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The (non-)recognition of same-sex marriage in the *Recognition of Customary Marriages Act* 120 of 1998

Summary

The *Constitution of the Republic of South Africa,* 1996 provides for all people to be equal, including people of all sexual orientations, and at the same time guarantees the right to participate in the cultural life of one's choice. This contribution examines the issue of same-sex marriage in South Africa through the combined lens of the right to equality and the right to culture. More specifically, it assesses whether same-sex couples are afforded the right to marry in accordance with their customary cultural beliefs and whether same-sex customary marriage is provided for in the *Recognition of Customary Marriages Act* 120 of 1998. Following an analysis of Constitutional Court jurisprudence on the right to equality and to culture, certain provisions of the *Recognition Act* are examined for their in-/exclusion of homosexual persons. It would appear that the only gender-neutrally phrased section in the *Recognition Act* dealing with customary marriages in particular is sec. 3, which lists the requirements for such marriages to be valid. Whether this was an oversight on the part of the legislature, or whether it was intentional, is uncertain. However, several other sections, notably also the definition of *lobolo* in sec. 1, are phrased from a distinctly heteronormative perspective. A subsequent discussion of homosexual practices in Africa serves a dual purpose. It not only debunks some prominent African leaders' contention that homosexuality is "un-African", but also reveals that homosexual marriage along with a number of ancillary same-sex forms of customary marriage are not catered for in the provisions of the *Recognition Act*. In light of these findings, the contribution concludes with recommendations for the improvement of the *Recognition Act* to be less exclusionary and discriminatory. It is further argued that, by adjusting the phrasing of the *Act*, the South African legislature stands to gain much more than affording same-sex couples recognition in customary law. It would also go a long way towards promoting a culture of tolerance towards all people, in line with what the *Constitution* demands.

1. Introduction

South Africa is among the few countries in the world that have granted same-sex couples the right to marry legally – a significant step, considering that the history of the country was wrought with oppression and conservatism. This development can primarily be attributed to the promulgation of the interim *Constitution of the Republic of South Africa*, *Act* 200 of 1993 (hereinafter, the interim *Constitution*) as well as the final *Constitution of the Republic of South Africa*, 1996 (hereinafter, the *Constitution*). The prohibition of unfair discrimination on the ground of sexual orientation was included in Chapter 3 of the interim *Constitution* and confirmed in Chapter 2 (Bill of Rights) in the *Constitution*.[1]

In 1994, South Africa was the only country globally to have included such a revolutionary provision in its *Constitution*. Yet this had not happened overnight. After its adoption, the Constitutional Court, on an *ad-hoc* basis, afforded recognition to same-sex partnerships for certain specific and constrained purposes.[2] Eventually, the Constitutional Court declared the exclusion of same-sex couples from the range of benefits and rights afforded through marriage to heterosexual couples to be constitutionally invalid.[3] This culminated in the promulgation of the *Civil Union Act*,[4] which granted marriage rights and benefits to all same-sex couples.

In addition to providing for people of all sexual orientations, the *Constitution* also guarantees the freedom of South Africa's various cultural communities and the right to participate in the cultural life of one's choice.[5] Knowing that the *Civil Union Act* already enables same-sex couples to marry lawfully, this article takes the debate a step further by examining whether same-sex couples who belong to a particular customary cultural group are afforded the right to conclude a marriage in accordance with their cultural beliefs. More specifically, it will assess whether same-sex customary marriage is provided for within the parameters of the *Recognition of Customary Marriages Act*[6] (hereinafter, the *Recognition Act*).

The contribution will commence with an exposition of Constitutional Court jurisprudence on the right to equality and to culture. Against this backdrop, it will also examine the provisions of the *Recognition Act,* particularly the requirements for a valid customary marriage and the definition of *lobolo*. It will analyse whether the requirements and the definition in effect bar same-sex couples from marrying in accordance with

1 See *Constitution of the Republic of South Africa* 1996:sec. 9.
2 For example, in *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC), the right to adoption was extended to a same-sex couple. See also *Langemaat v Minister of Safety and Security* 1998 3 SA 312 (T); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 1 BCLR 39 (CC); *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA).
3 *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC).
4 *Civil Union Act* 17/2006.
5 *Constitution of the Republic of South Africa*:secs. 30-31.
6 *Recognition of Customary Marriages Act* 120/1998.

customary law. This will be followed by a brief discussion of homosexuality within the African context to establish the accuracy of the contention that homosexuality is "un-African" and a colonial import. The article then concludes with recommendations for the possible development of the *Recognition Act*.

2. Constitutional Court jurisprudence on the right to equality and to culture

During the pre-constitutional era, same-sex unions were denied any form of legal protection and were regarded as immoral in South Africa.[7] However, the introduction of the *Constitution* radically altered this position.

The equality clause contained in sec. 9(1) of the *Constitution* provides that "everyone is equal before the law and has the right to equal protection and benefit of the law".[8] Sec. 9(3), in turn, expressly prohibits unfair discrimination on any of the prohibited grounds, including sexual orientation.[9] At the same time, though, the *Constitution* protects the right to participate in the cultural life of one's choice, entrenching the right to culture as one that can be limited only by a law of general application.[10]

But are these two freedoms mutually exclusive when it comes to same-sex marriage (equality) under customary law (culture)?

2.1 The right to equality

The Constitutional Court follows a substantive approach to equality, in order to take full account of the victim's experience of discrimination. This approach is aimed at ensuring that the laws and policies of the country do not perpetuate the marginalisation of vulnerable groups who suffered or continue to suffer social, economic, or political disadvantage.[11] The approach requires prevailing laws to embrace and accommodate diversity, eradicate the patterns of historical disadvantage experienced in pre-democratic South Africa, and transform the face of post-apartheid society.

On several occasions, the Constitutional Court has held that establishing unfair discrimination involves a two-stage inquiry. First, it involves a determination as to whether the differential treatment is based on one of the listed grounds of discrimination in sec. 9(3) of the *Constitution*,

7 *Minister of Home Affairs v Fourie*:par. 4.
8 *Constitution of the Republic of South Africa*:sec. 1.
9 It 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 birth.
10 See *Constitution of the Republic of South Africa*:sec. 36.
11 Smith 2014:613.

or on an analogous ground.[12] Once this is confirmed, the second stage determines the fairness of such discrimination. The second stage, in particular, involves an enquiry into the impact of the discrimination on the complainant, including the possibility of an infringement of human dignity. One indicator of the infringement of human dignity would be whether the treatment in some way promotes the notion that the individual/group is less worthy of consideration and respect than others in a similar social position.[13] An outcome that would certainly point to unfair discrimination or differentiation would be one that shows that the group/individual affected by the present discrimination also suffered past disadvantage, stereotyping, marginalisation, and vulnerability.[14] This would amount to so-called systemic discrimination against vulnerable groups in society, and is often imposed by legislation.[15]

The Constitutional Court has, in a number of instances, confirmed that gays and lesbians in South Africa are indeed exposed to systemic, historical discrimination. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*,[16] for instance, 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.[17] This put homosexual persons within the ambit of a minority group requiring constitutional protection from patterns of disadvantage and discrimination. The fact that they were a political minority who exclusively relied on the Bill of Rights for their protection, the court continued, rendered the impact of discrimination on homosexual persons more serious and increased their vulnerability.[18]

This sentiment was echoed in *Minister of Home Affairs v Fourie*,[19] where Sachs J stated that homosexuals in South Africa were a permanent minority who had suffered patterns of disadvantage and were, therefore, exclusively dependent on the Bill of Rights for their protection.[20] He further confirmed that the right to marry was an "inalienable right" afforded to all residing in South Africa, irrespective of race or sexual orientation, and for homosexuals to be affirmed as full and equal members of South African society, they too had to be granted this right.[21] The judge went on to stress that a family, as proposed by the *Constitution*, could be constituted in various ways, and that family life had to change along with social practices and traditions. He emphasised that continued discrimination based on

12 *Harksen v Lane* 1998 1 SA 300 (CC):321G-322C/D.
13 De Vos & Barnard 2007:799.
14 *Brink v Kitshoff* 1996 6 BCCR 752 (CC):769B-D.
15 *President of the Republic of South Africa v Hugo* 1997 6 BCCR 708 (CC):755E/F.
16 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR.
17 *National Coalition for Gay and Lesbian Equality v Minister of Justice*:par. 25.
18 *National Coalition for Gay and Lesbian Equality v Minister of Justice*:par. 25.
19 *Minister of Home Affairs v Fourie*:par. 15.
20 *Minister of Home Affairs v Fourie*:par. 15.
21 De Vos & Barnard 2007:798.

sexual orientation denied same-sex couples one of the most fundamental freedoms entrenched in our *Constitution*: the same inherent worth and dignity for all persons.[22] Thus, Sachs J concluded that the common law was in need of development to embrace same-sex couples.

In both the cases of *National Coalition*[23] and *Fourie*,[24] the respective judges confirmed that discrimination based on sexual orientation severely affected homosexual persons' dignity, personhood, and identity. Where homosexual persons suffer discriminatory or differential treatment based on their sexual orientation, it would render such treatment unconstitutional, unless proper justification in the form of a legitimate governmental purpose can be provided to substantiate it.[25]

2.2 The right to culture

2.2.1 Defining culture based on literature and case law

The value of multiculturalism, as well as the significance of culture for individual well-being and the welfare of society, is evident from the Bill of Rights. Sec. 30 states that "everyone has the right to use the language and participate in the cultural life of one's choice".[26] Sec. 31 then goes on to provide that

> persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, to enjoy their culture, practise their religion and use their language; and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.[27]

Sec. 6 acknowledges the cultural diversity in the Republic by recognising eleven official languages, while sec. 9 prohibits discrimination based on language, conscience, culture and religion.[28]

Despite its significance, however, there is no comprehensive, widely accepted definition of "culture", without which much of what is guaranteed in the provisions cited above could be rendered meaningless. A study of relevant literature along with case law reveals the following three meanings.

The first way in which "culture" is used is to denote a specific custom/practice that is based on ethics, thereby conveying the manner in which a person behaves. This is the case in, for instance, sec. 184 of the *Constitution*, which provides that the South African Human Rights Commission must "promote respect for human rights and a *culture* of

22 *Minister of Home Affairs v Fourie*:par. 15.
23 *National Coalition for Gay and Lesbian Equality v Minister of Justice*:par. 26.
24 *Minister of Home Affairs v Fourie*:par. 15.
25 *Harksen v Lane*:321-322.
26 *Constitution of the Republic of South Africa*:sec. 30.
27 *Constitution of the Republic of South Africa*:sec. 31.
28 *Constitution of the Republic of South Africa*:secs. 6, 9.

human rights".[29] Similar uses are found in *Khumalo v Holomisa*,[30] where the court referred to "the development of a democratic *culture*", and in *S v Walters*,[31] where the court spoke about "promoting a *culture* of respect for human life and dignity".

Secondly, the term "culture" is used to denote "aesthetical expression",[32] representing "the arts and other manifestations of human intellectual achievement regarded collectively".[33] This is found in, for instance, the *Culture Promotion Act*.[34] It has, however, been contended that this is a very limited interpretation of the term, as many social scientists view "culture" as an expression of the product of the majority of human activity, and not the arts only.[35]

The third use of the term "culture" is to depict "the ideas, customs and social behaviour of a particular people or society", or "the attitudes and behaviour characteristic of a particular social group".[36] This definition illustrates the inseparable nature of culture from identity. It is also a means of distinguishing between different categories of people based on cultural characteristics such as language, music, religion, beliefs, and even race.

2.2.2 The Constitutional Court's approach to culture

People are, in many instances, defined by their cultural roots and the concomitant customs. When promulgating the *Constitution*, the South African legislature embraced this central function of culture in the lives and identities of South African citizens through the entrenchment of the right to culture as an indefeasible right in secs. 30 and 31. To deny people the opportunity to express themselves in accordance with their cultural traditions and customs would not only be to deny an essential part of those human beings' self-expression and identity, but also be contrary to the tenor of the democratic constitutional dispensation.

This principle is also evident from case law. In *MEC for Education: Kwazulu-Natal v Pillay,*[37] for example, the fundamental role of culture in individuals' lives was emphasised when the court held that "cultural convictions or practices may be as strongly held and as important to those who hold them as religious beliefs are to those more inclined to find meaning in a higher power than in a community of people". The court stressed the importance of community to individual identity and, thus, to one's sense of self and self-worth, stating that cultural practices "are

29 Own emphasis.
30 *Khumalo v Holomisa* 2002 4 SA 294 (CC):par. 27; own emphasis.
31 *S v Walters* 2002 4 SA 613 (CC):par. 6; own emphasis.
32 Rautenbach *et al.* 2003:4.
33 See https://en.oxforddictionaries.com/definition/culture (accessed on 17 July 2018).
34 *Culture Promotion Act* 35/1983.
35 Rautenbach *et al.* 2003:4.
36 See https://en.oxforddictionaries.com/definition/culture (accessed on 17 July 2018).
37 *MEC for Education: Kwazulu-Natal v Pillay* 2008 2 BCLR 99 (CC):par. 53.

protected because they are central to human identity and hence to human dignity which is, in turn, central to equality".[38]

In *Pillay*, the court held that "cultural identity is one of the most important parts of a person's identity precisely because it flows from belonging to a community and not from personal choice or achievement", with belonging including "participation and expression of the community's practices and traditions".[39] The court then proceeded to describe how the aspects of culture that cultivate an individual's identity "differ from person to person within a culture".[40] In this regard, the court explained that individuals within the same cultural group often expressed themselves differently from others, depending on what they personally deemed as important rituals or customs. And whilst culture was dynamic and non-static, and "people find their cultural identity in different places", the court emphasised that "the importance of that identity to their being in the world remains the same".[41]

The notion that culture is crucial to one's self-identity, personhood, individual well-being and, ultimately, the long-term constitutional goal of achieving equality is key to this contribution. To deny a couple the opportunity to conclude a customary marriage in terms of the *Recognition Act* would, therefore, constitute a denial of a fundamental human right, particularly if such denial is based solely on the couple's sexual orientation. If it is found that the *Recognition Act* prohibits same-sex couples from concluding a cultural marriage, this could have a devastating effect on such persons' self-concept and may erode their human dignity.

3. The *Recognition of Customary Marriages Act*

3.1 Constitutional foundations of the *Act*

The obligations imposed by the *Constitution*, as the supreme law of the land, must be fulfilled, and any law or conduct inconsistent with it would be invalid.[42] Nowadays, the *Constitution* recognises customary law as a legitimate part of the South African legal system,[43] although this was not always the case. In *Alexkor v Richtersveld Community,*[44] it was stated that,

> while in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution.

38 *MEC for Education: Kwazulu-Natal v Pillay*:par. 62.
39 *MEC for Education: Kwazulu-Natal v Pillay*:par. 53.
40 *MEC for Education: Kwazulu-Natal v Pillay*:par. 54.
41 *MEC for Education: Kwazulu-Natal v Pillay*:par. 54.
42 *Constitution of the Republic of South Africa*:sec. 2.
43 See *Constitution of the Republic of South Africa*:sec. 211(3).
44 *Alexkor v Richtersveld Community* 2003 12 BCLR 1301 (CC):par. 51.

The *Recognition Act* drew inspiration from the obligations imposed by the *Constitution*. In fact, in *Gumede v President of the Republic of South Africa*,[45] it was held that the rights to dignity and equality entrenched by the *Constitution*, as well as the normative systems established in respect thereof, had inspired the promulgation of the *Recognition Act*.[46] It was further stated that one of the chief purposes of the *Recognition Act* was to reform customary marriages.[47] Therefore, the *Recognition Act* strives to achieve equality and equal treatment, and to end discrimination.[48]

In terms of the *Constitution*, the spirit, purport and objects of the Bill of Rights must be promoted in the interpretation and development of all South African law.[49] In *Gumede*, it was held that, where appropriate, courts were constitutionally obliged to develop customary law in a manner that aligned it with "constitutional dictates".[50] In *Bhe v The Magistrate, Khayelitsha*,[51] it was argued that adjustments to, and the development of customary law were required to ensure that it accords both with the *Constitution* as a whole and the spirit, purport and objects of the Bill of Rights. The following discussion of the relevant provisions of the *Recognition Act* should, therefore, be understood against this backdrop.

3.2 Requirements for a customary marriage: Sec. 3

In terms of sec. 3 of the *Recognition Act*, the following three requirements must be met for a customary marriage to be valid: (i) The prospective spouses must both be above the age of 18 years. (ii) The prospective spouses must both consent to be married to each other under customary law. (iii) The marriage must be negotiated and entered into, or celebrated in accordance with customary law.[52] An ordinary interpretation of these requirements may lead one to believe that same-sex couples are, in fact, not barred from concluding customary marriages. Sec. 3 explicitly speaks of prospective "spouses", with no classification as to the gender or sexual orientation of these spouses.[53] To contextualise these requirements and ascertain whether there is indeed any specification with regard to the gender of the prospective spouses, one needs to turn to case law.

45 *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC).
46 *Gumede v President of the Republic of South Africa*:par. 20.
47 *Gumede v President of the Republic of South Africa*:par. 23.
48 See *Constitution of the Republic of South Africa*:secs. 9, 15. See also *Gumede v President of the Republic of South Africa*:paras. 20-23; Mwambene & Kruuse 2015:237.
49 *Constitution of the Republic of South Africa*:sec. 39(2).
50 *Gumede v President of the Republic of South Africa*:par. 29.
51 *Bhe v The Magistrate, Khayelitsha* 2005 1 BCLR 1 (CC):par. 41.
52 For example, by means of the deliverance of *lobolo*. See Rautenbach 2018:90.
53 It is noted that the formulation and use of "prospective spouses" may be attributed to the polygynous nature of some customary marriages.

In both *Mayelane v Ngwenyama*[54] and *Gama v Mchunu*,[55] the respective courts gave a *verbatim* account of the requirements for a customary marriage as found in the *Recognition Act*. These cases thus provide no insight as to whether the requirements for the conclusion of a customary marriage could be interpreted as constituting a bar on same-sex customary marriages. In these specific instances, the parties happened to be a male and a female/females; any reference to gender could merely have been a reflection of the circumstances, or the court may simply have relied on the phrasing of the *Recognition Act*.

In *Fanti v Boto,*[56] the court set out as requirements for a valid customary marriage that there must be (i) consent of the "bride" as well as of the "bride's father or guardian", (ii) payment of *lobolo*,[57] and (iii) a handing over of the "bride".[58] The court also referred to the conditions documented by Olivier and colleagues,[59] namely that there must be a consensual agreement between the family groups of the two individuals who are to be married, an agreement regarding the *lobolo* to be paid, and the transfer of the "bride" by her family group to the family of the "man". In this case, reference was made to a "bride", which by its ordinary definition would have a gender-specific meaning, referring to "a woman on her wedding day or just before or after the event".[60] Of course, in *Fanti*, the requirements for a customary marriage may have been expressed in heteronormative terms, because the case dealt with a male and a female. Likewise, Olivier and colleagues' heteronormative references[61] might be attributed to the fact that many court cases seem to deal with customary marriages between males and females. (In fact, no cases to the contrary come to mind.)

It is clear, however, that explicit provision for same-sex marriage within the context of customary law seems not to have reached and, therefore, not to have been dealt with by our courts as yet. For this reason, there may be no references other than heteronormative ones in case law. At the same time, it is contended that the requirements set out and formulated in the *Recognition Act* do not explicitly preclude same-sex marriage. The exposition of the requirements, in their current form, may be a mere act of interpretation by implication, particularly as, in all previous court cases, the litigants were males and females. Therefore, until a case is heard

54 *Mayelane v Ngwenyama* 2013 8 BCLR 918 (CC):par. 28.
55 *Gama v Mchunu* 10/37362 [2015] ZAGPJHC 273:par. 11.
56 *Fanti v Boto* 2008 5 SA 405 (C). It should be mentioned that the *Fanti* case has been criticised for not having mentioned the *Recognition Act* by name.
57 *Lobolo* is defined as "property in cash or in kind … which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage". *Recognition of Customary Marriages Act*:sec. 1.
58 *Fanti v Boto*:par. 19.
59 *Fanti v Boto*:paras. 19-20.
60 For example, see https://en.oxforddictionaries.com/definition/bride (accessed on 17 July 2018).
61 As cited in *Fanti*.

involving a same-sex couple who wish to marry within the parameters of the *Recognition Act*, or who require the court's intervention in a matter with customary law connotations, the requirements will continue to be expressed in the context of a prospective husband and wife, as the context has to date not required any deviation from this norm.

To gain a more nuanced understanding of the implications of the *Recognition Act* for same-sex couples, one needs to delve deeper into some of the other provisions of the *Recognition Act*.

3.3 Definition of *lobolo*: Sec. 1

Sec. 1 of the *Recognition Act* defines *lobolo* as "property in cash or in kind ... which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage".[62] The definition contains an express reference to "husband" and "wife". Even though *lobolo* was excluded from the sec. 3 requirements of the *Act*, case law suggests that it is implied in sec. 3(1)*(b)*, namely the requirement that the marriage be negotiated, concluded, or celebrated according to customary law.[63]

In *Southon v Moropane*,[64] it was held that the payment of *lobolo* was not listed as an essential requirement for a valid customary marriage in terms of the *Recognition Act*, although the court maintained that it remained "an element intrinsically linked to a customary marriage".[65] The court further stated that the delivery of *lobolo* was a traditional principle, and that there could not be a customary marriage without it or, at least, without some negotiation in respect thereof.[66] The Supreme Court of Appeal in the same matter confirmed this finding.[67]

If one were to examine the actual practice of *lobolo*, it cannot possibly be argued that the practice intrinsically needs to occur only between a man and a woman or their respective families. On the face of it, nothing should prohibit a man and his family from entering into *lobolo* negotiations with another man and his family; nor is there anything that points to the barring of a woman and her family from entering into such negotiations with another woman and her family. This is corroborated by cultural expert Prof. Pitika Ntuli,[68] who is on record for having said that, where *lobolo* negotiations take place between a homosexual couple, the couple usually decide among themselves who will pay the *lobolo* and who will be the

62 *Recognition of Customary Marriages Act*:sec. 1.
63 *Southon v Moropane* 14295/10 [2012] ZAGPJHC:146.
64 *Southon v Moropane*:146.
65 *Southon v Moropane*:par. 81.
66 *Southon v Moropane*:par. 81.
67 *Moropane v Southon* 755/2012 [2014] ZASCA 76:par. 39.
68 Motloung 2015 "Homosexuality and lobola: Is there room for lobola in gay marriages?", https://social.shorthand.com/SABCNewsOnline/jgULPAEhgf/homosexuality-and-lobola (accessed on 16 July 2018).

recipient, after which the normal *lobolo* negotiations ensue. Not only does Prof. Ntuli's account seem to confirm that *lobolo* negotiations can, and do occur between same-sex couples in South Africa, but he has also pointed out that homosexuality is nothing new to Africa, and that people's (including cultural experts') failure to understand homosexuality in the African context confuses society.[69]

Yet when confronted with the definition of *lobolo*, as formulated in the *Recognition Act*, it would seem that the practice can occur only between a prospective husband and wife, which same-sex couples may interpret as a prohibition on their engagement in the practice. By defining *lobolo* in the manner the legislature has, same-sex couples are, by implication, excluded from the practice, which is ground enough to argue that the definition is an exclusionary and discriminatory provision.

Of course, some may insist that *lobolo* was only defined in this way for a lack of instances requiring accommodation for same-sex couples to date. However, it may also be argued that the phrasing of the definition, which essentially excludes certain members of society, could be perpetuating the ideology that same-sex couples may not marry in terms of the *Recognition Act* because of their sexual orientation. In this regard, Bekker and Buchner-Eveleigh[70] contend that the vast majority of commentators believe that the *Recognition Act* "simply equated customary marriages with civil marriages concluded in terms of the Marriage Act", and that the *Recognition Act* has created a "common law African customary marriage" by merely turning customary marriages into "civil marriages in which polygyny is permitted". As such, the authors argue, the *Recognition Act* "retains and enforces a single, homogenous, cultural version of customary marriage".

3.4 Other seemingly heteronormative sections

Other sections in the *Recognition Act* also refer specifically to a husband and wife in a customary marriage. These include sec. 6 on the equal status and capacity of spouses; sec. 7 on the proprietary consequences of customary marriages and the contractual capacity of spouses; sec. 8 on the dissolution of a customary marriage, and sec. 10 on the change of the marriage system. Even so, these sections are not elaborated on in this article, as they appear to have been included in the *Recognition Act* with a view to dealing with strictly heterosexual marriages and certain consequences emanating therefrom.

Thus, while it can be contended that they too are exclusionary, the main premise of this contribution is that, if sec. 3 and the definition of *lobolo* in sec. 1 are found to be exclusionary and discriminatory in some way, and require amendment, it would be implied that the remaining sections of

69 Motloung 2015 "Homosexuality and lobola: Is there room for lobola in gay marriages?", https://social.shorthand.com/SABCNewsOnline/jgULPAEhgf/homosexuality-and-lobola (accessed on 16 July 2018).

70 Bekker & Buchner-Eveleigh 2017:86-87.

the *Recognition Act* would also require amendment. For this reason, the discussion of the *Recognition Act*, in this instance, revolves around the sec. 3 requirements and the definition of *lobolo.*

3.5 The exclusionary and discriminatory nature of the *Recognition Act*

It would appear that sec. 3 is the only gender-neutrally phrased section in the *Recognition Act* dealing with customary marriages in particular. Whether this was an oversight on the part of the legislature, or whether it was intentional, is uncertain. Apart from the intention of the legislature, however, the discriminatory effect, or not, of this section would depend on whether its provisions, in fact, pass constitutional muster.

By implication, though, it is safe to say that the way in which the *Recognition Act* has been drafted and the phrasing of certain sections thereof, including the definition of *lobolo* in sec. 1, highlight a grey area in the law, which ultimately creates legal uncertainty.

4. Homosexuality in the African context

Faith in procreation as a way to ensure the continuation and endurance of cultural ancestors, patriarchy and the "supremacy of the male in society"[71] have been cited as chief reasons for the rejection of homosexual relationships in African communities.[72] Indeed, the majority of African political leaders deny that homosexuality forms any part of African life.[73] Many African countries have also criminalised homosexual acts, which are punishable by imprisonment.[74]

Homosexuality is, in many instances, understood as challenging certain patriarchal gender norms and undermining "traditional social order".[75] The late former Zimbabwean President Robert Mugabe is on record for having said that homosexuality is both "un- African" and "un-traditional".[76] Mugabe labelled homosexual persons as "worse than pigs and dogs" and not worthy of "any human rights at all", and said that homosexuality "destroys nations, apart from it being a filthy, filthy disease".[77] Nigerian

71 Mkasi 2013:6.
72 Mkasi 2013:6.
73 Mkasi 2013:10.
74 For instance, with life imprisonment in Gambia and Ghana, 14 years' imprisonment in Kenya, Malawi and Zambia, and 17 years' imprisonment in Egypt. For example, see The Law Library of Congress 2014 https://www.loc.gov/law/help/criminal-laws-on-homosexuality/homosexuality-laws-in-african-nations.pdf (accessed on 20 January 2020).
75 Mkasi 2013:10.
76 IRR 2018, https://irr.org.za/media/dispelling-the-myth-that-homosexuality-is-un-african-huffpost (accessed on 15 May 2019).
77 Mamba 2017, "Robert Mugabe: Here are the words of Africa's most notorious homophobe" http:www.mambaonline.com/2017/11/16/Mugabe-end-one-

President Goodluck Jonathan, in turn, signed a law that made it illegal for gay people to even congregate,[78] while Gambia's former President Yahya Jammeh, in 2013, threatened to slit the throats of homosexual persons in his country.[79] These are just a few of the homophobic statements expressed by African leaders.[80] Clearly, therefore, statements such as these, along with the criminalisation of homosexuality in many African countries, seem to perpetuate an ideology that homosexuality is not accepted within African borders.

Moreover, homosexuality has been described as a "western or colonial import" foreign to African societies.[81] Murray and Roscoe[82] state that, while colonialists did not introduce homosexuality or same-sex marriage to Africa, they did introduce intolerance of it, along with "systems of surveillance and regulation for suppressing it". They go on to state that it was only when those native to Africa "began to forget that same-sex patterns were part of their culture" that homosexuality became "truly stigmatised".[83] Matolino[84] contends that "homosexuality has always been present" on the African continent and that "evidence suggests that in pre-colonial Africa, the matter of sexual orientation was not generally contentious. In fact hatred of gay people and homophobia that are exhibited today have virtually no basis in African culture."[85]

4.1 "Customs and usages traditionally observed"

The *Recognition Act* defines a customary marriage as "a marriage concluded in accordance with customary law".[86] Customary law, in turn, is defined as "the *customs and usages traditionally observed* among the indigenous African peoples of South Africa and which form part of the culture of those peoples".[87] While it is beyond the scope of this contribution

africas-notorious-homophobes (accessed on 20 July 2018).

78 Alamba 2014, "Nigeria president Goodluck Jonathan bans gay meetings" http://www.cbc.ca/news/world/nigeria-president-goodluck-jonathan-bans-gay-meetings-1.2495376 (accessed on 18 July 2018).

79 Tejas 2013, "Gambia's president Yahya Jammeh threatens to slit the throats of gay people" https://www.ibtimes.com/gambias-president-yahya-jammeh-threatens-slit-throats-gay-people-1919881 (accessed on 18 July 2018).

80 See also Awondo *et al.* 2012:145-168; Van Heerden 2018. https://www.news24.com/Columnists/GuestColumn/the-west-exported-homophobia-not-homosexuality-20181202 (accessed on 26 June 2019).

81 Mkasi 2013:6; Murray & Roscoe 1998:1.

82 Murry & Roscoe 1998:XV.

83 Murray & Roscoe 1998:XVI.

84 Matolino 2017:67.

85 Matolino 2017:67.

86 See *Recognition of Customary Marriages Act*:sec. 1.

87 See *Recognition of Customary Marriages Act*:sec. 1; own emphasis.

to elaborate on the intricacies and pitfalls of these definitions,[88] they remain pivotal to the discussion.

Apart from the sec. 3 requirements for a customary marriage, the definitions above are, in fact, the only source as to what constitutes a customary marriage. It follows, then, that to truly determine whether a same-sex couple can marry in accordance with customary law, one will need to determine whether same-sex practices fall within the ambit of the above definitions, and especially within the parameters of the "customs and usages traditionally observed".

The examples/instances discussed below serve to show that there was and still is tolerance and accommodation of same-sex intimacies in African communities and in customary law in South Africa.

4.1.1 Mine marriages[89]

A first example of a homosexual practice on the African continent occurred in the mine compounds and was referred to as "mine marriages".[90] Senior miners (males) would take newer miners (also males) as their "mine wives". The seniors would initiate the newcomers to the way of life on the mines and protect them from threats. In return, the seniors required their "wives" not only to cook and clean, but also to perform certain sexual favours.[91] The "wives" were remunerated for their services, and the senior partners were often known to pay a "bride price" to the miner he was to "marry".[92] In an interview with Moodie,[93] an elderly Tsonga man who had worked on the mines corroborated this:

> On the mines there were compounds which consisted of houses, each of which had a *xibonda* inside. Each of these *xibondas* would propose a boy for himself, not only for the sake of washing his dishes, because in the evening the boy would have to go and join the *xibonda* on his bed. In that way he had become a wife. He (the "husband") would "double his join" [stay twelve months instead of the normal six] on the mines because of this boy. He would "make love" with him. The "husband" would penetrate his manhood

88 Livermon, for example, argues that these definitions "fail to distinguish between the traditions, culture, law and religion of the indigenous people". He states that "[t]he heteropatriarchal chieftancy has been able to claim a monopoly not only on the creation and designation of customary law, but also on the definition of what constitutes African culture and tradition, all of which are often represented in tautological terms … In this schema, African tradition and culture become whatever the chieftancy says it is, which creates a delimited vision of customary law that often serves to expand the power of the chieftancy and reinforce heteropatriarchy." See Livermon 2015:18.

89 The continued occurrence of these marriages in mine compounds is uncertain. This is why the account of these marriages is provided in the past tense.

90 Dlamini 2006:129.

91 Dlamini 2006:129; Moodie 1988:230.

92 Dlamini 2006:130; Moodie 1988:231.

93 Moodie 1988:230.

> between the boy's thighs. You would find a man buying a bicycle for his boy. He would buy him many pairs of trousers, shirts and many blankets.

The mine marriage was, in many ways, similar to a traditional marriage. The "wife" would attend to the household chores, and the "husband" would provide protection and financial support. Some accounts even referred to jealousy among the older miners if anyone paid too much attention to their "mine wives", which often resulted in physical fights over the more attractive miners in the compounds.[94]

Moodie[95] further explains that the "mine wives" were required to assume the behaviour and mannerisms of women in their relations with their spouses, and to remain clean-shaven and dress like women. The "wives", Moodie goes on, would gossip to the other "wives" about their "marriages", and would compare their relationships.[96] There was also the possibility of divorce.[97] This was, in most instances, brought on by some form of quarrel between the partners, or by the "wife" attaining a certain age and wanting to enter into a new mine marriage, in which he would then assume the role of "husband" and take a "wife" of his own.[98]

These marriages, although widespread, were not recognised as marriages by any part of the South African state.[99] These marriages also did not fall under the jurisdiction of customary law, since they did not occur in the rural regions.[100] Despite this, Hoad contends that "there exists no better word to describe their (the miners) impoverished, functional, intimate, and quasi-public status than 'custom'".[101]

4.1.2 *Izangoma*'s same-sex experiences

A second example is that of marriages among *sangomas*.[102] In his dissertation, Mkasi[103] raises the question: "If traditional healers practise same-sex relationships, why does the Zulu community (and African communities in general) insist that same-sex relationships are 'un-African'?" He then goes on to ask: "Given that homosexuality has been labelled as 'un-African' and 'un-cultural', how does one explain the

94 Moodie 1988:234.
95 Moodie 1988:234-235.
96 Moodie 1988:235.
97 Moodie 1988:235.
98 Moodie 1988:235-236.
99 Hoad 2016:12.
100 Hoad 2016:12.
101 Hoad 2016:12.
102 "*Sangoma*" is the name given to "shamans" or traditional healers in many South African cultural communities, including the Zulu people.
103 Mkasi 2013:3.

existence of homosexual relationships amongst Zulu *sangomas*, who are considered the custodians of culture?"[104]

Indeed, as suggested by Mkasi, there are accounts of woman-woman marriages concluded by female traditional healers.[105] In one instance, known as the practice of "ancestral wives",[106] the traditional healer's same-sex desire is ascribed to a dominant male ancestor who essentially guides the healer's behaviour.[107] The ancestral guide is said to will the traditional healer to behave in a specific way, which includes desiring and forming attachments to a particular woman chosen by the ancestral spirit or guide. Often, the ancestral spirit would compel the healer to assume a male identity, and some healers have even stated that their gender identity is subject to the will of the ancestor.[108]

In a similar vein, Carlson[109] argues that the only way in which a romantic relationship between two women can be accepted in the Shona[110] culture is if such woman is a *sangoma* who has been possessed by a male spirit medium. The traditional healer who claims to be possessed by the male spirit can then proclaim that she should not be required to marry a man because, through the possession of the male ancestral spirit, she is, in fact, a man herself; "the gender of her ancestral spirit outweighs her biological gender".[111]

In her book *Black Bull, ancestors and me: My life as a lesbian sangoma,* Nkunzi Nkabinde goes so far as to describe herself as a "lesbian".[112] Nkabinde explains how her sexual desires are directed by her male ancestor, who requires her to be a lesbian.[113] She even provides accounts of other *sangomas* involved in same-sex relationships, whom she also describes as "lesbians". Nkabinde says that she cannot decline the instructions she receives from the male ancestor; in all other instances, homosexuality would be regarded as taboo.[114] Gevisser[115] argues:

> Now that some female sangomas – traditional healers – are coming out as lesbians, it is being hypothesized that the institution of the sangoma might have developed as a way for women-identified women to find space for themselves outside of the patriarchy; at the very least, it presents to Africans a model of a respected community member who defines herself independently of men.

104 Mkasi 2013:3.
105 Bekker & Buchner-Eveleigh 2017:87.
106 Mkasi 2013:11.
107 Morgan & Reid 2003:384-386.
108 Morgan & Reid 2003:384-386.
109 As cited in Morgan & Reid 2003:378.
110 The Shona are a Bantu ethnic group native to Zimbabwe and neighbouring countries.
111 Morgan & Reid 2003:378.
112 Mkasi 2013:11-12.
113 Mkasi 2013:11-12.
114 Mkasi 2013:12.
115 As cited in Morgan & Reid 2003:381.

Furthermore, the above examples seem to provide support for Bonthuys[116] who contends that

> customary law as practised by African communities in Southern Africa contain[s] a relatively wide array of mechanisms and forms for accommodating same-sex relationships, for incorporating them into the social fabric and sometimes even valuing them by the community.

4.2 Certain ancillary customary marriages

Mokotong describes *go nyalela mosadi lapa* as one of the "oldest forms of traditional customary marriage".[117] It is concluded with a view to intervening and saving or reviving "a family name facing extinction" when no biological family member remains who can procreate and raise offspring to carry on the family name. This may, for instance, be the case when the male family head has died and is survived by either the wife only, or the wife and married daughters.

In terms of *go nyalela mosadi lapa*, the surviving female marries another woman into the family "to revive and continue with the family name of her new parent-in-law".[118] This is done in one of two ways. If the woman already has children, such children automatically assume the surname of their new family so as to continue the family heritage.[119] If not, the woman is expected to bear children for her new family, ideally with her choice of sexual partner, although a suitable male partner is normally suggested to her.[120]

The conclusion of such marriage, Mokotong states, follows a similar and almost identical procedure to the conclusion of a conventional customary marriage. He specifically states that the requirements for a customary marriage, namely those stipulated in sec. 3 of the *Recognition Act*, are observed. Despite this, however, the bride does not become a wife to the female parent-in-law, and no sexual relationship arises between them. In fact, as soon as any form of sexual relationship develops between the parties, it would cease to be recognised as *go nyalela mosadi lapa*, and would merely constitute another version of a woman-to-woman marriage.[121] As such, this particular form of woman-to-woman marriage cannot be said to be homosexual in nature such as, for instance, the *sangoma* marriages described earlier.

116 Bonthuys 2008:736.
117 Mokotong 2013:83.
118 Mokotong 2013:83.
119 Mokotong 2013:84.
120 Mokotong 2013:84.
121 Mokotong 2013:84.

According to Mokotong,[122] accounts and analyses of *go nyalela mosadi lapa* to date have largely been confined to non-African writers' interpretations. This has resulted in the African custom being incorrectly and carelessly translated into "a woman marriage or marriage involving a female husband or woman-to-woman marriage". He insists, though, that any notion that these marriages are in some way homosexual in nature is incorrect.[123] The spouses in a *go nyalela mosadi lapa* arrangement are not sexually attracted to each other; the marriage does not give rise to conjugal rights, and it is not homosexual in nature.

However, even though *go nyalela mosadi lapa* is not regarded as a homosexual practice as such, it remains utterly relevant to this contribution, as it shows that there are forms of ancillary customary marriages that appear to have been omitted from the ambit of the *Recognition Act*.[124] This is echoed by Mokotong, who argues that the *Recognition Act* only accommodates and gives legal recognition to customary marriages that are concluded in accordance with indigenous law and involve heteronormative couples. The *Act* fails to acknowledge any other form of marriage recognised by African communities under customary law, including *go nyalela mosadi lapa* and the "true" woman-to-woman marriages concluded between *sangomas*.[125] Other forms of customary practices, sometimes described as marriages,[126] which are not afforded recognition in the *Recognition Act*, include sororate unions and *ukungena*.[127]

Such non-recognition of ancillary customary marriages, Bekker and Buchner-Eveleigh argue, could potentially violate the constitutionally entrenched right not to be discriminated against on the ground of sexual orientation, as well as the right to culture itself.[128] In highlighting the severe limitations of the *Recognition Act*, Mokotong also contends that the recognition of only one form of customary marriage infringes on the constitutional rights of parties who have entered into, and concluded other forms of customary marriage. This excludes parties to such marriages as well as their children from benefiting from the rights and freedoms that the *Constitution* affords all South Africans.[129]

122 Mokotong 2013:79.
123 Mokotong 2013:79.
124 Ancillary marriages, cited by Bekker & Buchner-Eveleigh, include a woman marrying another woman to bear children for the lapa, house or kraal; marriages akin to same-sex marriages (true woman-to-woman marriages); sororate marriage, levirate marriage, and *ukungena*.
125 Mokotong 2013:81.
126 Bekker & Buchner-Eveleigh 2017:80-83.
127 A sororate union is a practice in terms of which the infertile wife is assisted by a seed raiser for purposes of bearing children for the house of the infertile or deceased wife, whilst *ukungena* refers to a situation where a male relative of a deceased husband cohabits with the latter's wife for the purpose of procreation within the deceased's descent group. For a discussion of these forms of customary marriage, see Bekker & Buchner-Eveleigh 2017:83-92.
128 Bekker & Buchner-Eveleigh 2017:93-94.
129 Mokotong 2013:79-81.

5. Recommendations

As stated in the introduction, South Africa was one of the first countries globally to legalise same-sex marriage, and has thereby become a custodian for sensitivity to human rights on the continent.[130] Thus, South Africa bears a certain duty to take the lead in developments with regard to same-sex marriage as well as cultural diversity. Through its endorsement of the eradication of past disadvantage and discrimination, the *Constitution* demands of South Africa's leaders to take an active stance against discrimination and sanctions against homosexual persons, particularly also in respect of any of its associations with African states that display antagonism towards homosexuality.[131] This makes it important for South Africa to herald in development within the context of African customary law, eradicate any possible future exclusion of homosexual persons from rights and freedoms, and develop a culture of tolerance towards homosexual persons instead of perpetuating negative stereotypes. This view was well captured by Sachs J in *Fourie*:[132]

> The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation … At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.

By more actively sensitising South Africans to the fact that homosexuality is not "un-African", and that different individuals express their individuality in ways that may not always conform to societal norms, South Africa could set an example to its African counterparts, and possibly to the world at large. The potential reduction in the level of homophobia that may result from such efforts would not only be vital to transformation in South Africa, but also promote greater tolerance on the African continent.[133]

However, as this contribution has shown, the phrasing of the *Recognition Act* has done nothing in the way of establishing certainty as to the status of same-sex marriage within a customary law context. In fact, the *Act* does not appear to provide for any type of ancillary customary marriage apart from heteronormative marriage. This might be seen to sustain an ideology that homosexuality, in general, and same-sex marriage, in particular, are "un-African", and are neither practised nor permitted on the continent.

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130 See par. 1 above.

131 See *Constitution of the Republic of South Africa*:sec. 9.

132 *Minister of Home Affairs v Fourie*:par. 60.

133 Being more active in condemning homophobia within African borders would also be in line with South Africa's duties as a member of the African Union and as signatory to many treaties and conventions with other African states.

To advance the development of customary law in this regard, the following recommendations are therefore proposed.

As stated previously, the *Recognition Act* defines *lobolo* in heteronormative terms, namely being "property in cash or in kind … which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage". This definition has not been amended by any of the subsequent amendment bills proposed by Parliament, and therefore remains as is.

To counter any exclusionary and discriminatory effect of this provision, it is recommended that the terms "husband" and "wife" be replaced with the term "spouse". This would also enable the definition to pass constitutional muster. In its present form, it is hard to conceive that the definition would be deemed constitutional, especially in light of the arguments in *Fourie* and the court's subsequent order to Parliament to intervene and correct the defects in the *Marriage Act*.[134] In *Fourie,* the court held that, if Parliament failed to intervene, the marriage formula in the *Marriage Act* would be automatically amended by simply reading in the term "or spouse" after the term "husband".[135] This argument would equally apply to the exclusionary provisions of the *Recognition Act*.

Whether or not the legislature intended to exclude same-sex couples by way of its phrasing of the definition of *lobolo*, the provision in its current form is viewed as discriminatory and should be amended to reflect the values entrenched in the *Constitution*.

The living, flexible and ever-changing nature of customary law has been confirmed in multiple cases.[136] For this reason, it is incumbent on the legislature to review all existing exclusionary provisions, and align them with current social practices as well as the normative values that underpin our *Constitution*.

On this ground, one could argue that by referencing specific genders through the use of "husband" and "wife", other provisions of the *Recognition Act* also serve to exclude same-sex couples from concluding a customary marriage in accordance with customary law and, even more injuriously, in accordance with their culture. These would include, though are not limited to secs. 6, 7, 8 and 10 cited earlier. As suggested above in respect of the definition of *lobolo,* such references could easily be replaced with the more neutral "spouse(s)" to render the provisions less exclusionary and discriminatory.

In addition, as the scholarly literature cited above has shown, the *Recognition Act* fails to accommodate certain ancillary customary marriages. As such, both *go nyalela mosadi lapa* marriage and true woman-

134 *Marriage Act* 25/1961.
135 *Minister of Home Affairs v Fourie*:par. 161.
136 See *Bhe v The Magistrate, Khayelitsha* 2005 1 BCLR 1 (CC).

woman marriages are, for instance, excluded, in addition to a number of other forms of customary marriage.

It is, therefore, recommended that the legislature take cognisance of the iniquity currently perpetuated by the *Recognition Act*. Spouses in other forms of customary marriage are equally entitled to enjoy the benefits associated with legal recognition. In this regard, the *Recognition Act* should live up to its name and extend recognition to all the various ancillary marriages that are governed by customary law, but lack legal recognition and endorsement in the *Act* in its current form.

Added to the (intentional or unintentional) exclusionary phrasing of the *Recognition Act*, intolerance of homosexual persons on the continent is further incited by some Africans' insistence that homosexuality is "un-African". This contribution attempted to expose the inaccuracy of this belief by providing only a few examples of possible homosexual practices that have occurred in Africa over centuries. While it was beyond the scope of this article and, in light of Constitutional obligations, also seemingly irrelevant to provide more detailed accounts of homosexuality on the continent, it is recommended that more scholars participate in research in this field. This might assist in debunking possible myths that homosexuality does not occur in Africa and/or is "un-African".

This is particularly important in light of the ongoing emphasis on human dignity. Homosexual persons' human dignity is perpetually being eroded by the misconception that their sexual orientation is somehow wrong and intolerable. This misconception has exposed and continues to expose homosexual individuals to oppression, homophobia and hatred, which undermine their human dignity and identities. In the twenty-first century, and particularly in light of South Africa's own past of human rights violations and oppression, it is imperative for the country's legislature to do everything it can to establish and promote a culture of tolerance. This would include affording homosexual couples the same rights as their heterosexual counterparts, namely to conclude a marriage in accordance with their cultural beliefs. That would represent the type of South Africa envisaged by the *Constitution*.

6. Conclusion

It is difficult to state conclusively whether the drafters of the *Recognition Act* outright intended to prohibit same-sex couples from concluding a customary marriage, as it might be argued that the phrasing of its provisions can be attributed to interpretation by implication. Until such time as the courts pronounce on this matter, or the legislature offers more clarity, this legal uncertainty will remain. To maintain the momentum of the debate, scholars should continue researching this field to shed more light on the legal position in this regard, expose the legal uncertainty, and offer recommendations to remedy it.

It can be stated with certainty that specific sections of the *Recognition Act* are phrased in a way that creates the impression that this *Act* is intended to apply to heterosexual couples alone. This impression can only be eradicated by reformulating these sections to be more inclusionary. Yet South Africa also stands to gain much more from such rephrasing. Apart from unambiguously including same-sex and other ancillary customary marriages in the ambit of the *Act*, this would also go a long way towards dispelling the myth that homosexuality is "un-African".

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