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Sexual Minority Rights Are Not Just for the West: Health and Safety Considerations in Africa

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INTRODUCTION

In an article published in this journal, C.O. Akpan argues that it is “unnatural for a man to sleep with a man as with a woman, and the idea of marriage in this sense is an abomination” (2017, p. 9). Arguments in favour of same sex marriage, he claims, are “driven and motivated by the human right fad through which same-sex couples feel they have [an] ‘inalienable right’ over their bodies and regarding who to marry...” (Akpan, 2017, p. 9). However, this alleged right is a “misrepresentation of what was originally intended,” and is therefore “a sort of elixir forced on people to accept same-sex marriage as a fundamental right. This is a consequent of [Western] culture’s anomie and cannot be made a global phenomenon” (Akpan, 2017, p. 9). In particular, he thinks that same-sex marriage (and homosexuality) is (are) inappropriate for African countries such as Nigeria where he lives and works.

Africans have a legitimate concern about any imposition of ‘Western values’ on Africa. As Marc Epprecht (2013; 2008) has noted, the colonialism of Europe and the Americas has had some tremendously negative effects on Africa, including the western world’s cultural and moral imperialism. It is important, therefore, to include African voices in a discussion of homosexuality and same-sex marriage in our discussion, which we do here. Having said that, however, flawed arguments remain flawed regardless of their author, and, we argue, Akpan’s arguments are deeply flawed. To begin, he misrepresents both ‘Western’ and ‘African’ views as homogeneous and ‘real African’ positions as somehow removed from any outside influences, whether that be from the West, the Middle East or elsewhere. ‘Western’ and ‘African’ thought is heterogeneous and fluid on a few issues including homosexuality and same-sex marriage. Hence, we begin our argument in Section 2 by setting the context with a brief discussion of Africa (including its diversity), both historically and at present. Another function of this section is to demonstrate that human rights are neither a “fad” nor something about which only ‘Westerners’ are interested.

Despite Akpan’s view on the immorality of homosexuality, his arguments in opposition to them clearly emanate from the Abrahamic religious tradition, which is an import to Africa. Moreover, though he formally rejects two widely employed anti-LGBTQ+ arguments as flawed -- the so-called unnaturalness argument and the argument from religion – his acceptance of the complementarity argument is a close relation, and in fact is based upon both these positions. Thus, as we shall see in detail in Section 3, Akpan’s anti- LGBTQ+ and anti same-sex marriage position is inadequately defended and should be rejected.

In Section 3, we also consider Akpan’s claims that the ‘West’ suffers from a cultural anomie that they attempt to force upon the rest of the world. Here, we show the ways in which Akpan misrepresents Western culture and the place of human rights within it, as well as the meaning of “anomie.” It is not that the West suffers from a lack of cultural norms, which is what is typically meant by anomie. Far from it: the nations of the West have cultural and moral norms, but these nations are heterogeneous, not homogeneous. One need only consider the social, political, and moral divide between two opposing camps within contemporary America to see the truth of this claim. To protect itself against the chaos

that such divisions can cause within a nation state, we must allow many groups of people (and individuals) to follow different paths to achieve what they perceive as the good for them as well as a conception of the public good. Hence, liberal democracies that respect both majorities, via public voting, and minorities, via constitutions and charters of rights and freedoms, aim to allow different groups within a nation state to co-exist peacefully.¹ They do this in large part by allowing their citizens, either individually or in combination, freedom in many areas, such as religion, expression, and association. These freedoms are allowed so long as doing so does not “harm” others, in the requisite sense of that term. Concomitant with these freedoms are rights that prohibit discrimination based on such things as race, sex, and religion.

Finally, in Section 4 we turn to consider the situation in South Africa, the only African nation to enshrine LGBTQ+ rights within its constitution. This consideration is fundamentally important. Though we believe we have shown the weaknesses of Akpan’s (and others’) anti-LGBTQ+ arguments, the real test of LGBTQ+ recognition comes from the ground, so to speak, i.e., how has this recognition altered the everyday situation of real people living real lives. By starting with a decision to leave behind the *moral* arguments on LGBTQ+, South Africa decided upon a *political* and *legal* course of action. In this section, we show the benefits, in terms of health especially, of a legal recognition of LGBTQ+ rights concomitant with a political obligation to adhere to such rights.

THE AFRICAN CONTEXT

In providing a proper context for discussing sexual rights in Africa, we define sexual rights as part of the broader definition of human rights, and we also show how the history of human rights in Africa is part of the overall global history of human rights. One of the problems with Akpan’s discussion of rights is he does neither of these things, opting instead to (erroneously) dismiss rights as a Western “fad.”

Sexual rights are most appropriately considered as human rights in general. While there is no consensus on the precise definition of sexual rights, the working definition of the World Health Organization (WHO) states, “Sexual rights embrace certain human rights that are already recognized in international and regional human rights treaties, supported in consensus documents and found in national laws” (WHO, 2010). It then outlines fundamental rights that are essential to the full realization of sexual health. Sexual rights, then, are based on applying existing fundamental human rights to sexual health and sexuality in the context of protection against discrimination. The specific rights include the rights to life, liberty, autonomy and security of the person, the right to be free from torture or cruel, inhuman, or degrading treatment or punishment, the right to privacy and the rights to information and education. Others include the rights to freedom of opinion and expression and the right to an effective remedy for violations of their fundamental rights. To assert, as Akpan does, that rights are a foreign, Western infiltration into Africa, indirectly also asserts that *all* the rights referred to in this paragraph are alien to Africa. This seems implausible.

The context in which Akpan’s paper is set is the historical evolution of human rights in general in a highly diverse and changing Africa. Without subscribing to the “radical break” theory, which asserts there were human rights protections in pre-colonial African communities, or to claims that there is a ‘hard split’ between the colonial and post-colonial periods, for heuristic purposes we consider three phases of underlying conditions relevant to people’s rights. These are the pre-colonial, colonial, and post-colonial phases of African human rights developments.

¹ The reason the US appears on the brink of chaos at the moment is a complex issue beyond the scope of this paper. One could argue, however, that a disrespect for the rule of law (like the appropriate separation between various branches of government), a failure to respect the point of views of others, the failure to protect minorities, and a turn to demagoguery are all part of America’s current problems. Interestingly, this is a problem that we have seen in far too many nations within Africa as we discuss below.

Pre-Colonial Phase

In the pre-colonial phase, Africa was dominated by traditional societies organized around more than 3,000 ethnic groups, featuring equally diverse languages and cultures. This background highlights the historic nature of the massive heterogeneity that makes it difficult to avoid Africa's astonishing diversity by trying to tell a single story, good intentions for an emancipatory Pan Africa notwithstanding. It also defies efforts to put a simple label to ideas as being 'un-African', as we have indicated regarding human rights.

In discussions of African human rights regimes of these earliest periods, one contentious issue has been whether there were human rights protections or merely a defense of human dignity in traditional societies. One idea regarding the beginning of human rights is that it began in ancient Europe: in, for example, the ancient philosophy, religion, and mythology of Greece. Another view similarly thinks the origin of human rights is European (and North American) but temporally places that beginning in the modern period, culminating in the UN human rights declaration of 1948.

If we accept that human rights originally stem from Europe, the claim by some scholars who uncover "African" forms of rights in the pre-colonial past confuse human dignity for human rights (Tibi, 1990) (Howard, 1990). While they acknowledge that fully developed notions of human dignity existed in societies outside Western cultures and contexts, the notion of human rights as enforceable against the state only came from the later articulation of entitlements in law. They argue that protections of human dignity alone do not generate human rights. Rhoda Howard, for instance, claims that the focus in traditional Africa was only on the inner moral nature and worth of the human person: "There is no specifically African concept of human rights. The argument for such a concept is based on a philosophical confusion of human dignity with human rights, and on an inadequate understanding of structural organization and social change in African society" (Howard, 1990, p. 23).

Other writers arrive at the same conclusion by using the distinction between human rights and distributive justice (Connelly, 1982). The central argument in this case is that giving people their entitlements as rights is different from having rights that accrue from the fact that one is a human being. In this view, rights assigned in traditional African societies according to one's communal membership, recognized achievements, family position or status do not qualify as human rights.

However, if we recognize and appreciate competing narratives about the meaning, practice, and history of human rights around the world including Africa itself, it makes sense to avoid the fixity of a single calcified meaning of human rights, as a recent legal 'gift' from the Universal Declaration of Human Rights of 1948. Obviously, essentialist legal scholars and legal positivists will disagree but the risk of being a-historical cannot be ignored. Downplaying the historical context partly accounts for this focus on change while neglecting the vital underlying continuities that provide the progression towards a more inclusive human right. As Ugor puts it:

Human Rights may have been codified and legally backed in 1948, but the philosophy and practices that it implies are traceable to different societies across the world and Africa ... At the very core of the idea of human rights is the concern with how individuals and groups interact within society. This implies that the most fundamental unit of social life is neither solely the individual nor the group, but rather the association between the two (Ugor, 2018, p. 368).

In this regard, the following remarks by Wole Soyinka, commenting on the practice in Northern Nigeria of stoning women to death, are important:

We can anticipate that some will claim that the religious laws under which such barbarity is justified predate the laws of the entity called Nigeria - and do note that I pronounce it a barbarity on the authority, not of the Western or Christian world, but on that of pre-existent codes of social regulations evolved in several of those constituent nations, the Yoruba among them, whose adjudicating systems, the balance of ethical norms,

infringement and restitution boast a longer ancestry than those of either of the imported religions of this nation - Christianity and Islam" (Soyinka, 2008, p. 47).

The other contextual backdrop to the evolution of human rights in Africa is the experience of widespread slavery. For four hundred years Africans were on the run from the monstrosity and raw terror of slave raids. As some have pointed out, what is stunning is that we even have a culture to speak of after such a harrowing historic episode. Apart from the immediate destruction that transpired, we will return to long-term consequences of slavery in discussing human rights in the post-colonial period.

The anti-slavery and emancipation struggles were part of the slow but sure progress towards fundamental freedoms and human rights. These struggles are relevant in thinking about human rights and inspiring in the quest for a more inclusive human rights regime in Africa today.

The Colonial Period

The historical link between the independence struggles in Africa and human rights is sometimes dismissed because anti-colonialism movements sought popular liberation and were not focused on limiting state power. However, as Bonny Ibhawoh has argued,

anti-colonialism did not develop in isolation of the universal human rights discourse. It was integral to the development and vernacularization of the post-war universal human rights ideal. By vernacularization, I mean the complex process by which external impulses were appropriated into local ideas and situations to produce hybridized understandings of human rights (Ibhawoh, 2014).

Generally, African states and their perspectives on decolonization and anti-colonialism were important to the history and emergence of the United Nations and its human rights agenda/legislation. The relationship between human rights and anti-colonialism though was not unidirectional. During the debates, the so-called colonial powers put up unprincipled defenses of colonization, pretending that lack of self determination had nothing to do with universal fundamental human rights.

The Post- Colonial Period

Post-colonial Africa is made up of 54 countries on the continent as well as six island states. Sometimes, a distinction is drawn between northern Africa and Sub-Saharan Africa, which excludes Morocco, Algeria, Libya, Tunisia, and Egypt. The total population of the continent is just over 1.2 billion. There are six different colonial legacies including British, French, Portuguese and German and more than 12 agroecological zones (Todd J Moss, 2018).

At the beginning of 1990, out of the 54 African countries, 49 were dictatorships of the military or 'civilian' type. The citizens had practically no substantive role in determining public policy because of low levels of political competition and participation. Leadership turnover was rare. Between the independence years in early 1950s and 1990, no African government had changed leadership by way of peaceful electoral defeat, the majority having been ejected by uniformed gunmen. The exceptions were Ahijdo of Cameroon, Senghor of Senegal, and Julius Nyerere of Tanzania. During the 2000s, almost all states carried out both economic and political reforms. The results are mixed. Some countries did relatively well. These include South Africa, Rwanda, Kenya, Botswana, Ghana, Cote d Ivoire, Benin, Ethiopia, and Senegal. Others fell behind including Malawi, Eritrea, Chad, Niger, Mauritania, Central African Republic, Congo Brazzaville, and Togo. Zimbabwe stands on its own with an imploded economy and a military government.

As a region, the profile of human rights in Africa has evolved and made the following achievements:

1. African states (especially frontline states as we used to call them) actively supported South Africa in removing the apartheid system. Here it must be emphasized that the struggle in South Africa was against minority rule, not against a section of South African society.
2. The rise of the public profile of human rights since the adoption of the African Charter on Human and People's Rights in 1981, subsequently ratified by the African Union.
3. The incorporation by some African states of human rights provisions or bills of rights in their constitutions.
4. The establishment by some African states of national institutions and mechanisms; for example, national human rights commissions, including Uganda, to promote and protect human rights.
5. An expansion of the normative and institutional architecture of the regional human rights system.
6. The signing of the African Charter on the Rights and Welfare of the African Child.
7. The establishment of the African Committee of Experts on the Rights and Welfare of the African Child.
8. The adoption by the African Union in 2003 of the Protocol to the African Charter on Human and People's Rights of Women in Africa.
9. The African Convention on Preventing and Combating Corruption.
10. More involvement and contributions to human rights work by individuals, including scholars, lawyers, and advocates.

All these accomplishments indicate that, contrary to what Akpan maintains, there has been a great interest in pushing for human rights *within Africa by Africans*.

Having said that, it is also undeniable that the continent has experienced some setbacks or limitations. The regional human rights achievements mentioned above have tended to be exclusionary to certain groups, especially the LGBTQ+ community. The only African nation to include LGBTQ+ rights is South Africa, which we discuss in some detail in Section 4. The problem with the other African states is that they have yet to bring the internationally recognized rights of non-discrimination to LGBTQ+ citizens of their countries. This remains the case even when most of those states specify non-discrimination in their constitutions.

The second setback is the criminalizing of homosexuality. There has been a wave in opposition to bringing sexual rights under the umbrella of human rights more generally, and of repealing laws or at least lessening the severity of 'sexual crimes. For example, in 1990, Uganda extended punishment for 'carnal knowledge against the order of nature' from a 14-year jail term to life imprisonment. In 2005, a constitutional amendment was passed prohibiting same-sex marriages. This sort of re-criminalization was repeated in Zimbabwe, Nigeria, Rwanda, Cameroon, the Democratic Republic of Congo, Liberia, Malawi, Kenya, Tanzania, and the Gambia. Among these, only Rwanda dropped plans to criminalize same sex relations. This stands in stark contrast to the 1990s where there were no arrests related to same sex relations in most African states and homosexuality was mostly not on anyone's political agenda.

Lastly, while instruments are now available *de jure*, the protection of human rights faces a multiplicity of challenges, led by the administrative capacity issues of the states. e.g., turmoil in Northern Uganda and Northern Nigeria.

Sadly, a major factor in the repeated pattern of making gains followed by setbacks is related to the slave history of Africa. Evidence of a causal link from slave raids to mistrust in modern day Africa is documented by Nunn and Wantchekon (2011). They show that current differences in trust levels within Africa can be traced back to the transatlantic and Indian Ocean slave trades. They combined contemporary individual-level survey data with historical data on slave shipments by ethnic group and found that individuals whose ancestors were heavily raided during the slave trade are less trusting today. They show that most of the impact of the slave trade is through factors that are internal to the individual, such as cultural norms, beliefs, and values. Here it is mistrust for family members, relatives, other

individuals, clients, and governments at any level. This is an important factor in the real lived contexts of Africa for any reform and development effort in the post-colonial period. A key ingredient in reforms and development is cooperation. This is so critical that it is advanced as one of the reasons for the dominance of the humans as a species. It is far more difficult to get cooperation where there is underlying mistrust.

One way forward, even within this context of mistrust, may come from viewing human, and thus sexual minority rights, in a holistic manner. Zeleza (Zeleza & McConnaughay, 2004) argues that the construction of human rights norms is a dynamic and continuous process which is foreclosed neither by exclusivist claims of an envisaged western progeny and universality nor an equally make-believe African or Asian cultural singularity and relativity. The plea for a holistic view of human rights is captured well in his introduction:

Thus, neither the North nor the South, the developed nor the developing worlds can claim to be on the side of angels where human rights are concerned. Yet, ethnocentrism continues in human rights discourse about conceptualization, constitution, and contextualization of human rights. A more holistic global regime of human rights would have to encompass all the so-called three generation of [rights]. The growing list of rights [is] itself a reflection of the emergence of an increasingly universal human rights regime as more and more societies and social constituencies, hitherto excluded from human rights claims, make their demands for inclusion.

Having set the context of rights in Africa, let us turn to the specific argument made by Akpan against same sex marriage and homosexuality.

AKPAN'S ARGUMENT

We note first that though Akpan claims his argument focuses on the moral illegitimacy of same-sex marriage, his arguments against same-sex marriage² depend on and are often conflated with his claim that homosexuality is immoral. This dependence comes out clearly when he says that "[s]ame-sex marriage' evokes questions pertaining to sexual morality" (Akpan, 2017, p. 4).

In considering the morality of homosexuality, Akpan considers but rejects (he claims) two arguments often used by those who are anti-LGBTQ+: the unnaturalness argument and the argument from religion. Yet, his support of the anti LGBTQ+ 'complementarity' argument relies upon these two arguments. So, a very brief discussion of these two 'rejected' arguments is in order.

The religious argument against homosexuality notes that in sacred scripture in all three Abrahamic religions -- Judaism, Christianity, and Islam --, homosexuality is considered immoral. In Judaism and Christianity, the most often cited scripture is Leviticus 18:22 "you must not have intercourse with man as you would with woman; it is abomination." Muslims often refer to the story of the prophet Lot telling his people: "Will you commit lewdness such as no people in creation have committed before you? For you come in lust to men in preference to women. No, you are indeed a people transgressing beyond bounds (*Qur'an:7:80-81*). As Akpan points out, these arguments must be rejected because very few Christians, Jews, and Muslims interpret sacred scripture so literally, or follow all the laws as they are stipulated therein. (Akpan, 2017, pp. 5-6). So, not following strict rules against homosexuality may be no

² Akpan actually distinguishes between two forms of same-sex marriage. One of these forms occurs when the marriage partners of the same sex engage in sex together, or are at least intimate in some sexual way. This is the type of same sex marriage familiar not only in the West but around the world. It is also the form of same sex marriage that we will discuss in this paper. The other form of same-sex marriage Akpan discusses is practiced in parts of Africa where a married woman marries another woman. Here, though, the two women do not have sex together. Rather, they get married because, allegedly, the initial wife can't conceive or can't bear children. The second wife is brought into the marriage to allow for procreation by having sex with the husband. For all intents and purposes, this second type of marriage is really a form of heterosexual polygyny. Akpan rejects this form of same-sex marriage as well – on the basis that it is a form of adultery. Since this practice has nothing to do with same-sex marriage as it is commonly conceived, we do not discuss it further.

odder than not following Biblical injunctions against eating sheep's fat (*Leviticus* 7:23) or the requirement that we condemn to death children who curse their parents (*Leviticus* 20:9: Akpan, pp. 5-6).

The unnaturalness argument moves from the claims that homosexuality is unnatural and that all unnatural things or behaviours are immoral to the conclusion that homosexuality must be immoral. The problem here, which is well documented in the literature (e.g., Leiser, 1997), is that there is no way to define unnatural consistently, and without equivocation, that makes the statements that 'homosexuality is unnatural' and that 'all unnatural things/acts/behaviour are immoral' both true. Consider, for example, when we define unnatural as uncommon (or statistically abnormal). Here, it becomes clear that though homosexuality is statistically uncommon, it is also quite clear that not all uncommon things are immoral, e.g., being 7 ft. tall, being a university professor, having red hair, etc. The most used definition of unnatural for use in this argument is dysteleological, i.e., something used in a way that is inconsistent with its purpose. Akpan rejects this form of the argument by noting it is too broad since it would make immoral several things that we typically don't consider so, such as sexual intercourse while using "artificial" forms of birth control, or sex between infertile people, such as women who have passed menopause, or men whose sperm is impotent (Akpan, 2017, p. 5).

But there are other problems with this argument that should be noted because Akpan uses them in his defence of the complementarity argument. Teleology has historically connoted a God created universe where everything (and their parts) has a *designed purpose*. This view is popular within religion but has been rejected by science since the Renaissance when scientists like Galileo worked to separate scientific investigation from religious ones. Darwin's theory of evolution by means of natural selection is particularly clear on this point. Speciation is not the result of purpose/telos designed by an omnipotent being, but by purely mechanical, earthly forces. Evolution is simply far too 'messy' to be the product of omnipotent design, a fact brought out by the fact that approximately 99% of the species that have ever existed on our planet are now extinct (See, e.g., Fuller, 2014). As we shall see below when we discuss the complementarity argument, organisms and their parts have *functions*, but not *teloi*. The difference between the two is important. Function does not imply creation (other than biological reproduction), and especially not designed creation. Moreover, function has no implication for morality. That is, there is no connotation that using a thing in a non-functional way is immoral, even if using a thing dysteleologically is often associated with immorality (though we dispute that claim below as well).

The complementarity argument seems related to the teleological argument (which itself is, as we have said, often part of a religious viewpoint) but is a little different. It is based on the perception of a 'fit' of some sort between the male and female bodies that is absent in male-male and female-female combinations. Somehow, only man-woman sexual activity is complementary; same sex coupling is not. As Akpan says, if we "take a very objective and deep look at the human structure, physique, and physiology," we will see how heterosexual sex is complementary, while homosexual sex is not" (Akpan, 2017, p.5).

But what is it exactly that becomes "clear" with this "objective and deep look?" Is it that a penis 'fits' in a vagina in a way that a penis does not fit in an anus or mouth, or other parts of the human body? Or that there is no penetration in lesbian sex at all (*qua* their genitalia)? But what does this mean exactly? In one sense, for example, penises *do* fit into anuses (and other parts of human anatomy) just as they fit into vaginas, as evidenced by the fact that all sorts of people – both gay and straight – engage in such sexual interaction. So, it can not be just the *possibility* of penetration that is at issue here. What else, then, could it be? Several people who employ this complementarity argument suggest that it is reproduction. Hence, though a penis might fit into both an anus and a vagina, it is only through penis-vaginal intercourse that reproduction is possible (leaving aside for the moment, artificial forms of insemination). As we have noted above, however, Akpan himself rejects the teleological/natural argument against homosexuality. So, again, we are left to wonder what point(s) Akpan is making here.

The passage below is Akpan's longest explanation of the complementarity argument regarding same sex sexual interaction.

Same-sex marriage is simply bestial: it is a slap on human sensibility and sickly. If a male goat, or dog or any other animal for that matter does not mate with their kind, why should man stoop that low to even think of marrying another man? If man is part of nature, and a natural and biological being for that matter, he should know that nature as it had structured the physique of man and woman in a way that every part has its function and should be used for that function. Or do we use our legs to fly, or our hands to walk or our ears to swallow food? Assuming we use any part of our body for non-specific function, we should know that such is tangential, and not natural. Assuming we see a man develop wings and fly or a man with full fleshed and milk-filled breast for example, would we not say such are unnatural phenomena? Physiologists and medical doctors would claim that such phenomena are sickly and abnormal, and not natural: for it is not in the nature of man to fly nor develop full fleshed and milk-filled breast. As such they would look for ways to rectify the abnormality. In this sense, does it not occur to homosexuals and supporters that such activity where a male sleeps with another male as with a woman is sickening, abnormal and therefore obscene, indecent, and immoral (Akpan, pp. 7-8)?

Akpan seems to make three (related) points here.

1. Other animal species do not engage in homosexual sex. A male goat or dog does not "mate" with another male goat or dog.
2. Humans are a biological part of nature and indeed survive only through sexual reproduction. Nature has structured their bodies – differently for males and females – for exactly this reproductive purpose.
3. It is unnatural for a human to fly or a man to have milk filled breasts. If a human were to try to fly or a man to breast feed his baby, this would be abnormal or uncommon, and "therefore obscene, indecent, and immoral."

Let's consider these points individually. The first point is quite simply false. Same-sex coupling occurs in a great many and wide variety of species, as does 'incest', 'rape', 'courtship', 'same-sex animal pairs', and so on (Ruse, 1995). Hence, same-sex sexual activity is a widespread 'natural' phenomenon. This isn't to say that we think this is particularly meaningful because we believe that human sexuality is quite different in significant ways than non-human animal sexuality, and hence the latter ought not to be taken as a model for the former. We mention the wide spread of same-sex coupling throughout the animal kingdom only as it pertains to this unnaturalness and complementarity argument against homosexuality.

The second point is partially true, but in a way that has no or only limited relevance to Akpan's conclusions. Humans are indeed biological beings, and they reproduce sexually, not asexually as some species do. Moreover, Akpan is correct that gays and lesbians cannot reproduce, at least *qua* gay and lesbian sex. So, clearly at least some humans must reproduce through sexual reproduction involving opposite sex intercourse. But given that heterosexuals constitute most people, there is surely no danger in humans becoming extinct because 2-5% of the population are not heterosexual. One could add as well that it is surely not immoral for individuals, gay or straight, not to reproduce. Indeed, some might argue that with a world population of almost 8 billion, and growing exponentially, it would be a benefit to humanity that some people do not reproduce.³

³ This is a sort of modern day rendition of the argument made by some sociobiologists and evolutionary psychologists to explain the persistence of homosexuality across thousands of generations given that they do not reproduce. Though we do not necessarily endorse or agree with sociobiology and its materialistic reductionism, one of their arguments here is that there must be some sort of evolutionary advantage to communities having some homosexuals vs. communities that are completely

The third point is more complicated since it involves the controversial notion of a teleological, God created universe. We have already addressed parts of this argument above by pointing out that such a view is anathema to contemporary science, and that “function” is different than “telos.” So, organs have functions. And clearly the (or a) function of the male and female reproductive organs is reproduction. Even granting this, Akpan’s claims about homosexuality and same-sex marriage still do not hold. First, some organs, like the penis, have at least two functions – urination and sexual intercourse. Does one take precedence over the other, making one of its uses immoral? If they are both legitimate functions of this organ, then why can’t organs in general and this one have more than one or two functions? Perhaps intercourse, or sexual activity more generally, functions as a way in which to express care and love, or as a way in which to have, under certain conditions, harmless, though often deeply meaningful, consensual pleasure?

Consider in this context, the ‘function’ or ‘telos’ of the female clitoris. Clearly, it functions as a way in which women can achieve an orgasm. Indeed, according to some recent research, only 18% of women say they can achieve an orgasm by penetrative sex alone (Herbinick et al., 2018). That is, most women need direct clitoral stimulation to achieve an orgasm which often does not happen through penis-vagina intercourse alone. Is that, then, the function of the clitoris? This possibility becomes even more intriguing given that several researchers, perhaps Elisabeth Lloyd (2006) most prominently, have argued that the clitoris *has no biological, reproductive function!* That is, whether a female experiences an orgasm has no impact and hence no purely biological function for human reproduction. Is women’s sexual pleasure, then, the function of this organ? Is it immoral *not* to employ the clitoris, for example, through digital or oral stimulation, so this organ can fulfill its function?

Finally, why does Akpan think that a dysteleological use of an organ makes such a use immoral – indeed “sickening” according to Akpan? I use my nose and my ears to hold up my glasses? Is this immoral since I am using the organs dysteleologically? One might note here that such uses of my nose and ears are incidental only. But this response is inadequate. Even if we agree that non-reproductive sex, whether straight or gay, is an incidental use of our sexual organs, we can still ask why such incidental use, in and of itself, makes such use immoral.

Having dealt with the issue about the morality of homosexuality, let’s turn specifically to the matter of same-sex *marriage*. On this subject, Akpan considers, but ultimately rejects, arguments based on tradition. He phrases this argument as follows: [T]raditionally, marriage is a sacred union that unites man and woman together for life, and any union having to do with sexual relations, but which is contrary to the sacred institution is immoral; and would change a generally acceptable tradition” (Akpan, 2017, p. 6). Supporters of same-sex marriage respond to this argument from tradition by claiming, as Akpan notes, that tradition does not justify an action (Akpan, 2017, p. 6). Most states/cultures have at some time condoned slavery. But that does not make such a practice morally acceptable no matter how long that practice has been part of that state or culture’s tradition.

Finally, Akpan considers rights-based arguments that defend the moral legitimacy of (homosexuality and) same-sex marriage. Oddly, in our view, Akpan at this point gets into a technical issue regarding whether the International Covenant on Civil and Political Rights (ICCPR) and the Human Declaration of Human Rights (UDHR) include same-sex marriage rights under their ‘right to marry’ articles. We are uncertain why Akpan refers at this point to these documents instead of to general claims made by same-sex marriage supporters of human rights in general. Perhaps putting forth interpretive questions on these human rights documents somehow weakens the force of these

heterosexual. Some suggestions have been that a slightly smaller community population runs less risk of running out of food. Or that having childless gays and lesbians in a community helps with raising the children of heterosexuals. (See, e.g., Ruse, 1995).

documents as they apply to nations such as Nigeria. But Nigeria is a signatory on the International Covenant on Civil and Political Rights (See UN, 1996).

As we have discussed in Section 1, human rights have a long history. While the 'West' has perhaps been at the forefront of promoting and extending human rights over the past two centuries especially, a concern for and recognition of human rights has become an increasingly global phenomenon, including Africa. Indeed, as we have noted, the recognition of some human rights in Africa has proven to be a successful tool in decolonizing Africa. In the next section, we turn to a consideration of how South Africa has employed legal rights for sexual minorities to improve both the lives of the LGBTQ+ community and improved public health for everyone. Before turning to that material, however, it is important to note that people in the 'West' are not all pro- LGBTQ+ rights and in favour of same-sex marriage (See, e.g., Gallagher's arguments in Corvino and Gallagher, 2012; Shrage and Stewart, 2015). It is a mistake, then, for Akpan to treat the 'West' as a single homogeneous viewpoint. Indeed, liberal democracies are favoured for the very reason that they offer the hope of peaceful differences of opinion and toleration about important issues. Furthermore, not all 'Western' arguments supporting LGBTQ+ concerns and same-sex marriage are rights based. Many are consequentialist. That is, the arguments employed point to the positive consequences respecting the concerns of people not only in the LGBTQ+ community but also society at large. Consider, in this context, the following argument by John Corvino in support of what he calls "marriage equality:"

It is good for human beings to commit to someone else to have and to hold, for better or worse, and so on, for life. It is good regardless of whether you happen to be straight or gay. It is good, not only for them, but also for their neighbors, because happy, stable couples make happy, stable citizens. And marriage helps sustain this like nothing else. (Corvino and Gallagher, 2012, p. 180).

THE IMPORTANCE OF SEXUAL MINORITY CONSTITUTIONAL RIGHTS IN SITUATION IN SOUTH AFRICA

With regards to constitutional, legislative, or public policy formalizations, states could reasonably consider grounding these in human rights principles that govern the collective, regardless of what individuals might choose at any given moment for themselves within that collective. In its constitutional era, South Africa has turned towards this approach concerning same-sex sexual practice or marriage and family, specifically, and broader legislative or policy reform, generally. Although not stated as such, this approach implies a distinction between what Habermas (1993) termed 'ethical' and 'moral' reasoning – a distinction which Akpan (2017) does not accommodate in his arguments. On one hand, the matter of an individual's (or group's) life choices, is a question for personal (or group) ethical deliberation. What is good for "me" or "us" rests on the same internal logic. On the other hand, whether sexual practice or marriage, *in general*, can be followed as a maxim, is a moral question which connects to a principle of universalizability, that is, is it a right that should be open to all in relevantly similar circumstances, whether they choose it or not? The latter directly affects the collective. With this important distinction, sexual practice and/or marriage is equally open to consenting adults who choose such undertakings for themselves and their consenting partners. No one is compelled to do so. The individual/pair/group formations of these interactions, be they heterosexual or LGBTQ+ or otherwise, should be insignificant. Consequently, for all consenting or concerned parties, whether they may find themselves in states in the West or Africa or anywhere else, if marriage and sexual rights are recognized as a general good as Corvino (2012) suggests above, then these rights should ideally be accessible to all and equally applied.

South Africa's pre-constitutional state was rooted in a narrow, religious, conservative morality that was oppressive towards sexual minorities with legislation being somewhat disconnected from the reality of the social collective. Linking to this problem, Rubin explains that there exists an ordering of sexuality and sexual practice in culture that authorizes "good, natural, normal sex" as "heterosexual,

marital, monogamous, reproductive, and non-commercial" (Rubin, 1984, p. 152). Rubin exposes a rather palpable, yet constructed, connection between heteronormativity and morality in social interaction. However, not only is this connection constructed, but it comes with numerous value attachments. Value framings, along with simple regularity of occurrence and visibility, has allowed heteronormative attitudes to shape socially acceptable sexual practice by portraying heterosexuality as 'natural' or 'normal' and these loaded concepts, in turn, further constrain and reproduce social phenomena within a feedback loop. Nevertheless, what is common or repeated, may not necessarily be 'natural' or 'normal' and none of these concepts necessarily implies notions of normativity or what *should* be. Logically speaking, these entailments might be arbitrary but the unquestioned leaps between natural-normal-normative concepts quickly consolidate to form the basis of moral judgments which often fix the basis for legislation and other formalizations.

The sex or sexuality continuum is vast and varied (Fausto-Sterling 2000). Therefore, the norms that govern human sexual or marriage interaction would have to be broader and more nuanced. As Gagnon rightly asserts, "there are many ways to become, to be, to act, to feel sexual" (Gagnon 1977, Preface). To serve an end of justice, as states are obligated to do, formalizations must be able to accommodate variations on the sexuality continuum. Accordingly, in the South African Constitution (1996), marriage and sexual rights would be granted regardless of personal biographical configurations which are specifically listed as: "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth" (Equality Clause, South African Constitution, 1996). The establishment of the Constitution paved the way for the removal of criminalization legislation aimed at LGBTQ+ individuals or communities and allowed for full legal recognition of same sex marriage (and adoption) in 2006.

Human rights resolutions and frameworks, in their current form, were preceded by enormous costs in terms of widespread pain, marginalization and loss of human life during global conflict which was not limited to populations of the "West." With a precursory acknowledgement of world history, it would be inaccurate to characterize human rights as a "fad" as Akpan does (Akpan, 2017, p. 1). Human rights are hard-fought-for highly contested victories. Similarly, in the South African context, specifically, the country emerged from long, arduous struggles against forms of tribal conflict, colonization, and segregation (apartheid), to become a free, equal, democratic society. During South Africa's well-documented, pre-constitutional era, both as groups and individually, LGBTQ+ individuals were habitually categorized as criminals and often bore the brunt of state-sanctioned punishment, harassment, force, and violence. LGBTQ+ individuals were routinely rebuffed in society, being variously characterized as sinners, or pariahs, as well as pathologized as sexual deviants or perverts. Just like other countries, neither disenfranchisement nor sociocultural attacks erased LGBTQ+ individuals from South African society but it did marginalize them or drive them underground. Furthermore, because apartheid was an explicitly racist system, and deeply connected to a particularly conservative brand of Christianity, these exclusions and marginalization were "experienced more intensely by those South Africans already suffering under the yoke of apartheid because of their race, sex and economic status." (de Ru, 2013). To be sure, not all sexual liberation activism was inclusive of all races (Frühstück 2014, p. 44).

The first election with universal suffrage took place in 1994. Following the establishment of a human rights-based Constitution in 1996, "South Africa thus became the first country in the world explicitly to recognise in its Constitution that discrimination on the ground of sexual orientation would automatically be unfair until proven otherwise" (de Ru 2013). However, the South African Constitution does not only prohibit discrimination, but it also "places a duty on the state to 'respect, protect, promote, and fulfill' the rights contained in the Bill of Rights" (Bilchitz 2015, p. 24). The expectation that active measures be taken by the state with regards to social intervention and promotion of equality, is a lesser known and less explored feature of human rights law. With the state taking up that

mandate, research, recording, programming, and advocacy endeavours can now be supported. Public policy and associated public health policy has expanded significantly to include LGBTQ+ health and wellbeing. However, more work needs to be done.

Currently, South Africa is the only country in Africa to fully recognize same-sex marriage. Regarding sexual practice, the rest of the continent's positions range from states that do not enforce a penalty for same-sex sexual practice (like Burkina Faso), to those which may invoke the death penalty (like Somalia). That said, social and cultural interaction is typically slow to align itself with legislation. Many LGBTQ+ South Africans continue to fight for freedom and acceptance in daily life. South Africa has one of the worst records of gender-based violence, globally, which can be argued to be "rooted in unequal power in gender relations, patriarchy, homophobia, sexism, amongst other harmful discriminatory beliefs and practices" (South African Human Rights Commission, 2018, p. 4). Consequently, LGBTQ+ individuals remain some of the most vulnerable members of the population, suffering significant minority stress with high incidents of self-harm and harm by others, including brutal hate crimes such as "corrective rape" committed by men against lesbians (Frühstück 2014, p. 48).

In any society, the suppression of sexual rights has grave implications for public safety and, consequently, public health. A healthy society implies a safe society. A significant benefit of recognizing LGBTQ+ sexual practice and marriage or family, in terms of legislation and constitutional protection, is that public health and supporting systems may take necessary measures to implement the appropriate research, education, response, treatment and intervention openly and without stigma or castigation for themselves and their patients. Decriminalization is not enough. More broadly, formal recognition paves the way for a generalized approach of attentiveness, understanding, compassion and support results in vastly improved public health interventions for many LGBTQ+ individuals, especially trans individuals who have suffered significant rights violations in this sector (Gruskin et al., 2018). Furthermore, when LGBTQ+ rights are fully recognized and accepted by the state, research, recording, programming, and advocacy endeavours may be supported. These, in turn, can provide valuable, reliable, and publicly accessible information. Access to information is vital for the implementation, monitoring, and protection of human rights (South African Human Rights Commission 2018, pp. 16-17). Without impediment from either legislation or social custom, the state's initiatives to create and expand statistical databases can be developed and utilized to screen and scrutinize all forms of discrimination and harm experienced by LGBTQ+ individuals. This is essential to establishing strategies or policies for all public sectors that are beneficial to all societal members regardless of individual gender or sexual identity.

South Africa, like many countries around the globe, has emerged from discriminatory pasts and chosen formal approaches to rights. Patriarchal regulation of female sexuality as well as what counts as legitimate sex is well documented (Stearns 2009, p. 17). The characterization of sexual rights and freedoms as a Western intrusion or colonial interference is also well documented. (Stearns, 2009, pp. 157, 158). South Africa continues to strive for equality and social reform under the same yokes. However, progression towards realizing rights for all continues in the modern era because of developments in global rights and standards that serve to minimize harm, especially with respect to violence against women and sexual minorities and its repercussions for physical and mental health.

In closing, we would like to remind readers of a lesson that was, or at least should have been, learned during the initial stages of the HIV/AIDS crisis. In the West, HIV/AIDS was initially thought to be a disease caused by and contained within the male gay community. Hence, the first 'formal' name for this disease was "gay-related immune deficiency," or GRID, but was referred to informally as 'the gay plague' (*Wikipedia*, ND). Because of its association with gay men and gay sex, followers of the "just world hypothesis/fallacy," HIV/AIDS was thought to be the just retribution for people engaging in immoral sexual activity (Lerner and Montada, 1998). Hence, the evangelical minister and founder of the Moral Majority, Jerry Falwell, infamously said in 1983 that "AIDS is not just God's punishment for homosexuals; it is God's punishment for the society that tolerates homosexuals." (Cohen, ND). Moreover, in 1981,

Ronald Reagan had just become President of the US in large measure from the support he received from American evangelicals like Falwell, and so he was reticent to devote time or research money to the disease. Reagan would address HIV/AIDS much later in his presidency at the Third International Conference on AIDS in Washington. When he spoke, 36,058 Americans had been diagnosed with AIDS and 20,849 had died. The disease had spread to 113 countries, with more than 50,000 cases" (White, 2004). The lesson here, surely, is that public health and safety ought not to become a political issue where some groups of people are cast aside as unworthy of care. As we have pointed out, by recognizing legal rights for those in the LGBTQ+ community, South Africa has made all its citizens safer and healthier. It is time for more African nations to follow their lead.

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