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SYMPOSIUM INTRODUCTION

LAW, RELIGION, AND SAME-SEX RELATIONS IN AFRICA

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Some years back, around 2013, I was asked to write an article on the uses of the Bible in African law.[1] Researching references to the Bible and biblical law across the African continent, I soon learned that, besides support for arguments by a few states in favor of declaring themselves "Christian nations," the main use was in emerging debates over homosexuality and same-sex relationships—almost exclusively to condemn those relationships. In January 2013, the newly formed African Consortium for Law and Religion Studies (ACLARS) held its first international conference at the University of Ghana Legon.[2] There, African sexuality debates emerged forcefully in consideration of a paper by Sylvia Tamale, then dean of the Makarere University School of Law in Uganda, who argued pointedly, "[P]olitical Christianity and Islam, especially, have constructed a discourse that suggests that sexuality is the key moral issue on the continent today, diverting attention from the real critical moral issues for the majority of Africans . . . . Employing religion, culture and the law to flag sexuality as *the* biggest moral issue of our times and dislocating the *real* issue is a political act and must be recognised as such."[3]

The dominance and dislocating effect of debates over African sexualities have only grown in the ensuing years. The issue has given rise to two notable African anthologies, edited by scholarly collaborators Ezra Chitando and Adriaan van Klinken and published in 2016. These volumes, *Public Religion and the Politics of Homosexuality in Africa* and *Christianity and Controversies over Homosexuality in Africa*, assemble contributions from a range of scholars from all over the African continent exploring African sexuality debates, mostly from various social science perspectives.[4] Questions of law and normativity are never far from these discussions, especially those addressing political developments, but much of the critical scholarship on African sexualities and gender identities has come from descriptive fields of the social sciences rather than from the normative fields of law and religion.

Interestingly, Chitando and Van Klinken have also written on issues of human security in Africa.[5] From 2013 to 2016, ACLARS had received only a handful of proposals for papers on

1 M. Christian Green, "Modern Legal Traditions: Africa," in *The Oxford Encyclopedia of the Bible and Law*, ed. Brent Strawn (Oxford: Oxford University Press, 2015), http://doi.org/10.1093/acref:obso/9780199843305.001.0001.

2 For more information on the African Consortium for Law and Religion studies, see the organization's website, https://www.aclars.org.

3 Sylvia Tamale, "Exploring the Contours of African Sexualities: Statutory, Customary and Religious Laws," *African Human Rights Law Journal* 14, no. 1 (2014): 150–77, at 158.

4 Adriaan van Klinken and Ezra Chitando, eds., *Public Religion and the Politics of Homosexuality in Africa* (London: Routledge, 2016); Ezra Chitando and Adriaan van Klinken, *Christianity and Controversies over Homosexuality in Africa* (London: Routledge, 2016).

5 Ezra Chitando and Adriaan van Klinken, eds., *Religion and Human Security in Africa* (London: Routledge, 2019).

topics related to sexuality. (An earlier version of Elias Bongmba's article, significantly revised and expanded here, was presented at the ACLARS 2016 conference in Ethiopia.[6]) But with the call for papers for the ACLARS 2017 conference in Morocco, on the theme "Religion, Law, and Security," ACLARS received a bumper crop of papers on sexuality—specifically, homosexuality and same-sex relations—for consideration. Earlier versions of the articles by Asonzeh Ukah, Habibat Oladosu-Uthman, and Damaris Parsitau included in this symposium were among the papers presented at the Morocco conference.[7]

The connection between sexuality and security is worth spelling out further. The call for papers for the ACLARS Morocco conference did not actually reference sexuality. Where the authors of proposed papers on homosexuality, same-sex relationships, and the LGBTQ community seemed to see a fit with the theme of security was in the specific call for papers on the security of "vulnerable communities," sometimes in concert with "religious tolerance" and "violent extremism." What turned out to be an emerging concern in the scholarship being proposed for presentation at ACLARS was the way in which LGBTQ communities were being made insecure by political and religious rhetoric, alongside some rather stringent new laws enacted in various parts of the African continent against same-sex relations.

This emerging international discussion about "sexual security" or "sex orientation and gender identity," or SOGI,[8] rights as a matter of human rights and human security has, in turn, played into a larger and, in some respects, distinctively African construal of security in the broader terms of human security that were being articulated increasingly in international human rights and related fields. Much like the broad—and at times controversial—World Health Organization definition of health as a "state of complete physical, mental and social well-being and not merely the absence of disease or infirmity,"[9] these new definitions of human security went beyond the traditional understandings of human security in terms of absence of war, conflict, and violence toward a broader understanding of personal, community, and political security. In that sense, a concern for sexual or SOGI security would direct attention to the ways in which LGBTQ people are made insecure or vulnerable by the legal, political, and religious context in which they exist.

The articles in this symposium, covering the legal, political, and religious contexts of Nigeria, Cameroon, South Africa, and Kenya, exemplify the kinds of struggles currently happening across Africa at the intersection of law, religion, and the politics of sexuality. Common themes among the articles include the need to interrogate the idea that homosexuality and same-sex relationships are un-African and to examine the ways in which colonial laws against homosexuality marked these relationships as normatively deviant. The independence movements in nations across Africa in the 1960s brought opportunities to renegotiate and redraft some of the colonial legal artifacts,

6 Elias Kifon Bongmba, "Homosexuality and the Law in Africa: South African Case Law as a Paradigmatic Example," in *Religious Pluralism, Heritage and Social Development in Africa*, ed. M. Christian Green, Rosalind I. J. Hackett, Len Hansen, and Francois Venter (Stellenbosch: African Sun Media, 2017), 291–312.

7 Other papers from the ACLARS Morocco conference were published in M. Christian Green, T. Jeremy Hill, and Mark Hill, eds., *Religion, Law and Security in Africa* (Stellenbosch: African Sun Media, 2018).

8 For examples of the emerging international discussion of SOGI rights as human rights, see Anne Hellum, ed., *Human Rights, Sexual Orientation, and Gender Identity* (London: Routledge, 2016); Giulia Dondoli, *Transnational Advocacy Networks and Human Rights Law: Emergence and Framing of Gender Identity and Sexual Orientation* (London: Routledge, 2019); Kerry O'Halloran, *Sexual Orientation, Gender Identity, and Human Rights* (London: Routledge, 2019).

9 World Health Organization, "Constitution," accessed February 17, 2021, https://www.who.int/about/who-we-are/constitution. The definition is among the principles set forth in the preamble to the World Health Organization's constitution, in force since 1948.

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but more pressing issues of political and economic development seemed to supersede these concerns, and the laws against homosexuality remained on the books.

In fact, Africa was not far behind Europe and North America in recognizing same-sex relationships. The United States began to recognize full same-sex marriage (as opposed to civil unions or domestic partnerships) only in 2004, and the right was not guaranteed until the 2015 case of *Obergefell v. Hodges* at the US Supreme Court, where it is said to be, at the time of this writing, under reconsideration soon.[10] As Elias Bongmba recounts here in his comparative analysis of Cameroon and South Africa, South Africa, with its landmark Constitutional Court decision in the *Fourie* case of 2005 and passage of the Civil Unions Act in 2006, was moving ahead with same-sex relationships recognition roughly in tandem with developments in Europe and North America. But things seemed to be taking a grim turn on the continent in 2009 with Uganda's Anti-Homosexuality Act, condemned internationally as the "Kill the Gays" bill. Subsequent legislation on the continent, significant portions of which are addressed in the articles in this symposium, has also moved in the direction of prohibition. There have also been indications of significant support for these prohibitions by African religious groups, including the continent's predominant Muslim and Christian faiths—and among the latter, both mainline denominations and, especially, the growing number of Pentecostal and charismatic groups, as recounted in several of the articles here.

The issues raised by these developments around SOGI issues and sexuality debates in Africa are many. First, there is the question of the interrelationship of colonial and contemporary laws and whether antihomosexuality laws are significantly a legacy of colonialism. Second, there is the related question whether indigenous traditions and customary law are more accommodating of sexual and gender diversity. Third, and following from these questions about colonialism and customary traditions, there is the postcolonial question of how to disentangle colonial antihomosexuality from opposition to same-sex relations that may be of more recent vintage and that may itself be in response to perceptions of imposition of more liberal or Western cultural norms. This last consideration has been a staple argument of many African opponents of homosexuality, even as many of these groups, from mainline Anglicans to US-influenced evangelical and Pentecostal and charismatic groups, often have origins or strong connections to forces from abroad. How to disentangle what is colonial or foreign from what is authentically or indigenously African—and practitioners of African indigenous religions often note that both Christianity and Islam are imported faiths—remains a perennial question in much of African studies.

Other questions are present, either explicitly or implicitly, in African debates about sexuality. Among them is the interesting question whether the harsh new laws are meant to serve a mostly aspirational, exhortatory, or even pedagogical function. That is, are the laws enforced and intended to be enforced strictly, or are they rather meant to be honored more on the books than in actual practice? This question is actually raised about some African traditions of Islamic sharia, particularly in Nigeria, where the punishments in the sharia penal codes are harsh but infrequently or rarely imposed.[11] Is it possible that the punitive laws against homosexuality may not accurately

10 Amy Howe, "Case Preview: Court Will Tackle Dispute Regarding Religious Foster-Care Agency, LGBTQ rights," *SCOTUSblog*, October 28, 2020, https://www.scotusblog.com/2020/10/case-preview-court-will-tackle-dispute-involving-religious-foster-care-agency-lgbtq-rights (previewing the case of *Fulton v. City of Philadelphia*).

11 Lydia Polgreen, "Nigeria Turns from Harsher Side of Islamic Law," *New York Times*, December 1, 2007; Karin Brulliard, "In Nigeria, Sharia Fails to Deliver," *Washington Post*, August 12, 2009, A10; Peter Kirkwood, "Moderate Muslim's Wisdom for Nigerian Extremists," *Eureka Street*, May 14, 2014, https://www.eurekastreet.com.au/article/moderate-muslim-s-wisdom-for-nigerian-extremists.

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or fully reflect the culture of the societies themselves, but instead exist in tension with social mores that may be more accommodating or permissive about sexual orientation and gender identity? Criminal law is often seen as reflecting the will of the public, but is the will of the public so univocally opposed to LGBTQ people and same-sex relationships? Or are harsh laws outliers to, rather than reflections of, African society and culture on sex and gender issues? Further, if the law is susceptible to influence by religious opponents of homosexuality, are there ways in which more progressive voices on SOGI rights might also effectively have a voice?

In the symposium presented here, articles by Asonzeh Ukah and Habibat Oladosu-Uthman take up the passage in Nigeria of the Same-Sex Marriage (Prohibition) Act of 2014. Ukah describes the passage of the act as a unifying discourse for Muslims and Pentecostal Christians in Nigeria in a religious and political landscape in which gay-rights activists have accused religious opponents of homophobia and hate speech. The situation pits the rights of religious freedom for opponents of homosexuality who claim to represent the wider Nigerian society against the SOGI rights of the LGBTQ activists as sexual minorities. Ukah examines the rhetoric around homosexuality by mainline and Pentecostal religious leaders at a time when global understandings of hate speech are also undergoing considerable evolution in the face of global religious and political extremism, religious-identity politics, and the advent of social media and other modes of rapid and widespread communication. Ultimately, Ukah argues that in the context of rapid global flux and complexities, extreme speech is increasingly an important weapon in the contest for sexual citizenship, belonging, inclusivity, and identity in a plural, multireligious, Nigerian society.

Habibat Oladosu-Uthman analyzes the 2014 Nigerian Same-Sex Marriage (Prohibition) Act through a somewhat different lens, examining the rise of homosexuality and same-sex relationships as a challenge to the traditional marriage system in Nigeria. Examining the history of homosexuality and same-sex relations around the African continent, she notes that, while such relationships were not unknown in African history and culture, they are more visible today in ways that may be generational and may reflect an increasing culture of acceptance by younger Nigerians, but which draw opposition—not only by religious groups—as reflections of a greater marriage malaise confronting Nigerian societies as a whole. Specifically, as traditional marriage wanes in popularity among Nigerian men, for whom the economy makes families unaffordable, and among educated Nigerian women, who are more likely to achieve economic independence—not to mention the continuing scourge of HIV and AIDS—a greater range of possible relationships, including same-sex relationships, has emerged. Despite this greater social liberalization, but also in reaction to it, various forces in Nigeria, especially religious ones, have sought to politically and legally delegitimize same-sex relations in ways that have rendered the human rights of these sexual minorities especially vulnerable.

Damaris Parsitau's article on religious involvement in constitutional reform around issues of homosexuality and same-sex relations begins with a description of a fateful 2015 meeting of US president Barack Obama and Kenyan president Uhuru Kenyatta, when sexual rights figured large on the agenda. The visit became an occasion for Kenyatta to decry homosexuality as un-African and a Western influence—common accusations in sexuality debates across the African continent. Parsitau uses the occasion as a departure point for analyzing religious influences on Kenyan homosexuality law, including the process of reform leading up to the 2010 Kenyan constitutional referendum that produced the current Constitution of Kenya. Along with abortion, marriage, and a number of other issues, homosexuality was a focus of religious activism and intervention, particularly among Kenya's Pentecostal churches. Indeed, Parsitau argues that, particularly on sexuality issues, "Kenyan politics cannot be understood in isolation from religion,

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particularly the role of Pentecostal Christianity in public life, governance, and public policy."[12] In her article, much as Ukah does in the Nigerian context, Parsitau provides a descriptive analysis and highly normative critique of homophobic religious rhetoric in Kenya. Parsitau examines how this rhetoric influenced the 2010 constitutional referendum and more recent case law and legislation on homosexuality and same-sex relations, including legal advances toward LGBTQ rights in 2015, which were walked back by more recent petitions to decriminalize homosexuality that failed in the courts in 2019.

With symposium articles having taken the reader from Nigeria in the west to Kenya in the east, the article by Elias Kifon Bongmba crisscrosses the continent once again to the West African nation of Cameroon, which offers some notable contrast to Africa's most sexually liberal nation, South Africa. Bongmba compares the increasingly restrictive climate for LGBTQ communities and same-sex relationships in Cameroon with the human rights–infused vision articulated in the decision of South African Constitutional Court justice Albie Sachs in the landmark 2005 *Fourie* decision, which recognized same-sex marriage in South Africa and led to its legalization in the Civil Unions Bill of 2006.[13] Bongmba analyzes particularly the positions of the Roman Catholic bishops of Cameroon, along with the social factors and court cases that led up to Cameroon's most recent penalization of homosexuality in the Penal Code of 2016. He contrasts the harshness of the current state of the administrative and criminal law against homosexuality in Cameroon with the constitutional recognitions afforded to same-sex marriage in South Africa, largely as a result of the Sachs opinion in the *Fourie* decision—a contrast that is particularly interesting, given that both Cameroon and South Africa adopted new constitutions in 1996. Overall, Bongmba argues that "constitutional protections offer a richer fairer outcome to these debates than do appeals to sectarian beliefs and traditional cultural norms in contexts where there is a multiplicity of cultures."[14] For now, South Africa is leading the continent in these constitutional protections, but Cameroon and other countries have a way to go.

In this symposium of African religion scholars commenting on the law, there is a sense of the power of religion to shape narratives and understandings of sex and gender. There are not yet in Africa the religious freedom arguments, as are heard in the United States, being made by traditional religions to deviate from what otherwise seems an international arc toward recognition of SOGI rights. But then there is not as much of a liberal religious presence in Africa on these issues. Indeed, even as conservative US evangelical groups have been charged with exporting homophobic views, other Christian groups, such as conservative Anglicans and Episcopalians and some African American denominations in the United States, have looked to supposedly more traditional African societies for conservative SOGI norms. In other words, the trade in SOGI norms between the United States and Africa has a distinctly bilateral and bidirectional character. In this context, the articles in this symposium reveal both the power and the danger, in some instances, of religious influence on the law. But they also attest to the importance of law and religion as factors in shaping African societies in ongoing debates over sexual orientation and gender identity.

12 Damaris Parsitau, "Law, Religion, and the Politicization of Sexual Citizenship in Kenya," *Journal of Law and Religion* 36, no. 1 (2021) (this issue).

13 *Minister of Home Affairs & Another v Fourie & Another* 2006 (1) SA 524 (CC) at 2 (S. Afr.).

14 Elias Kifon Bongmba, "Same-Sex Relations and Legal Traditions in Cameroon and South Africa," *Journal of Law and Religion* 36, no. 1 (2021) (this issue).

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