



**NATIONAL UNIVERSITY OF LESOTHO**

**THE RIGHT TO MARRY FOR MEMBERS OF THE LESBIANS, GAYS, BISEXUAL,  
TRANSGENDER, QUEER AND MANY MORE (LGBTQI+) COMMUNITY: A  
RELIGIOUS PERSPECTIVE**

Mini-Dissertation Submitted in partial Fulfilment of the Requirements of the Degree of  
Master of Laws (LLM)

Faculty of Law of the National University of Lesotho, Roma,  
Lesotho

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MAY 2024

**DECLARATION**

By submitting this dissertation, I declare that the entirety of the work contained therein is my own, original work, for which I am the author (unless to the extent explicitly stated otherwise).

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This mini-dissertation has been approved for submission by the Supervisor.



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## **ACKNOWLEDGEMENTS**

I would like to express my greatest gratitude to the Lord Almighty for making all this possible. I would like to acknowledge the family of ntate Potjo for their untiring support through the challenging life. If it was not because of ntate Potjo and his wife, my sister ‘Mareabetsoe, I would be frustrated and not have any future.

I will forever be grateful to Doctor Ngang Carol, my supervisor for his guidance. He was very patient with me, like a father to me and I am really thankful to him. I would also recall my junior counsels who contributed a lot by editing this work. It was not an easy task but they worked all night to enable me complete this work. I would like to pass my sincere gratitude to my classmates especially ‘m’e ‘Malerato Ntsatsi for her support in hard times and everyone who has participated and made both my research and analysis a success.

I acknowledge my close friends and family for tirelessly supporting me throughout this mini-dissertation writing. I am really humbled by their contributions and inputs.

## **DEDICATION**

I would like to dedicate this entire work to my late mother (\*Matholang Alice Lepheane) who became the real force behind all my hard and fought labour. She stood and fought hard for justice to be served in all aspects of her daily life. She always told me of how much she wanted me to grow up to be this educated and prosperous chap who would not fear to take on a challenge in life. It was her wish that I must further my studies and be a respected person in academia and hence, the study of law. This noble study came into play as part of satisfying her wish.

**REST IN PEACE, MOTHER.**

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# CHAPTER ONE

## INTRODUCTION

### 1.1 Problem Statement

The debate on the rights of homosexuals (it must be noted that, the word “homosexual” is used to refer to the LGBTQI+ community mentioned in the title and shall be used interchangeably) to marry one another has been a heated debate from the time the topic came into public discourse.<sup>1</sup> The question of the legalisation of homosexuality in general has been tabled before different parliaments, with some countries like South Africa have gone ahead to legalise the marriage between same sex couples. Other countries like Uganda have rather banned such activity on the basis that it is a sinful practice.<sup>2</sup> Both the courts and parliaments are facing a great challenge since the LGBTQ+ community is backed by European countries and organisations that influence governments to legalise homosexuality.<sup>3</sup> The influence of Europeans, Americans and civil organisations has also been realised with the passing of the law of inheritance in Lesotho, being a typical example that Americans may in future also influence the government to enact the law that legalises marriage between homosexuals in Lesotho.<sup>4</sup> Hence the need to probe into the discussion.

In Lesotho, the major problem is that the statutory law, common law, and customary law disregard homosexual marriages.<sup>5</sup> The only marriage that is officially recognised is the heterosexual marriage, and homosexuals do not have the right to marry each other.<sup>6</sup> This has caused homosexual activists to stand up and fight for the right to marry in Lesotho, whereby in 2013, they held a gay pride match which was applauded as one of the successful parades in the country.<sup>7</sup> Nonetheless, Lesotho stands alongside many other countries that have not legalised homosexual marriages, for amongst other reasons, the view that such marriages are contrary to nature and Christian morals. One may take the view that while the enjoyment of the rights of homosexuals is duly protected like everyone else’s, provisions such as article 29(2) of the

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<sup>1</sup> Hoffman Martin, *The Gay World* (New York 1968) 57.

<sup>2</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* CCT11/98 (1998) ZACC 15 1999(1) SA 6.

<sup>3</sup> Motebo Ntobe, “Human Rights Violations in Lesotho” <<http://www.ohchr.org>> accessed 16 April 2024.

<sup>4</sup> Public Eye Newspaper, “Senate rejects inheritance Bill” <[publiceyenews.com](http://publiceyenews.com)> accessed 16 April 2024.

<sup>5</sup> Public Eye Newspaper, “Call for gay marriage to be legalised in Lesotho” <<http://publiceyenews.com>> accessed 29 March 2024.

<sup>6</sup> L Houghton, “Same sex marriages: a perfectionist liberal justification” (2000) *UCL Jurisprudence Review*, millennium edition.

<sup>7</sup> Public Eye Newspaper (n 5).



Universal Declaration of Human Rights (UDHR) give governments a hideout in their claims for culture, religion and morality. Read with article 29(1), article 29(2) provides that, notwithstanding the right to free and full development of his personality, there will be some limitations in order to uphold morality, public order and general welfare. The Constitution of Lesotho, 1993 has provisions that are aimed at promoting inclusivity within the community. These are the fundamental human rights and freedoms enshrined in Chapter II and are due to every single citizen.<sup>8</sup> Some of the relevant fundamental rights that are subject to legitimate constitutional limitations include:

### **1.1.1 The right to the respect of private and family life**

Section 11(1) of the Constitution states that “every person shall be entitled to respect for his private and family life and his home.” In interpreting this right, the European Court on Human Rights in *Libert v France*,<sup>9</sup> explained that the government is prevented from unnecessarily and unjustifiably interfering with people’s personal life as well as private entities.

### **1.1.2 The right to freedom from discrimination**

The right to freedom from discrimination is entailed under Section 18 of the Constitution of Lesotho. In Section 18(3), discrimination is described as differentiating between people based on their race, colour, sex, *gender*, language, religion, political or other opinion, national or social origin, property, birth or other status. Discrimination is evidenced by affording privileges or benefits to an individual or categories of people while withholding same from persons of the same description.

While there is no express reference to sexual orientation among grounds for which discrimination is proscribed, the general position of the law is that it may be inferred from the phrase “other status”. This is because Section 4(1) as well as 18(3) of the Constitution of Lesotho make explicit reference to “sex” and “other status”. In *Fuma v Commander, Lesotho Defence Force and Others*,<sup>10</sup> the court held that the items listed in Section 18(3) are not exhaustive and the list may be extended as more marginalised or vulnerable groups emerge which could not have been anticipated as the time the Constitution was drafted.

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<sup>8</sup> *Ralekoala v Minister of Human Rights, Justice and Constitution Affairs and Others* [2012] LSHC 8, para. 52.

<sup>9</sup> [2018] 588/13.

<sup>10</sup> *Fuma v Commander-Lesotho Defence Force and Others* (CONST/8/2011) [2013] LSHC 68 (10 October 2013).

From the provisions of these selected rights, it is not explicit whether homosexual marriages should or should not be legalised. From the general obligations of the state to respect private lives and observe principles of non-discrimination, it can be inferred that homosexuals are supposed to have the same protections that are afforded heterosexuals in relation to marriage, thus have legalised marriages. However, given the power that the state has to limit rights for interests such as public morality, one may also take the view that Lesotho is justified in limiting the right of homosexuals as far as marriage is concerned. One of the examples where the state can be said to have exercised its powers in interfering with private lives of homosexuals is in section 187(5) of the *Criminal Procedure and Evidence Act (CP&EA)*.<sup>11</sup> The section makes it clear that a person may be charged with sodomy, and disregarding the part of assault and taking the existence of the potential charge of sodomy, it is clear that sex between men is proscribed, thereby impliedly proscribing marriage between men.

Therefore, the concern of the debate around the legalisation of homosexual marriages hinges on the need to afford homosexuals the same treatment of equal protection of the law between citizens, and the interest of the state in preserving what it considers its cultural, religious and moral designations. The clash is therefore, between human rights advocates who find the prohibition of homosexual marriages archaic and contrary to the contemporary human rights framework especially, regarding non-discrimination.<sup>12</sup> On the contrary, traditionalists and religious opponents argue for continued proscription on the grounds that homosexual marriages are contrary to the natural familiar structures and against the law, especially those designed for procreation.<sup>13</sup>

For activists on homosexual marriages, homosexuals suffer in all spheres of life since there is no law that protects them and this has left them vulnerable to various offences with no justice awarded to them. They advocate for the legalisation of homosexual marriages in Lesotho just

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<sup>11</sup> Criminal Procedure and Evidence Act No. 7 of 1981, sec 187(5): “Any person charged with sodomy or assault with intent to commit sodomy may be found guilty of indecent assault or common assault if such can be the facts proved.”

<sup>12</sup> Majobo Monese, “Would Legalising same-sex marriage be against public policy: A study of Homosexual right to marry” (2019) 56.

<sup>13</sup> Rev. M.C. Matooane, “Divorce escalation among the Basotho people of Lesotho, a challenge to pastoral care” (MA Theology: Practical Theology, University of Pretoria), 2008, 8.

as in neighbouring South Africa.<sup>14</sup> In fact, Lesotho is on the verge of taking the same direction of legalising homosexual marriages.<sup>15</sup>

For anti-homosexual marriage religious traditionalists, the Lesotho Marriage Act<sup>16</sup> holds the view similarly to the Christian perceptive that marriage is only between a man and a woman.<sup>17</sup> By Christian dogmas and teachings, marriage is only between a man and a woman.<sup>18</sup> This, they claim, is reflected in the Bible where God created every creature on earth, including a man and a woman.<sup>19</sup> This presupposes that no other marital relationship outside that of a man and a woman could be accepted. For, example, they take views such as those of Pope Benedict XVI where he described homosexuality as a disorderly nature, which must be cultivated and stopped.<sup>20</sup> Therefore, it is argued that to legalise homosexuality marriage will pose a threat to the existence of Christian morality and beliefs. Moreover, in the case of *Masterpiece Cakeshop, Ltd. V Colorado Civil Rights Commission*,<sup>21</sup> the court maintained that, no person can be forced to overlook his or her religious beliefs in favour of gay-marriages. This means, if one says, his religious beliefs are not in line with legalising gay marriages, then he or she must not be forced into engaging in homosexual marriages.

In addition to these beliefs, the legalisation of homosexual marriages poses potential factual difficulties such as depopulation that may take place with the increase of same-sex marriages. Also, due to sexual practices in men, they are likely to transmit HIV/AIDS to one another.<sup>22</sup> These and many other reasons pose a serious problem to the effective legalisation of homosexual marriages.

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<sup>14</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* (n 2) "...the common law offence of sodomy is inconsistent with the Constitution of South Africa 1996."

<sup>15</sup> S.P. Sakoane, "Remarks by the honourable chief justice S.P. Sakoane at the ICJ judicial workshops: Access to justice for persons with disabilities in Lesotho & LGBTI rights" (2022), page 7, para 13 <<https://www.icj.org/lesotho-chif-justice-sakoane-sakoane-calls-for-the-cultivation-of-lgbtq-sensetive-culture-in-lesotho/>> accessed 10 February 2024.

<sup>16</sup> Marriage Act No. 10 of 1974.

<sup>17</sup> Compendium of the Social Doctrine of the Church, (2004) 126.

<sup>18</sup> L. Manyeli, *Homosexuality and the right to self-determination: A challenge to morality* (2018) 146.

<sup>19</sup> The Jerusalem Bible, (Genesis 2:17-25).

<sup>20</sup> Pope Benedict, "Demonised LGBTQI+ people" <<http://www.petertatchellfondation.org>> accessed 16 April 2024.

<sup>21</sup> 2018, 543 U.S. 617.

<sup>22</sup> Martha Nussbaum, *A right to marry? Same-sex marriage and constitutional law*, (2009) 56: "...that act is not only unhealthy but it is also immoral and unnatural: Cornell Law School: definition of sodomy <[hppt://www.law.cornell.edu](http://www.law.cornell.edu)> accessed 29 March 2024.

## 1.2 Research questions

This research is mainly concerned with the following questions:

- 1 What is the legal and moral/religious concept of marriage?
- 2 What is the rationale behind allowing homosexuals to get married?
- 3 Whether legalisation of homosexual marriages is morally/religiously justified or whether it should be based solely on the human rights?
- 4 Whether the reasons given in deciding cases in the countries that have legalised homosexual rights are exhaustively valid or they can be critiqued?

## 1.3 Research objectives

The principal objectives of the study are:

- 1) To examine the legal and moral perspectives to marriage in terms of the laws of Lesotho.
- 2) To examine and assess the originality of the thinking in fighting for the rights of members of the LGBTQI+ community.
- 3) To discuss the moral and religious understanding of rights afforded to LGBTQI+ community and their right to marry.
- 4) To examine the application of the right to marry when it comes to LGBTQI+ community.
- 5) To propose recommendations on bringing a balance between the protection of LGBTQI+ community rights and upholding the rules of morality and religion.

## 1.4 Background to the study

The homosexuality battle started in the early 1950 after the Universal Declaration of Human Rights.<sup>23</sup> The legal recognition of same-sex marriage varies across different countries and jurisdictions. Laws have been enacted in some places like America<sup>24</sup> and South Africa<sup>25</sup> allowing same-sex couples to marry and thus, decriminalise homosexuality, granting them the same legal rights and benefits as opposite-sex couples. These legal changes reflect evolving societal attitudes and a growing recognition of LGBTQI+ rights. Since time immemorial, it has been a struggle for the LGBTQI+ people to be considered eligible for legitimate marriage in

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<sup>23</sup> Humphreys, *Out of the Closet: Sociology of Homosexual Liberation*, 90.

<sup>24</sup> The Decriminalization of Sodomy in the United States <<http://journalofethics.ama-assn.org>> accessed 16 April 2024.

<sup>25</sup> *Minister of Home Affairs v Fourie* (2005) 1 SA 429 (CC).

Lesotho. In some countries such as Uganda and Malawi, there are still heated debates about the existence of LGBTQI+ community.<sup>26</sup> Such countries not only resist to accept the behaviour of this marginalised groups of people but also to officialise marriages for them. However, a country such as America have succeeded in legitimising same-sex marriages. In the landmark case of *Obergefell v Hodges*,<sup>27</sup> the United States Supreme Court legalised same-sex marriage nationwide in the United States. The ruling addresses religious objections and the balance between religious freedom and LGBTQ+ rights.

In *Minister of Home Affairs v Fourie*,<sup>28</sup> the Constitutional Court of South Africa held that the common-law definition of marriage as a union between a man and a woman was unconstitutional and violated the equality rights of same-sex couples. The court ordered that same-sex couples should be allowed to marry, making South Africa the first country in Africa to legalise same-sex marriage. It is therefore, no longer an issue in South Africa where same-sex marriages are legitimate, meanwhile in Lesotho, it remains a taboo subject as the matter has not been considered to be part of the domestic legislation. Critics of same-sex marriage have expressed concerns over potential negative effects on society such as depopulation.<sup>29</sup> They have argued that traditional heterosexual marriages are fundamental to social stability and that altering the definition of marriage could have unintended consequences.<sup>30</sup> Tradition and cultural norms confirm that marriage has since been traditionally defined as a union between a man and a woman in many cultures.<sup>31</sup> These norms consider that changing the definition of marriage undermines societal perceptions and the traditions of marriage as being for procreation and child-rearing. Others argue that the primary purpose of marriage is procreation and the raising of children.<sup>32</sup> It is claimed that same-sex couples cannot naturally conceive children and therefore, should not be allowed to marry.

Although there is no law that obligates legislators to observe religious doctrines in enacting laws on marriage, it would be a betrayal of one's faith if he or she agrees to any law that is against his religious doctrine. This is because, in Lesotho, legislators are largely influenced by

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<sup>26</sup> Houghton (n 6), See also [www.theguardian.com](http://www.theguardian.com), "gay relationships are still criminalised in 72 countries, report finds, accessed 9 August 2024; see also Malawi Court rejects same-sex marriage [www.voanews.com](http://www.voanews.com) accessed 15 August 2024.

<sup>27</sup> *Obergefell v Hodges* (2015) 576 U.S. 644.

<sup>28</sup> *Minister of Home Affairs v Fourie* (n 24).

<sup>29</sup> Nussbaum (n 21).

<sup>30</sup> Sebastian Poulter, *Law and Population Growth of Lesotho, Family Law Aspects*, (1979).

<sup>31</sup> Poulter (n 30).

<sup>32</sup> Santra Kay, "A Constructionist analysis of the same sex marriage" (electronic theses and dissertation 2005,476)

a certain religious affiliation.<sup>33</sup> Any act relating to the implementation of same-sex marriage will not only be against natural law on what marriage should be, but also go against the religious doctrines that vehemently prohibit such a practice.<sup>34</sup> Religions such as Christianity, interpret sacred texts defining marriage as a union between a man and a woman and this is also reflected in the Marriage Act of Lesotho.<sup>35</sup> Therefore, if it is enshrined in the Marriage Act of Lesotho, then it is no longer about religion alone, but also about every Mosotho who is a law abiding citizen.

### 1.5 Significance of the study

This study on the religious view and state laws regarding same-sex marriage explores and reinforces the view that in countries such as Lesotho, religion plays a pivotal role in the enactment and execution of the laws of the state.<sup>36</sup> This is because, most of the law-makers are religiously inclined and affiliated various denominations of Christianity and Islam and thus, any law they pass, is believed to be in line with the precepts of religion.<sup>37</sup> It is therefore, important to highlight the fact that, in a properly organised state where religion and law are intertwined, the process of the legislators consulting with their religious communities becomes smooth and laws that contradict communal or societal norms may be avoided as their enactment may be protested as harmful to the communities they govern.<sup>38</sup> There is therefore, a consideration of the role of religion regarding the enactment and implementation of state laws as such religion is one of factors that informs the conscience of statesmen in the governance of their state.

Additionally, this undulates to the realistic acceptance and observance of the laws because if the laws are morally separate in that they go against what most citizen, through history and ways of life, consider immoral, there is a high probability of non-compliance.<sup>39</sup> Without suggesting that people contravene the law because it goes against their morals, it is a realistic observation that a law that goes against what is considered morally and religious decent will

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<sup>33</sup> Manyeli (n 16).

<sup>34</sup> “Declaration *Fiducia Supplicans* on the Pastoral Meaning of Blessings” <<http://www.vatican.va>> accessed 2 April 2024.

<sup>35</sup> Marriage Act (n 16).

<sup>36</sup> Religion Impacting the Concept of Law <<http://brill.com/jrat/article>> accessed 16 April 2024.

<sup>37</sup> Edwin Cameron, *Sexual Orientation and the Constitution: A Test Case for Human Rights*, (1994) 91.

<sup>38</sup> Matsumunyane K, “Culture, Religion and Sexual Diversity in Lesotho” <<http://journals.sagepub/doi>> accessed 2 April 2024.

<sup>39</sup> Matsumunyane (n 38).

most likely be unwelcomed, undervalued and disregarded by the society that considers religion an important guide of their lives.

Moreover, while on the one hand, non-legalisation of homosexual marriages may be said to infringe upon the rights of homosexuals to equal protection of the law, there are, on the other hand, religious and moral interests that must be protected, and which become the legitimate basis for the limitation of the equality rights of homosexuals as far as marriage is concerned. This limitation may be said to be constitutional because as much as it is discriminatory on the basis of sexual orientation, it is by far the most realistic protection of the interests of the institution of marriage which is traditionally defined as the union of a man and a woman. Homosexuals are like everyone else, afforded the protection of their fundamental rights, such as protection against being killed, raped or any abuse of members of the LGBTQI+ community.<sup>40</sup> It has been argued that homosexuals need a relationship in which they can feel settled and balanced and they can only do that through marriage.<sup>41</sup> However, the institution of marriage is reserved only for those who can naturally procreate and raise children because it is considered sacred, holy and is instituted for the purpose procreation.

This importance aspect does not only concern the community but also the actors in homosexual relationships who need to see and understand themselves as people who are expected to live with the realisation that as with every other right that has a limitation, their right to marry is justifiably limited for the public interests of the understanding of marriage as a union between a man and a woman.<sup>42</sup>

## **1.6 Hypothesis**

Considering the importance, nature and purpose of marriage, it is perceived that marriage is a holy institution meant for the formation of family, procreation and for the upbringing of children. Therefore, marriage must be between a man and a woman so that it fulfils that purpose. In this case, in Lesotho, where religion and cultural norms play a pivotal factor of society's ways of life, anything outside the union between a man and a woman is not marriage and it is not socially acceptable. It discredits the credibility of marriage. It is in this light that

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<sup>40</sup> The Church's response to Homosexuality <<http://tms.edu>>2021/9> accessed 16 April 2024.

<sup>41</sup> N. Pittenger *Making Sexuality Human*, (1970) 60.

<sup>42</sup> Encyclopaedia Britannica, "Marriage is defined as a union between a man and a woman and it is guided or ruled by the rules, beliefs and culture" <<https://www.britanica.com>> accessed 11 December 2023.

the research will be against the view of endorsing what the world now calls “gay-marriage”. Those who practice homosexuality have the right to live, and enjoy the full protection of their fundamental rights. However, as far as marriage is concerned, they are justifiably limited as this limitation is underpinned by a legitimate protection of the public interests that considers marriage as a union of a man and a woman.

## 1.7 Literature review

There is a lot of materials that have been produced in favour of legalising homosexual marriages and in denying the existence of this phenomenon. For instance, naturalists like St. Thomas Aquinas hold the view that homosexuality is one of the immoral acts that are *contra bonos* of the society.<sup>43</sup> While H.L.A. Hart as a positivist, argued that some laws do not have a connotation of morality hence if the authority has made a decision to legalise homosexuality, then it is law not morality.<sup>44</sup> The literature review is divided into many different fields of study such as legal, psychology, science, sociology and culture.

### 1.7.1 The Legal perspective

The law that is applicable in Lesotho among others is the common law, statutory law and the customary law.<sup>45</sup> According to the common law and customary laws, marriage is between a man and a woman.<sup>46</sup> Sodomy is a crime that could be punished if anyone is known or found to be involved in homosexual acts.<sup>47</sup> The Constitution of Lesotho is not clear on the issue of homosexual marriages as we have seen in the problem statement that it is general in its textual writing of the sections and therefore, subject to many interpretations. For instance, section 4 (1) (a) says every person in Lesotho has a right to life and this is general since it does not specify if it is the right to livelihood or right to be born and not to be killed.

The law of the state also confirms that marriage can only happen between a man and a woman. The Marriage Act of 1974 does not mention homosexuality, but all the provisions use “her”, “bride”, “bridegroom”, “spouse” and “widow” in view of the contract of marriage.<sup>48</sup> This

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<sup>43</sup> Aquinas (1915: 47).

<sup>44</sup> William c. Starr, *Law and Morality in H.L.H Hart's Legal Philosophy*, 67 *Marg. L. Rev.*673 (1984). See also <<https://scholarship.law.marguette.edu>> accessed 17 June 2024.

<sup>45</sup> Lesotho <<https://addleshawgoddard.com>> accessed 17 June 2024.

<sup>46</sup> Matooane (n 13).

<sup>47</sup> Motebo Ntate, “Human rights violations in Lesotho, submitted by the matrix support group for 2010 Universal periodic review of Lesotho” (2010).

<sup>48</sup> For example, section 31 of the Marriage Act 1974 on the formula of marriage.



means, the Marriage Act is enacted with the understanding that marriage is only between a man and a woman. Moreover, the Legal Capacity of Married Persons Act<sup>49</sup> provides for husbands and wives who are recognised as married persons. This confirms the spirit of the Marriage Act, that the lawmakers understood a valid marriage as being that of heterosexual marriage. Furthermore, section 187 (5) of the Criminal Procedure and Evidence Act<sup>50</sup> provides that one may be charged with sodomy, being sex between a man and a man. It indicates that there is a potential of facing criminal charges of engaging in the act of homosexuality even when the two adult men or women have consented to engaging in it. Effectively, this attaches to the prohibition of homosexual marriages. As the research has shown earlier, the everyday life of homosexuals is not a problem because they are also human beings and must be accepted and tolerated as they are also born with rights such as right to life, the only concern is when it comes to legalising their homosexual marriage. Therefore, from this legal point of view, homosexual marriages are not legal in Lesotho, and this must be maintained in for the interests of the public as regards morality and religion.

The other legal basis is that the right of homosexuals to marry stems from the right to equal protection of the law and non-discrimination, which can be inferred from sections 19 and 18 of the Constitution of Lesotho. The basis of the prohibition then stems from the power vested in the government to limit the rights of citizens for the protection of others' rights and the public interest, while ensuring that the limitation is underpinned by a legitimate purpose, acceptable in a democratic society and that it is proportional when matched against its nature and purpose versus its nature and effect of the rights of those it limits.<sup>51</sup>

Most importantly, the Constitution of Lesotho states in section 18(4)(b) that the concept of discrimination does not apply where the impugned law or act has the discriminatory effect on grounds of sex, gender, race, or religion, if the subject matter is adoption, "marriage", divorce, burial, devolution of property on death (customary inheritance) or other like matters, which is the personal law of persons of that description. It means that the discrimination that is felt and effected on homosexuals regarding marriage is one of the constitutional exceptions of discrimination, which stays more valid when regard is had to the legitimate purposes of the protection of the institution of marriage, which is regarded as a union of a man and a woman.

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<sup>49</sup> Act No. 9 of 2006.

<sup>50</sup> CP&EA (n 11).

<sup>51</sup> Currie and De Waal, *The Human Rights Handbook: Limitation of Rights*, (6th edn, Juta and Company 2013).

### 1.7.2 Psychological view

A psychologist once stated that every human being by the right of existence must enjoy his or sexual life according to the standard put by him or her as long as such sexual enjoyment does not unfairly, forcefully and needlessly interfere with the rights of other people.<sup>52</sup> It means, each and every individual is entitled to his sexual expression, which must be accepted as long as there is no interference with other people's rights. However, this is more of the positive perspective towards the reality of life that every human being is independent to any outside reality. A human being according to positivists, is living according to his or her way of life.<sup>53</sup>

One of the great ideas that promote homosexuality is that they feel from birth that they are homosexuals.<sup>54</sup> However, if life depends on feelings, then it has no meaning. This is because people always feel good or bad sometimes and if we can act or make decisions based solely on feelings, we cannot manage to live. For example, someone who feels that he or she wants to steal at a bank and then seeks the law to protect him for stealing on the basis that it is his right as he feels it, or someone who feels like killing, will that be allowed? Definitely not. In a similar manner, it is argued that homosexuals cannot be allowed to marry just based on their feeling to marry.<sup>55</sup>

The psychiatric theory maintains that homosexuality is mental. If a boy has a domineering, overprotective and seductive mother and weak detached and hostile father, he is likely to become a homosexual.<sup>56</sup> If the family is balanced, then there is not much homosexuality that seem to exist as disrupted parental relations are either necessary or sufficient conditions for homosexuality to emerge.<sup>57</sup> This means parental relationship must also be appropriate for the life of an individual as homosexuality is sometimes not something that a person is born with, but one that a person may become influenced by the surrounding circumstances.<sup>58</sup>

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<sup>52</sup> Positivism in Sociology: Definition, Theory and Examples <<http://www.simply psychology.org>> accessed 2 April 2024.

<sup>53</sup> Ibid.

<sup>54</sup> Public Eye Newspaper, "Being neither a "he" nor "she" in Lesotho" <<http://publiceyenews.com>> accessed 2 April 2024.

<sup>55</sup> Blasband D. David and Leticia Anne, *Sexual Behaviour* (1985) 108, "Men are said to be promiscuous than women regardless of their status of being heterosexual or homosexuals due to the dominant male mentality that, they should always get sex at any time they want."

<sup>56</sup> Gould Robert, "We don't know about homosexuality" (1974 New York Times magazine 1974).

<sup>57</sup> Ibid.

<sup>58</sup> Hooker Evelyn, "Parental relations and male homosexuality" (1960) *Journal of Consulting and Clinical Psychology* 141.

### 1.7.3 Scientific view

In the scientific world, there is a specific way that science understands how a child becomes a girl or a boy.<sup>59</sup> So the probability of a child scientifically, to become a homosexual happens when there is genetic abnormality.<sup>60</sup> In that case, men who are homosexuals have female genes.<sup>61</sup> This means, a man could physically appear to be a man but then the genes are female inside the body. Or he may have male genitalia, while other physical features are those of females, created by the many female genes and hormones in him. This results into hormonal imbalance which could lead one into the practise of homosexuality and finally result in the desire to get married to a person of the same sex. Moreover, if a male person has fewer male hormones, it would be easy to become a homosexual.<sup>62</sup> Another study indicates that lesbians' daily secretion of androgens, which is a male sex hormone was considerably higher than their production of oestrogens, which is a female sex hormones.<sup>63</sup>

From this scientific view, it is clearly indicated that homosexuality exists only because there are some imperfections in the creation of man whereby hormones might differ and so create some imbalance within a person. This cannot lead one into thinking that homosexuality is a way out of this situation. One may argue that there are still many people who are not created imperfectly, and they have never wanted to identify as different humans, and that hormonal imbalance must be worked out and not treated as the source of being homosexual.

### 1.7.4 Cultural view

In Lesotho, culturally, the life of Basotho people is partly reflected in the *Laws of Lerotholi*, which were codified in 1903.<sup>64</sup> This document reflects the main topics as being marriage, succession, chieftainship, land allocation and inheritance. One realises that matters of morality are not reflected in these laws and one reason to this silence might be that morality was not an issue at that time or somethings were not worthy of mentioning because although practised, they did not mean anything or have conceptual names as now called. On the other hand, Basotho were secretive with the matters that were considered taboos. For example, if a boy can

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<sup>59</sup> Kellan J. Franz, "Comparative twin in the genetic aspects of male homosexuality" (1952) *Journal of Nervous and Mental Disease* 67.

<sup>60</sup> Ibid.

<sup>61</sup> Franz (n 59).

<sup>62</sup> Freidman Richard, "Hormones and Sexual Orientation in man" (1977) *American Journal of Psychiatry* 571.

<sup>63</sup> Ibid.

<sup>64</sup> The Law <<https://senate.parliament.ls>> accessed 10 March 2024.

be involved in things like homosexual acts in the fields with other boys, to come and report that at home could have been ridiculed and such a boy will not be taken as trust worthy.<sup>65</sup>

In Lesotho, homosexuals were not discriminated against as Basotho sometimes happily named their children *Ntsoaki*, which means she has diluted a family or group of boys with herself being the only girl amongst them, thus, having male characteristics.<sup>66</sup> On the side of male persons, a boy who plays with girls is called *Ntli*. These two names carried the connotation of homosexuality although Basotho have heteronormative and masculine culture.<sup>67</sup> In Lesotho, the practice of homosexuality is common among herd boys in the fields as they often turn it into a playful practice that eventually comes to an end as they grow up.<sup>68</sup> If it happens that it continues even if someone is considered to be old, then it was considered a psychological problem. Moreover, if men are in one place for a long time say for example, working in the mines, in prison or at initiation school, they are likely to practise homosexuality.<sup>69</sup>

The homosexual relationship remains as long as they are bored together but as long as they get home, the practice ceases.<sup>70</sup> Therefore one gathers from this information that in Lesotho culture, homosexuality is only for pleasure, and it ends there. It cannot in any way be part and parcel of marriage like it happens among Europeans. So, to think of allowing homosexual couples to marry would be contrary to the Sesotho culture and may be labelled as European mentality and neo-colonialism (accepting indirect control of the West/Whites).<sup>71</sup> This may also be seen as giving in to the control of the West to control the cultural aspects of Basotho as they are regarded to have successfully done so as far as the political and economic aspects are concerned. They proportionally attach certain conditions to their aids for achieving certain ideologies through-out the world, with little regard for the cultures of other countries.<sup>72</sup>

With the legal, cultural, psychological and scientific views, one can infer that in a cultural society such as Lesotho, it would not be wise to legalise homosexual marriages for little or no acceptance that is underpinned by religious and cultural norms, and further supported by the

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<sup>65</sup> K. Matsumunyane, "Culture, Religion and Sexual Diversity in Lesotho" <<http://journals.sagepub/doi>> accessed 2 April 2024.

<sup>66</sup> Marc Epprecht, "Male-male sexuality in Lesotho, two conversations" (2002).

<sup>67</sup> Epprecht (n 66).

<sup>68</sup> Pittman J. David, "The Male House of Prostitution" (1971) 23-25.

<sup>69</sup> Bryant D. Clifton, *Sexual Proscription: The Social Context of Carnal Behaviour* (1982) *New York* 98.

<sup>70</sup> Humphreys, "Tearoom Trade: Impersonal Sex in Public Places" (1970) 18.

<sup>71</sup> *Migrancy and Male Sexuality on the South African Gold Mines* <<http://www.jstor.org>> accessed 2 April 2024.

<sup>72</sup> *Migrancy* (n 70).

constitutional exception that discrimination does not apply when it comes to defining the precepts of marriage.

## **1.8 Methodology**

To delve at length into this topic and proffer concrete solutions, the researcher uses the qualitative method of research.<sup>73</sup> It involves how people experience the reality and gives rich meaning when interpreting data. It is in this case that the research will construct arguments to counter those presented for the legalisation of homosexual marriages in Lesotho. This means, the research will inductively bring about the new solutions and create further discussion on the topic. This qualitative method is important for this research as the research will make the argument against accepting homosexual marriages. The research will then logically indicate that marriage is sacred and deserves to be respected and given the importance it deserves.

## **1.9 Chapter Outline**

This research consists of five chapters. The first chapter is the introduction whereby the research will lay down the problem statement and significance of the study among others. The second chapter tackles the definition of marriage and its purpose. The third chapter brings to light the importance of jurisprudence of homosexuality wherein, the discussion will focus on the naturalists and positivists theories in relation to the reality of homosexuality. Chapter four discusses legal perception on the right to marry while chapter five is the conclusion and recommendations to the problem.

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<sup>73</sup> Pritha Bhandari, "What is qualitative research?" (2020), "Qualitative research involves collecting and analysing data in order to study the opinion of others and generating new ideas for research."

## CHAPTER TWO

### THE LEGAL AND RELIGIOUS DEFINITION OF MARRIAGE

#### 2.1 Introduction

One of the major concerns for the LGBTQI+ community is the right to marry.<sup>74</sup> In a country like the United State of America (USA), this homosexual right has been granted. Homosexual marriages were constitutionalised by the Fourth and the Fifth Amendments to the Constitution of the USA following the decision in the case of the *United States v Windsor*.<sup>75</sup> However, in a country like Uganda, the Constitutional Court upheld the fact that homosexuality is not recognised by the people of Uganda and that such a right has no legal basis to be protected in the country.<sup>76</sup> Thus, it is of great importance to understand the essence and purpose of marriage and who are allowed to marry and who are not allowed to marry. The right to marry has been denied to people of the consanguinity.<sup>77</sup> This means, those who are closely related by blood to a certain degree of biological familial relations cannot marry each other. This limitation indicates that the society regulates and determines the dictates of marriage and the homosexual communities are not the only group that is restricted from marriage.

Society holds marriage as its property and thus, there have been laws that govern marriage. This chapter is divided into two major sections whereby the first section is on the legal definition of marriage and the second section is on the Christian view of the definition of marriage. The concentration will be on the general understanding of marriage as religiously understood. There is a short discussion on Islam type of marriage and the Roman Catholic Church perspective will also be examined. There are different perspectives, but the dissertation is limited on the legal and Christian views, to give a clear understanding of marriage.

#### 2.2 Definition of marriage

The oxford dictionary has been influenced by the legalisation of same-sex marriages but the current definition of marriage they hold is that marriage is “the formal union of a man and a

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<sup>74</sup> Ban welcomes US Supreme Court ruling guaranteeing right to same-sex marriages <<http://news.un.org>>2015> accessed 17 May 2024.

<sup>75</sup> (2013) 570 U.S 744.

<sup>76</sup> Uganda: Court upholds Anti-Homosexuality Act <<http://www.hrw.org>> accessed 26 May 2024.

<sup>77</sup> Considerations about the marriage regulations of Canon law <<http://revistas.unav>>\_accessed 4 June 2024.

woman, typically as recognised by law, by which they become husband and wife.”<sup>78</sup> This is the first understanding of marriage and it means, it was solely meant for a man and a woman. However, due to the changing world, they had to find a better solution to the understanding of marriage and they included gay marriages by defining marriage as a union between partners of the same-sex.<sup>79</sup> From these two general definitions, one realises that indeed, there are two definitions of marriage whereby the first one is the normal and natural definition while the second one is the revolutionised definition whereby the state is confronted with the pressure to legalised such marriages.<sup>80</sup> The definitions indicate the changing world towards a certain approach to the moral and societal issues. That means, they have changed the dictionary meaning to fit how Americans perceive marriage. Thus, it is not surprising that they have given the entity of marriage a new definition. However, it would be neo-colonialism to suggest that since Americans have changed their mentality towards homosexuality, then everyone must then follow them on that basis.

### **2.2.1 The Legal perspective on marriage**

The legal perspective to the understanding of marriage is very crucial as marriage is the foundation of any family and it is then fair to know the legal definition of marriage. The right to marry is protected under article 23(2) of the International Covenant on Civil and Political Rights that each and every man and woman has a right to marry. However, the formulation of this right in the context of this treaty, did not include same-sex marriages. For instance, the article reads as follows.

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognised.<sup>81</sup>

Although this article has been interpreted differently to meet the changed in mentality on marriage, this original treaty text is very clear that marriage is not an entity that an individual can claim by himself or herself. It is a societal fact and it is society that decides who is to marry and why. Same-sex marriages as a claim of right of certain people against the will and

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<sup>78</sup> Marriage Noun-Definition, pictures, pronunciations and usage notes, <<http://www.oxfordlearnersdictionaries.com>> accessed 27 May 2024.

<sup>79</sup> Marriage Definition and Meaning, <<https://www.merriam-webster.com>> accessed 17 June 2024.

<sup>80</sup> Marriage (n 78).

<sup>81</sup> Article 23 (1 and 2).

protection of society is not valid. At this juncture, those who claim marriage as a right for themselves against the will of the society are likely to have unacceptable views and may be considered detached from the realities of marriage in the context of different cultures, societies and political ideologies. Paula Gerber, in his article confirmed that the interpretation of article 23 does not include same-sex marriages as reflected in the case of *Joslin v Netherlands*.<sup>82</sup> He says:

The right to marry received its most prominent and frequently cited interpretation in the Human Rights Committee's ('HRC') decision in *Joslin v New Zealand*. The key question in that case was whether the right to marry in art 23 included same-sex couples; the HRC concluded that the article protects only heterosexual couples.<sup>83</sup>

Although, the very Human Rights Committee has rightly pointed out the understanding of marriage, some still interpret this differently to suit their ideologies that are informed by the revolutionised approach to human rights. For instance, some have criticised the wording of article 23 to the effect that it must not lay emphasis on men and women. Many have suggested that it is wrong to only think that marriage should be between man and woman only. Hence the *travaux préparatoires* of the UN Commission suggest that the Commission on Human Rights "should move forward boldly towards the realisation of the principles of equality".<sup>84</sup> It broadly implies that even if the right to marriage is explained and defined clearly, some will still define it differently in order to qualify homosexuals to be included in that definition.

### **2.2.2 African perspective on marriage**

According to the African Charter, article 18 (1), and (3):

The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral. The State shall have the duty to assist the family which is the custodian or morals and traditional values recognised by the community.

By this view, the terminology of the natural unit means a family is an institution between a man and a woman. The provision on marriage in the African Charter has been interpreted in

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<sup>82</sup> *Joslin v New Zealand*, UN Doc CCPR/C/75/D/902/1999.

<sup>83</sup> P. Gerber, "Marriage: A Human Right for All?" (2014) 645.

<sup>84</sup> The UN Commission on Human Rights was replaced by the UN Human Rights Council in 2006.



the Protocol to the African Charter on Human and People's Rights on the Rights of Women.<sup>85</sup> Article 6 defines the institution of marriage in the Protocol, which states that it is the right of every man and woman to get married at the appropriate time. Marriage is, according to the Protocol, envisaged to be monogamous in the sense that it must be between one man and one woman.<sup>86</sup>

Article 6 of the Protocol makes no mention of homosexual marriages as that type of marriage is not recognised in many African countries. In fact, marriage is understood to be between a man and a woman, and their duties and responsibilities are explained in the Protocol. Thus, to consider homosexual marriages in Africa as an existing phenomenon, is to force the African people into something they do not consider to be part of their life. Moreover, marriage is defined as aimed to be for procreation and the upbringing of children in the African context.<sup>87</sup> This indicates that couples give birth to their own children, and they contribute jointly to their well-being. Now, in homosexual marriages, one could ask if this idea in the African way of understating marriage will be realised since, there will be no natural way of bearing children in such kind of marriages. Therefore, in the African context, marriage is only between a man and a woman.

### **2.2.3 Southern African Developmental Community (SADC) view on marriage**

The SADC countries in the process of eradicating child marriages, have slightly defined marriage in the countries that form the SADC. They developed the SADC Model Law which indicates that member states must implement national laws to combat child marriages.<sup>88</sup> In this, the age limitation to girl and boys is 18 years old. Although, it is not clarified if the boys should be homosexual or not, the perspective of the SADC Model Law is concerned about heterosexual marriages. This is because, SADC member states were fighting against child marriage, which happens where girls are getting married at an early age deprived of education as children and many other human rights.<sup>89</sup> It is clear that in SADC member countries, homosexual marriages were not an issue in the early stages and hence, they were not included in the Model Law. In fact, marriage is still largely recognised as between a man and a woman

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<sup>85</sup> Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo 2003.

<sup>86</sup> Article 6 (c).

<sup>87</sup> Article 6 (i).

<sup>88</sup> Ending Child Marriage in Southern Africa: Domesticating SADC Model Law <<http://equalitynow.org>> accessed 25 May 2024.

<sup>89</sup> Ending Child Marriage (n 88).

and in the SADC region, women were married in their childhood stages hence, this needed to be stopped. Thus, marriage is regulated by the society and it is the very society that decides who should marry, when to marry and why they should marry. If the society says no to gay marriages, it would not be wise to force the society to accept such marriages.

#### **2.2.4 The legal understanding of marriage in Lesotho**

The law in Lesotho is very clear on the understanding of the reality of marriage. Marriage is regulated under customary law and the Marriage Act of 1974, and under this legislative guidance, marriage is only between a man and a woman.<sup>90</sup> Homosexual marriages are not recognised in the Marriage Act. The Constitution itself, does not have the word homosexual to indicate that the law in Lesotho does or does not include homosexual activities. Another law that indicates Lesotho only supports heterosexual unions between a man and a woman, is the Children Protection and Welfare Act.<sup>91</sup> It mostly outlines the interest of a child and section 55 (1) states that adoption is valid only if the application is made by husband and wife. This means, the only marital union that is legally considered is the one between a man and a woman.<sup>92</sup>

Amidst these legal definitions of marriage, which indicate that marriage is between a man and a woman, proponents of homosexual marriages argue that the Constitution of Lesotho states that nobody should be discriminated against.<sup>93</sup> In this context, to specifically state that marriage is between a man and a woman is erroneous as it infringes the rights of homosexuals to equality. However, they do not take into account that the Constitution itself makes an exception on discrimination where matters like marriage are concerned. Meaning that a differentiation based on marriage cannot be an outright unlawful discrimination, unless of course, issues of disproportionality or illegitimate government purpose may be shown to exist in a given scenario. Therefore, it would be erroneous to suggest that it is directed to welcoming homosexuals into marriage.

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<sup>90</sup> Cronje J Heaton, *South African Family Law* (2002) Butterworth's Durban 21.

<sup>91</sup> Act No. 7 of 2011.

<sup>92</sup> Public Eye Newspaper, "Call for gay marriages to be legalised in Lesotho" <publiceyenews.com> 27 May 2024.

<sup>93</sup> Constitution of Lesotho 1993, sect 18.

### 2.3 Customary understanding of marriage

In the perspective of Sesotho culture, marriage is between a man and a woman.<sup>94</sup> It is also acceptable when a man marries many women, as long as he can provide for them.<sup>95</sup> However, some Sesotho proverbs with regard to marriage might be confusing. For example, Basotho will say, *ha u nyala u ikhethele* literally meaning, when you marry, make your own choice. This kind of saying can be interpreted wrongly to mean that a homosexual must make a choice about their marriage.

This is because countries like the USA among others that have changed the definition of marriage, have opted to use general terms like this one in their definition of marriage. For instance, marriage in America is a union between two people who are in love.<sup>96</sup> Thus, there is no specification of a man and a woman to the exclusion of others. Thus, some sayings in Sesotho culture defining marriage might be confusing and we would like to clear the air about marriage in Sesotho culture. In Sesotho culture, the Laws of Lerotholi provide three requirements that essentially constitute validity of customary marriage. According to section 34(1) of Part II of that codification, the law provides that:

A marriage .... shall be deemed completed when

- (a) There is agreement between the parties to the marriage.
- (b) There is agreement between the parents of the parties or between those who in loco parentis to the amount of the bohali (dowry).
- (c) There is payment of or part of the bohali.

It is worth noting that this provision has become a bone of contention for so many years. The recurring question is whether the requirements thereof, essentially and *in toto* determine the validity of customary marriage? However, customary marriage is specifically between man and woman, involving the two families that will deliberate between themselves to finally complete the processes of customary marriage. This is also reflected in South African traditional marriages as reflected in the case of *South Africa In Fanti v Boto and Others*,<sup>97</sup> where the court indicated that the importance of the law of the bride's family were termed as "essential requirements that inescapably must be alleged and proved" in the following words it was held

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<sup>94</sup> L. Juma, "The Laws of Lerotholi: Role and Status of Codified Rules of Custom in the Kingdom of Lesotho" 2011) *Pace International Law Review* 23(1), 92-98.

<sup>95</sup> W.C.M. Maqutu, "Contemporary problems in the family law of Lesotho" (1985) *Lesotho LJ* 199.

<sup>96</sup> S. Poulter, *Family Law and Litigation in Basotho Society* (1976 Oxford, Clarendon Press) 73.

<sup>97</sup> 2008 (5) SA 405 (C).

that “in order to prove the existence of a valid customary marriage, essential requirements that inescapably must be alleged and proved are the following:

- (i) consent of the bride
- (ii) consent of the bride’s father or guardian
- (iii) payment of lobola
- (iv) handing over of the bride.”<sup>98</sup>

Moreover, one of the proponents of customary marriage concluded that “.... The boy’s father gets in touch with the girl’s parents.... Then, if they appear favourably disposed, he formally asks them for “a calabash of water” ... Once the parents have consented, the prospective bridegroom, accompanied by two or three companions, pays the girl a formal visit. If she is agreeable to match, she gives them a scarf (moqhaka) as a token of her acceptance...”<sup>99</sup>

In this customary view to the definition of marriage, marriage is particularly between a man and a woman. Most importantly, marriage is a family-based process where the two families must consent to that marriage.<sup>100</sup> It cannot be said with certainty that in customary marriages, gay marriage is uncommon considering the life of Basotho. Gay people have been there in the history of Basotho people but with regard to homosexual marriages, this phenomenon was inexistence. It therefore, indicates that homosexual marriages are not traditional or customary, but has been introduced to the Basotho people through influence from other countries and peoples. Although, this is not wrong, the Basotho people must know what is best for them and not allow themselves to be influenced to an extent that considerably dilutes their culture beyond recognition. It may suffice to say that the country has been welcoming enough to the existence and protection of homosexuals, and unlike countries that completely banish them, Lesotho has justifiably only reserved their right to customary forms of marriage.

#### **2.4 The religious understanding of marriage**

It must be understood from the beginning that religious denominations are many and diverse with the understanding of certain concepts and dogmas. For the purpose of this research, Christianity is mostly referenced as the research is meant for assimilation by the largely

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<sup>98</sup> *South Africa in Fanti* (n 97).

<sup>99</sup> Laws of Lerotoli, section 3(1).

<sup>100</sup> Q. Letsika, “The place of Sesotho customary law marriage within the modern Lesotho legal system” (2005) 88.

Christian Lesotho population. Muslim religion also plays an important role for better comparison. In the Christian arena, the Bible is the main source for the explanation of marriage and its establishment.

When one considers the reality of creation as reflected in chapters 1 and 2 of the book of Genesis, God created man and woman in his likeness. The purpose for creation is highlighted in chapter 1: 28, where it is stated that man and woman must participate in the multiplication of the human race. So, the two purposes of marriage are the welfare of the couple through their love for each other and the procreation and upbringing of children. These two purposes of marriage are protected and fostered when the couple clearly commits to a permanent relationship. These two ends of marriage are often called the unitive and procreative dimensions of marriage. Roman Catholic church Canon 1654 acknowledges that not every couple can procreate, and their marriage can still procreate in charity, hospitality and sacrifice. Many people have used this as a basis for indulging in homosexual union, and the catechism in the United States concluded that:

There are attempts by some in contemporary society to change the definition or understanding of what exactly constitutes marriage. Efforts to gain approval for and acceptance of same-sex unions as marriages are examples. While the Church clearly teaches that discrimination against any group of people is wrong, efforts to make cohabitation, domestic partnerships, same-sex unions, and polygamous unions equal to marriage are misguided and also wrong. The Church and her members need to continue to be a strong and clear voice in protecting an understanding of marriage, which is rooted in natural law and revealed in God's law.<sup>101</sup>

It is clear therefore, that with the mentality of creation, marriage can be between one man and many women (polygamy) or one woman and many men (polyandry) and most importantly, marriage cannot be between one man to another man or between a woman to another woman (homosexuality). God's major aim and objective was to multiply the human race through the institution of marriage and for the two to live well, support and cherish each other in life.<sup>102</sup> In the book of Leviticus 18:22, there is a significant act that shows how bad it is for men to have sex with other men since this is an abomination. In the New Testament, Jesus brought to full

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<sup>101</sup> United States Catechism p. 280.

<sup>102</sup> Manyeli (n 18).

awareness God's plan for marriage. In John's gospel, Christ's first miracle occurred at a wedding. The Church sees in Jesus' presence a confirmation of the goodness of marriage. In his teaching, Jesus was very clear about God's plan for marriage. In Matthew 19:3-6, we read: "Some Pharisees approached him, and tested him, saying, is it lawful for a man to divorce his wife for any cause whatever?" He said in reply, "Have you not read that from the beginning the Creator made them male and female," and said, "For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh." So, "they are no longer two, but one flesh. Therefore, what God has joined together, no human being must separate."

St. Paul reiterates Christ's teaching on marriage when he says: "A wife should not separate from her husband and a husband should not divorce his wife" (1 Cor 7:10-11). In his letter to the Ephesians, he states: "For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh. This is a great mystery, but I speak in reference to Christ and his church" (Eph 5:31-32). Paul is saying that the union of a husband and wife is like the union of Christ with his Church, and Paul calls this reality a mystery, a word translated by St. Augustine as "sacrament." Christian marriage is a visible sign of Christ's love for his Church. In this sense, marriage is what the Catechism calls an efficacious sign or sacrament of Jesus' presence. (For more on the term "efficacious sign". Indeed, marriage is covenantal sign and different from any contract that one could think of. For instance, a contract can be terminated if the other party to the contract is not observing the rules of the contract but with the covenantal contract, even if the other party does not observe the contractual clauses, the marriage cannot be terminated. Thus, marriage is specifically designed for the man and woman and no other party to it.

The Islamic religion on the other hand holds marriage *Nikah* as the union of a man and a woman.<sup>103</sup> It is instituted specifically for procreation of the human race. It is a commitment of a man and a woman to love, cherish each other and multiply the species of humanity. Marriage is also religious as the Prophet has said, "He who marries completes half of his religion; it now rests with him to complete the other half by leading a virtuous life in constant fear of god."<sup>104</sup>

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<sup>103</sup> Mehaj Ahmad Meraj, *The Importance of Marriage in Islam* (2018) 1-5.

<sup>104</sup> Muhammad Ibnu Ali Alarfaj "What must be known about Islam" (2009) 288.

This means, homosexual marriages in the Islamic religion are also not welcomed in any way since they do not fulfil the religious purpose of marriage between a man and a woman.

#### 2.4.1 The Roman Catholic Church

The Catholic Church's stance regarding marriage is very clear in Canon 1055 (1), which states that marriage is between a man and a woman, and its integrity must be kept. In 1208, Pope Innocent III called marriage a sacrament. In 1563, the Council of Trent reaffirmed that marriage is a sacrament and that a Catholic marriage had to take place in the presence of a priest as the Catechism of the Catholic Church holds:

The intimate community of life and love which constitutes the married state has been established by the Creator and endowed by him with its proper laws.... God himself is the author of marriage.<sup>105</sup>

It means that marriage is not a human invention but ordained by God for the procreation and multiplication of the human species. This perspective of the Catholic Church excludes homosexual marriages since the partners in that kind of a marriage cannot procreate. After all, in the view of the Catholic Church, homosexual behaviour, not even marriage, is something unnatural and not normal.<sup>106</sup> Article 4 of the Declaration *Fudicia Supplicans* says, marriage is an indissoluble union between man and woman. Pope Francis has suggested that priests can bless homosexuals like any other person but not validate their union. The intention of the blessing is to call them to repentance and reconciliation with God.

The declaration of the Pope on the blessing of marriage has been clarified by another letter, Declaration of the Dicastery for the Doctrine of Faith "*Dignitas Infinita*" on Human Dignity.<sup>107</sup> In this Declaration, the Pope indicates clearly that any sex change violates human dignity, which God has created and blessed every human person with. He says, as a man, the body given to a man has purpose from the Creator and what does the human person do when he or she changes herself into a man or a man changes himself into a human.<sup>108</sup> The Catholic understanding of marriage is that marriage is between a man and a woman exclusive of others.<sup>109</sup> It is indeed, a sacrament or a covenant that cannot be broken as long as those who

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<sup>105</sup> The Catechism of the Catholic Church (1603).

<sup>106</sup> The Catechism of the Catholic Church (1603).

<sup>107</sup> Published on the 8 April 2024.

<sup>108</sup> Article 60 of the Declaration *Dignitas Infinita*.

<sup>109</sup> Article 4 of the Declaration *Fuducia Supplicans*, (18 December 2024).

have engaged in it are valid and proper persons to take the vows. Therefore, homosexual marriages in the Catholic Church are, as of now unknown and not accepted. Thus, from the legal perspective to the religious view of marriage, the conclusion is that marriage is only between a man and a woman. The institution of marriage is not an individual right, but an entity that is controlled by the community that has norms and morals for validating the institution of marriage and if the community says, homosexual marriages are not welcomed in the community, then that democratic deliberation must be accepted and those whom the law is to apply, must observe and follow the law.

## **2.5 Conclusion**

From the above understanding of marriage, marriage is an institution of society instituted by God to unite a man and a woman for the procreation of children and their well-being.<sup>110</sup> This is the reason why it is particularly or specifically between a man and a woman. Any other union that cannot satisfy the main purposes of marriage are therefore, erroneous and solely planned to downgrade the integrity of marriage. From the discussed legal frameworks on marriage from the international perspective to the Lesotho context, marriage is understood as a societal and not an individual claim. The society has all the rights to deliberate on who can and should get married. Many African states have indicated that they do not accept homosexual marriages and unfortunately, they have always been persuaded by their European counterparts to act otherwise.<sup>111</sup> Therefore, the legal understanding of marriage as discussed, would bring to an end confusions to the states that are yet to face the dilemma of what is called homosexual marriage and to those states that have already established it, that marriage is solely between a man and a woman exclusive of others in order for them to procreate and raise children.

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<sup>110</sup> Thomas Aquinas, Trans (1915) *Summa Theologiae*: Question XCIV, Articles 1-6. London: Burns Oates & Washbourne.

<sup>111</sup> US talks sanctions against Uganda after a harsh anti-gay law <<http://theconversation.com>> accessed 27 May 2024. "The Biden administration has called for immediate repeal-and threatened to cut aid and investment to Uganda."



## CHAPTER THREE

### INFLUENCE OF THE NATURALISM AND POSITIVISM THEORIES ON THE LAW OF NATIONS

#### 3.1 Introduction

Proponents of homosexual marriages can be studied through jurisprudence theories which are the natural law theory, positivism theory, historical theory, legal realism and sociological theory.<sup>112</sup> This is because the laws that exist and apply in different states have been influenced by these theories. For the purpose of this study, the focus will only be on the natural law and positivism theories. The natural law theory is one of the oldest theories in the study of law. It dates from Plato and Aristotle who were Greek philosophers.<sup>113</sup> They are respected for kick-starting the field of critical thinking in the mediaeval period. They are also influential in the development of the natural thinking and moulding the natural theory. The natural law school maintains that beyond man-made laws, there are principles that are immutable and eternal.<sup>114</sup> These principles are:

With regard to the highest matter manmade law should be in accord with the principles of natural law. And to the extent that man-made law conflicts with natural law, it lacks validity: it is not a valid or binding law at all.<sup>115</sup>

Thinkers of the natural law theory, include writers like St. Augustine,<sup>116</sup> St. Thomas<sup>117</sup> and John Finnis.<sup>118</sup> Their standpoints are discussed here to provide an understanding on the morality of homosexuality and how religion provides direction on the matter. In the 19th century, there was a remarkable fall of the natural law theory where many thinkers established that law is law and it does not have any connotation of morality or religion.<sup>119</sup> In fact there is no upper law than the one formulated by the legitimate or self-imposing governments.<sup>120</sup> This means, whether the law is unjust or just, it must be obeyed regardless of the validity of the law makers.

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<sup>112</sup> Kwaku Debra Boadu, "The jurisprudence of Ghana's 4th Republican Constitution" (2011) 24.

<sup>113</sup> Lord Lloyd of Hampstead and M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* (1985) (5ed. Stevens & Sons, London).

<sup>114</sup> Daniel W/Gabriel Hassen Mohamed, "Teaching Material on jurisprudence" (2008) *Ethiopian Justice and Legal Research Institute* 7.

<sup>115</sup> Mohamed (n 114).

<sup>116</sup> <<http://www.cambridge.org>> accessed 1 May 2024.

<sup>117</sup> St. Thomas Aquinas, (1927) *Summa Theologiae, Treatise on Law (II.I)* 79-81.

<sup>118</sup> Aquinas (n 117).

<sup>119</sup> Raymond Wacks, "Understanding Jurisprudence" (2012) 21.

<sup>120</sup> Wacks (n 119) 22.

The issues of law, morality and religion are treated separately as compared to the natural theory. That would mean, if homosexual marriages are to be legalised, they would be done regardless of morality or religion. Proponents of this theory are thinkers like John Fuller,<sup>121</sup> H.L.A Hart<sup>122</sup> and Hans Kelsen.<sup>123</sup> These writers are analysed as their thinking are the source of the decisions taken in courts in legalising homosexual marriages.

### **3.2 The natural law theory**

The natural law theory has grown over centuries and various thinkers have contributed differently to its body of content.<sup>124</sup> Notably, natural law theory posits that there is a set of rules that are higher than man-made law. Natural law is held to be immutable and derived from higher moral principles.<sup>125</sup> The common theme in the natural law concept states that there is a higher order of morals that must inform man-made laws and must take precedence in the event of disharmony.

The natural law theory holds that morality and law are inseparable and law should be in conformity with morality to maintain its legitimacy.<sup>126</sup> The necessity of consonance between man-made law and natural law is the mainstay of the natural law theory. Unforgettably, St. Augustine famously stated that “an unjust law is really no law at all”.<sup>127</sup> From this statement, the heart of the natural law concept can be seen. From the natural law perspective, man-made law must always look to natural law for correction or acceptability.

The natural law theory is defined in terms of creation, to the effect that everything that exists has a beginning and an end.<sup>128</sup> The reality owes its existence from somewhere and exists for a certain end. Most natural law proponents are Christians who believe in God as the Creator of everything. For instance, the human being is created by God and everything that relates to his/her beginning, and end comes from God.<sup>129</sup> The parts that have been created have a certain

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<sup>121</sup> J. Fuller, “The Morality of Law” (1958) *Harvard Law Review* 630.

<sup>122</sup> H.L.A. Hart, “The Concept of Law” (1958) 71 *Harvard Law Review* 593.

<sup>123</sup> Hans Kelsen, *General Theory of Law and State* (1945) 128.

<sup>124</sup> A.G. Chloros, “What is Natural Law?” (1958) *The Modern Law Review* 21 at p.1.

<sup>125</sup> Chloros (n 124).

<sup>126</sup> Anton-Hermann Chroust and A. Frederick “The Basic Ideas in the Philosophy of Law of St. Thomas Aquinas as Found in the *Summa Theologiae*” (1941) 26 *Marq. L. Rev.* 11 at p. 16.

<sup>127</sup> Chroust and Frederick (n 126).

<sup>128</sup> W. Raymond, “*Understanding Jurisprudence: An Introduction to Legal Theory*” 12.

<sup>129</sup> Raymond (n 127).

purpose and institutions like the families that have been established through marriage must be respected.

### 3.2.1 Historical background to the natural law theory

The history of natural law dates from the beginning of critical thinking and enumerates proponents of this theory such as St. Augustine, St. Thomas, Lon Fuller and John Finnis as they are very crucial for their views on the nature of man and the reality at large. Their perceptions give an overview of how a man should conduct himself or herself towards reality.<sup>130</sup> St. Augustine opines that the reality is faced with the truth of contradictions.<sup>131</sup> In this reality, there is evil and good, light and darkness and the perfect joy is when one submits to the will of God who is the highest perfect being. For him, God created human beings with reason and it is man's duty to deliberate on whatever he or she engages in.<sup>132</sup> For instance, if same-sex marriage is to be established, there must be reasoning behind that, and a valid one. He argued that human law does not make any person good, but it prevents him or her from being a bad person.<sup>133</sup> Thus, if Lesotho legalises homosexual marriages, it will mean instead of preventing people from doing bad, society would be encouraging them to do bad, which for St. Augustine, this would not be the nature of law.

Besides St. Augustine, there are many other natural law thinkers, but I will focus on St. Thomas. St. Thomas Aquinas became very rigid on maintaining the natural theory in the philosophical and legal arena. He is renowned for giving the exact definition of God, being not caused but the cause of everything.<sup>134</sup> St. Thomas Aquinas put forth the proposition that there are three major strata of law. These are the eternal or divine law (*lex aeterna*), the natural law (*lex naturalis*), and the human law.<sup>135</sup> St. Thomas Aquinas posited that the eternal law is objective and absolute.<sup>136</sup> The proposition held out by him is that the eternal law is divine reason that exists in the mind of God. Aquinas puts forward that the first premise for the

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<sup>130</sup> Medieval philosophy| History, Philosophers, Neoplatonism < <http://www.britannica.com> topic>accessed 15 August 2024.

<sup>131</sup> Ancient Scepticism and The Contra Academicos of St. Augustine <<http://research.library.mum.ca>> accessed 29 May 2024.

<sup>132</sup> Ancient Scepticism (n 129).

<sup>133</sup> Ancient Scepticism (n 129131).

<sup>134</sup> Chroust and Frederick (n 126) at 17.

<sup>135</sup> Chroust and Frederick (126).

<sup>136</sup> St Thomas Aquinas, "Selected Political Writings" 1915. *Summa Theologica: Question XCIV, Articles 1-6*. London: Burns Oates & Washbourne.

necessity of eternal law is that man is destined for eternal happiness.<sup>137</sup> However, he cannot achieve this by his own power and therein lies the need for direction from God-given laws. His approach is that natural law stands as principles of right and justice that are in subjective relation to eternal law. Natural law is discovered by reason and informs the human person's participation in the eternal or divine law.<sup>138</sup> Natural law comprises of the general principles of what is right, which the human person has within himself or herself. However, these principles are not a complete discovery of the eternal law and Aquinas proposes that a complete knowledge of eternal/divine law cannot be arrived at by reason.<sup>139</sup> Aquinas' approach is that under natural law, good must be pursued and evil avoided, although these pursuits would be done only to the extent of the human person's understanding.

After this, Christian thinkers with religious influence, and the positivists came with different mentalities. They wanted to strip off some issues from the religious view.<sup>140</sup> On the other hand, Lon Fuller's approach to natural law is that it is mostly, although not completely arrived at by reason.<sup>141</sup> He concedes that some laws are arbitrary because reason is not all encompassing. However, Fuller's approach is that natural law endeavours for commonly effective and satisfactory life.<sup>142</sup> Principally, just law is attained by unearthing the common need in society. Fuller's position is that the common need approach is just or right because it is most effective, least disruptive, and reconciles individual desires and interests with social values.<sup>143</sup> Fuller's approach thus, seems to be secular and communitarian whereas, St. Thomas Aquinas' approach is theistic and premised on man's attempt to harmonise his conduct with the will of an autocratic deity. Law is an ordinance of reason for the common good of the society promulgated by the authority. This affirmation means, every law must have a good purpose for the community, and it must be known to people in order that they keep it.<sup>144</sup>

John Finnis was also instrumental in the revival of the natural law theory. As his teachings were drawn from Plato, Aristotle and Thomas Aquinas, he asserted the fact that natural law is

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<sup>137</sup> St Thomas Aquinas (n 134).

<sup>138</sup> Michael Bertram Crowe, "The Changing Profile of the Natural Law" (1977) *Martinus Nijhoff, The Hague* 163.

<sup>139</sup> Crowe (n 136).

<sup>140</sup> Raymond (n 127).

<sup>141</sup> L. Charles and C.S.P. Palms, "The Natural Law Philosophy of Lon L. Fuller" (2016) *The Catholic Lawyer* 11(2) at p. 106.

<sup>142</sup> Charles and Palms (n 141).

<sup>143</sup> Charles and Palms (n 141).

<sup>144</sup> J. Finnis J, *Natural Law and Natural Rights*, 2nd edn (Oxford University Press 2011) 3.

found in the inner self of every reality as it has been motivated by the innate motivations.<sup>145</sup> For him, natural law is intertwined with morality as they have similar goals, which is that of bringing the good out of people. He finally tabulated some requirements for the good life for everyone. He says, everyone must be alive to enjoy his potential as a human being.<sup>146</sup> It means that abortion, and euthanasia cannot apply since they advocate for death not life. Other basic norms for life are knowledge, recreation, aesthetic experience, sociability, practical reasonableness and religion.

### **3.2.2 Relationship between natural law theory and homosexual marriages**

In every state, the life of the people is reflected in their laws especially, the Constitution. This is the major reason the gay community are advocating for the legalisation of their marriages.<sup>147</sup> However, not everything people do must be backed by law. Indeed, not everything is a right within every state. Before considering legalisation, the religious and moral insights to the issue must be checked.<sup>148</sup> For instance, can any country legalise stealing only because thieves claim the right to food? Some contemporary legal issues that entangle natural law include the discourse on the law on abortion, homosexual marriages, and euthanasia. From Aquinas' approach, the morality or rightness of laws that would permit such, must be discovered, yielding reason to the divine law.<sup>149</sup> Today, this view has been a factor in largely 'Christian states' like Lesotho where for example, suicide is proscribed.<sup>150</sup>

However, some writers maintain that Aquinas' argument assumes a religiously homogenous world, or at the very least a monotheistic one.<sup>151</sup> In a religiously diverse world and even religiously diverse countries like the United States of America or the Republic of South Africa, Aquinas' argument falls short of guiding legal discourse on the issues confronting ethics and law. This is because there is no single God to approach for a commonly accepted code on morality or divine law.

Moreover, a largely non-religious state like Sweden would not find application for Aquinas' approach in guiding their legal discourse.<sup>152</sup> The different views to this approach will be, if any

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<sup>145</sup> J. Finnis, *The Nature of Law* (2017) *Cambridge Companion to Philosophy of Law* 4.

<sup>146</sup> Finnis (n 141).

<sup>147</sup> Call for gay marriage to be legalized in Lesotho <<http://www.publiceye.com>> accessed 29 May 2024.

<sup>148</sup> Edwin W. Tucker, *The Morality of Law by Lon L. Fuller* 40(2).

<sup>149</sup> St Thomas Aquinas (n 134).

<sup>150</sup> Penal Code, 2010, sect 45.

<sup>151</sup> David Bilchitz, "*Jurisprudence in an African Context*" (2017) 41.

<sup>152</sup> St Thomas Aquinas (n 134).

action is bad, it is not about whether a certain state is religious or not, moral or immoral, that action will always remain bad. For instance, one does not want any confirmation whether a state is religious or not, but most states and people know that, killing is bad and not acceptable. In a similar manner, homosexual marriages cannot be allowed as they only focus on the unity of two persons, solely for their marriage<sup>153</sup> as they would not procreate in such union like in the union of heterosexual couple. If we promote homosexual marriages, then we only focus on the pleasures of the individual, which in St. Thomas' view is sinful.

Lon Fuller's approach inherently advocates for a sacrificing of individual or minority group interests where they do not resonate with the larger community's perceptions of common need.<sup>154</sup> This means, if legalising homosexual marriages only concerns individual pleasure or good, then such individuals must compromise their need for the stability of the community. It is not good for the whole community to suffer for an individual especially, in the case of homosexuals whereby the community will have to change the status quo and historical development of such a community. This is because, in legalising homosexual marriages, it presupposes that other laws will be affected and will change drastically. For example, legalising homosexual marriages in Lesotho will mean other laws, including the inheritance law and other family laws will have to change to accommodate issues around child adoption by homosexual couples.

However, some have a different view that this approach would result in injustice to minorities such as those with interest in marriage amongst the LGBTQI+ community. Under this approach to natural law, minority groups would never be justified in seeking out their interests in law except if the larger society accepted those as common needs. Fuller's common needs approach can be seen contemporarily in states that do not permit abortion, homosexual marriages, or euthanasia because these are not considered what the community needs and rather, would shock or horrify the community conscience, especially in African states.<sup>155</sup>

However, there are cases like *Clark v Hurst NO and Others*<sup>156</sup> where judges have had to spearhead seemingly maverick moral notions in the law such as permitting the discontinuation of artificial feeding without the labelling of euthanasia. For Fuller, if the community did not

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<sup>153</sup> The Institution of Marriage, Same-Sex Unions, and Procreation <<http://alastairadversaria.com.ma>> accessed 29 May 2024.

<sup>154</sup> Lon Fuller, *The Morality of Law* (1969) 184.

<sup>155</sup> Fuller (n 151).

<sup>156</sup> *Clark v Hurst NO and Others* 1992 (4) SA 630 (D).

accept this then that would have been an unjust judgement.<sup>157</sup> Therefore, community decision is very important in the research of John Fuller and in order for anything to be legalised, the community must first be convinced about the importance of its existence. It is in this view that we realise that legalising homosexual marriages is not for the general good of the community, then it is as good as nothing and according to Fuller, it shouldn't get any legal recognition.<sup>158</sup>

### 3.3 Legal positivism

This legal theory came as counter-theory to the naturalistic thinking. The proponents of this theory aimed at empowering the human person and making him or her an independent person from society, religion, morality and other anthropological constraints that do not promote man as a human person and for them, law is a social fact with no connection to the natural theory or whatever.<sup>159</sup> It is the product of society as an institution that has its own setup and no other force influences law except the authorities of that society. Law must be separated from morality as law is what is, not what ought to be. This indicates that if the authorities of a certain state or society find no reason to legalise homosexuality when stripped off morality, then let it be. For them, homosexual marriages must be put on the same level as heterosexual marriages as we are all human beings and deserve similar treatment. This legal positivism theory is also historical in a sense and the research focuses on three main pioneers of this theory. These are H.L.A. Hart,<sup>160</sup> John Austin<sup>161</sup> and Hans Kelsen.<sup>162</sup>

#### 2.3.1 The historical background of the legal positivism

In the 19th century, the church was faced with the challenge of thinkers who wanted to strip morality from law.<sup>163</sup> During this time, the natural law theory, which is coined together with a belief in God, was established. Legal positivists came by and challenged every belief and dogma that the church had placed as a way of life. In the perspective of the church, abortion, homosexuality and euthanasia were known as deadly sins as they affect the human nature itself.

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<sup>157</sup> *Clark v Hurst NO and Others* (n 153).

<sup>158</sup> Anthony D'Amato, *Lon Fuller and Substantive Natural Law* (1981) 5.

<sup>159</sup> Legal Positivism <[<sup>160</sup> H.L.A. Hart, \*The Concept of Law\*, p. 269](http://study.com>academy></a> accessed 1 May 2024.</p></div><div data-bbox=)

<sup>161</sup> In his book, *The Province of Jurisprudence Determined* 1839, he held that, ... every law or rule (taken with the 9 largest signification which can be given to the term properly) is a command. Or, rather, laws or rules, properly so called are a species of commands. Now, since the term command comprises the term law, the first is the simpler as well as the larger of the two. But simple as it is, it admits of explanation. And, since it is the key to the sciences of jurisprudence and morals, its meaning should be analysed with precision. Accordingly, I shall endeavour, in the first instance, to analyse the meaning of "command."

<sup>162</sup> Hans Kelsen, *The Pure Theory of Law* (1934-1935) p. 348

<sup>163</sup> Kelsen (n 159).

This means, they are considered one of the grave sins.<sup>164</sup> However, with the advent of legal positivism, a new mentality was created whereby positivists argued that law must be separated from morality. There were proponents for this theory such as John Austin, H.L.A Hart and Hans Kelsen whose views are discussed here.

John Austin believes that law is the command of the sovereign backed by sanction.<sup>165</sup> Law must be separated from morality as this can sometimes be confused for law is a command from a superior to an inferior who obeys the command regardless of their situation. It is an expression of power that is intended to guide society to do something good. However, there is positive morality, and this must be differentiated from law since positive morality is just a command from any public figure who cannot enforce the law. Thus, law is a command from a superior to inferiors who are habitually made to obey the superior who is not bound to observe the same law. This mentality is observed in many states whereby some people are barred from being prosecuted. For instance, in Lesotho, there are situations where the King as the Constitutional Monarch is exempted from following the law like other people.<sup>166</sup> Therefore, according to John Austin, homosexuality can be legalised by any authority if the mentality of that authority intends to put a sanction to those who cannot observe homosexual laws. In John Austin's view, the validity of law is realised when the authority has promulgated it and then the followers must obey and observe such a law.

John Austin was criticised by his fellow man by the name of H.L.A. Hart who strongly argued that law cannot be a series of orders backed by threats.<sup>167</sup> For instance, contract law or marriage law cannot be backed by sanctions and therefore, that any law that is backed by sanctions can be erroneous. This is where the rule of law has originated to the effect that every person must observe the law regardless of his or status.<sup>168</sup> Hart developed his concept of law by opining that law has an element of reflective acceptance by the people without being coerced by any other authority.<sup>169</sup> He says, this kind of perception to law is soft positivism in that law in society

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<sup>164</sup> Mortal and Venial Sin-St Boniface Parish, In the Catholic Church, not all sins are equal, there are grave sins that separate a person totally from God and destroys the persons relationship with him, while the venial sins are lesser and does not destroy that relationship. <<http://stboniface-lunenburg.org>> accessed 29 May 2024.

<sup>165</sup> John Austin's Theory of Command Law <<http://papers.ssrn.com>> accessed 1 May 2024

<sup>166</sup> Constitution of Lesotho, 1993, sect 49 (1) "The King shall be entitled to immunity from taxation in respect of his Civil List, all income accruing to him in his private capacity and all property owned by him in his private capacity."

<sup>167</sup> <http://issuu.com/docs/usql-law>, Hart or Austin: Legal Positivism or rule of the sovereign, accessed 1 May 2024.

<sup>168</sup> Rule of law <<http://www.britannica.com>> accessed 16 April 2024.

<sup>169</sup> Hart (n 157).



could exist as a matter of practise although not necessarily declared as law.<sup>170</sup> Indeed for him, in adjudicating cases in court, judges are allowed to exercise their discretion in adjudicating a case according to morality.

Moreover, Hans Kelsen has affirmed that law must be separated from other theories such as religion, morality and ethics.<sup>171</sup> He follows John Austin by saying, law is an order of the sovereign backed by sanction to persons who have committed certain actions.<sup>172</sup> This, for him, will constitute pure theory whereby law is stripped of any other thing that could hide the essence of it.<sup>173</sup> For him, a moral norm is a required standard of behaviour in relation to some individual or social conception of the good.<sup>174</sup>

Additionally, a legal norm describes what the law specifies ought to be under certain circumstances. A legal norm is contained in statute while a moral norm is what ought to be done. He has advocated that, all norms have their origin in one law which he names the *grundnorm*.<sup>175</sup> All the laws originating from this law and any law in contravention of the *grundnorm* is void and invalid.<sup>176</sup> This influence of Hans Kelsen is realised in many constitutions of states whereby, the states have made their different Constitutions to be the foundation of other laws to the extent that if any law is contrary to it, that law must be void and invalid. For instance, section 2 of the Constitution of Lesotho states that the Constitution is the supreme law of Lesotho and that any other law that is inconsistent with any provision of the Constitution shall, to the extent of the inconsistency, be void. This is an indication that Kelsen's basis principle for making law is put into practice by different states.

### **2.3.3 Application of legal positivism in the governance of states**

Legal positivism has had an influence in the law of most states that have given their constitutions Kelsen's characterisation as the *grundnorm*. All the factors or definitions of law according to positivists are implemented in many states especially, the United States of America where homosexual marriages are accepted only because the government has issued such a law. Moreover, countries like Ghana have also implemented laws that are influenced by

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<sup>170</sup> Hart (n 157).

<sup>171</sup> Kelsen (n 159).

<sup>172</sup> Julius Stone, *Legal System and Lawyers Reasoning*, (1964) (Stanford University Press, Stanford, CA) p. 124.

<sup>173</sup> Stone (n 172)

<sup>174</sup> Kwaku Debra Boaduthe, *Jurisprudence of Ghana's 4th Republican Constitution* (2011) 70.

<sup>175</sup> Critical Analysis of the Concept of *Grundnorm* <<http://www.legalserviceindia.com>> accessed 29 May 2014.

<sup>176</sup> Critical Analysis of the Concept of *Grundnorm* (n 175).

positivists. Article 1(1) of the Constitution of Ghana vests sovereignty in the people of Ghana and makes the Constitution the supreme law of the country. The key institutions of government: the executive, legislature and judiciary are all made subject to the Constitution in articles 58, 93 and 125 respectively. This indicates that the positivists influence is realised in the institution of law. Moreover, according to Hans Kelsen all norms derive their validity from a higher norm in hierarchy.<sup>177</sup> The *grundnorm* is at the highest level in hierarchy and exists only in juristic consciousness. It is an order forming a basis for legal systems.<sup>178</sup> The *grundnorm* is presupposed, though not arbitrarily, by reference to whether the legal order as a whole, is by and large effective. As it could be seen, this perspective of Hans Kelsen has been implemented in many states that have made the constitution to be the ultimate law.

Therefore, regarding homosexual marriages, the legal positivism theory can apply well in implementing it. This is because, what matters is law as law, and not as law as what ought to be. In the South African case of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*,<sup>179</sup> the judge said, "...while the Constitution protects the right of people to continue with such belief, it does not allow the state to turn these beliefs – even in moderate or gentle versions – into dogmas imposed on society as a whole."<sup>180</sup> The belief the judge is referring to, amounts to religious and morality beliefs and he strongly objects to the beliefs that they must not be general and absolute. Thus, he supports legal positivism since positivists are more inclined to individual decision-making in to reach their goal. Therefore, for positivists, homosexual marriages are valid as long as the law enacted by the authority has satisfied all the procedures.

### 3.4 Conclusion

There is a realisation of conflicting ideas between natural theorists and legal positivists. This dilemma has been a very hard nut to crack since the existence of the legal positivism. Their main purpose is to challenge natural theorists and they indeed, accomplished this mission as could be seen how people can make decisions in our time and make no religious or moral implication of the act. It must be highlighted that, some countries like Lesotho still believe in the natural theory although legal positivism has already had some influence. This is because

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<sup>177</sup> Kelsen (n 159).

<sup>178</sup> François Rigaux, "Hans Kelsen on International Law" (1998) *European Journal of International Law* 9(2).

<sup>179</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* CCT11/98 (1998) ZACC 15 1999 (1) SA 6; 1988 (12) BCLR 1517.

<sup>180</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (n 179).

for Lesotho, God has created the universe and He is the source of everything that lives.<sup>181</sup> However, the existence of legal theory is realisable since the Constitution of Lesotho does not even have the word God since everything is planned and created around human capacity to state law without taking consideration of morality and religion.

In conclusion therefore, Lesotho is a country that believes in God and many people are Christians. Although Lesotho is not governed by religious norms, but the influence of religion is realisable as can be seen in many occasions such as when the parliamentarians take an oath of office by putting their left hands on the Bible, and concluding by saying, “so help me God”. This means, in their work of making laws, they must be guided by the word of God.<sup>182</sup> This means if the legalisation of homosexual marriages is against God, then it is not natural hence it would be very difficult for the law makers to go against the Bible if they understand well their faith in God.<sup>183</sup> This raises awareness that before thinking of legalising homosexual marriages, the government of Lesotho must consider the life of the people and find out their way of life, which is culture-bound. With the present laws, the Basotho people have accepted heterosexual marriages as the valid marriages and homosexual marriages are not known. Moreover, naturalists and positivists must find some intersecting points and tolerate each like in the sense that homosexuals are human beings and must be protected and not feel discriminated against, which naturalist must accept. On the other hand, positivists, including the legislature and the judiciary, must also accept the fact that homosexuals cannot be given rights to the extent that they can marry each other or form a union of that nature. This would help with living together in harmony and accepting the difference amongst the people of this world.

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<sup>181</sup> Rakotsoane Francis, “Religion of the Ancient Basotho with Special Reference to Water Snake” (1996) 36.

<sup>182</sup> Does Christianity influence Government? <<http://www.quora.com>> accessed 4 June 2024.

<sup>183</sup> <http://open.uct.ac.za>> accessed 1 May 2024.

## CHAPTER FOUR

### CRITICAL ANALYSIS OF THE REASONS FOR THE LEGALISATION OF HOMOSEXUALITY: LEARNING FROM OTHER COUNTRIES

#### 4.1 Introduction

In many instances, those who advocate for the legalisation of homosexual marriages in Lesotho base their reasoning on the fact that countries like the United States of America (USA) and South Africa have done so, and why not in Lesotho as well.<sup>184</sup> It is at this juncture that I proceed to show that countries differ in law-making and developmental preferences.<sup>185</sup> For instance, in the USA, homosexual marriages were constitutionalised in the Fifth Amendment to their Constitution.<sup>186</sup> This indicates that from the first formulation of the US Constitution, homosexual marriages were not considered. Apparently not only the first formulation of the Constitution but also the second and the third did not make any provision on homosexuality, which was only included in the Fourth Amendment that eventually gave such marriages legitimacy in the USA.<sup>187</sup> Regardless of the judicial existence and historical difference of states, some people observe that if the USA has accomplished legalising homosexual marriages, Lesotho should proceed to do so.

As indicated in chapter 3, every state establishes its own legislation with respect to the system and style of government the state would like to adopt.<sup>188</sup> This means, if a state develops a system of parliamentary supremacy, then the style and operation of the government will be different from a state that has adopted a system of constitutional supremacy. It is even becoming very difficult in Lesotho, which is governed as a constitutional monarchy.<sup>189</sup> Therefore, in this chapter, I delve into the discussion of the reasons that could have motivated Americans to legalise homosexual marriages and find out if such reasons hold water for Lesotho to also legalise homosexual marriages.

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<sup>184</sup> Call for gay marriage to be legalised in Lesotho <<http://publiceyenews.com>> accessed 12 May 2024.

<sup>185</sup> *Mitchell and Ors v DPP and Anor* [1986] LRC (Const) per Haynes, when J.W. Harris commented on this case of Mitchell, he describes the role of jurisprudence. He identified that the pressure of social needs that law satisfies vary from community to community. Jurisprudence, he points out, studies the methods by which these social needs are met rather than the particular and peculiar solutions proposed for each community.

<sup>186</sup> *Mitchell and Ors v DPP and Anor* (n 185).

<sup>187</sup> Fourth Amendment/ U.S. Constitution <<http://www.law.cornell.edu>> accessed 3 June 2024.

<sup>188</sup> De Vos & Freedman, *South African Constitutional Law in Context* (2014) pp 38-52.

<sup>189</sup> Lesotho (01/09) –state.gov-State Department <<http://2001-2009.state.gov>> accessed 10 May 2024.

## 4.2 Legalisation of homosexuality in the United State America

The historical development of American human rights law is very diverse and very old in the sense that America was a colony of Great Britain.<sup>190</sup> The major issue that motivated the American Revolution during the colonial period, was the fight against slavery of any sort. There were anti-slavery movements in many parts of the world. World War I took place, and many children were killed during the war. There was an outcry against the countries that were fighting to be held accountable for the killing of children.<sup>191</sup> The genocide committed was so huge that it shook the whole world, and some accountability was needed. Treaties were adopted to combat such behaviour of state and some states joined and signed such treaties.<sup>192</sup> Then from 1939 to 1945, World War II took place. During this war, many people were killed, and human rights were not observed. Therefore, after the World War II, nations including America and others produced the United Nations Charter (UN Charter), which was adopted in 1945.<sup>193</sup> Many African countries were still under colonial rule and did not take part in the drafting of the UN Charter.

As the two world wars happened, it was a lesson to many states that wars are not necessary as they leave the human race in great predicament. America and other states like Great Britain participated in the formulation of the treaties to combat human atrocities. This is an indication that America has always been the source and the core of human rights. The USA has participated in the formulation of treaties for signing by other states. The USA was fully involved in the drafting of the United Nations Charter, which many countries were not part of. Lesotho only acceded to the UN Charter after independence in 1996 and therefore, the treaty binds every state similarly but practically, the states that formulate the treaty, usually assume ownership thereof to the extent that it can inform other states about the importance of such a treaty. That means, the level of understanding towards that treaty cannot be the same. For instance, before the legalisation of homosexual marriages, surveys were conducted in the schools, families and every segment of the American population.<sup>194</sup> The public opinion and the perspective of the American people was thus, thoroughly sampled, since the law is the reflection of the life of the people.<sup>195</sup> It is therefore, a false approach by western states to force

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<sup>190</sup> Britain vs America: What led to the Declaration of independence <<http://www.cpalms.org/preview>> accessed 15 May 2024.

<sup>191</sup> Genocide in action, 1941-1945 <<http://www.theholocaustexplained.org>> accessed 3 June 2024.

<sup>192</sup> Genocide in action (n 191).

<sup>193</sup> United Nations Charter, 1945 <<http://www.archives.gov>> accessed 2 June 2024.

<sup>194</sup> Human Rights Campaign <[www.hrc.org](http://www.hrc.org)> accessed 12 May 2024.

<sup>195</sup> Law and Society <<http://papers.ssm>> accessed 2 June 2024.

African states into accepting homosexuality since, Africans in all spheres have shown that homosexual marriages are no compatible with them. This means, the will of the people must be respected especially in the democratic governments that we have adopted. If the people say no to homosexuality, then let it be. Therefore, Africans must resist the pressure from the westerners to incorporate such laws in their domestic legislation.<sup>196</sup> If homosexuality is to be legalised in Africa, then it should be at the pace of African people not in the way American people would want it to be.

### 4.3 Judicial decisions on homosexual cases in the USA

Having discussed the historical background to the American human rights it is unfair for African states to legalise homosexual marriages on the basis that Americans have done so and why not us. We turn towards two cases where the courts in the USA have pronounced themselves in the legalisation of homosexual marriages. I focus more on the reasons for the legalisation of homosexual marriages and find out if the reasons are applicable in the Lesotho context. The first legal marriage in the USA is believed to have taken place in 2003 where Marcia Kadish and Tanya McCloskey of Malden Massachusetts got married.<sup>197</sup> This was after the Supreme Court ruled in their favour that the state must change marriage laws and allow same-sex couples to legally get married.<sup>198</sup>

In 2015, same-sex unions became legal in all 50 states of the USA after the Supreme Court ordered in the case of *Obergefell v Hodges* that same-sex couples must be given marriage certificates.<sup>199</sup> In this case, the court acknowledged that homosexual couples who intended to get married were discriminated against as they were only allowed to get married outside the USA as reflected in the case of *Baker v Nelson*.<sup>200</sup> The court examined the nature of fundamental human rights and found that the definition grants human rights to everyone without any discrimination. It requires that every individual must always be treated equally at all times under the same law. The American courts base their reasoning on the constitutional right to non-discrimination of any sort. They say that for homosexual couples to become equal to heterosexual couples, they must be granted legal recognition. Without legal recognition, they

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<sup>196</sup> Mugabe's homophobia still haunts LGBTQI community <<http://www.universityworldnews.com>> accessed 2 June 2024.

<sup>197</sup> First legal same-sex marriage performed in Massachusetts <<https://www.history.com>> accessed 12 May 2024.

<sup>198</sup> First legal same-sex marriage performed in Massachusetts (n 197).

<sup>199</sup> First legal same-sex marriage performed in Massachusetts (n 197).

<sup>200</sup> 310, 191 N.W.2d 185.

feel less human, reason why they will feel fulfilled if their rights are recognised and granted constitutional recognition.

Equality is however, claimed without putting the question of morality in mind. Whether homosexuality is right or wrong does not concern them as long as the couples of homosexual marriages are treated equally with the heterosexual couples.<sup>201</sup> Not only the constitutional right to non-discrimination seems to be controlling the homosexual pride, but also the constitutional right to privacy also seems to come in play as the courts decide in some cases.<sup>202</sup> Europeans countries seem to be united in the so-called fight against homophobic mentality towards homosexuality and they are working hard to make African states to adopt laws that will allow gay people to get married.<sup>203</sup> They say, all people are equal and they must be treated equally and so does the law but, they have never in many spheres of humanity make Africans equal to them.<sup>204</sup> Seemingly for them, they have achieved in giving people their rights and they get surprised why African nations are still reluctant to legalise it.<sup>205</sup>

In Uganda, the Parliament signed a bill rejecting gay relationships and marriages.<sup>206</sup> This was a clear sign that the people in Uganda do not welcome the right to marriage for gay people. The US under the leadership of President Joe Biden, announced the decision to retract their money and all international aids to Uganda if they remain stubborn to legalise homosexual marriages.<sup>207</sup> In Lesotho, the homosexual community held a rally on 17 May 2024 in commemorating the international day against homophobia, transphobia, and biphobia (IDAHOT). In this rally, the representative of the European Union took part and in their speech, reiterated their unwavering support to those who fight for gay rights.<sup>208</sup> However, two days along the line, street vendors were reaped off the spaces where they do business and they organised a rally to demonstrate their dissatisfaction against being deprived of the means for

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<sup>201</sup> Five facts about same-sex marriage <<http://www.pewresearch.org>> accessed 2 June 2024.

<sup>202</sup> Five facts about same-sex marriage (n 201).

<sup>203</sup> Homosexuality: The Countries where it is illegal to be gay <<http://www.bbc.com.news>> accessed 2 June 2024.

<sup>204</sup> Homosexuality: The Countries where it is illegal to be gay (n 203).

<sup>205</sup> Homosexuality: The Countries where it is illegal to be gay (n 200).

<sup>206</sup> Uganda: Court Upholds Anti-Homosexuality Act <<http://www.hrw.org>> accessed 2 June 2024.

<sup>207</sup> US President Biden and EU Call for Repeal of Uganda Anti-Gay Law <<http://healthpolicy-watch.news>> accessed 2 June 2024.

<sup>208</sup> Message of Sodality by the EU Ambassador H.E Paola Amadei on International Day Against Homophobia, Transphobia and Biphobia (IDAHOT) <<http://www.eeas.europa>> accessed 3 June 2024.

livelihood.<sup>209</sup> The European Union did not show up in this good fight where the people are fighting for food and good health.

The Americans and the international community that advocate for equal rights and non-discrimination seem to focus only on the issue of human rights when it comes to homosexuality especially, when dealing with Africans. However, there are many things they could be fighting for especially, the currency between states which when the European currency is compared to some countries in Africa, the European currency supersedes all others, and this is one type of discrimination. For example, the American dollar is equalled to LSL20 in Lesotho and the euro equals to LSL17. This economic discrimination cannot be discussed since it does not benefit Africans while they are stripped of a better life but with things like homosexual rights, they are quick to spot discrimination. For Africans, it is wrong to make independent decisions, but the Americans and the European states have decision to economically discriminate against Africans and nobody says anything. Moreover, those who say, Africans cannot make decisions for themselves, they still think we are less human and we cannot make decision for ourselves.<sup>210</sup>

This is the reason why when decisions are made either by competent courts, they challenge that and impose themselves in our governmental systems.<sup>211</sup> Even as they practise the doctrine of separation of powers where their legislature cannot involve itself in court processes, they are at liberty to involve themselves in how African states are governing their own people. Indeed, there are many differences between Africans and the Europeans whereby, even the way we treat human rights differ. For instance, the African perspective to human rights is communal instead of individualistic whereby even a child can claim rights against her or his parents in the family.<sup>212</sup> In the African context, human rights are observed as societal objectives in the sense that every right has meaning in as much as it is connected to the society. If homosexual marriage is not for the benefit of the society, then it is as good as nothing since it seeks individual gain, which in African mentality is not important. In fact, Africans are mostly naturalistic in the sense that in Africa, *motho ke motho ka batho* literally means, a person is

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<sup>209</sup> Roads Directorate acts nuisance businesses <<http://www.thereporter.co.ls>> accessed 3 June 2024.

<sup>210</sup> Economic partnership agreement between the SADC EPA states <<http://www>rsl.org.ls>> accessed 3 June 2024.

<sup>211</sup> Fact Sheet: The United States Response to Uganda's Anti-homosexual Act and persistent human rights abuses, <[www.whitehouse.gov](http://www.whitehouse.gov)> accessed 17 June 2024.

<sup>212</sup> Individual Rights and the Constitution <<https://constitution.congress.gov>> accessed 3 June 2024.



because of others.<sup>213</sup> This is the reason why the doctrine of *ubuntu* is advocated for as a core principle to the life of Africans.<sup>214</sup> Therefore, it is necessary that Africans are given the chance to make their own decisions about homosexuality without fear or favour.

Furthermore, the courts in America and European countries are for the idea that the constitutional right to privacy is infringed for homosexual couples if they are not allowed to get married.<sup>215</sup> They portray to us that it is important not to interrupt people's private life. They did also legalise abortion to convince themselves that it is not right to control people in their private lives.<sup>216</sup> If it is that important not to interrupt people in their private lives, why are they so keen to interrupt our private life as Africans on matters of how to deal with our own people? For instance, Lesotho is family in this case as an example, and when it makes decisions for its own people, it is private and only pertaining to the people of Lesotho.

The courts in European countries make decisions without what the people want. They only apply the principles of reasoning regarding certain issues as they are presented before them.<sup>217</sup> It must be borne in mind that because the courts have upheld the right to marriage to homosexuals, it does not guarantee that homosexuality is good. If something is bad, it is bad and it cannot be made good by the courts.<sup>218</sup> Morality and law go hand in hand to bring the good out of people.<sup>219</sup> Hence, it is not valid for the people to think that because the courts in other states have legalised homosexuality, so Africans must also follow suit.

## 2.1 Homosexuality in Lesotho

Many at times, when activists for homosexual marriages in Lesotho advocate for this kind of marriage, they usually quote the situation in America or South Africa to push for the legalisation of homosexual marriages. This line of reasoning is questionable because Lesotho has its own history, culture, values and norms. One cannot deny the influence of other states on Lesotho, as the world is integrated, whereby culture gets adumbrated by other cultures.

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<sup>213</sup> Nqosa Mahao, *O sere ho moroa 'morooa tooe' African Jurisprudence exhumed*" (2010) *Comparative and International Law Journal of Southern Africa* 43 (3) at 317-336.

<sup>214</sup> Mahao (n 213).

<sup>215</sup> Adam Carlyle Breckenridge, *The Right to Privacy* (1970).

<sup>216</sup> Breckenridge (n 212).

<sup>217</sup> *Obergefell v Hodges*, 576 U.S 644 (2015).

<sup>218</sup> *Obergefell v Hodges* (n 217).

<sup>219</sup> Arthur Scheller Jr., *Law and Morality*, 36 *Marg. L. Rev.* 319 (1953). See also <<https://scholarship.law.marquette.edu>> accessed 17 June 2024.

There are however, clear differences between Lesotho and other states in the legalisation of the homosexual marriages.

### 2.1.1 History

The history of Lesotho is so unique that the notions and way of life is mostly different from all other nations. Just as many nations were colonised in Africa by Europeans, Lesotho was not an exception as she became a protectorate of Great Britain in 1868, which was a very bad move since the King of Lesotho barely chose one colonial master over the other.<sup>220</sup> While in other countries like South Africa, the colonialists imposed themselves on the people, in Lesotho the King invited the colonialists to govern them.<sup>221</sup> The laws and traditions that govern Lesotho were influenced by colonisers. This explains why Lesotho as a country was able to reinforce its culture, values and norms. With King Moshoeshoe I's "*u sere ho moroa, moroa tooe*,"<sup>222</sup> discrimination against homosexuality was never experienced. The people who seem to be developing homosexual behaviour have always been tolerated and they could not be denied their rights on the basis that they were homosexual.<sup>223</sup>

In other words, while in other countries homosexuals are killed due to homophobia, in Lesotho, there is no such incidents. One would realise that there are instances of discrimination but Basotho people have always tolerated the behaviour of gay people. However, this behaviour was not persistent but short-lived and when the perpetrators got older, they eventually got into a heterosexual marriage.<sup>224</sup> Moreover, the way of life for Basotho depicts a setup of a family where marriage is between a man and a woman. The family of the boy will go to the family of the girl to propose the girl for marriage. The processes of marriage, which includes the payment of dowry does not leave room for homosexual marriages. For instance, a bride will be given the ribs of the sheep since the ribs are significantly part of the sheep, which women have a share of.

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<sup>220</sup> King Moshoeshoe/South African History Online <<http://sahistory.org.za>> accessed 3 June 2024.

<sup>221</sup> The Reasons for the annexation of Lesotho 1868 a new perspective <<http://scholar.ufs.ac.za>> accessed 17 May 2024.

<sup>222</sup> Mahao (n 210).

<sup>223</sup> Motebo Ntabe, *Human Rights Violations in Lesotho* <<http://www.ohchr.org>> accessed 4 May 2024.

<sup>224</sup> Ntabe (n 223).

### **2.1.2 Christianity**

The dominant religion in Lesotho is Christianity. In a population of over 2 million, Christians make up 90 percent to the effect that every person whether Christian or not, at least knows about Christ.<sup>225</sup> It means that Lesotho law makers, in one way or another, are influenced by Christian doctrines. The judges in different courts are also, mostly Christians and they are not an exception to the influence of Christian ideas. This presupposes that any law to be implemented that is against the Christian doctrines, would have serious implications on their religious beliefs. The decision of a government that is led by a Catholic prime minister is always associated with the Catholic church. The leaders belong to either the Catholic church or other religious denomination.<sup>226</sup> As we have realised, in countries like the USA, the population is composed of many different races and many different religions.<sup>227</sup> The population does not only differ in religion but is also comprised of those who do not believe in God. This causes the country to make decisions that are not based on Christian doctrines. In Lesotho, the situation is totally different as the Christian doctrines are dominant and are totally against homosexual marriages.

### **2.1.3 Human rights**

In most parts of the world especially in the USA, India and South Africa, people have always been colonised and oppressed one way or another.<sup>228</sup> The oppression called for revolutionary movements to fight against such oppression. Those who colonised them have taken all rights of the people and the people do not have any control over their land, property and everything belonging to them. This resulted in people fighting for their rights. It must be indicated that Lesotho did not have anything in the strict sense to fight for as it was only protected by Great Britain and it was not until their independence was granted before the Basotho could get involved in riots.

Upon decolonisation of the people, human rights were granted to them although some rights were still about to be scrutinised such as abortion and homosexuality. Upon scrutiny, the state found no barrier to offer them to those who seek them. There is that non-reasonableness towards rights since, people think that having been denied rights like homosexual marriages,

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<sup>225</sup> Lesotho –State.gov <<http://2009-2017.state.gov>> accessed 16 May 2024.

<sup>226</sup> Catholic Church prays for PM, Cabinet <<http://www.lena.gov.ls>> accessed 3 June 2024.

<sup>227</sup> Why has America never been a homogenous society? <<http://homework.study.com>> accessed 17 May 2024.

<sup>228</sup> List of British Empire Countries <<http://www.geeks.org>> accessed 17 May 2024.

their rights are infringed like during the time when colonisers denied them freedom, and they think even where there must be limitations, such limitations are no longer lawful. Therefore, the reality of legalising homosexual marriages, must not only be a parliamentary act, but it must also involve the people and their way of life.

## 2.2 Conclusion

In conclusion, Lesotho cannot legalise homosexual marriages on the basis that other countries have legalised it. Lesotho is a different country with different territory, politics, religion and culture. The population itself is not like any population found in other countries and hence, whenever one thinks of making homosexual marriages legal, they must consider Lesotho as Lesotho and not Lesotho in comparison with other states. Countries like the USA was not called to sign an already formulated treaty for human rights, but it was part and parcel of the process of formulating human rights and its understanding of human rights therefore, certainly differ with Lesotho since Lesotho only later acceded to those treaties through ratification.<sup>229</sup> Moreover, a country like South Africa, is dominated by many different races that believe in different things. Furthermore, the comparison of Lesotho with other countries does not make homosexual marriages to be moral.

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<sup>229</sup> Raymond A. Atuguba, "Homosexuality in Ghana: Morality, Law: Comment on the American case of *Obergefell v Hodges*" "...the ruling has been described as the most "historic" development in US civil rights relations in generations; once again bringing gay rights and marriage into the fore globally and specifically in Africa. What has become apparent is that Africa and the US are not experiencing the same challenges; the debate is different."

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Introduction

Homosexuality in Lesotho is a reality that one cannot deny.<sup>230</sup> At the veld, boys do practise it as a form of playing as the older boys exercise their superiority by inflicting pain on the young boys by sodomising them.<sup>231</sup> Bigger girls often have strong friendships with young girls and these relationships sometimes develop homosexual tendencies. At an older stage, the men migrate to work in the mines in South Africa where it has been realised that some men still have some homosexual tendencies with others. Moreover, in the army, prisons and seminaries, researchers have also found that such homosexual tendencies are prevalent.<sup>232</sup>

Lately, in Lesotho some men in public bars have been identified to be practising homosexuality and it is now no longer a shame to them like in the past to express their homosexual identity publicly.<sup>233</sup> It results in the realisation that homosexual behaviour is a reality that is common among Basotho that needs to be confronted by sincerely seeking solutions to the homosexual people in their day-to-day challenges. For instance, homosexual people have formed societies aimed at fighting for their rights especially, the right to marriage.<sup>234</sup> At this juncture, in conclusion of this work, the research indicates that homosexuals are entitled to advocate for the right to marry, but in terms of the societal construction of the institution of marriage, they do not qualify for marriage. There is no issue recognising the right to their homosexual relationships, which is subject to limitation when it comes to the right to marry because marriage is intended for procreation and the upbringing of children.<sup>235</sup>

#### 5.2 Conclusion

Chapter one was very crucial in presenting the problem that the wish for homosexual marriages to be legalised when perceived from the religious point of view, poses challenges as, I endeavoured to illustrate that marriage is only designed for procreation and the upbringing of

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<sup>230</sup> “Universal Period Review Violations in Lesotho” <<http://www.ohchr.org>> accessed 5 June 2024.

<sup>231</sup> M. Epprecht, ‘Male-Male Sexuality in Lesotho: Two Conversations’ <<https://journals.sagepub.com>> accessed 10 June 2024.

<sup>232</sup> Epprecht (n 231).

<sup>233</sup> Napo Kuoape, ‘*Mosebetsi wa maponesa a Lesotho* (The police brutality in Lesotho)’, Facebook. Napo Kuoape, see also <<https://taboomedia.com>> accessed 10 June 2024.

<sup>234</sup> Lesotho, <<https://outrightinternational.org>> accessed 10 June 2024.

<sup>235</sup> Manyeli L., “Homosexuality and the right to self-determination: A challenge to morality” 2008, 157

children.<sup>236</sup> As noted, the body parts of every human being are designed by the Creator for a purpose and if a human being uses such parts differently in view of enjoyment, St. Thomas Aquinas says, this is total sin.<sup>237</sup> Thus, if homosexuals would want to marry only for personal satisfaction, then homosexuality is sinful. Chapter two was particularly on the definition of marriage, which unpacked the concept of marriage and the requirements for getting into marriage.<sup>238</sup> It is at this point where we realise that heterosexual marriages are the proper fit to marriage and not anything else. In his homilies, Bishop Raul says, marriage is a covenant between heterosexual couples and God in the religious sphere.<sup>239</sup> This is why in the Catholic Church, the marriage is valid only if it was presented before a priest to bless such a marriage. It means that marriage is not only about the human invention but also about God because God is involved in marriage and does not approve of homosexuality (1 Cor. 6:9, 1Tim 1:10). The law also proved that naturally, marriage is a union that can only happen between a male and a female. In Lesotho, the Marriage Act of 1978 is very clear on the fact that only heterosexuals can get married.<sup>240</sup>

Chapter three examined the beginning of the law and its separation from morality.<sup>241</sup> The theory of naturalism was discussed, indicating that human beings are created for the purpose of multiplying the human species (Genesis 1 and 2). The creator made them male and female in order for them to fulfil that purpose and any relationship outside of the scope of the aim of the Creator is unacceptable. The natural law theory holds that law is not separated from morality and hence, if the law is not moralistic, then it is not law.<sup>242</sup> Thus, if legalising homosexual marriages is not moral, then the state has the moral obligation not to legalise it. However, the positivism theory also comes into play as it maintains that law is law and morality, or ethics should not be brought into the law.<sup>243</sup> Positivists concluded that law must be separated from morality. For them, if homosexual marriages are a right to those who want it, then the state should give them their homosexual rights.<sup>244</sup> In this manner, positivists do not consider the

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<sup>236</sup> Manyeli (n 235).

<sup>237</sup> Would Aquinas support Homosexual activity if he were alive today <<http://phipapers.org>> accessed on the 4 June 2024.

<sup>238</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister* (n 2).

<sup>239</sup> Bishop Raul, Message to the Faithful about the importance of marriage, diocese of Dandag. See also 'Sacrament of marriage-Catholic Identity, <<https://catholicidentity.bne.catholic.edu.au>> accessed on the 10 June 2024.

<sup>240</sup> Public Eye Newspaper (n 5).

<sup>241</sup> Kwaku Debra Boadu, *The Jurisprudence of Ghana's 4th Republican Constitution*, 2011.

<sup>242</sup> Hart (n 160) at 269.

<sup>243</sup> Hart (n 160).

<sup>244</sup> Public Eye Newspaper (n 5).

morality aspect, they only consider rights. In a country like Lesotho where morality is upheld,<sup>245</sup> and the government guiding its people to obtain good values, it will be difficult to legalise homosexual's marriage as this is considered immoral.

Chapter four was immersed in the politics of the state regarding homosexuality whereby, the Americans present themselves as master to African states in terms of pushing them to legalise homosexual marriages.<sup>246</sup> This has been very clear in the case of Uganda where the national Assembly voted against a homosexual Bill and the Americans were not happy about that. It has been discussed that African states are independent and hence, must not accept bad influences from other countries. President Ramaphosa once critiqued President Trump of America that, he must have the sense of humour to respect Africa since Africa is the origin of humanity.<sup>247</sup> This was a clear stance that America must be concerned about its own affairs and stop interfering negatively with the affairs of other nations especially, African states.

### **5.3 Final Remarks**

First, as the research has reiterated, this mini-dissertation is not against homosexuals as persons and whatever they do. Indeed, they must be granted their rights and be treated like any other human being. This means, they have the rights to life among the many other human rights.<sup>248</sup> It is wrong to discriminate against them in any sphere of life on the basis of their status as homosexuals. They are our brothers and sisters, and they are human beings who can feel pain and get hurt by our ways of treating them. Therefore, the international treaties that Lesotho has signed for the protection of human rights must be implemented locally, and the society must accordingly, respect homosexual people.<sup>249</sup> However, regarding the right to marry, this must be limited in as much as marriage is meant for procreation and the upbringing of children.

Secondly, homophobic attacks either verbally or otherwise that are targeted at the homosexual community must be dealt with legally one way or another, since such attacks when aggravated, might result into the death of either the attackers or homosexual persons.<sup>250</sup> Thirdly,

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<sup>245</sup> Nompumelelo Magagula, 'Zodwa Wabantu not welcome in Christian nation', says Lesotho Government <<https://www.news24.com/trending>> accessed 10 June 2024.

<sup>246</sup> Homophobia in Africa: The American far-right's footprint, <<http://www.dw.com/lgbtq-in-africa>> accessed 5 June 2024.

<sup>247</sup> Ramaphosa responds to Trump, Facebook. Christiane Amanpour on the 28 January 2018. Also see, Business Insider Africa, <<http://www.instagram.com> reel, accessed 4 June 2024.

<sup>248</sup> Transgender Rights in Lesotho, <<http://www.equaldex.com/region>> accessed 5 June 2024.

<sup>249</sup> Transgender Rights in Lesotho (n 248).

<sup>250</sup> LGBTI Rights in Lesotho, <<http://database.ilga.org/Lesotho>> accessed 5 June 2024.

homosexual rights must be listed and be known, and the government must make it known to the general public that the right to marry is not a right that can be exercised by everyone.<sup>251</sup> Homosexual marriages can therefore, not be allowed since, they cannot procreate and they also cannot be allowed to adopt children since that may cause trauma to the adopted children when they are grown up.<sup>252</sup> If homosexuals desire to have children, they should device a way of making their own children. Why would they want to adopt children from the heterosexual relationships?

Fourthly, homosexuality is an unnatural state of the person, which is against nature.<sup>253</sup> This means, there is a certain way the Creator has directed the reality to be. For instance, every creature that is living is either male or female in its species. A human being is either male or female and wherever, a female human being appears to be female but inside feels manhood, then there is a limitation or deformation in the creation of that human being. These limitations according to religion especially, the Catholic Church doctrine cannot be treated medically especially by changing and transplant the private parts like others who have already gone through such process.<sup>254</sup> In terms of law, the processes of transplanting must be confirmed by the medical doctor only in the situation where it can cause harm, which means that if it is done only for homosexual purposes, then it is not allowed. Therefore, persons who are born like that must accept the difference in life of being born with certain limitations.

Finally, in every country, religion plays an important role.<sup>255</sup> If the people do not acknowledge religion and belief in many other things, then the moral life of the people become loose and not able to be controlled for the common good. To only use mental capacity to judge cases in courts without the belief of the people, means judges might err and judge without applying their religious influence on their judgments and we will see judgments that are against the will and belief of the people. Thus, law cannot be separated from morality and religion since the two are involved for a human being to become a better person.

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<sup>251</sup> *The 1978 Marriage Act of Lesotho*, sect. 29.

<sup>252</sup> *National Coalition for Gays and Lesbians Equality and Another v Minister* (n 2).

<sup>253</sup> Pope Benedict warns against gay marriage, <<http://www.bbc.com>>news, accessed 6 June 2024.

<sup>254</sup> Pope Benedict warns against gay marriage (n 253).

<sup>255</sup> The Importance of Religion in Society, <<https://mdcthereporter.com>> accessed 5 June 2024.



## 5.4 Recommendations

The research recommends first and foremost that the public must be made aware and taught about marriage.<sup>256</sup> From the primary to the tertiary levels of education, there must be counselling courses designed to teach about the importance of marriage and the knowledge about it. In fact, not only the definition and the essence of marriage must be understood but also the rights of married couples and the results or the outcomes of that marriage. If the population, including homosexuals is clear on the essence of marriage, then nobody will want to marry if he or she does not qualify for the enjoyment of such a right. Moreover, the public must also be taught to be aware and sensitive of the rights of homosexuals. They have a right to life, a right to equal rights and many other human rights and thus, should not be discriminated against. However, most human rights are generally subject to limitations, entailing that everybody must accept such limitations and endeavour to cooperate in that regard to ensure public order.

Secondly, mocking people because they are homosexuals must be strictly prohibited and made punishable by law. It must be considered a crime to mock or insult a homosexual person as that will amount to hatred. Thirdly, law making in any country involves applicable theories the country follows in enacting such laws.<sup>257</sup> For instance, the country can either follow the natural law or positivism theories in formulating laws. It is our duty to understand the operation of our country in terms of the theory that informs law making. Thus, Lesotho, being a naturalistic country where morality and religion matters, must not be forced to make laws that are contrary to the morality and religious norms upheld by the country. In as much as a country can copy from one another in terms of making laws, each country must not act superior and dictate to other countries as to what kind of laws to make.<sup>258</sup> If Uganda with all its arms of the government finds homosexuality unacceptable, it should be so for Uganda. If America finds it appropriate to legalise homosexuality, then it should also be so for America. Why would one country force another to make laws in its favour? Will this not be colonisation in an improved form? Moreover, religion plays an important role in the shaping of the life of a people. If the laws that are enacted have religious value, then there will be a way to fight against immoral laws such as abortion, euthanasia and homosexuality.

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<sup>256</sup> Does Marriage counselling work? <<https://verywellmind.com>> accessed 5 June 2024.

<sup>257</sup> Public Eye Newspaper (n 5).

<sup>258</sup> Monese (n 12).

Fourthly, homosexual marriages are not known in many African countries, including Lesotho and if any country would like to legalise it, then it would be better if they enact a special law to that effect. They must not change the already existing laws of marriage because the existing laws are purposely intended to protect heterosexual marriages. The gay marriage laws must be enacted as separate legislations, which should not seek to modify or amend the marriage laws that already exist in order to make homosexual marriages fit in their union, which is not controlled by anyone but themselves. Homosexuality is a special kind of union and therefore must be regulated by its own special laws.

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