

SECURING THE HUMAN RIGHTS OF LGBTIQ PERSONS ACROSS AFRICA: THE PROBLEM WITHIN\*

**Abstract**

For the West and international human rights community, the human rights of LGBTIQ (lesbian, gay, bisexual, transgender, intersex, queer) persons consist of a full set of rights including life, dignity, equality, privacy, sexual orientation and non-discrimination. However, in most parts of the world the enjoyment of these rights are often ignored or deprived. In most of Sub-Saharan Africa, LGBTIQ rights such as homosexuality and same-sex marriage are believed to be unnatural and un-African. LGBTIQ persons are also considered as perverse and immoral, and often stigmatized, discriminated and deprived of basic social benefits and legal rights, in some cases, including the right to life. This paper explores common threats faced by LGBTIQ persons in selected African countries. Using desktop review, it argues that currently, core Afrocentric beliefs are biased against the LGBTIQ, hence, securing LGBTIQ rights in the sub-region is a mission impossible. It makes a critique of this finding and concludes that despite Western-induced international socio-economic and political pressure on Africa, as well as broad activism and agitations for the recognition of LGBTIQ rights across Africa and globally, the African sub-region remains generally opposed to these 'new rights'.

**Keywords:** Human Rights, LGBTIQ, Afrocentrism, Sexual Orientation, Sub-Saharan Africa.

**1. Introduction**

Gender identity is viewed as an inborn piece of an individual's sex attributes, which usually varies in nature, hence, all people must be enabled to settle on their choices.<sup>1</sup> Accordingly, international human rights law supports and prescribes the guarantee of dignity, equality, non-discrimination and other human rights of LGBTIQ (lesbian, gay, bisexual, transgender, intersex, queer) individuals. However, in most of Sub-Saharan Africa and beyond, these rights are often ignored, if not deprived.<sup>2</sup> In a few cases too, political mobilizations and coalitions have been formed against LGBTIQ rights and interests.<sup>3</sup> This explains why the dignity, equality, life and allied human rights of LGBTIQ persons have remained almost impossible to protect despite unabated media and other campaigns in both private and public spaces around the world.<sup>4</sup> Significantly, LGBTIQ rights include gay and lesbian relationships and marriage which are being advocated by the developed Western democracies as part of a higher understanding of global human rights.<sup>5</sup> Using desktop research, this paper explores the chances of recognizing LGBTIQ rights in Africa. It argues that, based on core African trado-religious belief that LGBTIQ practices are 'un-African',<sup>6</sup> 'unnatural', 'immoral',<sup>7</sup> and against the order of nature<sup>8</sup>, most Sub-Saharan African countries currently reject

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\*By Aloy OJILERE, LLB (Hons.), BL, LLM, PhD., Senior Lecturer, Faculty of Law, Imo state University, Owerri, Nigeria. He teaches Human Rights, Gender Studies and, Diplomatic and Consular Law. His research interest is in the Judicialization, Globalization and Constitutionalization of fundamental rights in Nigeria, India and South Africa. Email: aloyojilere@yahoo.com; +2348033277550.

<sup>1</sup> S Arora (2020). 'LGBT Human Rights-Global Recognition.' *Journal of Human Rights Law and Practice*, 2(2). <http://lawjournals.stmjournals.in/index.php/jhrlp/article/download/415/360> (22/3/2020).

<sup>2</sup>R Karlsson (2016). 'LGBT and the universal enjoyment of human rights.' <http://www.diva-portal.org/smash/get/diva2:910502/FULLTEXT01.pdf> (22/3/2020).

<sup>3</sup> A Currier & JM Cruz (2020). 'The politics of pre-emption: mobilisation against LGBT rights in Liberia.' *Social Movement Studies*, 19(1), 82-96.

<sup>4</sup>KM Klump (2015). What Happens Now?: Identity and Commitment Among Lesbian Women With the Passing of Same-Sex Marriage Laws in Minnesota. *All Theses, Dissertations, and Other Capstone Projects*. Paper 511; AX Zhang & S Counts (2015, April). Modeling Ideology and Predicting Policy Change with Social Media: Case of Same-Sex Marriage. In *Proceedings of the 33rd Annual ACM Conference on Human Factors in Computing Systems* (pp. 2603-2612). ACM.

<sup>5</sup> This pro-gay rights quest followed the 26 June, 2015 decision of the United States Supreme Court delivered in the case of *Obergefell v. Hodges*, 576 U. S. (2015) which legalised same-sex marriage and authorised the licencing and legal recognition of such marriages across the United States. See also: A Ojilere (2018). 'The Diplomacy of Homocapitalism Against Africa: Same-Sex Marriage and the West's Promotion of Homosexuality.' *World Affairs: The Journal of International Issues*, 22(1), 152-163.

<sup>6</sup>V Reddy & U Baduza (2006). 'Black, Gay and Out/In: Interview with Utando Baduza.' *Agenda*, 20(67), 93-99.

<sup>7</sup> K Kaoma (2014). The Paradox and Tension of Moral Claims: Evangelical Christianity, the Politicization and Globalization of Sexual Politics in Sub-Saharan Africa. *Critical Research on Religion*, 2(3), 227-245.

<sup>8</sup> The Holy Quran 7:80-81 states: 'Do ye commit lewdness such as no people in creation (ever) committed before you? 'For ye practice your lusts on men in preference to women: ye are indeed a people transgressing beyond bounds.' Holy Quran 26:165-166 states: 'You shall not lie with a male as one lies with a female; it is an abomination.' Similarly, the Christian Holy Bible states in Leviticus 18:22 thus: 'If there is a man who lies with a male as those who lie with a woman, both of them have committed a detestable act; they shall surely be put to death.'

LGBTIQ rights including same-sex marriage and homosexuality.<sup>9</sup> Lastly, it makes recommendations for redressing Africa's stand against the dignity, equality, non-discrimination and other human rights of LGBTIQ persons, and then concludes that, for whatever it is worth, because of deep rooted Afrocentrism, the chances of securing the human rights of LGBTIQ persons across Sub-Saharan Africa remains vague and almost remote, for now.<sup>10</sup>

## **2. Conceptual Meaning of the Acronym, LGBTIQ**

Generally, the group acronym, LGBTIQ stands for lesbian, gay, bisexual, transgender, intersex and queer community. It describes persons whose gender presentation or sexual orientation<sup>11</sup> does not conform to the norm, or who are convinced that their gender identity does not conform to the biological characteristics of their sex.<sup>12</sup>

A 2017 research offers the following specific definitions for LGBTIQ,<sup>13</sup> namely,

*Lesbian:* This term refers to female-identified women who indulge in romantic or sexual relationships with other female-identified, transgender or intersex women.<sup>14</sup>

*Gay:* This term describes male-identified men who seek care, support, romance and sexual relationships with other male-identified, transgender or intersex men.<sup>15</sup>

*Bisexual:* Refers to and male-identified men and female-identified women who seek caring, supportive and sexual relationships with other women and men, be they biologically male or female, transgender or intersex.<sup>16</sup>

*Transgender persons* live as a gender (biological sex) other than the original gender of their birth.<sup>17</sup>

*Intersex individuals:* These are persons who are born with an anatomy or physiology that differs from contemporary ideals of the so-called 'normal' male or female.<sup>18</sup>

*Queer individuals* are considered to be not adhere to typical gender or sexual orientation stereotypes.<sup>19</sup>

## **3. African Common Attitude to LGBTIQ Persons, Practices and Rights**

LGBTIQ persons, practices and rights such as homosexuality, lesbianism and same-sex marriage have gained social prominence and legal acceptance across many Western countries and in South Africa.<sup>20</sup> This is, however, not so

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<sup>9</sup> A Ojilere (2016). 'Jurisprudence of Homosexuality and Same-sex Marriage in South Africa and the United Kingdom: Human Rights Protection or Political Correctness?' *IMSU Journal of International Law and Jurisprudence*, 1, 54-61.

<sup>10</sup> T Msibi (2011). The lies we have been told: On (homo) sexuality in Africa. *Africa Today*, 58(1), 55-77.

<sup>11</sup> Sexual orientation is the trait that predisposes a person to experience sexual attraction to other persons of the opposite sex (heterosexual or straight) or to people of the same sex (homosexual/gay or lesbian), or to both sexes (bisexual). See RA Dembroff (2016). 'What is sexual orientation?' in *Philosophers' Imprint*, 16, 3, 1-26.

<sup>12</sup> Human Rights Watch (2009) *Together, Apart. Organizing around Sexual Orientation and Gender Identity Worldwide*, United States of America: Human Rights Watch; Human Rights Watch. 2011. 'We'll Show you you're a Woman'. Violence and Discrimination against Black Lesbians and Transgender Men in South Africa. United States of America: Human Rights Watch.

<sup>13</sup> AH Mavhandu-Mudzusi, 'LGBTIQ Students' rights violation and its impact on combating HIV/AIDS.' *Inaugural lecture presented on 23 February 2017, at the University of South Africa*. PDF available at: [http://uir.unisa.ac.za/bitstream/handle/10500/22554/Mavhandu-Mudzusi\\_Inaugural%20lecture\\_23Feb%202017.pdf?sequence=1](http://uir.unisa.ac.za/bitstream/handle/10500/22554/Mavhandu-Mudzusi_Inaugural%20lecture_23Feb%202017.pdf?sequence=1), p. 7. (25/3/2020).

<sup>14</sup> Human Rights Watch. 2011, (n. 12).

<sup>15</sup> P Brouard & J Pieterse (2012) 'Two steps forward, one step back: equality and sexual orientation in South Africa 2009-2011', in *South African Human Rights Commission Report. Commentaries on Equality: Race, Gender, Disability and LGBTI Issues*, Braamfontein: South African Human Rights Commission.

<sup>16</sup> *Ibid.*

<sup>17</sup> Human Rights Watch. 2011, (n. 14).

<sup>18</sup> Brouard & Pieterse (2012), (n. 15).

<sup>19</sup> Dembroff (2016), (n. 11).

<sup>20</sup> A Ojilere (2016). 'Homosexuality and Same-Sex Marriage: The Dilemma of Human Rights in Sub-Saharan Africa.' *IMSU Journal of Commercial and Contemporary Law*, 6, 159-169. Historically, South Africa is the only African country and the first country in the world to provide constitutional protection for LGBTIQ, including homosexual and lesbian rights, by prohibiting discrimination based on 'sexual orientation'. Section 9 (3) of the country's 1996 Constitution provides that, 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and

across the rest of Sub-Saharan Africa.<sup>21</sup> Among Africans of popular religious divides, namely, Islam,<sup>22</sup> Christianity,<sup>23</sup> and African Traditional Religion (ATR),<sup>24</sup> LGBTIQ practices and rights are roundly denounced and rejected as unacceptable ‘new rights’<sup>25</sup> introduced by Western democracies to violate African piety and sanctity. As such, LGBTIQ persons are precluded from indulging publicly in acts or practices like homosexuality, child pornography or same-sex marriage, which quintessentially offend public morality and national conscience. Most Africans equally view LGBTIQ practices and rights as a deliberate ‘attempt’ by the West and international human rights community to contaminate Africa’s unique morality and cultural diversity<sup>26</sup> by seeking to elevate ‘perverse’, ungodly,<sup>27</sup> ‘homo-negative’,<sup>28</sup> ‘un-African’,<sup>29</sup> ‘immoral’ and ‘unnatural’ ‘vices’ to an international human rights pedestal, and using same as a bait for political intimidation, *Homocapitalism*<sup>30</sup> and diplomatic exclusion of Africa.<sup>31</sup>

Africa’s common rejectionist approach to LGBTIQ persons, practices and rights is evident from the fact that gay practices and same-sex marriage are criminalized by legislation in most of the region. It is also evident from the public opposition and unflinching stand against such ‘new rights’ by Africa’s political leadership at the highest level. For instance, at a state visit to the United States of America in July 2015, President Muhammadu Buhari of Nigeria was reported to have ‘categorically ruled out any chance of Nigeria being pressured’ by the then Obama administration into decriminalizing homosexuality or legalising same-sex marriage in Nigeria.<sup>32</sup> Also, under the Nigerian Criminal Code Act<sup>33</sup> which covers non-penile-vaginal sexual intercourse, anyone who ‘has carnal knowledge of any person against the order of nature’ or ‘permits a male person to have carnal knowledge of him or her against the order of nature’ shall be sentenced to fourteen years’ imprisonment, if convicted. Nigeria’s Same Sex

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birth.’ The country’s Civil Union Act also specifically permit same-sex marriage, albeit, the Act contradicts itself by providing in its section 5 that religious institutions are permitted not to solemnise same-sex marriages. Its section 6 also permit state marriage officers who object to same-sex marriage ‘on the ground of conscience, religion and belief’ to refuse to solemnise such marriages.

<sup>21</sup> LL Roberts (2019). ‘Changing worldwide attitudes toward homosexuality: The influence of global and region-specific cultures, 1981–2012.’ *Social science research*, 80, 114-131.

<sup>22</sup> N Mahomed (2013). ‘Islam and Homosexuality.’ *Journal for Islamic Studies*, 33, 235; M Rahman (2014). Islam versus Homosexuality as Modernity. In *Homosexualities, Muslim Cultures and Modernity* (pp. 27-48). Palgrave Macmillan UK; S Ahmadi (2015). ‘Islam and Homosexuality: Religious Dogma, Colonial Rule, and the Quest for Belonging.’ *Journal of Civil Rights and Economic Development*, 26(3), 2.

<sup>23</sup>N Subhi & D Geelan (2012). ‘When Christianity and homosexuality collide: Understanding the potential intrapersonal conflict.’ *Journal of homosexuality*, 59(10), 1382-1402; R Mathibe (2015). The Conflicts: Christianity and Homosexuality.’ *Agenda*, 29(1), 81-84.

<sup>24</sup> There is no known single African ‘religion’. However, various African traditional religions define the aggregate cultural environment within which Africans, whether Christians or Muslims, view the world and make moral decisions on issues such as homosexuality. See K Ward (2013). ‘Religious Institutions and Actors and Religious Attitudes to Homosexual Rights: South Africa and Uganda.’ *Human rights, sexual orientation and gender identity in The Commonwealth: Struggles for decriminalisation and change*, 409-427, at 411.

<sup>25</sup> Addressing the UNGA, on Africa’s stand against LGBT practices and rights, former President Robert Mugabe of Zimbabwean described homosexuality and same-sex marriage as ‘new rights’ which are alien to Africa and Africans. See: News Day. 2015. *Fifty percent of Gays are HIV positive*. (25 September 2015). The Speech is also available at: [http://www.slate.com/blogs/the\\_slatest/2015/09/28/zimbabwe\\_s\\_mugabe\\_u\\_n\\_speech\\_on\\_gay\\_human\\_rights.html](http://www.slate.com/blogs/the_slatest/2015/09/28/zimbabwe_s_mugabe_u_n_speech_on_gay_human_rights.html) (17/7/2018);

<sup>26</sup> O Abifarin & JO Chijioke (2016). ‘Same-Sex Marriage, Human Rights and Cultural Diversity: An African Perspective.’ *World Affairs: The Journal of International Issues*, 20(1), 126-139.

<sup>27</sup>L Vincent & S Howell (2014). ‘Unnatural’, ‘Un-African’ and ‘Ungodly’: Homophobic Discourse in Democratic South Africa.’ *Sexualities*, 17(4), 472-483.

<sup>28</sup> M Van Zyl (2011). ‘Are Same-Sex Marriages UnAfrican? Same-Sex Relationships and Belonging in Post-Apartheid South Africa.’ *Journal of Social Issues*, 67(2), 335-357.

<sup>29</sup> V Reddy & U Baduza (2006), (n. 6).

<sup>30</sup> The word, *Homocapitalism*, was introduced by Rahul Rao to describe the practice of global capital conspiracy whereby Western and international aid and monetary donors threaten to withdraw or deny aid to poor developing countries that do not recognize and guarantee LGBTIQ practices and rights. See R Rao (2015). *Global Homocapitalism*. *Radical Philosophy*, 194, 38-49.

<sup>31</sup> The fact that African countries are poor and underdeveloped, and often depend heavily on Western economic aid for infrastructural, medical, educational and other developments, the refusal to succumb to Western agitation for LGBTIQ practices and rights confirm Africa’s collective regional doggedness on the subject matter.

<sup>32</sup> T Bakare, ‘There is no room for gay rights in Nigeria, says Buhari’ *The Guardian Newspaper*, Nigeria, 22 July, 2015, <http://www.nguardiannews.com/2015/07/there-is-no-room-for-gay-rights-in-nigeria-says-buhari/> (24/3/2020).

<sup>33</sup> Cap. C38 Laws of the Federation of Nigeria, 2004.

Marriage (Prohibition) Act, 2013 equally prohibit the registration of gay clubs, societies and organizations, their sustenance, processions and meetings.<sup>34</sup> Media reports confirm that former President Yahya Jammeh of the Gambia had threatened to kill homosexuals wherever they may be ‘hiding’ in his country. In his words, as reported, ‘if you do it [gay practices in the Gambia] I will slit your throat,’ ‘If you are a man and want to marry another man in this country and we catch you, no one will ever set eyes on you again, and no white person can do anything about it.’<sup>35</sup> In Zimbabwe, section 78 (3) of the country’s 2013 Constitution specifically forbids relationships or sexual intercourse between people of the same sex and men specifically. In his highly confrontational address to the UN General Assembly in New York on 28 September 2015, former President Robert Mugabe of Zimbabwe expressed Africa’s common rejection and denunciation of LGBTIQ practices and rights especially homosexuality and same-sex marriage by declaring that: ‘We are not gays! These ‘new rights’ are contrary to our values, norms, traditions, and beliefs’.<sup>36</sup> The former president even described gays and lesbian as being ‘worse than dogs and pigs’.<sup>37</sup>

Some African scholars are, however, opposed to the rejection of LGBTIQ rights by countries in Sub-Saharan Africa. For instance, Dlamini disagrees with the contention that homosexuality is ‘un-African’ and ‘unnatural’<sup>38</sup> while Abe specifically advocate the legalization of LGBTIQ practices and rights (especially homosexuality and same-sex marriage) across Sub-Saharan Africa, as a mark of ‘appreciation’ of the inherent right of human beings to engage in a union that is best for them.<sup>39</sup> In sync with these African scholars, Elizabeth Moberly posited that the aggregate African abhorrence of homosexuality is unrealistic and ‘one of the oldest myths in African tradition which is also backed up and shaped by religious beliefs.’<sup>40</sup> For her, homosexuality had always been practiced in Africa and it would be foolhardy to state otherwise.

On the contrary, it may well be argued that the above propositions seemingly ignore Africa’s cultural uniqueness which naturally determines what may be considered as its societal best practices, and on the basis of which laws are made. The paper therefore reiterates that Western campaign for the legalization of LGBTIQ rights such as same-sex marriage is rather unrealistic and a matter of political correctness,<sup>41</sup> because a proper legal marriage with sexual attachments is logically ‘impossible’ between persons of the same biological sex.<sup>42</sup> This is true to the extent that even in the United States and other Western democracies where same-sex marriage is acclaimed to be a part of the personal choices made based on individual sexual orientation, equality and intimacy, the political divide on same-sex marriage still persists.<sup>43</sup> It is equally arguable that even in South Africa where section 9 (3) of the 1996 Constitution guarantees the right to sexual orientation on the Bill of Rights, LGBTIQ rights are still not fully guaranteed, for instance, section 5 of the country’s Civil Union Act still permit religious institutions to not solemnise same-sex marriages. Section 6 of the Act also permit state marriage officers who object to same-sex marriage ‘on the ground of conscience, religion and belief’ to refuse to solemnise same-sex marriages. This contradiction in South

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<sup>34</sup> SRSchwartz, RG Nowak, I Orazulike, B Keshinro, J Ake, S Kennedy & TRUST Study Group. (2015). ‘The immediate effect of the Same-Sex Marriage Prohibition Act on Stigma, Discrimination, and Engagement on HIV Prevention and Treatment Services in Men Who Have Sex with Men in Nigeria: Analysis of Prospective Data from the TRUST Cohort.’ *The Lancet HIV*, 2(7), e299-e306.

<sup>35</sup> I Tharoor, ‘Gambia’s president threatens to slit the throats of gay men’, *The Washington Post*, 25 May, 2015, <https://www.washingtonpost.com/news/worldviews/wp/2015/05/12/gambias-president-threatens-to-slit-the-throats-of-gay-men/> (23/3/2020).

<sup>36</sup> News Day. 2015. *Fifty percent of Gays are HIV positive*. (25 September 2015).

It is noteworthy that the vocal opposition to LGBTIQ rights and practices expressed by the political leaderships in Uganda, Nigeria, the Gambia and Zimbabwe herein cited does not in any way diminish the stand of other African countries on the matter. It rather underscores their common rejection, albeit, the cited countries are among the prominent African nations which have taken bold legal, political and social steps to publicly denounce LGBTIQ rights and practices, especially gay/lesbian practices/marriage.

<sup>37</sup> T Mojo (2014). *Sexuality as a Tool to Gain Political Power: An Introspection of Zimbabwe’s Elections of 2013*. Harare: University of Zimbabwe.

<sup>38</sup> B Dlamini (2006). Homosexuality in the African Context. *Agenda*, 20(67), 128-136.

<sup>39</sup> Abe O. (2016). ‘Dialectics of Same Sex Marriage: International Human Rights Reflections.’ 31(1) *Wisconsin Journal of Law, Gender, and Society*.

<sup>40</sup> ER Moberly (1983). ‘Homosexuality: A new Christian Ethic.’ James Clarke & Co., London.

<sup>41</sup> Ojilere (2016), (n. 9).

<sup>42</sup> Ojilere (2016). ‘*Obergefell v. Hodges* and the Judicialization of Same-Sex Marriage in America: Legalizing the Impossible.’ *International Journal for Intersectional Feminist Studies*, 2(1), 33-51.

<sup>43</sup> WR Schumm (2015). *The Institutionalization of Marital Inequality: The Case of Same-Sex Marriage*. Available at SSRN 2549319.

Africa's jurisprudence is, no doubt, a 'silent' acknowledgment of Africa's general contempt for gay practices and same-sex marriage.<sup>44</sup> The contradiction confirms that the legalization of gay rights and marriage in South Africa and most Western countries including the UK and USA is arguably a matter of political convenience and correctness.<sup>45</sup>

#### **4. Common Forms of Violation of LGBTIQ Rights in Africa**

Despite the rhetoric of the rights to equality, dignity, privacy, non-discrimination, as well as free choice in marriage and family life, contained in most domestic legislation and in international human rights instruments, the LGBTIQ community in the African sub-region still suffer varied forms of dehumanization including segregation, violence, killing. This imperative is not even altered by specific fundamental rights guarantees contained in the national Constitutions of concerned African countries. For instance, Chapter IV of Nigeria's 1999 Constitution (as amended) contain provisions for the guarantee of fundamental rights, including the right to life, dignity, privacy, free movement and non-discrimination. It is also remarkable that despite the specific provision of section 42 (1) (a) of the said Constitution which prohibit discrimination against persons on several grounds including membership of a particular community, ethnic group, place of origin, sex, religion or political opinion, yet the violation of LGBTIQ rights persist across the country.

This paper has earlier noted that homosexuality and related practices are outlawed in Nigeria, Uganda, Zimbabwe and the Gambia, and that in these countries, the LGBTIQ may be imprisoned or even Killed. In Kenya too, homosexuality is criminalized, even if it is shown to be private and consensual.<sup>46</sup> This places the LGBTIQ and homosexual individuals at the mercy of ill-trained and corrupt law enforcement officials who exploit their socio-legal vulnerability by blackmailing them with the threat of arrest and/or imprisonment.<sup>47</sup> Consequently, LGBTIQ individuals are dissuaded from reporting gross abuses and violations to their human rights, for fear of being arrested and imprisoned in a system that is manifestly structured against their sexual orientation and interest.<sup>48</sup> The LGBTIQ community are also unable to enjoy positive rights including access to healthcare because society views them as perverts.<sup>49</sup> Sometimes when they report cases of rape, sexual violations or even assault, rather than being protected on the merits of their complaint, the police arbitrarily arrest homosexual men and subject them to degrading anal testing in a bid to 'gather evidence of the crime',<sup>50</sup> thereby denying them of their right to equality, fair procedure and equal protection of the law.<sup>51</sup> This criminalisation invariably legitimizes the general homophobic attitude of most Africans, including the majority of Kenyans. It particularly marginalizes the LGBTIQ community, and expose them to common social threats of inequality and stigmatization, as well as the possible risk of mob violence.<sup>52</sup> One report from South Africa also reveal the frustration and stigmatization faced by LGBTIQ persons, despite the acclaimed right to sexual orientation contained in the Bill of Rights to the country's constitution. A female student of the University of Venda who reported for HIV counselling and testing at the university's HIV/AIDS unit had stated on the pre-test questionnaire that she had 'two females and one male as sexual partners.'<sup>53</sup> She was then specifically asked her sexual orientation, and she responded thus:

To tell you the honest fact, I am a lesbian, however, since I came to this university, due to the way in which the rights of LGBTI students are violated, it is like we are not the citizens of South Africa. We

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<sup>44</sup> This contention is complimented by the frustration expressed by Pierre de Vos, that in South Africa, it is still 'more difficult for same-sex couples to get married and the time has surely come to scrap this unconstitutional provision of the Civil Union Act.' See Pierre de Vos, 'Same-sex marriage in South Africa: Separate but unequal' Daily Maverick, (South Africa) 29 September, 2015 <http://www.dailymaverick.co.za/opinionista/2015-09-29-same-sex-marriage-in-south-africa-separate-but-unequal/#.VsmaANBHYqR> (24/3/2020).

<sup>45</sup>Ojilere (2016), (n. 41).

<sup>46</sup>AW Mukora (2017). *Giving rights to the outlawed among us: decriminalizing Kenya's anti-sodomy laws* (Doctoral dissertation, Strathmore University).

<sup>47</sup> Kenya Human Rights Commission Report, *The Outlawed Among Us: A Study of the LGBTI Community's Search for Equality and Non-Discrimination in Kenya*, 2011, at 21.

<sup>48</sup> *Ibid.*, at 30.

<sup>49</sup> Positive rights are fundamental rights which are usually associated with second and third generation human rights, and impose a positive obligation on States to ensure a progression of her citizens towards realisation of these rights. See Mukora (2017), (n. 46), p. 14.

<sup>50</sup> PEMA-Kenya, *The Issue is Violence: Attacks to LGBT People at the Kenyan Coast*, at 22-23; Human Rights Watch, 'Kenya: Court Upholds Forced Anal Tests', 16 June 2016.

<sup>51</sup> Human Rights Watch, 'Kenya: Court Upholds Forced Anal Tests', 16 June 2016.

<sup>52</sup> Kenya Human Rights Commission Report, (n. 48) at 27.

<sup>53</sup> AH Mavhandu-Mudzusi (2017), (n. 113).

are treated like dirt. We are called all the names, humiliated in public and even assaulted just for being who we are. The situation made me to just have a so-called boyfriend to disguise. But the truth is I don't feel anything when I am with him. He bores me to death. I am also putting on dresses to convince people that I am a 'real lady'. I am so uncomfortable.<sup>54</sup>

## **5. Critique**

Thus far, it has been shown that despite Western bias against Africa in relation to LGBTIQ rights, especially the legalization and decriminalization of homosexuality and same-sex marriage, the sub-region remains a 'no-go area' for LGBTIQs for now. It is disheartening too, that most of the West and international human rights community are mindless of Africa's unique religiosity and cultural sovereignty which informs its rejection of LGBTIQ rights. This is without prejudice to the recent finding that for over 600 years, African nations have been subjected to powerful influences of globalisation such as the slave trade, colonialism, transcultural exchange, and the law and development movement, which are steadily eroding the identity of indigenous African laws.<sup>55</sup>

Nonetheless, this paper is therefore of the view that if only the West and international human rights community will appreciate certain inherent peculiarities of Africans, the politics of diplomatic exclusion and threat of homocapitalism against the Sub-region will be minimized. Some of those factual peculiarities include the following:

1. African societies are generally fused and highly interactive, and sexual identity is a *sine qua non* for the advancement of hierarchical structures and social needs. This explains why paternity is taken seriously in Africa as a determining factor for the enjoyment of certain traditional and cultural rights and privileges which attach to the dignity of man. It remains consequential that the protection of LGBTIQ rights may, for instance, deprive children of their legitimate claim to paternal or maternal rights. Suffice to say, that children of gay and lesbian couples are surely likely to suffer social exclusion and stigmatisation among their peers, in a continent where Afrocentrism overwhelms agitations for LGBTIQ rights. Such children may be derided as having 'no paternal roots' with its inherent negative implications. They also risk the confusion and crisis of parental identity since they only have 'a father and a father' or 'a mother and a mother' instead of the traditional 'father and mother' parentage.
2. Africans are generally inclined to traditions and religion, and all major faiths, namely, Islam, Christianity and African traditional religion (ATR), condemn every single LGBTIQ practices including gender transplant, homosexuality and sexual relations against the order of nature. Diala, however, rejects this contention and argued instead that both Islam and Christianity are alien to African originality and that many Africans are rather confused about their cultural identity, while some are plain hypocrites for the manner they embrace change selectively.<sup>56</sup>
3. The endemic poverty and underdevelopment of most African nations, and their fragile economies may not withstand the implied special infrastructural and public health needs of the LGBTIQ community, who have been confirmed to be more vulnerable to anal infection/transmission of sexually transmitted diseases including HIV/AIDS.<sup>57</sup>
4. The truth must be accepted that contemporary struggles for LGBTIQ rights has so far been dominated by the prevalence of gay and lesbian identity issues and organisations.<sup>58</sup> These terms are western in origin and intended to reflect inherent Western notions of sexual orientation and identity which do not represent global diversity, especially with respect to sub-Saharan Africa, where homosexuality is considered a [mis]conduct rather than an identity, hence, it is referred to as men having sex with men (MSM), or much less widespread, as women having sex with women (WSW).<sup>59</sup>

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<sup>54</sup> *Ibid* at 8.

<sup>55</sup> AC Diala (2019). A butterfly that thinks itself a bird: the identity of customary courts in Nigeria. *The Journal of Legal Pluralism and Unofficial Law*, 51(3), 381-405.

<sup>56</sup> *Ibid*,

<sup>57</sup> C Beyrer, P Sullivan, J Sanchez, SD Baral, C Collins, AL Wirtz & K Mayer (2013). The increase in global HIV epidemics in MSM. *Aids*, 27(17), 2665-2678.

<sup>58</sup> A Lind (ed). (2010). *Development, sexual rights and global governance*. London: Routledge.

<sup>59</sup> AT Sauer & A Podhora (2013). 'Sexual orientation and gender identity in human rights impact assessment.' *Impact Assessment and Project Appraisal*, 31(2), 135-145.

These factors become more complicated with the African belief in the age-long ancestral history and heritage of their traditions and customary law, some of which (as in the case of LGBTIQ rights) they still believe to be unchangeable, against all odds. Rather than threatening African countries with diplomatic exclusion or homocapitalism, the West and international human rights community should patiently encourage individual African countries opposed to the legalization LGBTIQ rights to carry out a referendum on the subject matter, and the result of such referendum should be respected by the international human rights community as a true and honest reflection of the people's innermost wish.<sup>60</sup> Another pertinent issue with respect to LGBTIQ rights across Africa is the issue of African 'woman to woman' traditional marriage. Although, this form of marriage is arguably a 'same-sex marriage' between women,<sup>61</sup> it is devoid of physical romance, erotic or sexual relations between the parties.<sup>62</sup> This character distinguishes it from the form of same-sex marriage advocated by the West and international human rights community. By this form of traditional 'marriage', a childless woman, a barren widow,<sup>63</sup> or a woman of means who is not properly married,<sup>64</sup> may bring in a younger woman to procreate or bear a son for the family.<sup>65</sup> This form of marriage is justified by the notion of primogeniture whereby Africans believe that barrenness is a stigma and that male children are inevitable for the preservation of family ancestry.<sup>66</sup> African nations can therefore not be accused of blowing hot and cold at the same time, with regards to LGBTIQ rights.

### 6. Conclusion

The African approaches to certain critical human rights issues are oftentimes dependent on inherent traditional and mythological beliefs which have a long generational history from ancient times. These beliefs have brought Africa in collusion with international templates on the human rights of vulnerable persons.<sup>67</sup> As such, African women/girls are held inferior to men/boys,<sup>68</sup> just as sons are preferred to daughters;<sup>69</sup> persons with albinism have been segregated, abused, sacrificed to the gods or killed;<sup>70</sup> women with albinism have been particularly put at risk;<sup>71</sup> women have been treated as the 'property' of men and consequently disintitiled from inheriting immovable property; a class of persons have been tagged 'outcasts' (or *Osu*) and denied basic rights of social inclusion and kingship rites;<sup>72</sup> people living with HIV/AIDS have been adjudged as 'cursed by the gods' and discriminated or ostracized by society,<sup>73</sup> just like the LGBTIQ individuals. All these instances underscore the African notion of inequality with regard to certain vulnerable groups, even though residential experience in rural African societies shows that amongst all these, the rejection of the 'outcasts' and LGBTIQ persons seem to be the most central. It must however be conceded, that in recent times, some African societies including Nigeria, have used judicial fiat to narrow the gap of

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<sup>60</sup> Ojilere (2016), (n. 9).

<sup>61</sup> RJ Cadigan (1998). 'Woman-To-Woman Marriage: Practices and Benefits in Sub-Saharan Africa.' *Journal of Comparative Family Studies*, 89-98.

<sup>62</sup> RS Oboler (1980). Is The Female Husband a Man? Woman/Woman Marriage among the Nandi of Kenya. *Ethnology*, 19(1), 69-88.

<sup>63</sup> WN Njambi & WE O'Brien (2005). 'Revisiting 'Woman-Woman Marriage': Notes On Gikuyu Women.' In *African Gender Studies A Reader* (pp. 145-165). Palgrave Macmillan, New York.

<sup>64</sup> MJ Herskovits (1937). 'A note on 'woman marriage' in Dahomey.' *Africa*, 10(3), 335-341.

<sup>65</sup> In this case, a willing male is brought in to fill the sex-gap and make children for the 'new wife'. This is not immoral but rather encouraged by the practice of polygamy which is accepted all over Africa.

<sup>66</sup> A Ojilere & UU Chukwumaeze (2010). CEDAW and Gender-Based Discriminations against Women in Nigeria. *Nigerian Journal of Food, Drug and Health Law*, 3(1), 95-105.

<sup>67</sup> A Ojilere (2008). The Implication of Customary Law and Socio-religious Mythology on the Rights of Women in Nigeria. *Nigerian Journal of Public Law*, 1(1), 257-266.

<sup>68</sup> ST Birabil & U Idoghor (2020). 'Gender Inequality in Nigerian Society: Matters Arising and Way Forward for 21st Century.' *European Journal of Education Studies*. <https://www.oapub.org/edu/index.php/ejes/article/viewFile/2933/5571> (25/3/2020).

<sup>69</sup> I Nnadi (2013). Son Preference-A Violation of Women's Human Rights: A Case Study of Igbo Custom in Nigeria. *J. Pol. & L.*, 6, 134.

<sup>70</sup> A Ojilere (2018). African Mythology in the Violation of Life and Dignity of Albino Minorities in Nigeria. *University of The Gambia Law Review*, 1(1), 235-247.

<sup>71</sup> A Ojilere & M M Saleh (2019). Violation of Dignity and Life: Challenges and Prospects for Women and Girls with Albinism in Sub-Saharan Africa. *Journal of Human Rights and Social Work*, 4(3), 147-155.

<sup>72</sup> A Ojilere & C Madu (2019). Human Rights and Socio-Cultural Savagery: Critiquing the *Osu* Caste System in Igboland, Nigeria. *IMSU Journal of Jurisprudence and International Law*, 3, 47-56.

<sup>73</sup> A Ojilere (2008). The Socio-legal Implications of the Fight against HIV/AIDS in Nigeria. *Nigerian Journal of Food, Drug and Health Law*, 1(1), 84-106.

inequality on women's right to inherit immovable intestate property under customary law.<sup>74</sup> Christian Pentecostalism is tacitly eroding the segregation against the *Osu* in Nigeria while persons living with HIV/AIDS are also gradually regaining social acceptance across Africa. However, when and whether a combination of these social, legal and religious interventions may eventually change African rejectionist approach to LGBTIQ persons, practices and rights is certainly a matter for the future. This is without prejudice to the contention that laws, beliefs and practices which promote inequality and discrimination against peripheral groups, such as LGBTIQ persons are capable of undermining the peace and democratic process of a nation.<sup>75</sup> Therefore, as Africa continues to resist the pressure to legalize and recognize LGBTIQ rights, the affected group will also continue to struggle for their rights.<sup>76</sup>

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<sup>74</sup> A Ojilere, R Onuoha & T Igwe (2019). New Directions for Securing African Women's Right to Property under Customary Law: The Case of Nigeria. *Asian Women*, 35(1), 95-119.

<sup>75</sup> SM Feldman (2015). '(Same) Sex, Lies, and Democracy: Tradition, Religion, and Substantive Due Process (With an Emphasis on *Obergefell v Hodges*).' *Lies, and Democracy: Tradition, Religion, and Substantive Due Process (With an Emphasis on Obergefell V. Hodges)* (September 10, 2015), 24.

<sup>76</sup> ZZ Devji (2016). Forging paths for the African queer: Is there an 'African' mechanism for realizing LGBTIQ rights?. *Journal of African Law*, 60(3), 343-363; M Taruvinga & M Mushayamunda (2018). 'Homosexuality as a silent insider: a call for social work discourse among Lesbians, Gays and Bisexuals (LGB) in Zimbabwe.' *Mgbakoigba: Journal of African Studies*, 7(2), 23-38.