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ARTICLE SYMPOSIUM

SAME-SEX RELATIONS AND LEGAL TRADITIONS IN CAMEROON AND SOUTH AFRICA

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ABSTRACT

This essay revisits the debates and legal contests that grew in Cameroon at the turn of the millennium but failed to bring justice for members of the lesbian, gay, bisexual, transgender, and queer (LGBTQ) community. Several members of sexual minorities were tried in Cameroon courts and sentenced to serve jail time. In order to reflect on the state of legal limbo for LGBTQ people in Cameroon, I also revisit the South African case *Minister of Home Affairs and the Director General of Home Affairs versus Marie Adrianna Fourie and Cecelia Johanna Bonthuys*, which led to legalization of same-sex relationships and marriage in South Africa. In the first and longer part of the essay, I discuss the situation in Cameroon and South Africa. In the second part, I briefly discuss the different legal outcomes in the two countries. I conclude with a brief discussion of signs of hope in the critical dialogue on justice in the debate on same-sex relations in Africa. My goal in this essay is not to offer expert opinion on the legal entanglements on the question of same-sex relations, but to demonstrate that legal and constitutional protections offer the best chance for gaining the rights of LGBTQ people in Africa.

KEYWORDS: Africa, LGBTQ rights, criminalization of LGBTQ, Cameroon, South Africa

The law may not automatically, of itself eliminate stereotyping, and prejudice. Yet it serves as a great teacher, establishes public norms that become assimilated into daily life and protects vulnerable people from unjust marginalization and abuse.

—Justice Albie Sachs, South African Constitutional Court[1]

[The state] should go further and close down all these structures of evil, veritable training centres for vice and crime that these animated bars spreading to all our big towns are, and which take over entire neighbourhoods under the eyes of the authorities, in Mvog Ada, Yaoundé and Bali, Shell New Bell in Douala and even a few steps away from our universities. Confronted with the vice, the principle of tolerance is put aside, if not, we become complicitous and guilty.

—*L'Effort Camerounais*[2]

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1 *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC) at 86 (S. Afr.).

2 "Thérapie spirituelle contre certains fléaux. L'homosexualité a détruit leur vie. Les vitimes témoignent" [Spiritual therapy against certain ills. Homosexuality ruined their life. Victims testify], *L'Effort Camerounais*, March 2–15,

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INTRODUCTION

In this essay, I return to the legal debates on same-sex relations in Cameroon and South Africa at the end of the millennium to highlight the contrasting legal outcomes to the debates. My goal is to demonstrate that while the magnitude of the debate and the social forces that promoted the debate in both countries were different, one thing the debates in both countries had in common is the fact that the contestation of same-sex relations in each was fought in both public discourse and the courts. While Cameroon convicted and sentenced people for the "crime" of sodomy, in South Africa, the Constitutional Court granted same-sex couples the right to marry and charged the South African Parliament to enact a statute that would legalize same-sex marriage. I discuss these different legal outcomes and argue that central to the case in South Africa was the question of constitutional rights, a concern that was not properly reflected in the Cameroon cases.

My goal in this essay is not to offer expert opinion on the legal entanglements on the question of same-sex relations, but to demonstrate the important role that the law has played and could play in future contestation of the rights of lesbian, gay, bisexual, transgender, and queer (LGBTQ) people in the fight for equality under the law. This is important in the African context, where there are similar patterns in the debate on same-sex relations as in other countries, including in the United States. Religious leaders and members of faith communities have dominated the conversation, arguing that same-sex relations are a lifestyle condemned by religious teachings. In the African context, there is the added dimension that many of the opponents of same-sex relations claim that same-sex love violates African cultural norms. In revisiting these debates, it is essential to think about the role of law so that in matters that concern all members of the political community, religious actors and other participants in the debates can consider the legal structures and political institutions as the final arbiters of the debates, which, assuming that all people are equal under the law, necessarily involve all members of the political community.[3]

Citizens are governed by the legal system of a country regardless of religious affiliation, but religious differences do not always offer a common standard for adjudicating differences, leaving the legal instruments of the state to serve as appropriate tools for adjudication and adherence to the laws of a country. Neither Cameroon nor South Africa has a state religion; therefore, neither state can rely on religion to address these challenges. Nor can either state allow religious communities to make the final decisions in matters that are regulated by the state.[4] One cannot doubt that, given the current state of affairs in much of Africa, religion and religious actors will continue to play a role in negotiating public life. But my emphasis as I examine the different outcomes from the legal battles on same-sex relations in Cameroon and South Africa is that constitutional protections offer

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2011, at 2, as quoted in translation by E. H. Ngwa Nfobin, "Homosexuality in Cameroon," *International Journal on Minority and Group Rights* 21, no. 1 (2014): 72–130, at 82.

3 M. Christian Green, "Modern Legal Traditions: Africa," in *The Oxford Encyclopedia of the Bible and Law*," ed. Brent A. Strawn (New York: Oxford University Press, 2015), https://www.oxfordreference.com/view/10.1093/acref:obso/9780199843305.001.0001/acref-9780199843305. See also M. Christian Green, "Religious and Legal Pluralism in African Constitutional Reform," *Journal of Law and Religion* 28, no. 2 (2013): 401–39.

4 With the support of religious actors, Uganda and Nigeria have passed bills forbidding same-sex relations that were signed into law. Asonzeh Ukah, "Sexual Bodies, Sacred Vessels: Pentecostal Discourses on Homosexuality in Nigeria," in *Christianity and Controversies over Homosexuality in Contemporary Africa*, ed. Ezra Chitando and Adriaan van Klinken (London: Routledge, 2016): 21–37; Barbara Bompani, "For God and for My Country: Pentecostal-Charismatic Churches and the Framing of a New Political Discourse in Uganda," in *Public Religion and the Politics of Homosexuality in Africa*, ed. Adriaan van Klinken and Ezra Chitando (London: Routledge, 2016), 19–34.

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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.[5]

LGBTQ RIGHTS IN CAMEROON

On the eve of the twenty-first century, the debates about same-sex relations were well known in Cameroon. One example of this debate and public discourse is that surrounding the publication of Calixthe Beyala's book, *C'est le Soleil qui m'a brulée*, which introduced readers to female same-sex desire.[6] Beyala's work was pathbreaking for Cameroon. Further, I would argue, as is the case with other bold works that address difficult subjects, Beyala's work frames female same-sex love within the broad discourse (or the lack thereof) regarding the politics of gender. The protagonist, Ateba, a young woman, sees the world differently than do the women who came before her. They had conformed to the social norms and either depended on men or claimed that they needed to. Ateba knows that men have done (and do) a lot to damage society. Ateba offers a different view of the world; that is, she offers a view, grounded in her own experience, that women can love differently by loving other women. She writes to other women expressing her love for them: "You fulfill my need for love. To you alone can I say certain things; I don't have to be me anymore, I can melt away in you, for I say them better to you than to myself."[7] While this passage and others proclaim love for another female, the style is complicated because the subject is love and not sexuality alone. In articulating her love, Ateba affirms a woman's desire for another woman. Through her literary imagination, Beyala portrays an act that strikes at male violence: Ateba kills a man who attacks her. It is a complex narrative in which the intensity of Ateba's killing of the assailant is quickly replaced by—yet intimately connected with—Ateba's kissing one of her love interests, Irene. One can speculate about meaning here, but overall, Beyala paints a picture of how one person can love men and women, and also celebrate same-sex love on its own.

Beyala objected to the notion that her work affirmed same-sex love, but it is unclear why. While I do not have any particular insight into this matter that would provide clarity, one cannot discount the impact of the cultural, spiritual, and political climate in Cameroon at the time. Beyala's work reveals a personal, if not social, opening to same-sex relations in Cameroon at the time of its writing. But, even so, Beyala objected to the idea that her work portrayed same-sex love between

5 In focusing on the role of law and the role of religion as public instruments, which I am convinced ought to be used to protect human rights, freedoms, and human dignity in addition to providing a framework for arbitration and set guidelines for responsible citizenship, I do not assume that all religious leaders oppose same-sex relations. Some religious leaders support and affirm members of the LGBTQ communities. Archbishop Desmond Tutu of South Africa is a strong supporter of sexual minorities, The Reverend Dr. Kapya Kaoma of Zambia has been very supportive of sexual minorities, and he has joined other religious leaders in issuing the KwaZulu-Natal Declaration, which calls for an end to discrimination against sexual minorities. In Cameroon, Dr. Jean-Blaise Kenmogne, pastor of the l'Eglise Evangélique du Cameroun (Evangelical Churches of Cameroon) and rector of l'Université Evangélique du Cameroun (Evangelical University of Cameroon) has supported the rights of gays and lesbians. See Jean-Blaise Kenmogne, *Homosexualité, Église et Droits de l'Homme, Ouverons le débat* (Yaoundé: Éditions CEROS, 2012).

6 Calixthe Beyala, *C'est le soleil qui m'a brûlée* (Paris: Stock, 1987). All quotations are from Calixthe Beyala, *The Sun Hath Looked upon Me*, trans. Marjolijn de Jager (Portsmouth: Heinemann, 1996). See also, Richard Bjornson, *The African Quest for Freedom and Identity: Cameroonian Writing and the National Experience* (Bloomington: Indiana University Press, 1994), 411, 416–18. I am grateful to studies of Beyala by Juliana Abbenyi-Nfah and Natalie Etoke, and S. N. Nyeck for insights and interpretations.

7 Beyala, *The Sun Hath Looked upon Me*, 41.

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women. She stated, "I think those who see lesbianism in my writings are simply perverts because tenderness between women does not necessarily imply lesbianism. . . . Moreover, the word 'lesbian' does not exist in the African lexicon. I do not know of any equivalent of the word 'homosexual' in my native language."[8] One could look at Beyala's claim through the hermeneutical principle of distanciation, which according to Paul Ricoeur, points to "communication in and through distance."[9] From this perspective, a text can offer readers a different perspective and, later on, new meanings emerge that may disrupt authorial intention.[10] As Juliana Makuchi Nfah-Abbenyi has argued, "Beyala uses the character of Ateba to question the silences (specifically women's silences) and prohibitions that for millennia have repressed and suppressed homosexuality in language, beliefs, customs and culture of her people."[11]

Beyala was not the first to open a window onto same-sex relations among African or Black women. However, the representation, even as Beyala seemed to retract it in public comments (one wonders why she wanted to take it back!), was a welcome introduction to the public discourse of same-sex relations in Cameroon. I think Beyala pointed to a different view of the social and intimate reality among some Cameroonians at a time when many community and legal voices were raised to drown the existence of same-sex love. Natalie Etoke argues that "Beyala [did not challenge] the silent and social repression that characterizes the lesbian issue in Africa. Same-sex relations could, according to Ateba, end up in 'tragic realms of happiness.' In other words, the cost of lesbian love is death. The ambiguities of women's relationships in *The Sun Hath Looked upon Me* 'do not see homosexuality as incompatible or excluding heterosexuality.'"[12]

At the beginning of the new millennium, LGBTQ rights were challenged in Cameroon. Cameroonians were discussing, but also vehemently denying, that same-sex relations were not part of Cameroonian or African cultures. Two newspapers, *L'Anecdote* and *Le Metéo*, published the names of persons, described as *les pédés de la Republique* (meaning pedophiles of the Republic), alleging that these people were engaged in same-sex relations.[13] S. N. Nyeck has argued that *L'Anecdote* especially amplified rumors that homosexuality was introduced by Europeans. Nyeck points out that the rumors, included claims that Cameroon was not a democratic state because Dr. Louis-Paul Aujulat, a Catholic lay worker and a former governor of Equatorial French Africa, was a Freemason and a homosexual who sodomized Ahmadou Ahidjo, the first president of Cameroon.[14]

A second incident that sparked debate was a gruesome crime committed by a student, who allegedly killed another student of the same sex in Yaoundé because the victim had flirted with him.

8 Rangira Béatrice Gallimore, *L'oeuvre romanesque de Calixthe Beyala: le renouveau de l'écriture féminine en Afrique francophone sub-saharienne* [The romantic works of Calixthe Beyala: The renewal of women's writing in sub-Saharan francophone Africa] (Paris: L'Harmattan, 1997).

9 Paul Ricoeur, *Hermeneutics and the Human Sciences: Essays on Language, Action and Interpretation*, ed. and trans. John B. Thompson (Cambridge: Cambridge University Press, 2016), 93.

10 Ricoeur, *Hermeneutics and the Human Sciences*, 101–06.

11 Juliana Makuchi Abbenyi-Nfah, *Gender in African Women's Writing: Identity, Sexuality, and Difference* (Bloomington: Indiana University Press, 1997), 29.

12 Nathalie Etoke, "Mariama Barry, Ken Bugul, Calixthe Beyala, and the Politics of Female Homoeroticism in sub-Saharan, Francophone African Literature," *Research in African Literatures* 40, no. 2 (2009): 173–89, at 186.

13 Frida Lyonga, "The Homophobic Trinity in Cameroon," in Chitando and van Klinken, *Christianity and Controversies over Homosexuality in Contemporary Africa*, 51–64, at 55–56; see also S. N. Nyeck, "Queer Fragility and Christian Social Ethics: A Political Interpolation of the Catholic Church in Cameroon," in Chitando and van Klinken, *Christianity and Controversies over Homosexuality in Contemporary Africa*, 110–24, at 113–16; Charles Guebogou, *La question homosexuelle en Afrique. Le Cas du Cameroun* [The question of homosexuality in Africa: The case of Cameroon] (Paris: L'Harmattan, 2006), 164.

14 Nyeck, "Queer Fragility and Christian Social Ethics," 113.

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In the best of all possible worlds, one would have thought that the suspect in such a cold-blooded crime would have faced close judicial scrutiny and that the perpetrator would have been brought before the courts to defend himself against charges of murder, but that was not the case. The killing sparked a spirited debate on same-sex relations, but rather than focusing on the crime that was committed, many people focused on the alleged dangers posed by same-sex relations in the country. Although few could point to offenses committed by members of the LGBTQ community in Cameroon, hysteria took hold, leading members of faith communities to fan the flames of exclusion against members of the LGBTQ community on the grounds that they were a threat to the community. One of the first persons to speak against same-sex relations was the then Roman Catholic archbishop of Yaoundé, Monseigneur Victor Tonyé Bakot. He criticized what he described as the spread of same-sex relations in the country. During the Feast of the Ram in 2006, the Imam of Douala, Cheikh Ibrahim Mbombo, condemned what he called the "plot against the family and marriage" for recommending habits against nature.[15]

Ngwa Nfobin has pointed out that the criticism of same-sex relations by Archbishop Bakot was not the only word from the Catholic community. The influential Catholic weekly *L'Effort* criticized same-sex relations in a series of articles and opinions and called on Cameroonian Christians to launch a spiritual fight against same-sex relations.[16] The editors thought the alleged dangers of same-sex relations needed more than a spiritual response, and thus they further called on Cameroonian authorities to eliminate same-sex relations, arguing "[The state] should go further and close down all these structures of evil, veritable training centres for vice and crime that these animated bars spreading to all our big towns are and which take over entire neighborhoods under the eyes of the authorities, in Mvog Ada, Yaoundé and Bali, Shell New Bell Douala and even a few steps away from universities. Confronted with the vice, the principle of tolerance is put aside; if not, we become complicitous and guilty."[17] The paper also criticized what the editors thought was the less than strong opposition of same-sex relations in Cameroon by President Paul Biya when Biya seemed to indicate to interviewers that there might be a change of heart on the subject by the people of Cameroon.

Following the April 2012 National Episcopal Conference of Cameroon—six years after the debates on same-sex relations started—the Catholic bishops issued a statement reaffirming the Catholic Church's position on sexuality and family values and condemning same-sex relations. The bishops emphasized that marriage was a union between a man and a woman. To demonstrate the seriousness of their view that same-sex relations posed a grave danger to the country, the bishops decided to write a new prayer on the subject.[18]

It was clear that the bishops of Cameroon interpreted same-sex relations as a significant problem in the country. It was thus no surprise to observers of Cameroon that on January 12, 2013, the National Episcopal Conference of Cameroon issued a statement on abortion, same-sex relations, incest, and sexual abuse of minors.[19] In this statement, the bishops justified the urgency of their appeal by pointing to a "climate of permissiveness, forgetfulness of God, of creation, of nature

15 Ngwa Nfobin, "Homosexuality in Cameroon" 83–84.

16 See, for example, "Thérapie spirituelle contre certains fléaux," *L'Effort Camerounais*, March 2–15, 2011.

17 "Thérapie spirituelle contre certains fléaux," *L'Effort Camerounais*, March 2–15, 2011, at 2, as quoted in translation by Ngwa Nfobin, "Homosexuality in Cameroon," 82.

18 See *L'Effort Camerounais*, No. 527 (154) 068, 23 April–9 May 2012, at 2, as quoted in translation by Ngwa Nfobin, "Homosexuality in Cameroon," 82–83, 83n41.

19 National Episcopal Conference of Cameroon, "Declaration of the Bishops of Cameroon on Abortion, Same Sex Relations, Incest and Sexual Abuse of Minors," January 12, 2013, http://www.familiam.org/pcpf/allegati/4561/Declaration_ENG.pdf. The bishops' declaration does not invite broad conversations on these major issues, and it ignores the distinctions about a woman's right to choose, a person's expression of his or her sexual orientation,

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as God created and intended it for our happiness, a climate experienced and resisted by families and against which they courageously protect and defend themselves, upholding human and divine values[.]"[20] In the January 2013 declaration—and subsequent ones—the bishops argue that the debate about LGBTQ persons raises questions about sexuality, dignity, and the language and meaning of sexuality. The bishop's concerns are that discussion of same-sex relations necessarily raises questions about the legality of same-sex marriage, adoption of children, the establishment of families, and procreation. They also argue that the discussions of same-sex relations are merely "semantic abuses intended to distort realities and the real meaning of the concepts of family, spouse, sexuality, marriage, [and] procreation."[21]

In their declaration, the bishops make three arguments against same-sex relations. First, they argue that, according to Genesis 1:26, God created male and female and established sexual dignity and marriage as the basis of family life—inferring from the language of the Bible that sexuality is only a relationship between a man and a woman. Second, they reinforce their reading that "[the] invariable difference [between male and female] is the basis of their relationship and their complementarity and this is fulfilled in marriage."[22] Finally, the bishops argue that the very notion of same-sex relations "falsifies human anthropology and trivializes sexuality, marriage and family as the foundation of society."[23] The bishops justify their position by appealing to African cultures and family life, claiming that same-sex relations violate the legacy of African ancestors. They further claim that same-sex relations have led to the decay of society.

The bishops also argue that marriage legalizes and legitimates sex for procreation, based on a doctrine of the specificity of male/female nature that they describe as "a right which is invariable, irreducible and structuring" understood only in the context of a family and "the 'liberal' orientation of sexuality brandish[ed] by the promoters of same-sex relations is a denial of this law."[24] The bishops argue that children have a right to live and experience their identity under a father and mother. They claim: "homosexuality is not a human right but a disposition that seriously harms humanity because it is not based on any value intrinsic to human beings . . . as evidenced by the biblical tradition. Rejecting it is not discrimination but legitimate protection of constant and perennial values in the face of vices against nature, for the right to difference is only justified when it is founded on human values."[25] Quoting Romans 1:26, the bishops argue that "[t]he homosexual union is not a marriage, it distorts the meaning of marriage by reducing it to a link that is sterile, hedonistic and perverse[.]"[26] They further assert that men and women should assume their specific natures, children should live with a male and female parents, and same-sex relations are "a disposition that seriously harms humanity because it is not based on any value intrinsic to human beings."[27] They recommend that the Christians pray for LGBTQ persons and show compassion in order to convert them to heterosexuality.

These official views fueled the general negative discourse about same-sex relations and LGBTQ people that was carried out in public, in places of worship, and at family gatherings as the clergy

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and child sexual abuse. In condemning abortion outright, the bishops ignored the arguments that make the case for a woman's right to terminate a pregnancy for a variety of reasons.

20 National Episcopal Conference of Cameroon, "Declaration of the Bishops of Cameroon," 1.

21 National Episcopal Conference of Cameroon, 3.

22 National Episcopal Conference of Cameroon, 3. (One need only note that differences and complementarities of many kinds beyond sexual ones are found and achieved in interpersonal relations.)

23 National Episcopal Conference of Cameroon, 3.

24 National Episcopal Conference of Cameroon, 4.

25 National Episcopal Conference of Cameroon, 4.

26 National Episcopal Conference of Cameroon, 4.

27 National Episcopal Conference of Cameroon, 4.

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tried to persuade Cameroonians that LGBTQ persons were the problem in the society. The bishops and other faith leaders ignored the real problems of the country such as the HIV/AIDS crisis, the economic meltdown of late 1982, the political debates about governance, and the Anglophone crisis that has now led to civil war. They ignored other pressing problems, such as the need for democratic governance, the quest for economic growth, and eradication of poverty, choosing instead to focus on same-sex relations as a sensational topic.[28]

Many Cameroonian faith leaders espouse a narrow religious interpretation of personal and social life in a country that at independence touted itself as a secular state. Secularity, as Cameroonians see it, shows no respect for ideas like freedom of choice, rights, and privilege of individuals to decide what to do with their bodies. Some would question the energy put into isolating LGBTQ people when social science research demonstrates that post-independence discourses on democratization and civil society in Africa still point to crises in Africa as mostly socioeconomic in nature. However, Cameroon and other countries continue to face enormous challenges in the area of human rights and freedoms. Even when individual choices have no negative impact on the well-being of others, the debates over same-sex relations encourage the state to curtail the freedoms of same-sex couples.[29] This crucial legal issue must be addressed in the postcolonial state in order to find the right balance between religion and secularity, but more importantly to ground the legal system of the country in constitutional provisions that guarantee and protect the rights of all members of the political community.

CAMEROON LAW ON SAME-SEX RELATIONS

Although the Penal Code of postcolonial Cameroon, promulgated in 1965, was silent on the criminalization of same-sex relations, persons accused and tried in court for practicing same-sex relations were prosecuted under an earlier version of the Penal Code that was cited by many church leaders and politicians when they called on the state to ban same-sex relations and bring charges against gays and lesbians. Current Cameroon law now specifically prohibits same-sex relations, and state authorities have actively suppressed gay and lesbian rights. In 2010, Cameroon adopted Law No. 2010/012 of 21 December 2010, which added to the penal code the crime of cybersecurity and other cybercrimes, such as soliciting sexual relations with a person of the same sex online.[30]

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28 The extreme position of the bishops has been described by Cameroonian philosopher Achille Mbembe, a leading theorist of postcoloniality, as a one-dimensional religious approach that opposes same-sex relations on three grounds: same-sex relationship reflects demonic power, is a sin against nature, and "is repugnant to right reason, namely applying the genitals to a vessel other than the natural vessel." Achille Mbembe "The Sexual Potentate: On Sodomy, Fellatio, and Other Postcolonial Privacies," trans. Andrew S. Brown, in *Readings in Sexualities from Africa*, ed. Rachel Spronk and Thomas Hendriks (Bloomington: University of Indiana Press, 2020), 296–300, at 296; see also Basile Ndjio, "Post-colonial Histories of Sexuality: The Political Invention of a Libidinal African Straight," *Africa: Journal of the International African Institute* 82, no. 4 (2012): 609–31.

29 See Julia Paley, *Marketing Democracy: Power and Social Movements in Post-Dictatorship Chile* (Berkeley: University of California Press, 2001); Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003); Saba Mahmood, *Politics of Piety: The Islamic Revival and the Feminist Subject* (Princeton: Princeton University Press, 2005); Harri Englund, *Prisoners of Freedom: Human Rights and the African Poor* (Berkeley: University of California Press, 2006); Tania Murray Li, *The Will to Improve: Governmentality, Development, and the Practice of Politics* (Durham: Duke University Press, 2007).

30 "Whoever uses electronic communication devices to make sexual proposal to a person of the same sex shall be punished with imprisonment from 01 (one) to 02 (two) years or a fine of from 500,000 (five hundred thousand) to 1,000,000 (one million) CFA francs or both of such fine and imprisonment." Cameroon Penal Code, Law No. 2010/012 of 21 December 2010 Relating to Cybersecurity and Cybercriminality in Cameroon, § 83(1).

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The most recent Penal Code of Cameroon, Law No. 2016/007 of 12 July 2016, Relating to the Penal Code was deliberated and adopted by the Parliament, and the president of the republic enacted it into law. It contains a number of provisions that penalize same-sex relationships.

First, Section 347-1, on Homosexuality states, "Whoever has sexual relations with a person of the same sex shall be punished with imprisonment from 6 (six) months to 5 (five) years and a fine of from CFAF 20,000 (twenty thousand) to CFAF 200,000 (two hundred thousand)."[31] Second, Section 347a of Ordinance No. 72/16 of 28 September 1972 stipulates penalties for same-sex relations.[32] This version of the law contains the clearest stipulations in the Cameroon Penal Code to which opponents of same-sex relations in Cameroon referred in arguing that the rest of the world should not tell Cameroonians how to run their own country.

There are other provisions on same-sex relations that must also be taken into account. Section 26 of the 1965 Penal Code, which addressed "nationality, status of persons, matrimonial system, succession and gifts," also prohibited same-sex marriage.[33] As E. H. Ngwa Nfobin has pointed out, it is important to note that Article 237 limits the rights of LGBTQI persons by defining marriage as "a voluntary and stable union between a man and a woman resulting from a formal declaration, aimed at raising a family."[34] Marriage is thus restricted to a man and a woman, reflecting a view of marriage as the basis for procreation.

Prosecution of gays and lesbians in Cameroon has been carried out to enforce these provisions of the law. For example, on November 23, 2011, a Yaoundé court used the indecency law to convict defendants of the crime of same-sex relations, even though these persons had not engaged in any sexual activity. In cases such as this, the laws of Cameroon have thus criminalized not only homosexual acts, but also LGBTQ identity. A closer look, however, makes it evident that these laws are not clear as currently written. First, there is no common understanding of what indecency means. Possibilities may range from dressing in a sexually suggestive manner or kissing in public to displaying one's genitals, urinating in public—in short, just about anything someone might find objectionable. Second, the indecency charges apply to actions that may take place in private. A further question is the notion of consent, which raises the question of what should happen if two parties of the same sex give their consent to activity that they deem important and meaningful to themselves.

The most celebrated and studied case on same-sex relations in Cameroon was that brought against Jean-Claude Roger Mbede, a Cameroonian citizen who showed affection to another man. He was charged with the crime of sending a love text to another man in which he stated, "I've fallen in love with you."[35] He was tried, convicted, and sentenced to serve three years in prison. He appealed the judgment and an appeals court in Douala upheld that sentence.

31 Law No. 2016/007 of 12 July 2016, Relating to the Penal Code, § 347-1, p. 133, https://www.wipo.int/edocs/lexdocs/laws/en/cm/cm014en.pdf. See Human Rights Watch, "Cameroon: Sodomy Law Violates Basic Rights," May 17, 2011. https://www.hrw.org/news/2011/05/17/cameroon-sodomy-law-violates-basic-rights.

32 The penal code stipulates, "Whoever has sexual relations with a person of the same sex shall be punished with imprisonment from six months to five years and fine of from 20,000 to 200,000 francs." Quoted in Eddie Bruce-Jones and Lucas Paoli Itaborahy, *State-Sponsored Homophobia: A World Survey of Laws Criminalising Same-Sex Sexual Acts between Consenting Adults* (Geneva: International Lesbian, Gay, Bisexual, Trans and Intersex Association, 2011), 21, https://www.ecoi.net/en/file/local/1233606/90_1340784424_2011-05-ilga-state-sponsored-homophobia-2011-0.pdf.

33 For further elaboration, see Ngwa Nfobin, "Homosexuality in Cameroon," 92.

34 Ngwa Nfobin, 92.

35 Robbie Corey-Boulet, "Who Killed Roger Mbede?" *Al Jazeera America*, March 26, 2011, http://america.aljazeera.com/articles/2015/3/26/who-killed-roger-mbede-gay-rights-cameroon.html.

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While in prison, Mbede had a health crisis because of the deplorable conditions in Cameroonian prisons, and human and gay rights activists in Cameroon pressed for his release.[36] Journalist Robbie Corey-Boulet has reported that Mbede's trial was followed by the international community, prompting Amnesty International to name Mbede a prisoner of conscience with a Write for Rights Campaign on his behalf drawing five hundred letters supporting Mbede in one day.[37]

One cannot miss the fact that there is also a political engagement in these prosecutions. Neela Goshal of Human Rights Watch has stated of Cameroon: "It's the country that arrests, prosecutes, and convicts more people than any other country that we know of in Africa for consensual same-sex adult conduct. . . . In most of these cases, there is little or no evidence. Usually people are convicted on the basis of allegations or denunciations from people who have claimed to law enforcement officials that they are gay."[38] Mbede, who had served part of the sentence and was released as the appeal process began, expressed shock and told the Associated Press by phone: "I am going back to the dismal conditions that got me critically ill before I was temporarily released for medical reasons . . . I am not sure I can put up with the antigay attacks and harassment I underwent at the hands of fellow inmates and prison authorities on account of my perceived and unproven sexual orientation. The justice system in this country is just so unfair."[39]

The evidence used to convict people of these crimes in Cameroonian courts has also raised concerns by observers of the LGBTQ debates in Cameroon. In one instance, the courts convicted two people who were charged with being "effeminate." What was the evidence? The men were caught with Bailey's Irish Cream, viewed in Cameroon as a drink that is preferred by women and gay men.[40] Judicial activism against same-sex relations in Cameroon has also been accompanied by violence. Andre Banks, executive director of the gay rights organization All Out, has pointed out that the anti-gay climate in Cameroon hurt Mbede: "Roger said he had to leave the university where he was studying because of the attention from the case and because of the mounting threats and fear of violence that have been very concerning to him," Banks said. "He's worried that he won't be able to have a normal life in Cameroon because of the amount of attention it's brought to him."[41]

There were attempts to have Mbede travel to France when he continued to be targeted by hate messages and ill treatment (even by his own family), but this did not work out. He became ill and was hospitalized in his village in January 2013, but his family reportedly had him discharged from the hospital, and they took him against his will to the village where he eventually died.[42] The judicial process in Cameroon did not resolve the debates on same-sex relationships. Instead, it led to the prosecution, punishment, and death of Roger Mbede.

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36 Neela Goshal, "Dispatch: Does Cameroon Support Violence against LGBTI People?" Human Rights Watch, September 12, 2013, https://www.hrw.org/news/2013/09/12/dispatch-does-cameroon-support-violence-against-lgbti-people.

37 Corey-Boulet, "Who Killed Roger Mbede?"

38 Goshal, "Dispatch."

39 "Gay Man's 3-Year Sentence Upheld by Cameroon Court," *New York Times*, December 12, 2018, https://www.nytimes.com/2012/12/18/world/africa/gay-mans-3-year-sentence-is-upheld-by-cameroon-court.html.

40 "Cameroon: UN Concerned over Reports of Arrests of Suspected Gay and Lesbian People," UN News, November 16, 2012, https://news.un.org/en/story/2012/11/425812-cameroon-un-concerned-over-reports-arrests-suspected-gay-and-lesbian-people.

41 "Gay Man's 3-Year Sentence Upheld by Cameroon Court"; see also Corey-Boulet, "Who Killed Roger Mbede?"

42 Corey-Boulet, "Who Killed Roger Mbede?"

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THE LAW AND SAME-SEX RELATIONS IN SOUTH AFRICA: THE *FOURIE* DECISION

During the same period in which Cameroonian courts handed down prison sentences to persons suspected of homosexual activities, the South African Constitutional Court issued an unprecedented ruling that legalized same-sex relations and marriage in South Africa.[43] In *Minister of Home Affairs and the Director General of Home Affairs v. Marie Adriaana Fourie and Cecelia Johanna Bonthuys*, Justice Albie Sachs ruled that it was unconstitutional and an act of injustice for the state and members of certain religious communities to prevent same-sex marriages.[44] Following the judgment, the South African Parliament voted on November 14, 2006, to pass the Civil Union Bill by an overwhelming majority of 230 to 41, and Deputy President Phumzile Mlamblo-Ngcuka signed it into law on November 30, 2006. On December 1, 2006, South Africa legalized gay marriage, becoming the first country in Africa and the fifth in the world to do so.[45]

In issuing the judgment, Justice Sachs spelled out the full human dimension of the case: Two persons were attracted to each other, deepened their relationship over time, later decided to get married, and set up a home as a married couple. Their friends had known and accepted them as a couple for more than a decade. They then decided to marry and receive the public recognitions that come with marriage, such as the registration of their relationship, and assume the rights and obligations that accrue to individuals who decide to live as married partners. The only impediment was that both of them were women.[46]

The appellants sought relief before the Constitutional Court because they were excluded (unconstitutionally) from the public rituals and celebrations of their commitment to love and life as a married couple. They were prevented from getting married because common law stated that marriage was a union between a man and a woman. In the trial court, Judge Roux ruled that Section 30(1) of the Marriage Act referred to marriage as a union between male and female and that compelling the minister of justice to change it was tantamount to asking him to act unlawfully.[47] The applicants then took their case to the Supreme Court of Appeal. In his majority for the Supreme Court of Appeal, Judge Cameron pointed out, "the Constitution grants powers to the Constitutional Court, the S[upreme] C[ourt of] A[ppeal] and the High Courts to develop the common law, taking into account the interests of justice."[48] The idea here was that a reasonable application of the Bill of Rights could develop common law to limit provisions of Section 36(1) and make them consistent with the spirit, aims, and objects of the Bill of Rights. According to Sachs, "Taken together, these provisions create an imperative normative setting that obliges the courts to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. Doing so is not a choice. Where the common law is deficient, the courts are under a general obligation to develop it appropriately."[49] That was the background of the appeal that brought the case to Justice Sachs and the Constitutional Court.

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43 Nsongurua J. Udombana, "Interpreting Rights Globally: Courts and Constitutional Rights in Emerging Democracies," *African Human Rights Law Journal* 5, no. 1 (2005): 47–69, at 56.

44 *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC) at 86 (S. Afr.) [hereafter *Fourie* Constitutional Court decision].

45 David E. Newton, *Same-Sex Marriage: A Reference Handbook* (Santa Barbara: ABC-CLIO, 2010), 93.

46 *Fourie* Constitutional Court decision, at paragraph 1.

47 *Fourie & Another v Minister of Home Affairs and Another (The Lesbian and Gay Equality Project intervening as amicus curiae)*, 2002 (unreported) (HC) Case No. 17280/02 (S. Afr.) [hereafter *Fourie* trial court decision].

48 *Fourie & Another v Minister of Home Affairs & Others* 2005 (3) SA 429 (SCA) at paragraph 4 (S. Afr.) [hereafter *Fourie* Supreme Court of Appeal decision]; see also *Fourie* Constitutional Court decision, at paragraph 8.

49 *Fourie* Constitutional Court decision, at paragraph 13.

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In earlier court rulings, Judge Cameron indicated that the framework of the Constitution of the Republic of South Africa, 1996, supported incremental legal development, which could allow changes that would accommodate all types of sexual orientation. Judge Cameron argued that laws regarding family and family life ought to change to avoid unfair discrimination against LGBTQ persons because these laws deny their dignity and ignore the foundational ideals of the Constitution. However, the Court's majority decision claimed that the verbal formula prescribed by the Marriage Act cannot be substituted and can only be done by "the constitutional remedy of 'reading-in.'"[50]

In dissent to the 2004 Supreme Court of Appeal opinion,[51] Judge Farlam reviewed the history of marriage, going back to the 1563 Council of Trent, in which marriage was recognized as a civil institution but received religious institutionalization. Judge Farlam noted that barring homosexuals from marriage discriminates against them, prevents them from exercising the privileges and responsibilities of marriage, and infringes on their constitutional rights and their dignity.[52] The problematic issue in the *Fourie* case was that the appellants did not challenge the marriage formula in the Marriage Act in their earlier court filing. The South African Law Reform Commission had recommended actions that could remedy discrimination against gays and lesbians, but these were incremental changes. The applicants could not be denied relief on grounds that they did not challenge the validity of Section 30(1) of the Marriage Act because the Marriage Act did not approve the common law definition of marriage, and the formula could be changed by updating and changing traditional terms like *wife* and *husband* to *spo*use to conform to the terms of the law. Judge Farlam would also approve suspending the provisions of common law for two years in order to give Parliament time to pass legislation recognizing the rights, equality, and dignity of all people.[53] Both parties in the case did not like the outcome and appealed to the Constitutional Court.

At the Constitutional Court, Justice Sachs stated that the two interrelated issues in the case were whether common law and the provisions of the Marriage Act unfairly discriminated against gays and lesbians and what was the appropriate remedy for that unconstitutional act.[54] On the first issue, Justice Sachs noted that the state argued that the Constitution of the Republic of South Africa, 1996, protected not the right to marry, but the right of individuals to set up their own family life without interference from the state. Sachs argued that this was a form of negative liberty that historically had denied same-sex couples the right to marry. If LGBTQ preferences for family life brought disadvantages, it was appropriate to address it with suitable legal remedies and pursue a "global set of rights and entitlements established by marriage."[55] This argument was correct because the Bill of Rights in the South African Constitution does not "expressly include a right to marry."[56] Sachs

50 *Fourie* Constitutional Court decision, at paragraph 18. In a personal email exchange on June 22, 2020, Professor Nameko B. Pityana of the University of South Africa, a lawyer and former chairperson of the Human Rights Commission of South Africa, wrote, "reading-in in Constitutional Law, is an interpretative technique where the judicial officer reads a text as if such a principle of law as may be implied, and also as if the text reads with the principles that helps to clarify meaning. It is important to state that that is done in extraordinary instances because the law of interpretation always states that the starting point for any interpretation is the express or ordinary meaning of words. However, in cases where the intention of the legislature cannot be intelligently understood except by the technique of 'reading in' then the judges will do so."

51 *Fourie* Supreme Court of Appeal decision, at paragraphs 50–150.

52 *Fourie* Supreme Court of Appeal decision, at paragraphs 133–37 (opinion of Judge Farlam).

53 *Fourie* Supreme Court of Appeal decision, paragraphs 139–50 (opinion of Judge Farlam).

54 *Fourie* Constitutional Court decision, at paragraph 45.

55 *Fourie* Constitutional Court decision, at paragraph 46.

56 *Fourie* Constitutional Court decision, at paragraph 47.

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pointed out that one cannot infer from this that the South African Constitution did not protect rights, because in another case the court noted that values of human dignity, equality, and freedom are enshrined in the text and, regardless of how they were interpreted in the future, enforced marriages or prohibitions would not survive a constitutional challenge.

Justice Sachs then argued that central to the case were the values of dignity, equality, and freedom, considerations that displayed moral precision with regard to human rights and freedoms.[57] According to Sachs, these ideals articulated the primary values contested in the debates on same-sex relations and same-sex marriage. Past court cases demonstrated that same-sex couples are a "permanent minority in society and have suffered in the past from patterns of disadvantage."[58] LGBTQ persons suffered the same pattern of discrimination at a deep level of intimacy, social relations, and were thus denied constitutional guarantees of equality and human dignity based on their sexuality in a way that reduced same-sex couples to a single dimension of sexuality at the expense of wider social relations and civil status.[59] Sachs insisted that LGBTQ people in same-sex relationships have the same emotional, spiritual, physical, and financial capacities to run households, and adopt and care for children. LGBTQ persons can establish *consortium vitae* (partnership or cohabitation) by which they become entitled to the benefits enjoyed by heterosexuals. Prejudice and these stereotypes created a "crass, blunt, cruel and serious invasion of their dignity."[60] Sachs argued that although the courts recognized discrimination on grounds of sexual orientation and since protecting marriage as an institution should not be done at the expense of the dignity of gays and lesbians, the Court was left two open questions: What is the status of unmarried people in a heterosexual relationship? Should the law grant recognition to same-sex relationships, and if so, how? Justice Sachs rejected legal relief that would be administered in bits and preferred that the Parliament enact legislation that would give members of the gay and lesbian community the freedom to marry.

Arguing for the right to be different, Sachs maintained that "unfair" discrimination on the basis of sexual orientation existed in South Africa, where the presence of multiple family formations ought to rule out a specific definition of marriage and family. The country has a long history of discrimination against gays and lesbians; there is no adequate regulation of the rights of LGBTQ persons to experience family life of their own; and the 1996 Constitution of the Republic of South Africa asserts the respect of the rights and dignity of all people, a change from past patterns of discrimination.[61] A key mark of a democratic society is the acceptance of people as they are. Penalizing people for who they are is "is profoundly disrespectful of the human personality and violatory of equality."[62] All persons should be respected and difference should be a cause of celebration, not the basis of stigma, marginalization, or the promotion of negative historic positions. All South Africans should affirm the character of the nation by affirming mutual respect and tolerance.[63]

After considering some of the deprivations same-sex couples suffer when their unions are not solemnized publicly, when two people declare their love for one another in exercise of their freedoms and their desire to support each other, and given the fact that freedom and responsibility

57 *Fourie* Constitutional Court decision, at paragraph 48.

58 *Fourie* Constitutional Court decision, at paragraph 49.

59 *Fourie* Constitutional Court decision, at paragraph 50.

60 *Fourie* Constitutional Court decision, at paragraph 54, quoting *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC), at paragraph 54.

61 *Fourie* Constitutional Court decision, at paragraph 59.

62 *Fourie* Constitutional Court decision, at paragraph 60.

63 See *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) (S. Afr.).

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is what sets aside marriages from mere common law relationships,[64] Judge Sachs then stated that in light of the proceeding explanation of the idea, reality, and obligation of marriage:

> The exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into the normal society, and as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.[65]

Same-sex couples suffer both material deprivation and intangible damage. They live in a state of legal blankness devoid of all the celebrations and commemorations that come from recognition. They also deserve the right to depend on state regulation when things go wrong and the law cannot ignore the needs of people when things go wrong.[66]

Justice Sachs characterized the exclusion of same-sex couples from the equal protection from unfair discrimination in the South African Constitution as a matter of "historic prejudice." The Constitution is clear: "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, belief, culture, language, and birth."[67] Sachs argued that gays and lesbians are "defined out of contemplation as subjects of the law."[68] Sections 9(1) and 9(3) not only protect same-sex couples from punishment and acts that stigmatize and do more than just leaving them alone, but also demand that they be treated as equals and be given all the dignity accorded them by the law.

In consideration of the rights, dignity, and freedoms of the applicants, Justice Sachs found for the appellants in the cross-appeal and granted certain leave to reduce their legal burdens. Justice Sachs ordered: "The common law definition of marriage is declared to be inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples to enjoy the status and the benefits coupled with responsibilities it accords heterosexual couples."[69] Rather than merely order that changes to the marriage formula include same-sex couples, he ordered the South African Parliament to pass a bill that would recognize same-sex couples, giving them the right to solemnize their unions publicly—which, as noted above, Parliament and the deputy president did.

This precedent-setting ruling is important because it was grounded on the provisions of the South African Constitution and its norms of human dignity, human rights, and freedom, superseding practices deemed to have parallels with slavery, colonialism, prohibition of interracial marriage, and male domination. "All were based on apparently self-evident biological and social facts; all were once sanctioned by religion and imposed by law."[70] This statement is pertinent today because

64 *Fourie* Constitutional Court decision, at paragraphs 63–64.

65 *Fourie* Constitutional Court decision, at paragraph 71.

66 *Fourie* Constitutional Court decision, at paragraph 73.

67 South Africa Constitution, 1996, article 9.3, quoted in *Fourie* Constitutional Court decision, at paragraph 76.

68 *Fourie* Constitutional Court decision, at paragraph 77.

69 *Fourie* Constitutional Court decision, at paragraph 162 (see (1)(c)(i) in "The Order").

70 *Fourie* Constitutional Court decision, at paragraph 74.

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the debate on same-sex relations in Africa today draws from colonial laws. In the postcolonial era, however African politicians and religious leaders have become even more verbally abusive of gays and lesbians based on what they assume are "self-evident facts."

SEXUALITY IN LEGAL LIMBO: THE QUESTION OF HUMAN RIGHTS

Both Cameroon and South Africa enacted new constitutions in 1996, but when it comes to the human rights of LGBTQ people, Cameroon has further to go. For example, what accounts for the differences in the legal outcomes and adjudication of cases involving same-sex relations in Cameroon and South Africa? It is obvious that the constitutional provisions of both countries uphold human rights and human dignity. However, two significant factors account for the different outcomes. First, constitutionalism in Cameroon dates from the 1960s, when the country became independent and adopted a constitution that spelled out human rights and dignity as enshrined in the Universal Declaration of Human Rights. Cameroon, like other African countries, was not merely echoing international rulings, but adopting them as part of a fight for independence that reflected a desire in the people of Cameroon to be free. However, the new nation retained colonial laws and restrictions on sexuality, marriage, and types of marriage defined as constituted by a man and woman. As discussed above, these colonial-era norms came to be further enshrined in Cameroonian administrative law, where they have been used excessively to restrict freedoms in Cameroon. Civil administrators in Cameroon have exercised great authority, often in violation of constitutional principles.

In South Africa, the adoption of the Bill of Rights with the Constitution of the Republic of South Africa in 1996 further strengthened the constitutional provisions on human rights and human dignity. But more importantly, the South African courts exercised their legal responsibilities to interpret the law in ways that would uphold the provisions of the Constitution and Bill of Rights. It is in that context that the courts struck down marriage formulas that recognized marriage only as being between a man and a woman because such definitions discriminated against gays and lesbians and violated their constitutional rights. One cannot state unequivocally that Cameroonian jurists lack independence: the jurists must also address administrative orders that are sometimes treated with the force of law. Such administrative orders have not been subjected to broad constitutional provisions of the country that offer more room for defending individual rights, as is the case with South Africa.

Second, the legal outcomes in Cameroon have been different from those of South Africa because of the role religion has played in the debate over same-sex relations. In South Africa, a broad coalition that had fought against apartheid realized that the country could not exclude other members of the society from all the rights protected in the Bill of Rights. While religion played a big role in the anti-apartheid movement, the Bill of Rights offered a broad view of rights on nonconfessional grounds that covered the people of South Africa. Those rights include the right to choose whom one can love and build a family with. The Sachs ruling in the *Fourie* case recognized these rights. While some religious interests opposed same-sex relations and filed friend of the court briefs, in the end, the protections enshrined in the Bill of Rights were the basis for the historic ruling that legalized same-sex marriage in South Africa.

The case in Cameroon is different. Several national and international organizations defend LGBTQ persons in Cameroon. The most well-known of these defenders, the Association pour la Défense des Droits des Homosexuels and L'Association pour la Liberté, la Tolerance, l'Expression et le Respect des Personnes de Nature et Victims d'Exclusion Sociale au Cameroun

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(also known as Alternatives-Cameroun), have called attention to the growing discrimination and legal jeopardy that members of the LGBTQ community in Cameroon face, particularly the constant barrage of criticism, rejection, and abuse from the Cameroonian people and their religious leaders. The discourse on same-sex relations at the turn of the millennium in Cameroon clearly demonstrates that the country has found a voice, if one can put it that way, but it is a voice that promotes exclusivity and decries inclusion.

Alice Nkom, an attorney who practices law in Douala and has defended LGBTQ people in the courts in Cameroon, noted in 2011 that when she first talked to a Cameroonian gay couple in Europe who wanted to return to Cameroon, she told them they would have to be careful because Cameroon was not open to these issues. Reflecting on what she told Cameroonian LGBTQ persons living abroad who wanted to return home, Nkom said, "I felt very guilty. I said, 'OK, maybe it's good for you to tell them that they should be careful,' but that doesn't mean anything, they must live as they are."[71] During the trial, Nkom contended that Article 347b of the Cameroon Penal Code, under which Mbede was charged, violated the Constitution of 1996. Furthermore, the laws used to charge Mbede had not been adopted and passed into law by the National Assembly of Cameroon.

Nkom has called attention to the broad view of freedom proposed by Cameroonian president Paul Biya, who said in 2006: "The society of freedom and progress that we are trying to build implies common attachment to the democratic institutions which we are putting in place . . . . Writing and communicating are, of course, a way of expressing our freedom. But freedom knows limits imposed by respect for privacy."[72] Nkom maintains that the president's words suggest that he did not exclude homosexuals from their right to privacy. President Biya's statement was an important critique of the public concern with same-sex relations that led to the publications of names of individuals in newspapers claiming that those people practiced same-sex relations. But Nkom, who placed the struggle for LGBTQ rights in Cameroon on the same par with the work of Rosa Parks in the civil rights struggle in the United States and of Nelson Mandela in South Africa, compared the attitude toward same-sex relations in Cameroon to the former South African apartheid system in its power.

The Constitution of the Federal Republic of Cameroon, promulgated into law by President Ahmadou Ahidjo in 1961, stated in Section 1, 1.2 that the country is a secular state. Title I of the Constitution also affirmed the fundamental freedoms enshrined in the Universal Declaration of Human Rights. The Constitution proclaimed that all persons are equal before the law and embraced the principles of the Declaration. The preamble to the Constitution of the Republic of Cameroon stated, "The State shall be secular. The neutrality and independence of the State in respect of all religions shall be guaranteed."[73] The 1996 Constitution of Cameroon declared that

71 Stephen Gray, "Interview: Alice Nkom and Jonathan Cooper on the Future of Criminalisation," *PinkNews*, November 18, 2011, https://www.pinknews.co.uk/2011/11/18/interview-alice-nkom-and-jonathan-cooper-on-the-future-of-criminalisation/.

72 "Address by the President of the Republic to the Youths of Cameroon on the Occasion of the 40th National Youth Day, Yaounde, 10 February 2006," in Churchill Ewumbue-Monono, *Youth and Nation-Building in Cameroon: A Study of National Youth Day Messages and Leadership Discourse (1949–2009)* (Mankon: Langaa Research and Publishing CIG, 2009), 155–157, at 157.

73 Cameroon Constitution, preamble, principle 4. The preamble to the Constitution of Cameroon, 1972, states, "We, the people of Cameroon, declare that the human person, without distinction as to race, religion, sex or belief possesses, inalienable and sacred rights; Affirm our attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of United Nations and The African Charter on Human and Peoples' Rights, and all duly ratified international conventions relating thereto, in particular, to the following

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"the human person, without distinction as to race, religion, sex or belief, possesses inalienable and sacred rights."[74] It also reaffirmed the country's commitment to the Universal Declaration of Human Rights and accepted the legitimacy of the Charter of the United Nations, as well as the African Charter on Human and People's Rights.[75] While one cannot assume that every time the notion of the sacred is invoked it refers to God or a divine being, the notion of sacred makes the rights that should be enjoyed by members of the political community inviolable. The 1996 Constitution affirmed all international conventions on equal rights, respect for minority rights, and the freedoms and security of individual persons; it also declared that one's home was inviolable and could not be searched without cause.

The 1996 Constitution of Cameroon does not impose religious teachings and doctrines on the citizens of the republic. Instead, quasi-religious language is invoked regarding the dignity and inviolability of the human person. Offenses against race, religion, sex, or belief are said to violate the rights and dignity of a human being. An important distinction, obviously, is the fact that the Constitution remains the supreme law of the land. The implication is that even laws passed by the Parliament of Cameroon must not violate the provisions or the spirit of the Constitution of Cameroon when it comes to individual freedoms.

I am not suggesting that the Constitution has always been clear. For example, the 1960 Constitution of Cameroon, which described the country as a secular state, also subjected Cameroonians to the "the protection of God." This was a contradictory move for a state that prided itself on being secular, declared that secularity meant a separation of church and state, and emphasized that the state would not be ecclesiastical or religious. The 1961 Constitution removed the notion of protection under God and declared that the Federal Republic of Cameroon was a democratic secular and social state. The Constitution guaranteed equality for all under the law and accepted the provisions of the United Nations Charter and the Universal Declaration of Human Rights. In 1972, Cameroon dropped the name Federal Republic of Cameroon and became the United Republic of Cameroon through a referendum that dissolved the Federal Republic made up of West and East Cameroon. As noted above, the new Constitution was more explicit in protecting personal rights without "distinction to race, religion, sex or belief," describing these rights as "inalienable and sacred."[76] What could now enhance the rule of law in Cameroon would be for the Parliament and Senate to pass into law a Bill of Rights like that of South Africa, guaranteeing all rights, including the right to choose who to love, marry, and build a family.

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principles" and then lists equal rights and development, protection of minorities, freedom and security, right to settle and move freely, the home as inviolable, absence of compulsion, right to a fair hearing before the courts, among others. Cameroon Constitution, preamble; see also, Cameroon Constitution, Article 1, no. 2 ("The Republic of Cameroon shall be a decentralized unitary State. It shall be one and indivisible, secular, democratic and dedicated to social service. It shall recognize and protect traditional values that conform to democratic principles, human rights, and the law. It shall ensure the equality of all citizens before the law.").

74 Preamble to the Constitution of Cameroon, 1996 Law No. 96-06 of 18 January to Amend the Constitution of June 1972 [hereafter 1996 Constitutional Amendments].

75 1996 Constitutional Amendments. For discussions of the African System for the Promotion and Protection of Human rights, see Malcolm Evans and Rachel Murray, *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000* (Cambridge: Cambridge University Press, 2002); Rachel Murray, *The African Commission on Human and Peoples' Rights and International Law* (Oxford: Hart Publishing, 2000); Obiora Chinedu Okafor, *The African Human Rights System: Activist Forces and International Institutions* (Cambridge: Cambridge University Press, 2007).

76 See above, note 73.

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The debate on same-sex relations in Cameroon is complicated because in addition to the Constitution, Cameroon has administrative law that is a set of public orders and decrees used by all administrators in the country from the president to local administrators. These laws offer additional clarifications to the statutory law and the penal code. Administrative laws are also used to regulate traditional governance, public security, peace, and public health. In general, the administrative authorities tend to oversee these laws and call on the army, gendarmerie, and police to carry out relevant orders.[77] In Cameroon, administrative law has been the tool that state leaders have drawn on to prevent indecency and actions by homosexuals, which may harm the alleged cultural values of Cameroon.

The administrative law gives local administrators extensive powers and discretion. The Cameroon administrative system falls under the minister of territorial administration. At the regional level, the governor is in charge and reports to the minister of territorial administration. At the district level, the senior divisional officer is in charge and reports to the governor or the minister, as the case may be. In the case of same-sex relations, Ngwa Nfobin has argued correctly, Cameroon's administrative law influences local administrators in their approach to criminal law. The debates over same-sex relations in Cameroon have affected the actions of administrative police, who are tasked with protecting public security, public health, and public peace.[78] The result has been that administrative police and its enforcement activities have shifted their attention to public morality, which has led to increasing focus on same-sex relations. Enforcement of this administrative law has taken on a new sense of urgency and created dilemmas in the context of the same-sex relations debate. According to Ngwa Nfobin,

> It is important to point out that the maintenance of law and order has to contend with the exercise of civil liberties and human rights and in fact it is balancing competing interests against one another. It requires the restriction of liberties protected by the constitution and statute in place and time. This delicately balanced compensatory mechanism may not accommodate gender non-conformity, not only because that freedom is abolished by the texts in force, but fundamentally because the crime-prevention police is tasked with protecting the citizen. The possible breakout of civil disorder as a result of the exercise of such a right in public spaces will serve as an escalating justification for the negation of such a liberty by the administrative authorities responsible for the maintenance of law and order all over the Republic.[79]

Such are the challenges posed by legal context of Cameroon. First, is it not the case that where administrative laws enacted by Parliament violate the Constitution, the constitutional guarantees of freedom should prevail? Second, as many of the arrests for same-sex relations made in Cameroon have been based solely on suspicion, have not the actions taken by the police violated the rights to privacy of the individuals arrested? Third, should not the power of the state be used to protect minorities, including sexual minorities? Fourth, have not the actions of the police and the courts in Cameroon violated fundamental rights, especially constitutional provisions that bar discrimination based on sex? Finally, is it not presumptuous for the state to think that in personal matters of love and family, the violence other people direct toward LGBTQ persons is done to protect them?

The debates about political liberty, defined as actions that do not harm others, remain central to the way same-sex relations is treated in Cameroon. Police have intervened to preserve public order and decency. However, sexuality remains a private and sacred responsibility between two consenting

77 Ngwa Nfobin, "Homosexuality in Cameroon," 94.

78 Ngwa Nfobin, 94–95.

79 Ngwa Nfobin, 96.

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adults. Where mutual desire and consent come together, it would be presumptuous for the state or other people to claim that by using violence to place restrictions on LGBTQ persons, they are acting to protect sexual norms because sexual norms in many communities encourage privacy. One must also consider Ngwa Nfobin's point that in Cameroon state authorities claim that they intervene because the state has the authority to ban actions that show no respect for human dignity: this argument falls short because it assumes that same-sex experience diminishes human dignity.

State leaders in Cameroon have exploited and overused provisions of the Penal Code and administrative law in violation of constitutional guarantees of freedom and human rights. Local and regional administrators have used administrative law to promote aggressive anti-LGBTQ attitudes. One of the ways local and regional administrators have used administrative law has been to protest international organizations that recognize, promote, and provide funding for human rights of LGBTQ people. For example, Cameroon's minister of external affairs was directed to inform the representative of the European Commission in Cameroon that funding the human rights work of lawyer Alice Nkom was not acceptable because Cameroonian law proscribed same-sex relations. Additionally, the Association pour la Défense des Droits des Homosexuels organized a meeting on March 27, 2012, in Yaoundé, but the government did not take any action to protect attendees at a meeting, saying only that the organization had misled the district officer who issued them a permit to hold the meeting about the objectives of the meeting and its LGBTQ advocacy.[80] Another meeting on the oppression of same-sex relations, organized by the same association and held at the French Cultural Center in Douala, was also disrupted.

Cameroon's laws still leave the LGBTQ community in legal limbo, with no protections. The way forward is not clear, but it is safe to speculate that the question really hangs on judicial independence in Cameroon. The question is whether Cameroonian jurists and judges can interpret the laws of the country in a manner that recognizes the fundamental role of the Cameroon Constitution as a guarantor of human rights. The Cameroon legal system has the instruments in the Constitution and the international protocols to which Cameroon is signatory to grant freedom from persecution on grounds of laws that violate the spirit of the Cameroon Constitution. Furthermore, the laws against so-called public indecency are vague, outdated, and do not consider public indecency practiced by heterosexuals. In addition to these a Bill of Rights would go a long way to change the situation.

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80 Ngwa Nfobin and other scholars have discussed this. See Ngwa Nfobin, 97.

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