian religious state in Africa having declared so in its constitution. However, the majority of African states typically fall under the fourth model, classified as secular states.<sup>208</sup> According to Smith, a secular state is one that<sup>209</sup>

ensures individual and collective religious freedom, treats citizens impartially regardless of their religious beliefs, maintains no constitutional ties to any particular religion, and refrains from either promoting or interfering with religion.

African nations have drawn inspiration from these two models to navigate state-religion relationship, and when they fail to strike the right balance, conflicts arise.<sup>210</sup>

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<sup>205</sup> JO Ambani *Africa and the Decolonisation of State-Religion Policies* (2021) 2.

<sup>206</sup> Ambani (n 205).

<sup>207</sup> AT Kuru ‘Passive and Assertive Secularism: Historical Conditions, Ideological Struggles, and State Policies towards Religion’ (2007) 59(4) *World Politics* 570.

<sup>208</sup> TO Ranger ‘Religious Movements and Politics in Sub-Saharan Africa’ (1986) 29(2) *African Studies Review* 1-69.

<sup>209</sup> ED Smith *India as a Secular State* (1963) 4.

<sup>210</sup> Ambani (n 205).

As a case in point in this study, Uganda and Nigeria, which are both secular nations, are the lead in the enactment of laws that make same-sex practices illegal. Uganda was the pioneer in passing anti-homosexual legislation back in 2005,<sup>211</sup> while Nigeria's Same-Sex Marriage Prohibition Act (2014) stands out as one of the quickest and unanimously approved Bills in the country's parliament since the return to civilian governance in 1999.

Today, the resurgence of Christianity revivals, the rise of Islamic radicalism, and the strengthening of conservative religious convictions underscore that Africa is not moving in the direction of becoming a continent dominated by secular states.<sup>212</sup> Politicians who seek guidance from diviners, guerrilla fighters who place their religious beliefs in protective amulets against bullets, and ordinary individuals seeking ritual healing, demonstrate the pervasive application of religion to address everyday challenges and concerns, spanning all strata of society.<sup>213</sup>

#### **4.3 Constitutional approach to inclusivity, tolerance and human rights of sexual and gender minorities**

Over the years, shifts in social and religious perspectives have played a significant role in shaping the interpretation, and adjustment of colonial-era laws and policies concerning sexual rights. These evolving trends have led to diverse outcomes, with certain nations progressing by dismantling legal frameworks rooted in international human rights norms, particularly through the decriminalisation of sodomy laws. In contrast, some countries have taken a leading role in safeguarding human rights by embedding anti-discrimination safeguards based on sexual orientation or gender identity into their constitutions. Although in some countries sodomy laws might not be enforced, this state of perpetual apprehension effectively strips sexual and gender minorities of their constitutional entitlement to non-discrimination and equal protection under the law. Further, in numerous countries, there are indications of transnational influences on legal strategies employed by activists.<sup>214</sup>

A constitutional approach serves as a reminder that human rights are designed to ensure inclusivity and equality. In the contemporary context, both global and regional political forums, states and their representatives have adopted resolutions and issued statements recognising the imperative of safeguarding the rights of sexual and gender minorities. Concurrently as discussed below, on the domestic front, legal systems and Courts have embraced the rights of sexual and gender minorities by

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<sup>211</sup> 'Uganda Anti-Gay Timeline' Available at < <https://www.glad.org/wp-content/uploads/2014/05/uganda-timeline.pdf> >

<sup>212</sup> S Ellis & GT Haar *Worlds of Power: Religious Thought and Political Practice in Africa (Contemporary History of World Affairs)* (2004).

<sup>213</sup> Ellis & Haar (n 212).

<sup>214</sup> Jjuuko (n 7) 15.

declaring sodomy laws as unconstitutional, and have embedded anti-discrimination safeguards based on sexual orientation. But before that, in view of the argument based on African morality and the views of the majority, in the domestic jurisprudence of South African case *National Coalition for Gay and Lesbian Equality v. Minister of Justice*,<sup>215</sup> Justice Sachs expressed,<sup>216</sup>

As a ‘document founded on deep political morality, the Constitution does not ‘debar the State from enforcing morality.’ Issues such as (de)criminalising are therefore determined with reference to diversity, central to the spirit and values of the Constitution, and not by simply relying on societal prejudices. In terms of the values of the Constitution, those members of society who disagree with homosexual conduct are also ‘tolerated’ in their freedom to condemn and criticise.

Moving forward, in January 2021, Angola introduced a new Penal Code, marking a significant milestone since its decolonisation in 1975. This revision notably removed Articles 70 and 71(4) from the legal framework, which had long been associated with the prohibition of same-sex conduct under the label of ‘vices against nature’,<sup>217</sup> originally enacted during the Portuguese colonial era, dating back to 1886.<sup>218</sup> Of utmost importance, the updated Penal Code goes beyond mere removal and actively addresses discrimination, including on the basis of sexual orientation. Consequently, anyone found refusing to employ or provide services to individuals based on their sexual orientation may now face penalties of up to two years in prison.<sup>219</sup> By eliminating these antiquated provisions, Angola has unequivocally rejected discrimination and embraced the principles of equality, marking a definitive end to the lingering influence of Portuguese colonial-era laws in its legal system and Africa.<sup>220</sup>

In the same year, Benin’s Constitutional Court issued a landmark decision in the case of *Djoue, Padonou, Dossou & Public Prosecutor v Hounsinou*, handing down a twelve-month sentence, including six months of imprisonment, to a young man convicted of assaulting and subjecting a transgender woman to inhuman and degrading treatment.<sup>221</sup> It is important to note that throughout the Court proceedings, the Constitutional Court addressed the victim in her preferred name ‘Nina’ for protective

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<sup>215</sup> (n 157).

<sup>216</sup> (n 157) para 137.

<sup>217</sup> ‘Angola joins growing list of countries eradicating ‘out-dated’ sexual offences laws’ (*Human Dignity Trust*, 24 January 2019) <<https://www.humandignitytrust.org/news/angola-joins-growing-list-of-countries-eradicating-out-dated-sexual-offences-laws/>> Accessed 24 September 2023.

<sup>218</sup> (n 217).

<sup>219</sup> G Reid ‘Angola Decriminalizes Same-Sex Conduct’ (*Human Rights Watch*, 23 January 2019) <<https://www.hrw.org/news/2019/01/24/angola-decriminalizes-same-sex-conduct>> Accessed 24 September 2023.

<sup>220</sup> (n 217).

<sup>221</sup> *Djoue, Padonou, Dossou & Public Prosecutor v Hounsinou* (2021) judgment 370-1FD-21 (Constitutional Court of Benin).

measures and giving comfort to the latter. The case revealed that the victim experienced discrimination based on her sexual orientation, enduring an attempted sexual assault by a group of men, followed by public humiliation. She suffered physical violence resulting in bodily harm and psychological distress, all of which were filmed and circulated on social media. The Court determined that these actions constituted violations of Articles 15 and 18 of its Constitution, including Article 2, 4, 5, and 12(1) of the African Charter, along with Articles 2, 3, 4, and 5 of the protocol to the African Charter on the Rights of Women in Africa.<sup>222</sup> This judgment made history in the Economic Community of West African States (ECOWAS), being the first significant landmark judgment in the protection of sexual and gender minority rights.

Last but not the least, hot off the bench are the two landmark judgments from the Supreme Court of Mauritius in the cases of *Fokeerbux N. A. & Ors v The State of Mauritius*<sup>223</sup> and *Ah Seek A.R.F. v The State of Mauritius*.<sup>224</sup> Of particular note, in these two judgments, the Supreme Court extensively referenced international and foreign jurisprudence to address constitutional deficiencies. The Supreme Court took a firm stance, recognising that the prohibition of private same-sex relationships is a colonial relic, pointing to the antiquated provisions of Section 250(1) of the 1838 Mauritius Criminal Code. The Court pointed out that said the law did not ‘reflect any indigenous Mauritian values but was inherited as part of our colonial history from Britain’. The Court also adopted a scientific perspective, drawing from the Supreme Court of India’s decision in *Navtej Singh Johar & Ors v Union of India*,<sup>225</sup> affirming that homosexuality is not a wrongful practice but rather a ‘variant of sexual practice’. The Court remarkably rejected the argument of cultural motives for infringing upon sexual rights, emphasising that Mauritius is a secular state and that freedom of religion and thought is safeguarded by section 11 of its 1968 Constitution.<sup>226</sup>

From the above, it is clear that judicial bodies have established evolving legal precedents affirming the constitutional rights of sexual and gender minorities, regardless of social morality debates. Most remarkable is that the two landmark judgments<sup>227</sup> from the Supreme Court of Mauritius arrives amidst a backdrop of increasing oppression and stringent repressive legislation against sexual and gender minorities in certain African nations today. These reinterpretations uphold the constitutional rights of all citizens, irrespective of sexual orientation or gender identity, aligning with the idea of transformative

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<sup>222</sup> (n 221).

<sup>223</sup> *Fokeerbux N. A. & Ors v The State of Mauritius* (2023) Supreme Court of Mauritius.

<sup>224</sup> *Ah Seek A.R.F. v The State of Mauritius* (2023) Supreme Court of Mauritius.

<sup>225</sup> *Navtej Singh Johar & Ors v. Union of India* (petition 76 of 2016) (2018) Supreme Court of India.

<sup>226</sup> (n 223).

<sup>227</sup> (n 222 & n 223).



Constitutionalism,<sup>228</sup> which prioritise constitutional morality over societal norms.<sup>229</sup> In fact, the weight of sexual taboo is without doubt the most insurmountable even at the discursive level. Therefore, upholding equality, dignity, and liberty for sexual and gender minorities requires rejecting majority-driven notions of morality.

In the same line of thought, there is an ongoing debate surrounding the application of international law in certain states concerning the implementation of international treaties in domestic courts. As noted by Killander and Adjolahoun,<sup>230</sup> courts with dualist traditions in Africa use international law to vindicate the rights of citizens. Besides, Courts also fulfil their duty by interpreting the constitution purposively, in manner that upholds rather than in breach of ratified treaties. Yet, they often fail to do so due to religious and social morality. Thereupon, Courts must boldly use jurisprudence from human rights treaty bodies, including judgments and observations, to fully realise the Bill of Rights and uphold human rights for all individuals as part of the potential strategies to achieve a more inclusive society irrespective of one's sexual orientation and gender identity.

#### **4.4 Decolonial approach: Documenting pre-colonial African societies on sexual and gender minorities**

Decolonial theory asserts that the influence of colonialism endures even after gaining independence.<sup>231</sup> Hence, one facet of dismantling oppression and discrimination rooted based on sexual orientation and gender identity involves comprehending and mitigating the consequences of colonial processes. Mutua elucidates the process through which African traditions underwent delegitimisation due to the emergence of a novel socio-political and religious framework:<sup>232</sup>

Africa, from top to bottom was remade in the image of Europe complete with Eurocentric modern states. Christianity played a crucial role in this process: weaning Africans from their roots and pacifying them for the new order. Utilising superior resources, it occupied most political space and practically killed local religious traditions...Islam, which had invaded Africa at an earlier date, was equally insidious and destructive of local religions. Its forceful conversions and wars of conquest, together with its prohibition

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<sup>228</sup> E Kibet & C Fombad 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 *African Human Rights Law Journal* 340-366.

<sup>229</sup> A Banerjee 'Transformative Constitutionalism: Indian Supreme Court Upholds Constitutional Morality by Reading Down Section 377' (*Oxford Human Rights Hub*, 28 September 2018) < <https://ohrh.law.ox.ac.uk/transformational-constitutionalism-indian-supreme-court-upholds-constitutional-morality-by-reading-down-section-377/> > Accessed 10 October 2023.

<sup>230</sup> M Killander & H Adjolahoun 'International law and domestic human rights litigation in Africa: an introduction' in *M Killander (ed) International law and domestic human rights litigation in Africa* (2010) 4.

<sup>231</sup> T Na'puti 'Rhetorical Contexts of Colonization and Decolonization' (2020) *Oxford Research Encyclopedia of Communication*.

<sup>232</sup> M Mutua *Human rights: A political and cultural critique* (2002) 109-110.

of its repudiation, were violative of the rights of Africans as well ... Progress, culture and humanity were identified entirely in Islamic or Christian terms, never with reference to indigenous traditions.

Today, numerous states still strongly assert that sexual and gender minority identities are foreign influences that challenge the established socio-religious norms within the continent. Likewise, engaging in same-sex relationships is viewed as a behaviour acquired by individuals who have travelled abroad and been exposed to people from Western nations or because of encounters with foreign sex tourists in Africa.<sup>233</sup> These perceptions, linking sexual and gender minorities to Western origins and accompanied by public animosity towards same-sex relationships, have led to calls for the arrest and imprisonment of those involved in such relationships, as well as a demand for remedial measures like religious conversion practices.<sup>234</sup>

Scholars like Tamale<sup>235</sup> and Ngwena<sup>236</sup> have argued that diverse sexualities existed in Africa prior to colonialism and challenged the idea that sexual and gender minorities are an imported concept from the West to Africa. Ngwena further notes that incorporating sexual diversity, which encompasses same-sex relationships, is an integral aspect of 'Africanness'.<sup>237</sup> While Africans traditionally placed high value on heterosexual relationships for procreation and the continuation of generations, they also acknowledged and celebrated same-sex relationships as a meaningful part of society, serving various purposes such as strengthening communities during times of conflict and enhancing agricultural productivity.<sup>238</sup> As a result, early Western scholars who first encountered same-sex behaviours in Africa concealed such evidence and manipulated the facts to present a uniform portrayal of African sexualities, aligning with the interests of their European governments and sponsors.<sup>239</sup>

In addition, there is no historical evidence of persecution or discriminatory laws targeting sexual and gender minorities in any African country before colonisation.<sup>240</sup> Africa embraced a wide range of expressions of non-heterosexuality and non-heteronormativity.<sup>241</sup> Despite the acknowledgment of pre-colonial sexual diversities in Africa, there remains a pervasive resistance, even among those entrusted

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<sup>233</sup> E Baisley 'Framing the Ghanaian LGBT rights debate: competing decolonisation and human rights frames' (2015) *Canadian Journal of African Studies* 49.

<sup>234</sup> PA Amoah & RM Gyasi 'Social institutions and same-sex sexuality: Attitudes, perceptions and prospective rights and freedoms for non-heterosexuals' (2016) *Cogent Social Sciences* 2.

<sup>235</sup> S Tamale *African sexualities: A reader* (2011).

<sup>236</sup> C Ngwena *What is Africanness? Contesting nativism in race, culture, and sexualities* (2018).

<sup>237</sup> Ngwena (n 236).

<sup>238</sup> JO Ambani 'A triple heritage of sexuality? Regulation of sexual orientation in African in historical perspective' in S Namwase & A Jjuuko (2017) *Protecting the human rights of sexual minorities in contemporary Africa* 14.

<sup>239</sup> M Epprecht 'Bisexuality and the politics of normal in African Ethnography' (2006) *Anthropologica* 48.

<sup>240</sup> S Murray & W Roscoe (eds) *Boy wives and female husbands* (2001).

<sup>241</sup> Collins (n 21).

with knowledge preservation and the safeguarding of communities.<sup>242</sup> Furthermore, the responsibility for concealing pluralist sexualities in Africa cannot be solely attributed to Western scholars. African societies also inadvertently contributed to this suppression. They favoured a patriarchal and heteronormative social order, both historically and in contemporary times, thereby neglecting what Ngwena terms as ‘transgressive sexualities’.<sup>243</sup>

The present prevailing ideas in Africa, which embody an entrenched African hetero-nationalism or even opposition to homo-nationalism, seem to stem from a combination of postcolonial forgetfulness and a persisting colonial influence on identity. Hence, to move beyond these oversimplified and essentialist narratives, it is necessary to recognise, emphasise, and reclaim the diverse expressions of sexuality and gender within African history and communities, all while remaining aware of the various forms of anti-queer rhetoric that exist.

#### ***4.4.1 Decrypting the missionary and colonial roots***

The arrival of the colonisers, accompanied by Christian missionaries considered their religion superior, leading them to assume the responsibility of ‘saving’ the indigenous populations.<sup>244</sup> Colonial endeavours frequently involved the imposition of regulatory measures on the rights of sexual and gender minorities within the colonized regions. Referred to as ‘sodomy laws’, they criminalised behaviours characterised as ‘buggery’, ‘carnal knowledge against the order of nature’ or ‘crime against nature’, with specific terminology varying depending on the jurisdiction and the colonial patterns in the respective country.<sup>245</sup> They also implanted heteronormative perspectives on sexuality, which intricately intertwined with racialized characterisations of gender and sexuality.<sup>246</sup> This Western influence on Africa has been profound, shaping how different regions of Africa perceive themselves and each other. Contemporary advocates of Islamic states also ‘seek to use the powers and institutions of the state, as constituted by European colonialism to coercively regulate individual behaviour and social relations in the specific ways selected by ruling elites’.<sup>247</sup>

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<sup>242</sup> I Dery, D Fiaveh & AA Apusigah ‘You cannot be like that here’: Discourses of sexual identities among urban Ghanaian families’ (2019) 36 *Gender Issues* 342-356.

<sup>243</sup> M Epprecht ‘Hidden histories of African homosexualities’ (2005) *Canadian Woman Studies* 24.

<sup>244</sup> Ambani (n 205) 10.

<sup>245</sup> A/78/227 ‘report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity’ on colonialism (2023) Para 20.

<sup>246</sup> AA Mazrui ‘The Re-Invention of Africa: Edward Said, V. Y. Mudimbe, and beyond’ (2005) 36(3) *Indiana University Press* 76-97.

<sup>247</sup> AA An-Na`im ‘Islam, State and Politics: Separate but Interactive’ 7. Available at: <[https://www.brookings.edu/wp-content/uploads/2012/04/2007islamforum\\_an-naim.pdf](https://www.brookings.edu/wp-content/uploads/2012/04/2007islamforum_an-naim.pdf)> Accessed 25 September 2023.

## 4.5 Conclusion

As a result, generations of Africans now perceive anti-queer rhetoric as integral to their religious convictions. As the decolonial theory posits, the formal end of colonial rule does not necessarily eradicate the enduring structures of colonial dominance. The remnants of colonial systems, including religious institutions, legal frameworks, and the influence of elites educated in the ways of British colonizers, persist to this day. The political elite, which encompasses parliamentarians who have benefited from colonial education and thinking, have yet to undertake the process of ‘decolonization’ to restore African religious traditions that once embraced sexual and gender minorities. The historical introduction of sodomy laws by colonial administrators in British Commonwealth Africa not only undermined religious practices but also sowed the seeds of queerphobia, a phenomenon that continues to manifest in contemporary Africa. Hence, ultra-conservative political and religious leaders should stop turning a blind eye on the historical existence of sexual and gender minorities in pre-colonial African societies. States need to break free from the colonial legacy of intolerance and oppression and embrace the values of acceptance, diversity, and respect that have deep roots in Africa’s own history.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Introduction

This study investigated the impact of Christianity and Islamic teachings and mores on sexuality and gender, and their power in the politicisation of sexual and gender minority rights in the region. The study highlighted how political discourse often fuels the laws by exploiting religion to distract from other social concerns, and depict sexual and gender minorities as outsiders threatening social cohesion. While this study primarily focused on specific African countries, it recognised the limited existing literature on comprehensive cross-country comparisons in addressing sexual and gender minority rights. It is worth noting that this study did not aim for a broad comparison of all African nations but suggest that countries with similar contextual factors to those examined could gain valuable insights from the experiences discussed.

#### 5.2 The influence of religion on the politicisation of sexual and gender minority rights

It is clear that the influence of religious victimhood on the political discourse in Africa has had a profound impact on the lives of sexual and gender minorities, making their struggle for recognition and rights even more challenging. Although it may not always be explicitly articulated that religion holds the authority of law, numerous religious tenets are reflected in the legal systems and frequently employed to validate and endorse both religious beliefs and legislation. For instance, as exemplified in chapter Two, religious narratives have resorted to influencing legal discourse on sexual and gender minority rights and religious conversion practices, conflicting with, or undermining fundamental human rights. While the two religions hold distinct doctrinal beliefs, they frequently unite and stand in solidarity when advocating for ‘conservative’ viewpoints on sexual and gender minority rights. This renewed surge of religious fundamentalism has made its way into Africa through a well-coordinated born-again evangelical movement often instigated and funded by American evangelical lobbies, as well as through conservative factions within different Islamic sects and Christian groups.<sup>248</sup>

In addition, sexual and gender minorities face opposition, criticism, and condemnation as a strategic move by political leaders, who aim to resist what they perceive as UnAfrican and a threat to traditional heterosexual family values. This basis, in the name of upholding heterosexual family values, excludes, devalues, and inflicts harm on sexual and gender minorities. Besides, religion exerts a profound impact

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<sup>248</sup> K Kaoma *Globalising the culture wars: US conservatives, African churches and homophobia* (2009).

on shaping the evolution of social justice and ethical standards within numerous African communities. Therefore, utilising religion and the legal system to emphasise sexual rights as the predominant moral issue of today, while diverting attention from the actual concern, is a political manoeuvre and should be acknowledged as such.<sup>249</sup>

### 5.3 Human rights implications

Sexual orientation and gender identity are risk multipliers.<sup>250</sup> This study underscores the paramount significance of international human rights law as a guiding framework for protecting the rights and freedoms of all individuals, regardless of their sexual orientation or gender identity. As discussed in chapter Three, freedom of religion is undoubtedly recognised and guaranteed. However, it is essential to emphasise that this freedom is not absolute, and it must co-exist with the fundamental principle of equality and non-discrimination and the protection of the rights of sexual and gender minorities. The study noted that the manipulation of religious beliefs to justify the violation of the rights of sexual and gender minorities is not permissible under international human rights law. While freedom of religion is a cherished right, it should not be weaponised to curtail the rights and freedoms of others.

Regrettably, this study highlights evidence of persistent politicisation of sexual and gender minority rights, often justified in the name of conservative religious beliefs. Sexual and gender minorities' bodies serve as platforms for political imposition, even as they are framed as the sexual 'other'. Whether it is the Anti-Homosexuality Act in Uganda or the Nigerian same-sex Marriage (Prohibition) Act, all legislation oppressing sexual and gender minorities across the continent garners widespread backing due to the influence of dominant power structures.<sup>251</sup> These stances breach the state's human rights treaty obligations, under the African Charter, as elaborated in resolutions and other statements by the African Commission on issues concerning the right to life and freedom from discrimination, and towards ending violence against sexual and gender minorities in Africa.

These attitudes of the African states undermine the rule of law and poses a threat to the integrity of the African human rights system. The power and influence wielded by religion is frequently exploited to rationalise the oppression, exclusion, suppression, manipulation, and control of sexual and gender minorities. Paradoxically, religion has also served as a pivotal point upon which arguments for equality, freedom, and liberty were constructed such as during anti-apartheid resistance in South Africa, to appreciate the contributions of religious-based movements to liberation.

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<sup>249</sup> Tamale (n 29) 158.

<sup>250</sup> A/78/131 'The situation of human rights defenders' (2023) para 70.

<sup>251</sup> Tamale (n 29) 167.

As a result, this study emphasise on the need for a balanced and nuanced constitutional approach to the intersection of religion and human rights. These encompass a broad array of rights, such as the right to life, human dignity, personal freedom and security, which encompasses safeguards against torture and other inhumane treatments, privacy, freedom of speech, freedom of association, access to the highest possible level of healthcare, the right to education, and access to justice. Noteworthy, in these struggles, the law is a double-edged sword. Accordingly, the concept of separation of power is subjected to careful examination.

#### **5.4 Evangelicals and Pentecostal Christian leaders influence on the politicisation of sexual and gender minority rights**

The substantial influence exerted by charismatic evangelical and Pentecostal Christian leaders in Africa as exemplified in this study has considerably contributed to the growing politicisation of sexual and gender minority rights. This phenomenon has led to heightened public discourse infused with vehemently anti-queer rhetoric.<sup>252</sup> Given this context, it is crucial to recognise that the recent surge in anti-queer rhetoric and the legal efforts to recriminalise same-sex relationships spreading across the African continent, from Dakar to Djibouti and from Cairo to Cape Town, are not random occurrences or mere coincidences.<sup>253</sup> In recent times, there has been a linkage between religious and politically motivated queerphobia in African nations and the resurgence of evangelicalism as discussed in chapter Three. This viewpoint is articulated by scholars like Klinken, who suggests that ‘the mobilisation of these groups and their involvement in the increasing politicisation of sexual and gender minority rights in Africa can be seen as a response to post-colonial identity politics with the growing acceptance of same-sex relationships and sexual and gender minorities in Western societies.’<sup>254</sup> As a result, this new wave of criminalisation and oppressive laws leads to a new wave of human rights violations. Besides, contrary to Kaoma’s suggestion that American evangelical movements utilise African groups, it is apparent that both parties derive mutual advantages from disseminating anti-queer rhetoric, often accompanied by a sense of hypocritical self-righteousness to further their selfish agendas.<sup>255</sup>

#### **5.5 Colonial influence on religious beliefs towards sexual and gender minorities**

The suppression of pre-colonial African perspectives on sexuality and gender has had a lasting influence on post-colonial African views and has contributed to religiously motivated opposition to sexual rights. Hence, this study delved into the origins of African countries penal code targeting sexual and gender

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<sup>252</sup> A V Klinken ‘Changing the narrative of sexuality in African Christianity: Bishop Christopher Senyonjo’s LGBT advocacy’ (2020) 26(1) *Theology & Sexuality* 1-6.

<sup>253</sup> Tamale (n 29) 166.

<sup>254</sup> Klinken (n 252).

<sup>255</sup> Tamale (n 29).

minorities, whose *raison d'être* refers to the European colonial rule. The majority of the statutes criminalising same-sex acts in African penal codes were directly adopted from the legal systems of former colonial nations.<sup>256</sup> This shows that colonial missionaries perceived Africa as a place in need of Christianization, a process often imposed through coercive means.<sup>257</sup> Missionaries rationalised the subjugation of Africans by portraying them as lacking in morality, religion, and political structure. Ironically, while many victimless sexual offenses have been decriminalised in the former colonial powers like Britain, France, Portugal, and Belgium, African legal systems continue to uphold these moral oversight regulations with zeal. Likewise, it appears paradoxical to some that while these conservative religious and political leaders denounce sexual and gender minorities' acts as foreign, they simultaneously support their arguments with religions like Christianity and Islam, which have origins outside their regions. Hence, the issue lies not with religion *per se*, but is also associated with colonial missionaries' ideals to legitimise the subjugation of Africans, and reinforce hetero-patriarchal norms that oppress sexual and gender minorities.

## 5.6 Recommendations

In the words of Tamale<sup>258</sup> as the old adage goes, 'knowledge is power'. The saying can be interpreted in the way that 'knowledge reflects the 'truths' of the powerful, of those that pen and record history'.<sup>259</sup> The current politicisation of sexual and gender minority rights does not represent the model that Africa has become today. Human rights framework is fundamentally centred on the principle of proportionality. It is incongruent to argue that holding intolerant religious beliefs against sexual and gender minorities justifies imposing criminal penalties upon them. Hence, the imperative to combat oppressive laws targeting sexual and gender minorities in Africa emerges not only as a vital human rights concern but also as an elemental matter of basic human decency and justice. This study results in the following recommendations:

### 5.6.1 Human rights approach

I. In line with the evolving and reimagining of human rights at its best, states must acknowledge the rights of sexual and gender minorities, and undergo a transformative process in governance, with policies that promote gender equality and eliminate religious-based oppression. For instance, states should take steps to ban or restrict religious conversion practices on false premises that is not even scientifically proven.

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<sup>256</sup> Tamale (n 29) 163.

<sup>257</sup> M Ananyev & M Poyker 'Christian Missions and Anti-Gay Attitudes in Africa' (2020) *Nottingham Interdisciplinary Centre for Economic and Political Research* 7.

<sup>258</sup> Tamale (n 29) 155.

<sup>259</sup> Tamale (n 29) 155.



- II. The criminalisation of consensual same-sex sexual activities represents an infringement on human dignity.<sup>260</sup> The path to restoring this dignity lies in the decriminalisation of such acts. In the same wise, states can adopt transnational jurisprudence in repealing colonial relic laws and counter against oppressive laws targeting sexual and gender minorities.
- III. The fundamental issue revolves around the power structures in play. The criminalisation and oppression of sexual and gender minority rights is becoming a ‘queerphobia spectacle’ backed by religion, and is now the most common tactic used to silence and discredit sexual and gender minorities defenders. Thus, litigators must take action to ensure these states are held accountable for rejecting the rule of law and to champion claims for social justice, framed in the language of rights while navigating through the troubled waters of orthodoxy versus modernity.
- IV. The pluralistic character of the African human rights systems both complicates and enhances the comprehension of sexualities, presenting them as both a constraining and potentially emancipatory influence. Therefore, as argued by Murray and Viljoen,<sup>261</sup> it is crucial to exercise caution when selecting a regional legal strategy although the AU and its human rights bodies<sup>262</sup> serve as valuable platforms for discussing sexual and gender minority rights. This is a result of the current trend in some African nations to adapt and Africanize Western prejudices against sexual and gender minorities.
- V. Given that most international human rights bodies already incorporate sexual and gender minority rights in their non-discrimination and privacy frameworks, international law becomes a valuable tool for advocacy. African states should align their domestic laws and policies with international human rights standards outlined in documents such as the UDHR, ICCPR, African Charter, UN resolutions, and the recommendations of treaty bodies.
- VI. In cases where complete decriminalisation may not be immediately feasible, activists should focus on securing the rights to work, freedom of association, freedom of expression, and live free from violence and discrimination. This non-confrontational approach provides some breathing space for sexual and gender minorities and activists to pursue advocacy and litigation.

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<sup>260</sup> A 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 *African Human Rights Law Journal* 684.

<sup>261</sup> R Murray & F Viljoen ‘Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union’ (2007) 29 *Human Rights Quarterly* 86 106.

<sup>262</sup> AM Ibrahim ‘Evaluating a decade of the AU’s protection of human rights and democracy: A post-Tahrir assessment’ (2012) 12 *African Human Rights Law Journal* 46-47.

### ***5.6.2 Decolonisation of the law and the language***

I.States must acknowledge the historical injustices and colonial legacies that have contributed to the oppression of sexual and gender minorities and that many bigoted laws and attitudes were introduced or reinforced during colonial rule, and therefore need to be repealed in contemporary Africa, as it does not reflect pre-colonial African sexualities.

II. There is a need for a reformist interpretation of religious texts to actively challenge and reconsider the prevailing fundamentalists' interpretations of sacred texts and religious narratives, replacing them with perspectives that are more inclusive. African sexual rights activists should employ analytical approaches, with the aim of highlighting the historical, theological, and ethical contributions of sexual and gender minorities. This scholarly endeavour is vital for equipping the movement with a language of liberation and for providing an alternative theological discourse.

### ***5.6.3 Intersectional Approach***

I.States should prioritise safeguarding constitutional morality, upholding the authentic African ideals of Ubuntu,<sup>263</sup> and striving for a continent where every individual is treated with respect, dignity and equality.

II.Acknowledging that religion and religious leaders have an influential impact on society at large and especially on the social inclusion of sexual and gender minorities, there is an urgent need for an established inter-faith dialogue as a search for common ground, based on factual information, counter-arguments, and positive stories of sexual and gender minorities. While not all religious leaders may align with the views of Archbishop Tutu and Imam Hendricks, it is crucial to emphasise that it is the duty of all religious leaders to condemn and prevent acts of violence against sexual and gender minorities, even if they hold differing beliefs.

III.The influence of American evangelicals and Pentecostals conservatism is unquantifiable and therefore religious leaders from other denominations should become agents of justice, promote human rights, and in some contexts, policy change. This helps in a constructive dialogue about human rights and anti-segregationist to counteract harmful narratives and propaganda spread by religious extremist groups.

IV.Admitting that Courts cannot take action unless citizens and relevant parties initiate legal proceedings, there is a necessity to establish platforms for advocacy and awareness-raising, aimed at educating and

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<sup>263</sup> The African philosophy of ubuntu refers to understanding diversity and the belief in a universal bond and sharing.

empowering individuals to actively participate in litigation discussions related to sexual and gender minority issues and consider unconventional approaches.

V. The pursuit of sexual rights within the African political landscape is set against formidable institutions, namely law and religion, and the approaches to this engagement remain a matter of ongoing dispute. Consequently, activists need to create innovative strategies to advance their cause, for instance, aligning the objectives with the realms of public health or development is found to be a strategic approach than explicitly emphasising ‘sexual empowerment’.<sup>264</sup>

#### ***5.6.4 Comprehensive sexuality education and research***

I. Though the legal situation might be improved, it is important to remember that societal attitudes may still lag behind. Hence, it is crucial for states to engage in holistic sexuality education, including the understanding of orientation, identity and expression as shifting and plural, not a singular identity as has too often been the case in human rights.<sup>265</sup>

II. African scholars must liberate their academic imaginations and challenge the heteronormative structures of knowledge that do not adequately recognise the deep inclusivity of sexual and gender minorities within African societies, both in historical contexts and in the present day. These micro-level investigations within diverse African communities aims to uncover the historical roots of sexual and gender minorities in pre-colonial societies by delving into analytical frameworks, decolonising ways of knowing, scrutinizing contemporary African sexual and gender minorities policy frameworks, and envisioning alternative expressions of being African identity as well as those of sexual and gender minorities.

**Religion, a source of solace, also pain, in the battle for human rights and social justice, whose loss is gain?**

***A luta continua - ‘The struggle continues’***

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<sup>264</sup> Tamale (n 29) 11-36.

<sup>265</sup> M Rahman ‘Queer as Intersectionality: Theorizing Gay Muslim Identities’ (2010) 44(5) *Sociology* 944–961.

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