

A Progressive Reading of Customary and Religious Norms Associated with Heteronormativity in South Africa

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Abstract

Customs that enforce heteronormativity, generally also safeguard the interests of society's vulnerable, for instance orphans and widows, to name two examples. The recognition that non-heterosexual people is a minority group with legitimate concerns is important, as they could contribute to family support while maintaining their identity and mental well-being. Non-heterosexual individuals' interests are protected in the current Constitution; however, their protection must transform social support structures beyond written laws. Social structures tend to accept change at a slower pace than progressive laws. In South Africa the gender-normative and heteronormative are generally being overridden by a 'don't ask, don't tell' code, where sexual minorities are gradually gaining acceptance in a dominantly heteronormative society. In this article, the authors argue against the customs of spousal inheritance and *ukuthwala*, which, among others, are being imposed on non-heterosexual people, because they suggest a person's sexuality belongs to a clan. These cultural practices may serve a purpose in society but could be interpreted to support constitutional values. For instance, traditional healers as custodians of culture have documented instances of being gender-fluid, when a female could be possessed by a male spirit, thus requiring a female sexual partner. Indigenous culture as it is known, has been tainted by capitalism, patriarchy, foreign religion, and the absolute opinions of a few elders. Which begs the question whether heteronormativity truly is a South African construct.

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Keywords: Heteronormativity; gender-normative; sexual minorities; *ukuthwala*; lobolo; ubuntu

Introduction

Heteronormativity may have been regarded as an African value but the era of colonisation and its accompanying norms of Christianity, patriarchy and capitalism have reinforced it.¹ These norms are at the core of sociological beliefs in South Africa, creating the impression of being natural, but they were simply imposed by a dominant culture. It is the nature of the majority to inform culture, even in discussions about decoloniality and transformation, which attempts to address injustice at the roots.² A picture of a society free from hate and distrust is drawn in this article.³ Apart from behaviour being directed by society, cultural belonging is a part of every individual's identity. To take away an element of an individual's identity based on doubt or suspicion about the individual's sexual identity, is unjust.³

Pursuing uniformity of values concerning marriage leads to debates about what is culturally authentic,⁴ who will benefit from lobolo, and who will take care of a deceased family member's children are, among others, explored in this article. Cultural belonging also requires that all members of a society have duties towards set ideals or values, as Bekker and Buchner-Eveleigh illustrate:

Whatever happens to the individual happens to the whole group, and whatever happens to the whole group happens to the individual. The individual [in the spirit of ubuntu] can only say: 'I am, because we are, and since we are, therefore I am.'⁵

However, the literature indicates a need for a transformed understanding of custom that allows for non-heterosexual members of society to participate in community activities.⁶ Sexual attraction between same-sex individuals is a personal matter, and it cannot be

1 Sylvia Tamale, 'Exploring the Contours of African Sexualities: Religion, Law and Power' (2014) 14 AHRLJ 150, 151.

2 *ibid* 176.

3 Caroline Müller-Van der Westhuizen and Samatha Meyer, 'The (Non-)recognition of Same-sex Marriage in the Recognition of Customary Marriages Act 120 of 1998' (2019) 44 JJS 44, 50; *MEC for Education: Kwazulu-Natal v Pillay* 2008 2 BCLR 99 (CC) para 53. This case is about a student with a nose-ring, as part of her culture, who was being discriminated against.

4 Adetoun Adebajo, 'In Search of a Middle ground: Addressing Cultural and Religious Influences on the Criminalization of Homosexuality in Nigeria' in Ebenezer Durojaye, Gladys Mirugi-Mukundi and Charles Ngwena, (eds), *Advancing Sexual and Reproductive Health and Rights in Africa: Constraints and Opportunities* (Routledge 2021) 134.

5 Jan Bekker and Mariana Buchner-Eveleigh, 'The Legal Character of Ancillary Customary Marriages' (2017) 50 De Jure 80, 81.

6 Berry Nibogora, 'Advancing the Rights of Sexual and Gender Minorities under the African Charter on Human and Peoples' Rights: The Journey to Resolution 275' in Durojaye (n 4) 178; Müller-Van der Westhuizen and Meyer (n 3) 50.

assumed that this reduces the individual's capacity to participate in social support structures for family members during difficult times, as will be argued further.

The term 'customary' is a political construct, given that the years of negotiation between colonial forces, advocates of tribal sovereignty, and radical individuals gradually created new ideals,⁷ resulting in the Constitution, which espouses both individual rights and the freedom of religious and cultural association.⁸ What an individual would want for themselves and what cultural associations would want for them matter in how people relate at a personal level, hence at times mutually beneficial compromises are required. 'Family life as contemplated by the Constitution can be provided for in different ways,'⁹ which means that the Constitution defines a new norm, a transformed society that will tolerate all who live in it.¹⁰

Transforming society in a customary context requires a comprehensive understanding of individual and group ideals and values¹¹ Therefore, this article will focus on issues of historical, cultural, sexual, psycho-social wellbeing and religious import. Participating in debates of this nature must leave room for the shifting of opinions, while maintaining proper representation of the parties involved. When sexual minorities are not adequately represented in cultural and religious associations it could cause unnecessary suffering when individuals are forced to live apart from their families and disconnecting them from an identity integral to their existence. The family will also suffer when it loses an able provider.

In the next section the discussion will outline how attempting to moralise sexual minorities has a hidden geo-political agenda that protects the gendered division of labour—a culture that thrives on the practice of lobolo, and the complete subordination of females.¹² Separation of sex, gender, and usefulness to a clan seems unimaginable to those who believe in dictating absolute sovereignty of the bloodline and of the clan.¹³ Dictatorship is a governance norm that was introduced to clans in the apartheid and colonial eras, which bars leaders from negotiating the role of sexual minorities in the family. When authoritarian leaders are faced with an alternative reality such as non-heteronormative sexualities, they tend to either stigmatise, silence, or subordinate minorities to a dominant sexuality.¹⁴

7 Oliver Phillips, '(Dis)Continuities of Custom in Zimbabwe and South Africa: The Implications for Gendered and Sexual Rights' (2004) 7 *Health and Human Rights* 82, 86.

8 The Constitution of the Republic of South Africa, 1996 ss 9, 15, 30, 31 and 39(3)

9 *Du Toit and Another v Minister for Welfare and Population Development and Others* 2002 (10) BCLR 1006 (CC) para 19. The case is about a same sex couple's ability to jointly adopt children.

10 David Bilchitz, 'Should Religious Associations be Allowed to Discriminate?' (2011) 27 *SAJHR* 219, 224.

11 *ibid.*

12 Charles Ngwena, *What is Africanness? Contesting Nativism in Race, Culture and Sexualities* (PULP 2018) 197.

13 *ibid* 197–198.

14 *ibid* 197.

Background

The political struggle for legitimisation of human rights in post-colonial African societies was a struggle for the realisation of all rights against all forms of oppression, which is both historical and ideological.¹⁵ Sexual rights are no exception. The ideological basis of apartheid and colonialism established ethnic, racial, sexual and gender-based oppression.¹⁶ A heteronormative criterion of personhood was thereby imposed by the dominant culture which frowned upon sexual minorities.¹⁷ Dividing people according to essential identity markers attempted to preserve moral purity, by limiting inter-racial sex and same-sex practice. Ethnic centralisation was also in force, where separate existence of people based on creed was seen to strengthen sovereignty. This ethnic sovereignty highlighted the importance of the clan above individual sexuality, which did not further the clan's interests. How the group felt about sexual minorities was corrupt because oppression was the norm.¹⁸ Where there is oppression there is no room for negotiating the roles of people with alternative sexual preferences.¹⁹

African customary laws as they are known, were filtered through a common law lens of a so-called 'enlightened culture' that was tainted by apartheid ideology.²⁰ The law and accompanying imported institutions attempted to reduce free thinking to avoid conflicts. The prominence of missionary activity in the black areas and the colonial education system entrenched norms about morality in African society, and definitions of sexual virtues that are subject to bias.²¹ Undermining, criminalising and scandalising private sexual behaviour shows how 'the moral failures of the past' affected social, legal, and cultural discourse about sexuality.²² African traditional religions have documented instances of using same-sex sexual behaviour for good luck, traditional medical practice and exploring sexual pleasure when coming of age.²³ Not to say that this is the norm, popular, or a natural rite of passage, it is known but silently dealt with.²⁴ Conservative religious, social and cultural practices take precedence over open discussions and free thinking,²⁵ but the capacity of sexual minorities to function as equal members of a family and hold the same values is not in doubt.²⁶

The goals of the clan are set by family heads, who are typically males and exercise 'authority over all other members.'²⁷ This authority is limited by the rules, ideals and

15 Bilchitz (n 10) 225.

16 *ibid.*

17 *ibid.*

18 Phillips (n 7) 86.

19 Adebajo (n 4) 133.

20 Tamale (n 1) 154; Bilchitz (n 10) 239–240; Müller-Van der Westhuizen and Meyer (n 3) 50.

21 *ibid.* 153.

22 *ibid.* 154; Bilchitz (n 10) 241; Müller-Van der Westhuizen and Meyer (n 3) 50.

23 *ibid.* 165.

24 *ibid.* 154.

25 Bilchitz (n 10) 239–240.

26 *ibid.* 241.

27 Bekker and Buchner-Eveleigh (n 5) 81.

values implied in ubuntu, as explained above. Ubuntu is group-oriented as much as it is individual-oriented and it entails giving and receiving,²⁸ thereby imposing a chain of responsibilities. The expectation of some elders is that a child born to the clan should mature into a person who can parent the next generation. Reproduction is an essential element of responsibility for the individual, the family, and the clan.²⁹ Belonging to a clan is a central element of African religion which entrusts peoples' talents, reproductive and productive capacity to a clan.³⁰ The twisted norms of patriarchy and socially defined division of labour may, however, lead to hiding behind custom while entrenching heteronormativity and commodifying women.³¹

The inability of a lesbian to add bride wealth to the family undermines basic reproductive and economic culture, which male siblings depend on for the fulfilment of their own lobolo obligations.³² This is one of the reasons why heteronormativity is entrenched in South African societies that receive lobolo. 'Heteronormativity forms one of the essential power bases for men in the domestic arena.'³³ Such power requires the economic exploitation of women to maintain the masculinity of patriarchal heterosexual males.³⁴ Receiving lobolo for a female without her consent is an abuse of culture, and unwilling exploitation of her productive capacity. Accepting that women can survive without men is revolutionary in its own right,³⁵ considering that even after the death of a male, his wife remains accountable to her husband's people.³⁶ This unfortunately undermines the majority status of women and 'their [individualised] sexual, health, reproductive, equality, and dignity [expectations].'³⁷

The expressed customs demonstrate that even virgins should be comfortable with their bodies 'as reproductive or sexual icon[s],' which is seemingly contradictory to the extreme virtue theorists as influenced by coloniality.³⁸ Sexual autonomy and sexual expression are, however, to be practiced in safe environments, where the abuse of culture to gain sexual favours is criminalised.³⁹ Reasonable people celebrate virtues but exceptions to the rule are acceptable, given the private nature of choice of marriage or sexual partner. Framing matters of sexual autonomy as strictly virtue arguments,⁴⁰ is

28 *ibid* 81.

29 *ibid* 81.

30 Jane Diala and Anthony Diala, 'Child Marriage, Bride-Wealth and Legal Pluralism in Africa' (2017) 4 *Journal of Comparative Law in Africa* 77, 84–85.

31 See Diala and Diala (n 30) 93, on the perpetuity of the lobola agreement.

32 Phillips (n 7) 95.

33 Tamale (n 1) 160.

34 *ibid*.

35 Phillips (n 7) 95.

36 Diala and Diala (n 30) 84–85.

37 *ibid* 79.

38 Tamale (n 1) 153.

39 Phillips (n 7) 89.

40 Tamale (n 1) 153.

not a typical feature of African society, given the influence of coloniality on African religion.⁴¹

Practically speaking, the principle of ubuntu rarely overrides the ‘effect of ... inherent mechanisms of accountability [that] entrench rule of the elders and patriarchal relations of power.’⁴² Equally, imposing individual rights on indigenous communities is a reminder of apartheid that deemed African people uncivilised.⁴³ Keeping arbitrary sexual norms to impress elders entrenches their views and ideals in religious or cultural institutions.⁴⁴ Norms and ideals are singular narratives of reality meant to make sense of reality and consolidate moral theories but they tend to be overly simplistic. Ideals, therefore, have limited transformative potential if they are not linked to realities as narrated by minorities.⁴⁵

The generalisation of ideals or values and historical events can be taken out of context, however, evidence of cultural practices and what can be read into them is a clear indication of engagement with society. Debates about transformation without engagement or indication of what is to be changed tend to be removed from society. As will be discussed in the next section, knowledge of the purpose of both customs and constitutional values is essential for a progressive reading of customary practices.

Heteronormative Practices in the South African Context

The South African context is largely shaped by the transformative spirit of the Constitution, which recognises rights that flow from customary law.⁴⁶ Customs that enforce heteronormativity, generally also ‘safeguard the interests of the vulnerable in society, namely [orphans] and widows.’⁴⁷ This is essentially acquiring rights from customary law and ensuring the continuity of religious and cultural associations. However, the responsibilities connected to cultural association need not outweigh substantive equality considerations.⁴⁸ Sexual minorities like everyone else have the right to choose sexual partners, and how and when to have children. Sexual minorities’ rights are protected in the current constitutional dispensation. However, their protection must surpass mere symbolic inclusion and transform underlying social structures.⁴⁹ For instance, a gay man can adopt his brother’s wife and children, without sexual and biological birth obligations owed her and only if they agree to do so.⁵⁰ We argue that this style of reasoning fulfils both parties’ need to belong and protect the bloodline,

41 *ibid.*

42 Phillips (n 7) 87.

43 Mikateko Maluleke, ‘Culture, Tradition, Custom, Law and Gender Equality’ (2012) 15 PELJ 2/428.

44 Bekker and Buchner-Eveleigh (n 5) 80; Diala and Diala (n 30) 79.

45 Maluleke (n 43) 15/428.

46 The Constitution s 39(3).

47 Bekker and Buchner-Eveleigh (n 5) 91.

48 Bilchitz (n 10) 230.

49 Phillips (n 7) 84.

50 Bekker and Buchner-Eveleigh (n 5) 91.

while maintaining their rights to sexual expression and autonomy. This reasoning is a transformed version of *ukungena*,⁵¹ which entails stepping into the shoes of the deceased in terms of taking care of his wife and children for the sake of continuity. This position is contrary to statements like that of conservative and unexposed thinkers who label homosexuality a ‘white man’s disease.’⁵²

‘Ancillary customary marriages,’ such as spousal inheritance continue to exist for their desirability, convenience, and fulfilment of customary obligations.⁵³ Naturally a person who takes over the responsibility of a deceased brother or sister harbours no ill will for the children and contributes to ‘their upbringing, socialisation and eventually, marriage.’⁵⁴ The issue of sexuality and sexual autonomy can however remain actively in play,⁵⁵ through the use of reproductive technology if such is deemed necessary. The rule of a widow remaining in her deceased husband’s family and the right of a widowed man to take a seed-raiser from his wife’s family should not temper with any person’s sexual autonomy.⁵⁶ These unions are beneficial and continue to exist, with the autonomy of the parties respected.⁵⁷

Another form of ancillary marriage is motivated by the infertility of a bride,⁵⁸ which may inconvenience a lesbian or celibate sibling. ‘This practice is referred to as a ‘sororate union’ and it flows from the reproductive duties established by the lobolo custom.⁵⁹ The transformed version of a sororate union would require the initial wife to agree with the second wife on the nature of responsibilities expected of her,⁶⁰ which are not limited to surrogate motherhood arrangements and artificial insemination. The children born to such a union for all intents and purposes belong to the infertile wife.⁶¹

Ukuthwala meaning ‘carrying off’ is another type of customary union that is conducted by means of a staged abduction to lower the requirement of parental consent in customary marriage.⁶² It is ideally ‘targeted at certain women of marriageable age ... [and does not] involve raping or having consensual sex with the girl until the marriage

51 Jan Bekker, Christa Rautenbach and Nazeem Muhammad Ismael, *Introduction to Legal Pluralism in South Africa* (6th edn, LexisNexis 2018) 106: ‘It is expected of the widow to remain with the family group of her late husband and to be available for the procreation of children for the deceased by means of the *ukungena* custom.’

52 Phillips (n 7) 84.

53 Bekker and Buchner-Eveleigh (n 5) 82.

54 Bekker and Buchner-Eveleigh (n 5) 82.

55 *ibid.*

56 Bekker, Rautenbach and Ismael (n 51) 106.

57 Bekker and Buchner-Eveleigh (n 5) 82.

58 *ibid.* 88.

59 *ibid.*

60 *Mayelane v Ngwenyama and Another* 2013 (4) SA 415 (CC) para 85—‘A subsequent marriage will be invalid if consent from the first wife is not obtained.’

61 Bekker and others (n 51) 106.

62 Maluleke (n 43) 11/428.

requirements have been met.’⁶³ The practice has been distorted over time to entail ‘human trafficking, assault and rape of an under-age girl[s]’⁶⁴ and justify these evils in the name of culture and tradition.⁶⁵ Taking this custom of *ukuthwala* too literally may result in the reinforcement of capitalism, patriarchy and the limitation of sexual freedoms.⁶⁶ Colluding to facilitate marriage of a lesbian without her consent, including accepting her lobolo is human trafficking. In such circumstances understandings of what tradition entails requires a level of transformation to meet norms that are representative of the current constitutional order that value the ‘freedom, equality and dignity’ of all persons including sexual minorities.⁶⁷

In African societies, such as Balobedu, that have some matrilineal values (kingship is traced through maternal lines instead of paternal lines) and possibly females who acquire great wealth or titles such as monarchs the possibility of female husbands occurs.⁶⁸ The case of female husbands also offers an idealistic solution to how polygamy should take place to maintain structures of authority in powerful households. The underlying factor is the wife being sought out by the female husband, having her lobolo paid for by the female husband, and getting sexually attached either to the female husband’s brother or her husband as the scenario dictates.⁶⁹ The primary relationship in this scenario is seen as that between two females because female husbands owe an obligation to their wives and children as custom dictates.⁷⁰ These unions are however not homosexual in nature.⁷¹ According to Bekker and Buchner-Eveleigh: ‘Upon the conclusion of a marriage the bride becomes the woman’s daughter-in-law and not the wife of the woman and (the bride) refers to the woman as parent/mother-in-law.’⁷²

The case of female ‘husbands’ has the potential for universal application in order to fulfil sexual obligations that a woman belonging to a sexual minority cannot meet. Equally males who inherit a spouse for fulfilment of parental roles can request to be substituted by a relative where sexual relationships are required. The sacredness of sexual autonomy is no longer a threat to the preservation of a clan considering reproductive technologies, and the capacity of sexual minorities to exist independently, while valuing culture. Ngwena,⁷³ opines that: ‘an inclusive approach to articulating African sexualities should have [information] exchange and, ultimately, the development of pluralistic norms as its goal.’ Choosing which norms to localise as a form of transformation does not amount to being uncultured but it is a demonstration of

63 *ibid.*

64 Diala and Diala (n 30) 83.

65 *Jezile v State* 2016 (2) SA 62 (WCC) para 42—case against distorted version of *ukuthwala*.

66 Diala and Diala (n 30) 83.

67 The Constitution s 7.

68 Bekker and others (n 51) 107.

69 *ibid.*

70 *ibid.*

71 *ibid.*

72 Bekker and Buchner-Eveleigh (n 5) 82.

73 Ngwena (n 12) 205.

embracing one another rather than fostering sexual division. What a person can do and what they believe in is arguably more important than their sexual life for the functioning of the clan.

Transforming methods of acquiring the clan's goals as discussed in this section is important, but overturning the foundational subordination of sexual minorities is equally important as will be discussed in the next section. The harmfulness of cultural and economic devaluation of sexual minorities will be problematised, and their equal worth idealised.⁷⁴

Embracing Diversity Concerning Treatment of Sexual Minorities in South Africa

As already highlighted, idealistic reasoning leads to avoidable conflict, and consensus regarding issues of sexual minorities is difficult to reach. As Müller-Van der Westhuizen and Meyer,⁷⁵ put it:

gays and lesbians were identified as a permanent minority in South African society, who were unable to use political power to secure favourable legislation for themselves. This put homosexual persons within the ambit of a minority group requiring constitutional protection from patterns of disadvantage and discrimination.

In the minds of the majority, culture and politics are linked, but some issues require consensus rather than competitive discriminatory reasoning. However, Bekker and Buchner-Eveleigh,⁷⁶ hold the view that 'The African traditional culture has an almost infinite capacity for the pursuit of consensus and reconciliation, as opposed to being individualistic and competitive.'

The norm as expressed above is threatened by a heteronormative mentality when it comes to the rights of sexual minorities. A sense of community is arguably necessary to everyone, and rejecting or avoiding sexual minorities is dehumanising and affects their mental wellbeing.⁷⁷ Abandoning sexual minorities would also require them to break or tear a part of their own identities, as argued by Bilchitz.⁷⁸ Heavy-handed reasoning would also assume that society is not internally evolving to support the rights of sexual minorities in a progressive manner.⁷⁹

The concept of ubuntu when defending the rights of sexual minorities can be argued either way, firstly through the lens that sexual minorities have lost ubuntu and secondly through the lens that ubuntu asserts 'the values of a civilisation based on humanness ...

74 Ngwena (n 12) 209.

75 Müller-Van der Westhuizen and Meyer (n 3) 47.

76 Bekker and Buchner-Eveleigh (n 5) 91.

77 Bilchitz (n 10) 234–235.

78 *ibid* 231.

79 *ibid*.

inclusiveness and respect for human dignity in our differences’ as argued by Nibogora.⁸⁰ Broader social associations and exposure to reality, will determine which norms a particular family follows. Broader associations encourage peaceful consensus, whereas a lack of exposure will lead to hostility by the uninformed.⁸¹ If small hostile groups are allowed to define issues in a way that recognise only heteronormative identities, sexual minorities’ rights will be meaningless.⁸² Going back to ubuntu, the dominant feature of a communal reality that accepts broad associations is that a person is not an object that can be thrown away (*umuntu akalahlwa*), which is a salient communal proverb, especially where family is concerned.

Personality features are seldom linked to religion and personal upbringing, yet it is expected that ‘individuals’ ... [choice] of sexual and reproductive behaviour ... [be] largely determined by cultural considerations, including religious considerations.’⁸³ The belief that all persons are equal is as difficult to embrace as is the rule that religions are equal.⁸⁴ Embracing ‘diversity ... [requires a conscious consideration that society] is made up of a wide range of people and beliefs; and it is crucial to respect these differences.’⁸⁵ Formal equality is more easily accepted when it comes to a change in belief system, than when it comes to issues of sexual orientation that are largely rejected by faiths imported from the Arab world and their subsidiaries.⁸⁶ Freedom of association including religious associations, shapes an individual’s experience of family, upbringing, protection, and support.⁸⁷ The isolating effect that expulsion from heteronormative religious associations brings must be considered before shame and disadvantage are entrenched.⁸⁸

A person’s understanding may reflect transformative ideals, but leadership decisions are respected as a unifying symbol in African society and breaking the ‘laws of the family’ is thought to attract the wrath of the ancestors.⁸⁹ In many instances the laws of the family do not always lead to the realisation of rights in a natural and globalised sense. International law entrenches respect of the right to ‘free and full consent of the intending spouses’⁹⁰ and for the establishment of a valid marriage. However, in most cases group considerations take precedence over individual concerns by requiring that an individual should obey the commands of the family without acknowledging their sexual

80 Nibogora (n 6) 182.

81 Bilchitz (n 10) 234–235.

82 *ibid.*

83 Yvonne Donders, ‘Exploring the Cultural Dimensions of the Right to the Highest Attainable Standard of Health’ (2015) 18 PELJ 179, 181.

84 Bilchitz (n 10) 228.

85 *ibid.*

86 Tamale (n 1) 165.

87 Müller-Van der Westhuizen and Meyer (n 3) 46.

88 *ibid.*

89 Bilchitz (n 10) 231; Bekker and Buchner-Eveleigh (n 5) 95.

90 Article 16 of the (Universal Declaration of Human Rights) UDHR 1948; Art 8(2) of the SADC Protocol on Gender and Development of 2008.

preferences. This limits an individual's willingness to help family and at the same time, oppresses the individual.⁹¹

The paying of lobolo by heterosexual African men builds on doing what is right, acquiring legitimate offspring and contributing to the continuity of a clan.⁹² Lobolo simply represents the celebration of a union between two individuals and a token value of cows is paid.⁹³ The rendering of reciprocal duties between husband and wife is respected as part of their private domain, but the continued usefulness of sons-in-law may gain them favour.⁹⁴ Such favours may include a male inheriting a second wife (which must be consensual), should the first wife die. In the African order of values, respect for relationships counts more than continued sexual ties. Relationships are valuable in the African setting, its loss through any cause (including sexual orientation) is unappreciated. Because duties owed to a clan may be honoured in a variety of ways, including maintenance to surviving relatives, reproductive technologies and substituted marriage as discussed above, that may cause a disconnection from family is unnecessary.

Group concerns such as the right to health may have gendered dimensions with varying levels of political acceptance as, 'each nation [clan or family] must define itself.'⁹⁵ What is healthy is not necessarily the same as 'moral,' and this is a cause of debate about sexual autonomy. For Western moral theorists both polygamy and non-heteronormative activity are immoral. Polygamy is said to objectify women as 'things' that can be bought and expose them to health risks, but it is a form of sexual expression that is culturally acceptable.⁹⁶ The same cannot be said for non-heteronormative activity that is not religiously or culturally sanctioned but has been visible for ages.⁹⁷ According to Tamale,⁹⁸

How and with whom we have sex, what we desire, what we take pleasure in, how we express that pleasure, why, under what circumstances and with what outcomes, are all forms of learned behaviour communicated, inter alia, through the institutions of culture, religion and law. It is through these social institutions and social relationships that sexuality is given meaning.

Discrimination is the result of social institutions not lending sufficient respect to individuals or groups like sexual minorities. Discussions about sexuality could be labelled as divisive in social institutions when raised with disrespectful intentions. Respect for the elder is key behaviour in African culture, hence talking ill of people who

91 Bekker and Buchner-Eveleigh (n 5) 95.

92 *ibid* 89.

93 Diala and Diala (n 30) 84.

94 *ibid*.

95 Phillips (n 7) 82.

96 Tamale (n 1) 155–156.

97 *ibid*.

98 *ibid*.

preserve cultural ties must not be tolerated. People who attempt to preserve cultural ties through adopting children and maintaining widows ‘do what is good and acceptable.’⁹⁹

In the next segment the use of theory, cultural and religious norms to describe behaviour will be critiqued and the danger of misrepresenting psycho-social occurrences will be discussed. Without proper representation of sexual and cultural rights, essential elements of sexual minorities’ identities will be lost. Some facts that are rarely mentioned give a clearer picture of what is truly the norm. The culture of uniformity regarding sexual issues emerged because of borrowed religion, ageism and patriarchy, which created impractical norms given the mysterious relationships between men and the divine. Essentialism means that people and things have natural characteristics that are inherent and unchanging.¹⁰⁰ It allows people to be categorised and put into groups; dictating what is normal, which is usually that which is visible. An example of essentialism is the assumption that all people are heterosexual and respect public opinion above their own rights. However, the result of an action determines if it is good or bad. What good has come out of homophobia?

A Progressive Reading of Sexual Minorities’ Rights to Avoid Essentialism when Describing South African Customs

As previously argued, idealistic reasoning gives power to a single narrative, and the truth of that narrative is limited by the worldview a person gives attention to.¹⁰¹ Preserving and transmitting beliefs such as heteronormativity may be at the core of a worldview, but the damage heteronormativity causes extends to private relations that are integral to psycho-social wellbeing.¹⁰² People who support the values of heteronormativity may not realise that actual harm is occurring to the extent that pursuing their ideal will result in ‘feelings of exclusion and isolation’ for sexual minorities.¹⁰³ The harm these beliefs cause is given further attention in this section and the impact of legislation in the South African context is also assessed.

The impact of legislation is primarily assessed by the political will to enforce it and the level of social acceptance of change over time. Struggles for liberation against a dominant culture are not solely concerned with political issues; they include liberation of minds, bodies, and sexuality from control by faceless conventions.¹⁰⁴ Anti-discriminatory laws, public order laws, and laws against insult and incitement seem to be failing in the face of acts of so-called corrective rape, *ukuthwala*, physical and psychological violence.¹⁰⁵ These violent acts have an aura of legitimacy as they are indirectly supported by corrupt understandings of tradition. However, factual legitimacy

99 *ibid.*

100 Ngwena (n 12) 212–213.

101 Adebajo (n 4) 133.

102 Bilchitz (n 10) 227; 236–237.

103 Donders (n 83) 210.

104 Nibogora (n 6) 176.

105 Tamale (n 1) 167.

of the action of any community is based on the community's ability to take diversity seriously.¹⁰⁶ Despite religious or cultural convictions the fact that members of conventional or customary societies end up admitting to same-sex attraction proves that sexual orientation is inherent.¹⁰⁷ It is ironic that sexual minorities can be seen to be at the forefront of poverty alleviation, anti-corruption, and anti-domestic violence campaigns, yet homophobic individuals fail to see past personal biases.¹⁰⁸

'Co-existence occurs in behavioural or normative fields in which various normative influences affecting [the acceptance of same sex] marriage compete.'¹⁰⁹ Sex and gender issues are not clear-cut for conservative thinkers who rely on old values, but admitting to a failure to accept these realities must not amount to hate. The dominant normative regime in any society either promotes or disagrees with homophobic practices. Homophobic utterances are confused with strong religion, but both sexual conduct and strong religion are inherent. Religious institutions, cultural groupings and the media often lack the necessary objectivity and political will to override unnecessary discrimination.¹¹⁰ Consent to sexual acts is necessary, being hated for not giving it to the opposite sex is unnecessary. Premature legal or academic invasions in cultural issues are not a 'magic charm to bring about behavioural change,' but objectively listening to and representing life issues as determined by living law is necessary.¹¹¹ Living law in the context of this paper is how the law is practised according to current ideals, ideals that espouse equal representation of views and equal human worth.

Nibogora, describes how ideals have evolved in African society and this article suggests that this position is where living law stands.¹¹² Knowledge of sexual minority practices does not entail their universal acceptability. Resistance to change may be seen as preservation of culture, masculinity, femininity, dominance, religion, and ideology but to what end and at what costs? Losing connection with a loved one on account of gender-normativity and heteronormativity shows inability to relate with them because family relationships have nothing to do with their private sexual life. Hidden gender-normativity and heteronormativity features in society are generally being overridden by a 'don't ask, don't tell' code, where sexual minorities are gradually gaining acceptance in dominantly heteronormative culture.¹¹³ Active oppression and discrimination of minorities is becoming less acceptable in most societies, where the private domain is

106 Bilchitz (n 10) 227.

107 Adebajo (n 4) 133.

108 Tamale (n 1) 158.

109 Diala and Diala (n 30) 92.

110 *ibid* 82.

111 *ibid* 92.

112 Nibogora (n 6) 171–172.

113 Nibogora (n 6) 171–172.

respected and preserved.¹¹⁴ Nibogora, describes this phenomenon ‘not as tolerance of one’s sexual life but as deliberate ignorance of hidden behaviour.’¹¹⁵

Allowing the traditional lifestyle to define the norm is not always for spiritual reasons, for at times capitalistic, and patriarchal cultural thoughts come into play when forcing marriage onto lesbians.¹¹⁶ Diala and Diala, forcefully protest the norm that ‘informed consent flies out of the window when cultural demands [invalidate] it, or when parents regard marrying off their children as a solution to poverty.’¹¹⁷ The Prevention and Combatting of Trafficking in Persons Act,¹¹⁸ makes it a crime to facilitate a forced marriage.¹¹⁹ The Act also defines abuse of vulnerability as force,¹²⁰ entrenching the norm that it is the duty of mature caregivers to take care of vulnerable women rather than just pass on the burden of their upkeep. Vulnerability limits free and full consent to marriage for lesbians and celibate women. Life experiences have informed African society that breadwinners and leaders are not typically male or heterosexual, but heteronormativity and general cultural bias continue to limit personal growth of potential leaders. A respectful approach to the issue of sexuality focuses on deep-seated autonomy and personal capacity development before marriage, rather than determining adulthood through marriage.¹²¹

Undesirable marital unions continue and their root cause is the fact that some women still feel that they need men to survive, and families regard a woman as inherently being of no value, apart from her role as a nurturer and child bearer.¹²² Gay men are potentially caught up in the practice of widow marriage that preserves the bloodline of future children and makes sure another man does not inherit the wealth of their brother.¹²³ The culture of marriage by inheritance has become less about family welfare and the mental well-being of the spouses and more about ‘regulating sexual and reproductive capacity in line with patriarchy and capitalism.’¹²⁴ This culture invalidates women’s capacity to build and work for themselves and by themselves,¹²⁵ and reduces gay men’s capacity for desirable affection and family participation.

Sangomas (traditional healers) are likely to be more progressive and relatable than most members of society, given that they are inspired to bring about change and healing.¹²⁶

114 *ibid.*

115 *ibid.*

116 Phillips (n 7) 85; Diala and Diala (n 30) 78.

117 Diala and Diala (n 30) 81.

118 Act 7 of 2013.

119 Section 4(2)(b).

120 Section 4(1).

121 Diala and Diala (n 30) 79.

122 Bekker and Buchner-Eveleigh (n 5) 92.

123 *ibid.*

124 Tamale (n 1) 160.

125 *ibid.*

126 Bekker and Buchner-Eveleigh (n 5) 87.

Every sangoma is believed to be possessed by a spirit and at times a male spirit may possess a female sangoma, leading to same-sex desire and marriage.¹²⁷ It is, however, yet to be tested if the majority and other sangomas accept this conduct. Public approval is what constitutes modern custom,¹²⁸ but the tradition of lesbian sangomas cannot be overlooked. The majority of sangomas are loath to use traditional methods to harm others and the abuse of human body parts for charms and medicine,¹²⁹ however, the seriousness of unacceptable conduct cannot include same-sex relationships. The norm of customary law marriage being celebrated according to custom,¹³⁰ can be transformed to include same-sex marriage in line with the custom of lesbian sangomas.¹³¹

Knowledge, including indigenous knowledge, is constantly expanding and being tested. This is contrary to the view that indigenous knowledge is religious and static.¹³² Indigenous knowledge is both forward-looking and subject to hindsight as is demonstrated by the debates on decoloniality and transformation.¹³³ Questions about what constitutes truly African may be answered by solutions that can move Africa forward, rather than dwell on potentially harmful inclinations such as heteronormativity.

African Conscience and Understandings of Family

A discussion about religion ‘need not necessarily be treated as resting on a single perspective.’¹³⁴ The origin of religion, including African traditional religion is based on an imagined community, an idealistic world, and even without the common Arabic text, religious minds share perspectives on how to achieve common goals.¹³⁵ Experiences of good and evil usually have a common thread and involve an oppressor and the oppressed. The oppressor being immune to change, thereby devalues minorities.¹³⁶ This narrative shares a common thread with African leaders insisting on heteronormative ideals. As society comes to terms with the reality of the existence of sexual minorities,

127 *ibid.*

128 *Mogaramedi v S* 2015 (1) SACR 427 (GP) para 21–22 (muti killings case): ‘[21] The public at large has expressed its anger in respect to muti killings. Instances where the community have taken the law into their own hands to kill witch doctors is not uncommon [22]’; Gérard Labuschagne, ‘Features and Investigative Implications of Mutu Murder in South Africa’ (2004) *Journal of Investigative Psychology and Offender Profiling* 191–206 stated: ‘The majority of Africans and traditional healers do not condone such behaviour and associate it more with charlatans and “evil” traditional healers ... such practices are rejected by other healers ... The use of human body parts as an ingredient for medicines or portions, ... is practiced by a minority of individuals (but is rejected by the majority of traditional healers and members of society.’

129 *Mogaramedi v S* 2015 (1) SACR 427 (GP) para 21–22.

130 Recognition of Customary Marriages Act 120 of 1998 s 3(c).

131 Müller-Van der Westhuizen and Meyer (n 3) 51.

132 Ngwenya (n 12) 220.

133 *ibid.*

134 *ibid.*

135 *ibid* 221–222.

136 *ibid* 220.

African religion has the advantage of being able to see signs of the ancestors being willing to associate with lesbian sangomas.¹³⁷

For an ignorant mind, the rights of sexual minorities appear in the current setting as a constitutional imposition, without admitting the failings of past conservative and oppressive regimes.¹³⁸ Dominant culture, religious and moral claims to legitimate behaviour entrench systematic discrimination of already vulnerable sexual minorities.¹³⁹ Phillips¹⁴⁰ identifies a well-publicised political contest between feminists and traditional leaders that resulted in cultural and religious rights being subjected to the ‘objects, spirit, and purport of the Constitution.’¹⁴¹ This is important because the founding values of the Constitution are ‘freedom, equality and dignity,’¹⁴² effectively placing ‘the right to equal protection and benefit from the law’ in the public domain, including religious settings.¹⁴³ The instrumentality of religion in creating inner peace, should lead to religion’s instrumentality in dismantling discriminatory rules and stereotypes.¹⁴⁴ The apparent heavy-handed and non-compromising stance of the South African Constitution on prohibiting discrimination on grounds related to sexual orientation,¹⁴⁵ can be justified as acceptance of difference without dehumanising sexual minorities. Claims to freedom of association with religious and cultural societies being exercised through banishment of sexual minority members are subject to the Constitution, which has the right to dignity as a core value.¹⁴⁶ The international law position also clearly does not exempt cultural and religious institutions from non-discriminatory conduct, given that the:

UN Committee on Economic, Social and Cultural Rights (Committee on ESCR) in General Comment 22 to the effect that to realize the right to sexual and reproductive health [condemns] institutional arrangements and social practices which prevent individuals from effectively enjoying their sexual and reproductive health.¹⁴⁷

Sexual orientation rights are ‘indivisible from and interdependent with other human rights... [thereby promoting] ... mental integrity of individuals.’¹⁴⁸ Unnecessary, unjustifiable, and avoidable laws that affect the granting of adoption orders were challenged in *Du Toit and Another v Minister for Welfare and Population Development and Others*,¹⁴⁹ where same-sex couples’ capacity to adopt a child and jointly undertake

137 Bekker and Buchner-Eveleigh (n 5) 87.

138 Müller-Van der Westhuizen and Meyer (n 3) 44.

139 *ibid* 47.

140 Phillips (n 7) 91.

141 The Constitution s 39(2).

142 *ibid* s 7(1).

143 *ibid* s 9.

144 Bilchitz (n 10) 239–240.

145 The Constitution s 9(3).

146 Bilchitz (n 10) 223.

147 CESCR General Comment 22 (2016) on the right to sexual and reproductive health para 8.

148 *ibid* para 9.

149 *Du Toit and Another v Minister for Welfare and Population Development and Others* 2002 (10) BCLR 1006 (CC) para 14.

parental rights and responsibilities was confirmed. This new norm of family has also affected those in African settings and sets out which roles family members can accept.¹⁵⁰ What is of importance to society is that children and bereaved loved ones receive emotional and financial support as tradition demands.¹⁵¹

Customary law and the constitutional dispensation have the aspect of valuing children's right to 'family or parental care' in common.¹⁵² In *Du Toit and Another v Minister for Welfare and Population Development and Others*,¹⁵³ the court recognised same-sex couples' capacity to 'constitute a stable, loving and happy family,' which are 'important to a child's development.'¹⁵⁴ To say otherwise would be demeaning, dehumanising and immoral.¹⁵⁵ Financial support and caregivers may not always be available to children but heteronormativity bars orphans from nourishment in some African settings.¹⁵⁶

Moralising sex seems to be a deeply held value and a requirement of citizenship in cultural and religious associations that believe in virginity testing and purity until marriage.¹⁵⁷ The extension of heteronormativity is also based on faith in procreation as a way to ensure purity of the bloodline¹⁵⁸ and idolises heterosexual intercourse.¹⁵⁹ Sexual minorities are often silenced, dehumanised and discriminated by moralists, who argue that sex is not for pleasure or comfort but for procreation.¹⁶⁰ Openly supporting gay and lesbian rights in religious and political settings does not demonstrate immorality or that one is at variance with the common tenet of religion—rather, it is a demonstration of compassion, which is a positive dimension of cultural association.¹⁶¹ As Donders puts it: 'Changes in cultural practices are most successful if they arise within the cultural community itself and are not imposed from outside, by law or by the State.'¹⁶²

Using African religion and customs to support popular opinions about solidarity, while dismantling the essence of life for sexual minorities and denying help from them defeats the purpose of solidarity.¹⁶³ Bilchitz,¹⁶⁴ proffers the view that:

Prohibiting discrimination in private associations of all kinds can be seen to advance a more inclusive political community and in fact can help develop stronger bonds between

150 *ibid* para 5.

151 *ibid* para 14.

152 The Constitution s 28(1).

153 *Du Toit* case (n 149) para 29.

154 *ibid* para 21.

155 *ibid* para 29.

156 *ibid* para 18.

157 Nibogora (n 6) 176.

158 Müller-Van der Westhuizen and Meyer (n 3) 55.

159 Tamale (n 1) 153.

160 Müller-Van der Westhuizen and Meyer (n 3) 47.

161 Adebajo (n 4) 145; Donders (n 83) 212.

162 Donders (n 83) 212.

163 Bilchitz (n 10) 222.

164 *ibid*.

diverse individuals on the basis of mutual respect. This is also of vital importance given that discriminatory religious views and practices can have an impact upon the public standing of groups that are discriminated against.

Although levels of individual resilience vary, the stress that stigmatisation, abandonment, and insults cause is real and harms sexual minorities.¹⁶⁵ Customary law and religious norms should encourage getting along with sexual minorities, but in the absence of strong representation and advocacy this may be a distant dream.¹⁶⁶

Ambition and sexual pleasure are what gives human life meaning, what separates us from animals; our desire to live happily and comfortably.¹⁶⁷ Even in conduct expressly forbidden in moral codes such as same-sex desire or prostitution, the issue is not the conduct but the appearance thereof, the problem is the appearance, but the reality is accepted.¹⁶⁸ This begs the question ‘is the power and authority vested in religions and their leaders [for] oppressing, excluding, stifling, manipulating, and controlling others?’¹⁶⁹ Adebanjo,¹⁷⁰ found that there is

existence of a strong relationship between a country’s religiosity and opinions about homosexuality, with usually far less acceptance being recorded in countries where religion was central to people’s lives, and conversely more widespread acceptance of homosexuality in countries where religion was less central to people’s lives.

Given that African spirituality is intense and actively pursued and witnessed by all in the community, many people are forced into relationships that do not work for them to prove their virtue. People who fail to prove their virtue and fall into hardship are often regarded as cursed, but the truth is it could happen to anyone. The doctrine of sin, unnatural sexual conduct, and ‘un-African’ sexualities are also to blame for sexual minorities’ partial recognition.¹⁷¹ In a broader African understanding issues of sexuality, religious, and moral judgments continue to interfere with the recognition of a same-sex person’s entitlements and capacities.¹⁷² The choice of a sexual partner, the right to self-protection during sex, and the right to control fertility are all threatened by heteronormative misinformation.¹⁷³ This misinformation ‘drives homosexual conduct

165 *ibid.*

166 *ibid.*

167 Phillips (n 7) 95.

168 Tamale (n 1) 172.

169 *ibid* 176.

170 Adebanjo (n 4) 133.

171 Tamale (n 1) 165.

172 Nibogora (n 6) 176.

173 The mischief behind Art 14 of the African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003 -

1. States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:

- the right to control their fertility;
- the right to decide whether to have children, the number of children and the spacing of children;

underground, withdraws them from social support systems and increases their vulnerability.’¹⁷⁴ Rights in informal support structures need reform to allow sexual independence and freedom from emotional and physical violence.¹⁷⁵

The needs of sexual minorities become apparent when everyone disagrees with how they have been treated. When gross injustices such as corrective rape, gang violence or death of a voiceless loved one occurs. Religious and cultural misinterpretations of issues dealing with sexuality cause more harm than good. Inability to accept sexual minorities’ inherent capacity for good is a sign of spiritual corruption and failing to accept reality. As we conclude it is important to note that universalism is a great teacher, because even oppressive regimes had ideologies they followed. Hence, religious, and cultural ideology is subject to scrutiny and improvement.

Conclusion

Although at first glance this work is based on a progressive approach, the cause of the problems in cultural and religious organisations has been given weight. ‘The moral evils of discriminatory treatment,’ were also evaluated.¹⁷⁶ The study argued that by ignoring sexual minorities’ deep-seated capacity for a ‘good’ and peaceful existence their functioning in an inter-dependent social network of African existence is affected. Defiance of gay and lesbian rights in day-to-day life is scarce, however, the populist nature of African religion and the selfish opinions of elders may gradually destroy positive values.¹⁷⁷ State law in South Africa has been a positive influence on the broader acceptance of sexual minorities’ rights—however, in the cultural sphere the gendered division of labour and the influence of foreign religion on sexual minorities’ rights remains in evidence.¹⁷⁸

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d) the right to self protection and to be protected against sexually transmitted infections, including HIV/AIDS;

e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices;

• the right to have family planning education.

174 Adebanjo (n 4) 137.

175 Phillips (n 7) 96; Nibogora (n 6) 174.

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177 Diala and Diala (n 30) 95.

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